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COMPRISING ALL THE CURRENT DECISIONS OF THE
SUPREME AND APPELLATE COURTS OF ARKANSAS
KENTUCKY, MISSOURI, TENNESSEE
AND TEXAS

WITH KEY-NUMBER ANNOTATIONS

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¹ For other rules, see 154 S. W. vii, 169 S. W. vii.

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JOHNSON v. DIXIE MINING & DEVELOPMENT CO. (No. 17969.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

DEATH \S 49(1)—**ACTION—PLEADINGS.**

Rev. St. 1909, \S 5426, 5427, authorizing an action for damages for negligent death, declare that the damages shall be sued for and recovered by the same parties and in the same manner as provided in section 5425, authorizing an action for negligent death caused by negligence of an employé while managing any locomotive, car, or train. In action by an administrator thereunder for the negligent death of his intestate, over 21 years at the time of death, and leaving no wife or minor children, *held*, the petition must allege the names of the beneficiaries for whom he sues other than the estate, and the facts from which the measure of damages may be ascertained.

[Ed. Note.—For other cases, see Death, Cent. Dig. \S 64-66, 69; Dec. Dig. \S 49(1).]

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by John Q. Johnson, administrator, against the Dixie Mining & Development Company. Judgment of the Springfield Court of Appeals affirming a judgment for defendant (171 Mo. App. 134, 156 S. W. 33) is certified to the Supreme Court. Affirmed.

Clay & Davis, of Joplin, for appellant.
Spencer, Grayston & Spencer, of Joplin, for respondent.

GRAVES, P. J. This case reaches us by certification from the Springfield Court of Appeals. A concise statement of the question involved is made by Farrington, J., in the majority opinion of that court thus:

"This action was instituted in the circuit court of Jasper county by John Q. Johnson, the administrator of the estate of Arthur Johnson, deceased, for damages for the alleged negligent killing of the deceased while in defendant's employ. Deceased at the time of his death was over the age of 21 years, and left no wife, minor child or minor children, natural born or adopted, surviving him. The petition charges that deceased lost his life by reason of the negligent failure of the defendant to furnish him a reasonably safe place in which to do his work. The suit was brought under sections 5426 and 5427, R. S. 1909. The defendant demurred to the petition for the reason that it failed to state facts sufficient to constitute a cause of action, in that the administrator failed to allege the name or names of the beneficiaries for whom he sued and for a failure to allege a state of facts from which the measure of damages in an action

brought under these sections could be ascertained. The petition merely alleges that plaintiff was the duly appointed administrator, set out the acts of negligence complained of and the death of the deceased resulting therefrom, and alleged that the estate of the deceased had sustained injury, and the prayer was as follows: 'Wherefore plaintiff says the estate of the deceased has been damaged in the sum of \$7,000, for which judgment is prayed.' The demurrer to the petition was sustained, and plaintiff, electing to stand on his petition, has appealed to this court, contending that an administrator suing under sections 5426 and 5427 does so for the benefit of the estate of the deceased, and is not required to allege the names of the beneficiaries for whom he sues other than the state, and is not required to allege facts other than the acts of negligence and the death of the deceased, nor to show the pecuniary loss for which defendant is called upon to answer in damages, except such as would naturally occur to the estate of the deceased."

The case is reported in 171 Mo. App. 134, 156 S. W. 33. It will be observed that the real question is whether since the amendment of our damage act an administrator sues for the benefit of the estate or for the benefit of beneficiaries other than the estate of the deceased. The majority opinion holds that under our present damage act the administrator does not sue for the benefit of the estate, but that he sues for surviving beneficiaries, and the petition should name such beneficiaries and plead such facts as may be necessary to show the damages suffered by them through the death of the party. It therefore held that the judgment sustaining the demurrer and entering judgment for defendant by the trial court was right.

Since this case was certified here the precise question was ruled by the St. Louis Court of Appeals, and the views by that court expressed fully sustain the majority opinion of the Springfield Court of Appeals. *Troll v. La Clede Gaslight Co.*, 182 Mo. App. 600, 169 S. W. 337.

In *Kirk v. Wabash Railroad Co.*, 285 Mo. 341, 177 S. W. 592, this court had under consideration an analogous question. In this case this court, through Blair, J., gave express approval to the holding of the St. Louis Court of Appeals in the *Troll* Case, *supra*. We there said:

"A number of questions are presented by the briefs, but there is one which is determinative of the case, and it alone need be considered. The action is brought under section 5425, R. S.

1909, and it was admitted on the trial that decedent left neither wife nor children. There was neither allegation nor evidence that he was survived by any one competent to take under him under the law of descents in this state. In view of this condition of the record, appellant contends that no case was made out, and that its demurrer to the evidence should have been sustained. The question thus presented has been decided (since this appeal was taken) by the St. Louis Court of Appeals. *Troll v. Gaslight Co.*, 182 Mo. App. 600, 169 S. W. 337. The question arose in that case upon a demurrer to the petition, but the principle announced is applicable here. The authorities are collated and discussed, and an examination of the opinion satisfies us that the correct conclusion was reached. The thoroughness of the discussion by Allen, J., and our approval of what is said by him render unnecessary a detailed consideration of the question presented."

It thus appears that the dispute between our Brothers of the Springfield court has been settled by this court before the submission in this case. We are satisfied with our previous ruling, and it follows that the judgment of the circuit court in the case at bar should be affirmed.

It is so ordered. All concur.

SCHUSTER et al. v. MORTON et al.
(No. 17017.)

(Supreme Court of Missouri. Division No. 1.
June 2, 1916.)

WILLS §783—ELECTION BY DEVISEE.

A surviving husband entitled to the fee of one half of the land of which his wife had died seised in fee could not take such interest contrary to the terms of her will, and also take a life estate in the other half under the will, but was put to his election whether to claim under the statute or under the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 2034; Dec. Dig. § 783.]

Appeal from Circuit Court, Cooper County;
John M. Williams, Judge.

Statutory proceeding by Viola Schuster and another against Charles E. Morton and another to adjudge and decree title to land. Judgment quieting title in defendant Morton to one-half land in fee and awarding him a life estate in the other one-half, and plaintiffs appeal. Reversed, and cause remanded to enable defendant to amend his answer and make his election whether to claim under the statute or under the will.

Roy D. Williams, of Boonville, for appellants. John Cosgrove and D. W. Cosgrove, both of Boonville, for respondent Morton.

BLAIR, J. This is a proceeding under section 2535, R. S. 1909, to adjudge and decree the title to nearly 100 acres of land in Cooper county. This appeal is from a judgment of the Cooper circuit court quieting title in defendant to one half of the land in fee and awarding him a life estate in the other half. Both parties claim under Mary E. Morton, who died testate, seised of an estate in fee in the lands in suit. Appellants are devisees

under Mrs. Morton's will. Respondent was the husband of testatrix, and also a devisee under the will. Testatrix died without descendants in being capable of inheriting.

The applicable portion of the will in question reads as follows:

"First: I give and devise to my husband, Charles Edwin Morton, for and during his natural life, the farm on which I now live, consisting of ninety-six and forty hundredths (96.40) acres, situated in Lamine township, Cooper county, Missouri, and at his death to my sisters, Mrs. Vinie Plumlee and Mrs. Viola Schuster and Clara Cybeal Roby, who is now living with me at my home, equally, and in case the said Clara Cybeal Roby die before my said husband, I will that the above mentioned farm be divided equally between my two sisters, Vinie Plumlee and Viola Schuster."

The petition alleged the devisees named were the owners of the fee in the entire tract subject to the life estate of respondent; but that respondent made some claim to the fee, adverse to plaintiffs, and prayed that the title be defined and adjudged. Respondent admitted testatrix was his wife, that she executed the will set up, that the title to the land was in her name, and that he claimed an interest in the fee therein. He averred he owned one half the land in fee and a life estate in the other half. The agreed statement shows testatrix died May 2, 1910, leaving no children; that at her death she owned in fee simple the land in suit.

Respondent's position is that under section 350, R. S. 1909, he is entitled to one half the land in fee, and that under his wife's will he is entitled to a life estate in the remaining half. The section mentioned reads as follows:

"Sec. 350. When a wife shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one half of the real and personal estate belonging to the wife at the time of her death, absolutely, subject to the payment of the wife's debts."

Appellants concede respondent's right, under the facts, to take under section 350, but insist he cannot both take under this section and under the will; i. e., that he cannot take one half the land in fee contrary to the terms of the will and a life estate in the other half under and in accordance with the will; but that he is put to his election. The trial court took respondent's view, and held him entitled to one half in fee and a life estate in the remaining one half.

The judgment cannot stand. In *Wood v. Trust Co.*, 265 Mo. loc. cit. 525, 178 S. W. 201, the authorities are collected and the rule stated thus:

"It is a fundamental principle of law that one who accepts a beneficial interest under a will thereby adopts the whole will, and renounces every right or claim that is inconsistent with the will. This is a principle of universal application, and it extends so far that, when a testator in his will disposes of property which belongs to a third party, and at the same time makes provision for that third party in his will, the party whose property is so wrongfully disposed of cannot accept the provision made for

her in the will, without allowing her property to be disposed of as the will provides."

In that case the claim made in conflict with the will was based upon section 351, R. S. 1909, a section analogous to section 350, but applying to the wife instead of the husband. In *Lindsley v. Patterson*, cited in the Wood Case and reported in 177 S. W. loc. cit. 832, L. R. A. 1915F, 680, the claim made contrary to the provisions of the will was based upon the same section relied on in this case—section 350, R. S. 1909. In this last-mentioned case the whole matter is carefully considered, and what is there said disposes of every objection to the application of the general rule to the facts of this case.

The judgment is reversed, and, in accordance with the request made in appellant's brief, the cause is remanded to the end that respondent may amend his answer and make his election whether he will claim under the statute or under the will. All concur.

PHELPS v. CRITES. (No. 17975.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. EASEMENTS §24 — CONVEYANCE — PRIOR CONTRACT.

Where grantor had a right of way over adjoining land under contract with the owner, but in his deed merely conveyed his "easement over the land acquired" from the owner, such words were merely descriptive of the way, but did not limit the grantee's rights to those of the grantor under the contract.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 64-69; Dec. Dig. §24.]

2. EASEMENTS §8(1)—PRESCRIPTION—COLOR OF TITLE—DEEDS.

Where grantor, who had a contractual right of way over adjoining land, by his deed conveyed "his easement over such land," the grantee was justified in taking possession of the way under his deed, and his possession was adverse to the world.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 27-33; Dec. Dig. §8(1).]

3. EASEMENTS §36(3)—PRESCRIPTION—EVIDENCE—SUFFICIENCY.

Evidence held to show acquisition of absolute title by adverse possession, under deed conveying easement in right of way, under which grantee and his successors occupied, undisputed by the owner, for 22 years.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88, 93; Dec. Dig. §36(3).]

4. EASEMENTS §26(1)—LOSS OF RIGHT.

Forfeitures are not favored in the law, especially where a right of way under contract, of which grantee did not know, required acts on his part in return for way, and he occupied under deed from former owner purporting to convey an easement for 22 years.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 72½-74; Dec. Dig. §26(1).]

5. EASEMENTS §53 — RIGHT OF WAY — CONTRACTS—ENFORCEMENT.

Where a deed purported to convey an easement in a right of way absolute, and the grantee and his successors and the owners of the servient estate for 22 years treated the occupancy as making the grantee the owner and in pos-

session, a prior contract of the owners of the servient estate and the grantor requiring the grantor to fence the way would not be enforced.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 117-119; Dec. Dig. §53.]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Injunction by J. C. Phelps against R. A. Crites. Decree for plaintiff and order denying new trial, and defendant appeals. Affirmed.

Plaintiff commenced this proceeding by injunction in the circuit court of Vernon county, Mo., against above-named defendant, to restrain him from closing or obstructing a roadway, used by respondent, running north on the line between the northeast quarter of the northwest quarter and the northwest quarter of the northwest quarter of section 13, township 35, range 32, to the county road on the north side of said section. The answer admits that defendant is the owner of the northeast quarter of the northwest quarter of section 13 aforesaid, and that plaintiff is the owner of the southeast quarter of the northwest quarter of said section 13. The answer then sets out the legal effect of a contract between L. H. Parmalee and John T. Birdseye, dated April 24, 1889, in reference to above roadway; and alleges that in September, 1889, said Birdseye conveyed said southeast quarter of the northwest quarter of section 13 aforesaid, to plaintiff, including the easement in respect to said road, which Parmalee had conveyed to Birdseye as aforesaid. It is then averred in the answer that plaintiff failed and refused to keep up the fences, etc., as required by the said Parmalee-Birdseye contract, and renounced said contract, etc.

It appears from the evidence, that on April 24, 1889, John T. Birdseye, party of the first part, and L. H. Parmalee, party of the second part, entered into a written contract as between themselves, which reads as follows:

"That whereas said John T. Birdseye owns the S. E. ¼ of N. W. ¼ and said Parmalee owns the N. ½ of the N. W. ¼ and the S. W. ¼ of N. E. ¼, all in section 13, in township 35, of range 32, and said L. H. Parmalee has given said John T. Birdseye a right of way out from his land north on the line between the N. E. ¼ of N. W. ¼ and the N. W. ¼ of N. W. ¼ of said section 13 to the county road on the north of said section, and said John T. Birdseye has permitted said Parmalee to join to and use the fence on the east and north of said Birdseye's 40 acres. Now it is agreed and contracted that said Birdseye, or his assigns, shall have the free use of said right of way out to the public road as aforesaid so long as he shall keep and maintain a good hog-tight fence on the lines between the lands of said Birdseye and Parmalee and permit said Parmalee or his assigns to use the same as a division fence. And said John T. Birdseye and his assigns agree and contract to keep up such fence as aforesaid and permit said L. H. Parmalee to use the same forever.

"It is further agreed that if said Birdseye, or his assigns, wish to keep an open lane out on said right of way then he or his assigns will keep up a lawful fence on the east side there-

of from his premises to the barn lot of said Parmalee. And if he does not desire to keep an open lane, then he shall put in a gate at the end of said Parmalee's opening and close the same whenever it is used by said Birdseye, or his assigns, or persons using it for his business or pleasure."

This contract was acknowledged, but never recorded.

On September 28, 1889, John T. Birdseye, for the expressed consideration of \$1,300, sold to plaintiff, Joseph C. Phelps, the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 13, township 35, range 32, in Vernon county aforesaid, and made him a deed with full covenants of warranty therefor. After the description of the land conveyed, the deed to plaintiff contains the following:

"And I also convey hereby the easement over the west side of the northeast quarter of the northwest quarter procured from L. H. Parmalee April 24, 1889, and in the section first above described."

Plaintiff moved onto the above land bought from Birdseye, in March, 1890, and continued to use, without interruption, the roadway in controversy, from said date to October, 1912, when defendant built a fence across the road. The evidence fails to show that Birdseye, after the 24th of April, 1889, up to the time he sold to plaintiff, ever built the hog-tight fence called for in said contract, or that he complied with any of the requirements of said contract.

Henry Short, who lived in that vicinity since 1873, testified, in reference to the date when said road was opened, as follows:

"I don't remember just the year, but it has always been an opened road since '73; starting from that, any time it has never been closed up until Mr. Crites closed it."

This witness also testified that Parmalee, who was in possession of the land, told him that he had sold Birdseye the road. Rufe Riggs testified that this lane or roadway was fenced on each side in 1887 or 1888, and was used as a road after that date. In fact, the evidence conclusively shows that, for more than 20 years before the road was fenced by defendant in the fall of 1912, the plaintiff and his family, as well as his tenant, had openly, notoriously, continuously, and under a claim of right been using this lane or road as a means of exit to the public road on the north, from his own land.

Plaintiff got the above contract from Birdseye, after he bought the land from the latter, and before he took possession of same in the spring of 1890. He retained the contract, and testified, at the instance of defendant, as follows:

"Q. Have you ever performed any of the work prescribed in this contract on the road or fences? A. No, sir. Of course, I have made fences there, but I never did it with regard to this contract at all."

Plaintiff further testified, on cross-examination:

"Q. Then you claim under that deed and this contract together? A. No, sir, I never claimed

under the contract at all, because I expected to hold Mr. Birdseye all the time for the road."

Plaintiff testified that he put the contract in his machine drawer when he received it from Birdseye; that it had remained there until he got out his deed to show it to defendant in the fall of 1912; that the contract fell out of the deed; and that he had forgotten all about the contract during the 23 years it had remained there.

Upon a careful reading of the record, we are of the opinion that the evidence shows that neither Birdseye nor the plaintiff ever complied with the requirements of the contract between Parmalee and Birdseye, nor did either ever attempt to do so. The evidence is equally as clear that neither Parmalee nor any of those claiming under or through him, prior to the fall of 1912, ever made any complaint about the alleged failure of plaintiff to build a good hog-tight fence on the lines between plaintiff and defendant, or his failure to comply with said contract in any respect. The evidence likewise shows that the fences along the lane in controversy, as well as the other fences mentioned in said contract, were repaired by plaintiff, as well as the former owners of the northeast quarter of the northwest quarter of section 13, aforesaid, and their respective tenants. In fact, the repairs made were such as adjacent property owners might well have made, had there been no contract in existence. The lane had been there and constantly used by plaintiff, his family, and tenants for more than 20 years, when defendant bought his land from Parmalee. Defendant knew the roadway was there and used as aforesaid, and made no objections to the use of same by plaintiff as an easement until he saw the contract, heretofore mentioned, in the fall of 1912.

Defendant's testimony was in some respects contradictory of that offered by plaintiff; and especially in regard to alleged admissions made by plaintiff, concerning the obligations to fence, etc., imposed by the contract aforesaid. Plaintiff also introduced evidence in rebuttal. There is no controversy, however, over the fact that plaintiff took possession of said roadway in 1890; that he continued in the open, notorious, continuous, exclusive, and uninterrupted possession of same, until it was fenced by defendant in the fall of 1912.

The trial court, after hearing all the evidence, found the issues in favor of plaintiff and rendered its decree accordingly. Defendant, in due time, filed his motion for a new trial, which was overruled and the cause duly appealed to this court.

Homer M. Poage, of Nevada, Mo., for appellant. W. M. Bowker, of Nevada, Mo., for respondent.

RAILEY, C. (after stating the facts as above). [1] I. On September 28, 1889, John T. Birdseye and wife, for the expressed con-

sideration of \$1,800, executed and delivered to plaintiff a deed, with full covenants of warranty, conveying to him the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 13, township 35, range 32, in Vernon county, Mo. Following the above description, said deed contains the following:

"And I also convey hereby the easement over the west side of the northeast quarter of the northwest quarter procured from L. H. Parmalee April 24, 1889, and in the section first above described."

This deed does not in terms refer to the contract between Parmalee and Birdseye, nor does it refer to the deed made by Parmalee to Birdseye for plaintiff's land aforesaid. The above quoted language, "procured from L. H. Parmalee April 24, 1889," is simply descriptive of the location of the road in controversy, and distinguishes it from any other road. The above description, when considered in connection with the fact, that the road had already been there since 1873 and fenced on each side since 1887 or 1888, was sufficient to locate the road without any reference to the contract aforesaid. The deed from Birdseye to plaintiff did not undertake to convey the easement upon the same terms and conditions upon which Birdseye had received it from Parmalee. On the contrary, Birdseye's deed to plaintiff warrants the title to the easement as well as the land conveyed.

[2] In view of the foregoing, we think the plaintiff was justified in taking possession of the above easement in 1890, under the terms of his deed, and that the possession which he then took was adverse to the world.

[3] Upon a full and careful consideration of all the testimony, we are of the opinion that the conclusion reached by the trial court, to the effect that plaintiff had acquired an absolute title by adverse possession to the easement in controversy, before defendant bought his land, is fully warranted by the facts in the case, and meets with our approval.

Plaintiff therefore had a good title to said roadway when it was fenced by defendant in the fall of 1912. *Boyce v. Missouri Pacific Ry. Co.*, 168 Mo. 583, 68 S. W. 920, 58 L. R. A. 442; *Sanford v. Kern*, 223 Mo. 616, 122 S. W. 1051; *Power v. Dean*, 112 Mo. App. 283, 86 S. W. 1100.

[4, 5] II. The contract between Parmalee and Birdseye was executed on April 24, 1889. Birdseye did not comply with the terms of said contract before he sold to plaintiff; nor did Parmalee, during said period, undertake to enforce the provisions of said agreement, or to make any complaint in respect to Birdseye's failure to carry out its provisions. After plaintiff bought his land from Birdseye, he made no effort to build or maintain a hog-tight fence, or to comply with the provisions of said agreement. Neither Parmalee nor any of his successors in title, before

October, 1912, ever made any complaint in regard to plaintiff's failure to comply with the contract. On the other hand, prior to October, 1912, both plaintiff and those claiming under Parmalee acted on the theory that respondent owned, and was in the exclusive possession of, said easement. Plaintiff had no knowledge of the existence of the contract between Parmalee and Birdseye, when he bought his land from the latter on September 28, 1889. He did not learn of its existence until after Christmas, 1889. The contract recites that Parmalee—

"has given said John T. Birdseye a right of way out from his land north on the line between the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of said section 13 to the county road on the north of said section, and said John T. Birdseye has permitted said Parmalee to join to and use the fence on the east and north of said Birdseye's 40 acres."

The contract does not provide for a forfeiture of said easement, in case Birdseye failed to carry out the provisions of the contract. Forfeitures are not favored by the law, and especially under such circumstances as those disclosed by the record in this case, *Tetley v. McElmurry*, 201 Mo. loc. cit. 394, 100 S. W. 37, and cases cited. All the parties in interest therefore, having proceeded, from 1890 to 1912, upon the theory, that plaintiff was the owner and in possession of said roadway, it would neither be equitable, nor just to allow defendant, at this late date, to enforce the provisions of said contract as against the plaintiff, even if the latter were claiming title thereunder.

III. We have fully considered all the facts presented in the record before us, and have reached the conclusion that the decree of the trial court was for the right party.

The judgment below is accordingly affirmed.

BROWN, C., concurs in closing paragraph and in result, without considering other questions.

PER CURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All concur; BOND, J., in result.

SUMMERS et al. v. CORDELL et al.
(No. 17953.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. APPEAL AND ERROR \S 761—SUFFICIENCY OF BRIEF—POINTS AND AUTHORITIES.

Under Supreme Court rule 15 (169 S. W. ix) the points and authorities of appellants' brief should contain a brief statement of facts relating to each point separately presented, showing the page of record where testimony can be found, and by appropriate language should apply the authorities cited to each point.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3096; Dec. Dig. \S 761.]

2. HIGHWAYS — 63 — ESTABLISHMENT OF COUNTY ROAD — JUDGMENT OF COUNTY COURT—COLLATERAL ATTACK.

Under Rev. St. 1909, § 10435, requiring the petition for the establishment of a new road to be accompanied by the names of all resident persons owning lands through which such road will pass, together with the amount of damages claimed by them, the petition need not contain such information, and, where the record affirmatively shows that such information accompanied the petition, that due notice was given as required by section 10436, and that commissioners were duly appointed to assess damages under section 10438, the amount of which was paid into court, the order of the county court is not subject to collateral attack in an action to enjoin the opening of such road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 168; Dec. Dig. —63.]

3. HIGHWAYS — 64 — ESTABLISHMENT—JUDGMENT OF COUNTY COURT — SUFFICIENCY OF COLLATERAL ATTACK.

Where the county court acquires jurisdiction over the proceedings for the establishment of a road and over the proper parties by duly posted notices, the action of the court in ordering a survey, appointing commissioners, etc., cannot be collaterally attacked in a suit to enjoin the opening of such road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 165, 334; Dec. Dig. —64.]

4. APPEAL AND ERROR — 877(2) — REVIEW — ERRORS PREJUDICIAL TO APPELLANT.

Only errors that are prejudicial to appellant will be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3563, 3564; Dec. Dig. —877(2).]

5. HIGHWAYS — 58(3), 64 — ESTABLISHMENT BY STATUTORY PROCEEDINGS—APPEAL AND ERROR—COLLATERAL ATTACK.

The order of the county court establishing a new road and assessing damages is appealable to the circuit court under Rev. St. 1909, § 10440, and, where no objection to the proceedings nor exceptions to the report of damages was made, nor any appeal taken, errors in the proceedings not jurisdictional cannot be raised on collateral attack in proceedings to enjoin the opening of the road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 165, 179-183, 334; Dec. Dig. —58(3), 64; Appeal and Error, Cent. Dig. § 575.]

6. HIGHWAYS — 64 — ESTABLISHMENT BY STATUTORY PROCEEDINGS—APPEAL AND ERROR—COLLATERAL ATTACK.

The competency of commissioners appointed by the county court under Rev. St. 1909, § 10438, to assess damages in establishing a new road and the insufficiency of the damages are questions that cannot be reviewed in collateral attack on an order establishing the road in an action to enjoin the opening of the road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 165, 334; Dec. Dig. —64.]

7. COURTS — 87—RECORDS—PERSONAL LETTER BY JUDGE.

A court of record must speak through its record, and a letter written by one of three judges is not binding on the court, regardless of personal views expressed therein.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 306-310; Dec. Dig. —87.]

8. HIGHWAYS — 64 — ESTABLISHMENT—COLLATERAL ATTACK—MISLEADING LETTERS OF JUDGE—EFFECT.

The plaintiff in proceedings to enjoin opening of road cannot complain that he was misled by letter of presiding judge of county court where commissioners were appointed to assess

damages more than a year thereafter without any remonstrance or objection by him.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 165, 334; Dec. Dig. —64.]

Appeal from Circuit Court, Howell County; W. N. Evans, Judge.

Application by John Summers and others against W. C. Cordell and others to restrain the opening of a public road. From a judgment dissolving a temporary injunction, plaintiffs appeal. Affirmed.

On December 4, 1911, appellants filed a petition for injunction against respondents, Cordell, Vaughn, and Bellew, as judges of the county court of Howell county aforesaid, and Offield, as road overseer, alleging therein that said county court had entered of record an order establishing a new public road in Spring Creek township (describing same), and requiring Offield, as road overseer, to open said road at the expiration of 100 days from the date of said order; that plaintiffs are landowners along the proposed new public road; that they each refuse to give the right of way for said road; that said Offield, as overseer, is threatening to open said road, and is about to proceed to open same, and will, if not prevented by order of the court, proceed immediately to open said road, to tear down the fences of plaintiffs and move the same back a sufficient distance to acquire land for said road, and will appropriate the lands of plaintiffs for such purpose. It is then alleged in petition that the order of the county court aforesaid is void, and five different grounds are set forth therein in support of said contention. The petition concludes with a prayer for injunctive relief.

Defendants answered, and admitted therein that they are officers as charged in petition, and that they are proceeding to open said road under a valid order of the county court. They deny each and every other allegation of petition.

Upon a hearing before the trial judge the latter dismissed plaintiffs' bill, dissolved the injunction theretofore issued, and in due form entered judgment for defendants. Plaintiffs filed a motion for a new trial, and also a motion in arrest of judgment. Both motions were overruled, and the case appealed to the Springfield Court of Appeals. It appearing from the record that the title to real estate is involved, the case was properly transferred by the Court of Appeals to this court. The facts disclosed by the record, as far as necessary, will be considered in the opinion to follow.

J. N. Burroughs, of West Plains, for appellants.

RAILEY, O. (after stating the facts as above). [1] I. Rule 15 of this court (169 S. W. 1x) provides that:

"All briefs shall be printed and shall contain separate and apart from the argument or discussion

sion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. And any brief failing to comply with this rule may be disregarded by the court.

"The brief filed by appellant shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown the court shall otherwise direct."

Appellants' brief does not come up to the requirements of the above rule. The "points and authorities" do not contain any reference to the pages of the record where the testimony can be found, nor is there any attempt to apply the authorities cited to any particular part of the record. The points and authorities simply contain statements of abstract propositions of law, without the slightest reference to the record. They should contain a brief statement of the facts relating to each proposition presented, with the page of the record where the testimony can be found, and by appropriate language apply the authorities cited to the points we are called upon to consider. A compliance with the above suggestions would relieve the court, in many cases, of a vast amount of labor in searching the record for the testimony in order that we may consider the same in the light of the authorities cited and relied upon by counsel.

[2] 11. It is contended by appellants that: "The petition to the county court was void, for the reason that it did not give the names of these appellants as landowners to be affected by said road, nor the damages claimed by them."

Section 10435, R. S. 1909, relates to the establishment of new roads, and, among other things, provides that:

"Said petition shall be accompanied by the names of all resident persons owning land through which said proposed road or change or relocation of road shall run, with the amount of damages claimed by them, so far as can be ascertained, and also the names of those who are willing to give the right of way for said proposed road or change of road."

The petition presented to the county court, among other things, contains the following:

"And we further aver that said new public road is entirely practicable and a public necessity. And we further aver that said public road is, whenever practicable, along government surveys, and that this petition is accompanied by the names of all resident and other persons owning land through which said public road shall run, with the amounts of damages claimed by each of them so far as can be ascertained, and also by the names of all those who are willing to give the right of way for said proposed public road."

It will be observed from comparing the petition with the requirements of section 10435, *supra*, that it follows the language of the statute.

In *Halter v. Leonard*, 223 Mo. loc. cit. 292, 122 S. W. 706, Judge Gantt, speaking for Division No. 2, said:

"There is no warrant in the statute for the contention that the petition itself should contain these names. Full and complete jurisdiction was conferred upon the county court to pass upon the sufficiency of this petition, and to find as

a matter of fact that it was accompanied by the list of landowners as provided by the statutes. As said in *Baubie v. Osaman*, 142 Mo. loc. cit. 505 [44 S. W. 339]: "The county court having the exclusive jurisdiction for the laying out and opening public roads, and having acquired jurisdiction in this particular case by the notice and petition, its findings and judgment are not open to collateral attack, and its judgment is entitled to every presumption in its favor. *Lingo v. Burford*, 112 Mo. 149 [20 S. W. 459]; *Snoddy v. Pettis County*, 45 Mo. 361; *Rose v. Kansas City*, 128 Mo. 135 [30 S. W. 518.]"

There is no testimony in the record before us tending to show that the above allegation of petition in reference to names of property owners, etc., having accompanied said petition, was not true. Plaintiffs offered in evidence the record of the county court, which reads as follows:

"Now, the above cause coming on again to be heard, and the county highway engineer and ex officio road commissioner has filed herein his report, from which said report it appears that Thurman Tabor, John Tabor, John Summers, W. C. Edmonds, J. W. Fox, J. O. D. Davis, J. F. M. Dooley, N. T. Edmonds, J. W. Lorange, and J. L. Calloway have failed or refused to relinquish the right of way for said road: It is therefore ordered by the court that Arch Davidson, John T. Richardson, and W. C. Hocutt be, and they are hereby, appointed to act as commissioners," to assess the damages, etc.

Section 10438, R. S. 1909, reads as follows:

"But if it appear that any person or persons through whose lands such proposed road * * * should run have failed or refused to relinquish the right of way, and are not willing to take the amount of damages offered them by the court or petitioners, * * * the county court shall appoint, by order of record, three disinterested freeholders, of the county," etc., to assess the damages.

In addition to the foregoing, the county court, in its final order establishing said road, affirmatively set out the above matters, and recites therein the names of those in whose favor damages had been assessed by the commissioners, as well as the amount allowed each. It recites the names of those to whom no damages were allowed. It also recites that the damages allowed by said commissioners were paid into court. In addition to the foregoing, the petition for injunction herein contains the following:

"Plaintiffs further state that they each and all own land along the proposed new public road; that they each refuse to give the right of way for said road."

In the proceedings before the county court the petition for the road was in proper form. It contained the requisite number of qualified petitioners, and literally complied with the terms and provisions of section 10435, R. S. 1909. Due notice was given as required by section 10436, R. S. 1909. The county court affirmatively found and entered of record that the requirements of said sections 10435 and 10436 had been complied with. Keeping in mind that this is a collateral attack upon the proceedings of the county court, in respect to a matter over which it had exclusive original jurisdiction, and there being nothing in the record tending to controvert the allegations of petition in re-

spect to said matters, it is clear that the foregoing contention of plaintiffs is not sustained by the record.

[3] III. It is insisted by plaintiffs that there is nothing in the record which "shows a finding by the court as to the probable amount of damages accruing to landowners and other expenses attending the opening of the road or any order requiring payment of the same by petitioners." The record of the county court, introduced by plaintiffs, recites, that:

"Commissioners' report accepted and damages paid in, and road ordered open, all parties have 100 days to move fences from August 17, 1911."

It also appears from the final judgment of the county court that the damages assessed in favor of plaintiffs were paid into court. The county court having acquired full jurisdiction over the subject-matter, and the parties interested therein having been properly brought before the court by the posting of proper notices, the action of said court in ordering a survey, appointing commissioners, etc., cannot be declared void in this collateral proceeding, even if it failed to ascertain beforehand the probable amount of damages accruing to landowners, etc. We are at a loss, however, to understand what just grounds of complaint these plaintiffs can have on account of said alleged failure of the court, for the obvious reason that the damages due them were paid into court, no exceptions were filed to the report of the commissioners assessing same, and no appeal was taken from either the final judgment in the county court or from the assessment of damages aforesaid.

[4] As said by this court in *Howell v. Jackson County*, 262 Mo. loc. cit. 412, 171 S. W. 344:

"It is only errors that affect appellant or plaintiff in error that are reversible, and courts lend an attentive ear to none other. *City of St. Louis v. Lanigan*, 97 Mo. loc. cit. 180 [10 S. W. 475]; *R. S. 1909, § 2082*; *Kansas City v. Woelshoeffer*, 249 Mo. loc. cit. 24 [155 S. W. 779]."

[5] In *Seafeld v. Bohne*, 169 Mo. loc. cit. 551-552, 69 S. W. 1055, Judge Vallant, speaking for this Division, said:

"But, when private property rights are threatened, it is the duty of the owner to avail himself of the process of law for his protection, and, if he stands by and allows a court in the exercise of its rightful jurisdiction to decide questions of law or of fact contrary to the correct interpretation of the one or to the weight of the evidence as to the other, and neglects the means at hand to correct the error, he cannot afterwards treat the whole proceedings of the court as a nullity."

Judge Vallant, on pages 552 and 553 of 169 Mo., page 1055 of 69 S. W., concludes the above opinion as follows:

"Our conclusion is that, if the county court made any mistake in its judgment touching any of the matters in issue in the proceeding to open the road in question, it was an error of judgment which could have been reviewed and corrected in the manner provided by law for relief against such errors, but that it did not render the judgment void as one the court had no ju-

risdiction to render, nor subject it to collateral attack."

The above was an injunction suit brought against the county court of Dade county, Mo., and a road overseer. The principles of law announced therein are equally as applicable to the case at bar. These plaintiffs made no objections to any of the proceedings before the county court. They filed no exceptions to the report of commissioners, and made no effort to appeal the case to the circuit court, where it could have been tried de novo as provided in section 10440, R. S. 1909.

The above contention of appellants is without merit, and is accordingly overruled.

[6] IV. It is further insisted by appellants that:

"The statute requires that the commissioners appointed to assess damages shall be resident freeholders of the county, disinterested, and not of kin to the parties in interest. This requirement must also be shown by the record itself. No presumption will be indulged that the commissioners possess the necessary qualification," etc.

Regardless of the merits of such contention in a proper case, these plaintiffs are in no condition to complain of alleged error of the county court in respect to above matter. The quotation from *Howell v. Jackson County*, 262 Mo. loc. cit. 412, 171 S. W. 342, set out in the preceding proposition, applies with equal force to above contention.

It is not asserted that the commissioners failed to allow plaintiffs adequate damages, nor that any objection was raised before the county court as to their competency to act. Appellants were in court. They had the legal right to object to said commissioners, if any valid reason existed for so doing. If the damages were inadequate, they could have filed exceptions to the report of commissioners and called for a new assessment of damages. They acquiesced in the assessment made, and should not be heard in this collateral proceeding to call in question the competency of said commissioners to act, and especially so in a court of equity. This contention is likewise ruled against appellants.

V. It is also contended by appellants that "section 10438 requires the commissioners appointed to assess damages to notify resident owners of the time and place of their meeting," etc., and that the proceedings before the county court are void, because the commissioners failed to comply with the law.

Section 10438, R. S. 1909, reads as follows:

"* * * The said commissioners, after having been duly sworn to faithfully perform their duties, shall verbally notify the resident owner or owners of such lands, if they can be found on their premises when proceeding to the discharge of the duties of their business, and proceed to view the premises and assess the damages." etc.

The report of commissioners, among other things, contains the following recitation:

"We, the undersigned, * * * did, on the 4th day of August, 1911, proceed to the premises described in said petition, having first notified

all the parties interested of our intended meeting, and the purpose thereof, and did then and there, hear all the testimony offered in relation to the damages sustained by the laying out of said road, and do assess the damages thereof to each particular landowner, as follows, to wit."

Then follow the names, amounts, etc. This report was sworn to by the commissioners on August 4, 1911, and filed with the county court.

It appears from the record that appellants knew commissioners had been appointed to assess their damages. They were already in court, and, if the damages assessed were inadequate, or if the commissioners had failed to notify them as to the time and place for hearing evidence upon this subject, they should have promptly moved in the county court to have the report of commissioners set aside, and asked for a new assessment of damages, if they claimed injustice had been done them. They, however, stood by and made no complaint to the county court, in respect to this matter, and should not now be heard in this collateral proceeding before a court of chancery to complain of alleged failure of the commissioners to do their duty, when the sworn report of the latter was on file showing a compliance with the law.

The above contention is likewise overruled.

VI. It is claimed that the proceedings before the county court should have shown that the parties could not agree upon the amount of damages which appellants had sustained. As heretofore shown, the petition for injunction alleges that appellants "each refuse to give the right of way for said road." The county engineer in his report stated that plaintiffs refused to give the right of way, etc. In view of the foregoing, it then became the duty of the county court to appoint commissioners to assess the damages, which was done. If any irregularity had existed in respect to this matter, the attention of the county court should have been called thereto. As previously stated, courts of equity do not encourage parties to lie in ambush, seemingly acquiesce in proceedings of public importance, and then undertake collaterally to accomplish those things which they could have brought forward at an opportune time before the court having original jurisdiction to pass upon such questions. This contention is likewise disallowed.

[7] VII. Finally, complaint is made that the presiding judge of the county court misled appellants by reason of a letter which it is claimed he wrote to A. J. Tabor in regard to his opinion as to certain phases of the road. This letter was lost, and the parties do not agree as to its exact language. The county court consists of three judges, is a court of record, and must speak by its record. A personal letter written by one member of the court to an individual would not be binding upon said court, regardless of the personal views expressed therein.

County of Johnson v. Wood, 84 Mo. loc. cit. 516-517; Maupin v. Franklin, 67 Mo. loc. cit. 329; Reppy v. Jefferson County, 47 Mo. loc. cit. 69.

[8] This alleged letter, according to the testimony of A. J. Tabor, was received by him in January, 1910. Appellants knew, however, that commissioners were appointed in May, 1911, to assess their damages, and yet it does not appear from the record that they ever made any attempt before the county court to file a remonstrance, or to be heard upon any other question relating to the establishment of said road.

We are of the opinion that the above contention is devoid of merit, and should be disallowed.

VIII. We have doubtless prolonged this discussion at greater length than was necessary, but, as the law relating to the establishment of new roads, etc., is of state-wide importance, we have deemed it expedient to meet the questions presented and rule thereon, in order that the views of this court, in respect to such matters, may be known. Having given full consideration to all the questions presented by the record, we are of the opinion that the judgment of the trial court was for the right parties.

It appearing from the transcript on file herein that plaintiffs were allowed to deposit \$100 in the trial court for stay of execution while the case was pending in the appellate court, we hereby affirm the judgment and remand the cause.

BROWN, C., concurs in result.

PER CURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All concur; BLAIR and BOND, JJ., in result.

LEDBETTER et al. v. PHILLIPS et al.
(No. 17951.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. APPEAL AND ERROR \S 1010(1)—SCOPE OF REVIEW—ACTIONS AT LAW.

On appeal from the judgment in a law action, if there is any substantial testimony in the record to sustain the judgment, it is the duty of the court to affirm it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. \S 1010(1).]

2. APPEAL AND ERROR \S 994(3)—QUESTIONS FOR COURT—CREDIBILITY OF WITNESSES.

In a cause tried to the court which has the witnesses before it, the court is the sole judge of their credibility.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3904-3905½; Dec. Dig. \S 994(3).]

3. QUIETING TITLE \S 44(3)—EVIDENCE—SUFFICIENCY.

Evidence held to sustain the judgment of the trial court in quieting title to land in contro-

versy in defendants, who claimed under alleged conveyance from plaintiff's original grantor.

[Ed. Note.—For other cases, see Quietting Title, Cent. Dig. § 91; Dec. Dig. § 44(3).]

Appeal from Circuit Court, Howell County; W. N. Evans, Judge.

Action by P. A. Ledbetter and husband against A. W. Phillips and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

On January 30, 1912, P. A. Ledbetter, the only child and heir at law of Henry Goodman, deceased, and J. M. Ledbetter, her husband, commenced in the circuit court of Howell county aforesaid an action to quiet title under section 2535, R. S. 1909, to the south half of the northeast quarter and north half of the southeast quarter of section 19, township 26 north, range 7 west, containing 160 acres, and claiming to be the owners thereof. Defendants A. W. and E. C. Phillips filed a separate answer, claiming to be the owners of the north half of the southeast quarter of said section 19; and defendants S. S. De Board and Cora De Board, husband and wife, filed a separate answer, claiming to be the owners of the south half of the northeast quarter of said section 19. Except as to the land described, the above separate answers were duplicates of each other.

Henry Goodman, father of P. A. Ledbetter, homesteaded the 160 acres of land above described, and made his final proofs required of homestead claimants on January 2, 1877. The patent, however, to said land, was not issued to Henry Goodman until February 15, 1884, although homestead final certificate 1568 was issued to him March 22, 1877. Henry Goodman died April 22, 1878.

All of the defendants appeared to above action, except Christopher C. McGuire, Grace D. McGuire, and T. W. Brower, who were duly served by publication, but made default therein. The case was submitted to the court without a jury. Upon a full consideration of the evidence and argument of counsel the trial court found that plaintiffs had no right, title, nor interest whatever, either legal or equitable, in any of the 160 acres of land in controversy and heretofore described. The court further found that defendants A. W. Phillips and E. C. Phillips are owners in fee of said north half of the southeast quarter of section 19 aforesaid, and that defendants S. S. De Board and Cora De Board are the owners of said south half of the northeast quarter of section 19 aforesaid.

Judgment was entered in due form in accordance with above findings. The case was submitted to the court without instructions. The evidence disclosed by the record, as far as necessary, will be considered in the opinion to follow.

R. S. Hogan and Green & Green, all of West Plains, for appellants. J. N. Burroughs and M. E. Morrow, both of West Plains, for respondents.

RAILEY, C. (after stating the facts as above). [1, 2] I. The case was tried without the intervention of a jury and without instructions. On the facts disclosed by the record this is an action at law. If, therefore, there is any substantial testimony in the record sustaining the judgment of the trial court, it becomes our plain duty to affirm the judgment. *Buford v. Moore*, 177 S. W. loc. cit. 872; *Chilton v. Nickey*, 261 Mo. 232, 169 S. W. 978; *Morrison v. Bomer*, 195 Mo. 535, 94 S. W. 524; *Bartlett v. Kauder*, 97 Mo. loc. cit. 359, 11 S. W. 67; *Schad v. Sharp*, 95 Mo. loc. cit. 579, 8 S. W. 549; *Hamilton v. Boggess*, 63 Mo. loc. cit. 251, 252. The trial court had before it the witnesses, and was the sole judge of their credibility.

[3] It is admitted that Henry Goodman is the common source of title, and that he died on April 22, 1878.

J. M. Garrett testified, that in April, 1884, he married the widow of Richard Goodman; that she had in her possession a deed from Henry Goodman to his brother, Richard Goodman, which conveyed the land in controversy; that said deed remained in his possession from 1884 until 1902, and was lost without being recorded.

Bud Jackson testified that he knew Henry Goodman in his lifetime, that his wife was the sister of Henry and Richard Goodman; that about 1878 he saw Henry Goodman in Arkansas, and that Henry told him he had sold the above land to Richard Goodman for two horses and a wagon. Witness said he knew the team of horses which belonged to Richard, and that Henry Goodman had them with him, and also the wagon, when the above conversation occurred. Richard was living on the land at the above date, and told witness that he had bought Henry out. Witness never knew of Henry claiming title to the land afterwards, but Richard lived on the place and claimed title to the land.

M. Kenaga on cross-examination testified at the instance of plaintiffs that Richard Goodman, who was living on the land in question, told him that he (Richard) had traded with his brother for the land. The title of Richard Goodman to above land passed by mesne conveyance to defendants Phillips and De Boards, as found by the trial court.

There was no substantial contradiction of any of the foregoing testimony, relating to the title of Richard Goodman, acquired from his brother, Henry Goodman. The finding of the court was fully justified by the above testimony. *Givens v. Burton*, 183 S. W. loc. cit. 621, 623.

II. The finding and judgment of the trial court is abundantly sustained by clear and

substantial evidence in the record. No errors were committed during the progress of the trial below.

The judgment was for the right parties, and is accordingly affirmed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of RAILLEY, C., is adopted as the opinion of the court. All concur.

WOODS v. ST. LOUIS & S. F. R. CO.
(No. 17674.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. APPEAL AND ERROR \S 1061(3)—**HARMLESS ERROR—GROUND OF NONSUIT.**

Plaintiff not having been entitled to go to the jury either on the issues of negligence or contributory negligence, any error in nonsuiting him on the ground of his not producing sufficient evidence to overcome a release will not work a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4210; Dec. Dig. \S 1061(3).]

2. MASTER AND SERVANT \S 139 — **INJURY — NEGLIGENCE—PROXIMATE CAUSE.**

Even if failure of engineer to give signals were negligence, it would not avail a section man on a hand car who, by seeing the train, had timely notice of its approach.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 275, 282, 289, 296; Dec. Dig. \S 139.]

3. MASTER AND SERVANT \S 155(3)—**RAILROAD SECTION MEN—WARNING OF TRAINS.**

It is not the duty of a railroad company to notify section men that any certain trains are expected to pass over the road, but it is their duty to be on the lookout and keep out of the way.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 310; Dec. Dig. \S 155(3).]

4. APPEAL AND ERROR \S 585(1) — **COUNTER ABSTRACT.**

Respondent's counter abstract, not being controverted, must be taken as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2586, 2587, 2590-2594, 2604; Dec. Dig. \S 585(1).]

5. MASTER AND SERVANT \S 240(1)—**INJURY—CONTRIBUTORY NEGLIGENCE.**

A railroad section man injured by the hand car on which he had been riding being thrown by a train against him was guilty of contributory negligence in not leaving it and going to a place of safety while he had time, and in going where the hand car would be thrown, instead of in the opposite direction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 751; Dec. Dig. \S 240(1).]

Appeal from Circuit Court, Laclede County; L. B. Woodside, Judge.

Action by William Woods against the St. Louis & San Francisco Railroad Company. From an adverse judgment, plaintiff appeals. Affirmed.

On June 21, 1910, plaintiff was a section man on defendant's railroad, and was under

the direction of John Doss, the foreman of the section gang. Doc Stephens and Wm. Brown were the other two section men who composed said gang. About 7 o'clock in the morning of above date, John Doss and the three section men above named, left Stoutland, Mo., on a hand car, and traveled in a westerly or southwesterly direction until they came to a deep cut and curve in the road. The four men were located on the hand car as follows: Doss was on the left side between the levers; plaintiff was on the left side, back of Doss; Stephens was on the right side; and Brown was behind him. The crew were all facing west, the direction the hand car was traveling. They stopped three or four times before reaching the scene of accident to listen for approaching trains. The place where the accident occurred was a sharp curve around the side of a hill. The curve is through a cut about 25 feet deep, and there were trees and brush on the top of the cut outside the right of way. The train was going east and the hand car west, when the latter was struck.

Plaintiff in his direct examination testified:

"The train was not more than the distance between two telegraph poles from me at the time I tried to push the hand car off the track."

On cross-examination plaintiff testified as follows:

"When I first saw the train it was about two telegraph poles and a half from me."

Plaintiff proved that there were 30 telegraph poles to the mile.

John Doss testified as follows:

"When we first saw the train it was about 420 feet away. At that time the hand car was in the act of stopping."

The hand car was stopped. Doss and Stephens, who were in front, grabbed the handhold and swung the front end of hand car around to the north. Doss then hallooed to the boys to get out of the way. He did not give plaintiff any order in reference to moving the hand car. Plaintiff testified upon this subject as follows:

"When Doss said, 'Look out,' and that was all that was said, they jerked the front end of the car and threw it around, and I thought the next thing for me to do was to throw the hind end off. That is the general rule if you have time to jerk it off before the train hits it. I then stepped down in the center of the track and reached down to push the car over the rail. I had hold of the hand car, and did not hear any one say anything at that time. * * * The train was not more than the distance between two telegraph poles from me at the time I tried to push the hand car off the track."

Counting 30 telegraph poles to the mile, it makes the distance between such poles 176 feet. If the train was 2 telegraph poles away, it would make the distance 352 feet, but, if it was $2\frac{1}{2}$ telegraph poles away, it would make the distance 440 feet.

There is nothing in the record to indicate whether the approaching train was a passen-

ger, freight, or mixed train, nor does the record show the rate of speed it was running before the accident. The foreman and section men concluded the hand car could not safely be removed, and left the track. The foreman, Stephens, and Brown, when leaving the track, went towards the on-coming train, so that the hand car would not strike them when knocked from the track. The plaintiff, however, went in the opposite direction from the others, and when the locomotive struck the hand car it was knocked against the plaintiff and caused the injuries complained of. As shown by respondent's supplemental abstract, plaintiff testified in reference to this matter as follows:

"Q. You knew if the engine hit the car it would knock it in the direction it was going? A. It was bound to. Q. Had you ever seen a hand car hit before by a train? A. Yes, sir."

Plaintiff was sent to the hospital, and remained there over three months. Defendant's claim agent, it is alleged, paid plaintiff \$180 on August 17, 1910, in full satisfaction and release of his cause of action, as shown by the release set out in the abstract, but plaintiff denies that he received any amount in excess of \$80, and claims that he understood he was simply being allowed for his time, etc.

On February 6, 1912, defendant filed its answer in this cause, pleading the general issue, contributory negligence on the part of plaintiff, and likewise pleaded the above release in bar of plaintiff's right of recovery. The case was called for trial before a jury on August 7, 1912. On said last-named date plaintiff's reply was amended so as to allege a tender to defendant of said \$80. The trial court directed a verdict for defendant on the ground that plaintiff had not produced sufficient evidence to overturn the settlement which he had made with defendant. The jury returned a verdict for defendant, and judgment was accordingly entered thereon. Plaintiff filed a motion for new trial, which was overruled, and the case appealed to this court.

A. R. Lamb, of Coffeyville, Kan., and Metcalf, Brady & Sherman, of Kansas City, for appellant. W. F. Evans, of St. Louis, and Mann, Todd & Mann, of Springfield, for respondent.

RAILEY, C. (after stating the facts as above). [1] I. Although the trial court nonsuited plaintiff on the ground that he had failed to produce sufficient evidence at the trial to overcome the release pleaded and offered in evidence by defendant, yet, if he failed to introduce any substantial evidence tending to convict defendant of any of the acts of negligence lodged against it in his complaint, or if it should appear from the undisputed facts in the case that plaintiff was guilty of negligence contributing to his own injury at the time and place of accident, then it would be our duty to affirm the judgment below, re-

gardless of the action of the court in nonsuiting plaintiff for alleged failure to produce sufficient evidence to overturn the settlement made with defendant's agent. Boessel v. Wells Fargo & Co., 260 Mo. loc. cit. 463, 478, 479, 169 S. W. 110; Hurck v. Railway Co., 252 Mo. loc. cit. 51, 52, 158 S. W. 581; Trainer v. Mining Co., 243 Mo. 350, 148 S. W. 70, Ann. Cas. 1913C, 949; Quinn v. Met. Street Ry. Co., 218 Mo. 545, 118 S. W. 46; Warner v. St. L. & M. R. Ry. Co., 178 Mo. loc. cit. 134, 77 S. W. 67; Moore v. Lindell Ry. Co., 176 Mo. loc. cit. 544, 545, 75 S. W. 672; King v. King, 155 Mo. loc. cit. 425, 56 S. W. 534; Bartley v. Street Railway Co., 148 Mo. loc. cit. 142, 49 S. W. 840.

Keeping in mind the above principles of law, let us turn to the record and ascertain (1) whether plaintiff was entitled to go to the jury on any of the alleged grounds of negligence charged against defendant in the complaint; (2) and whether he was entitled to go to the jury on account of his alleged contributory negligence at the time and place of accident.

[2] II. The first charge of negligence lodged against respondent in the complaint reads as follows:

"That the engineer and fireman in charge of defendant's extra freight train No. 1251, whose names are to this plaintiff unknown, failed and neglected to blow the whistle or ring the bell of the engine of said train or give any warning of any kind of its approach as it was about to speed around the curve where the plaintiff was injured."

The first part of the above complaint alleges that the engineer and fireman in charge of defendant's extra freight train No. 1251, neglected to blow the whistle or ring the bell of said train. (a) There is not a word of testimony in the record showing that the train which struck the hand car was a freight train. (b) There is not a syllable of testimony in the case tending to show that the engineer and fireman of the train which collided with the hand car did not blow the whistle and sound the bell before the collision occurred. (c) The testimony fails to show that the engineer and fireman could see plaintiff or his crew until the locomotive emerged from the cut. Even if it had been shown that the whistle was not blown and the bell was not rung, it would not have been available to plaintiff as a cause of action, because the engineer and fireman, under the circumstances of this case, were not required by law to sound the whistle or ring the bell as a warning to plaintiff. Gabal v. Railroad, 251 Mo. loc. cit. 270, 271, 158 S. W. 12; Rashall v. Railroad, 249 Mo. 509, 155 S. W. 426; Van Dyke v. Railroad, 230 Mo. 259, 130 S. W. 1; Degonia v. Railroad, 224 Mo. 564, 123 S. W. 807; Sissel v. Railroad, 214 Mo. 530, 113 S. W. 1104, 15 Ann. Cas. 429; Cahill v. Railroad, 205 Mo. 393, 103 S. W. 532; McGrath v. St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872; Clancy v. St. Louis Transit Co., 192 Mo.

615, 91 S. W. 509; *Evans v. Wabash Ry. Co.*, 178 Mo. loc. cit. 517, 77 S. W. 515; *Ring v. Mo. Pac. Ry. Co.*, 112 Mo. 220, 20 S. W. 436; *Hitz v. Railroad*, 152 Mo. App. 687, 133 S. W. 397; *Wilkerson v. Railroad*, 140 Mo. App. 306, 124 S. W. 543; *Aerkfetz v. Humphreys*, 145 U. S. loc. cit. 419, 12 Sup. Ct. 835, 36 L. Ed. 758; *Riccio v. New York, N. H. & H. Railroad*, 189 Mass. 358, 75 N. E. 704; *Texas & P. Ry. Co. v. Myers*, 58 Tex. Civ. App. 408, 125 S. W. 49; *Myers v. Texas & P. Ry. Co.* (Tex. Civ. App.) 134 S. W. 814; *Cincinnati, N. O. & T. P. Ry. Co. v. Swann's Adm'r*, 160 Ky. 458, 169 S. W. 887 L. R. A. 1915C, 27. (d) Even if the whistle had been sounded and the bell rung before the train came into the cut, there is no evidence in the record tending to show that either could have been heard by plaintiff or the section crew. Nor does the evidence show that either signal could have been heard by plaintiff while the train was in the cut. (e) Plaintiff testified in chief that he saw the train when it was 852 feet away, and on cross-examination said he saw it 440 feet away. There is no evidence tending to show the train was running at a rapid rate of speed, but, even if it had been, plaintiff had ample time to have moved to a place of safety. Having seen the train after the hand car had stopped, while it was from 352 to 440 feet away, the failure to sound the whistle or ring the bell, even if neither signal had been given, would be unavailing to plaintiff as a ground of negligence. The foreman says the train was 420 feet away when he first saw it, and plaintiff places it at above distance. Where a whistle is required to be sounded, or a bell rung, it is for the purpose of imparting notice of the approach of the train. *Hutchinson v. Missouri Pacific Ry. Co.*, 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. Rep. 710; *Murray v. St. Louis Transit Co.*, 176 Mo. loc. cit. 189, 75 S. W. 611; *Hutchinson v. Mo. Pac. Ry. Co.*, 195 Mo. 546, 93 S. W. 931, 4 L. R. A. (N. S.) 729, 113 Am. St. Rep. 693, 6 Ann. Cas. 699; *Sissel v. Railroad*, 214 Mo. loc. cit. 529, 530, 113 S. W. 1104, 15 Ann. Cas. 429; *Craine v. Metropolitan St. Ry. Co.*, 246 Mo. loc. cit. 404, 152 S. W. 24; *Illinois Cent. R. Co. v. Willis' Adm'r*, 123 Ky. 636, 97 S. W. 21; *Baltimore & O. S. W. R. Co. v. Abegglen*, 41 Ind. App. 603, 84 N. E. 566; *Pakalinsky v. N. Y. Cent. & Hud. R. R. Co.*, 82 N. Y. 424. Plaintiff had timely notice of the approach of the train to have moved to a place of safety if he had not voluntarily remained at the hand car and then moved in the opposite direction from that which he should have gone. There is no evidence in the record tending to show that plaintiff did not have ample time, after learning of the approach of the train, to have moved to a place of safety. The record utterly fails to show any testimony relating to the bell or whistle of the oncoming locomotive. (f) It is charged that defendant had no regular train

schedule to enter Stoutland, Mo., from the west at this hour. There was no testimony offered on this subject, and it is not shown to have had any connection with the case, even if true.

[3] III. It is averred as negligence:

"That the agent of defendant at Stoutland, Mo., failed to warn John Doss, section foreman, this plaintiff, or any member of the section crew of the approach of said extra freight train."

In his direct examination plaintiff testified as follows:

"When we started to work we came back to the depot and asked if there were any extra trains out, and the agent said 'No.' * * * Q. Where were you when this was asked? A. I was standing on the hand car. Q. Where was the hand car? A. In front of the depot. Q. Who did the talking? A. Mr. Doss. Q. Did you hear a conversation there between Mr. Doss and the agent at the depot? A. Well, I understood they said there was not nothing out; that there wasn't no extras out. Q. Did you hear a conversation there? A. No, sir."

Plaintiff admitted that he did not hear the alleged conversation between Doss and the agent. He did not testify that Doss told him any such thing. On the contrary, plaintiff testified as follows:

"Doss said, 'We will go ahead' of a fill that was there, and said 'Maybe we can get over it before it catches us if there is anything out.'"

This indicates that neither Doss nor any of his crew were relying on the fact that a train was not expected to pass over the road.

No court would permit a verdict to stand in favor of plaintiff based upon such alleged negligence of the agent. There is nothing in the record to indicate where the train was when plaintiff left the station at Stoutland, or that the agent knew where it was then. But, even if the agent had known this train was coming over the road, and had failed to notify Doss of that fact, it would have been immaterial, because it was not the duty of the defendant or its agents to notify section men along the road that any certain trains were expected to pass over same. It was the duty of the section men, as declared in the authorities cited under proposition II, supra, to be on the lookout for trains, and to keep out of the way of same. Again, it was immaterial, even if the agent did fail to notify Doss that the train mentioned in evidence would pass over the road; for it clearly appears that both plaintiff and Doss knew of its approach when more than 350 feet away, and in ample time for plaintiff to have moved to a place of safety, had he exercised ordinary care, as the other section men did under the circumstances.

IV. It is further charged as negligence in the petition:

"That the engineer and fireman on said extra train No. 1251 knew that the section men on the defendant's railway started to work upon the defendant's hand cars at the hour of 7 o'clock a. m., and that the said engineer and fireman knew that said section men were likely to be upon said defendant's railway track going to work between the hours of 7 and 8 o'clock, a. m.; that it was one of the rules of the defendant's railway company, and had been for a long

time prior to the date of the injuries complained of customary, for every train to blow its whistle when approaching an extreme curve."

There is not a scintilla of evidence in the record in regard to above allegation. No witness testified as to any such rule of the company, nor in respect to any such duty devolving on the engineer and fireman of a train under the circumstances of this case. As heretofore suggested, the foreman and his crew knew of the approach of the train in time to have moved to a place of safety.

[4] V. Plaintiff's last charge of negligence reads as follows:

"That John Doss, the section foreman of the defendant as aforesaid, negligently and carelessly ordered and lead this plaintiff to assist in attempting to remove said hand car from the defendant's track when the engine of said extra freight train was only about 200 feet away and running at a high and dangerous rate of speed, and failed and neglected to order this plaintiff to leave said hand car in time for this plaintiff to escape being struck by said hand car when it was thrown off of defendant's track by said engine."

(a) There is no evidence in the record tending to show that Doss ordered plaintiff to assist in removing the hand car. Plaintiff introduced as his witnesses Doss and Stephens. It appears from respondent's counter abstract, which must be taken as true, because it is not controverted, that Stephens, on cross-examination, testified:

"I heard some one holler two or three times—I took it to be the foreman—to get to a place of safety. As we came around the curve and saw the train the hand car stopped and we jumped off. Doss and I grabbed hold of the handhold of the front end and swung around to the north, the inside of the curve, the low side of the track. We did not do that on anybody's order. I did not hear the foreman give any orders. We men just knew we were trying to get the hand car off."

Doss testified that when he first saw the train it was about 420 feet away. After he and Stephens moved the end of car around to the north he saw they could not get it off, and he said to the boys, "Get out of the way and let him have it." The train at that time was about 200 feet away. He further testified:

"The other men stepped back on the bank, and I hollered at Woods the third time. When he started to leave the track he went in the same direction the train was going. We just stepped in the direction the train was coming from and to the side of the track. I never made over two steps from the car. I could have gone six or eight, but two steps cleared me, and I knew when the engine hit it it would knock it in the direction it was going."

Plaintiff testified that Doss said, "Look out," and without any order from Doss he attempted to move the rear part of hand car. The train, he says, was then about the distance between two telegraph poles from him, or 352 feet away. There is not the slightest intimation in plaintiff's testimony that Doss ordered him to assist in removing the hand car. The evidence is undisputed that when he did leave the hand car, instead of going toward the approaching train so that the

hand car would not strike him, he went in the opposite direction, and was struck by the hand car he had left on the track as it was knocked off by the train.

(b) As heretofore shown, there is absolutely no testimony in the record which even mentions the rate of speed at which the train was running. Nor is there any evidence tending to show that it was traveling at a rapid or dangerous rate of speed. The evidence is clear and undisputed that plaintiff was warned to look out for the train in ample time to have moved to a place of safety if he had exercised ordinary care for his own protection.

VI. Upon a careful consideration of each of the charges of negligence preferred against defendant in the complaint we are compelled to hold upon the facts disclosed by the record that plaintiff, by his evidence, has signally failed to make out a case against defendant upon either of the charges of negligence aforesaid. The trial court would therefore have been clearly justified in sustaining defendant's demurrer, on the ground that the charges of negligence against defendant were not sustained by the proof.

[5] VII. On the undisputed facts disclosed by the record the plaintiff at time and place of accident failed to exercise ordinary care for his own protection, and was clearly guilty of negligence in failing to leave the hand car and move to a place of safety while he had time to do so, and was likewise guilty of negligence in going east by the side of the track, where the hand car could strike him, when knocked from the track by the train, when two or three steps in the opposite direction would have carried him to a place of safety. The trial court would likewise have been justified, upon the undisputed facts in the case, in directing a verdict for defendant upon plaintiff's contributory negligence.

VIII. In view of the conclusion heretofore reached, we deem it unnecessary to consider the action of the court in directing a verdict for defendant on the ground that plaintiff failed to produce sufficient evidence to overturn the settlement pleaded in defendant's answer.

The judgment below was for the right party, and is accordingly affirmed.

PER CURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. BLAIR and BOND, JJ., concur in result. GRAVES, P. J., concurs in opinion filed, as to all except a portion of paragraph 7 of opinion. WOODSON, J., concurs in opinion of GRAVES, P. J.

GRAVES, P. J. I concur in the result of the majority opinion and in all of the opinion, except part of the seventh paragraph therein. I agree that no negligence as pleaded by plaintiff was shown against the defendant. I agree that it was contributory

negligence for plaintiff to have undertaken to remove the hand car in front of a rapidly approaching train so close to him, but I do not agree that his movement to the east rather than to the west was such an act as should be declared contributory negligence as a matter of law. Under the stressed circumstances, had the case turned upon this point, the question was one for the jury. One placed suddenly in a position of peril is not called upon to use the same exact judgment as would be used under different circumstances. This is one of the common rules in measuring alleged acts of contributory negligence. As a rule, where one acts in the face of impending peril, the question of his negligence is usually for the jury. So it would have been in this case. It is likewise, for very similar reasons, a very close question whether or not we should say that plaintiff's attempt to remove the hand car was contributory negligence.

But it may be this last question is ruled well enough, and I let it go at that.

WOODSON, J., concurs in these views.

REID v. ST. LOUIS & S. F. R. CO.
(No. 17326.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. RELEASE 24(2) — ATTACK FOR FRAUD — TENDER BACK OF CONSIDERATION.

It was incumbent upon an injured railroad employé, before attacking his release of liability to the company for fraud in its procurement, the company's representative having used neither guile nor force to prevent the servant from reading the release, to tender the road the \$675 received for its execution.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 45; Dec. Dig. 24(2).]

2. COMPROMISE AND SETTLEMENT 6(3) — SETTLEMENT OF CLAIM FOR INJURIES.

Where an injured railroad employé, after negotiating with the company's representative, accepted \$675 in money as compensation for his injuries, there was a settlement of his claim unaided by his written release.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 39, 43; Dec. Dig. 6(3).]

3. RELEASE 15 — FAILURE TO READ.

An injured railroad employé who signed a release of liability to the road could not set it aside because he did not read it, where it contained only the terms of his parol agreement of settlement with the representative of the road.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 30; Dec. Dig. 15.]

4. RELEASE 24(2) — TENDER BACK OF CONSIDERATION—WAIVER.

Where counsel for an injured railroad employé who had signed a release for \$675 wrote the company's attorney, without inclosing any money, check, etc., that he tendered back the sum paid the employé, to which the company replied that the injury was the result of the employé's own negligence, that he had been treated with generosity on account of the seriousness of his injuries alone, and that no voluntary action could be taken by the company, there was no

waiver by it of tender back of the consideration for the release.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 45; Dec. Dig. 24(2).]

5. TRIAL 145 — ISSUE — WITHDRAWAL.

In an action for injuries by a railroad servant who had signed a release, where the petition alleged fraud in its procurement, and plaintiff's counsel stated the release had been procured by fraud, and the case was tried solely on such theory until on rebuttal defendant offered a witness who gave testimony relied on by plaintiff as tending to show mental incapacity to execute the release, it was defendant's right to have the issue of fraud specifically withdrawn from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 328, 341; Dec. Dig. 145.]

6. TRIAL 194(9) — INSTRUCTION.

In an action for injuries against a railroad by an employé who executed a release, an instruction that there was no evidence that the settlement was obtained by fraud or misrepresentation, simply withdrawing the issue of fraud made by the pleadings, presented by the opening statement of plaintiff's counsel, and adverted to in the evidence, was not erroneous as telling the jury the claim was fairly settled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 453, 456, 463; Dec. Dig. 194(9).]

7. APPEAL AND ERROR 232(3) — RESERVATION OF GROUNDS OF REVIEW—OBJECTION TO INSTRUCTION—WAIVER.

In a railroad servant's action for injuries, where plaintiff's counsel stated that his objection to an instruction was the only one he had, he was precluded on appeal from making any other, having waived all but the excepted one.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1351; Dec. Dig. 232(3); Trial, Cent. Dig. § 691.]

8. APPEAL AND ERROR 995 — REVIEW — WEIGHT OF EVIDENCE.

The Supreme Court is not concerned with the weight of evidence on an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3907; Dec. Dig. 995.]

Appeal from Circuit Court, Jackson County; James E. Goodrich, Judge.

Action by Milton Reid against the St. Louis & San Francisco Railroad Company. There was verdict for defendant, which was set aside by the trial court, and defendant appeals. Order granting new trial reversed, and cause remanded, with directions to enter judgment on the verdict.

W. F. Evans, of St. Louis, and Hale Houts and Cowherd, Ingraham, Durham & Morse, all of Kansas City, for appellant. R. J. Holmden, of Kansas City, for respondent.

BLAIR, J. This action was begun in the Jackson circuit court to recover damages for injuries respondent suffered in a collision between two engines in appellant's yards. There was a verdict for the railroad company, which the trial court set aside on the ground an instruction given was erroneous, and the company appealed.

In the view we take of the case it is unnecessary to set out the circumstances resulting in respondent's injury. The answer consisted: (1) Of a general denial of all allegations of the petition except that it was

admitted appellant was a corporation; (2) a plea of contributory negligence; (3) a plea of assumption of risk; and (4) a count setting up a release and averring appellant compromised and settled his claim. The reply denied the second and third averments of the answer, and concluded as follows:

"Plaintiff, further replying, states that the alleged release set forth in defendant's amended answer is without lawful consideration and void; that such release was obtained from plaintiff by misrepresentation, imposition, and deception practiced upon him by defendant's agents, servants, and employes while he was in deep distress and mental and bodily affliction and anguish, brought about by the injury set forth in his first amended petition herein, and while plaintiff was unable, through such bodily and mental condition, to understand or comprehend the contents and terms of said release, and that plaintiff never assented to the terms thereof; that defendant company, through and by its said agents, with the purpose and design of defrauding plaintiff out of his right of action set forth in said amended petition, well knowing that plaintiff was incapable of understanding or comprehending the nature and terms of said release, told plaintiff that his injury was caused by, and the result of, an accident; that the defendant company was not responsible or liable therefor; that the money mentioned in said release was given and paid plaintiff as an act of charity and because he had been an employe of the company; that the paper signed by him was a receipt to show the company where the money had been paid, and plaintiff, with full confidence in defendant's agents, employes, and servants, believing that the statements so made were true, and in his bodily and mental condition as herein stated, signed and executed said paper.

"Plaintiff, further replying, denies that he is now or ever was compelled to make return of or tender back to defendant the money so given and paid under the circumstances mentioned, but states that he did make a tender of and offer to return said money to defendant prior to the institution of this suit, and now herein again makes a tender of and offers to return to defendant company the money so paid and given this plaintiff by defendant."

Appellant unsuccessfully demurred to the evidence, and the case went to the jury with the result stated. In support of its position that the order granting the new trial should be reversed, with directions to reinstate the verdict and enter judgment thereon, appellant contends: (1) There was no substantial evidence tending to prove negligence on the part of appellant; (2) contributory negligence of respondent is conclusively shown; (3) there was no evidence of fraud in the procurement of the release; (4) there was no tender made of the amount received by respondent in settlement; (5) there was no evidence of mental incapacity of respondent avoiding the release; and (6) that the cause was fairly tried in all respects.

The facts necessary to an understanding of the questions we think decisive of the case will be stated in connection with the discussion of those questions.

1. Appellant admits he signed the release pleaded in bar by respondent, and admits he received \$675 at the time he did so. He himself is the only witness testifying in his behalf who claims to have been present during all the negotiations resulting in the exe-

cution of the release. Testimony of others adds nothing of importance in this connection. As to these negotiations he testified in considerable detail. He swore the company's first offer was \$250; that he replied this was not enough for the injury he had received. There was some discussion. The company's representative then said the company was not liable; that neither it nor respondent was responsible for the mischance; that it was one of those accidents which could not be helped. Respondent rejoined he thought the company ought to give him \$2,000, and this counter suggestion was immediately refused consideration. This was the substance of the first conversation. On February 19, 1906, nearly two months after respondent had been discharged from the hospital, the representative of the company again went to respondent's home. Respondent details the conversation upon this occasion substantially as follows, repetitions and inconsequential matter being omitted:

"Q. What talk did you have at the time? A. Mr. Lee talked all the morning about the company not being liable, and he said that was all really that the company would give. He said that the company was not liable for this accident; that it was one of those accidents that was brought about by the providence of God. He said that the fog—it being so foggy that night that none of us could not see the engine, and that the company didn't think I was responsible for it, and they didn't think they were responsible for it; and then he inquired into my financial conditions, what I was doing, and then he asked my wife what she was doing, any work, and finally he employed her to go out to his house and work. So he talked on half a day, and finally he said that was every bit that the company would give was \$500. Q. In that talk you told him that you didn't see the engine standing on that switch was because it was so foggy? A. Because there was no lights on it. (Note.—It is admitted lights were never used on engines in this work.) Q. Because it was so foggy he said you were not responsible for not seeing it? A. Yes, sir. Q. That there was an accident in his opinion, and he didn't think the company was liable? A. Yes, sir. Q. And they would not give you more than \$500, and what did you say about that? A. He kept on talking. I wasn't saying anything; I was listening. Q. What did you say about a check or draft? A. Finally he lifted the \$500 up, and said the company had authorized him to give me that, that was all the company had authorized, but he could raise it \$175 more, he had that power himself, to raise it \$175 more, and he said that he had their check, and that was all the company would give. Q. Yes. A. And he said the company wasn't liable; that there was no liability, and they were giving it as an act of charity. He started to write out a check for it, and I told him that I could not cash any check, so he went away and brought the money. Q. Why did you tell him that you could not cash any check? A. I don't know anybody in town that I could cash a check like that. I might have been put in jail for having the check. I told him that I could not cash a check, and wanted it in money. Q. He wrote the check out and had you to sign it, and told you he would get the money? A. Yes, sir. Q. He came back, did he? A. Yes, sir. Q. What time did he go away? A. I don't know. Q. You say he came there at 10 o'clock in the morning. How long did he stay? A. He came about 10, and I should judge it was after 12 o'clock when he left. Q. What time did he get back? A. I think he got back a little after 3 o'clock. Q. A

young man was with him? A. Yes, sir. Q. Who was with you at the time? A. My wife. Q. He brought the money back with him? A. Yes, sir. Q. Did you count it? A. No, sir. Q. Did your wife count it? A. No, sir. Q. You saw him count it? A. Yes, sir. Q. Did he have a paper there for you to sign? A. Yes, sir. Q. Did you talk this over with your wife when Mr. Lee came down there? A. No, sir. Q. Did you and she talk it over after he left? A. No, sir. Q. Did she hear the talk between you and Lee? A. She heard a portion of it, and a portion she didn't. Q. When he came back with this young man, what did he say? A. He brought the money at that time and gave it to me, and brought two papers out of his book, and said these were papers that the company required him to have in order to show where the money had been paid. Q. What did you say? A. I never said anything only to sign. Q. That is your signature? A. Yes, sir. Q. You said you [can] read? A. Yes, sir. Q. Your eyes are good? A. Yes, sir. Q. Your wife reads and writes, too? A. Yes, sir. Q. That is her signature; you saw her sign it? A. Yes, sir. Q. You took the \$675? A. Yes, sir."

He had previously testified in a deposition that he refused the company's offer to pay him \$250, saying it looked like they ought to give him \$2,000, and that, when the company's representative finally offered \$675, the offer was accompanied with a statement that the company was not liable, and that he (respondent) could either take the \$675 or the company would "cut off negotiations, or something like that"; that this "scared" him, and he then said he would take the \$675. On the trial he reiterated the correctness of this testimony. That he instituted this action without tendering to appellant the \$675 paid him when he signed there can be no question.

[1-3] (a) In the circumstances of this case was incumbent upon respondent, before he could attack the release for fraud in its procurement, to tender to appellant the amount received for its execution. *Althoff v. Transit Co.*, 204 Mo. loc. cit. 170, 171, 102 S. W. 642; *Utman v. Boyer*, 173 Mo. App. loc. cit. 398, 9, 158 S. W. 861, and cases cited. There is no substantial evidence to support any theory that the company's representative used either guile or force to prevent respondent from reading the release he signed; and, if it be assumed a tender in such circumstances would not be necessary, this case does not fall within that exception. Further, respondent's own testimony demonstrates that the negotiations he details were negotiations for the settlement of his claim against appellant, and that the release signed whether he read it or not, contained simply the agreement his testimony shows was made. In fact, his testimony, unaided by the written release, clearly shows a settlement of claim. In these circumstances his failure to read the release before signing it is of no consequence on this phase of the case, whatever the reason for such failure. That one who signs a release containing an agreement he testifies he made can set it aside because he did not read it, where it admittedly contains the terms of that agreement, is not a rule we are willing to follow. We say he

admitted the agreement the release evidences because his testimony as to the negotiations permits of no other rational construction. His present effort to maintain the contention that he believed the company was merely making him a present is wholly inconsistent with his testimony as to what was said and done, and is based on a remark or argument used to induce his agreement to the settlement and release. The question as to respondent's mental capacity to agree to a settlement is, of course, another matter, and will be considered in another connection. It is also to be noted that the demand is unliquidated and disputed, and there can be no claim respondent was entitled to \$675, or more, in every view of the transaction.

[4] (b) While it was not pleaded, yet it is now suggested, appellant waived the tender. This is based upon two letters. Over two years after the release was signed and the money paid respondent's present attorney wrote appellant's claims attorney that he had been employed by respondent, had investigated the facts in connection with respondent's injury, and believed appellant was "absolutely liable for it"; that he was informed "the company paid soon after the accident the sum of \$675, and I presume took a release"; that he desired to "take advantage of this conduct on the part of the company, and hereby tender back the sum so mentioned and so paid to Reid. The paper, contract, or release, is repudiated." The writer of this testified he, in fact, tendered nothing; that he never offered appellant any money, check, or draft, and inclosed nothing of the kind in the letter sent it. In answer to that letter appellant's claims attorney in due time wrote respondent's attorney:

"In response to your favor of March 23d, have to say that investigation, as well as facts stated in affidavit of Mr. Reid himself, which is on my file, discloses that his injury was the result of his own neglect of duty and carelessness, and that he was treated with great generosity by the company on account of the seriousness of his injuries alone, and no further voluntary action will be taken by the company in this case."

It is upon this last clause respondent's counsel bases his suggestion tender was waived. No authorities are cited, and the matter is not argued. Obviously there was no waiver. The clause relied on indicated the company would pay nothing further unless compelled to do so. It is not a reference, even, to a tender of any kind. There was no duty imposed upon appellant to take any voluntary action with respect to a tender. It was the duty of respondent and his counsel to act in that matter if they expected to rely upon a tender in any subsequent action they might begin.

Counsel, who wrote the letter for respondent, testified he made no tender. That is the only thing his testimony can mean. He testified, further, that he had no money of respondent wherewith to make a tender, and respondent testified he had no money available for that purpose. It is said there is

testimony respondent could have raised the money among his friends. He should have done so, and then tendered it to appellant if he expected to rely upon a tender. What he might have done cannot avail him in this case. The evidence shows no tender and no waiver thereof.

It follows that, so far as concerns the question of fraud in the procurement of the release, respondent had not, in the circumstances, put himself in a position to raise the issue.

[5, 6] II. It is argued there was error in the instructions. Among other instructions given was the following:

"The jury are instructed that there is no evidence in this case that the settlement in question was obtained by fraud or misrepresentation on the part of the defendant or its agents."

It is said: (1) There was no issue of fraud submitted to the jury, and that this instruction might have misled the jury on the question of mental incapacity submitted in other instructions; and (2) that the instruction was equivalent to telling the jury that "a fair settlement had been made."

The petition alleges fraud, and respondent's counsel, in his opening statement, stated the release had been procured by fraud. The case was tried solely upon that theory until, in rebuttal, respondent offered a witness who gave testimony now relied on as tending to show mental incapacity. In these circumstances it was appellant's right, in the circumstances of this case, as appears from what has been previously said, to have the issue of fraud specifically withdrawn from the jury. It is conceded this "might not have been reversible error," but the other matter mentioned is relied upon as such. It is said the instruction amounted to telling the jury the claim was settled, and was fairly settled. We do not so regard it. It simply withdrew the issue of fraud made by the pleadings, presented by the opening statement of respondent's counsel, and adverted to in the evidence. As suggested by appellant's counsel, the words "the settlement in question" furnishes no just ground for the contention the jury could have been misled into believing the court meant to tell them there had been a binding settlement; they meant simply that "the settlement in question" in the case was not open to the defense of fraud, so far as the jury was concerned, and left the question of respondent's mental capacity to be determined upon instructions given for both parties and relating to that subject.

[7] III. Objections are made to two instructions upon the subject of mental incapacity. To these instructions and some oth-

ers counsel for respondent objected in the trial court thus:

"The *only* [italics ours] objection I have to 'D 4' is based upon our view of this case, that a release may be set aside for imposition upon one in such circumstances of being unable to properly protect himself as enlightened consideration of the circumstances recognizes when the surroundings are suggested; that is, you can't deal with a person who is ignorant and incapable, although he may have sufficient capacity, if it is exercised, to agree for himself, in such a way as to take advantage by overruling his mind through the fact of his weakness and incapacity."

This objection proceeds upon the assumption of mental capacity, and is directed to the contention that weakness, short of mental incapacity, is to be considered on the issue of fraud. If it does not mean this, we do not understand what it means. It is the chief argument in the brief. We have held the issue of fraud of this kind was not available; was not in the case. The objection made is disposed of by that holding. We are also of the opinion that in stating that the objection made was the only one he had to the instruction counsel is precluded from making any other now. If he had stated he had no objection to make, he could make none now. When he stated he had none to make except one which he stated, he waived all but the excepted one. This was the effect of the language used. We do not decide counsel must state specifically his objection to instructions or waive them, nor that the statement, without more, of certain objections, is a waiver of others not stated. These matters are not involved. What we hold is that, when counsel stated he had only a certain objection to make, he thereby limited the trial court's examination of the instruction to that one objection, and limits himself to that objection on appeal.

IV. This disposes of the ground upon which the new trial was granted, and all other rulings to which counsel for respondent has directed our attention.

[8] A careful examination of the record shows that the jury's verdict was in all probability a correct one. While we are not concerned with the weight of the evidence on this appeal, there is no impropriety in saying it seems apparent from the record the jury's finding was not out of accord with it. There is no such condition of the evidence as creates surprise at the verdict or to warrant any peculiar emphasis by us of rulings against respondent on the trial. We are satisfied the verdict ought to stand.

The order granting the new trial is reversed, and the cause is remanded, with directions to enter judgment on the verdict. All concur.

WILLIAMSON et al. v. ROBERTS et al.
(No. 17960.)

(Supreme Court of Missouri, Division No. 1
June 2, 1916.)

1. DESCENT AND DISTRIBUTION §47(1) —
FAILURE TO NAME OR PROVIDE FOR CHILDREN—STATUTE.

By Rev. St. 1909, § 544, a testator dies intestate as to children and their descendants not named or provided for in the will.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 126, 130; Dec. Dig. §47(1).]

2. WILLS §481—TIME OF TAKING EFFECT.

A will takes effect at testator's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1005-1007; Dec. Dig. §481.]

3. WILLS §486—PRESUMPTION.

In making his will, a person is presumed to hold in judgment what property, and the method of its distribution, which he shall own at the time of his death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1016-1022; Dec. Dig. §486.]

4. DESCENT AND DISTRIBUTION §47(1) —
FAILURE TO PROVIDE FOR CHILDREN—STATUTE.

Under Rev. St. 1909, § 544, providing that if testator leaves a child or children, or descendants of such child or children, in case of their death, not named or provided for in his will, he shall be deemed to die intestate as regards such child or children, where testator left land which he devised to a daughter, the only child he named in his will, and personally insufficient to pay his debts, the will providing that the rest of his estate other than the devise to the daughter be disposed of as the law directs, there was no provision for the other children in the will sufficient to validate the devise to the daughter.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 126, 130; Dec. Dig. §47(1).]

5. ESTOPPEL §110—ESTOPPEL IN PARS.

Estoppel is an affirmative defense.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 800; Dec. Dig. §110.]

6. APPEAL AND ERROR §1008(1)—REVIEW—FINDING.

In a purely legal action, such as ejectment, the Supreme Court is concluded by the trial court's finding of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. §1008(1).]

Appeal from Circuit Court, Greene County; Arch A. Johnson, Judge.

Suit in ejectment by J. N. Williamson and others against J. R. Roberts and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded, with directions.

Wm. H. Horine and J. T. White, both of Springfield, for appellants. Neville & Goran, of Springfield, for respondents.

BOND, J. I. This is an ejectment, involving the title to certain land situated in Greene county, Mo., necessitating the construction of the will of R. H. Williamson, deceased, who owned said land at the time of his death. At the time he executed the

will in controversy and at the date of his death, R. H. Williamson was the father of five children, one of whom, an unmarried daughter, Alamanda, was a sufferer from epilepsy. It was his desire to provide for this unfortunate child, and in the second clause of his will he devised certain land to her, the title to which is in dispute in this cause, together with certain other land which is the subject of another suit, with which we are not concerned on this appeal. At the time of his death, October 12, 1903, the testator owned only the land described in the will and devised to his daughter Alamanda. On August 1, 1904, Alamanda Williamson was declared insane, and H. A. Wommack was appointed as her guardian and curator. In order to provide for her, it became necessary to sell said land, which was done under the direction of the probate court on December 15, 1906; the proceeds being applied by her guardian toward her maintenance and support until her death in 1912. In the meantime, the title to the land thus sold passed by mesne conveyances from the first purchaser Maze, to the defendant J. R. Roberts.

This suit was instituted by the children and grandchildren of R. H. Williamson to recover the land from the last vendee on the theory that the will was void as to the other children of the testator who were not specifically mentioned nor provided for therein. The defendants in their answer set up the will as one defense, and also pleaded that plaintiffs were estopped by their conduct to dispute the validity of the will or to claim the land.

[1] The trial court rendered judgment for defendants, and found as a fact that plaintiffs had waived no right to question the validity of the will, but held the will was sufficient to pass the title to the exclusion of the plaintiffs, and that the third clause ("[3] I desire that all the rest and residue and remainder of my estate be disposed of as the law directs") was sufficient provision for the plaintiffs to take them out of the statutory rule that a testator dies intestate as to children and their descendants not named or provided for in such will. R. S. 1909, § 544. Plaintiffs duly appealed to this court.

II. The question presented is whether the terms of the will bring it within the purview of the statute annulling it as to such children or their descendants neither named nor provided for therein, which shall survive the testator. The language of the statute is, to wit:

"If any person make his last will, and die, leaving a child or children, or descendants of such child or children in case of their death, not named or provided for in such will, although born after making such will, or the death of the testator, every such testator, so far as shall regard such child or children, or their descendants, not provided for, shall be deemed to die intestate."

It has been repeatedly interpreted and construed both in this state and in other states having substantially the same statute. *Meyers v. Watson*, 234 Mo. 286, 136 S. W. 236; *Hargadine v. Pulte*, 27 Mo. 423; *Wetherall v. Harris*, 51 Mo. loc. cit. 68; *Pounds v. Dale*, 48 Mo. 270; *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657; *Bradley v. Bradley*, 24 Mo. 311; *Boman v. Boman*, 49 Fed. 329, 1 O. C. A. 274; *Gerrish v. Gerrish*, 8 Or. 351, 34 Am. Rep. 585; *Gage v. Gage*, 29 N. H. 533; *In re Barker's Estate*, 5 Wash. 390, 31 Pac. 976; *Purdy v. Davis*, 18 Wash. 164, 42 Pac. 520; *Bower v. Bower*, 5 Wash. 225, 81 Pac. 598. The rule deducible from these decisions, as well as the language of the above statute, is that, where the will fails to name or make a substantial provision for the children or their descendants surviving the testator, it is void as to them only. When the will under review was made, and also at the death of the testator, he was the father of five children, no one of whom was mentioned in the instrument, except his afflicted, unmarried daughter Alamanda Williamson. Nor was there any provision of any kind or degree for his remaining children, unless such provision was made by the disposition expressed in the third clause of his will, *supra*.

[2] It is upon this clause of the will alone that respondents base their claim that the requirements of the above statute were complied with, and consequently that the testator validly devised the land in question to one of his children, thereby cutting off the rights of the others and their descendants. It is not claimed for respondents that the alternative provision of the statute providing for the naming of all the children or their descendants existing at the death of the testator was observed. Hence the question to be determined is whether the clause in question constituted such a provision for the unnamed children as to exempt the present will from the operation of the statute. The will, of course, took effect at the death of the maker. The record is undisputed that at his death he owned a small amount of personalty which was insufficient to pay his debts, and nothing else except the land specifically devised to his daughter Alamanda.

[3, 4] Bearing in mind that in making his will a person is presumed to hold in judgment what property, and the method of distribution thereof, which he shall own at the time of his death (*Mueller v. Buenger*, 184 Mo. loc. cit. 476, 83 S. W. 458, 87 L. R. A. 648, 105 Am. St. Rep. 541), and, considering in the same connection what actually hap-

pened at the time of the decease of R. H. Williamson, we see no reason for ascribing to him the intention of devising any part of his estate to his four unnamed children. He left nothing upon which such a devise could take effect, for his estate was insolvent and comprised no other land than that which had been specifically devised to Alamanda. Nor is there anything in the language of the clause quoted above which necessarily implies that the testator had his other children in mind when he made the will. The effect of that clause, as appears from inspection, was to leave whatever undisposed estate he might have at the time of his death to the operation of the law, which would, primarily, apply it to the payment of his debts. As he did not leave enough after excluding the devise to Alamanda, to pay his debts, it cannot be said that, in making a provision which would subject what he did leave to that burden, such an act necessarily implied that he was thinking of and providing for his other children who could not obtain any part of such residue.

The idea which underlies the statute is that the will must show expressly that the children to be cut off thereby were named, or such substantial provision for their benefit as to raise a necessary implication that they were in the mind of the testator. Our conclusion is that there was nothing in the terms of the present will, or the circumstances of its execution and as they existed at the time of the death of the testator, which takes it out of the provision of the statute, and hence as to these plaintiffs R. H. Williamson must be held to have died intestate.

[5, 6] III. It is insisted, on behalf of respondents, that the present plaintiffs are estopped or precluded from the assertion of their heritable rights under the facts of this record. We are unable to concur in that view, for we have been unable to find, and the learned counsel for respondent has failed to point out to us, any facts or circumstances in this record which constitute an estoppel against the institution of this suit. Besides, that is an affirmative defense which the court below found against the respondents, and, this being a purely legal action, we are concluded by that finding under the facts in this record.

From what has been said, it follows that the construction of the will by the learned trial court was erroneous.

The judgment in this case is therefore reversed, and the cause remanded, with directions to proceed in conformity with this opinion. All concur.

STATE v. ISAACS. (No. 19388.)

(Supreme Court of Missouri, Division No. 2.
May 31, 1916.)

1. CRIMINAL LAW § 1056(1)—APPEAL AND ERROR—PRESENTATION IN LOWER COURT OF GROUNDS FOR REVIEW—EXCEPTIONS.

In a prosecution for homicide, instructions given or refused, to which no exceptions were saved, are not reviewable on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056(1).]

2. HOMICIDE § 174(6)—EVIDENCE—ADMISSIBILITY.

In a prosecution for homicide, where it appeared that soon after the crime the body of the deceased and surrounding premises were searched and no weapons were found, but later a pair of "knucks" were found near the body of the deceased, evidence tending to show that defendant, instead of deceased, had access to the "knucks" was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 364; Dec. Dig. § 174(6).]

3. CRIMINAL LAW § 698(1)—APPEAL AND ERROR—OBJECTIONS.

In a prosecution for homicide, where defendant allowed testimony concerning the ownership of a weapon found near deceased some time after the crime to be introduced without objection and fully cross-examined the witness, he could not later object because the testimony proved unfavorable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1651, 1653; Dec. Dig. § 698(1); Witnesses, Cent. Dig. § 984.]

4. CRIMINAL LAW § 719(1)—TRIAL—STATEMENTS OF COUNSEL.

In a prosecution for homicide, where the record is entirely silent as to alleged statements of the defendant concerning a sister of the deceased, or that they were false or slanderous, or adversely reflected on her good name, statements of state's counsel, that "defendant had circulated slanderous reports concerning deceased's sister, and deceased had a right to inquire about such reports," that "in the difficulty in which deceased was killed he was defending the good name of his sister," and that "defendant had made false statements concerning the young sister of the deceased, and in defending her deceased did only what any one would have done for a little sister," were improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719(1).]

5. CRIMINAL LAW § 718—TRIAL—STATEMENTS OF COUNSEL.

In a prosecution for homicide, statements of state's counsel that, if defendant had not been violating the law by carrying a revolver, deceased would not have been killed, was improper, since it is immaterial whether defendant was violating the law in carrying the weapon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1668; Dec. Dig. § 718.]

Appeal from Circuit Court, Dallas County;
O. H. Skinker, Judge.

Alfred Isaacs was convicted of manslaughter in the fourth degree, and he appeals. Reversed and remanded.

Defendant was charged by indictment with having taken the life of one William Campbell in Dallas county, this state, under such circumstances as to constitute murder in the second degree. He was convicted of man-

slaughter in the fourth degree, and sentenced to imprisonment in the penitentiary for a term of two years. He admitted the killing, but attempted to justify the act upon the ground of self-defense.

The state's evidence is that the deceased, his brother, and defendant, together with others, were, on the evening of the difficulty, attending an entertainment; that during the progress thereof these three persons, at different times, left the house, and soon thereafter the deceased and his brother accosted the defendant and inquired of him as to whether he had retracted certain alleged false statements concerning their younger sister. Upon receiving a negative reply, the deceased, after releasing himself from the hold of his brother, rushed towards and struck at defendant. Defendant ran, and deceased followed at close proximity. Running thus a distance of 20 or 25 yards, the defendant drew from his pocket a pistol and fired a shot, causing almost instant death.

The body and wearing apparel of the deceased was soon thereafter examined, and no weapons of any kind were found. An inspection was also made of the surrounding premises, and no weapons found. Several hours later, however, and after the arrival of the officers, and many other persons, a weapon, to wit, "knucks," was found near the body and at a place that had been previously inspected. This weapon is described as a "constructed pair of knucks made out of a corn-planter plate." The state then proved by one Duncan that something like a year prior to the difficulty he had placed an instrument, which he thought was the one found near the body of deceased, in an outhouse belonging to him, and that later, and some time prior to the difficulty, he found in this outhouse a couple of bundles of wearing apparel, which, he says, the defendant later called for and claimed as his own, stating, at the time, that he had, prior thereto, left these in the outhouse where the witness had placed the instrument referred to. After this testimony was offered, and received without objection, and after full cross-examination in relation thereto, defendant moved the court to strike the same out, alleging that it was immaterial and did not tend to prove any issue in the case.

On the part of the defendant, the evidence tends to show that, when he was approached by the deceased and his brother and asked as to whether he had made retraction of his alleged false statements, he not only said he had not, but also that he had neither said nor thought of anything derogatory of the character of the girl, whereupon the deceased assaulted him and knocked him to the ground; that in his efforts to avoid further difficulty he ran and was pursued by the deceased, until deceased was so close to him that he shot in order to protect himself. He

also offered evidence tending to show that, on prior occasions, the deceased had stated that he was "looking for" him (the defendant), and that he would do him bodily harm, because of certain things he had said about the sister. These statements he testified had been communicated to him, and that on one prior occasion he had left a public meeting because he had been told that the deceased was then "looking for" him.

The coroner testified that on the day following the killing he saw the defendant and observed a small puncture just above the left ear, and a cut in the cap which defendant wore, corresponding in position to the cut on the ear; that such a puncture and cut could have been made by an instrument or weapon like the "knucks" which were found near the body of the deceased.

O. H. Scott and John S. Haymes, both of Buffalo, for appellant. John T. Barker, Atty. Gen. (Lewis H. Cook, of Jefferson City, of counsel), for the State.

REVELLE, J. (after stating the facts as above). [1] I. Defendant complains because of one portion of the instruction on self-defense; but this assignment is not reviewable, since no exceptions were saved to any of the instructions, either given or refused. Notwithstanding this omission, we have examined them and find that they are as favorable to defendant as he could ask.

[2, 3] II. The court did not err in refusing to strike out the testimony of witness Duncan. Soon after the fatal occurrence, both the body of deceased and the surrounding premises were examined for the express purpose of ascertaining whether the deceased had been armed. No weapon was then found, but several hours later a pair of "knucks" was discovered near the body of the deceased, and so located that the state was justified in endeavoring to explain their peculiar appearance, and who was responsible therefor. The evidence of this witness tended to show that, while the instrument belonged to one other than either the defendant or deceased, the same had been missing from the possession of the owner, and that the defendant, instead of deceased, had had access thereto and the opportunity to possess the same at the time in question. In addition to this, the record discloses that this testimony was received without any objection whatever, and that the defendant fully cross-examined the witness in relation thereto, bringing out more fully the facts than did the state. As said by this court in *State v. Ferguson*, 183 S. W. 336 (not yet officially reported):

"Parties are not permitted to remain silent when improper questions are asked and take chances on receiving helpful replies, and then object if the answer proves unfavorable."

[4, 5] III. We come now to an assignment of greater merit, the alleged improper remarks of state's counsel. During the argument it was said on behalf of the state:

"Defendant had circulated slanderous reports concerning William Campbell's sister, and Campbell had a right to inquire about such reports. * * * In the difficulty in which Campbell was killed, he was defending the good name of his sister. * * * Defendant had made false statements concerning the young sister of William Campbell, and in defending her Campbell did only what you or any one else would have done for a little sister."

Again, counsel for the state made the following statement:

"If defendant had not been violating the law by carrying a revolver, Campbell would not have been killed."

The record is entirely silent as to what statements, if any, the defendant had made concerning the sister of deceased. It likewise fails to show that his alleged statements were false or slanderous, or of a nature that adversely reflected upon her good name. That counsel was outside of the record and in a field foreign to the case is entirely clear. The injection of this extraneous issue, particularly in this wise, was clearly improper, and we need not go far in our calculations of the effect of such statements until the estimate of the prejudice that they were likely to produce carries them beyond the harmless line. We have some conception of human nature and know that there are some things which generally reaches and influences it. The statement that, "if defendant had not been violating the law by carrying a revolver, Campbell would not have been killed," was also improper. For our present purpose, it is unnecessary to determine whether the defendant was violating the law in carrying this weapon, this being immaterial, because, as said by this court in *State v. Heath*, 221 Mo. loc. cit. 594, 121 S. W. 149:

"Obviously the fact as to whether he was in the possession of a pistol and had a right to carry it, or was carrying it unlawfully, has no tendency to prove or disprove any of the issues submitted to the jury. The overshadowing question, so far as this proposition is concerned, is as to the use made of such pistol at the time of the difficulty, that is to say, whether or not the defendant, without any just or lawful provocation, killed the deceased by the use of such pistol, or, on the other hand, whether or not he used it upon a reasonable apprehension of danger and for the purpose of protecting his own life, or used it in a sudden heat of passion aroused by some just or lawful provocation, and not strictly upon the ground of self-defense, as defined in the instructions in this cause."

The same proposition was involved in *State v. Renfrow*, 111 Mo. 589, 20 S. W. 299, and the same doctrine and conclusion announced.

For the error pointed out, the judgment is reversed, and the cause remanded. All concur.

STATE ex rel. DETROIT FIRE & MARINE
INS. CO. v. ELLISON et al. (No. 18967.)

(Supreme Court of Missouri. In Banc. June
2, 1916.)

1. TRIAL \S 237(3)—INSTRUCTION—DEGREE OF
PROOF.

In an action on a policy of fire insurance, where the defense was arson, an instruction in effect requiring proof by a preponderance of the evidence of the circumstances relied on to show insured was guilty of arson, and then requiring that circumstances so proved "must be inconsistent with any other reasonable hypothesis than that of his guilt," was improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 548; Dec. Dig. \S 237(3).]

2. EVIDENCE \S 60—PRESUMPTION OF INNOCENCE OF CRIME—EFFECT.

In a civil case, where the commission of crime is in issue, the presumption of innocence places the burden of proof on the party alleging a crime was committed, and, in the absence of evidence of its commission, warrants a direction of verdict against the charge of crime.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 81; Dec. Dig. \S 60.]

3. EVIDENCE \S 86—"REBUTTABLE PRESUMPTION OF LAW."

A rebuttable presumption of law generally may be defined as a conclusion, which, in the absence of evidence upon the exact question, the law draws from other proof made or from facts judicially noticed or both, the burden of proof cast by it being satisfied by the presentation of evidence sufficient to convince the jury that the probabilities of truth are against the party whom the presumption relieves of the burden of proof; the presumption itself not being evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 107, 108; Dec. Dig. \S 86.]

For other definitions, see Words and Phrases, Second Series, Rebuttable Presumption.]

4. EVIDENCE \S 86—REBUTAL OF PRESUMPTION OF LAW—BURDEN OF PROOF.

Despite a rebuttable presumption of law, the party upon whom it casts the burden of proof in a civil case makes out his case when he adduces evidence proving his allegation of fact to be more probably true than the contrary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 107, 108; Dec. Dig. \S 86.]

5. TRIAL \S 234(7)—INSTRUCTION—BURDEN OF PROOF.

In an action on a policy of fire insurance, where the defense was arson, an instruction that "in civil suits (like this one), just as in the trial of a person charged with crime in a criminal case, the law presumes that the person charged with the willful burning of the property is innocent," was erroneous as directing the jury that they must look for proof of a more conclusive character than in ordinary civil cases.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 537; Dec. Dig. \S 234(7).]

6. TRIAL \S 296(7)—INSTRUCTIONS—CURING ERROR.

In an action on a fire policy, where the defense was arson, the added clause that "the presumption continues until he is proven guilty by the preponderance of credible evidence in the case" did not cure the error in the charge that "in civil suits (like this one), just as in the trial of a person charged with crime in a criminal case, the law presumes that the person charged with the willful burning of property is innocent."

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 710; Dec. Dig. \S 296(7).]

7. APPEAL AND ERROR \S 882(12)—INVITED ERROR—INSTRUCTION.

In an action on a fire policy, where the defense was arson, error in charging that in civil suits, as in the trial of a person charged with crime, the law presumed that the person charged is innocent, was not invited by an instruction requested by defendant not mentioning the presumption of innocence, specifically stating that in a civil action like the present there is no question whether any crime has been committed, etc.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3602; Dec. Dig. \S 882(12).]

Bond, J., dissenting.

Certiorari by the State, on the relation of the Detroit Fire & Marine Insurance Company, against James Ellison and others, to quash the record of the Kansas City Court of Appeals (Rice v. Detroit Fire & Marine Ins. Co., 176 S. W. 1113) affirming judgment for plaintiffs in an action by Benjamin Weinberg and another against the relator. Record of the Court of Appeals quashed.

I. J. Ringolsky and Fyke & Snider, all of Kansas City, for relator. Ed. E. Yates, of Kansas City, and Perry S. Rader, of Jefferson City, for respondents.

BLAIR, J. In the Jackson circuit court Benjamin Weinberg and W. J. Rice recovered judgment against relator on a fire insurance policy. On appeal the Kansas City Court of Appeals affirmed that judgment, Rice v. Detroit Fire & Marine Ins. Co. of Detroit, Mich., 176 S. W. 1113, and our writ of certiorari is invoked to quash the record.

Rice was a creditor of Weinberg, and his interest arose out of an assignment of the policy to him to secure his claim. The answer averred the fire causing the loss was of incendiary origin, and that Weinberg was responsible, with others, therefor. There was evidence tending to prove this averment and evidence tending to refute it and to show the defense was concocted.

Relator contends the Court of Appeals failed to follow the controlling decisions of this court in ruling upon assignments of error lodged in that court against the following instructions:

"(2) The court instructs the jury that one of the defenses set up by defendant in this case is the willful burning of the insured property by the plaintiff Benjamin Weinberg. Now upon this issue the court instructs you that the burden of proving by the greater weight of the believable evidence that Benjamin Weinberg did, in fact, intentionally set or cause to be set the fire that burned said property is on the defendant; and you are further instructed that in civil suits (like this one), just as in the trial of a person charged with a crime in a criminal case, the law presumes that the person charged with the willful burning of the property is innocent, and the presumption continues until he is proven guilty by a preponderance of the credible evidence in the case.

"(3) The jury are instructed that to warrant a finding on circumstantial evidence in this case that plaintiff Benjamin Weinberg burned or caused to be burned the property in question the circumstances must be proved to your satis-

faction by a preponderance of the evidence, and when the circumstances are so established they must point to the said plaintiff, and must be inconsistent with any other reasonable hypothesis."

Relator contends these instructions imposed upon it the burden of making out its defense by a weight of evidence greater than a mere preponderance, and thus violate the settled rule in civil cases and run counter to designated decisions of this court.

[1] I. The Court of Appeals held the evidence warranted an instruction on circumstantial evidence, and then held that instruction 3 was free from prejudicial error.

Relator contends the final clause of the instruction exacted evidence beyond a mere preponderance, and that the holding to the contrary is in conflict with *Rothschild v. Insurance Co.*, 62 Mo. 356; *Edwards v. Knapp*, 97 Mo. 439, 10 S. W. 54; *Marshall v. Insurance Co.*, 43 Mo. 586; *Smith v. Burrus*, 106 Mo. 101, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329; *Dakan v. Chase & Son*, 197 Mo. 238, 94 S. W. 944; *Gay v. Gillilan*, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712. The instruction, in effect, requires proof, by a preponderance of the evidence, of the circumstances relied on to show Weinberg was guilty of arson, and then requires that the circumstances so proved "must be inconsistent with any other reasonable hypothesis than that of his guilt."

In *Rothschild v. Insurance Co.*, supra, in which the defense set up to the policy was, as in this case, arson, this court held it was error so to word an instruction as to impress the jury "with the belief that greater caution should be exercised by them and proof of a more conclusive character should be required" to prove in a civil case facts constituting a crime than was required in "ordinary civil cases." By this last was meant cases in which no criminal act was in issue. The Court of Appeals quoted this rule, but held, as stated, instruction 3 contained no prejudicial error.

In *Gay v. Gillilan* the question was presented. In that case the trial court had given an instruction on the issue of undue influence in procuring the execution of a will which instruction contained, among other things, this direction:

"And in order to set aside the will of a person of the sufficient mental capacity aforesaid, on the ground of undue influence, it must be shown that the circumstances of its execution are inconsistent with any other hypothesis than such undue influence, which cannot be presumed, but must be shown in connection with the will, and it devolves upon those contesting the will to show such undue influence by a preponderance of the testimony."

The instruction was held erroneous on several grounds. The court said the rule it laid down was more stringent than that applicable to criminal cases, but that, even if the words "reasonable hypothesis" had been employed instead of "hypothesis" alone, yet the instruction would have been erroneous.

Instruction 3 introduces into this case the rule of the criminal law. Proof of circumstances which exclude every "other reasonable hypothesis" makes out the proof beyond a reasonable doubt. This appears from the language itself. If, on the facts, the only reasonable hypothesis is that one charged with crime is guilty, obviously there is no reasonable doubt of his guilt. A given set of circumstances reasonably may be explicable on more than one reasonable hypothesis. In a criminal case the jury is not at liberty to take either of two equally reasonable hypotheses and find the defendant guilty. Neither may it find him guilty upon an hypothesis more probably true than another which yet is reasonable. It can act upon the hypothesis of guilt only when that is the only reasonable one. In a civil case the jury may, as between two or more hypotheses, choose the more reasonable and find against the less reasonable one which may accord with innocence. The approval of this instruction by the Court of Appeals brought its opinion into conflict with the decisions cited and the principle they announce, and necessitates the quashal of the record brought here by our writ.

The decision of this Court in *Fritz v. Railroad*, 243 Mo. loc. cit. 77, 78, 148 S. W. 78, is not in conflict with that conclusion. In that case the burden was upon plaintiff to prove that one of defendant's locomotives communicated the fire which caused the loss of which the petition complained. This proof plaintiff sought to make by circumstantial evidence. The court quoted several definitions of circumstantial evidence which support the idea that:

"The force and effect of circumstantial evidence depend upon its incompatibility with, and incompatibility of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove."

The court stated its own view to be that:

"In cases turning on circumstantial * * * evidence, the proof should have a tendency to exclude any other reasonable conclusion than the principal fact."

It held the evidence in that case had no such tendency, and, in effect, that the circumstances proved supported no reasonable theory that could render defendant liable. Running through the opinion is also a tacit recognition of the rule that in case the evidence tends to prove two causes of loss or injury, for one of which defendant is responsible, and for one of which he is not, the burden is upon plaintiff to adduce evidence tending to show it to be more probable than the loss or injury resulted from the cause for which defendant is liable. We do not think the opinion can be understood to mean that under no circumstances can circumstances proved said to be explicable, for the practical purposes of a lawsuit, on more than one reasonable hypothesis. That this is not the doctrine of this court is implied by the language of all instructions in crim-

inal cases on circumstantial evidence requiring that it exclude every other reasonable hypothesis save that of defendant's guilt. The Fritz Case is not opposed to the conclusion reached.

II. In passing upon instruction 2, the Court of Appeals (citing the decisions in *Edwards v. Knapp & Co.*, 97 Mo. 432, 10 S. W. 54; *Smith v. Burrus*, 106 Mo. loc. cit. 101, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329; and *Rothschild v. Insurance Co.*, 62 Mo. 360 et seq.) held that:

"In civil cases involving a charge of crime, the rule in this state is that the rights of the parties are to be determined by a preponderance of the evidence; while in a criminal prosecution the crime must be proved beyond a reasonable doubt."

It further held that:

"Instructions are to be condemned as prejudicial which directly or indirectly suggest to the jury that the measure of proof required to establish the existence of a crime in issue in a civil case is affected by the criminal nature of the act under investigation"—following *Rothschild v. Ins. Co.*, supra.

It pointed out that in that case this court condemned an instruction because:

It was held "calculated to impress the jury with the belief that greater caution should be exercised by them and proof of a more conclusive character should be required, than in ordinary civil cases."

The instruction held erroneous in the *Rothschild Case*, in which case the defense set up to the policy was the same as in this, was like that approved in *Marshall v. Ins. Co.*, 43 Mo. 586, except that the trial court added to the statement of the rule as to the requisite weight of evidence in such cases the clause:

"Regard being had, however, to the serious nature of the charge, in determining the preponderance or weight of evidence."

This added clause this court held vitiated that instruction.

Discussing instruction 2 involved here, after quoting the rule and authorities mentioned above, the Court of Appeals in this case said:

"The instruction under consideration came perilously near the line of error marked out in the cited case (*Rothschild v. Insurance Co.*) in saying that the presumption of innocence in a civil case is the same as that in a criminal case, not, however, because the definition is inaccurate, but that for the saving clause we shall note would have been calculated to induce the belief that the same degree of proof was required in a criminal prosecution for the same offense."

The court then held that the presumption of innocence applied with equal force, whatever the character of the proceeding in which an alleged crime is brought under judicial investigation, but held that with respect to the presumption:

"The difference between the two kinds of actions [civil and criminal] is that in a criminal proceeding the presumption must be overcome beyond a reasonable doubt, while in a civil suit may be overcome by a preponderance or mere slight of evidence. This the jury were clearly held in the concluding clause: 'The presumption continues until he is proven guilty by a pre-

ponderance of the credible evidence in the case.' We must assume the jury were men of common sense and ordinary understanding, and, if they were, we do not see how they could have been misled by the instruction into the belief that defendant had a greater burden than the law imposed upon it."

A rehearing was granted and the cause reargued, and the Court of Appeals handed down a supplementary opinion in which it said the reargument left it "convinced of the correctness of the opinion delivered at the first hearing." This opinion then proceeded:

"There, perhaps, should have been omitted from plaintiff's instruction 2, set out in the original opinion, the following words: 'Just as in the trial of a person charged with crime in a criminal case.' If, standing alone, those words would have a tendency to suggest to the jury that the same character of proof must be produced in a civil action as in a criminal prosecution, thereby coming within the case of *Rothschild v. Insurance Co.*, 62 Mo. loc. cit. 359, that tendency is lost when the instruction is read in connection with defendant's No. 7. For in that instruction defendant itself has the court to bring to the jury's attention the difference between a civil and a criminal action and instructing them that, while in a criminal action there must be evidence to convince beyond a reasonable doubt, such rule did not obtain in a civil action, and explaining the difference in requisite of proof in the two classes of cases. The instruction is taken bodily from that given in the *Rothschild Case*, save the last clause, added by the circuit court and condemned by the Supreme Court. When the two instructions are read together, there can be no reasonable ground for the suggestion that the jury was misled. If it was improper for plaintiff to have referred at all to a criminal case, it was an impropriety adopted and joined in by defendant; a fault condoned."

Relator contends the opinion of the Court of Appeals, in so far as it approves instruction 2 is in conflict with *Rodan v. Transit Co.*, 207 Mo. 392, 105 S. W. 1061; *Mockowik v. Railroad*, 196 Mo. 571, 94 S. W. 256; *State v. Kennedy*, 154 Mo. 268, 288, 55 S. W. 293; and *Morton v. Heldorn*, 135 Mo. 608, 37 S. W. 504.

(a) In *Morton v. Heldorn* this court condemned an instruction which told the jury that a will executed and published by one of sound mind was "presumed to be his free and voluntary act, and you cannot in such case find against said will on the ground of undue influence, unless the charge of undue influence has been proven to your satisfaction by a preponderance of the evidence." It was held that the use, without explanation of the words "preponderance of the evidence," was not necessarily erroneous, but that their use in connection with the words "proven to your satisfaction" and the direction as to the asserted presumption, would lead the jury to infer naturally that the "preponderance of the evidence" must be such as to overcome the presumption which the court declared to exist as a matter of law." The opinion proceeds:

"That declaration is not entirely correct. When the cause was submitted to the jury, there was no presumption of the law that the document was testator's 'free and voluntary act.' There was evidence before them which all the parties and the court alike interpreted as tending to prove undue influence. Both adversary

parties asked and obtained instructions on that theory. In that state of the case it was not proper to give proponents of the will the benefit of a so-called presumption which is merely one of fact, applied in the absence of any evidence permitting a different inference."

The Mockowik and Rodan Cases apply a like rule to efforts to rely upon the presumption of ordinary care on the part of injured persons when there is evidence tending to prove the actual facts respecting that matter. Our reports contain numerous decisions upon this question, and the rule approved in *Morton v. Heldorn* often has been applied.

Counsel for respondents, however, contend this principle applies only to what are termed "presumptions of fact," and not to "presumptions of law"; that the presumption of innocence is one of law, and therefore outside the rule. Frequently, in applying the rule, this court has, as in *Morton v. Heldorn*, pointed out that the "presumption" under consideration was a "presumption of fact." In other decisions it is stated the presumption is "disputable" or "rebuttable," as appears from cases cited in *Morton v. Heldorn* and cases they cite. In *Ham v. Barret*, 28 Mo. 388, this court, however, held the rule applicable to all presumptions of fact, and held that all rebuttable presumptions are presumptions of fact. It thereby included under the head of presumptions of fact what this court now more frequently denominates rebuttable or disputable presumptions of law. With this understanding of the difference in terminology now and then, that decision is authority against respondents' present position that the rule relator relies upon is inapplicable to a rebuttable presumption of law, as this court employs those terms in its classification of presumptions.

The doctrine written in *Cornelius v. Cornelius*, 233 Mo., loc. cit. 36, 135 S. W. 65, et seq., directly supports respondents' contention on this point. No judge concurred in that opinion in such manner that his concurrence necessarily included his agreement to the proposition that it was reversible error to refuse to tell the jury there was a presumption in that case against malice. What was said of that case in *Knapp v. Knapp*, 183 S. W. 576, did not have reference to any question whether the presumption should be stated in instructions. It must be confessed, however, that in numerous instances this court has approved instructions, despite the presence of evidence on the point, instructing juries that the law presumed this or that when the presumption was what we call one of law, though rebuttable. It is also true that there are many decisions (see briefs) in other jurisdictions holding it necessary that the jury be instructed as to the presumption of innocence in civil cases in which crime is in issue. In these circumstances, if this court cannot, in a case like this, review on certiorari any holding not in conflict with our own decisions, it cannot be held the Court of Appeals erred in approving that

portion of instruction 2 which merely told the jury there was a presumption of innocence of crime even in a civil case.

(b) The rule laid down in *Morton v. Heldorn*, supra, ought not, in the writer's opinion, to be restricted to "presumptions of fact."

[2-5] The presumption of innocence is not in itself evidence, as this court, in effect, held in *State v. Kennedy*, supra, when it refused to follow *Coffin v. United States*, 156 U. S. 433, 15 Sup. Ct. 394, 39 L. Ed. 481, wherein that presumption was held to be evidence for defendant, and a failure to declare the presumption to the jury was, on that ground, held reversible error. The *Coffin* Case frequently has been criticised, and even the court which rendered it seems to have receded, in part at least, from the position it took therein. The propriety, affirmed in *State v. Kennedy*, supra, of instructing on the presumption of innocence in a criminal case therefore depends upon something besides evidentiary force in the presumption itself. This may be said to be the law's anxiety to present the defendant in such cases to the trial jury in such manner that he shall not be handicapped by the inference which might arise from his arrest, commitment, indictment, etc. This reason is obviously inapplicable to an ordinary civil case, even though the commission of crime is in issue. In such case the presumption of innocence places the burden of proof upon the party alleging a crime was committed, and, in the absence of evidence of its commission, warrants a direction of a verdict against the charge of crime. That is usually and logically the sole effect of rebuttable presumptions of law, which generally may be defined as conclusions which, in the absence of evidence upon the exact question, the law draws from other proof made or from facts judicially noticed, or both. The burden of proof cast by such presumptions is satisfied by the adduction of evidence sufficient to convince the jury that the probabilities of truth are against the party whom the presumption relieves of the burden of proof. The presumption itself is not evidence. It is not a thing to be "overcome" by evidence in the sense that it, of itself, adds anything to the strength of the evidence of the party invoking it. Despite the presumption, the party upon whom it casts the burden in a civil case makes out his case when he adduces evidence proving his allegation of fact to be more probably true than is the contrary. In argument the facts giving rise to the presumption may be invoked, and the legitimate inferences from them employed to convince the jury the evidence offered by the party having the burden of proof does not establish the fact he contends is true. To say, however, in an instruction to a jury, in the case of a rebuttable presumption, and when evidence has been introduced upon the question, that "the law presumes" so and so, and

that such presumption "must be overcome" or "overthrown" by evidence, is sometimes useless, sometimes prejudicial, and always illogical. As suggested under (a), there are Missouri decisions not in accord with this conclusion.

[8, 7] (c) In any event, however, to instruct in a civil case, in which the defense is arson, that "in civil suits (like this one) just as in the trial of a person charged with crime, in a criminal case, the law presumes that the person charged with the willful burning of the property is innocent," is in contravention of the rule laid down in the Rothschild Case, cited above. The added clause that "the presumption continues until he is proven guilty by a preponderance of the credible evidence in the case" does not, for the reasons given in the Rothschild Case and in *Gay v. Gillilan*, supra, cure the error; nor was the error either invited or condoned by instruction 8 given at defendant's request. This was the instruction referred to as "instruction 7" in the opinion of the Court of Appeals on rehearing. As stated in that opinion, it is taken bodily, less the added clause this court held erroneous, from *Rothschild v. Insurance Co.*, 62 Mo. loc. cit. 358, 359. That instruction did not mention the presumption of innocence. It was designed to inform the jury as to the difference in the weight of evidence requisite to convict in a criminal case and to warrant a verdict in a civil case. Among other things, it specifically told the jury that:

"In civil questions like the present there is no question whether any crime has been committed. The question in this case is merely a question of greater or less probability, and the jury in order to find a verdict for the defendant need not be satisfied of the complicity of the plaintiff in the burning in any or other way or with any different degree of satisfaction than if the question were an ordinary question in a civil case."

That instruction constituted no invitation to the court so to instruct as to impress the jury that, in order to find for defendant on the issue of arson, they must look for "proof of a more conclusive character * * * than in ordinary civil cases." This is what we think the court did by giving instruction 2 for plaintiff.

The record of the Court of Appeals is quashed. All concur, except BOND, J., who dissents.

WHITESIDE v. OASIS CLUB. (No. 17891.)
(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. BOUNDARIES ¶14—DESCRIPTION—WATER COURSES—"FROM" OR "TO."

Whether a description states that land extends "to" a stream or "from" it is immaterial, since both forms equally imply that it is in contact with the water course.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 102-107; Dec. Dig. ¶14.

For other definitions, see *Words and Phrases*, First and Second Series, *From*; *To*.]

2. BOUNDARIES ¶14—DESCRIPTION—WATER COURSES—"LYING WEST OF A LAKE."

A description of land as "all the land lying west of the lake" means the same as if it were "the land bounded on the east by the lake."

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 102-107; Dec. Dig. ¶14.

For other definitions, see *Words and Phrases*, First and Second Series, *Lying*.]

3. WATERS AND WATER COURSES ¶89—CONVEYANCE—USQUE AD FILUM.

Whenever land is sold and conveyed as being bounded by a water course, the water course usque ad filum aquae is included.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 91, 92, 107; Dec. Dig. ¶89.]

4. LANDLORD AND TENANT ¶63(5)—ESTOPPEL TO DENY LANDLORD'S TITLE—LAND EXCEPTED FROM LEASE.

The acceptance of a lease does not estop a tenant to deny the lessor's title to land expressly excepted from the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 175; Dec. Dig. ¶63(5).]

5. ADVERSE POSSESSION ¶85(1)—HOSTILITY OF POSSESSION—BURDEN OF PROOF.

The burden is upon a claimant by adverse possession of land to which he has no color of title to prove actual, open, visible, and adverse possession during the required period.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 498, 656, 657, 660, 668; Dec. Dig. ¶85(1).]

6. EVIDENCE ¶65—PRESUMPTIONS—KNOWLEDGE OF LEGAL TERMS.

One is presumed to know the legal effect of terms used by him in describing his land.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 85; Dec. Dig. ¶65.]

7. ADVERSE POSSESSION ¶66(2) — WITH INTENT TO CLAIM TO TRUE BOUNDARY ONLY—EFFECT.

Where an adverse possessor limits his claim to the true boundary, his possession beyond that line, when ascertained, is subject to correction.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 378-383; Dec. Dig. ¶66(2).]

8. ADVERSE POSSESSION ¶85(3) — EVIDENCE OF HOSTILE OCCUPATION.

In ejectment for a slough, the fact that plaintiff had been accustomed at one time to use the slough for pasturage by repairing his own and defendant's predecessor's fence on the high land on two sides and running a fence across the low ground to inclose it on the side left open, did not show assertion of title, but a mere neighborly arrangement.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 688; Dec. Dig. ¶85(3).]

9. ADVERSE POSSESSION ¶50—RECOGNITION OF TRUE OWNER'S TITLE.

In ejectment for a slough, deed from plaintiff of a right of way across his land running from the "center" or "middle" of the slough was a recognition by him of defendant's title to the slough to the center line, defeating plaintiff's claim of adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 255-261; Dec. Dig. ¶50.]

Appeal from Circuit Court, Montgomery County; James D. Barnett, Judge.

Action by Josiah Whiteside against the Oasis Club. From a judgment for defendant, plaintiff appeals. Affirmed.

This is a suit in ejectment instituted May 15, 1912, in the Lincoln county circuit court, from which it was removed, on plaintiff's application, by change of venue to Montgomery county, where it was finally tried. Its object is to obtain possession of premises described in the petition as follows:

"All that part of the northwest fractional quarter of section 24, township 50, range 2 east, which lies east of the west bank of King's Lake, and also that other part of the said northwest fractional quarter of section 24, township 50, range 2 east, which lies south and east of the middle or center of Fish slough as now located and north and west of the south and east bank of said Fish slough, all of said lands being situate in the county of Lincoln and state of Missouri."

The situation is as follows: On August 18, 1884, David S. Jewell and wife, then in possession, conveyed to the appellant lands described in the deed as follows:

"Forty acres, northwestern part of section 24, township 50, range 2 east, Lincoln county, Missouri, bounded on the north by the southern line of survey No. 1732, on the east by King's Lake, on the south by line running through the center of section 24, and on the west by the line between section 23 and 24, all of said lands lying in township 50, range 2 east, formerly conveyed to David S. Jewell by H. H. Morris, except, however, 4 acres off of said 40 acres sold and conveyed to John L. Stewart."

The deed referred to in the last clause of the foregoing description was made April 30, 1886, by John A. Sitton, whereby he conveyed to Stewart a tract described as follows:

"All that piece or parcel of land, being and lying west of King's Lake, and known as a piece lying south and east of what is known as Fish slough, a part of the northwest fractional quarter of section 24 in township 50, range 2 east, Lincoln county, Missouri, containing 4 acres, more or less."

King's Lake is a slough or stream 1,000 or 1,200 feet wide running through the fractional quarter in a direction west of north. The water of streams emerging from the bluffs to the north and west flows through it to the Mississippi river. The fraction seems, upon the survey in evidence, to be divided by a line in the lake running substantially north and south, and leaving something over 52 acres in the east half and 46 acres in the west half, which latter comprises the tracts conveyed to appellant and Stewart; the latter of which is now owned by the respondent, an incorporated hunting and fishing club which has constructed upon it extensive clubhouses for the use of its members and boat-houses and floating docks extending into the water of King's Lake on its east front, and of Fish slough, which constitutes its north and west boundaries. The area of water occupied by these on the King's Lake front and extending to the middle of the channel on the Fish slough front constitute the property described in the petition and sought to be recovered in this suit.

Fish slough is a stream of water which enters the fractional quarter at its southwest

corner in a northwesterly direction, curving toward the east and passing across it in an easterly direction, discharging its waters into King's Lake and leaving a part of the fractional quarter upon its south and east, and west of King's Lake. This is the Stewart tract now occupied by respondent.

The appellant, under date of December 1, 1897, executed to one Grimes an instrument which calls itself a "hunting and fishing lease" by which he leases to the latter for the term of ten years from July 15, 1907, "the exclusive right to hunt and fish and seine over all the lands and waters now owned by the party of the first part," except as follows:

"Party of first part and his family shall have the right to hunt and fish and also to seine the lake covered by this lease and take all fish caught except the game fish known as cropppy, bass, perch and Jack Salmon, which shall be taken tenderly and carefully and put in the fish park belong to part of the 2nd part and party of the first part shall have his son, Wm. or Walter or his self to attend to same in good shape and party of the first part and his family shall have the right to fish with hook and line in the fishing park belonging to party of the 2nd part."

It further provided that the lease should be determined at any time on all or any part of said land or waters which the party of the first part shall wish to sell or dispose of upon one year's notice. Appellant says in his testimony that this lease was made to replace one made earlier in the year and lost.

Evidently as a part of the same transaction, he made on November 20th, of the same year, a conveyance to Grimes, who had then acquired the Stewart tract, of "a strip of land wide enough for a private roadway not to exceed 20 feet," commencing in the center of Fish slough and running northerly along the west bank of King's Lake through said section 24 and lot 11 of survey No. 1782, as near the edge of the bank as possible or practicable, and thence westerly to the railroad. This strip was to be used as right of way for such road only, and appellant was to have free access to it from his own land through gates to be constructed by Grimes for that purpose. Later (September 30, 1899) another quitclaim deed was made to the same strip in which the right of way along the lake shore was fixed definitely at 20 feet, but no other change was made in this part of the road.

Upon the execution of the original lease above mentioned Mr. Grimes began to make improvements on his own land in line with its purpose. He employed appellant to assist him in building a dam across the mouth of Fish slough so that the waters of the latter could be maintained at a comparatively constant stage against floods from the river through King's Lake on one side and failure of the supply from the hills from which the slough was fed, and in that way established and maintained what is called in

the lease the "Fish Park." Grimes paid the appellant \$285 for this work.

The respondent succeeded Grimes to the possession of the Stewart tract, including the water front improvements we have mentioned, and at the expiration of the Grimes lease in 1907 appellant executed to it an instrument of writing whereby he—

"demised and leased to the said party of the second part, all those premises lying and being in the county of Lincoln and state of Missouri, known and described as follows, to wit: * * * 36 acres, more or less, being all of the N. W. fractional quarter of section 24, except 4 acres, heretofore deeded by John A. Sifton to J. L. Stewart by deed recorded in Book T. at page 143 in the recorder's office of Lincoln county, Missouri, for a term beginning July 15, 1907, and ending the 1st day of May, 1908."

The instrument then proceeded as follows:

"The party of the second part and members of their hunting and fishing club are to have the exclusive privilege of hunting and fishing on said land and water thereon at all times of the year. It is agreed by the party of the second part that the party of the first part and his family shall not be debarred from hunting or fishing on this land. * * *

"It is further agreed by the party of the second part that if the said party of the first part wishes to drain or improve the aforesaid land, that said party of the second part will in no wise object.

"And it is further agreed by the said party of the second part that they will be responsible for any damage done to the crops by himself or members of the club while hunting on this land; and it is further agreed by said party of the second part that said party of the first part, or his legal representatives, shall be entitled to the possession of said premises, and possession thereof shall be peacefully surrendered by said party of the second part on demand therefor, and will peaceably deliver up to the said party of the first part, his heirs, executors, administrators and assigns, at the termination of this lease."

Upon the execution of the Jewell deed in 1884 the appellant took possession under it. Fish slough, where it had cut its way into King's Lake, had high and almost perpendicular banks, and while the south bank, which the stream hugged closely, continued steep to the west line of the section, it fell off into a flat on the north side, leaving some 3 acres between the stream at its ordinary stage and the high bank. It was the lowest of this ground that Mr. Grimes utilized in the formation of his fish park. The Stewart tract had been occupied and cultivated for a long time, and there was, when appellant purchased, an old worm fence along the high bank on that side which had fallen into a state of more or less decay, and another old fence on the high bank at the north side, which inclosed on that side the cultivated lands of the Jewell tract. The flat ground between the two fences, both of which the appellant repaired, was used by him for pasture. How long this continued does not appear from the record, but it does appear that the south fence was allowed to decay and disappeared.

The sole issue which the court permitted to go to the jury was whether or not the ap-

pellant had acquired title to the property sued for by adverse possession. By giving and refusing instructions which we will notice further in the opinion, if necessary, it held that he had not shown a paper title on which he could recover, and that the respondent had not by reason of the license to itself or to Grimes acquired its possession under such circumstances as to estop it from availing itself of that weakness in his case.

R. H. Norton and Avery, Young, Dudley & Killam, all of Troy, and Nowlin & Hughes, of Montgomery City, for appellant. Frank Howell and Sutton & Huston, all of Troy, Geo. B. Webster, of St. Louis, and Ball & Ball and E. Rosenberger & Son, all of Montgomery City, for respondent.

BROWN, C. (after stating the facts as above). 1. The first question which presents itself relates to the Jewell deed which constitutes the foundation of the appellant's claim of title. Whatever possession he may have had he admits to have been taken and held under this deed, and the possessory acts upon which he relies must be considered in connection with its terms.

This deed purports to convey 40 acres of the northwest part of section 24, bounded on the north by survey No. 1732, on the east by King's Lake, on the south by the center line of the section, and on the west by its west line, except 4 acres formerly conveyed to Stewart. According to this description it has a frontage on King's Lake throughout the extent of its eastern boundary, which can only be ascertained in connection with the eastern boundary of the Stewart tract, which is expressly excepted from the general description, and which also fronts on King's Lake throughout its eastern boundary from the mouth of Fish slough south to the quarter section line, so that the appellant is not, nor does he claim to be, a riparian owner. His claim under the Jewell deed is limited at this point to the water in front of respondent's land. Nor is there any evidence in the record that he was ever in actual possession of this part of the water sued for. His claim as well as his title depends entirely upon the question whether or not it is included within the terms of his deed. The Stewart tract, excluded from the land conveyed by the Jewell deed, is described in substance as all that part of the northwest fractional quarter of section 24 being and lying west of King's Lake and south and east of Fish slough. If this description refers, in naming these water courses, to the middle of the water which flows through them, then none of the land sued for is conveyed by the Jewell deed, but is expressly excepted by its terms from its operation.

[1, 2] It can make no difference whether we say that one's land extends to a stream or from it; both forms equally imply that it is in contact with the water course, and

any attempt to distinguish between them in this respect could only result in confusion and uncertainty. That the expression "all the land lying west of the lake" means the same as if it were said "the land bounded on the east by the lake" is so evident that to make a distinction between them would be to set a trap in the path of the unskilled in the anomalies of the law; yet it is upon such a distinction that much of the plaintiff's argument stands.

[3] It has been said that a water course is considered the safest boundary of real estate, as it is a natural boundary; and the invariable construction in this country has been, as it has been for centuries in England, that whenever land is sold and conveyed as being bounded by a water course, the water course *usque ad flum aquæ* is included. Angell on Water Courses, § 11. And the same author (section 9) says:

"The only mode by which a right of property in a water course, above tidewater, can be withheld from a person who receives a grant of the land, is by a reservation directly expressed or clearly implied to such effect."

And in South Carolina it was held that where a survey called for "Dean's swamp" as a boundary, the creek or main stream of the swamp was intended, and not the margin of the marshy land. *Felder v. Bonnett*, 2 McMull (S. C.) 44, 37 Am. Dec. 545. The rule is stated by Gould on Waters (3d Ed.) § 196, as follows:

"In the case of nontidal waters, also, a deed which describes the land as bounded by the water conveys *prima facie* as far as the grantor owns. Thus the term 'river,' when employed to designate a boundary by land owners whose title extends *usque ad flum aquæ*, means in law the center of the stream."

In this same connection it is said by the distinguished author that the deed is taken most strictly against the grantor in the application of this rule, and courts will not favor the presumption that he has retained the title to the bed of the stream. *Devlin on Deeds*, § 1023. And in *Benson v. Morrow*, 61 Mo. 350, this court said:

"In all cases, therefore, where the river itself is used as a boundary, the law will expound the grant as extending *ad flum medium aquæ*."

While the courts and text-writers recognize the utility of the principle that the waters of nonnavigable streams should be available to the owners and occupants of lands in which they have been placed by nature, the doctrine stands firmly on the simpler ground that when we speak of a stream, without further explanation, we refer to it as a whole, as to a stake or stone, and nature has fixed its medial line where, notwithstanding the fluctuation of its waters, they steadily flow to the last. The application of the same general rule to this case results in the conclusion that the Stewart deed, which was adopted by the parties to the Jewell deed as a part of the description of the land conveyed by the latter, will, for that purpose, be presum-

ed to have conveyed to the grantee therein the water front in King's Lake and Fish slough now in controversy, and was therefore excepted out of the Jewell deed. Neither party having attempted to show title in the grantors in either of these two deeds, they stand upon an equal footing in that respect, so that it is unnecessary to determine the effect of such failure so far as it might affect the presumption we have been considering.

[4] 2. The appellant contends that the respondent is estopped from contesting the right of the plaintiff to the possession of the premises sued for by the acceptance of the hunting and fishing lease to respondent. What we have already said in the preceding paragraph seems to dispose of that question, for the license so far as it can affect the rights of the parties in this case excepts out of its provisions the Stewart lands as described in the Siltou deed, and which we have held to extend to the "middle or center" of Fish slough as well as over the lands shown to have been occupied by the respondent in King's Lake. The lease itself limits the extent of the respondent's possession under it.

[5-7] 3. The appellant being without color of title on which to rest his claim by adverse possession, the burden is upon him to sustain it by proof of actual, open, visible, and adverse possession during the period required by law to bar the owner of recovery. As a standpoint from which to consider the evidence upon this point we must take not only his statement as a witness that he made no claim other than under the Jewell deed, but also the formal statement of his counsel upon the trial as follows:

"We are not claiming in this suit anything embraced in the 4 acres more or less. We are claiming under the Jewell deed which excepts this 4-acre tract."

Giving these words their full and ordinary significance, they would make an end of this controversy for, as we have already said, the boundary of the Stewart tract by the terms of the deed extends *ad flum aquæ*, and the appellant, in adopting it as a part of the description of his own land, will be presumed to have known the legal effect of its terms. His claim being limited to the true boundary, his possession beyond that line would be subject to correction upon ascertaining it. *Foard v. McAnnelly*, 215 Mo. 371, 114 S. W. 990, and cases cited.

[8, 9] Removing our standpoint to the position appellant seems to occupy in this suit, and admitting for this purpose alone that a possession taken under a claim of right founded upon the mistaken interpretation of his own deed might ripen into title, we will examine the acts which are relied on as an open assertion of such a claim. He had a farm with cultivated land north of the slough, with a fence on the high bank in

closing it. Between this fence and the slough was a low flat subject to overflow, which he desired to clear and use for pasture. On the high bank south of the slough was the land of the Stewarts, his neighbors, who had an old and somewhat dilapidated fence along the bank of the slough so close as to leave no land susceptible of profitable use between it and the water. The appellant, upon acquiring his land, repaired this fence, built a short fence across the west end of the open strip, thus connecting his own with the Stewarts' fence, cleaned out the flat, and put in his cattle. The whole pasture, which was fully inclosed by perhaps 200 feet of fence, had an area of only about 3 acres. There is no evidence in the record that he ever asserted title to the Stewart fence, if the facts just stated did not constitute such an assertion. It strikes us as a neighborly arrangement by which one was assisted in maintaining his worm fence, while the other was enabled to utilize a strip of alluvial land upon which periodical overflows made it impracticable to maintain a fence of his own. The record does not show how long this arrangement continued. It does, however, show that it had ceased at the time the hunting and fishing lease was made with Grimes, while he was in possession of the Stewart land in 1897. It may be that the appellant did not recognize the interest of Grimes in the water of the slough by the construction of the joint Fish pond for which he received \$235, but he did recognize it when he conveyed him the right of way for a road to the railway. The first of these deeds is dated November 20, 1897, about the time the dam was being constructed by appellant, and ran from the center of "Fish or (Stewart) slough" and thence north along the west bank of King's Lake, while the second deed, dated September 30, 1899, after the work was all completed still recognized it by beginning "in the middle (the center) at mouth where it enters into King's Lake, of what is known as Stewart or Fish slough." It is inconceivable that these deeds should have been intended to bar the access of the grantee to the railroad by establishing its beginning half the width of the slough north of his land. We can construe it in no other way consistent with its evident purpose than as an acknowledgment then made by the parties that the line between them was the middle of the slough at its mouth. We do not think that there is anything in the evidence tending to show that the appellant ever took possession of that part of Fish slough now in controversy under claim of ownership. For this reason it is unnecessary to discuss the evidence relating to the physical character of such alleged possession, or to review the instructions by which it was submitted to the jury. Their verdict for the defendant being the only one which would

have been permitted to stand under the evidence, the judgment entered upon it is affirmed.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

BUCKLEY et al. v. MONCK et al.
(No. 17501.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. CHARITIES \S 47—CHARITABLE TRUST—JUDICIAL APPOINTMENT OF TRUSTEE.

A charitable trust being lawful and sufficiently specific and definite to enable the court to execute it, it will name a trustee; the will having failed to do so.

[Ed. Note.—For other cases, see Charities, Cent. Dig. \S 85; Dec. Dig. \S 47.]

2. CHARITIES \S 43, 47—CHARITABLE TRUST—CERTAINTY AS TO PURPOSE.

If the use is so expressed in a charitable trust that the court may judge of the donor's motive so as to give specific effect to his general directions, he failing to name a trustee, the court will appoint one and administer the trust.

[Ed. Note.—For other cases, see Charities, Cent. Dig. \S 83-90; Dec. Dig. \S 43, 47.]

3. CHARITIES \S 34—CHARITABLE TRUST—INDEFINITENESS AS TO RECIPIENTS.

Indefiniteness as to the individual recipients of the bounty is one of the elements of a charitable trust; otherwise it would be a private trust.

[Ed. Note.—For other cases, see Charities, Cent. Dig. \S 75-77; Dec. Dig. \S 34.]

4. CHARITIES \S 10 — CHARITABLE TRUST — CREATION.

Provision of a will that land or its value be put on interest for the use of worn-out preachers in Methodist Episcopal Church in North Missouri Conference is sufficient in every respect to create a valid charitable use.

[Ed. Note.—For other cases, see Charities, Cent. Dig. \S 34; Dec. Dig. \S 10.]

5. EJECTMENT \S 9(2)—RIGHT OF PLAINTIFF TO POSSESSION.

The heirs of testator having no beneficial interest or possessory title in or to land, as to which testator created a valid charitable trust, without naming a trustee, they are not entitled to recover in ejectment, even if the incorporation of an association, the members of which are rightfully in possession, executing the trust under the direction of the court, be void.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. \S 17; Dec. Dig. \S 9(2).]

Appeal from Circuit Court, Harrison County; J. W. Wanamaker, Judge.

Action by R. R. Buckley and others against J. Clarence Monck and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Barlow, Barlow & Kautz, of Bethany, and J. W. Perry, of Kansas City, Kan., for appellants. A. S. Cumming, of Bethany, and Kendall B. Randolph and Lewis F. Randolph, both of St. Joseph, for respondents.

BROWN, C. This is a suit in ejectment for 210 acres of land in Harrison county, which is described in the record as the Buckley home farm. It was instituted December 16, 1909 by petition in the usual form. The plaintiffs are all the collateral heirs of A. G. Buckley, deceased, who died in August, 1887, without having had any children, and leaving a will devising all the land in controversy by the following paragraph:

"I bequeath first to my beloved wife Malinda Buckley home farm two hundred acres, described 160 acres S. W. qr. of section twenty and 40 acres N. E. of S. E. of section (19) and the E. $\frac{1}{2}$ of the east half of southeast fourth of the southeast quarter of section No. (22) in Twp. 65 range No. 28 containing 10 acres to have and to hold during her natural life at her decease the said land mentioned above or the value thereof to be put on interest for the use of worn out preachers in M. E. Church in North Mo. Conference."

The widow died in September, 1909. Defendant Board of Stewards of the Missouri Conference of the Methodist Episcopal Church was a permanent committee of that conference and was on September 9, 1907, incorporated by pro forma decree of the circuit court for Clinton county, Mo., as a benevolent corporation by the name and with powers as they had existed theretofore, which were as follows:

"Sec. 1. To incorporate under the laws of the state of Missouri as a benevolent corporation.

"Sec. 2. To determine, subject to the action of the aforesaid annual conference, who are conference claimants of the aforesaid Missouri Conference as recognized in and defined by the governing rules and discipline of the Methodist Episcopal Church.

"Sec. 3. To receive, hold, and disburse any and all funds received by the aforesaid annual conference for distribution in aid of the support of conference claimants of the aforesaid Missouri Conference, as recognized and defined by the governing rules and discipline of the Methodist Episcopal Church, and as determined as aforesaid.

"Sec. 4. To receive, hold, and distribute any and all funds coming from whatever sources, intended for distribution in aid of the support of conference claimants as aforesaid.

"Sec. 5. To receive and hold as trustee any and all trust funds, including real estate and all forms of personal property donated or otherwise acquired, which according to the terms of the gift or grant shall be required to be held in trust for the purpose of producing an income, or for any other purpose whatever, for the benefit of such conference claimants as aforesaid, to invest or otherwise administer such funds, and to do and perform any and all things necessary to a proper performance of such trusts.

"Sec. 6. To receive and hold as trustee or otherwise any and all real estate and personal property subject to the payment of rents or annuities thereon, as may be granted, devised, or bequeathed for the benefit of the conference claimants as aforesaid, and to pay such rents and annuities thereon as may be required by the terms of such grant, devise, or bequest; provided that this association deems the acceptance thereof advisable.

"Sec. 7. To sell, dispose of, and execute suitable deeds of conveyance and bills of sale or assignments of any property received or held by this association in any manner and for any purpose herein specified, the alienation of which shall not have been prohibited by the terms of

the grant under which it shall have been received.

"Sec. 8. To administer, hold, invest, or distribute any and all funds coming into the hands of this association for the benefit of the aforesaid conference claimants in such manner as may be prescribed by by-laws.

"Sec. 9. To decline any gift or grant of any fund or property incumbered with any provision for the administration thereof which may be deemed contrary to good morals or the general policy of the Methodist Episcopal Church.

"Sec. 10. To adopt a code of by-laws providing for the conduct of the business and affairs of this association and the administration, investment, custody, and distribution of any and all funds coming into its hands not inconsistent with the provisions of these articles, or the discipline or general policy of the Methodist Episcopal Church."

The territory of Missouri for the purpose of church government is divided by the Methodist Episcopal Church into two conferences, the St. Louis Conference, which includes that part of the state south of the Missouri river, and the Missouri Conference, which includes the part of the state north of the Missouri river. The latter is frequently and perhaps usually called the North Missouri Conference. The governing code of the church is the "Discipline," which designates as "conference claimants" those preachers who have failed to receive adequate support in their charges or other work, or are disabled or superannuated, with their wives, widows and children and, of these, disabled and superannuated preachers are designated in the discipline as "worn-out preachers." A list of all conference claimants is kept in the records of the annual conference, as these local or state conferences are called in distinction from the general conference, or governing body of the whole church in the United States; and at the time of the trial there were 26 worn-out preachers in the Missouri Conference. When this suit was instituted, and at the time of the trial, the defendant Monck was in possession of the premises as tenant of the defendant Board of Stewards.

At the conclusion of the testimony the court, at the request of defendants, found as follows:

"That said corporation named Board of Stewards of the Missouri Conference of the Methodist Episcopal Church is not a religious corporation, but is a charitable organization for the purpose of administering charity for the benefit of those dependent upon said conference.

"That said Board of Stewards of the Missouri Conference, Methodist Episcopal Church, are lawfully in possession of said real estate as trustee as aforesaid, by and through its said tenant, and are entitled to hold same and administer same for the benefit of the worn-out preachers aforesaid, and that the title thereto is vested in them."

It thereupon rendered judgment for the defendants, and the questions so raised have been properly saved and brought to this court for review. The appellants state their case here as follows:

"1. The trust attempted to be created in the will of A. G. Buckley by the words, 'at her decease the said land mentioned above or the value thereof to be put on interest for the use of worn-

out preachers in M. E. Church in North Mo. Conference,' is not valid, because (a) it is vague, indefinite, and uncertain, and there was no trustee named or indicated in said devise or in said will to take the title to said property or to administer said trust or to designate or select or ascertain the beneficiaries of said pretended trust, nor was there any plan, scheme, or manner of executing or carrying out said pretended trust provided for or indicated in said devise or in said will. (b) Even if it be conceded that the above-quoted clause would create a valid trust if a trustee had been named, notwithstanding that there was no such organization as the North Missouri Conference, yet, when no trustee is named who could select or determine the beneficiaries, and no plan pointed out in the devise for determining the beneficiaries and administering the trust, it is void.

"2. The defendant corporation, the Board of Stewards of the Missouri Conference of the Methodist Episcopal Church, is clearly a religious corporation within the meaning of section 8 of article 2 of the Constitution of Missouri, and therefore the finding and judgment of the court, that the title to the land in controversy is vested in it, is erroneous, and should be reversed."

[1] 1. The principal and controlling question in this case is, did the will of Buckley create a valid charitable trust? The general rule which, independently of statutory changes, is applied by courts of equity in most common-law jurisdictions, is that:

"If the object of a charitable trust is lawful and sufficiently specific and definite to enable the court to execute it, it will not be permitted to fail for want of a trustee competent to take, but a court of equity, by its general inherent jurisdiction over charitable trusts, will appoint one." 5 R. C. L. 315, and cases cited.

And in *Schmidt v. Hess*, 60 Mo. loc. cit. 595, it is said that:

"Although * * * there was no one in esse, at the time of making the donation, capable of being the recipient of the trust, yet the use being a charitable one, a court of equity, having ascertained the intent of the grantor, will not allow the grant on that account to fail, but will see to its effectuation."

As we said in *Hadley v. Forsee*, 203 Mo. loc. cit. 427, 101 S. W. 59, 14 L. R. A. (N. S.) 49, gifts to charitable uses have always received favorable consideration in this court. In pursuance of this policy, where no trustee capable of taking is appointed in a charitable devise or bequest, the principle so often invoked by courts of equity, in the exercise of their jurisdiction over trusts and equitable uses is brought to its aid, and the heir at law or executor, as the case may be, holds the legal title to the property subject to the use; and a trustee may be appointed by the court. *Brown v. Kelsey*, 2 Cush. (Mass.) 243, 250, 251; *Winslow v. Cummings*, 3 Cush. (Mass.) 358; *Washburn v. Sewall*, 9 Metc. (Mass.) 280; *Burbank v. Whitney*, 24 Pick. (Mass.) 146, 35 Am. Dec. 312; *Grand Prairie v. Morgan*, 171 Ill. 444, 49 N. E. 516; *Hoefler v. Cogan*, 171 Ill. 462, 472, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241; *Hood v. Dorner*, 107 Wis. 149, 82 N. W. 546. The facts in the case last cited are so similar to these as to give it peculiar interest in this connection.

The principle, upon which these naked uses are administered directly by the courts of

equity in this country, is illustrated in the doctrine of cy pres, by which the application of the fund is taken up by the court after the powers of the trustee have been proven inadequate. While the specific trust has failed through the lack of prophetic vision in its creator, the charitable purpose, which had its birth in the conscience of the founder, remains, and appeals to equity to prevent the defeat of the benevolent intention, which often originates in a moral impulse higher than the origin of mere municipal law. *Catron v. Scarritt Collegiate Institute*, 284 Mo. 713, 175 S. W. 571; *Lackland v. Walker*, 151 Mo. 211, 52 S. W. 414. In the case first cited it is said that this doctrine, whereby the courts of equity approximate the intention of the founder of a public charity, is universally applied in Missouri and other states. Another high authority (*Bouv. Law Dic. tit. Cy Pres*), accurately defines the principle as "the rightly liberal rules of construction to deal with a trust having a designated particular purpose, though in general terms, and enforce it within the limits of such purpose, supplying the trustee if necessary," citing *Tincher v. Arnold*, 147 Fed. 665, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471, 8 Ann. Cas. 917; *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 807, 76 Am. St. Rep. 924.

[2, 3] 2. It is not every attempted devise or bequest to charitable uses which courts of equity will directly administer. For instance it will not substitute its own jurisdiction for the personality of the testator, by executing a devise to "charity" or to promote the cause of "charity" generally. It is plain that in such a case the doctrine of cy pres can have no application, because it covers the entire field of charitable activity, and to be as near as possible to the thing expressed must still be outside it. Nor can the court administer such a discretion generally, for it might carry it into fields which it might consider appropriate objects of public aid and encouragement, but which the testator might, in his lifetime, have abhorred, as involving personal or public wrong or, if religious, mortal sin or spiritual degeneration. It is impossible that any human charity should cover the entire field of charitable activities including as it does the things that proceed from the love of God as well as those that proceed from the love of his sentient creation. In a legal sense it is a "gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by creating or maintaining public buildings or works, or otherwise lessening the burdens of government." This definition, formulated by Mr. Justice Gray in *Jackson v. Phillips*, 14 Allen (Mass.) 556, has been adopted by a multitude of authorities, many of which will be found collected in 5 R. C. L. pp.

291, 292. In their desire to preserve these public benefactions the courts have uniformly held that, although they be ever so general in their nature, if a trustee is appointed on whom the donor confers his right to select from them the real objects of his bounty, the trust will be upheld. Although no trustee be appointed, if the use is so expressed that the court may judge of the motive which actuated the donor so as to give specific effect to his general directions, a trustee will be appointed and the trust administered by the court. In such case it is not necessary, nor is it possible, to designate the individual recipients of the bounty, because the benefaction would then cease to be a charitable use and become a private trust. Indefiniteness in this respect is always held to be a necessary element of a charitable use. Illustrating this point with the case in hand, had the gift been to a trustee for the use and benefit of the 26 worn-out preachers that were on the rolls of the Missouri Conference by name, it would have ceased to be a charitable use and would have become a private trust. It is not necessary to intimate whether, in that case, the appointment of a trustee to hold the legal title would have been necessary, or whether the heir at law would have been converted by the use into a trustee of the legal title. This devise, however, was not a private trust because of its indefiniteness in this very respect; and for this reason it falls within the definition of a public charity which it is the duty of the court by virtue of their equitable jurisdiction over that subject to recognize and administer.

[4] 3. It is hardly necessary after what we have said in the preceding paragraph to present other reasons for holding, as we do, that the gift in question here is sufficient in every respect to create a valid charitable use, for the benefit of the class which it sufficiently designates as the "worn-out preachers" of the North Missouri Conference. That this was a popular name for the Missouri Conference there can be no doubt from the evidence; and were it not, the word prefixed to the official name is descriptive in its meaning, and affords in itself a simple element of identification that takes nothing from the true name which succeeds it, and the class of beneficiaries to which it refers is so identified that they may be easily and definitely ascertained. In a careful study of the appellants' brief we have failed to find any suggestion in conflict with the well-established rule that uncertainty as to persons is one of the elements of a charitable use as distinguished from a personal trust, or any good reason why the uncertainty in this case is of such a nature as to call for a trustee with power of selection to give it validity. We therefore hold that this is a charitable use which may be administered by the court through its own instrumentalities.

[5] 4. In the view of the matter which we

have taken it is unnecessary to decide whether the Board of Stewards of the Missouri Conference of the Methodist Episcopal Church, incorporated as such long after the death of the testator, is a religious corporation within the meaning of the Constitution or not. It was an association of individuals by that name at the time the will was executed and also at the time the charitable use became effective; and at the time of its incorporation was in possession of this land by its tenant. Its act of incorporation, if void, worked no change in the capacity in which its members, through the unincorporated association, had been acting. They were rightfully in possession, executing the trust under the direction of the court, and the plaintiffs had no beneficial interest or possessory title.

This is a plain suit in ejectment in which no equitable relief was asked by either party, or granted by the court. Although the court stated its conclusions of fact as provided by section 1972, R. S. 1909, they constituted no part of the judgment so as to bind the parties outside the issues included in it. The question of the incorporation of the Board of Stewards is not such an issue.

The judgment is affirmed.

RAILEY, C., concur.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

STATE ex rel. SCULLIN et al. v. ROBERTSON et al. (No. 18368.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. CERTIORARI ~~§~~57—REVIEW—SUBMISSION TO JURY—SUFFICIENCY OF EVIDENCE.

On certiorari to review the judgment of the Court of Appeals in remanding the cause after reversal because of the jury's failure to return a verdict on separate counts alleging defendant's liability under the humanitarian doctrine, notwithstanding plaintiff's contributory negligence, the finding of the appellate court that evidence was sufficient to warrant a submission of such count to the jury, where such count was submitted to the jury by the trial court, will not be reversed, where the record does not contain all the evidence.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 145; Dec. Dig. ~~§~~57.]

2. APPEAL AND ERROR ~~§~~1178(2)—DISPOSITION AFTER REVERSAL—REMANDING CAUSE FOR INSUFFICIENCY OF EVIDENCE.

The action of the Court of Appeals in remanding a cause after reversal will not be disturbed even though the evidence be insufficient to support a recovery, where there is a possibility that sufficient evidence may be adduced on another trial, since the appellate court, under Rev. St. 1909, § 2083, has authority to remand in such cases.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4605-4610; Dec. Dig. ~~§~~1178(2).]

3. COURTS \Rightarrow 207(2)—CERTIORARI TO REVIEW JUDGMENT OF COURT OF APPEALS—CONFLICT OF DECISIONS.

On certiorari to review judgment of the Court of Appeals on the ground that its decision, refusing to determine whether verdict on one count is a bar to actions on other counts covering the same cause of action, is in conflict with designated decisions of the Supreme Court, the writ should be quashed where no such conflict in fact is shown.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \Rightarrow 207(2).]

4. APPEAL AND ERROR \Rightarrow 1178(2)—DISPOSAL OF CASE AFTER REVERSAL—REMANDING CASE FOR ERRORS NOT RAISED BY CROSS-APPEAL.

The Court of Appeals, in reversing a judgment, may under Rev. St. 1909, § 2083, look into the entire record and remand the case if errors appear therein, though such errors are not raised by the respondent by cross-appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4605-4610; Dec. Dig. \Rightarrow 1178(2).]

5. JUDGMENT \Rightarrow 581—JUDGMENT UPON ONE COUNT AS A BAR TO RECOVERY ON OTHER COUNTS — EFFECT OF REVERSAL OF SUCH JUDGMENT.

While a recovery upon one count is final and in bar of recovery upon other counts, a reversal of the judgment on appeal removes the bar, and on another trial recovery may be allowed on a count other than the one on which the former judgment was had.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1025; Dec. Dig. \Rightarrow 581.]

Certiorari on the relation of John Scullin and others, receivers, against W. R. Robertson and others, judges of the Springfield Court of Appeals. Writ quashed.

On the question of the right of appellants to complain of errors against Fagg, who did not appeal, relators cite the following authorities in their brief: Section 2082, R. S. Mo. 1909; Sarazin v. Railroad, 153 Mo. 479, 55 S. W. 92; Campbell v. Coquard, 93 Mo. 474, 6 S. W. 360; Schmidt v. Densmore, 42 Mo. 225; St. Louis v. Lanigan, 97 Mo. 1. c. 180, 10 S. W. 475; Nearen v. Bakewell, 110 Mo. 645, 19 S. W. 988; Callaway Co. v. Henderson, 119 Mo. 32, 24 S. W. 437; Sutton v. Dameron, 100 Mo. 141, 13 S. W. 497; Amonett v. Montague, 63 Mo. 204.

O. L. Cravens, of Neosho, for relators. Hubbert & Hubbert, of Neosho, for respondents.

BLAIR, J. Certiorari. The record we are called upon to review is that of the Springfield Court of Appeals on an appeal by defendants from a judgment of the Newton circuit court in favor of David Fagg in an action he instituted against relators, receivers of the Missouri & North Arkansas Railroad Company, to recover damages for personal injuries and loss of property suffered when a wagon which he was driving was struck by a car propelled by a gasoline motor and operated by relators' employes over the railroad of which they had charge.

In that case the petition was in three counts, each based upon the same cause of

action. The first count alleged a failure to sound crossing signals. The second was based upon the humanitarian doctrine. The third alleged a failure to provide a proper crossing. Demurrers to the evidence under each count were offered by appellants, but were overruled, and the trial court submitted the case to the jury upon all three counts. There was a verdict for \$200 for plaintiff, Fagg, on the first count, but the jury made no express finding upon the second and third counts. Judgment was entered on the verdict, and defendants, these relators, appealed. The Springfield Court of Appeals heard the cause, and held there was evidence tending to support the charge in the first count of the petition that no crossing signals were given, but also held plaintiff's evidence, as a matter of law, convicted him of contributory negligence barring recovery under the first count. So holding, the Court of Appeals reversed the judgment on the first count. It also expressed the opinion there was no substantial evidence tending to prove the allegations of the third count. Having reached these conclusions, it took up the question whether the cause should be simply reversed, or reversed and remanded. It found that plaintiff had so presented his case in the trial court as to call for a finding on each count, that defendants had induced the trial court to give an obviously erroneous instruction on the second count, involving the humanitarian doctrine, and that "it may have been this erroneous instruction on plaintiff's second count that caused the jury to fail to make a finding for the plaintiff on such count." It then concluded the opinion thus:

"Whatever may be the effect of the failure of the jury to make a finding on the second and third counts of the petition in the verdict, it would be no bar until a judgment was rendered in defendants' favor on such returned verdict; and no question is before us on the verdict returned so far as the second and third counts are concerned, because no judgment was entered thereon as to such counts. Besides, the question as to what order shall be made in case of reversal is not briefed by the attorneys. In view of the error in the instruction on the humanitarian doctrine, we will not decide whether the failure of the jury to make a specific finding on the second count is such a bar as to deny plaintiff the right to a trial on such issue. The judgment appealed from is reversed, and the cause remanded."

The application for our writ complains that the Court of Appeals failed to follow certain decisions of this court in that it considered errors against the nonappealing plaintiff, Fagg, i. e., the erroneous instruction upon the second count, that it, impliedly at least, held the evidence sufficient to take the case to the jury on the humanitarian doctrine under the second count, despite the fact that such evidence, relators contend, was clearly insufficient under cited decisions of this court, and that it ignored numerous decisions cited which are said to hold that

a verdict on one of several counts of a petition, such as that in this case, the several counts merely making different statements of the same cause of action, is a complete and final bar to those counts upon which there was no express finding, the effect of which plaintiff could have removed only by successfully prosecuting an appeal therefrom.

[1] 1. So far as concerns the contention the evidence is insufficient to support the second count and make out a case under the humanitarian doctrine, we need not discuss the cases cited by relators, since there are answers to their contention not depending thereon: First, the trial court sent the case to the jury on the humanitarian doctrine, and then the Court of Appeals impliedly held the evidence sufficient to justify that action. Those courts had the entire evidence before them and passed upon the question in view of it all. We have before us in this case only such facts as the Court of Appeals thought necessary to state in connection with the questions arising under the first count as to the failure to sound crossing signals and Fagg's contributory negligence. In view of the fact the Court of Appeals thought fit to remand the cause on the second count, we cannot presume the evidence was insufficient to justify such action, nor, to overthrow that ruling, can we presume the court set out, in considering the question presented under the first count, all the evidence in the case applicable to the question whether the evidence supported the second count. Presumptions run in support of the action of the Court of Appeals in such circumstances. Second, even if we could conclude the court attempted to state all the evidence in the case, and that, as contended, it was insufficient to support the second count, yet the Court of Appeals, with the whole record before it, may have rightly concluded that it appeared therefrom that on a retrial Fagg might be able to adduce additional evidence which would entitle him to go to the jury upon the humanitarian doctrine under the second count. In such circumstances it is the settled practice of this court to remand causes for retrial even when we hold the evidence in the record insufficient to make a case. This is true even in criminal cases. No case holding the contrary is cited. We cannot hold our brethren of the Court of Appeals in error for ruling as we ourselves habitually rule.

[2] 2. The next and most important contention is that the Court of Appeals had no power to remand the case because, it is insisted, the verdict upon the first count became an immediate and final bar to any right to proceed upon other counts.

(a) In the first place, the remanding of the cause might be sustained upon a theory adverted to in the preceding paragraph; i. e., that the Court of Appeals deemed it right in the exercise of its power in the premises (section 2083, R. S. 1909) to send the case back

for retrial upon the first count on the belief that the record indicated other evidence might be adduced under that count. The opinion of the Court of Appeals does not, however, give this as its reason for the order remanding the cause.

[3] (b) Another ground upon which the order mentioned can be sustained is that the Court of Appeals expressly refused to decide whether the verdict upon the first count is a final and complete bar to the action upon the second and third counts, thus leaving the question open and remanding it with the cause to the trial court. That ruling is clearly not in conflict with any of the decisions of this court cited by relators which are said to hold such bar final upon the rendition of a verdict on one count of a petition containing several counts covering the same cause of action. Since conflict with designated decisions is the sole ground on which we are asked to quash the record of the Court of Appeals, and as on the theory stated there is no such conflict, our writ should be quashed on that ground.

[4] (c) It may be conceded that Fagg, not having appealed, could not complain of the error in the instruction to which the Court of Appeals refers in its opinion. *Scott v. Ferguson*, 235 Mo. 576, 139 S. W., 102. The question is, however, not what Fagg could do, but whether the Court of Appeals in remanding the cause ran counter to the decisions of this court upon which relators rely to convict that court of getting outside the law applicable to that question. Relators cite numerous decisions (see briefs) in which this court and the Courts of Appeals have refused to consider complaints of errors committed against the party who succeeded in the trial court. In none of these cases cited by relators was the question presented which is now urged. In none of them, so far as our examination has gone, did this court hold that, upon the question whether it would reverse the judgment outright or would reverse it and remand the cause, it might not consider everything the record showed. The question was decided the other way in *Turner v. Anderson*, 236 Mo. loc. cit. 542, 139 S. W. 180, et seq. In that case, a will contest, the petition set up two grounds for setting aside the will involved—testamentary incapacity and undue influence. In that case the trial court, of its own motion, had taken from the jury the question of testamentary incapacity, and then submitted the case to the jury on the issue as to undue influence. On appeal by the proponents only this court held there was no evidence of undue influence, but that the record did contain substantial evidence tending to prove testamentary incapacity. It then reversed the judgment entered upon the verdict against the will, on the issue of undue influence, and remanded the cause for trial on the issue as to testamentary incapacity, despite the fact

that contestants had not appealed. In fact, it was held contestants could not have appealed, not being aggrieved by any judgment. The court said:

"As we have determined that the judgment cannot stand on the issue of undue influence found in favor of contestant, we are confronted with the question whether we will reverse and remand the case generally or reverse and remand with directions to probate the will. Sometimes we have done the latter. *McFadin v. Catron*, 138 Mo. loc. cit. 227 [38 S. W. 932, 39 S. W. 771], *Story v. Story*, 188 Mo. loc. cit. 129 [86 S. W. 225], and *Hamon v. Hamon*, 180 Mo. loc. cit. 702 [79 S. W. 422], are samples of such disposition of cases. In *Bradford v. Blossom*, 207 Mo. loc. cit. 234 [105 S. W. 289], we reversed a judgment establishing a will, and gave directions to enter one rejecting the will. It is not worth while to discuss the questions whether there is anything so peculiar about a will case that appellate courts refer to those peculiarities as grounds for so adjusting their judgments and mandates as to attain the ends of justice, or whether the practice in that behalf is referable alone to statutes regulating the disposition of cases on appeal. It is sufficient to refer to the practice and let it stand as its own reason. It is also settled practice to reverse and remand for a new trial generally where that course meets the ends of refined justice. The statute says (R. S. 1909, § 2083) that we shall award a new trial, reverse or affirm the decision of the circuit court, or give such judgment as such court ought to have given as to us shall seem agreeable to the law. The practice under that statute has been flexible enough to permit the award of a new trial on the whole case, or on a certain issue, or to retry by eliminating pointed out errors, or to retry on a certain theory of the law, or by including or excluding certain evidence. *Donnell v. Wright*, 199 Mo. loc. cit. 317 [97 S. W. 928].

"In this case contestant took no appeal. He was not 'aggrieved by the judgment of any circuit court in any civil cause' (R. S. 1909, § 2083), and therefore could not appeal. He was not entitled to a bill of exceptions to be brought here for review. If he had taken his exceptions and had them preserved in a bill, that bill would have lain below on the appeal of proponents. *Patterson v. Patterson*, 200 Mo. loc. cit. 342 [98 S. W. 613] et seq. In such condition of things, if we refuse to consider the testimony on testamentary incapacity, our refusal would amount to one of two things, viz.: Thereby we would: (1) indirectly (willy-nilly) sustain the ruling taking that issue from the jury whether we were of opinion it was right or wrong; (2) or (if we conclude it was wrong) we would turn contestant out of court without a just determination of that issue—a theory palpably abhorrent to refined justice. In this case we are relieved from all embarrassment by the fact that appellants necessarily brought the testimony relating to testamentary incapacity to this court for our consideration. It was an essential element in the determination of the question of undue influence."

This decision is sufficiently in point, and it was in accordance with the principle it announces that the Court of Appeals, after determining to reverse the judgment in Fagg's case, looked into the whole record to determine whether it should stop with a mere reversal or should remand the cause. What is said about the entire evidence being before the court in that case, and thus relieving us from embarrassment, does not militate against the application of the rule to this case. In this case the Court of Appeals had all the evidence before it. It had

the instructions before it. It was in the situation this court was in in *Turner v. Anderson*, supra. The fact the whole evidence is not before us does not affect the matter save that it justifies us in presuming the record before the Court of Appeals justified whatever action it took in so far as evidence, rulings on instructions, etc., could justify it.

[8] (d) It is urged, however, that the action of the Court of Appeals is in conflict with those cases which hold a defendant can be held to but one liability, and that, in an action on a petition containing several counts stating the same cause of action different ways to meet the course the evidence may take, a recovery on one of such counts is a bar to judgment on any other such counts. *Boeger v. Langenberg*, 97 Mo. loc. cit. 397, 11 S. W. 223, 10 Am. St. Rep. 322. This case makes a careful statement of the doctrine. It is supported by many decisions, as the briefs show. It is said in some of the cases cited by relators that the finding upon one count in such a case is "a bar to any further recovery on any count in the petition," or that there "is an implied finding against plaintiff" on all counts in such a case except that upon which the jury based its verdict. *Hoyle v. Farquharson*, 80 Mo. loc. cit. 378; *Owens v. Railway*, 58 Mo. loc. cit. 394. Relators base their contention upon the idea that the jury's silence upon the second and third counts was an implied finding against plaintiff thereon which survives even the reversal and destruction of the express finding from which it was implied, and bars forever any further proceeding on the counts ignored by the verdict. We think the implied finding falls with the actual finding or verdict which was its foundation. While a verdict upon one count in a case of this kind stands it is well enough, only a single recovery for a single injury being permissible, to say that it bars the remaining counts grounded upon the same claim; but when that verdict no longer exists, having been reversed, how can it give rise to either implication or bar? That plaintiff did not appeal is no answer. He could not appeal. There was no judgment against him. *Turner v. Anderson*, supra. Further, when defendants appealed from the verdict on the first count, they took to the appellate court the whole verdict, implications and all. The decisions relied on by relators do not, when properly understood and read in connection with the facts upon which they depend, present a contrary view. The case of *Hamon v. Hamon*, 180 Mo. 702, 79 S. W. 422, was before the court in *Turner v. Anderson*, supra, and was not regarded as calling for a conclusion different from that reached. Further, the facts in the record in the *Hamon* Case are not shown to have made a prima facie case on the question of undue influence.

For these reasons, our writ is quashed. All concur; BOND, J., in result only.

BROSS et al. v. ROGERS et al. (No. 17886.)
(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. CANCELLATION OF INSTRUMENTS ¶47 —
FRAUD—SUFFICIENCY OF EVIDENCE.

In suit to cancel a deed on the ground that it was procured by deceit and conspiracy to defraud, evidence held insufficient to show any fraudulent knowledge or connection of a defendant with an antecedent trade between a plaintiff and a Kansas corporation.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 102, 103; Dec. Dig. ¶47.]

2. EVIDENCE ¶317(2)—**HEARSAY.**

In suit to cancel a deed as procured by deceit and conspiracy, testimony of plaintiff that he heard it affirmed by a neighbor that a defendant was a "party to a fraud to beat him out of his land" was incompetent as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1175, 1192; Dec. Dig. ¶317(2).]

3. CANCELLATION OF INSTRUMENTS ¶47—**DEGREE OF PROOF.**

In a suit in equity to cancel a deed or other solemn instrument, whether by the establishment of a trust, the showing of fraud and deceit in procuring the deed, or any other impeaching method, the proof to justify such action on the part of the court must be so clear, convincing, and complete as to exclude any reasonable doubt in the chancellor's mind.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 102, 103; Dec. Dig. ¶47.]

4. DEEDS ¶211(3)—**DECEIT AND CONSPIRACY—SUFFICIENCY OF EVIDENCE.**

In suit to cancel a deed on the ground that it was procured by deceit and conspiracy to defraud, evidence of deceit and conspiracy on the part of a defendant held insufficient to satisfy the legal requirement of clear, convincing, and complete proof.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 644, 645; Dec. Dig. ¶211(3).]

5. DEEDS ¶196(2)—**DECEIT AND CONSPIRACY—BURDEN OF PROOF.**

In suit to cancel a deed on the ground that it was procured by deceit and conspiracy, the burden of adducing clear, convincing, and complete evidence of such deceit and conspiracy rests on plaintiff.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 649; Dec. Dig. ¶196(2).]

Appeal from Circuit Court, Marion County; William T. Ragland, Judge.

Suit by Edward J. Bross and others against John J. Rogers and others. From a decree dismissing the petition, plaintiffs appeal. Affirmed.

Jas. A. Kemper, of Warrensburg, for appellants. R. S. McClintic, of Monroe City, and Humphrey & Gose, of Shelbyna, for respondent Rogers.

BOND, J. I. This is a suit in equity to set aside and cancel a deed to 160 acres of land, executed by plaintiffs to defendant Rogers; plaintiffs alleging that it was procured by deceit and conspiracy to defraud upon the part of Rogers and his codefendants.

The material facts are these: Plaintiffs owned a farm of 160 acres in Marion county, Mo., which they agreed to trade for 640 acres

of land in Kansas, giving \$800 boot. During the negotiations the owner of the Kansas land offered the Missouri land, which plaintiffs had agreed to exchange, to defendant Rogers for \$70 an acre. Rogers declined to consider it at that price. Bross had also agreed to assist in finding a purchaser for his farm to aid the Kansas people in disposing of it. The highest offer any of them obtained for it was \$50 an acre. Later Purnell, one of the defendants, again approached Rogers, who again refused to purchase at \$70 an acre, but made a counter proposition of \$52.50. This offer was accepted, and arrangements were made for the parties to meet at Palmyra with their representatives and close the two deals. At this time a deed was made to plaintiffs conveying the Kansas land, and plaintiffs executed their deed direct to Rogers. To consummate this deal, which was to be entirely in cash, Rogers borrowed \$8,400, from his attorney McClintock, giving him a deed of trust on the Bross farm for \$4,500 and another deed of trust for \$3,900 on other lands he owned.

At the hearing in the circuit court the petition was dismissed and judgment given for defendants, from which plaintiffs perfected an appeal to this court. The decisive question presented here is whether or no the defendant Rogers was a party to the fraud and conspiracy alleged to have been practiced in the obtaining of the deed.

II. In considering the question of the innocence of the purchase by defendant Rogers, we shall assume, for the argument, that the trade between plaintiffs and the other defendants was induced by fraud, misrepresentation, and deceit upon the part of the persons acting for the Kansas corporation which held the title to the land conveyed to plaintiffs, and then determine, seriatim, the validity of the several points relied on to prove that defendant Rogers was cognizant of or a party to the fraud of his codefendants.

[1] The first circumstance adverted to is that Purnell, the active agent of the Kansas owner in bringing about the exchange, had married a cousin of the deceased wife of Rogers and was presumably on social terms with him. It is too much to say that such a connection was sufficient to support an inference of fraudulent conspiracy between Rogers and Purnell. There is not a shadow of testimony that Rogers had any part or lot in the scheme of Purnell to induce the appellant Bross to go to Kansas and inspect the lands conveyed to him. Nor is there any evidence that Rogers knew anything of the terms of the trade between Bross and the Kansas corporation until it had been reduced to writing and nothing was left to be done except the execution of mutual deeds; for it is at this stage that Rogers came upon the scene, and then only as a purchaser from

the Kansas corporation. Having thus gotten title, he gave authority to Purnell to sell the land, within a limited time, at a small advance on what he had paid for it, and he also employed an Illinois agent to sell the land, through whom it was afterwards sold to a resident of that state. No part of the commission for this sale was paid to Purnell, since the authority given to him lapsed without his procuring a purchaser.

We see no evidence in any of these transactions of any fraudulent knowledge or connection of Rogers with the antecedent trade between appellant Bross and the Kansas corporation.

[2-4] III. It is next insisted that Rogers' participancy is inferable from the testimony of Bross that he had heard it affirmed by a neighbor, Mr. McIntire, who originally got him into negotiations with Purnell, that Rogers was a "party to a fraud to beat him out of his land." This statement, if not incompetent as hearsay, would have been unsatisfactory for the reason that it was denied by the alleged maker; and the same may be said of the testimony of appellant that Purnell told him that he had a contract with Rogers to divide all they got over and above what Rogers paid. That contract is in writing and in evidence and only gave Purnell authority to sell at fixed prices between certain dates, and to have as compensation whatever he might get over the amounts limited. This contract shows no other rights of the parties to divide the surplus of a sale over the purchase price.

Neither did the statement of appellant that Purnell told him Rogers was "a holding party" afford proof of fraud on his part. This statement was denied by several witnesses, and the attendant circumstances conclusively show that he was not a holding party for the other defendants, or for their principal, the Kansas corporation. He bought this land with \$8,400 cash, which he borrowed and secured by a mortgage on it and other lands owned by himself. This money was paid out by respondent according to the direction of his vendor, the Kansas corporation. The land so acquired was sold by Rogers through an Illinois agent, and no part of the proceeds was shown to have been paid to the Kansas corporation, or to Purnell, or any other of its agents.

It is impossible to view the circumstances pointed out by appellant, as carrying the proof-power prescribed by law to set aside deed or other solemn instrument in equity. In such circumstances, whatever the specific grounds, whether the establishment of a trust or the showing of fraud and deceit in the procuring of a deed, or any other impeaching method, the rule is, without exception, that the proof to justify such action on the part of the court must be so clear, convincing, and complete as to exclude any reasonable

doubt in the mind of the chancellor. The feeble inference arising from a distant relationship by marriage and statements ambiguous in import and resting purely on hearsay do not meet the demands of the law, which requires the fraud herein alleged to be shown by proof of the above character and strength.

[5] The burden of adducing evidence of that degree and cogency rested upon appellants. It has not been discharged in this case.

Hence the decree of the learned trial judge dismissing the petition is affirmed. All concur.

CORLESS v. EATHERTON et al. (No. 16810.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

EASEMENTS ~~§~~36(3)—EVIDENCE TO AID CONSTRUCTION—INTENTION OF TESTATOR.

Where a private road ran from testator's residence across three adjoining tracts to a county road, evidence held to show intention of testator to reserve such road from a residuary devise of the tract nearest the county road.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88, 93; Dec. Dig. ~~§~~36(3).]

Appeal from Circuit Court, St. Louis County; G. A. Wurdeman, Judge.

Suit for injunction by John C. Corless against James W. Eatherton and another. From a decree for defendants, plaintiff appeals. Affirmed.

On December 12, 1910, plaintiff commenced in the circuit court aforesaid a suit by injunction against the above-named defendants to restrain them from cutting a wire fence on plaintiff's land where it crosses a private roadway running through the northwest portion of plaintiff's 70 acres in a southwesterly direction through the 50 acres of said James W. Eatherton; thence southwest through the west 70 acres purchased by plaintiff and sold to his father. A plat appears between pages 2 and 3 of respondents' brief which shows the location of the lands, residences, roads, etc., and is herewith made a part of this statement.

Evidence. On February 13, 1901, James R. Eatherton was the owner in fee simple of the two 70-acre tracts and the 50-acre tract of land shown by the plat aforesaid. On the date last mentioned said James R. Eatherton executed in due form his last will and testament, and left all his real and personal property to his wife, Martha Eatherton, for life, with remainder to his children. Paragraph 3 of said will devised to said James W. Eatherton the 50 acres aforesaid, and after describing same concludes as follows:

"To have and to hold the same to him the said James W. Eatherton and to his heirs and assigns forever, providing that he or they must keep open my private road running over said 50

acres, from my dwelling to the said Wild Horse Creek road."

Paragraph 5 of said will reads as follows:

"After the decease of my said beloved wife all the balance of my land as well as all personal property which my said wife may leave, is to be divided in equal shares among all my children, to wit: One share to my son Alexander Eatherton, one share to my son George Eatherton, one share to my son Charles Eatherton, one share to my son John B. Eatherton, one share to my son James W. Eatherton, one share to my daughter Frances Orr, one share to my daughter Lorena Orr, and one share to my daughter Emma Corless."

Said James R. Eatherton died on the 28th day of April, 1901, and the will aforesaid was duly probated, etc.

On February 9, 1903, said George Eatherton, James W. Eatherton, and the other children and heirs at law of said James R. Eatherton, except plaintiff's wife, entered into a written contract with plaintiff for the sale of the two 70-acre tracts shown upon the plat aforesaid for the sum of \$3,500. Said contract contains the following recitation:

"We agree to convey to him all our right, title, and interest to said land devised to us in said last will and testament, in the fifth clause thereof, by a sufficient deed or deeds."

Nothing was said in this contract about the private road mentioned in the third paragraph of said will.

Afterwards, on the 17th of September, 1903, said George Eatherton, James W. Eatherton and the other heirs at law and children of said testator, except plaintiff's wife, conveyed to plaintiff, by warranty deed, the two 70-acre tracts aforesaid for the consideration of \$3,500. The above deed, following the description of said land, recites that:

"Said two tracts of land being devised to us in the fifth clause of the last will and testament of our father, James R. Eatherton, deceased, which last will is duly probated in the probate court of St. Louis county, and is recorded in Book 137 at page 341 in the recorder's office of said county."

Said deed contains the usual covenants of a warranty deed, and after which concludes as follows:

"Excepting one-eighth part of said described land, which is owned by Mrs. Emma Corless, and taxes for 1903, and thereafter."

The above conveyance contains no recital in respect to the private road in controversy. Nothing was said by the heirs aforesaid or the plaintiff, about said private road when the contract and conveyance were executed. We gather from the testimony of defendants and the other heirs that nothing was said by them in regard to the private road in controversy, for the reason that they understood the road was reserved by the will, and that they had no right to convey the same. This private road constituted the only outlet from the residences of George and Alex Eatherton, as well as that of James W. Eatherton, to the Wild Horse Creek county road, as shown by the plat aforesaid. De-

fendant George Eatherton testified that testator went with him and his brother, Alex Eatherton, and helped them cut out the road through the woods leading out to the Wild Horse Creek road, and said to them:

"Now, you boys have a road that is yours as long as you live in there."

This was in the fall of 1878.

Mr. Stelnes drew the will aforesaid in 1901. He testified in behalf of respondents as follows:

"Q. What did Mr. Eatherton say to you in regard to Alexander and George and the outlet to the Wild Horse Creek road at the time you drew up this will, before you wrote that will? * * * A. He told me that he wanted to reserve his private road over the 50 acres into the Wild Horse Creek road for the reason that he had his sons living in the rear of him, and he wanted them to have an outlet to that road."

This witness further testified as follows:

"Q. How long is it, if you know, that this road has been a traveled road from the property that is owned by Alexander and George to the Wild Horse Creek road? A. Between 50 and 60 years. Q. Fifty and 60 years? A. Yes, sir. I know when Mr. Tyler occupied it—he was the predecessor of Mr. Eatherton—he used it as an outlet, and I have traveled it myself before the war and during the war from the Hencken or from the Pond road, which it is now, it went through Hencken place and then through the Eatherton place into the Wild Horse Creek road, a county road."

Without incumbering the record by quotations from the testimony, we find that for more than a quarter of a century before plaintiff bought the land aforesaid the above private road was in existence, constantly used by the Eathertons, plaintiff, and others, whenever they desired to pass along same to said public road on the north. This private road was likewise worked by the Eathertons when it needed repairs. After plaintiff bought the east 70-acre tract aforesaid in 1903, he, as well as the Eathertons and others, continued to use this private road, as they had always done, from the Wild Horse Creek road, by the residence of James W. Eatherton, up to the time he fenced across said private road in September, 1910. We are fully satisfied from the evidence that testator intended said private road should remain as a private way of necessity across said 50 acres and to said Wild Horse Creek road when he executed the will aforesaid, and did not intend that said easement should be disturbed by said will.

The court issued a temporary restraining order, but upon final hearing found the issues in favor of defendants, dismissed appellant's bill, and entered judgment accordingly in favor of said defendants. The cause was duly appealed to this court by plaintiff, and the death of defendant James W. Eatherton suggested herein. The cause was revived in the names of the widow and children of said decedent. The court appointed Hon. A. T. Dumm as guardian ad litem for the minor children of said decedent, and he adopted the briefs heretofore filed by counsel for said James W. Eatherton.

D. C. Taylor, of Clayton, and Henry Higginbotham, of St. Louis, for appellant. Stevens & Stevens, of Clayton, and R. M. Nichols, of St. Louis, for respondents.

RAILEY, C. (after stating the facts as above). 1. It is contended by appellant, under the facts heretofore set out in the statement, that he acquired title to that portion of the road in controversy which passes over the northwest corner of the east 70 acres which he bought from the Eatherton heirs, and which is set out upon the plat aforesaid. It is true that the Eatherton heirs, except plaintiff's wife, executed and delivered to him a deed with general covenants of warranty, without reservation as to said road, conveying to him the absolute title to said 70 acres, but it is insisted by respondents that the Eatherton heirs did not own the private road in controversy across the 50 acres described on said plat, and running to the public road on the north. They contend that testator reserved said road from his residence to the public road, and that by reason thereof the same did not pass to his heirs by the terms of said will.

Under the authorities cited by appellant he may be entitled to maintain an action on his covenants of warranty for the damage, if any, which he has sustained on account of the failure of said heirs to convey to him the full title to said 70 acres, including the road in controversy running over the same, but it does not follow, from the deed thus made, that he acquired title to the private road described in the third paragraph of testator's will. The latter at the time of the execution of the will and up to his death was the owner of both the 70-acre tracts and the 50 acres between same. He had the legal right to reserve this roadway in disposing of his property, and the evidence heretofore set out discloses a good and sufficient reason for so doing. He had been solicitous about his sons having an outlet from their residences to the public road on the north. He was expecting in his will to devise to James W. Eatherton the 50 acres above mentioned, and, of course, desired to reserve an outlet to him to said public road. Testator knew that in the ordinary course of events at his death the will would be probated and filed for record in St. Louis county, and would impart notice to all those undertaking to acquire title through his will that he had reserved the private road in controversy, and did not intend the same to be closed against his children and others who were desirous of using same.

It appears from the evidence that for more than a quarter of a century before the will above mentioned was executed the Eathertons, especially George and Alex, had been using this road as an outlet to the public road on the north, and that they had no other way of traveling to said road aside from the

mere license granted by Mr. Bates. The long and continued use of this road indicated a purpose upon the part of the original owner, Tyler, as well as his successor, the testator, to leave the road open in order that the owners of the above tracts of land might have a roadway over the same to said county road. We are therefore of the opinion that it was the clear intention of testator, in the execution of his will, to reserve the private road as it then existed, running over said 50 acres from his dwelling house to the Wild Horse Creek county road.

In *Bunch v. Wheeler*, 210 Mo. loc. cit. 628, 109 S. W. 654, it is said:

"The grounds upon which a reversal is sought are: First, that the reservation in the deed from plaintiff to Fisher of 'the right of passway near the original road through said land for a passway' was and is void for uncertainty; second, that if the reservation in the deed is void, then the testimony is entirely insufficient to show such a user of a definite route as would cure the defect in the reservation."

Judge Gantt, after stating the issues involved in above case, on page 628 of 210 Mo., on page 655 of 109 S. W., said:

"There is in this record no question of a way of necessity. Neither, in our opinion, does the record support the contention that the alleged passway was created otherwise than by express reservation in the deed of plaintiff to Fisher. This reservation in the deed from plaintiff to Fisher is equivalent, for the purpose of the creation of the easement of a passway, to an express grant by the grantee Fisher to plaintiff."

On page 630 of 210 Mo., on page 656 of 109 S. W., Judge Gantt said:

"We think a fair and reasonable construction of this reservation is that Fisher granted to Bunch a right to pass over the land along a route near to the then well-known and long-existing road through this land. We are not inclined to hold that the grant was void for uncertainty, inasmuch as it was a mere easement or right to pass over the land, and, as the old road was a fixed monument or well-defined course, and the right of way granted was to be near that original road, it was sufficiently definite, and that it was and is the right of the owner to put his gates at the east and west termini of said way to permit plaintiff to pass through said premises, and to indicate where the way shall be, provided always it shall be 'near' (which is a relative word) the old road."

The facts in the above case are not as clear and explicit as they are in the case at bar. The great weight of the evidence discloses that the roadway reserved by testator over the 50 acres supra, and over the land of plaintiff to said public road on the north, has been practically in the same place, and especially in the northwest corner of plaintiff's land, for the last 30 or 40 years. The plaintiff and Eathertons, as well as others, continued to use this road after plaintiff bought the land in 1903 clear up to 1910 just as it had been previously used. We are satisfied with the principles of law announced by Judge Gantt in the *Bunch-Wheeler* Case supra, and rule that the same principles of law should be applied to the case at bar.

In view of the conclusion reached, we do

not deem it necessary to pass upon other questions of law discussed in the briefs.

The decree of the trial court was for the right parties, and is accordingly affirmed.

BROWN, C., not sitting.

PER CURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the Court. All concur.

STATE ex rel. COMBS v. STATEN et al.
Justices of Vernon County Court.
(No. 17977.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. EXCEPTIONS, BILL OF \S 6 — INCORPORATION OF EVIDENCE.

There is no provision of law authorizing a bill of exceptions to be filed in the county court containing the oral and documentary evidence introduced before such court so that it may be made a part of the record thereof.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 8, 12; Dec. Dig. \S 6.]

2. CERTIORARI \S 70(4) — APPEAL — BILL OF EXCEPTIONS — INCORPORATION OF RECORDS AND EVIDENCE.

In certiorari proceedings to review the action of a county court in establishing a public road, certified copies of the county court records, as well as the documentary evidence accompanying them, and all the other evidence considered at the trial, should be incorporated in a bill of exceptions in order to become a part of the record, and without a bill of exceptions the Supreme Court can only consider the record proper, i. e., the petition, respondents' return, relator's motion to quash, and the judgment.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 201, 202; Dec. Dig. \S 70(4).]

3. HIGHWAYS \S 60 — CERTIORARI — INTEREST OF RELATOR IN THE SUBJECT-MATTER.

Relator, who failed to disclose, on the face of his petition for certiorari to review the action of a county court in establishing a public road, that he had any interest in the subject-matter of the proceedings before the county court, was not entitled to the writ, so that the circuit court's action in dismissing the same was proper.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 204-213; Dec. Dig. \S 60.]

4. CERTIORARI \S 5(1) — REMEDY BY APPEAL — STATUTE.

Under Rev. St. 1909, § 10440, touching appeals to the circuit court from the judgment of the county court opening any road, etc., relator, petitioning for certiorari to review the action of the county court in establishing a public road, had an adequate remedy by appeal, so that he could not resort to certiorari proceedings.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 5; Dec. Dig. \S 5(1).]

5. HIGHWAYS \S 60 — CERTIORARI — NULLIFICATION OF PROCEEDINGS.

If proceedings for certiorari show want of jurisdiction on the part of the county court in establishing a public road, all proceedings before such court are nullified.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 204-213; Dec. Dig. \S 60.]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Certiorari by the State, on the relation of J. W. Combs, against Jasper N. Staten and others, Justices of the Vernon County Court. From a judgment dismissing the writ, relator appeals. Judgment affirmed.

On October 7, 1912, a petition for a writ of certiorari was filed in the circuit court of Vernon county, Mo., which without caption and the description of the proposed road, reads as follows:

"The relator herein, J. W. Combs, complains of the respondents, Jasper N. Staten, W. S. Creel, and Jas. H. Caton, and for cause of action states that the respondents do now, and did at all times hereinafter complained of, compose the county court of Vernon county, state of Missouri; and that on the — day of October, 1911, it being the regular October term of the county court of said county, and state aforesaid, there was commenced before said justices and in said county court a proceeding for the purpose of establishing a new public road in Harrison township, Vernon county, Mo., known as the Alva Ripley et al. public road, described as follows, to wit: (Here follows the description of the proposed road.)

"The relator further avers that said respondents have taken cognizance of and are proceeding to act in said matter thus brought before them, and are about to order said new public road opened, and are about to condemn and take from this relator a tract of land 40 feet in width and 1/2 mile long, through relator's land, described as aforesaid.

"Relator further avers that said respondents are therein acting without authority of law and without jurisdiction in the premises, for the reasons, first, that the notices of the intended application for said road were posted by the petitioners and made returnable at the July term, 1911, of said county court, but that proof of said notices was not made until the following October term, 1911, of said court. And that said petition for said new public road was not filed as indicated by said notices, nor was the same acted upon by said county court until the regular October term, 1911, and that then said county court proceeded to order said road surveyed by the county highway engineer without first having given the remonstrators an opportunity to be heard thereon, nor was any evidence heard by said court as to the public necessity, practicability, and probable damages to the owners of the land through which said proposed road would run, nor did they find and enter as a matter of record that said proposed road was a public necessity, or the practicability thereof, or that due notice of the intended application for said road was ever given, but proceeded at once to order the county highway engineer to view, survey, and to mark out said proposed public road; and then proceeded at once upon the report of said highway engineer to appoint three commissioners to assess the damages along said public road to the landowners, without having determined as a matter of record that said commissioners so appointed by them aforesaid were qualified under the law to act as such commissioners, in this, that they failed to find that they were disinterested freeholders of said county.

"Relator further avers that said proceedings of the respondents are altogether outside of the course of the common law, and likewise outside of any statutory or judicial proceedings, and that no writ of error or appeal lies to such proceedings from this or any other court to this relator.

"Wherefore the relator prays this court to issue a writ of certiorari, directed to the respondents in their official capacity as afore-

said, requiring them and each of them to certify to this court a true, full, and complete copy of the petition, remonstrance, record, and all other acts and proceedings in said matter, and have said copy returned to this court on or before the _____ day of _____, 1912, in order that this court may adjudicate upon the legality of said proceedings, and may make such other and further adjudication and orders therein as right and justice may require.

"J. B. Journey,
"Attorney for Relator."

A writ of certiorari was issued in due form and served on defendants as the justices of said county court.

On October 7, 1912, respondents filed their return, which, without caption, reads as follows:

"Comes now the defendants in the above-entitled cause and, for return to writ of certiorari issued against them, deny each and every allegation therein contained. Defendants state that all the proceedings concerning the road referred to in plaintiff's petition and writ were conducted according to law, and in pursuance with the statutes in such case made and provided.

"Defendants, for further return to said writ, hereby tender to the court the entire files and records of the county court in said road proceedings.

Scott & Bowker,
"Attorneys for Defendants."

On October 16, 1912, relator filed a motion to quash the proceedings of the county court aforesaid, in respect to the establishing and opening of said road. Said motion, without caption, reads as follows:

"Now at this day comes the relator herein and moves the court to quash the proceedings of the county court in establishing and opening what is known as the Alva Ripley et al. public road, for the following reasons, to wit:

"(1) That the petition for said public road was not filed with said county court within the time prescribed by the notices for said public road.

"(2) That the county court failed to take proof, or find that notices of the intended application for said public road were posted according to law.

"(3) The county court failed to find that said public road petition was signed by twelve or more freeholders residing in the township where said proposed public road was to be established, three of whom resided in the immediate neighborhood of said proposed road.

"(4) That the said county court failed to take testimony, and failed to find that said proposed public road was a public necessity, the practicability and probable damages to the landowners through whose land said proposed public road would pass.

"(5) That the county court failed to appoint three disinterested freeholders to assess the damages to the landowners as provided by law.

"(6) That the county court failed to obtain jurisdiction in said road proceedings for other reasons appearing on the face of the record of the county court in said road proceedings."

The circuit court entered its decree in this cause, which, without caption, reads as follows:

"And on this 16th day of October, it being the ninth day of the regular October term, said cause coming on for hearing upon respondents' return and relator's motion to quash the proceedings of the county court as shown by said return, and the court after an inspection of said return, and after hearing the evidence and argument of counsel, enters the following judgment in said cause, to wit (omitting caption):

"Now on this day, the above-entitled cause coming on for hearing upon the petition, writ, and return of respondents herein, the court having fully considered the return and the writ issued in this cause, together with the records and files of the county court of said road proceedings, made a part of said return, the court, after duly considering the same and hearing the argument of the counsel, finds the issues joined in favor of the respondent; that said road proceedings described in the writ to the county court of Vernon county, Mo., were regular and according to law, and that the relator is not entitled to the relief prayed for.

"It is therefore ordered, adjudged, and decreed by the court that said writ be and hereby is dismissed at the cost of the relator, and that respondents have and recover their costs, and that execution issue therefor."

On October 18, 1912, relator filed his motion for a new trial for the following reasons:

"(1) That said finding and judgment are against the evidence, against the weight of the evidence, and against the law under the evidence.

"(2) That said finding and judgment is for the wrong party."

The above motion was overruled, the cause appealed to the Kansas City Court of Appeals, and relator given leave to file his bill of exceptions on or before the first day of the next regular term of said circuit court. No bill of exceptions was ever filed in the cause, although the judgment of the court below recites that evidence was heard at the trial.

J. B. Journey, of Nevada, Mo., for appellant. Scott & Bowker, of Nevada, Mo., for respondents.

RAILEY, C. (after stating the facts as above). [1] I. The circuit court had before it the record entries of the county court, and also the documentary evidence produced before said court. None of the oral testimony heard by the county court was certified to the circuit court to be considered with the documentary evidence filed by respondents. We know of no provision of law which authorizes a bill of exceptions to be filed in the county court containing the oral and documentary evidence introduced before said court, in order that it may be made a part of the record thereof. Appellant's abstract contains the following:

"And by agreement of the parties hereto, the entire records and rolls of the proceedings of said road case before the county court of Vernon county, Mo., are to be considered a part of the respondents' return."

[2] In order to consider this agreement and the testimony heard by the court, on the motion to quash, a part of the record in the cause, it was necessary that they should have been incorporated in a bill of exceptions. We hold that the certified copies of the county court records, as well as the documentary evidence accompanying same, and all other evidence considered at the trial, should be incorporated in a bill of exceptions, in order to become a part of the record in the case. Without a bill of exceptions, we can only consider the record proper, which in this

case would be the petition, the return of respondents, the motion to quash filed by appellant, and the judgment of the trial court. *Bradbury v. Smith*, 181 S. W. loc. cit. 422; *Stevenson v. Smith*, 177 S. W. loc. cit. 615; *McMurray v. McMurray*, 258 Mo. 405-415, 167 S. W. 513; *Mitchell v. Sparlin*, 255 Mo. 124, 164 S. W. 205; *Hanne v. Garvey*, 255 Mo. 106, 164 S. W. 210; *Mahaffey v. Cemetery Ass'n*, 253 Mo. loc. cit. 141, 142, 161 S. W. 701; *Bridge Co. v. Corrigan*, 251 Mo. 667, 158 S. W. 39; *Craig v. Railroad*, 248 Mo. 270, 154 S. W. 77; *Harding v. Bedoll*, 202 Mo. 625, 100 S. W. 638.

As no bill of exceptions was filed in the case, we will turn to the record proper as heretofore indicated, in order to determine whether the trial court can be convicted of error therefrom.

II. Referring to the record proper and considering the petition, answer, motion to quash, and the judgment below, we find nothing which would warrant us in disturbing the finding and judgment of the trial court in this cause.

[3] III. There is nothing in the petition or the record which indicates that relator has any interest in the subject-matter of this litigation, nor does it appear why he waited until more than seven months after the road had been ordered opened by the county court, before commencing this action, even if he were interested in said proceeding. Having failed to disclose on the face of his petition that he has any interest in the subject-matter of the proceedings before the county court, relator was not entitled to the writ issued by the trial court, and hence its action in dismissing same was proper under the law. *Davison v. Otis*, 24 Mich. loc. cit. 25; *People v. Leavitt*, 41 Mich. 470, 2 N. W. 812; *Blodgett v. McVey*, 131 Iowa, 552, 108 N. W. 239; *Colden v. Botts*, 12 Wend. (N. Y.) 234.

[4] IV. If relator had any interest in the subject-matter of this controversy, and desired to have the proceedings before the county court reviewed, he had an adequate remedy by appeal. Section 10440, R. S. 1909, reads as follows:

"Appeals to the circuit court shall be allowed either party from the judgment of the county court assessing damages, or for opening, changing or vacating any road, and upon such appeal the circuit court shall proceed to hear and determine the same anew; but no commissioner shall be appointed by the circuit court, nor shall any appeal, prior to the determination thereof in the circuit court, operate as a supersedeas of the proceedings of the county court; and provided further, that all appeals shall be taken within ten days from the date of rendition of the judgment appealed from, and the appellant shall, before such appeal is allowed, file with the clerk of the county court his appeal bond, payable to the county and to the appellee, as their interest may appear, in such sum as may be required by the county court or by the clerk thereof in vacation, and conditioned that he or they (the appellants) will fully pay or satisfy any judgment for damages or costs that may be rendered against them in the circuit

court, and will in all things abide the judgment of said court."

We have heretofore held in plain, unmistakable language that, where a party has an adequate remedy by appeal, he cannot resort to certiorari proceedings in cases of this character. *State ex rel. v. Goodrich*, 257 Mo. 40-50, 165 S. W. 707; *State ex rel. v. Mosman*, 231 Mo. loc. cit. 482, 483, 133 S. W. 38; *State ex rel. v. Reynolds*, 190 Mo. 578, 89 S. W. 877; *State ex rel. v. Woodson*, 161 Mo. 444, 61 S. W. 252; *State ex rel. v. Shelton*, 154 Mo. loc. cit. 691, 55 S. W. 1008, 50 L. R. A. 798; *State ex rel. v. County Court of Nodaway Co.*, 80 Mo. 500.

The Legislature of this state, in 1909 (Acts 1909, p. 727), repealed a large portion of the law as it then stood relating to roads and bridges, and enacted new provisions in lieu thereof. Section 9419, R. S. 1899, was very materially changed by the above legislation, as will appear upon a comparison of section 10440, R. S. 1909, with said section. It is evident that the lawmaking power contemplated in the above change that proceedings to open roads should be facilitated, rather than retarded. This case presents a practical illustration of the necessity for refusing a writ of certiorari on the record disclosed herein.

The relator has shown no interest in the subject-matter of this litigation; waited until more than seven months after the road had been ordered opened before applying for the writ; and incurs no liability, except for costs. If he had been successful here and the proceedings of the county court had been quashed, all the efforts of the community interested in this matter would have come to naught. On the other hand, if relator, under the facts disclosed by the record, had been required to test the validity of the county court proceedings by appeal, he would have been required to perfect his appeal within ten days from the date of final judgment in said proceeding. He would likewise have been required to give a bond, etc.

[5] In addition, however, to the foregoing, in order that there may be no unnecessary delay in cases of appeal, it is provided that the circuit court shall proceed to hear and determine the case anew. In proceedings by appeal, the errors, if any, committed by the county court, may be corrected when the case reaches the circuit court, where it will be tried anew. On the other hand, if the proceedings by certiorari show want of jurisdiction upon the part of the county court, it would nullify all the proceedings before such court.

We therefore hold that, on the facts disclosed by this record, the writ of certiorari was improperly issued and properly dismissed by the trial court.

V. It may be contended that the petition, remonstrance, and final judgment of the county court ordering the road opened constituted the record proper of said court, and

that this part of the proceedings should be considered as a part of the respondents' return, without any reference to the other documents and proceedings certified to the circuit court. Without undertaking to determine this question, on account of the conclusions heretofore reached, as it is not necessary to do so, we would suggest that the final judgment rendered by the county court covers all the jurisdictional facts affirmatively, and validates any portion of the record which is silent as to such matters.

In the very able and exhaustive opinion of Judge Sturgis of the Springfield Court of Appeals, in *State ex rel. v. Ross*, 177 Mo. App. loc. cit. 230, 162 S. W. 702, it is said:

"It has also been ruled that it is sufficient in certiorari proceedings that the jurisdiction of the inferior tribunal, with which alone the review court has to deal, appears by any part of the record. *State v. Schneider*, 47 Mo. App. 669, 676; *State ex rel. v. Mayor of Neosho*, 57 Mo. App. 192, 198."

Upon a full consideration of all the matters before us, we have reached the conclusion that the judgment below was for the right parties, and it is, accordingly affirmed.

BROWN, C., concurs in result.

PER CURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All concur; BLAIR, J., in result.

MILLER v. MISSOURI WRECKING CO. et al. (No. 16984.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. MUNICIPAL CORPORATIONS §759(5)—LIABILITY FOR DEFECTS IN STREET—PERSONAL INJURY.

Where the property owner had carelessly piled I-beams on a portion of street between property line and sidewalk, the city is not relieved of liability for injuries to plaintiff from a falling I-beam, because such portion of the street was unimproved.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1600; Dec. Dig. § 759(5).]

2. MUNICIPAL CORPORATIONS §819(1)—LIABILITY FOR DEFECTS IN STREET—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to sustain a finding of negligence where a loose, irregular, inclined pile of I-beams of irregular dimensions was permitted to remain on an unimproved portion of the street between the property line and the sidewalk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1739; Dec. Dig. § 819(1).]

3. MUNICIPAL CORPORATIONS §762(2)—LIABILITY OF CITY FOR DEFECTS OF STREET—TEMPORARY USE OF STREET FOR LOADING AND UNLOADING MATERIAL.

The rule relieving the city of liability for injuries sustained from a temporary use of the street in loading and unloading material does not apply to injuries received through an I-beam falling from a pile which had remained for sev-

eral weeks on a street between the sidewalk and the property line.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1606-1608; Dec. Dig. § 762(2).]

4. MUNICIPAL CORPORATIONS §791(2)—LIABILITY FOR DEFECTS OF STREET—ACTUAL NOTICE—NECESSITY.

Where a pile of I-beams remained on unimproved portion of paved street between sidewalk and property line for seven weeks, actual notice to the city was unnecessary.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1647, 1648; Dec. Dig. § 791(2).]

5. MUNICIPAL CORPORATIONS §821(16)—LIABILITY FOR DEFECTS OF STREET—CONSTRUCTIVE NOTICE—JURY QUESTION.

Where a pile of I-beams remained on unimproved portion of paved street between the sidewalk and the property line for seven weeks, the question of constructive notice to the city was for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1750; Dec. Dig. § 821(16).]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by Genevieve Miller, a minor, by John S. Miller, next friend, against the Missouri Wrecking Company and the City of St. Louis. From the order granting the plaintiff a new trial, the defendant City of St. Louis appeals. Affirmed and remanded.

William E. Baird and Truman P. Young, both of St. Louis, for appellant. Wm. F. Woerner and Emerson E. Schnepf, both of St. Louis, for respondent.

BLAIR, J. Respondent sued the Missouri Wrecking Company and the city of St. Louis for damages for personal injuries. The jury returned a verdict for \$1,500 against the wrecking company, and a verdict in favor of the city. The wrecking company's motion for new trial was sustained on the ground the damages allowed were excessive, and respondent's motion for new trial was sustained, as against the city, because of error in an instruction. The city appealed.

The Missouri Wrecking Company's building adjoins O'Fallon street at its intersection with Jefferson avenue. Between this building and the sidewalk on the south side of O'Fallon street is a space of seven feet and seven inches, forming a part of the street but not improved in any way. Next the wall of its building, the wrecking company had piled a large number of I-beams. When she was injured, respondent, a girl of 14, was standing at the inner edge of the sidewalk on the south side of O'Fallon street, and immediately in front of the pile of beams mentioned, watching a procession moving along Jefferson avenue. She held in her arms her baby sister. Others were watching the same procession. A neighbor's child was sitting upon the pile of beams. In response to his mother's call, this child arose, and one of the beams rolled down upon respondent's foot,

injuring her. Other facts pertinent to questions presented by appellant's counsel are stated in the course of the opinion.

Appellant contends that: (1) In specified particulars the evidence is insufficient; and (2) the instruction the court held erroneous is sound.

[1] I. It is contended the fact the beams were piled upon an unimproved part of the street exculpates the city. "The obligation of a city to keep its streets and sidewalks in repair is not limited to defects existing in the street." *Campbell v. Chillicothe*, 239 Mo. loc. cit. 461, 144 S. W. 408, 39 L. R. A. (N. S.) 451, and cases cited; *Shippey v. Kansas City*, 254 Mo. 1, 182 S. W. 137. These cases show cities are held liable for injuries resulting from their negligently suffering structures and excavations to exist on private property adjacent to a street. This rule is broad enough to include that portion of the street shown in this case to lie between the sidewalk and the property line.

[2] II. It is urged there is no evidence the beams were negligently piled. There was evidence the beams mentioned were I-beams of lengths ranging from 6 to 14 feet; that they were of different sizes as well as lengths, the webs being of different widths, and therefore the flanges being of different widths; they were loosely piled and were not laid evenly, one upon the other, but, to some extent, were piled irregularly and somewhat crosswise; the pile was 4½ feet high and that wide or wider at the base, and the face of the pile fronting the street was slanting, the degree of slant being variously indicated by the witnesses; the top of the pile was two or more feet wide.

From this testimony it is reasonably inferable this pile of I-beams was of unstable equilibrium, and that the falling or rolling down of some of them was reasonably to be anticipated. In the case of *Bowman v. Foundry Co.*, 226 Mo. 53, 125 S. W. 1120, the petition charged that a pile of pig iron which fell and injured plaintiff "had been so piled and placed as that it was liable to fall over at any time," but plaintiff offered no evidence tending to show any defect in the piling of the iron. The court indicated that a showing the pile was leaning or was not compact should have been made, or that expert testimony showing, if true, that the height of the pile rendered it dangerous, was necessary. The tendency of the evidence in this case to show the loose, irregular, and slanting piling of beams of irregular lengths, widths, thicknesses, and weights meets the requirement of the rule in the *Bowman Case*. The evidence was sufficient to take the case to the jury, so far as concerns the showing as to the negligent piling of the beams.

[3] III. It is clear the use of the street shown in this case cannot be held, as a matter of law, to fall within the rule permitting

the temporary use of a street in loading and unloading material, etc. *Corby v. Railroad*, 150 Mo. loc. cit. 469, 52 S. W. 282. Further, that rule does not protect from damages for a use which is in its nature negligent and endangers those lawfully using the street. Obviously, if the pile of beams was dangerous by reason of being negligently made, and remained for weeks near the sidewalk, it does not fall within the principle permitting temporary use for purposes of the sort mentioned.

[4, 5] IV. It is urged there was no evidence tending to show notice to the city. There was evidence the pile of beams in question stood at the same place for seven or more weeks before respondent was injured. It was upon a strip of ground adjacent to the sidewalk upon which respondent was standing, which sidewalk was a part of a paved and traveled city street. Actual notice was not necessary, and seven weeks is a sufficient time, in the circumstances, at least to take the question of constructive notice to the jury if the pile of beams in fact presented the appearance plaintiff's evidence tended to prove it did. *Shippey v. Kansas City*, supra; *Straub v. St. Louis*, 175 Mo. loc. cit. 416, 75 S. W. 100. It also follows from the authorities cited that the instruction requiring actual notice was erroneous.

The judgment is affirmed, and the cause remanded. All concur.

DONOVAN v. GIBBS.

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. ATTACHMENT \S 265—ATTACHMENT AGAINST NONRESIDENT—DISSOLUTION BY ANSWER TO MERITS—STATUTE.

Under Rev. St. 1909, § 2298, authorizing attachments without bond against nonresidents, but providing that, when any writ of attachment has issued against a nonresident, and plaintiff has given no bond, the attachment shall be dissolved as of course upon defendant's entering his appearance and filing his answer to the merits, a nonresident defendant's plea to the jurisdiction did not affect the attachment.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 945-947; Dec. Dig. \S 265.]

2. ATTACHMENT \S 265—ATTACHMENT AGAINST NONRESIDENT—DISSOLUTION BY ANSWER TO MERITS—STATUTE—"OF COURSE."

Under Rev. St. 1909, § 2298, authorizing attachments without bond against nonresidents, but providing that, when any writ of attachment has issued against a nonresident, and plaintiff has given no bond, the attachment shall be dissolved as of course upon defendant's entering his appearance and filing his answer to the merits, where a nonresident defendant, against whom attachment had issued without bond, filed his answer, the attachment was not automatically dissolved, it being incumbent for defendant to move for dissolution, since "of course" means any action or step taken in the course of judicial proceedings, which will be allowed by the

court upon mere application without inquiry or contest.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 945-947; Dec. Dig. ¶285.]

For other definitions, see Words and Phrases, First and Second Series, Of Course.]

3. EVIDENCE ¶82—PRESUMPTIONS—JUDICIAL PROCEEDINGS.

In suit to quiet title, where defendant's title depended on the validity of a sale under judgment in a suit by attachment against the party who was plaintiff's and defendant's common source of title, the Supreme Court must presume that the trial court in the attachment suit acted in accordance with the law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. ¶82.]

4. ATTACHMENT ¶265—ATTACHMENT AGAINST NONRESIDENT—DISSOLUTION—STATUTE.

Under Rev. St. 1909, § 2298, authorizing attachments without bond against nonresidents, but providing that, when any writ of attachment has issued against a nonresident, and plaintiff has given no bond, the attachment shall be dissolved as of course upon defendant's entering his appearance and filing his answer to the merits, in suit by attachment against a nonresident, in which plaintiff gave no bond, where the cause had been taken under advisement by the court when defendant's answer was filed, the filing of the answer, without leave and without setting aside the submission of the case, did not render applicable the proviso of the statute, though construed to automatically dissolve the attachment upon filing of defendant's answer.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 945-947; Dec. Dig. ¶265.]

Appeal from Circuit Court, Dent County; L. B. Woodside Judge.

Suit by Walter Donovan against James H. Gibbs. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

G. C. Dalton, of Salem, for appellant. W. P. Elmer, of Salem, for respondent.

BLAIR, J. This is a suit under section 2535, R. S. 1909, to adjudge and quiet title to lot 2 of the northwest quarter and the north half of lot 2 of the southwest quarter of section 81, township 35 north, of range 5 west, in Dent county. The Dent circuit court rendered judgment for defendant, and this appeal followed. B. P. Vickery is the agreed common source of title. Appellant claims through mesne conveyances from B. P. Vickery, having obtained a deed in September, 1909. Respondent claims title under deed from Stephens and Horsman, whose title depended upon the validity of a sale under judgment in a suit by attachment they began against B. P. Vickery November 5, 1908. The ground of attachment was Vickery's non-residence. No attachment bond was given. Service was had by publication. On April 21, 1909, Vickery, appearing solely to question the jurisdiction, filed a motion in the cause. On April 22, 1909, alias summons was served in Dent county on Vickery, who was temporarily there. The cause was continued, and was heard at the next term of court. On November 29, 1909, Vickery filed

a general denial by way of answer, no ruling having been had or asked on his plea to the jurisdiction, and no leave to file answer having been asked or given so far as the record shows. On November 30, 1909, the court rendered judgment in the attachment proceedings reciting:

"Now on this day, this cause coming on to be heard, the judge of this court, having previously heard the evidence of witnesses and the argument of counsel, and *having taken the case under advisement* [italics ours], finds the issues for the plaintiffs in the sum of two hundred dollars."

Then follows an ordinary judgment by attachment declaring a lien upon the land attached in that suit and involved in this. Vickery called neither his plea nor his answer to the attention of the court in that case, nor did he move to dissolve or ask dissolution of the attachment or vacation of the attachment proceedings. Neither did he appeal from the attachment judgment. Sale was regularly made under that judgment, and Stephens and Horsman purchased the land and took possession. Subsequently, for full price, they sold to defendant, who took possession and thereafter expended nearly \$2,000 in money and labor improving the land, erecting a dwelling, barns, fences, digging wells, clearing, making a pond, etc. When attached the land was subject to a deed of trust for \$500 which Stephens and Horsman paid, and which sum appellant does not offer to repay. April 19, 1909, some months after the attachment suit was begun, and some time after service by publication was had, B. P. Vickery and wife executed a deed, recorded April 23, 1909, purporting to convey the attached property to Wm. B. Vickery, who lived in the same town in Illinois with B. P. Vickery. May 3, 1909, Wm. B. Vickery and wife conveyed to Anna B. Vickery, also of the same town. September 8, 1909, Anna B. Vickery and husband, B. P. Vickery, who had then removed to South Bend, Ind., in consideration of \$1, conveyed to appellant, also of South Bend. Appellant then had knowledge of the pendency of the attachment suit. Neither appellant nor any one of the Vickerys testified in this case.

[1] Appellant's sole contention is that the filing of Vickery's answer in the attachment suit on November 29, 1909, ipso facto instantly dissolved the attachment, and as instantly freed the attached land from the lien, and that his title under his deed of September 8, 1909, is consequently one in fee simple, unaffected by the sale in the attachment proceedings. This contention is grounded upon the proviso in section 2298, R. S. 1909. That section authorizes attachments without bond against nonresidents, but provides that:

"When any writ of attachment has issued against a nonresident, and the plaintiff has given no bond, the attachment shall be dissolved as of course upon the defendant entering his appearance and filing his answer to the merits of the case."

It is obvious the plea to the jurisdiction did not affect the attachment, since the statute makes an "answer to the merits of the case" a condition precedent to whatever relief the proviso affords one within its scope. Did the filing of the answer automatically dissolve the attachment?

[2] 1. In *Brown v. McKown*, 265 Mo. 335, 176 S. W. 1043 et seq., we recently had occasion to consider the effect of the proviso in section 2298, but what was said in that case was not directed to the point appellant now presents. The question here is whether the quoted language of the proviso means that the filing of an answer to the merits, in a case to which it applies, of itself, dissolves the attachment without application to or action by the court, and without any further step of any kind. The words to be construed are "shall be dissolved as of course." Had the Legislature intended to provide that upon the filing of an answer in such a case the attachment should, when answer was filed, thereby stand dissolved, and the attachment proceedings thereby stand vacated, we think it would have used words clearly stating that meaning. The language actually used ordinarily implies further action by the court or the party entitled to the benefit of such a provision. Black's Law Dictionary thus defines the words "of course":

"Any action or step taken in the course of judicial proceedings which will be *allowed by the court upon mere application*, without inquiry or contest, or which may be effectually taken without even applying to the court for leave, is said to be 'of course.'" (Italics ours.)

Bouvier's Law Dictionary defines the same words thus:

"That which *may be done* in the course of legal proceedings without making any application to the court; that which is *granted by the court*, without further inquiry, *upon its being asked*." (Italics are ours.)

In *Yates v. People*, 6 Johns. (N. Y.) loc. cit. 359, it was held that the words "of course" mean "according to the course and practice of the court." This was said in discussing writs issuable of course. In *Merchants' Bank of St. Joseph v. Chrysler*, 67 Fed. loc. cit. 390, 14 C. C. A. 446, in discussing motions "of course" in equity, the United States Circuit Court of Appeals for this circuit said such motions were those granted "without the court being called upon to investigate the truth of any allegation or suggestion upon which they are founded." In *Stoddard v. Treadwell*, 29 Cal. 281, it was held that a statute providing for costs following judgments "of course" meant "as a matter of right."

These authorities warrant the conclusion that the language of the proviso is not susceptible of the meaning now attributed to it by appellant. We hold that, if in an attachment proceeding defendant desires the benefit of the proviso of section 2298, R. S. 1909, it is incumbent upon him to move therefor. One effect of the dissolution of an attach-

ment is a right to a vacation of all proceedings "touching the property and effects attached and the garnishee summoned" (section 2342, R. S. 1909), and this also implies court action. That such attachment defendant is entitled, upon answering, to such dissolution of the attachment and vacation of proceedings, and may secure it upon application, does not sustain the contention that the filing of the answer in itself works a dissolution and vacation, unless we disregard the principle laid down in the authorities cited.

[3,4] 2. We must presume the trial court acted in accordance with the law. Therefore, even if it could be conceded appellant's construction of the statute is correct, yet the record shows the cause was taken under advisement some time prior to the rendition of judgment on November 30, 1909. The record being silent, so far as appears here, as to the date on which the cause was taken under advisement, we can presume, in aid of the judgment, that it was under advisement when Vickery's answer was filed on November 29, 1909. Indulging this presumption, we are of the opinion that in such circumstances the filing of the answer without leave and without setting aside the submission could not render applicable the proviso of section 2298, even though it be construed as appellant desires.

The judgment is affirmed. All concur; BOND, J., in paragraph 2 and result.

CRATON v. HUNTZINGER. (No. 19130.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. COURTS §231(51) — JURISDICTION — SUPREME COURT—AMOUNT IN CONTROVERSY.

Where plaintiff sued for \$25,000 and secured judgment for \$250, and defendant was satisfied, but plaintiff asked for and obtained a new trial, the order for which the court refused to set aside on defendant's motion, from which defendant appeals, if the new trial was properly granted, the case stands on the original demand, and transfer from the Court of Appeals to the Supreme Court was justified.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 659; Dec. Dig. §231(51).]

2. APPEAL AND ERROR §840(1)—REVIEW—SCOPE—QUESTION APPEALED FROM—AMOUNT OF RECOVERY.

Where defendant in personal injury suit acquiesced in judgment for plaintiff, the judgment was conclusive as to his negligence and plaintiff's freedom from contributory negligence, and the only question on plaintiff's appeal was the adequacy of the judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. §840(1).]

3. EVIDENCE §192—ADMISSIBILITY—DEMONSTRATIVE EVIDENCE—AUTOPTIC PREFERENCE.

In a personal injury suit, autoptic preference of the plaintiff to show the extent of his injuries is of probative force, which may be conclusive.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 677; Dec. Dig. §192.]

4. DAMAGES \Leftrightarrow 185(1)—EVIDENCE—PERSONAL INJURIES.

Evidence in suit for personal injuries in accident caused by plaintiff's horses becoming frightened by defendant's automobile, *held* to sustain plaintiff's allegations as to extent of injuries.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 503, 505, 508; Dec. Dig. \Leftrightarrow 185(1).]

5. DAMAGES \Leftrightarrow 182(15)—PERSONAL INJURIES—INADEQUACY OF DAMAGES.

Verdict for \$250 for numerous injuries to body, head, and face, causing permanent disfigurement and temporary confinement, was grossly inadequate.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 396; Dec. Dig. \Leftrightarrow 132(15).]

6. NEW TRIAL \Leftrightarrow 75(4)—GROUNDS—PERSONAL INJURIES—INADEQUACY OF DAMAGES.

Where damages awarded by verdict are grossly inadequate, it is the duty of the court to interfere, and new trial may be granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 152; Dec. Dig. \Leftrightarrow 75(4).]

7. DAMAGES \Leftrightarrow 95 — PERSONAL INJURIES — AMOUNT OF COMPENSATION.

In a personal injury action, plaintiff, on proving his case, is entitled to full compensation, regardless of what defendant should pay.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. \Leftrightarrow 95.]

8. APPEAL AND ERROR \Leftrightarrow 1068(1)—SCOPE OF REVIEW—HARMLESS ERROR—INSTRUCTIONS—CURE BY VERDICT.

Plaintiff, who recovered judgment, cannot complain of erroneous instructions as to negligence or contributory negligence, such questions having been resolved in his favor by the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Dec. Dig. \Leftrightarrow 1068(1); Trial, Cent. Dig. §§ 475, 480, 525.]

9. APPEAL AND ERROR \Leftrightarrow 856(5)—SCOPE OF REVIEW—GROUNDS OF DECISION.

Where the court, in sustaining motion for new trial on specific grounds which were erroneous, impliedly overruled all other grounds, it was the party's right to have such other grounds examined on defendant's appeal from the order granting new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3408, 3410, 3423, 3424; Dec. Dig. \Leftrightarrow 856(5).]

10. APPEAL AND ERROR \Leftrightarrow 856(5)—SCOPE OF REVIEW—GROUND OF DECISION.

If the motion for a new trial contains several grounds, and the court sustains it as to one ground, without passing upon the others, the court on appeal will not overturn its decision, even if the ground on which it was sustained was not well taken, provided the record contains substantial evidence that the motion for a new trial ought to have been sustained upon some other ground alleged therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3408, 3410, 3423, 3424; Dec. Dig. \Leftrightarrow 856(5).]

Appeal from Circuit Court, Chariton County; Fred Lamb, Judge.

Action by M. W. Craton against Noah Huntzinger. Judgment for plaintiff, and from the order granting new trial on the plaintiff's motion, and denying motion to set aside such order, defendant appealed to the Court of Appeals, which transferred the cause to the Supreme Court (177 S. W. 816). Motion to remand the cause to the Court of

Appeals denied, and judgment affirmed, and cause remanded.

This action was originally brought in Carroll county, Mo., by plaintiff, a practicing physician, against defendant, the owner of an automobile, for damages on account of injuries sustained through the alleged negligence of defendant in operating his machine, through his nephew, in such manner as to cause plaintiff's team to become unmanageable, break his buggy wheel, throw him to the ground, and thereby cause him permanent injury. Plaintiff, upon a trial of said cause in the circuit court of Carroll county aforesaid, obtained a verdict before a jury for \$5,000. Defendant duly appealed the case to the Kansas City Court of Appeals. The latter, on account of errors occurring during the progress of the trial in the circuit court aforesaid, reversed and remanded the case. The opinion in above cause was written by Judge Ellison, and will be found reported in 163 Mo. App. 718, 147 S. W. 512, and following. A change of venue was taken, and said cause transferred to the Chariton circuit court, where another trial was had before a jury, resulting in a verdict and judgment for plaintiff for \$250.

Being dissatisfied with the result of the last trial, plaintiff, in due time, filed his motion for a new trial. The latter, among other grounds, contains the following:

"Third: Because the verdict is against the law and the evidence.

"Fourth: Because the verdict is against the evidence and against the greater weight of the evidence.

"Fifth: Because the amount of damages awarded plaintiff by the verdict of the jury, under the evidence and instructions of the court, are insufficient and grossly inadequate. * * *

"Ninth: Because the court erred in giving instructions * * * 12 * * * 16, on behalf of the defendant and over the objections of plaintiff."

On March 27, 1913, the Chariton circuit court, by its entry of record, disposed of said motion for a new trial as follows:

"Now come the parties hereto and the motion for new trial heretofore filed is taken up and heard by the court, and by the court sustained, on account of giving instructions No. 12 and 16 given on part of defendant, and on account of excluding evidence of Muri Burruss, Flora Burruss and W. G. Holms, offered by plaintiff in rebuttal and objected to by defendant."

Defendant, in due time, filed his motion to set aside the above order, which was overruled and an appeal granted him, to the Kansas City Court of Appeals, from the order and judgment of said court in sustaining plaintiff's motion for a new trial, and granting plaintiff a new trial.

On May 12, 1915, appellant filed in the Court of Appeals aforesaid a motion to transfer the cause to this court—after Judge Ellison had filed his opinion on May 5, 1915, affirming the judgment of the Chariton circuit court, in granting plaintiff a new trial—on the ground that the amount in dis-

pute is in excess of \$7,500, etc. This motion was resisted by respondent, and briefs were filed in the Court of Appeals by both plaintiff and defendant on this subject. Upon a full consideration of this question, Judge Trimble, in behalf of the Court of Appeals, in which all of the judges of said court concurred, filed an opinion, transferring said cause to this court. Judge Trimble's opinion will be found reported in 177 S. W. at pages 816 and following. The mandate of the Court of Appeals, and the record in said cause, were filed in this court on June 28, 1915.

On October 12, 1915, respondent filed herein a motion to remand said cause to the Court of Appeals, on the ground that the latter alone has jurisdiction of the cause. Suggestions in support of above motion were filed by plaintiff. On the same day, respondent filed his motion to advance said cause, which was sustained, and the case set for argument in this division on April 13, 1916.

The cause was argued in this court on above date by counsel for both plaintiff and defendant.

W. W. Rucker and Roy W. Rucker, both of Keytesville, and Lozier & Morris, of Carrollton, for appellant. J. A. Collet, of Salisbury, and James F. Graham and Jones & Conkling, both of Carrollton, for respondent.

RAILEY, C. (after stating the facts as above). [1] I. It becomes necessary for us at the outset to determine whether this court has jurisdiction over the cause, or whether respondent's motion to transfer same to the Court of Appeals should be sustained. The conclusion reached in the very clear and logical opinion delivered by Judge Trimble in the Court of Appeals, sustaining appellant's motion to transfer the cause to this court, reported in 177 S. W. 816 et seq., meets with our approval.

In the case before us, the defendant was satisfied with the judgment for \$250 rendered against him. The plaintiff was dissatisfied with same judgment and asked for a new trial. The court below sustained plaintiff's motion and granted him a new trial. If this action of the court be sustained, plaintiff's cause of action for \$25,000 stands as though no former trial had ever taken place. On the other hand, if defendant's contention is well founded, and it should appear to the Appellate Court that a new trial was improperly granted, then it would clearly appear that the amount in dispute was only \$250, and the Court of Appeals alone would have jurisdiction. The defendant, however, appealed from the order granting respondent a new trial in the case.

In *State ex rel. Patton et al. v. Gates*, Judge, 143 Mo. 63, 44 S. W. 739, the trial court directed a verdict for defendant on the merits. Plaintiffs filed a motion for a new trial, which was sustained and defendant appealed from the order granting plain-

tiffs a new trial. Plaintiffs thereupon applied to this court for a writ of mandamus, to compel respondent to proceed with the trial of said cause, as judge of the trial court, on the ground that no appeal bond had been given, and by reason thereof, the proceedings in said cause had not been stayed by said appeal. The question before us was whether, under the statute, an appeal from an order of the circuit court granting a new trial without bond, stayed the trial of the cause in the circuit court, pending defendant's appeal from the order granting plaintiffs a new trial. In referring to section 2246, R. S. 1889, as modified by the acts of 1891, 143 Mo. 68, 44 S. W. 741, Judge Brace, speaking for the Supreme Court, said:

"Thereupon it becomes the duty of the court to make an order allowing the appeal, as required by section 2246, supra. The effect of which order is to transfer the jurisdiction of the case from the circuit court to the appellate court, from the operation of which, however, is excepted the execution on the judgment appealed from in all cases except those stated in section 2249. In other words, the effect of the order granting the appeal is to suspend all further exercise of judicial functions in the case by the court from which the appeal is taken and to transfer the same to the appellate court, where further judicial proceeding is continued until the case is disposed of."

The above announcement of the law relating to this subject has been followed by the subsequent decisions of this court. *Young v. Young*, 175 S. W. loc. cit. 586; *Reed v. Bright*, 232 Mo. loc. cit. 415, 134 S. W. 653, and cases cited.

It logically follows from the foregoing cases that if the entire controversy between plaintiff and defendant is transferred to the appellate court by virtue of defendant's appeal herein, then the rights of both litigants must be considered in disposing of the case. If defendant's theory alone be considered and sustained, the trial court had no right to set aside the verdict of the jury for \$250. Considered without any reference to plaintiff's rights, the Court of Appeals would have exclusive jurisdiction of the case. On the other hand, if the appeal be considered without regard to the rights of defendant and based alone upon the rights of plaintiff, then this court would have jurisdiction, as the amount in dispute, would be in excess of \$7,500.

In the case before us, the plaintiff is strenuously insisting that his judgment for \$250 has been set aside, and that he now occupies the same position which he held before the trial occurred, and is entitled to assert his claim for \$25,000. As the case now stands, the defendant is seeking to have the original judgment for \$250 reinstated. The entire record has been brought before the court, in order that the tribunal exercising appellate jurisdiction may pass upon the relative rights of both parties to the litigation. In order to determine these rights, it will be necessary to consider plaintiff's

demand for \$25,000, as well as defendant's claim, to the effect that the original judgment for \$250, should be reinstated.

The conclusion reached by the Court of Appeals in transferring the cause to this court is not without precedent to support it. In *McCarty v. St. Louis Transit Co.*, 192 Mo. 396, 91 S. W. 132, the plaintiff's husband, a member of the fire department of the city of St. Louis, while earning good wages, was killed, on December 15, 1902, through the negligence of defendant, and his widow brought suit for \$5,000 damages, under sections 2865 and 2866, R. S. 1899. This court had jurisdiction at the date of said accident, where the amount in dispute was in excess of \$4,500. The jury returned a verdict in favor of plaintiff for \$500, and judgment was entered thereon. Plaintiff filed her motion for a new trial, and claimed therein that the damages awarded her were inadequate. The trial court sustained plaintiff's motion on the above ground and granted her a new trial. The defendant there, as in the case at bar, appealed from the order granting a new trial, and the appeal in said cause was granted directly to this court. Our jurisdiction was not questioned by either party to the action, but Judge Lamm, in a very able and eloquent opinion, affirmed the judgment of the trial court in granting plaintiff a new trial.

We are therefore of the opinion that the Kansas City Court of Appeals was fully justified, under the laws of our state, in transferring the cause to this court for final determination. Respondent's motion to transfer the case back to the Court of Appeals aforesaid is accordingly overruled.

II. We have read with much interest the able and exhaustive opinion promulgated by Judge Ellison of the Court of Appeals, on the merits of this controversy, and hereby adopt it as the opinion of this court, with a few supplemental observations after the conclusion of same. Said opinion is in words and figures following:

"In the Kansas City Court of Appeals, October Term, 1914. *M. W. Craton, Respondent, v. Noah Huntzinger, Appellant.* No. 10869. Appeal from Chariton Circuit Court.

"Plaintiff, a practicing physician, had been to see a patient and was returning home along the public road in a two-horse buggy. On the way, he met with an automobile, owned by defendant, in which were defendant's nephew, his daughter, a farm hand, and himself. The machine was being driven by the nephew. By reason of defendant's negligence the team became badly frightened, whirled short around, crushed down the front wheel of the buggy, and ran away. Plaintiff was thrown out receiving serious injuries. He brought this action for damages and recovered judgment for \$5,000. On appeal to this court that judgment was reversed and the cause remanded for new trial on account of error in an instruction. See 163 Mo. App. 718 [147 S. W. 512], where the facts are stated in more detail. A change of venue was taken and the case sent to Chariton county, where another trial was had resulting in a verdict and judgment for plaintiff for \$250. Being dissatisfied with that amount, he filed a motion for new

trial, which was granted, and defendant appealed from that order.

[2-4] "Plaintiff's motion for new trial set up several reasons, among them that the verdict was against the evidence and that the damages awarded were 'insufficient and grossly inadequate under the evidence and instructions'; and the question that assignment presents is the principal one in the case. The verdict for plaintiff and defendant's acquiescence therein conclusively establish the latter's negligence and the former's freedom from contributory negligence, which, as to the facts, only leaves open the extent and character of plaintiff's injuries. As to these, we think that practically they were conceded at the trial to be as was shown by the evidence in plaintiff's behalf. By that evidence it appeared that plaintiff was rendered unconscious by his fall from the buggy. He was bleeding in great profusion; the blood running into his throat rendered breathing extremely difficult. He was carried to a farmhouse, where a cot was brought into the yard and he laid upon it. Dr. Tull was called, and while awaiting him others rendered what assistance they could by bathing his face and head. His head was found to be cut to the bone from an inch up in the hair to an inch below his cheek bone. His nose was broken and mashed and so torn that one part of it hung over on his cheek. His lip was mashed so as to partially paralyze it, rendering free and easy speech more difficult. Dr. Tull sewed the wound on the head and jaw and likewise put stitches in the nose. His face was cut in various places, leaving scars. The septum of the nose, which was stated to be the bone or cartilage which supports it and divides the nostrils, was broken so that it is now out of line, leaving the nose crooked and the nostrils so obstructed that breathing is difficult, except through the mouth. In putting in place the torn part of the nose, there was left what the witnesses called a small 'tit which hangs down.' He was in bed for ten days and endured much pain and suffering. One or more doctors attended him and his condition was such up to the time of the last trial that occasionally he was compelled to seek the aid of a physician, and the shock has left him in a nervous condition that causes him much inconvenience. His wounds were described not only by himself, but by other physicians who were conceded by defendant to be competent men in their profession. The pits or small scars on the face, the larger scar coming from the scalp onto the jaw, the crooked nose and the tit thereon, were pointed out to the jury. The proof was indubitable; in fact, it was not disputed at the trial, that his defacement and his nasal injury were permanent, but that relief for the latter difficulty probably could be had by a surgical operation.

"Defendant contested the case on the ground that he was not guilty of negligence, and that plaintiff was guilty of contributory negligence. He did not introduce any evidence to combat plaintiff's injuries, nor to minimize their extent. He did not even cross-examine plaintiff's witnesses in that regard, save by asking one of the physicians if the nose could not be helped by a surgical operation. Not only that, but the record, we think, shows that defendant admitted the injuries were as stated by these physicians, except as to their permanency. The following is what occurred: Plaintiff's counsel asked Dr. Tull, the first of the physicians who reached him: 'Doctor, I wish you would take Dr. Craton and show the jury just where the wounds were and point them out.' Defendant's counsel spoke up, saying: 'There is no controversy about that.' Plaintiff's counsel then asked: 'Do you admit they are the way they say?' (meaning these physicians). Defendant's counsel answered: 'We admit that they are the way that either of these gentlemen say they are.' Then, immediately, plaintiff's counsel asked: 'Do you admit that they are permanent injuries?' Another of de-

fendant's counsel answered: 'We don't make any admissions.' This, of course, referring to the permanency of the injuries.

"But it was said by defendant's counsel at the argument that plaintiff's appearance at the trial was evidence that the observation of him by the jury should be considered. It is true that 'self-perception, or self-observation, autoptic preference; that is, presentation of the object itself for the personal observation of the tribunal, is of probative force, and may be conclusive in some instances. We so decided in *Orscheln v. Scott*, 90 Mo. App. 352, 361-365. That view was discredited by a decision of the Supreme Court in *Phelps v. City of Salisbury*, 161 Mo. 1 [81 S. W. 582]; but it is asserted in later cases; *State v. Gebhardt*, 219 Mo. 708, 718 [119 S. W. 350]; *State v. Davis*, 237 Mo. 237, 242 [140 S. W. 902]. A remark in the *Gebhardt* Case, that 'courts are frequently called upon to act upon evidence addressed to the senses, often called view or inspection, and to recognize without further proof that the person before them is an aged person, male or female, a child, a boy or a girl, white or black, a person with or without physical deformity of limbs and the like,' is especially applicable to this case, in its application to plaintiff's claim of facial disfigurement. But in order to allow observation to have any weight, there must be a presence or an absence of something to observe. If, for instance, a man present at the trial had but one leg, it could not be said the jury could observe he had two. So in this case it should not be said that the jury observed that plaintiff's nose and face were not disfigured when the plaintiff himself exhibited his face to the jury and pointed out by name the scars and the tit on the nose. He said to the jury 'you see a tit that hangs down,' which was where the edges didn't come quite together.' He said, 'There is a triangular cut right in the head there, extending down to about here (indicating); you can see the scar right here.' In much the same way his face and crooked nose caused by breaking or mashing the septum were exhibited to the jury by physicians. In view of this and other evidence, not questioned by defendant, and the statement of counsel above set out, there is no reasonable ground left for the idea that the jury may have observed that plaintiff was not injured and disfigured. It is possible that reputable physicians or plaintiff himself would go through the farce (without dispute or challenge from the defendant) of exhibiting and pointing out perfect and natural conditions of face and head and falsely calling them names of disfigurement; but it is not believable.

[5, 6] "But we are met with defendant's claim that the verdict of the jury assessing compensation in actions in tort for unliquidated damages cannot be disturbed. Counsel qualified that statement by the proviso, 'if the amount is a substantial sum'; conceding that if the sum is merely nominal, the court had supervisory power; but claiming that \$250, the amount of the verdict, was a substantial sum. In our opinion, keeping the character of the injuries in mind, it should not be so considered. We think, under the evidence and instructions of the court, that sum, to use the language of the motion for new trial, 'is grossly inadequate,' and must have been arrived at in disregard of the evidence. It should strike all reasonable minds as palpably unjust and unfair. In such instances it is the duty of the court to interfere. *Fischer v. St. Louis*, 189 Mo. 507, 579 [88 S. W. 82, 107 Am. St. Rep. 380]. That case cites others from the Supreme Court and announces the duty of the court to interfere when the verdict is wholly inadequate as well as when it is excessively large. It is stated in *Leavitt v. Dow*, 105 Me. 50 [72 Atl. 735, 134 Am. St. Rep. 534, 17 Ann. Cas. 1072], that the rule of absolute deference to the verdict of a jury in actions in tort, 'has been re-

laxed, and it is now held both in England and in the courts of the United States that no reason can be given for setting aside verdicts because of excessive damages, which does not apply to setting them aside for inadequacy of damages.' The same, in substance, is said in *Light Co. v. Mason*, 81 Ohio St. 463 [91 N. E. 292, 28 L. R. A. (N. S.) 180], and in *Simmons v. Fish*, 210 Mass. 563 [97 N. E. 102, Ann. Cas. 1912D, 538], in which latter case, practically like the one at bar, the issue of liability was the only contest, there being no dispute as to the injury done, which was the loss of an eye, and the verdict was for \$200. The court said at page 571 of the report that such a verdict, the jury having agreed upon the defendant's liability, 'was inconceivable' as to the damages returned, and that 'the inference was irresistible that it was agreed upon from improper motives.' In *Benton v. Collins*, 125 N. C. 83, 93 [34 S. E. 242, 47 L. R. A. 33], a verdict for \$350 for assault and battery was set aside for inadequacy. In *Tuthwell v. Cedar Rapids*, 122 Iowa, 50 [97 N. W. 96], a verdict for \$100 was set aside for same reason. In *Rossey v. Lawrence*, 123 La. 1053 [49 South. 704, 17 Ann. Cas. 484], a verdict for \$1,000 for loss of a thumb and forefinger and injury to others was 'manifestly inadequate.' In *Morrissey v. Electric Ry. Co.* [30 App. Div. 424], 51 N. Y. Supp. 945, a verdict for \$500 in a personal injury case was said to be ridiculously small and it was set aside.

"From the frequency of applications by defendants to set aside verdicts for excessiveness and the rarity of such requests from plaintiffs for inadequacy, the bar has been, in a manner, led into the belief that the latter is not allowable by law. But the cases herein cited disclose that no reason exists for the former class, that could not, and should not, be applied to the latter.

"The extreme case falling under our observation is that of *Phillips v. London Ry. Co.* (1879) 5 L. R. Q. B. 78, where a verdict for £7,000 (\$35,000) was held so far inadequate as to require a new trial, at which £16,000 (\$80,000) was recovered; (1879) 5 L. R. C. P. 280. The plaintiff in that case was a physician with large income. We have not a case like that, but we are now dealing with defendant's proposition that we have not the legal right to interfere with a verdict where a substantial sum is returned.

"There is a class of actions in tort, such, for instance, as slander, where, in the absence of special or consequential damages, there is no tangible loss, in which it has been held that the small amount of the verdict is not ground for new trial, 'unless there has been some mistake in a point of law on the part of the Judge who presided, or in the calculation of figures by the jury.' *Rendall v. Hayward*, 5 Bing. (N. C.) 424; *Forsdike v. Stone*, L. R. 3 C. P. 607. In the latter of these cases the court said that 'in a case of slander a jury considers not only what the plaintiff should receive, but what the defendant should pay.' On the first appeal of *Phillips v. London Ry.*, supra (1879, 4 Q. B. 406), *Cockburn, C. J.*, at page 409, approved of that statement, and distinguished between an action for slander and one for personal injury, in these words: 'We think the rule contended for (in slander) has no application in a case of personal injury, and that it is perfectly competent to us if we think the damages unreasonably small to order a new trial at the instance of the plaintiff. There can be no doubt of the power of the court to grant a new trial where in such an action the damages are excessive. There can be no reason why the same principle should not apply where they are insufficient to meet the justice of the case.'

[7] "While we are not called upon in this case to distinguish between slander and personal injury, we do say that in the latter action, so far as compensatory damages are con-

cerned, one is entitled to have full compensation, and a jury has no right to consider what a guilty defendant should pay, apart from what a plaintiff should receive. Full compensation is a plaintiff's right and the courts should be equally as alert to see that he gets no less, as they are to prevent his getting more; making, of course, all proper allowance for the fair and unbiased sense of justice and the reasonable discretion which is necessarily left to a jury, when the nature of the loss is such that the amount of it cannot be precisely ascertained.

[8, 9] "The trial court gave as the reason for granting a new trial that it erred in two instructions (12 and 16) given for defendant on the subject of negligence and contributory negligence. But since the verdict was for plaintiff notwithstanding those instructions, it leaves him without ground of complaint in that respect. Assuming that the court, in only naming the error just mentioned, impliedly overruled all other causes set up in the motion for new trial, it still leaves plaintiff with the right to ask this court to examine the other causes he set up, viz., that the verdict was 'against the evidence,' and that the damages awarded were 'grossly inadequate, under the evidence and instructions.'

"As the case is to be retried we suggest the number of the instructions be materially lessened. We think the judgment should be affirmed.

"Trimble, J., concurs. Johnson, J., dissents. "James Ellison, P. J."

In *Ewart v. Peniston*, 233 Mo. loc. cit. 709, 136 S. W. 425, this court said:

"We are of opinion that courts, upon their own motion, may, in the interest of justice, and during the same term of the court, set aside their judgment and the verdict upon which it was entered."

To the same effect is *Hollenbeck v. Ry. Co.*, 141 Mo. 97, 38 S. W. 723, 41 S. W. 887. The motion for a new trial was filed and sustained in this case, at the same term at which the judgment was entered.

[10] We have likewise uniformly held that if a motion for a new trial contains several grounds, and the court sustains it without specifying of record the ground or grounds on which it is sustained, we will not reverse such ruling if the record contains substantial testimony, warranting the conclusion reached by the trial court, on other grounds. *Hewitt v. Steele*, 118 Mo. loc. cit. 473, 24 S. W. 440; *Lead & Zinc Mining Co. v. Webster*, 193 Mo. 351, 92 S. W. 79; *Johnson v. Grayson*, 230 Mo. loc. cit. 393, 130 S. W. 673. It is equally as well settled that if the motion for a new trial contains several grounds, and the court sustains it as to one ground, without passing upon the others, that we will not overturn its decision, even if the ground on which it was sustained was not well taken, provided the record contains substantial evidence from which this court can reach the conclusion that the motion for a new trial ought to have been sustained upon some other ground alleged therein. The foregoing opinion points out clear and substantial testimony in the record, tending to show that the ends of justice would best be subserved

by sustaining the action of the trial court in granting plaintiff a new trial, although upon a different ground from that mentioned by the court, in its record sustaining same.

In the *McCarty Case*, supra, 192 Mo. loc. cit. 400, 91 S. W. 133, it is said:

"There is no brief by respondent. By that of appellant only one insistence is made, to wit, that the verdict was a substantial one—a verdict the jury was authorized to render and which, to attain or disturb, was error, nisi, because thereby appellant is subjected to a new inquisition of damages and placed in danger of being mulcted in \$5,000."

Judge Lamm, in considering this subject upon pages 401, 402, of 192 Mo., upon page 133 of 91 S. W., said:

"Considering the case from this point of view, it must not be lost sight of that a jury may not give any verdict it pleases. Its verdict is first subject to the trained judicial discretion of the trial judge, and his judicial discretion, so exercised upon the verdict, will not be interfered with on appeal except it be unmistakably unwisely exercised. *Bank v. Armstrong*, 92 Mo. loc. cit. 279 et seq. [4 S. W. 720]; *Bank v. Wood*, 124 Mo. loc. cit. 76, 77 [27 S. W. 554]; *Kuenzel v. Stevens*, 155 Mo. loc. cit. 285 [56 S. W. 1076]; *McCloskey v. Pulitzer Pub. Co.*, 163 Mo. loc. cit. 33 [63 S. W. 99], and cases cited. The wise exercise of this judicial discretion on the part of circuit judges has always been encouraged by this court—a discretion exemplified by Justice Grier in his celebrated dictum that 'it takes thirteen men in this court to steal a man's farm; twelve in the box and one on the bench.'

"The trial judge stands peculiarly close to the fountainhead of legal justice. He is the high priest presiding at the very altar of the temple. To him it is given to hear the intonation of voice of a witness, to see his manner, his cast of countenance, the glance of his eye, the behavior of the jury, their intelligence, their attention and the whole network of small incidents creating an atmosphere about a case and tending possibly to a perverted result or otherwise, none of which can be preserved in the bill of exceptions and sent here, and in him, therefore, should exist the courage to prevent a miscarriage of right. His viewpoint is entirely different from that of an appellate court."

The above case affords a strong precedent for the action of the trial court in granting plaintiff a new trial. Plaintiff was earning good wages, and a jury only allowed his widow \$500 on account of his death. The court below granted her a new trial because the damages were inadequate, and we affirmed the judgment. We are satisfied with the conclusion reached in the *McCarty Case*, and see no reason for departing from same in disposing of the case before us.

The judgment below is accordingly affirmed, and the cause remanded to the circuit court of Chariton county for further disposition.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All concur; BOND, J., in result.

STATE ex inf. WRIGHT, Prosecuting Attorney, v. MORGAN et al. (No. 18754.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. APPEAL AND ERROR \S 502(1)—RECORD—BILL OF EXCEPTIONS — MOTION FOR NEW TRIAL.

Appellant, in his abstract of record, where matters of exception are relied on, must show by the record proper that his motion for new trial was filed within the time required by law, and must set out as part of the bill of exceptions the motion for new trial, or by appropriate language call for it, else the court can consider only the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2306; Dec. Dig. \S 502(1).]

2. STATUTES \S 96(1) — CONSTITUTIONALITY — LOCAL AND SPECIAL LAW.

Sess. Acts 1913, p. 721, providing for the organization of consolidated schools and rural high schools, and providing state aid therefor, is not violative of Const. art. 4, \S 53, prohibiting local or special laws concerning schools, as being local and special, applying to only part of the state, while a general law could be made applicable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 107; Dec. Dig. \S 96(1).]

3. SCHOOLS AND SCHOOL DISTRICTS \S 22 — STATUTE AUTHORIZING FORMATION—CONSTITUTIONALITY.

Sess. Acts 1913, p. 721, providing for the organization of consolidated schools and rural high schools, and providing state aid therefor, is not violative of Const. art. 10, \S 11, prescribing the limits of taxation for local purposes, in that a school district formed under the act would be neither a country nor a city district; Rev. St. \S 10775, classifying school districts.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 41; Dec. Dig. \S 22.]

4. CONSTITUTIONAL LAW \S 225(1) — EQUAL PROTECTION OF LAWS — SCHOOL DISTRICT STATUTE.

Sess. Acts 1913, p. 721, providing for the organization of consolidated schools and rural high schools, and providing state aid therefor, is not violative of the Fourteenth Amendment of Const. U. S. \S 1, as denying citizens of the state equal protection of the laws, etc.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 681; Dec. Dig. \S 225(1).]

5. STATUTES \S 235—CONSTRUCTION—SCHOOL LAWS.

It is the policy of the Supreme Court, in construing statutes relating to schools and school districts, to give them a liberal construction, and to uphold the same whenever it can be done without violating the plain provisions of the law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 316; Dec. Dig. \S 235.]

Appeal from Circuit Court, Nodaway County; Wm. C. Ellison, Judge.

Quo warranto, on the relation of George P. Wright, Prosecuting Attorney of Nodaway County, against Everett L. Morgan and others. From a judgment for respondents, the relator appeals. Judgment affirmed.

On July 7, 1914, George P. Wright, prosecuting attorney of Nodaway county, commenced a proceeding by quo warranto, in the circuit court of said county, against the above-named defendants, charging that they

were unlawfully and willfully usurping and exercising the functions and prerogatives of directors of school districts numbered 141, 160, 161, 162, and 181, in said county, in the way and manner aforesaid, under the pretense and claim that the above-mentioned school districts were embraced in and constitute the alleged consolidated district No. 162 as aforesaid; and that said respondents have been, and now are, unlawfully and willfully acting in concert and together, as a board of school directors in the territory embraced in the school districts aforesaid, and are causing taxes to be assessed and levied, teachers to be employed, schools to be run, etc., and are performing all acts and things required and permitted to lawful school directors; all of which is willfully and unlawfully done to the injury and detriment of the state of Missouri.

On October 12, 1914, respondents filed their return, setting out in detail all the different steps and proceedings to establish consolidated school district No. 162, and tending to show that they were elected as directors in said consolidated district, as required by law. The facts stated in the return, if true, show a substantial compliance with the law, in regard to the formation of said district and the election of respondents as directors therein.

Relator filed a reply, putting in issue the facts pleaded by respondents in their return, and attacked the validity of the Acts of 1913, page 721 and following, upon the alleged grounds that said act violates section 28 of article 4 of our Constitution in that it contains more than one subject, which is not clearly expressed in the title; and that the title to said act is misleading and not broad enough to cover the subjects attempted to be embraced therein. He further charges that said act violates section 53 of article 4 of our Constitution in that it is local, special, and applies only to a part of the state; that a general law could be made applicable to the whole state; that it is a local option law and exempts from its operations portions of the state; that the attempted classification violates section 11 of article 10 of our Constitution. He further alleges that said act violates the Fourteenth Amendment to the Constitution of the United States in that it denies to the citizens of the state the equal protection of the laws; and that the enforcement of said act would abridge the privileges and immunities of citizens of the United States and of the state of Missouri.

The court, on the 19th of December, 1914, after hearing the evidence and argument of the counsel, found the issues in behalf of respondents and entered judgment in accordance therewith. The cause was duly appealed by relator to this court.

We have simply set out heretofore the substance of the petition, answer, reply, and judgment, as constituting the record

proper; and have not set out any of the evidence and matters of exception, because the alleged bill of exceptions mentioned in the abstract of record does not contain a motion for a new trial, nor is there any call therein for same. This matter will be considered more fully in the opinion to follow.

Wm. G. Sawyers, Pros. Atty., of Maryville (George P. Wright and A. F. Harvey, both of Maryville, of counsel), for appellant. Cook, Cummins & Dawson, of Maryville, for respondents.

RAILEY, C. (after stating the facts as above). Appellant has set out, as a part of the record proper his motion for a new trial, the ruling of the court thereon, and alleged that an exception was taken to the action of the court in overruling same. Turning, however, to the abstract of record, and inspecting the contents of the alleged bill of exceptions, we find no motion for a new trial set out, nor is there any call made there for said motion.

[1] Appellant, in his abstract of record, where matters of exception are relied on, must show by the record proper that his motion for a new trial was filed within the time required by law. He complied with this requirement, as shown by the record. He is likewise required, in his abstract of record, to set out, as a part of the bill of exceptions, the motion for a new trial, or by appropriate language call for same therein. In the case at bar, the alleged bill of exceptions does not contain any motion for a new trial, nor is there any call therein for said motion. Hence, under the repeated rulings of this court, we can only consider the record proper. *Haggerty v. Ruth*, 259 Mo. loc. cit. 222, 223, 168 S. W. 587; *City of St. Louis v. Young*, 248 Mo. loc. cit. 347, 348, 154 S. W. 87; *Realty Co. v. Brewing Co.*, 247 Mo. loc. cit. 31, 32, 152 S. W. 31; *Blanchard v. Dorman*, 236 Mo. loc. cit. 438, 439, 139 S. W. 395; *City of St. Louis v. Henning*, 235 Mo. loc. cit. 51, 138 S. W. 5; *Betzler et al. v. James*, 227 Mo. loc. cit. 337, 126 S. W. 1007; *Hays v. Foos*, 223 Mo. loc. cit. 423, 424, 122 S. W. 1038; *State ex rel. v. Adkins*, 221 Mo. loc. cit. 120, 119 S. W. 1091; *Groves v. Terry*, 219 Mo. loc. cit. 597, 598, 117 S. W. 1167; *Gilchrist v. Bryant*, 213 Mo. loc. cit. 443, 111 S. W. 1128; *Reed v. Colp*, 213 Mo. 577, 112 S. W. 255; *Stark v. Zehnder*, 204 Mo. 442, 102 S. W. 92; *Harding v. Bedoll*, 202 Mo. 625, 100 S. W. 638; *State v. Ruck*, 194 Mo. 416, 12 S. W. 706, 5 Ann. Cas. 976; *State v. Levely*, 145 Mo. 660, 47 S. W. 787; *State v. Jandley*, 144 Mo. 118, 45 S. W. 1088; *State v. Wray*, 124 Mo. 542, 27 S. W. 1100; *State v. Griffin*, 98 Mo. loc. cit. 674, 12 S. W. 358, and cases cited. There are numerous other cases decided by this court, as well as the various courts of appeals, announcing the same rule of law. This court has endeavored to impress upon counsel throughout the

state the necessity of observing this plain requirement. If members of the bar are heedless in failing to observe the law, in respect to these matters, with so many decisions requiring it, they should not expect the court to overlook such errors, when they are patent upon the face of the record.

II. *Record Proper*. The petition states a good cause of action, and the answer, as heretofore stated, sets out in detail all of the proceedings tending to show that consolidated school district No. 162 was legally established, as required by the Acts of 1913, page 721 and following, and that respondents were legally elected to fill the positions, from which they are now sought to be ousted by relator. The reply puts in issue the allegations of the answer, and attacked the validity of above act upon the grounds heretofore set out in the statement.

On the record thus presented, the trial court, after hearing the evidence and argument of counsel, found the issues in favor of respondents and entered judgment in accordance therewith. As the trial court, on the facts, has found in favor of respondents, and as we are precluded from reviewing same, because no motion for a new trial appears in the bill of exceptions or is called for therein, the judgment below must stand affirmed, unless the Acts of 1913, at page 721 and following, be held as unconstitutional upon one or more of the grounds set out in the reply.

III. The reply challenges the constitutionality of the Act of the General Assembly of Missouri, approved March 14, 1913, and reported in the Session Acts of 1913, at page 721 and following, on the ground that it is violative of section 28 of article 4 of the Constitution of Missouri in that it contains more than one subject which is not clearly expressed in the title, and because the title to said act is misleading and not broad enough to cover the subject attempted to be embraced therein.

We are relieved of the necessity of considering this question, on account of the recent ruling of the court in banc in the case of *State ex rel. Clark et al. v. John P. Gordon*, 261 Mo. 631, 170 S. W. 892. Judge Woodson, in speaking for the above court, in his opinion set out various sections of the act complained of, and in direct terms held that said act did not violate the provisions of section 28 of article 4 of the Constitution aforesaid. He cites in his opinion a large number of authorities sustaining the conclusion reached by him in that respect. In discussing other constitutional questions raised, in respect to said act, Judge Woodson, on page 649 of 261 Mo., page 897 of 170 S. W., said:

"This act is progressive and in keeping with the forward movement of the state and country at large—bringing home better schools and higher grades of instruction, which the ordinary public schools do not teach, and are incapable of teaching on account of the lack of means to construct appropriate buildings and to employ competent teachers. By this scheme of the Legislature, thousands of our children can and will be

instructed in the higher branches of education not taught in the ordinary school, who are unable to go to city high schools, colleges, and universities away from home.

"The design of the Legislature is good and wise, and before the act conferring this beneficence upon the youth of the country should be declared invalid the reasons therefor should be so clear and unanswerable that no reasonable doubt should exist as to its unconstitutionality; and, after a careful reading of the briefs of the respective parties and having investigated the authorities cited, we are of the opinion that no such reason has been pointed out."

The language above quoted fully disposes of the foregoing question, and is alike applicable to the other constitutional questions hereafter discussed.

[2] IV. It is charged in the reply that said act is unconstitutional because it is violative of section 53 of article 4 of the Constitution of Missouri in that it is local and special, and applies to only a part of the state; that a general law can be made applicable to the whole state, etc. We are of the opinion that there is no merit in this contention. The above act is not confined to any county or township in the state. A consolidated school district may be formed anywhere in the state, if the terms and conditions prescribed by the statute are followed.

This same class of questions has been often brought before our courts in different forms. At an early day, the Legislature passed what was generally known as a local option law, in respect to the sale of intoxicating liquors (Acts 1887, p. 177). It was vigorously assailed for many years in the courts of the state, and, among other things, the charge was made that it was unconstitutional. In the case of *State ex rel. Maggard v. Pond*, 93 Mo. loc. cit. 621, 68 S. W. 472, Judge Norton, speaking for this court, said:

"Under the rule thus laid down, the contention of the relator that the act in question is a local or special, and not a general, law is without foundation. The act in question applies to all the counties in the state as a class, and to all incorporated cities or towns as a class having a population of 2,500 or more inhabitants. All the counties in the state, and all cities and towns with the requisite population, may, by complying with its terms, come under its provisions."

After an elaborate review of the above law, it was sustained by the court.

The construction of above law afterwards came before this court in *Ex parte Handler*, 176 Mo. loc. cit. 388, 389, 75 S. W. 920, 922. Judge Gantt, in behalf of Division No. 2, said:

"The very words 'local option' imply the grant of the right to one locality to adopt and another to decline to avail itself of the law. Moreover, it is no objection to a law that it does not operate upon every citizen alike; it is sufficient if it operates equally upon all who in all parts of the state come under the same circumstances and conditions. *Gordon v. State*, 46 Ohio St. 607 [23 N. E. 63, 6 L. R. A. 749]; *Santoro v. State*, 46 Ohio St. 607 [23 N. E. 63, 6 L. R. A. 749]."

Judge Gantt, in presenting the issue involved, on page 388 of 176 Mo., page 922 of 75 S. W., said:

"Addressing ourselves now to the two propositions which counsel now urge in addition to

those decided in the *Maggard-Pond Case*, the first is that it violates the constitutional provision that all laws of a general nature shall have uniform operation throughout the state, and, inasmuch as a different penalty is imposed by the local option law for selling and giving away intoxicating liquors from that inflicted for the sale or giving away of such liquors in other portions of the state, it necessarily offends the principle of uniformity."

All of the objections urged against the constitutionality of said act were again overruled in the *Handler Case*.

In *State ex rel. Dome et al. v. Wilcox*, 45 Mo. 458, the relator instituted proceedings in the nature of a quo warranto in the Livingston circuit court, to determine the right of respondent to the office of school director in the town of Utica; it being a school corporation, organized under chapter 47 of the General Statutes of 1865. Relator sought to oust respondent from office on the ground that said chapter of the above law of 1865 was unconstitutional. Judge Wagner, on page 461 of 45 Mo., said:

"A question of more grave and paramount importance to the people of this state could hardly be brought in this court. Nearly every town and village has organized under the law referred to. Acting in accordance with its authority, they have built schoolhouses, employed teachers, incurred debts, and systematized and put in operation rules and regulations which have greatly redounded to our educational interests. Before a court would be justified in pronouncing against this system, and producing the inextricable confusion which must necessarily follow, it should furnish reasons for its decision, at once clear, cogent, and convincing."

The same learned judge, on page 465 of 45 Mo., said:

"Special statutes relate to certain individual classes or particular localities. Had the act applied to a certain specified town or a single corporation, it would have been special; but such is not the case. It is coextensive with the state, and its influence is felt in every county and almost every township. It is conceded that it does not include in its operation every individual nor extend to all the territory, but that is not required. It is as general as is consistent with its scope and design, and no law more general in its nature could be framed to effectuate and carry out the object in view. This is also a sufficient answer to the point raised, that the act is in opposition to the fourth section of the eighth article of the Constitution."

The above observations of Judge Wagner apply with equal force to the law under consideration here. Similar laws have been passed in this state, relating to other subjects which have likewise been sustained.

In 1873, this court was called upon by the General Assembly to express its opinion as to whether or not a township organization law could be legally passed under the Constitution of 1865. Said opinion, in *Opinion of Justices*, 55 Mo. on page 297, reads as follows:

"It is a general law made for the whole state and by the terms of the act itself took effect from and after its passage. Every county in the state may avail itself of the privileges offered by this law by a majority vote of its people. It is left to the option of the counties whether they will organize under the law or not. If a majority vote for it, such vote does not create the law

but places the county so voting within its provisions; and the organization then takes effect, and also the law, as it existed before the vote was taken. The law does not delegate, nor was it the intention of the lawmakers to delegate, legislative authority to the counties. Unless the counties avail themselves of the right to organize they will remain as they were, unaffected by any of the provisions of this statute. It is unnecessary to elaborate this point or to write a lengthy political essay on a subject, which, it seems to us, needs no illustration. It is sufficient to say that we are satisfied that no provision of the Constitution has been violated in the passage of this law."

This opinion was signed by Judges Adams, Wagner, Sherwood, and Ewing.

We likewise have in this state, and have had for many years, a statute authorizing any county or township, under the circumstances named therein, to adopt a stock law. The same objections were urged to this class of legislation as are urged in the present case; but this court uniformly held that the different classes of laws, heretofore discussed, are neither special, nor do they violate any provision of the Constitution.

We are of the opinion that the above contention of relator is without merit, and is overruled.

[3] V. It is next insisted that the above act is in violation of the provisions of section 11 of article 10 of the Constitution of Missouri in that such a district would be neither country nor city district. We are of the opinion that there is no merit in this contention. Section 10775 of R. S. 1909 classifies the different school districts of the state, and here is nothing in the above act of 1913 which, in any manner, conflicts with the section of the Constitution above referred to. His contention of relator is likewise overruled.

[4] VI. It is contended by appellant that the above act violates section 1 of the Fourteenth Amendment of the Constitution of the United States in that it denies to citizens of the state equal protection of the laws, etc. This same constitutional question was put forward in the attack made on the local option law of this state, as will be seen by reference to the opinion of Judge Black in *Ex parte Swann*, 98 Mo. loc. cit. 51, 52, 3 W. 10, 11, in which he says:

"A further objection to the statute is that it contravenes section 1 of article 14 of the Constitution of the United States, which declares that no state shall 'deny to any person within its jurisdiction the equal protection of the law.' The statute, which allows the state to preemptively challenge in capital cases in cities having over 100,000 inhabitants, whilst elsewhere the state is allowed only 3 preemptory challenges, is assailed in *Hayes v. Missouri*, 120 U. S. 7 [7 Sup. Ct. 350, 30 L. Ed. 578] as being in conflict with the above prohibitions upon state legislation. The Supreme Court of the United States then said: 'This amendment does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation be treated alike, under like circumstances and conditions, both in the privileges conferred

and in the liabilities imposed.' And again it was said in *Missouri v. Lewis*, 101 U. S. 30 [25 L. Ed. 989], speaking of the same constitutional provision: 'It contemplates persons and classes of persons. It has no respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the place or municipalities for which such regulations are made.'

"The law in question applies alike to all persons within the territory or locality where it is adopted. There is no discrimination whatever in favor of or against persons or classes of persons within such territory. They are all treated alike. It is true the penalties for violating this law are not the same as those for violating the dramshop law. They are, indeed, not the same offenses. In the one case the offense is the violation of a law which allows and regulates traffic in intoxicating liquors as a beverage, and in the other case the offense is for selling such liquors where the sale of it is prohibited by law. But aside from this the law makes no discrimination as to persons in the territory where it takes effect, and that is enough to show that it in no way contravenes the section of the Constitution of the United States before quoted."

We do not deem it necessary to consider the constitutionality of the above act further. In no uncertain language, the following recent cases have upheld the validity of the proceeding thereunder, to wit: *State of Missouri ex inf. James S. Simrall ex rel. Benjamin M. Clements et al. v. George Clardy, et al.*, decided March 30, 1916, 185 S. W. 184; *State of Missouri ex rel. Emert C. Hilbert v. E. C. Graves et al.*, decided May 15, 1916, 186 S. W. 685; *State ex rel. v. Gordon*, 261 Mo. 631, 170 S. W. 892.

[5] It has been the policy of this court, in construing the statutes relating to schools and school districts, to give them a liberal construction, and to uphold the same whenever it can be done without violating the plain provisions of the law.

Having decided the constitutional questions adversely to relator, and no error having been found in the record proper, the judgment of the trial court is affirmed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All concur; BOND, J., in result.

HOUSE et al. v. CLARKE et al. (No. 17952.)
(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. MORTGAGES — 24 — OFFICER OF MORTGAGEE AS TRUSTEE — FRAUD.

Where the owner of land borrowed from a bank and executed his note, secured by deed of trust to the president of the bank, with knowledge of the latter's official position, thus consenting that the president should act as trustee, and the latter, upon the note's becoming due, advertised and sold the land in controversy under the deed of trust, a note for \$2,650, executed to the owner of the land by the buyer thereof and left with the bank for collection not having been paid, the heirs of the owner after his death could not recover the land from the trustee's grantee on foreclosure on the ground that

the sale made by the bank president as trustee was voidable.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 28½; Dec. Dig. ¶ 24.]

2. MORTGAGES ¶ 516—SALE ON FORECLOSURE—RIGHT TO PURCHASE.

The cashier of a bank, which loaned a land-owner money, the latter giving his deed of trust, naming the bank president as trustee, as security, had the right as an individual on foreclosure to bid on the property at the trustee's sale and to buy it in if he were the highest and best bidder.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1518; Dec. Dig. ¶ 516.]

3. MORTGAGES ¶ 529(8)—REDEMPTION—STATUTE.

Under Rev. St. 1909, §§ 2829, 2830, providing that all realty, if bought in by the beneficiary in a deed of trust under a foreclosure sale, shall be subject to redemption by the grantor in the deed or his successors within a year from the date of sale, upon giving security, etc., where neither the grantor in a deed of trust nor his heirs gave notice or security, and failed to tender into court the debt, interest, etc., to the mortgage bank, the cashier of which purchased on foreclosure for the bank, they were not entitled to recover the land from the cashier.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1541; Dec. Dig. ¶ 529(8).]

4. MORTGAGES ¶ 529(8)—SALE ON FORECLOSURE—INADEQUACY OF CONSIDERATION.

Mere inadequacy of consideration, unless the consideration is so insignificant as to shock the moral sense, is not sufficient to warrant setting aside a foreclosure sale, otherwise regular and seemingly without fraud, so that a sale on foreclosure of a deed of trust of land worth \$5,000 for \$1,800 will not on that account alone be set aside.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1540; Dec. Dig. ¶ 529(8).]

5. MORTGAGES ¶ 415(1) — FORECLOSURE — DUTY TO EXTEND TIME.

The fact that the grantor, in a deed of trust given to secure his note to a bank, was in poor health, left the state soon after the execution of the deed, and died in California thereafter, imposed no duty on the bank or its officers to extend the time or wait longer to foreclose.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1210-1218; Dec. Dig. ¶ 415(1).]

Appeal from Circuit Court, Howell County; W. N. Evans, Judge.

Action by W. R. House and others against M. B. Clarke and others. From a judgment for defendants on dismissal of the bill, plaintiffs appeal. Judgment affirmed.

On January 29, 1912, plaintiffs, W. R. House, Horace House, Nellie Montelius, and Cora Sweedblom, commenced an action against defendants, M. B. Clarke, R. S. Hogan, and the West Plains Bank, in the circuit court of Howell county, Mo.; and thereafter, on June 1, 1912, filed in said cause an amended petition which contains the following averments:

That plaintiffs are the only children and heirs at law of John S. House, deceased. That said deceased died on the _____ day of June, 1911, single and intestate. That on January 8, 1910, he was the owner of 220 acres of land located in sections 28, 29, and 33, of township 23, range 8 west, in Howell

county aforesaid. That on said January 8, 1910, said John S. House executed to R. S. Hogan, as trustee, a deed of trust on the land aforesaid, to secure the payment of a certain promissory note of that date in the sum of \$1,000, payable to the defendant bank, which said deed of trust is recorded in book 111, at page 596, of the deed records of said county. That on said date and at all the times mentioned herein said R. S. Hogan was president, and said M. B. Clarke was cashier of said defendant bank. That said loan secured by the deed of trust aforesaid was the loan of the West Plains Bank, and it was the owner of said note. That on said January 8, 1910, said John S. House sold his equity of redemption in said land to William H. Hooker and Herman Schmachtenberger, and executed to said purchasers a deed conveying his equity in said land. That, on the same date, said Hooker and Schmachtenberger executed to said John S. House their promissory note in the sum of \$2,650 to cover the purchase price for the equity of said House in said land. That said purchasers executed a deed of trust on said land to secure said note, subject to the deed of trust to the West Plains Bank, above mentioned. That said R. S. Hogan was named as trustee in the second deed of trust also, in which said John S. House was named as beneficiary, which said second deed of trust is recorded in book 111, p. 626, of the deed records of Howell county. That, immediately after the execution of said deeds of trust, said John S. House left said county, without ever returning thereto, and died in the state of California, about June, 1911. That he left with the defendants his note of \$2,650 aforesaid, for collection, and they have ever since held and retained possession of said note. That said John S. House was in bad health from the time of the execution of said deeds of trust to the date of his death. That during all that time said House was incapable of looking after his business affairs and was in a very feeble and demented condition. That while he was in Oregon or California, and in the condition aforesaid, the said R. S. Hogan, though president of the West Plains Bank, assumed to act as trustee, under the first deed of trust, given to secure said \$1,000 note belonging to said bank, and, as such trustee, immediately upon said debt falling due, advertised and sold the lands aforesaid, to satisfy said note. That defendant Clarke became the purchaser at said sale, and the said Hogan executed to him a trustee's deed, to the land aforesaid, which is recorded in book 107, at page 77, of the deed records of Howell county. That said \$2,650 note remains wholly unpaid, and the security of plaintiffs, as the heirs of House aforesaid, has been fully lost and destroyed if said foreclosure sale is permitted to stand. That said Hooker and Schmachtenberger are both insolvent, and

their present abode is unknown to plaintiffs. That said foreclosure proceedings are voidable under the law, for the reason that the officers of the defendant bank cannot act in the dual capacity of representing both the bank and its debtor. That said bank could not, through its officers and agents, act as trustee in a sale of the land and become purchasers at such sale. That it would be inequitable and unjust for said sale to stand for the further reason that said defendants were the trusted agents of said House to look after his securities and collect his debts, secured by said second deed of trust, which has been slaughtered and sacrificed by them as aforesaid. That said sale should be set aside and for naught held for the further reason that said land only brought one-third of its value at said sale. That said land is worth \$5,000, but only sold for \$1,800 at said sale, leaving a small sum, after satisfying the debt, interest, and costs of sale under the first deed of trust. That plaintiffs should be permitted to redeem said land upon payment of the debt, interest, and costs of sale under the first deed of trust. That they should have an accounting of the rents and profits accruing to defendants since they have been in possession of said lands.

"Wherefore plaintiffs pray for an accounting of the matters and things aforesaid; that the debt, interest, and cost of sale may be judicially ascertained; that defendants be required to account for the rents and profits of said land since they have come into possession of the same, and, in case they have sold or disposed of any part of said land, that they may be required to account for the proceeds thereof; that upon payment of any balance that may be found due from plaintiffs they may have the right to redeem; that said foreclosure sale and the said deed to defendant Clarke may be declared null and void and for naught held; that the said first deed of trust to the defendant bank may be adjudged to have been paid and satisfied, and may be canceled and for naught held and esteemed, and for such other orders and judgments as to the court may appear meet and proper."

On July 22, 1912, said defendants filed a demurrer to said amended petition, which, without caption, reads as follows:

"Come now the defendants and demur to the amended petition of plaintiffs, and for grounds therefor say that the amended petition does not state a cause of action."

On August 17, 1912, the court sustained said demurrer. Plaintiffs stood on their petition and refused to plead further. The court, on said August 17, 1912, dismissed plaintiffs' bill and in due form entered judgment in favor of defendants. Thereupon plaintiffs duly appealed the cause to this court.

J. N. Burroughs, of West Plains, for appellants. Green, Wayland & Green, of West Plains, for respondents.

RAILEY, C. (after stating the facts as above). This case is before us, upon the appeal of plaintiffs, as the heirs at law of John S. House, deceased, from the final judgment of the trial court sustaining a demurrer to

their amended petition, upon the ground that it failed to state a cause of action. The petition charges that said John S. House, on January 8, 1910, borrowed from the West Plains Bank \$1,000, and executed his note therefor, secured by a deed of trust on the land described in petition; that R. S. Hogan was president and M. B. Clarke cashier of said bank; that said Hogan was named as trustee in said deed of trust; that on said 8th day of January, 1910, said John S. House sold his equity of redemption in said land to William H. Hooker and Herman Schmachtenberger, and on the same day executed to them a deed for above land; that, on the same date, the purchasers of said equity executed and delivered to said House their promissory note for \$2,650, to cover the purchase price of same, and secured the last-named note by a deed of trust on the land aforesaid, subject to the one executed in behalf of said bank. Defendant Hogan was likewise named as trustee in said second deed of trust. It is averred in petition that the second note given by the purchasers of said equity to said House was by the latter left with the bank aforesaid for collection; that said Hogan, immediately upon the note in said first deed of trust becoming due, advertised and sold the land in controversy, under the first deed of trust, to defendant Clarke for \$1,800, although it was worth \$5,000, and made said Clarke a trustee's deed to said land.

[1] I. It is contended by appellants that the sale made by Hogan as trustee is voidable, without any reference to sections 2829 and 2830, R. S. 1909, for the reason that he was president of said bank when the loan was made by it, and the first deed of trust was taken with Hogan as the trustee therein. It is not averred that either defendant was guilty of actual or constructive fraud. It is not charged that Hogan, in foreclosing the first deed of trust, proceeded in any other manner than that provided for in said instrument. It is not alleged that defendant Clarke bought the land at the sale for the bank, nor that he failed to pay out of his own funds the \$1,800 bid by him for said land. It is alleged in complaint that John S. House, immediately after the execution of the deeds of trust aforesaid, left Howell county, Mo., for the state of California, and died in the latter state, in June, 1911. It is not averred that House was ignorant of the fact that Hogan was president of the bank when the first deed of trust was taken, nor when the second deed of trust was executed, as Hogan was named as trustee in it also.

We are fully justified, on the record before us, in holding that House knew Hogan was president of the West Plains Bank when the first deed of trust was executed, and hence consented that he should act as trustee, regardless of his position as president of said institution. The petition does not aver that any arrangements were made by House,

or any one in his behalf, to pay the \$1,000 note at its maturity. Although the \$2,650 note, mentioned in the second deed of trust, was left with the bank for collection, yet nothing was ever paid thereon. The petition alleges that both Hooker and Schmachtenberger are insolvent and their presence unknown to plaintiffs. Presumably, the land was left in the possession of the purchasers of the equity of redemption when they bought it. Here, then, was the situation: House had consented to Hogan acting as trustee in the first deed of trust. He left the country without paying the bank's note or making any provision for its payment. No part of the \$2,650 note was paid to the bank, and the makers thereof were insolvent. Hogan, as trustee, proceeded in the ordinary and usual course of business, in good faith, so far as the record discloses, and foreclosed the first deed of trust when the note described therein became due, and sold the land for the best price obtainable. These plaintiffs occupy no better position than would House, if he were alive and prosecuting this action. On the facts disclosed by the record, House, if alive, would be estopped from claiming, in a court of conscience, that a sale, regular in form and without fraud, should be set aside, because the trustee, agreed upon by him, was president of the bank which made the loan, and known by him to occupy such position when the loan was made.

The amended petition therefore fails to state a cause of action based upon the charge that Hogan was president of the bank when the loan was made, and foreclosed the first deed of trust as such trustee. The case of *Alfred v. Pleasant*, 175 S. W. 891, where actual fraud was charged, has no application to foregoing facts.

[2] II. The petition charges that the land was bought in by defendant Clarke, who was cashier of said bank at the time; and that a deed was made by the trustee to Clarke conveying to him the land in controversy. It is not averred that Clarke bought the land for the bank, nor that he failed to pay the \$1,800 bid by him, to the trustee, when the latter made him a deed for the land. Having heretofore reached the conclusion that Hogan was acting as trustee, with the full knowledge and consent of House, when foreclosing the first deed of trust, and that the sale could not be set aside on that account, it necessarily follows that Clarke, as an individual, had the legal right to bid on the property at the trustee's sale, and to buy in the same, if he were the highest and best bidder. In other words, as Clarke had nothing to do with the sale, except to bid as any other person, his purchase would furnish no grounds for setting aside the sale under such circumstances. *Briant v. Jackson*, 99 Mo. 585, 13 S. W. 91.

[3] III. But even if it should be contended that the petition intended to charge that, as Clarke was cashier when the loan was

made and the foreclosure sale took place, he bought the property for the bank, we would still be confronted with the proposition that no effort to redeem was ever made as required by the provisions of sections 2829 and 2830, R. S. 1909. Where real estate is bought in by the beneficiary in a deed of trust under a foreclosure sale, it "shall be subject to redemption by the grantor in said deed or his executors, administrators or assigns, at any time within one year from the date of said sale," etc. Section 2829, R. S. 1909.

"No party shall have the benefits of the preceding section until he shall have given security to the satisfaction of the circuit court for the payment of the interest to accrue after the sale, and for all damages and waste that may be occasioned or permitted by the party whose property is sold. In case the circuit court is not in session, such security may be taken by the clerk of said court." Section 2830, R. S. 1909.

It is not claimed that plaintiffs or their ancestor have complied with the provisions of either of above sections. Having given neither notice nor security, and having failed to tender into court the debt, interest, etc., due said bank, as required by above sections, no case is stated in the petition in respect to this matter. *Moss v. King*, 212 Mo. 578, 111 S. W. 589; *Long v. Vending Machine Co.*, 158 Mo. App. loc. cit. 665, 666, 139 S. W. 819.

[4] IV. In view of the facts disclosed by the amended petition, we would not feel justified in reversing the case on the ground that the petition states the land only brought \$1,800 at the sale, when it was alleged to be worth \$5,000. Mere inadequacy of consideration, in a case of this character, unless it is so insignificant as to shock the moral sense, is not sufficient to warrant us in setting aside a foreclosure sale, otherwise regular, and without the semblance of fraud. *Guinan v. Donnell*, 201 Mo. 173, 98 S. W. 478; *Mangold v. Bacon*, 237 Mo. loc. cit. 522, 141 S. W. 650; and cases cited; *Shoe Company v. Wyble*, 261 Mo. loc. cit. 691, 170 S. W. 1128.

[5] V. The fact that John S. House was in poor health, left this state soon after the execution of said deeds of trust, and died in California in June, 1911, imposed no duty upon the bank or its officers to extend the time or wait longer to foreclose said deed of trust. No provision was ever made to meet the indebtedness, nor was any extension of time ever requested. *Vanmeter v. Darrah*, 115 Mo. loc. cit. 157, 22 S. W. 30; *Lipscomb v. Ins. Co.*, 138 Mo. 17, 39 S. W. 465.

VI. We have carefully considered this case in all its bearings. The conclusion reached by the trial court in sustaining the demurrer to the amended petition is fully justified by the record before us, and its judgment is, accordingly, affirmed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All concur.

SCHOFIELD et al. v. HARRISON LAND & MINING CO.

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. APPEAL AND ERROR ⇐882(12)—ESTOPPEL TO ALLEGE ERROR—REQUEST FOR INSTRUCTIONS.

Instructions given at the request of the plaintiffs were binding upon them, whether they correctly declared the law or not.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. ⇐882(12).]

2. APPEAL AND ERROR ⇐1067 — HARMLESS ERROR—INSTRUCTIONS.

In a statutory suit at law to ascertain and adjudge title to land, error, if any, in the refusal of an instruction for plaintiff that the jury in passing upon the defendant's good faith and those through whom it claimed in taking possession of the land, should consider all the facts in the case, including the purposes for which the land was required, the time for which possession was claimed, the nature of the improvements, the extent of the cultivated part, etc., was not reversible, where there was no evidence that defendant and those through whom it claimed did not enter into the possession of the premises in good faith, and where the evidence showed that the chief value of the land consisted in the timber.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ⇐1067; Trial, Cent. Dig. § 475.]

3. ADVERSE POSSESSION ⇐84—"GOOD FAITH"—"LAWFUL POSSESSION."

Good faith in taking possession of and holding land under deeds means honesty, the absence of fraud or deceit; and "lawful possession" means entering upon and holding land and claiming to be the owner, and not as an intruder or trespasser (citing Words and Phrases, vol. 4, p. 3117).

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 488-500; Dec. Dig. ⇐84.

For other definitions, see Words and Phrases, First and Second Series, Good Faith; Lawful Possession.]

4. ADVERSE POSSESSION ⇐84 — COLOR OF TITLE—GOOD FAITH.

Where defendant and its predecessors took possession of the land involved in a statutory suit to ascertain and adjudge title under color of title derived through tax deeds, the question of good faith was immaterial.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 488-500; Dec. Dig. ⇐84.]

5. ADVERSE POSSESSION ⇐13 — ELEMENTS — STATUTE.

Under the 10-year statute of limitations, all that the law requires is that the claimant's possession shall be taken and continued in good faith, and be exclusive, open, and notorious, adverse to the world, and continuous for a period of 10 years or more, prior to the date of suit by the owner of the title to recover the possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67-76; Dec. Dig. ⇐13.

For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

6. APPEAL AND ERROR ⇐1051(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a suit at law to ascertain and adjudge title to land, error, if any, in the admission of evidence as to the good faith of the defendant and its predecessors in taking possession of the

land, was not reversible, when taken in connection with testimony as to the character of the furnace and improvements upon the land, and the fact that witness was simply stating what he thought the facts showed, and that there was no evidence to the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4163; Dec. Dig. ⇐1051(2).]

7. ADVERSE POSSESSION ⇐114(1)—EVIDENCE—GOOD FAITH.

In such case, good faith, if involved, might be shown by direct testimony as well as by inferences from the facts in the case.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683; Dec. Dig. ⇐114(1).]

8. ADVERSE POSSESSION ⇐25 — POSSESSION BY TENANT—EXTENT.

While possession of land may be maintained by a tenant, such possession can extend no further than the terms of the lease or contract by which the tenant holds.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 116-120; Dec. Dig. ⇐25.]

9. ADVERSE POSSESSION ⇐116(7)—INSTRUCTION—EXTENT OF POSSESSION.

In a suit at law under Rev. St. 1909, § 2535, to ascertain and adjudge title to land, an instruction that while possession might be maintained by a tenant it could extend no further than the terms of the lease or contract by which the tenant held was properly refused as misleading, where the evidence showed that defendant's tenants, in addition to having possession of definite tracts of land, were also defendant's agents in caring for the remainder of the lands, and that the land constituted one tract and had always been so treated by all of the parties to the suit.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. ⇐116(7).]

10. ADVERSE POSSESSION ⇐101—POSSESSION OF PART—EFFECT—"TRACT."

The possession of a part of a "tract," which means a contiguous body of land embraced in one deed, with a claim of the whole, and the usual acts of ownership over the entire tract, establishes possession of the whole which will ripen into title under the statute of limitations (Rev. St. 1909, § 1882).

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 575-589; Dec. Dig. ⇐101.

For other definitions, see Words and Phrases First and Second Series, Tract.]

11. ADVERSE POSSESSION ⇐13—THIRTY-YEAR STATUTE.

Under the express provision of Rev. St. 1909, § 1884, a showing that the title had issued from the United States more than 30 years prior to the beginning of the suit, that plaintiff failed to bring his action within 31 years after leaving possession of the land, and that defendant and his predecessors had been in the possession ever since claiming title thereto under color of tax deeds, established title in the defendant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67-76; Dec. Dig. ⇐13.]

Appeal from Circuit Court, Dent County, L. B. Woodside, Judge.

Action by Mary E. Schofield and others against the Harrison Land & Mining Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

See, also, 139 Mo. 467, 41 S. W. 234, 61 Am. St. Rep. 464.

This was a suit at law under section 2535, R. S. Mo. 1909, to ascertain and adjudge title to 240 acres of land situate in Dent county, particularly described in the petition. It was bought October 24, 1911. The trial resulted in a verdict and judgment for the defendant, and the plaintiffs duly appealed the cause to this court. The paper title to the land was conceded to be in the plaintiffs, but they had paid no taxes on the same since before 1879. The defendant interposed the 10 and 30 year statutes of limitations as a defense in the case. The defendant, through mesne conveyances, claimed title to said lands from Joseph A. Schofield, the ancestor of plaintiffs. Said lands were sold by the sheriff under tax judgments against said Schofield; part in the year 1879, and the remainder in 1880.

It is conceded, however, those deeds were void and conveyed no title whatever to the lands; but defendants contend, and their evidence tended to show that when it and those through whom it claims title took possession of the lands under said deeds, they constituted color of title. That shortly after the sale of said lands for taxes, the Nova Scotia Iron Company duly acquired the same from the purchasers at said sales, and some 10,000 additional acres in the same vicinity from other parties, and took possession thereof and constructed a large blast furnace for the manufacture of pig iron, and built a good-sized town thereon, consisting of stores, residences, and barns, for the accommodation of the several hundred people who were employed by the defendants' predecessors, at a cost of more than \$200,000. Said company, in the year 1880, began the manufacture of pig iron at said furnace, and continued to so do for 4 years, and cut the timber from several thousand acres of said land for fuel in the operation of said furnace. That said plant was a losing proposition, and after 4 years it was dismantled and moved to another state. The residences, barns, etc., were left standing for the accommodation of such of the former employes who were left in charge of the property.

The principal stockholders, Harrison, Lackland, and Howard, in the meantime, had loaned to said company, it being a corporation, \$20,420, and in satisfaction of that indebtedness, the company conveyed to them all of its property, including the land in controversy; and later in the year 1890, said stockholders incorporated the defendant company and conveyed all of said land to it by one deed; and that since said time said company has been claiming said lands, paying the taxes thereon and protecting the timber, as will be presently stated. That T. J. Scott, one of the former employes of the Nova Scotia Company, was left in charge of all its lands as agent or superintendent, and as such he leased several small tracts of the land to various persons; one to S. C. Ramsey, a part of the land in controversy. That

was in the year 1883 or 1884. Under the agreement Ramsey was to cultivate and fence as much of the land as he desired, and in consideration thereof he was to preserve and protect the timber on the adjoining lands of the company. In pursuance to that agreement Ramsey inclosed and cultivated 10 or 12 acres of this land, and always recognized the defendant as his landlord, and patrolled the adjoining lands of defendant and protected it from trespassers. That after the dissolution of the Nova Scotia Company E. L. Dye procured some kind of a title to the land in section 11, another part of this land, and took possession of the same and built a box house thereon and operated a sawmill on an adjoining section. Dye claimed under a deed based on what was known as the Butler sale of Scotia lands. Butler obtained a judgment and sold some of the Scotia lands after the conveyance to Harrison, Lackland and Howard. Butler attacked this conveyance, but was unsuccessful. The rights of the parties were determined in this court and the case is reported in *Butler v. Harrison Land & Mining Co.*, 139 Mo. 467, 41 S. W. 234, 61 Am. St. Rep. 464. During the time Dye occupied the lands, he built a small house, cleared out and fenced about 12 acres of the land and cut the pine timber off of the southwest quarter of section 11. In a subsequent action of ejectment against him, the possession was adjudged to the Harrison Land & Mining Company, and Dye vacated the land and the company took possession, through its agent, D. B. Ball, and placed a tenant in the house, and has ever thereafter kept one there.

The Harrison Land & Mining Company employed D. B. Ball as agent to look after all of the lands belonging to this company and to lease the lands to tenants and to protect and care for all of the lands and timber, and prevent trespassing. Mr. Ball has acted in this role for more than 18 years, at the date of this trial, and has gone over the lands periodically about once a month and has prevented practically all trespassing on said lands, except by Dye, who claimed to have bought the land. This was particularly true of the lands in dispute, which were also under the protection of Mr. Ramsey. The land is rough, not worth much without the timber. Only about 40 acres in section 11 is susceptible to cultivation.

The possession of Ramsey was open and notorious, and the possession of the land in section 11, by Cisco, Hulsey, and Sapaugh, under the permission of Ball, was open, notorious, and exclusive.

It was admitted by the plaintiffs in the trial that neither they nor their ancestor had paid any taxes on the lands for 30 years. It was proven they never had been in the possession of the lands, and that since the date of the tax sale the Nova Scotia Iron Company and its successors in title had discharged all of the taxes on the same and

had been claiming the title thereto. After the Nova Scotia Iron Company acquired it, all of the lands which they owned were treated and conveyed as one tract to the three stockholders and from them to the defendant, and the plaintiffs' ancestor and predecessors in title at no time conveyed the lands in any other way.

The evidence for the plaintiffs tended to disprove adverse possession of the defendant for the requisite period of time to ripen into title.

J. D. Gustin and Jackson C. Stanton, both of Kansas City, and R. L. Horsman, of Salem, for appellants. Wm. P. Elmer, of Salem, for respondent.

WOODSON, J. (after stating the facts as above). [1] I. The court, at the request of the plaintiffs, gave a number of instructions which need not be questioned and need not be considered, as they are binding upon them, whether they correctly declare the law or not.

[2] Counsel for plaintiffs requested the court to instruct the jury that in passing upon good faith of the defendant, and those through whom it claims, in taking possession of the land that they should take into consideration all of the facts and circumstances in the case, including the purpose for which the land was required, the length of time for which said possession was claimed, the character and nature of the improvements, if any, the purposes for which the land was used, the extent of the cultivated land compared with the amount of tillable land in the whole tract, etc. This instruction was by the court refused, to which action of the court the plaintiffs duly excepted.

If error, that action of the court was not reversible error, for the reason that there was no evidence introduced at the trial which tended to show that the defendant and those through whom it claims did not enter into the possession of the premises in good faith. While that fact was not expressly admitted, yet the uncontradicted evidence conclusively shows that this land, with many more thousands of acres, were purchased for the purpose of furnishing a site for a large and expensive iron furnace, as well as the necessary fuel for its operation. That in pursuance to that design, the furnace and many buildings—stores and residences—were constructed at a large outlay of money, labor, and materials, and that the same was operated for 4 years in the manufacture of pig iron, and that the timber on several thousand acres of the land was cut therefrom for fuel for said furnace.

It was also practically conceded that the land was not fit for agricultural purposes, save about 40 acres, and that its chief value consisted of the timber growing upon it.

[3] There is nothing in that evidence remotely indicating the lack of good faith on the part of the defendant in taking possession

of and holding said lands under said deeds; but upon the contrary, it strongly tends to show the best of faith upon their part. Good faith means "honesty, without fraud or deceit." Words and Phrases, vol. 4, p. 8117, and "lawful possession" means entering upon and holding land and claiming to be the owner, and not as an intruder or trespasser. *Collins v. Pease*, 146 Mo. 185, 47 S. W. 925; *Abeles v. Pillman*, 261 Mo. 359, 168 S. W. loc. cit. 1184.

[4] Moreover, it is undisputed that the defendant and its predecessors took possession of these lands under color of title derived through the tax deeds before mentioned, and under those facts the question of good faith is immaterial. *Bradley v. West*, 60 Mo. 33; *Wilkerson v. Eilers*, 114 Mo. 245, 21 S. W. 514. This point is decided against the plaintiffs.

[5] II. The plaintiffs also requested the court to instruct the jury:

"That under the claim of color of title to the entire premises, if accompanied by the exercise of the usual acts of ownership over the unoccupied portions, amounts to the possession of the whole tract claimed, yet such possession of the occupied portion must be so strict and definite in character and the acts of ownership so customary and usual, as to amount to a public notice of claim of title. And that if you believe that the land was susceptible of a more strict and definite possession than that claimed by the defendant, or that defendant's acts of ownership, over the unoccupied portion, were so loose, uncertain, and indefinite as to not amount to public notice of its claim of title, your verdict should be for the plaintiffs."

The language of this instruction is highly misleading, and imposes a higher degree of occupancy upon the claimant than the law requires, and the court, for those reasons, properly refused to give it to the jury. Under the 10-year statute of limitations all the law requires is that the possession of the claimant shall be taken and continued in good faith, which must be exclusive, open, and notorious, adverse to the world, and continuous for a period of 10 years or more prior to the date of the institution of the suit, by the owner of the title, to recover the possession from the former.

The vice of this instruction consists in declarations of law regarding the "strict and definite character of the acts of ownership" imposed by the law upon the defendant, amounting to "public notice of its claim of title," and that if the jury find, "that the land sued for in this case was susceptible of a more strict and definite possession than that claimed by the defendant," etc., then they should find for the plaintiffs.

This instruction simply means that before a person can acquire title to real estate by adverse possession, his occupancy thereof or his acts of ownership exercised over it must be as complete or perfect as the character of the land will permit. No such requirement is made by the law, nor have I ever seen a case so holding. Such a possession would be not only impracticable, but so ex-

pensive and arduous that title to lands could never be acquired by adverse possession.

That instruction was properly refused.

[8, 7] III. In connection with the previous question, counsel for plaintiffs complain of the action of the court in permitting Scott to testify regarding the good faith of the defendant and its predecessors in taking possession of the land.

This testimony, if erroneously admitted, did not constitute reversible error, for the reason that it was given in connection with his testimony as to the character of the furnace constructed, the number and character of the stores, buildings, dwellings, and other houses erected in connection therewith, and their cost, about \$200,000, as well as the total number of acres of land purchased in that vicinity, etc.

This testimony, which consisted of a single question and answer, and when read in connection with its context, makes it perfectly apparent he was not trying to give his own opinion as to the good faith of the defendant, and its predecessors in taking possession of his land, but simply stating what he thought the facts stated tended to show in that regard, and as there was no evidence to the contrary, no harm was thereby done the plaintiffs. Besides that, where the question of good faith is involved in a case of this character, that fact may be shown by direct testimony, as well as by inference from the facts and circumstances in the case. Ency. of Evidence, vol. 7, p. 96; Abeles v. Pillman, 261 Mo. 359, 168 S. W. 1181.

[8-10] IV. Plaintiffs' fourth refused instruction told the jury:

"That while possession of land may be maintained by a tenant, such possession can extend no further than the terms of the lease or contract by which the tenant holds."

This instruction correctly announces a correct abstract proposition of law, but it is misleading in this case; first, because the evidence tended to show that the tenants of the defendant, or at least some of them, in addition to having possession of definite tracts of land, were also the agents or superintendents of the defendant in caring for and keeping trespassers off the remainder of its lands; and, second, because the evidence tended to show that the land in dispute constituted one tract, and had always been so treated by all of the parties to this suit. All of it had been embraced in one deed in every conveyance made, except one.

A tract of land is defined to be "a contiguous body of land embraced in one deed." Words and Phrases, vol. 8, p. 7036; Gaines v. Saunders, 87 Mo. loc. cit. 563; Rannels v. Rannels, 52 Mo. 108; Hughes v. Isreal, 73 Mo. 538.

The law is well settled that the possession of a part of a tract of land with a claim of the whole, with the usual acts of ownership over the entire tract, establishes pos-

session of the whole, and such possession will ripen into title under the statute of limitations. Section 1882, R. S. Mo. 1909; Hellemann v. Bennett, 144 Mo. 113, 45 S. W. 1092; Herbst v. Merrifield, 133 Mo. 287, 34 S. W. 571; Stevens v. Martin, 168 Mo. 407, 68 S. W. 347; Brown v. Hartford, 173 Mo. 183, 73 S. W. 140; Thompson v. Stilwell, 253 Mo. 89, 161 S. W. 681.

[11] V. It is finally insisted that the evidence did not make out a case for the defendant under the 30-year statute of limitations. We cannot lend our concurrence to that proposition. The evidence tended to show that neither the plaintiffs nor those under whom they claim title had been in actual possession of the land or had paid any taxes thereon at any time within 30 years prior to the date of the institution of this suit, nor within 1 year thereafter; that the title had issued from the United States more than 30 years prior to the institution of this suit; that the plaintiffs failed to bring their action within the 81 years after leaving the possession of the land; and that the defendant and those through whom it claims have been in the possession ever since, claiming title thereto under color of the tax deeds before mentioned.

This evidence brings the case squarely within the provisions of section 1884, R. S. 1909, known as the 30-year statute of limitations, and as construed by this court in the cases of Abeles v. Pillman, 261 Mo. 359, 168 S. W. 1180; Campbell v. Greer, 200 Mo. 190, 108 S. W. 54.

Finding no reversible error in the record, the judgment of the circuit is affirmed. All concur; BOND, J., in paragraph 5 and result.

KANSAS CITY, C. C. & ST. J. RY. CO. v. COUCH et al. (No. 17615.)

(Supreme Court of Missouri, Division No. 1, June 2, 1916.)

1. EMINENT DOMAIN \S 222(2) — CONDEMNATION PROCEEDINGS—DAMAGES—INSTRUCTION.

In condemnation cases, it is proper for the court to direct the attention of the jury to facts in evidence, which, if proven, may, in their opinion, affect the market value of the land, and to direct them that such evidence is proper for them to consider in that connection.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. \S 563; Dec. Dig. \S 222(2).]

2. EMINENT DOMAIN \S 222(5)—PROCEEDINGS—DAMAGES—INSTRUCTION.

In a railroad's statutory condemnation suit it was error to instruct that in estimating damages the jury would consider the quality, quantity, and value of the land taken, and also the damage and depreciation in value of the remainder of the farm not taken as a right of way by reason of the railroad's running through it, continuing that they would also consider the size and shape of the two tracts into which the farm was divided, the cuts and fills upon the same, the inconvenience in getting water, etc., and any other fact or facts which they believed would

have a tendency to depreciate the value of the farm.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 566; Dec. Dig. ¶222(5).]

3. TRIAL ¶252(1)—INSTRUCTION.

An instruction unsupported by evidence in the record is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 612; Dec. Dig. ¶252(1).]

4. EMINENT DOMAIN ¶222(5)—PROCEEDINGS—DAMAGES—INSTRUCTION.

An instruction requiring the jury to estimate the damage occurring, by reason of a change in the plan on which the commissioners made their report and assessment, between December, 1911, and October, 1912, which could only be done by estimating the amount of damage as the conditions existed at the former period, was erroneous.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 566; Dec. Dig. ¶222(5).]

5. EMINENT DOMAIN ¶222(5)—PROCEEDINGS—DAMAGES—INSTRUCTION.

An instruction requiring the jury to separately estimate as a special injury the difference in conditions between December, 1911, and October, 1912, an interval in which the plan on which the commissioners made their report and assessment was changed, was erroneous.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 566; Dec. Dig. ¶222(5).]

6. EMINENT DOMAIN ¶203(1)—PROCEEDINGS—DAMAGES—MATTER FOR JURY.

The assessment and report of the commissioners were not proper matter for the jury's consideration in assessing damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542; Dec. Dig. ¶203(1).]

7. EMINENT DOMAIN ¶150—DAMAGES—EXCESSIVE VERDICT.

Where the evidence as to the damage from the taking and from injury to the remaining land extended from less than \$500 to more than \$26,000, verdict for \$9,674.34 was not so excessive as to authorize interference by the Supreme Court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 402; Dec. Dig. ¶150.]

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Condemnation suit by the Kansas City, Clay County & St. Joseph Railway Company against Joseph W. Couch and others. From the award of damages to defendants, plaintiff appeals. Reversed, and cause remanded.

Bowersock, Hall & Hook and Beardsley & Beardsley, all of Kansas City, for appellant. Francis M. Wilson, of Kansas City, Charles Lyons, of Lexington, James P. Chinn, of Higginsville, and Carl L. Ristine, of Lexington, for respondents.

BROWN, C. This is a statutory condemnation suit to appropriate land for the construction and operation of plaintiff's railroad. The suit was instituted in Platte County, where the land is situated, and was removed by change of venue to Lafayette County, where it was tried and resulted in the verdict and judgment for \$9,674.34, from which this appeal is taken.

The plaintiff is a railroad corporation organized and incorporated under the general laws of the state of Missouri for the purpose of constructing, maintaining, and op-

erating lines of railroad from Kansas City, St. Joseph and from Kansas City Springs. The usual preliminary surveys were had, and the commissioners' damages in favor of defendants. From this award both parties appeal. Circuit court, the trial resulting as stated.

The land with respect to which the damages were awarded is a stock farm of 480 acres of which consists of quarter sections lying side by side, extending a mile and a half east and west, and the remaining 160 acres consists of the north of two quarter sections lying south of two west quarters first mentioned. Defendants' farm buildings are located at the southeast line of the middle quarter section some little distance east from a public road extending north and south, approximately dividing the middle quarter section and the half quarter south of it into equal parts, and west of the railroad, which enters the farm across the northeast corner of the east of the two 80's, close to the southwest corner of the east quarter section, and runs northwesterly and in a straight line diagonally across the public road, leaving the farm at the north line, and leaving approximately 50 acres of the quarter and 210 acres of the farm east of the right of way, which amounts to 6.38 acres. The land along the right of way is uneven, so that the construction consists mostly of cuts and fills. The deepest cut is 16 feet on one side and 14 feet on the other, while the highest fill or embankment is 26½ feet. The defendants ordinarily feed upon the place about 250 head of cattle each year. The feed lots are east of the railroad and public road, where there is a spring which furnishes an abundance of water for the stock. The cultivated land and the most of the pasture is on the west side of the railroad, where there is a stream which furnishes water part of the year and fails in a dry time. The spring and the stream provide the only surface waters on the farm. The testimony as to the value of the land taken ranged from \$75 to \$200 per acre, while the testimony with reference to the damage to the remainder of the farm covered the latitude lying between nothing and \$40 per acre.

The giving of certain instructions is assigned as error. We will notice these as they require consideration in the opinion. It is also assigned for error that the verdict is so clearly excessive that it ought not to be permitted by this court to stand.

[1, 2] 1. Defendant's seventh instruction, of which the appellant complains, opens with the following proposition:

"The court instructs the jury that, in estimating the damages in controversy, you will take into consideration the quality, quantity, and value of the land taken by the railway company for a right of way, and also the damage and de-

preciation in value of the remainder of the farm of the defendants not taken as such right of way, by reason of said railroad running through it."

This sentence constitutes a distinct and separate proposition concluding with a period, and presents in general terms the principles which should govern the jury. Every element of damage is included in its general terms. It then proceeds to enlighten them as follows:

"You will also consider the size and shape of the two tracts into which the farm is divided by said railroad running through it; the cuts and fills upon the same; the inconvenience in getting to water; the inconvenience in getting from one part of the farm to another on account of the location of said right of way, and any other fact or facts in testimony, which you may believe will have a tendency to depreciate the market value of said farm for the purpose for which it is used or adapted."

In this sentence we have emphasized the word *also*, which always means, in such a connection, "in addition to," or "likewise," to direct attention to the fact that it authorizes damages for the several incidents of what it assumes to be personal inconveniences which will follow the appropriation and use of the right of way, to be added to the damage and depreciation in value of the remainder of defendants' farm by reason of the railroad running through it. But it proceeds in the same sentence to tell them that they will take into consideration any other fact or facts in testimony *which they may believe will have a tendency to depreciate the market value of the farm for the purpose for which it is used or adapted*. The respondent suggests that the adjective member of this latter clause, in addition to being descriptive of the words "any other fact or facts" as appears from its grammatical position, refers back to all that preceded it in the sentence, and directs the attention of the jury to an implied intention to apply the same description to them. Thus the court tells the jury that certain facts have been established, that they are inconveniences and elements of damage, and that they will scan the evidence for other facts of the same kind. The suggested cure is worse than the disease. The court does not stop here, but, after a pause indicated by a period, proceeds:

"You will deduct from these amounts the benefits, if any, peculiar to said tract of land arising from the running of the railway through it."

The best that can be said of this instruction is that the jury might possibly interpret it innocently. Referring to one which contains a part though not all of these objectionable elements this court lately said:

"While a strained construction of the language of an instruction is not a sensible device for administering justice, neither is a loose or illogical construction. As put by Professor Gray: 'A loose vocabulary is the fruitful mother of evils;' and we may add that a loose construction of loose language is the nursing father of many more. Giving the language of the instruction a sensible interpretation, it is plain that the jury were told to consider the cost of building the necessary fences along the road and the damage to the whole tract of land of which

that taken for the road forms a part, and they were told that from the 'sum' of these, together with the value of the land taken, they were to deduct the benefits, if any, peculiar, etc. That meaning is a fair and legitimate one, nay, the only one, shining on the very face of the instruction itself." *Howell v. Jackson County*, 262 Mo. 403, 171 S. W. 342.

While the principle is well established that in these cases it is proper for the court to direct the attention of the jury to facts in evidence which, if proven, may, in their opinion, affect the market value of the land, and to direct them that such evidence is proper for them to consider in that connection, it is nowhere held that such matters as are enumerated in this instruction may be proven as distinct items of damages, or that it is within the province of the judge to determine their existence, their injurious character, or that they affect the market value of the remaining land. This instruction in the form in which it was given constituted reversible error.

[3-6] 2. The giving for respondents of their instruction No. 8 is also assigned for error. It is as follows:

"The court instructs the jury that the question to be determined by you is the market value of the property, as a whole, without the railroad and what will be its market value after the road is built and in operation. And if the jury find that since the assessment of damages in the case by the commissioners and the taking of defendants' land by the railroad company the road has been graded through the same upon plans different from those upon which the said commissioners made their report and assessment and the changes thus made inured to defendants' injury, you will consider the said injury, if any, in estimating the amount of damages to be allowed to defendant for the condemnation and taking of defendant's land."

This instruction in distinct terms tells the jury that any injury to the farm caused by a change in the plan of the work from that upon which the commissioners made their report and assessment will be considered by them as a distinct element of damage. We cannot imagine any ground upon which to justify this direction. The road was constructed at the time of the trial. It was their duty to make their assessment in view of the work as constructed. If it was incomplete, it was their duty to make the assessment in view of the construction which it then appeared from the evidence would be carried out. That they might not be influenced by the action of the commissioners they had no right to know what that action had been. *Railway v. Roberts*, 187 Mo. 309, 86 S. W. 91; *Railroad v. Pfau*, 212 Mo. 398, 111 S. W. 10.

We have carefully examined the record and find that there was no evidence of change of plans, and that the only office the instruction could have performed was to direct the attention of the jury to the testimony of a witness for respondent named Skillman, who testified that the damage to the part of the farm not taken was \$10 per acre. He was recalled on the same day by the respondent

to correct this statement, and thereupon testified that it would be about \$15 per acre. When cross-examined for the evident purpose of eliciting an explanation of this change, he testified that he was one of the commissioners who made the preliminary assessment, and that he put on 50 per cent. more damage now than before, because he then supposed they were going to put a subway under the grade, although "there was no claim at the time one way or the other about it."

The respondents frankly say in their printed argument, in substance, that this legitimate cross-examination to secure an explanation of a change which occurred so promptly in the mind of the witness, and which amounted to more than \$3,000, was their excuse for poisoning the mind of the jury with an intimation that there had been a change of 50 per cent. in the conditions, between the time of the assessment of the commissioners in December, 1911, and the assessment by the jury in October, 1912. The fact that this 50 per cent. was fairly represented in the verdict carries with it its own suggestions.

The instruction was erroneous because (1) there was no evidence in the record to support it; (2) because it required the jury to estimate the damage occurring by reason of a change of plan between December, 1911, and October, 1912, which could only be done by estimating the amount of damage as the conditions existed at the former period; (3) because it required them to separately estimate the difference in conditions between those periods as a special injury; (4) because it directs the attention of the jury to the assessment and report of the commissioners as an element of their own work; (5) because the assessment and report of the commissioners were not proper matter to be considered by the jury, while the instruction amounted to a direction that they should be considered. There are other elements of error in the instruction, but those enumerated are sufficient to explain our conclusion.

[7] 3. The evidence as to the amount of damage resulting from the taking of the right of way and injury to the remaining land covered a wide field, extending from less than \$500 to more than \$28,000. After a careful examination of the evidence, we have come to the conclusion that the amount of the verdict and judgment, while very substantial, is not so excessive as to authorize our interference with the action of the trial court on that ground.

For the reasons stated in the first and second paragraphs, the judgment will be reversed and the cause remanded.

RAILEY, C., concurs.

PER CURLAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

BARRETT v. FOOTE et al. (No. 17976.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. TRUSTS \Leftrightarrow 79—RESULTING TRUST—FURNISHING PURCHASE PRICE.

Where the purchase money for realty is paid by two persons and title taken in the name of one, the land is held by the latter in resulting trust in favor of both purchasers in proportion to the amount paid by each, and such a trust arises by operation of law where the purchase money of realty is paid by one person and the legal title transferred to another.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 111, 112; Dec. Dig. \Leftrightarrow 79.]

2. TRUSTS \Leftrightarrow 77—RESULTING TRUST—FURNISHING PURCHASE PRICE.

In case of a claimed resulting trust arising from the payment of the purchase price of realty and title being taken in the name of another party, the relation of trustee and cestui must result from the facts as they existed at the time of or anterior to the purchase, and cannot be created by subsequent occurrences.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 109; Dec. Dig. \Leftrightarrow 77.]

3. PARTNERSHIP \Leftrightarrow 67—PROPERTY OF PARTNER.

Where a father, partner with his son, realized \$1,600 for his Oklahoma homestead, which he brought to Vernon county, Mo., and deposited in a bank in his own name, the money continued to be his individual property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 95-100; Dec. Dig. \Leftrightarrow 67.]

4. FRAUDULENT CONVEYANCES \Leftrightarrow 57(3)—INSOLVENCY OF DEBTOR.

Where a father, within two months after the maturity of his debt to plaintiff, conveyed to his son all of his real estate and personalty, receiving only \$500, which was borrowed on the land conveyed, and, when judgment was entered upon plaintiff's note, execution was issued and returned unsatisfied, the father was rendered insolvent by the conveyance to his son.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 148; Dec. Dig. \Leftrightarrow 57(3).]

5. FRAUDULENT CONVEYANCES \Leftrightarrow 64(2)—INVALIDITY AS TO EXISTING CREDITOR—MOTIVES.

Where a father's conveyance to his son rendered the father insolvent, and was made without provision for payment of the demand of the father's existing creditor, the son agreeing to support the father for life, borrow \$500 on the land, and turn it over to him, such conveyance was invalid as to such creditor, regardless of the motives actuating the father and son.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 164, 165; Dec. Dig. \Leftrightarrow 64(2).]

6. FRAUDULENT CONVEYANCES \Leftrightarrow 96(2)—HOLDING PROPERTY FOR SUPPORT OF DEBTOR.

A conveyance by father to son, which rendered the father insolvent, of land in which the son owned a half interest, the son agreeing to support the father, result being that after the conveyance he held \$575 of his father's property for future support, was invalid as to an existing creditor of the father.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 298-304, 320-322; Dec. Dig. \Leftrightarrow 96(2).]

7. FRAUDULENT CONVEYANCES ⇨107 — FATHER AND SON.

In dealings between father and son, as between husband and wife, where the rights of creditors are involved, their acts should be closely scrutinized.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 347-350; Dec. Dig. ⇨107.]

8. FRAUDULENT CONVEYANCES ⇨299(13)—INTENT OF DEBTOR—SUFFICIENCY OF EVIDENCE.

In suit to set aside a conveyance of land as fraudulent, evidence held sufficient to show that a defendant executed and delivered a quitclaim deed to the land in controversy to his son for the purpose and with the intent of hindering and delaying plaintiff from the collection of his debt, and with the purpose and intent of placing all his property beyond the reach of plaintiff as his creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 890; Dec. Dig. ⇨299(13).]

9. FRAUDULENT CONVEYANCES ⇨301(3)—KNOWLEDGE OF GRANTEE—SUFFICIENCY OF EVIDENCE.

In suit to set aside a conveyance as fraudulent, evidence held sufficient to show that a defendant, who received a conveyance from his father, knew that his father owed plaintiff, and was desirous of placing his real and personal property beyond reach of seizure by plaintiff.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 906; Dec. Dig. ⇨301(3).]

10. FRAUDULENT CONVEYANCES ⇨301(3)—MOTIVE OF GRANTEE—SUFFICIENCY OF EVIDENCE.

In suit to set aside a conveyance as fraudulent, evidence held sufficient to show that the debtor's son, as grantee, attempted to aid his father in placing the land in controversy beyond plaintiff's creditor's reach, and accepted a quitclaim deed for that purpose.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 906; Dec. Dig. ⇨301(3).]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Suit by M. B. Barrett against F. S. Foote and another. From a judgment for defendants, plaintiff appeals. Cause reversed and remanded, with directions.

On September 7, 1912, plaintiff filed in the circuit court aforesaid a petition in equity against said defendants, and alleged therein that on September 20, 1910, defendant F. S. Foote executed and delivered to him a promissory note for \$310, due December 1, 1911, with interest from maturity at the rate of 8 per cent. per annum; that plaintiff recovered judgment against said defendant on the above note in the circuit court aforesaid on May 15, 1912, for \$347.44; that after the execution and maturity of said note defendant F. S. Foote, on January 26, 1912, conveyed to defendant George Foote by quitclaim deed the W. ½ of the S. E. ¼ of section 24, township 35, range 32, situate in Vernon county, Mo.; that said last-mentioned deed was duly recorded in Vernon county aforesaid; that George Foote is a son of F. S. Foote; that by said conveyance defendant F. S. Foote rendered himself insolvent; that

said conveyance was without consideration, was fraudulent, and made with the intent to hinder and delay plaintiff in the collection of his said debt.

The separate answer of George Foote admits that he is the son of F. S. Foote, and alleges that he is the owner of the land described in petition, and that it is incumbered by a deed of trust securing a certain note for \$500. He denies every other allegation in petition, save that in reference to the conveyance of said land from F. S. Foote to himself. Defendant F. S. Foote filed a separate general denial.

Evidence. It appears from the record that on September 20, 1910, defendant F. S. Foote executed and delivered to plaintiff a promissory note of said date for \$310, due December 1, 1911, as described in petition; that on May 15, 1912, plaintiff recovered judgment against defendant F. S. Foote on above note for \$347.44. It further appears from the evidence that on January 26, 1912, said F. S. Foote, while the record owner of the real estate aforesaid, conveyed the same by quitclaim deed to his son, the codefendant herein, for the expressed consideration of \$3,500. It also appears from the testimony that said F. S. Foote, at the time of the conveyance of the real estate aforesaid, also put in with the land his interest in the stock on said farm and everything else he had. On February 11, 1913, a general execution was issued on the above judgment, directed to the sheriff of Vernon county aforesaid, and on May 12, 1913, said execution was returned unsatisfied, because the sheriff could find no property of defendant F. S. Foote in said county.

Defendants testified that F. S. Foote owed George \$200; that the latter was to go in as part of the consideration George was to pay for the land; that George was the owner of the undivided one-half of said land, and was to pay his father \$1,275 for the remaining half interest; that after the quitclaim deed was made to George the latter borrowed \$500 on said land and turned that over to his father as part payment of the purchase money; that George was to keep his father, furnish him a home, pay his doctor bills, and give him a decent interment. The remaining \$575 of purchase money, it is claimed, was to be settled in above manner. Other facts appear in the record, which will be considered in the opinion to follow.

The trial court, after hearing the evidence, found in favor of defendants, and entered judgment accordingly. Plaintiff in due time filed his motion for a new trial, which was overruled, and the cause duly appealed to this court.

A. E. Elliott, of Nevada, Mo., for appellant.
A. J. King, of Nevada, Mo., for respondents.

RAILEY, C. (after stating the facts as above). In view of the impeaching testimony offered by respondents as to the gener-

reputation of B. N. Gallego for veracity in the community where he lived, we will not consider his testimony in disposing of the case. Leaving out of consideration the impeaching testimony aforesaid, and the oral testimony of George Foote in behalf of defendants, the remainder of the evidence consisted of depositions and other record testimony. We therefore see no reason for referring to the conclusion reached by the trial court on the facts disclosed by this record.

[1, 2] I. What were the respective interests of defendants in the land in controversy when it was bought in December, 1908, and the title thereto taken in the name of defendant F. S. Foote? Where the purchase money for real estate is paid by two individuals, and the title is taken in the name of one, it is held by the latter as a resulting trust in favor of both purchasers in proportion to the amount paid by them respectively. *Baumgartner v. Guessfeld et al.*, 38 Mo. loc. cit. 41; *Miller et al. v. Davis*, 50 Mo. 72; *Hall v. Hall*, 107 Mo. 109, 17 S. W. 11; *Plumb v. Cooper*, 121 Mo. loc. cit. 675, 1 S. W. 678; *Condit v. Maxwell*, 142 Mo. loc. cit. 274, 275, 44 S. W. 467; *Meyer Bros. Lumber Co. v. White*, 165 Mo. loc. cit. 143, 144, 1 S. W. 295; *Wrightsmen v. Rogers*, 239 Mo. loc. cit. 428, 144 S. W. 479. A resulting trust arises by operation of law, where the purchase money of real estate is paid by one person and the legal title is transferred to another. The relation of trustee and beneficiary trust in such cases must result from the facts as they existed at the time, or anterior to, the purchase, and cannot be created by subsequent occurrences. *Kelly Johnson*, 28 Mo. loc. cit. 251, 252; *Richardson v. Champion*, 143 Mo. loc. cit. 544, 45 S. W. 250; *Stevenson v. Haynes*, 220 Mo. loc. cit. 206, 119 S. W. 346; *Shelton v. Harrison*, 2 Mo. App. loc. cit. 418, 167 S. W. 634, and cases cited. It is claimed that a resulting trust was created in favor of George Foote at the time the land in controversy was conveyed to his father in December, 1908, because of the alleged payment by George of \$1,275, or one-half the purchase money due on said land. Keeping in mind the well-established principles of law heretofore referred to, we will proceed to ascertain what part, if any, of the purchase money of the land in controversy, was paid George Foote.

It is claimed by defendants that they were partners in Oklahoma, before coming to Vernon county, Mo., and that they were engaged in raising cattle and horses, and trading, while there. No particulars are stated with reference to this alleged partnership, but for the purposes of the case we will accept their contention as well founded. According to their testimony they were equal partners, and \$950 of their partnership funds went into the land in controversy as part of the consideration of same. Defendant F. S.

Foote owned a homestead near Buffalo, in Harper county, Okl. This homestead was sold by the father for \$1,600, and said money was deposited by F. S. Foote in his own name in the First National Bank of Nevada, Mo., and by him checked out in part payment for the land in controversy. F. S. Foote testified, in regard to said homestead and the proceeds thereof, as follows:

"Q. He [George] didn't have a half interest in your homestead in Oklahoma? A. No, sir; he couldn't hold that. Q. That was all yours? A. Yes, sir. Q. And you took \$1,600 from the sale of the homestead and put it in this land? A. Yes, sir. He helped improve that land and work it, and was to have half of it when the time came."

[3] We find from the evidence that defendant George Foote had no interest in the Oklahoma homestead when it was sold by his father. The \$1,600 realized by defendant F. S. Foote for said homestead, having been brought to Vernon county and deposited in his own name, continued to be his individual property, and as such was used as part payment of the purchase money of the land in controversy. The above conclusion is supported by the previous ruling of this court. *Dixon v. Dixon*, 181 S. W. 84, et seq. The testimony of defendants relating to the alleged partnership in Oklahoma is far from satisfactory, as no details of same are related. As it will not affect the conclusion reached by us, we will dispose of the case, however, on the theory, that defendants were equal partners as to the \$950 paid as part purchase money for the land in controversy. We accordingly find from the evidence that the purchase price of the land involved herein, when paid in December, 1908, was \$2,550. Of this amount the sum of \$2,075 was paid by F. S. Foote, and conceding \$475 (one-half of the \$950) as having been paid by defendant George Foote, their interests in said land should be considered in the above proportion, when the father conveyed to this son the 80 acres of land described in petition, on January 26, 1912.

[4] II. Was defendant F. S. Foote rendered insolvent by the conveyance of all his land and personal property to his son on January 26, 1912?

"The term 'solvency,' in its application to cases like this, implies as well the present ability of the debtor to pay out of his estate all his debts, as also such attitude of his property as that it may be reached and subjected by process of law, without his consent, to the payment of such debts." *Eddy v. Baldwin*, 32 Mo. loc. cit. 374; *Patten v. Casey et al.*, 57 Mo. 118; *State ex rel. v. Koontz*, 83 Mo. loc. cit. 332; *Walsh v. Ketchum*, 84 Mo. 427; *Jordan v. Buschmeyer*, 97 Mo. 94, 10 S. W. 616; *Patton v. Bragg*, 113 Mo. 601, 20 S. W. 1059, 35 Am. St. Rep. 730; *Snyder v. Free*, 114 Mo. loc. cit. 369, 21 S. W. 847; *Mitchell v. Bradstreet Co.*, 116 Mo. loc. cit. 240, 22 S. W. 358, 20 L. R. A. 138, 38 Am. St. Rep. 592; *Hoffman v. Nolte*, 127 Mo. loc. cit. 137, 29 S. W. 1006; *Scharff v. McLaugh*, 205 Mo. loc. cit. 364, 365, 103 S. W. 550; *Lemp Brewing Co. v. Correnti et ux.*, 177 S. W. 612.

It would be hard to conceive of a plainer case of insolvency. The father conveyed to the son all of his real estate and personal property within two months after the maturity of plaintiff's debt. He only received \$500 cash, in return from his son for all of said property, and that, too, was borrowed on the land he had conveyed. The above sum was deposited in the pocket of the father, so that it could not be reached by his creditor. When judgment was entered upon plaintiff's note, which had been executed before the conveyance aforesaid, an execution was issued and returned unsatisfied, because no property could be found belonging to F. S. Foote. We therefore hold, without the slightest hesitation, that defendant F. S. Foote, was rendered insolvent, if the conveyance aforesaid to his son George is permitted to stand.

[5] III. Defendant F. S. Foote conveyed to his son the entire eighty acres in controversy and all of his personal property. We have heretofore pointed out that the purchase money of the father which went into the above land was \$2,075, while the son's interest therein was \$475. According to the testimony of defendants, the son was to cancel his alleged indebtedness of \$200 against his father, was to borrow on the land \$500 and turn that over to the latter, and was to keep his father the rest of his natural life, give him a home, pay his doctor bills, and give him a decent burial. Deducting the above \$700 from the value of the father's interest in the land as above indicated, it leaves \$1,375 of the father's property in the hands of the son.

The father was a single man during all the times mentioned, and no one is dependent upon him for support. The property in his hands was not exempt from execution. The conveyance was invalid as to plaintiff, an existing creditor, regardless of the motives which actuated the father and son in making said deal, as no provision was made for the payment of plaintiff's demand. *Walter v. Null*, 233 Mo. 104, 134 S. W. 993; *Bank of Versailles v. Guthrey*, 127 Mo. 189, 29 S. W. 1004, 48 Am. St. Rep. 621; *Kegan v. Haslett*, 128 Mo. App. 286, 107 S. W. 17; *Massey v. McCoy*, 79 Mo. App. 169; *Wait on Fraudulent Conveyances*, § 10.

[6] IV. Even if the theory of defendants be adopted, to the effect that the son had a half interest in the land, and that his father's interest therein was only \$1,275, it would still be of no benefit to defendants, as the son would still hold \$575 of his father's property for future support, etc. Under the authorities heretofore cited, the conveyance would be invalid by reason of the foregoing.

[7] V. In dealings between father and son, as between husband and wife, where the rights of creditors are involved, their acts should be closely scrutinized. *Bank v. Fry*, 216 Mo. loc. cit. 45, 115 S. W. 439; *Cole v. Cole*, 231 Mo. 236, 132 S. W. 734; *Ice & Cold*

Storage Co. v. Kuhlmann, 238 Mo. loc. cit. 697, 698, 142 S. W. 258. On September 20, 1910, defendant F. S. Foote, when he executed the note mentioned in petition to plaintiff, was a single man, with no one dependent upon him for support, and with none of his property exempt from execution. He was the record owner of the land in controversy, together with some personal property, and so far as the evidence discloses was not indebted to any one, except possibly to his son, until he executed said note to plaintiff. The latter's debt became due December 1, 1911, and demand of payment was made by the bank upon the father. In less than two months thereafter the father conveyed all of his land and all of his property to his son. We are not informed as to the particulars which made up the alleged indebtedness from the father to the son of the \$200 taken into account as part of said deal. According to the theory of defendants, the father conveyed to the son his interest in land worth \$2,075, together with his interest in the personal property upon said farm, for the alleged consideration heretofore mentioned.

It is manifest to us from the record that F. S. Foote, when called upon to pay this security debt to plaintiff, made up his mind not to do so, and before judgment could be obtained by plaintiff concluded to put his property beyond the reach of his creditor, by turning it over to his son, with whom he expected to reside on this land, after his return from the East. George Foote testified in respect to plaintiff's note as follows:

"Q. Did you know Mr. Van Arsdale? A. Yes, sir. Q. Did you know your father had gone on this note with Mr. Van Arsdale? A. No, sir; I heard of it; I didn't know it. Q. Who told you about it? A. Well, I heard father and him talking about it. Q. Your father and Van Arsdale talked about him going on this note with Van Arsdale? A. Yes, sir."

George Foote further testified:

"Q. At the time this deed was made to you, do you know whether the note was due? A. No, sir. Q. You don't know anything about it? A. No, sir. Q. But you knew your father had signed this note? A. Yes, sir; that was hearsay. Q. Did you and your father talk this over? A. He wanted to sell, and I told him what I was willing to do with him."

[8-10] We are satisfied from the record before us that defendant F. S. Foote executed and delivered the quitclaim deed to the land in controversy to his son George for the purpose and with the intent of hindering and delaying plaintiff in the collection of his debt, and with the purpose and intent of placing all of his property beyond the reach of plaintiff as his creditor. We are equally as well satisfied, from the facts disclosed in the record, that defendant George Foote knew his father owed the plaintiff this security debt and was desirous of placing his real and personal property where it could not be seized to satisfy plaintiff's demand. When all the facts and dealings between father and son are considered, we cannot escape the con-

viction that George attempted to aid his father in placing the land in controversy beyond the reach of plaintiff, and accepted the quitclaim deed aforesaid for that purpose. He acquired his father's interest in said land, worth \$2,075, for \$700 and future support of his father. The fictitious consideration of \$3,500 was placed in the deed, when George says it was worth \$2,550. The most important part of the whole agreement between the father and son, relating to the father's future support, was omitted from the deed.

On the record as it now stands, the defendants have accomplished their purpose. They are living together on the farm, and the land is still in the family. The plaintiff did not levy upon and buy in said land, as he could have done, but is pursuing the course, commended by this court, of having the land in the hands of the son subjected to the payment of his demand. *Ice & Cold Storage Co. v. Kuhlmann*, 238 Mo. loc. cit. 704, 142 S. W. 253; *Welch v. Mann*, 193 Mo. loc. cit. 326, 92 S. W. 98; *Lionberger v. Baker*, 88 Mo. loc. cit. 456. Considering the case from any viewpoint, the conveyance from father to son was a fraud upon the rights of plaintiff as an existing creditor, and cannot be sustained.

As there is no attack made upon the \$500 incumbrance, the cause is reversed and remanded, with directions to the trial court to ascertain the amount of principal and interest due plaintiff on the judgment described in petition, to ascertain the amount of unpaid costs in both cases, and to enter a decree therefor in this cause, as a special lien on the land aforesaid, subject to said \$500 incumbrance, and to issue a special execution enforcing said decree.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of BAILEY, C., is adopted as the opinion of the court. All concur.

ELKS INVESTMENT CO. v. JONES et al. (No. 17370.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916.)

1. COURTS §231(6) — APPELLATE JURISDICTION — MISSOURI — CONSTITUTIONAL QUESTIONS.

The jurisdiction of the Supreme Court to review a cause because a constitutional question is involved does not depend upon the validity of the claim of constitutional right set up therein; it being sufficient if there is substantial dispute.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 646, 658; Dec. Dig. §231(6).]

2. COMMON LAW §12 — ADOPTION — STATE CONSTITUTION.

When Missouri came into the Union under its first Constitution, it brought with it the common law which it had adopted as a territory in 1818.

[Ed. Note.—For other cases, see *Common Law*, Cent. Dig. § 10; Dec. Dig. §12.]

3. JURY §10—RIGHT TO JURY TRIAL—CONSTITUTIONAL PROVISIONS.

The right to jury trial protected by Const. 1820, art. 12, § 8, remains now as it was established and guaranteed in 1820.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 15, 16, 27½; Dec. Dig. §10.]

4. JURY §10—RIGHT TO JURY TRIAL—CONSTITUTIONAL PROVISIONS—CHANGE IN PROCEDURE.

No legislative change in procedure can impair the right to jury trial guaranteed by Const. 1820, art. 12, § 8.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 15, 16, 27½; Dec. Dig. §10.]

5. REFERENCE §8(1)—CONFUSED OR COMPLEX ACCOUNTS.

Where a case arises where the accounts are so numerous and confused that it would be impossible for a jury to comprehend and intelligently decide it unless the issues are simplified by preliminary investigation, it is within the power of the trial court to direct a preliminary investigation and direct a suitable person as officer of the court to call the parties before him, as a tentative tribunal, to simplify the items and issues in order that the case may be intelligently presented to the jury.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 18, 14, 20; Dec. Dig. §8(1).]

6. REFERENCE §8(3)—EXAMINATION OF ACCOUNTS — SUIT ON BUILDING CONTRACTS — "LONG ACCOUNT."

The pleadings in an action upon building contractor's bond, although the petition stated a number of breaches of contract and defendant sureties answered alleging a number of unauthorized changes in the contract, and the principal defendants counterclaimed, alleging various items of damage, held not to show a "long account" within Rev. St. 1909, § 1996, authorizing compulsory reference for the examination of a "long account," since the questions involved were merely legal ones, involving liability for unliquidated damages for breach of an entire contract, expressing only an entire consideration.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 16, 17; Dec. Dig. §8(3).]

For other definitions, see *Words and Phrases*, First and Second Series, Long Account.]

Appeal from Circuit Court, Barry County; Carr McNatt, Judge.

Action by the Elks Investment Company against L. B. Jones and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

This is a suit by the owner upon a bond to secure the performance of a contract dated August 11, 1909, for the construction of a clubhouse for the plaintiff. The defendants are L. B. Jones and W. A. Bridges, the contractors and principals in the bond, and J. U. Vermillion, Leroy Jeffries, and W. O. Hathaway, their sureties in the bond. The petition was filed February 13, 1911, and states the execution of the contract to construct the clubhouse in Monett, Mo., furnishing at their own cost and expense the material therefor and doing all the work required by the plans and specifications, and to complete the building in accordance therewith by the 11th of December, 1909; if the completion was unreasonably delayed the damages therefor were to be deducted from

the contract price, which was fixed at \$9,300. That the bond sued on, which was attached to the contract and signed by all the defendants as such principals and sureties, was for \$4,650, and "conditioned that in the event that said L. B. Jones and W. A. Bridges should well and truly perform said foregoing contract and should build and erect said clubhouse in every particular according to said contract and plans and specifications and should hold plaintiff, Elks Investment Company, harmless from all damages, actions, or causes of actions by reason of any and all materialmen or mechanic's liens, then said obligations should be void"; that plaintiff had fully complied with the contract on his part, but that the contractor had failed, neglected, and refused to complete the building according to the plans and specifications by the 11th day of December, 1909, and that plaintiff had been deprived of its use and occupancy up to — day of February, 1911, to plaintiff's damage in the sum of \$1,000.

It also alleged as a breach of the bond: That the defendants had failed to hold the plaintiff harmless from liens for material and labor on account of which judgments had been obtained against the building as follows:

"M. L. Coleman Lumber Company, materialman for lumber in the sum of \$3,872.22; Davis & Chappell Hardware Co., for material in the sum of \$253.95; George W. Baldrige, for material and labor in the sum of \$926; C. L. Williams, for material and labor in the sum of \$719.24; Fred Reinsmith, for labor and material in the sum of 264.52; J. H. Otterman, for material in the sum of \$133.90; D. J. Randolph, for labor in the sum of \$173.85; W. H. Floreth, for material in the sum of \$45.90. That the above-mentioned judgments were by said court adjudged against said building and premises of plaintiff as will more fully appear by the records of said court, to plaintiff's damage in the total sum of \$6,389.64."

That plaintiff was compelled to pay attorneys' fees in said suits amounting to \$50, all of which plaintiff had been forced to and did pay to save the building from sale.

The petition proceeded as follows:

"Plaintiff states that for another breach of said bond the said defendants L. B. Jones and W. A. Bridges have failed, neglected, and refused to complete said building according to said contract and plans and specifications in this, to wit: To fix and clean and oil the hearth of the mantel on the first floor; place and fit floor plates around the risers and fit and place floor moulds to the plates; repaint plastering in basement; give smoke pipe a coat of graphite, or black paint; close up bottom of flue to toilet room; replace broken stair window on the first landing to second floor, and nail fourth tread from said landing; level up upper landing to nosing; decorate auditorium so that it would be of same color, and to clean off the floor and finish dressing and sand paper same; paint galvanized ridging, provide sash lock for balconies, and box head windows; fix floor where hole has been cut in same for risers in auditorium under radiator; to place transom on second story where it was dropped; repair porch where chimney passes through roof; make ladder to scuttle on second floor; and to furnish plaintiff with written

guaranty of heating apparatus—all to plaintiff's further damage in the sum of \$200.

"Plaintiff further states that it has paid to the defendants on said contract price as aforesaid the sum of \$5,485, and that after allowing said defendants Jones & Bridges for all work and labor performed on said building, plaintiff would be indebted to said defendants, had the building been all completed according to said contract, the sum of \$3,975.50, which said amount has been by plaintiff fully paid out by it to the above-named materialmen and mechanics pro rata, together with the additional sum of \$2,415.15, which plaintiffs were forced to pay in settlement of the total sum of \$6,389.64 aforesaid, the established liens against said property, in order to prevent said materialmen and mechanics aforesaid from selling said property aforesaid under execution judgments aforesaid."

Judgment was asked for the penalty and damages to be assessed at \$3,665.14.

Jones & Bridges answered separately that the contract provided that the plaintiff should pay 75 per cent. of the cost of all labor and material in the building as the work progressed upon estimates to be furnished by the superintendent of the building, which payments it failed and refused to make; that it also provided that defendants should complete the building by December 11, 1909, unless prevented by conditions and circumstances over which the parties had no control; that the material ordered could not be obtained; that plaintiff failed to clear the lot on which the building was to be erected for some months after the date of the contract by which the contractors were without their fault and by fault of plaintiff prevented from constructing and completing the said building until February, 1911; and that plaintiff is not entitled to recover on account of the mechanics' liens for the reason that said liens were caused by the failure of plaintiff to pay for the labor and material in the course of construction of said building as provided in the contract.

The sureties filed an amended answer charging that the contract provided that the plaintiff should not make any alteration or changes in the plans and specifications except in manner and form stated in the answer, and that plaintiff should pay 75 per cent. of the cost of labor and material based on estimates made by the superintendent, and proceeded as follows:

"Defendants say that plaintiff, in violation of its said contract, made various changes, alterations, and departures from the plans and specifications for the erection of said building without the knowledge or consent of these defendants, as follows: The foundation of said building was raised 18 inches above grade line, causing the use of about 600 cubic feet of stone more than was required by the original contract, and added 90 square feet of lattice work; two concrete steps at front entrance of building, 12 feet long, and two wooden steps at south entrance of building, 6 feet long, all of said steps being 12 inches wide; about 300 square yards of walls of basement of said building were white-coated and three 2x12x26 double joints were placed over partitions; 172 feet of lumber was put in as truss work in wall under plate and over partitions and sliding doors, and a wooden beam and ironing were placed over attic scuttle; an extra alabas-

time coat was placed on inner walls and ceiling of entire story of said building; 90 square feet of painting on lattice work two coats; extra switch box and switch behind the rolling partitions, and resetting of partitions on the south side of stage which required material alterations in original rolling partition and caused contractors to have to send to factory and have rolling partitions shortened; changing sewer pipe after same had been laid and covered as provided in original plans by having it taken up, lowered, and extended 20 feet north under building, and on to a manhole; placing two iron beams and rings in ceiling of lodge room, removing and resetting one of said rings and beams to another point in said ceiling; changing pine flooring in said lodge room to clear maple, about 3,000 feet, scraping and sand papering same; two extra switches in the wiring of said building; painting of the interior woodwork throughout the entire building, changed from a stain to hard oil finish.

"Defendants state that after the execution of said bond and contract, plaintiff and said contractors, Jones & Bridges, by their certain instrument in writing, agreed to and did adopt the following changes in the plans of erecting said building, to wit: Area coping changed from Carthage stone to cement; I-beams in billiard room to be left exposed, omitting the wire, lath, and plastering on same; the gas pipe columns in basement changed to 8 by 8 surfaced; the fire escape changed to ladder fire escape in place of stairs, as shown on drawings; the outside finish changed from white pine to Louisiana cypress; omit lining of sliding door pockets; all sash to be 1 1/2 inches thick, instead of 1 3/4 as specified; omit dipping and staining of shingles; the interior of exterior walls of basement to have the furring and lath and plaster omitted and given a half coat of Portland cement, the same as specified for the top of cement floor—this to extend from floor to ceiling and where plastering is specified only.

"That said changes and alterations in the plans of said building, last mentioned, were material variations from the original contract price of said building, and plaintiff and said contractor did not agree in writing upon the amount of increase or deduction from the original contract price that said changes would cause, as provided in said contract that by reason of all of said changes and alterations as herein stated, the cost of said building was increased in the sum of \$1,400 above the original contract price; that plaintiff gave said contractors an extension of time in which to complete said building, on a verbal order only, in direct violation of the rights of these defendants under said contract; that plaintiff did not pay 75 per cent. of the labor and material placed in said building as the work progressed, based on estimates made by the superintendent of the building, as provided in said contract.

"Defendants say that the alterations, changes, and departures by plaintiff from the contract, plans, and specifications herein mentioned were material alterations in the contract into which these defendants entered with plaintiff; that said changes were made by plaintiff without the knowledge or consent of these defendants, and in violation of the rights of defendants under said contract; that by reason of the changes, alterations, and departures made by plaintiff, in the plans of said building as aforesaid, these defendants are released and discharged from any and all liability on the bond and contract sued on."

To these answers plaintiff replied.

When the pleadings were all settled the plaintiff moved to refer the cause upon the ground:

"That the amount in controversy will necessitate the computing of several different and

difficult items, and the examination of a long account and the study of a large and complicated volume of specifications, covering the entire contract entered into by the plaintiff and the defendant for the construction of the large, two-story, commodious building; also the examination and study of large and extensive blueprint plans, which is made a part of the contract between the parties hereto; which examinations of said specifications, plans, and items of construction and expenditures, etc., will take some time to investigate, and by reasons of the complications aforesaid, a jury would be unable to retain all the complicated matters, and render a verdict thereon that would be fair and just to the litigants herein as well as to the jurymen, who might try the said cause."

This motion was sustained, and the court appointed Mr. John Sturgis, referee, to all of which the defendants excepted and filed their bill of exceptions. They then filed their motion to set aside the order of referee on the following grounds:

"First. Because the subject-matter of this suit, under the issues made by the pleadings, is not a matter of reference as provided by statute.

"Second. The order of the court sustaining said motion to appoint a referee deprives defendants of their right of trial by jury, as guaranteed them under article 2, section 28, of the Constitution of the state of Missouri.

"Third. Because the action of the court in sustaining said motion to appoint a referee herein deprives these defendants of due process of law as provided in section 32, article 2, of the Constitution of the state of Missouri, in that it might deprive these defendants of their property without having their rights therein determined according to the methods allowed them under due course of law.

"Fourth. Because the court erred, as under the statute, it has not authority to appoint a referee, as this action is simply a suit on a building contractor's bond.

"Fifth. Because the issues joined by the pleadings show on their face that it is not a proper cause to send to a referee as provided by statute law in this state."

This motion was overruled by the court, and defendants duly excepted, including said exceptions in their term bill.

Thereupon the referee proceeded to hear the cause upon all the issues of law and fact and made his report recommending judgment on the bond against the defendants and the assessment of the damages in the sum of \$2,750.53. Exceptions were duly filed to the report, which was overruled by the court, to which the defendants duly excepted, and the court entered judgment for said amount against all the defendants, from which this appeal is taken.

J. S. Davis, of Cassville, and J. E. Sater, of Monett, for appellants. D. H. Kemp, of Monett, and I. V. McPherson, of Aurora, for respondent.

BROWN, C. (after stating the facts as above). [1] 1. The amount involved in the issues in this case, upon any theory applicable to the construction of the pleadings, being less than that necessary to sustain the jurisdiction of this court, it must stand, if at all, upon the ground that we are called upon to construe the provision of the state Con-

stitution (section 28, art. 2) declaring that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate." A trial by jury was demanded on constitutional grounds, and the demand was pressed throughout the case. Although we are called upon to consider, in the light of the constitutional guaranty we have quoted, whether section 1996 of the Revised Statutes of 1909, authorizing the trial court to refer the cause for the trial of the whole issue, the constitutional question raised in the record goes deeper than the mere construction of this section of the statute. The appellant, at the trial, asked upon constitutional grounds that he be given a jury, which the court refused. The question was thus put in the case. The statute authorizing compulsory references "to hear and decide the whole issue" had no more connection with it than if the court had put its denial upon the broad ground that the issue was in equity, and therefore one in which the right of trial by jury had never existed. It was only after holding that the Constitution did not guaranty to the appellant the right of trial by jury of any of the issues in that particular case that it was called upon to inquire whether this statute authorized him to refer it.

The jurisdiction does not depend upon the validity of the claim set up under the Constitution. It is enough if it involves a clear and substantial dispute or controversy. Our determination of its validity is the exercise of our jurisdiction. *Dorrance v. Dorrance*, 242 Mo. 625, loc. cit. 644 et seq., 148 S. W. 94. We have no doubt of our jurisdiction.

[2-4] 2. When Missouri came into the Union of the states under its first Constitution, it brought with it the common law which it had adopted as a territory in 1816. The schedule provided (section 2) that all laws then in force in the territory of Missouri not repugnant to that Constitution should remain in force until they should expire by their own limitations, or be altered or repealed by the General Assembly. It is thus that the foundation was laid upon which section 8 of article 12 was built, and incorporated in its Bill of Rights. It declared "that the right of trial by jury shall remain inviolate." The word "remain" is significant of the common-law foundation upon which this declaration rested, and the same constitutional guaranty has existed during every instant of the existence of the state up to the present day, so that there has been no opportunity to give it new meaning, by legislative action, as to the character of the cases to which it applies. It remains now as it was established and guaranteed in 1820. There is no other point of time on which we can put our finger as the beginning of this right. No legislative change in procedure can impair it. It still means that all the substantial incidents and consequences that pertained to the right of trial by jury are be-

yond the reach of hostile legislation, and are preserved as they existed at common law. *State ex rel. v. Withrow*, 133 Mo. 500, 519, 34 S. W. 245, 36 S. W. 43; *Lee v. Conran*, 213 Mo. 404, 111 S. W. 1151; *Minium v. Solel*, 183 S. W. 1037, not yet officially published.

[5] At the time the state was admitted, and up to 1835, there was no statute authorizing the compulsory reference of any issue in actions at law. Sometimes, however, a case arises "where the accounts are so numerous and confused that it would be impossible for a jury to comprehend and intelligently decide it, by reason of the complexity and diversity of the issues and items, unless they are simplified by a preliminary investigation." Under such conditions it is within the power of the trial court "to direct a preliminary investigation in a proper case, and to designate a suitable person as an officer of the court to call the parties before him, as a tentative tribunal, to simplify the items and the issues in order that the case may be intelligently presented to a jury." *Fenno v. Primrose*, 119 Fed. 801, 803, 56 C. C. A. 313. The person so appointed by the court was usually called an auditor and so far from his office being intended to usurp the constitutional function of the jury it was to aid them by simplifying the process by which they were to arrive at the questions of fact for their determination. The utility of employing an accountant for the examination of books and vouchers and the stating of accounts was appreciated and the method adopted as a part of the common-law procedure, and in most jurisdictions, as in Missouri, its limits have been defined by statutes. *Whitwell et al. v. Willard*, 1 Metc. 216, affords an excellent illustration of judicial interpretation of one of these statutes somewhat similar to our own. There was a reference by the trial court under a statute of Massachusetts providing:

"That whenever a cause is at issue, and it shall appear that the trial will require an investigation of accounts, or an examination of vouchers by the jury, the court may appoint one or more auditors to hear the parties, and examine their vouchers and evidence, and state the accounts, and make report thereof to the court."

The suit was brought against a sheriff for the alleged nonfeasance of one of his deputies, alleging that a process had been put in his hands with directions to attach all the property of one Brigham, consisting of furniture and supplies in a hotel. They alleged that on account of his negligence and improper conduct of the sale and failure to attach numerous items of wines, liquors, stores, furniture, and other personal property in the hotel, a large amount had been lost. The plaintiff objected to the appointment of auditors under the statute quoted and appealed on that ground to the Supreme Judicial Court, which, in holding that the reference was improperly made, said:

"The plaintiffs seek to maintain this action mainly for the negligence of the deputy, in not attaching a great number of articles of furniture, provisions, wines, and the like, being the furniture and stock of a large hotel. These articles are so numerous that a list of them would perhaps fill several sheets of paper, and in this respect such a specification would bear some resemblance to an account; but it would be so in its appearance only, and not in its nature or character, taking the term 'account' as used in this statute. The question before the jury must be, in determining whether the deputy was guilty of the nonfeasance and tort complained of in regard to each separate item: Was it in that house at the time? Was it the property of Brigham, or of some lodger or guest, or other person? Was it known to the deputy, or could it be discovered by reasonable inquiry and diligent search, or was it shown to him by the plaintiffs or their agent; what was its value? etc. It involves no question of debtor and creditor, no examination of book accounts or other vouchers, no relation in which one party is accountant to the other, or in which any question of accounts can come collaterally in issue. It charges a series of torts, each of which is to be tried and proved, upon competent evidence, in the same manner as if it stood alone; and it does not alter the character of the trial, or the mode of conducting it, or the nature of the proof by which the issue is to be maintained on either side, that it involves a great number of torts, enumerated and stated upon paper, instead of a single instance."

[8] The only provision of our section 1996 upon which the respondent seeks, or could intelligently seek, to sustain this reference, is as follows:

"First, where the trial of an issue of fact shall require the examination of a long account on either side, in which case the referees may be directed by the court to hear and decide the whole issue, or to report upon any specific question of fact involved therein."

This provision and that of the Massachusetts statute we have just quoted have the feature in common that they apply to the examination of accounts, but differ in the respect that ours only applies to "long" accounts. While the word "account" may have a variety of meanings and may represent any liability consisting of a series of charges, or charges or credits, growing out of mutual business transactions between the parties, as a bank account or an account for goods sold, it has not been held, so far as our information extends, to include a liability for unliquidated damages resulting from the breach of an entire contract, expressing only an entire consideration.

We have here a suit for such damages arising from the breach of such a contract. The petition contains a list of 11 particulars, in which it alleges there was a failure on the part of the contractor to perform the work and furnish the material called for, fixing the damages in the gross sum of \$200. The only other breach consists of the failure of the contractors to discharge 8 liens against the building amounting to \$6,389.64, where were matters of record in the circuit court in which this suit was pending, and about which there was no controversy. Nor was there any controversy over the gross amount which had been paid to the contractor. So far as the

petition disclosed, there was no account to be examined. On the other hand it raises 11 distinct questions of fact to be tried by the jury relating to 11 distinct alleged deficiencies in the work going to make up the gross sum claimed. The answer of the three sureties is equally devoid of any feature pertaining to an accounting and is equally pregnant with issues peculiarly within the province of a jury. It is founded solely upon the charge that various changes and additions were made to the building in question in violation of the terms of the contract and without the consent of the sureties, by all of which the cost of the building was increased in the sum of \$1,400, by which the identity of the contract was destroyed and defendant sureties discharged from liability upon the bond. No value is fixed upon these several changes, nor is their value of the gist of the defense, but each of them involved a question or questions for the consideration of a jury, which the defendant sureties had the right to have submitted to a jury for determination.

The defendant contractors in their answer pleaded by way of counterclaim that the plaintiff had ordered and they had done extra work consisting of the raising of the foundation 18 inches at a cost of \$400, and had done numerous other items of extra work at plaintiff's instance which were lumped without itemizing their value at \$1,000, and ask judgment for \$1,400. They also pleaded that the damages claimed by plaintiff resulted from its failure to make the payments for labor and material according to the terms of the contract and its delay in wrecking and moving the old buildings from the site in time to permit the work to proceed as contemplated in the contract.

We do not think that there was anything in these pleadings or in any of them that suggested the existence of a long account or any other account for examination in connection with the trial of the issues.

This cause comes well within the matters at issue in the late case of *Reed v. Young*, 248 Mo. 606, 154 S. W. 766, where the cause was referred on the ground that a counterclaim in an action by an architect for services rendered the owner in planning and superintending the construction of a building, consisted of 28 items of damage due to plaintiff's incompetence, negligence, unskillfulness, and fraud in his work, each separately stated in the answer and separately itemized as to damage, and amounting to the gross sum of \$10,535.61, was a long account within the meaning of section 1996.

In reversing the cause this court, after citing numerous authorities, said:

"The terms 'examining a long account' are used by the statute in the sense in which they are ordinarily understood, and do not imply either an account stated or a bill of particulars, but refer to a series of charges made at various times covering transactions between the parties, or to an account kept by one party or the other, for which redress might be had

in actions ex contractu. The statute did not intend that actions sounding in tort, which juries are peculiarly adapted to try (R. S. 1909, § 1968), should be sent to a referee against the consent of the litigants. Such was not its construction prior to the adoption of the present Constitution (Martin v. Hall, 26 Mo. loc. cit. 389), and to give it that construction now would violate the constitutional guaranty that the right of trial by jury should remain inviolate as heretofore enjoyed. Constitution, article 2, § 28."

The judgment in this case is reversed, and the cause remanded to the circuit court for Barry county for further proceedings.

RAILEY, C., concurs.

PBR CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the Court. All concur.

SHIMMIN v. C. & S. MINING CO.
(No. 1729.)

(Springfield Court of Appeals. Missouri. June 17, 1916.)

1. MASTER AND SERVANT §286(19)—ACTION FOR INJURY — QUESTION FOR JURY — SAFE PLACE TO WORK.

In an action for injury from an accumulation of ice falling from near the top of a mine shaft, held on the evidence that whether it was negligent for defendant to defer removing the apparently dangerous ice, when the only excuse shown was that to stop long enough to do that would delay other work for a short time, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1026; Dec. Dig. § 286(19).]

2. MASTER AND SERVANT §258(17) — ACTION FOR INJURY — PETITION — KNOWLEDGE OF DANGEROUS CONDITION.

In a servant's action for injury, defendant's actual or constructive knowledge of the defect should be alleged and shown to have existed for a sufficient length of time to permit a removal in the use of reasonable care and diligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 832; Dec. Dig. § 258(17).]

3. PLEADING §433(8)—PETITION—SUFFICIENCY AFTER VERDICT.

Under Rev. St. 1909, § 2119, providing that a verdict shall not be in any way affected by reason of the want of any allegation or averment the omission of which would have been ground for demurrer, or for omitting any allegation without proof of which the triers of the issue ought not to have given the verdict, the failure of the petition in a servant's action for injury to allege that defendant knew of the dangerous condition for a sufficient length of time before the accident to have removed it by the exercise of ordinary care, in the absence of a demurrer, and in view of the evidence as to such knowledge and the instruction thereon, was sufficient after verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1462, 1469-1471, 1473, 1476; Dec. Dig. § 433(8); Replevin, Cent. Dig. § 209.]

4. DAMAGES §216(8)—LOSS OF TIME—EVIDENCE—INSTRUCTION.

In a servant's action for injury, where the petition alleged that plaintiff had lost much time by reason of the injury, and where the evidence showing an actual loss of time partly

after the petition was filed was stricken out so far as it related to loss of time after filing of the petition, an instruction for plaintiff that, in determining the damages, the jury should consider the loss of time, if any, without restriction to the time lost before the suit was filed, was not erroneous, since no evidence as to the loss of time was before the jury, except that occurring before the suit was filed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 553; Dec. Dig. § 216(8).]

5. TRIAL §255(5)—INSTRUCTIONS—REQUESTED INSTRUCTIONS.

In such case, the defendant, if not satisfied with the restriction placed on the evidence, should have asked the court to repeat the same in the form of a written instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 638; Dec. Dig. § 255(5).]

6. DAMAGES §159(3) — PLEADING — FUTURE LOSS OF EARNINGS.

An allegation of injury and that it had impaired the plaintiff's earning capacity and caused a loss of his time, and that such injury and conditions were permanent, was a sufficient allegation of future loss of earnings, to let in evidence of such future diminished earning capacity or loss of time.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 443; Dec. Dig. § 159(3).]

7. DAMAGES §132(1)—EXCESSIVE DAMAGES—PERSONAL INJURY.

A verdict of \$2,500 awarded to a mine employé who had two ribs broken, and received other severe injuries which were permanent and impaired his ability to follow his usual occupation, was not so excessive as to imply that it was the result of passion and prejudice.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 372; Dec. Dig. § 132(1).]

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by John Shimmin against the C. & S. Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

R. M. Sheppard, of Joplin, and J. P. McCammon, of St. Louis, for appellant. Owen & Davis, of Joplin, for respondent.

STURGIS, J. [1] Plaintiff sued for and recovered \$2,500 damages for injuries received by him in defendant's mine. The plaintiff, when injured, was descending defendant's shaft for the purpose of repairing the pump, and the injury was caused by an accumulation of ice falling on him from near the mouth of the shaft. The injury occurred on Monday morning two days after Christmas, and the weather was quite cold. The shaft was laced with boards so as to form a smooth surface over the cribbing. There is evidence that the ice began forming on these lacing boards, near the surface, on the Saturday previous. We are not sure from the evidence whether the mine was regularly operated on Sunday or not, but the plaintiff was not at work that day. Some of the witnesses said that some ice had fallen down the shaft the day before the accident. The pump was not operated at night, and, there being no heat from the steam pipes in the shaft, a considerable quantity of ice had formed by Monday

morning. The plaintiff went to work on that morning and was directed to go down the shaft and fix the pump, which we understand was operated by steam conveyed through pipes descending through this shaft. The plaintiff and three other men were let down by the hoistman; and, after examining the pump, plaintiff came up to the surface and in 15 or 20 minutes was again being lowered through the shaft. When he was 100 feet or more down in the shaft the ice broke loose from above and fell on him. He says the shaft was full of escaping steam when he went down and up the same so that he could hardly see, and that it was not his duty to inspect or keep the shaft in a safe condition. This duty devolved on the tub hooker and other workmen under the direction of the ground boss.

The evidence shows that the ground boss and tub hooker were in and about the mine and that their attention was specially called to the condition of the shaft and the accumulation of ice there some 20 minutes before it fell, and that the boss then said he would have it removed or knocked down as soon as he got caught up, meaning that he wanted first to get some dirt hoisted and out of the way. The tub hooker and ground boss were then just starting down in the mine and the tub hooker testified that the ice then looked to him like it was rather loose; that the boss told him to knock it down when he "got caught up." The evidence also is that most of the men had been lowered through this shaft while in this condition and that some dirt had been hoisted before this accident occurred.

Whether or not the defendant was bound to anticipate the formation of ice near the surface in this shaft because of the cold weather then prevailing, the evidence shows that the ice began forming two days before this accident, and that the attention of defendant's ground boss and the man whose duty it was to see that the shaft was kept safe was specially called to the apparently dangerous accumulation of ice on the sides of the shaft near the surface, about the time the men commenced work that morning, and some 15 to 20 minutes before this accident occurred. It was certainly a question for the jury to say whether it was negligent to defer removing this apparently dangerous ice, when the only excuse shown was that to stop long enough to do that would delay other work for a short time.

[2, 3] The defendant assigns error in that the petition, while alleging defendant's negligence in this respect and defendant's knowledge, actual or constructive, of the dangerous condition of the shaft, yet that it does not charge that defendant's knowledge of this dangerous condition existed for a sufficient length of time before the accident for defendant to have removed the same by use of ordinary care and diligence. Many cases are cited, and we have no doubt as to it being

the law, that actual or constructive knowledge of the defect by the defendant should be alleged as well as shown to have existed for a sufficient length of time to afford a remedy by the use of reasonable care and diligence. *Abbott v. Mining Co.*, 112 Mo. App. 550, 555, 87 S. W. 110; *Mueller v. Shoe Co.*, 109 Mo. App. 506, 84 S. W. 1010; *Pavey v. Railroad*, 85 Mo. App. 218. No demurrer, however, was asked to the petition. The evidence as to the above facts went in without objection, and the jury were instructed:

"And if the jury further believe from the evidence that defendant knew, or could have known by the exercise of reasonable care and caution, before ordering and directing plaintiff to go down into said mine, that ice had accumulated on the sides of the shaft of said mine, and that it was dangerous (if the jury believe it was dangerous), in time to have had it inspected and trimmed of said ice, before the accident complained of, and that defendant negligently failed and omitted to inspect said shaft and to trim it of said ice, and that its failure to do so was the cause of plaintiff receiving the injuries complained of, if any, then the jury will find the issues for the plaintiff."

Under these circumstances the objection comes too late, and the petition must be held good after verdict. Section 2119, R. S. 1906, reads:

"When a verdict shall have been rendered in any cause, the judgment thereon shall not be stayed, * * * impaired, or in any way affected by reason of the following imperfections, omissions, defects, matters, or things, or any of them. * * * Eighth, for the want of any allegation or averment on account of which omission a demurrer could have been maintained; ninth, for omitting any allegation or averment without proving which the triers of the issue ought not to have given [the] verdict."

In *Smith v. Greene*, 187 Mo. App. 210, 173 S. W. 705, the court, in speaking of a similar assignment of error, said:

"The real test, in solving the question of whether a given insufficiency is fatal or not, is to ascertain if the allegations contain enough to support an amendment which would state a good cause of action without substantial change of the cause defectively stated, or the injection into the case of a different subject-matter."

In *Davis v. Watson*, 89 Mo. App. 15, 27, the court said:

"But the defect was waived by the defendant's answering and going to trial. *Black v. Crowther*, 74 Mo. App. 480. And we may add that such defects under section 672, Revised Statutes 1899, *supra*, after verdict are cured, where it appears that the omitted allegations of fact were proved."

The following cases will, we think, be found to hold that similar defects in a petition are held not fatal after verdict when the facts were duly proven and the issues properly submitted to the jury. *Sawyer v. Railroad*, 156 Mo. 468, 476, 57 S. W. 108; *Sexton v. Railroad*, 245 Mo. 254, 263, 149 S. W. 21; *Seckinger v. Manufacturing Co.*, 129 Mo. 590, 31 S. W. 957; *Winn v. Railroad*, 245 Mo. 406, 412, 151 S. W. 98; *State ex rel. v. Reynolds*, 137 Mo. App. 261, 266, 117 S. W. 653.

A technical objection is also made to the instruction mentioned which we have noticed

but will not discuss, as we think the jury could not have been misled thereby.

[4] The petition alleges that plaintiff, by reason of his injury, has lost much time. The evidence showed an actual loss of considerable time and an impairment of plaintiff's physical ability to do manual work. Some of the lost time occurred after the petition was filed. The petition alleges several specific injuries and their consequences, and that plaintiff was otherwise greatly and permanently injured. There is no specific charge that plaintiff will suffer loss of time in the future. The evidence went in without objection as to the loss of time; and then at defendant's request the court orally struck out the evidence as to loss of time after the filing of the petition, stating to the jury:

"This suit was filed on the 20th day of January, this year, and this accident happened on the 27th day of December, 1914, and if you find a verdict for the plaintiff, in fixing the amount of damages, you will not take into consideration any loss of time after the date the suit was filed, after the 20th day of January, nor consider any of the testimony given as applying to any time after the 20th day of January."

The plaintiff's instruction on the measure of damages is criticized in that it tells the jury that, in determining the amount of the verdict in case of a finding for plaintiff, it should take into consideration the loss of time, if any, without restricting the same to that lost before the suit was filed. The defendant relies on the rule of law that loss of time or earnings is a kind of damage which is not regarded as a necessary consequence of personal injury, and must therefore be pleaded to entitle plaintiff to prove and recover for such loss. *Coontz v. Railroad*, 115 Mo. 669, 22 S. W. 572; *Davidson v. Transit Co.*, 211 Mo. 320, 344, 109 S. W. 583; *Wellmeyer v. Transit Co.*, 198 Mo. 527, 543, 95 S. W. 925; *Paquin v. Railroad*, 90 Mo. App. 118. It is sufficient, we think, to dispose of this point to say that the instruction mentioned does not in terms authorize an assessment of damages for future loss of time. The loss of time mentioned in the instruction must be taken to refer to the loss of time the proof of which was before the jury. The jury had

been specially told that no loss of time after the filing of the suit should be considered in estimating the damages, and to regard the evidence as applying only to such prior time. No evidence, therefore, was before the jury as to loss of time except that occurring before the suit was filed.

[5] If defendant was not satisfied with the restriction thus placed on the evidence and feared, as it now argues, that the jury would not observe this restriction, it should have asked the court to repeat the same in the form of a written instruction.

[6] Moreover, the rule is that an allegation of injuries and that same have impaired the plaintiff's earning capacity and caused loss of his time, and that such injuries and condition are permanent is a sufficient allegation of future loss of earnings, to let in evidence of such future diminished earning capacity or loss of time. The defendant, therefore, was accorded more than it was entitled to in this respect. *Pendegrass v. Railroad*, 179 Mo. App. 517, 538, 162 S. W. 712; *Scholl v. Grayson*, 147 Mo. App. 652, 664, 127 S. W. 415; *Ferrier v. Mercantile Co.*, 158 Mo. App. 533, 138 S. W. 893; *Abernathy v. Lusk*, 182 S. W. 1049, and cases cited.

[7] It is claimed that the damages allowed are so excessive as to require a remittitur or granting a new trial. It will not be profitable to set out the evidence or discuss this question at length, and we will only say that according to plaintiff's evidence, corroborated to a considerable extent by his physician, he had two ribs broken and received other severe injuries; that his injuries are permanent and his ability to follow his usual occupation very greatly impaired. While the verdict is somewhat large, we have concluded that it is not so large as to imply that the same is the result of passion and prejudice. It is only in extreme cases that the courts are warranted in interfering in this respect, and we will not do so in this case.

Finding no error in the record, the judgment will be affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

STRAWBRIDGE v. STANDARD FIRE INS. CO. OF HARTFORD, CONN. (No. 12017.)

(Kansas City Court of Appeals. Missouri. June 12, 1913.)

1. INSURANCE \Leftrightarrow 500—FIRE INSURANCE—VALUED POLICY LAW.

The valued policy law (Rev. St. 1909, § 7030) merely fixes the value of the insured property at the time of insurance, and not its value at the time of destruction.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1275, 1276; Dec. Dig. \Leftrightarrow 500.]

2. INSURANCE \Leftrightarrow 646(8) — FIRE INSURANCE—BURDEN OF PROOF.

In an action on a fire policy for the destruction of an automobile, an article changing in value, plaintiff has the burden of proving its value at the time of its injury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1665; Dec. Dig. \Leftrightarrow 646(8).]

3. INSURANCE \Leftrightarrow 500—FIRE INSURANCE—VALUED POLICY LAW.

Under Rev. St. 1909, § 7030, prohibiting fire insurers to take a risk at a ratio greater than three-fourths of the value of the property insured and declaring that when taken its value shall not be questioned in any proceeding, the value of an automobile insured for \$1,500 is conclusively fixed to be \$2,000 at the time the insurance was written.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1275, 1276; Dec. Dig. \Leftrightarrow 500.]

4. INSURANCE \Leftrightarrow 665(4) — FIRE INSURANCE—ACTIONS—EVIDENCE.

In an action on a fire policy upon an automobile, evidence held to warrant finding that the automobile, at the time of its destruction, was worth the sum fixed in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1722; Dec. Dig. \Leftrightarrow 665(4).]

5. INSURANCE \Leftrightarrow 660—FIRE INSURANCE—EVIDENCE—DEPRECIATION.

In an action on a fire policy, evidence of depreciation of the article insured cannot be shown by proof that because it had been used by the insured it would sell for less sum than if not secondhand.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1695; Dec. Dig. \Leftrightarrow 660.]

6. INSURANCE \Leftrightarrow 602—FIRE INSURANCE—ACTION—ATTORNEY'S FEES.

Where the insured, whose motorcar had been destroyed by fire, demanded the full amount of the policy and refused to discuss depreciation, the refusal of the insurance company to pay the amount of the policy cannot be deemed vexatious within Rev. St. 1909, § 7068, providing that in such case the jury may allow a penalty and attorney's fees, this being particularly true where it did not appear that the insured offered to credit on the policy the sum he received for the wreckage, and so an attorney's fee was improperly allowed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. \Leftrightarrow 602.]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

"To be officially published."

Action by Parson W. Strawbridge against the Standard Fire Insurance Company of Hartford, Conn. From a judgment for plaintiff, defendant appeals. Affirmed, on condition that plaintiff file a remittitur; otherwise, reversed and remanded.

Fyke & Snider, of Kansas City, for appellant. Ed E. Yates, of Kansas City, for respondent.

TRIMBLE, J. Plaintiff sued upon an insurance policy covering an automobile. The policy insured plaintiff against direct loss or damage by fire to an amount not exceeding \$1,500 upon one Auburn automobile, factory No. 1428, gasoline, four-cylinder touring car, model 1910. There was a provision in the policy that:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper reduction for depreciation, however caused."

The policy was for one year from July 24, 1912. Shortly after midnight on July 10, 1913, lacking a few days of being a year after the policy was written, the machine burned while in use on the road in Dallas county. The petition alleged that the car was burned and destroyed by fire and was wholly lost to the plaintiff, save that the wreckage left from said fire was thereafter sold by plaintiff for the sum of \$50, which was the reasonable value thereof.

The suit was for \$1,450 (being the full amount of the policy less the \$50 received for the wreckage), with interest at 6 per cent. from September 15, 1913, for an attorney's fee of \$200 and for 10 per cent. of the loss as a penalty for vexatious refusal to pay. The jury returned a verdict for \$1,551.50 for the loss and assessed an attorney's fee at \$150, but made no allowance for, and said nothing about, a penalty. The defendant has appealed, claiming that the court erred in matters respecting the determination of the question of the amount of plaintiff's loss, and also the allowance of the attorney's fee. With reference to the question of plaintiff's loss, it is claimed by defendant that plaintiff offered no evidence whatever upon the value of the automobile at the time of the fire, and that the court erroneously excluded defendant's evidence offered to show the depreciation in value of the automobile at the date of its destruction.

[1, 2] Section 7030, R. S. Mo. 1909, provides that:

"No company shall take a risk on any property in this state at a ratio greater than three-fourths of the value of the property insured, and, when taken, its value shall not be questioned in any proceeding."

It has been frequently held that this section goes no further than to conclusively establish the value of the automobile at the date of the policy. And, where the property insured is personalty of a changing character which is subject to diminution or depreciation, and the policy provides, as in this case, that the insurer shall not be liable beyond the actual cash value of the property at the time of the loss, the extent of the insured's de-

mand and of the insurer's liability is, in the case of a total loss, the value of the property at the time of its destruction by fire; and this question of the value of the property at the time of the fire is open to dispute and litigation. *Burge Bros. v. Greenwich Ins. Co.*, 106 Mo. App. 244, 80 S. W. 342; *Surface v. Northwestern Ins. Co.*, 157 Mo. App. 570, 139 S. W. 262; *Non-Royalty Shoe Co. v. Phoenix Assurance Ass'n*, 178 S. W. 246. And, in cases where the insurance is on personal property of a changing character or which is liable to depreciation from use or injury, the burden is on the plaintiff to show the value of the property at the time of the fire. *Sharp v. Niagara Fire Ins. Co.*, 164 Mo. App. 475, 147 S. W. 154.

[3, 4] But in this case we think the plaintiff did furnish evidentiary facts from which the jury could find that the machine was worth at least all that the plaintiff was demanding. It is true plaintiff offered no evidence expressly stating, in dollars and cents, the value of the automobile at the date of the fire. He did say, however, that "the machine was *in fine condition* so far as I know at the time of the fire; the only repairs ever made on the machine was to tighten up the engine, which I did myself, and tires." Now, by virtue of the statute (section 7030 *aforsaid*) the value of the automobile, on July 24, 1912, the date of the policy, was fixed, not at \$1,500, the amount of the policy but at \$2,000, since, under the statute, the \$1,500 was only three-fourths of the machine's value. With the value of the machine on July 24, 1912, conclusively fixed at \$2,000, the only diminution on the value thereof, which could be considered in determining the loss for which payment can be demanded as insurance, is the inherent depreciation in the machine itself through use, injury, or damage, accruing to it *subsequent* to the date of the policy. And such diminution must be deducted, not from the \$1,500, but from the value of the machine, as fixed by the statute and the policy, namely, \$2,000. *Spickard v. Fire Association of Philadelphia*, 164 Mo. App. 1, *loc. cit.* 4, 146 S. W. 808; *Stevens v. Norwich, etc., Ins. Co.*, 120 Mo. App. 88, 106-108, 96 S. W. 684. The evidence was that the machine was not used but was put away during the months between December 1, 1912, and April 1, 1913, though used the rest of the time elapsing since the policy was issued. If, now, the machine was worth \$2,000 July 24, 1912, and was not used during the winter months, and was *in fine condition* on July 10, 1913, the date of the fire, this was a sufficient showing of facts from which the jury could infer that the machine, on the day it burned, was worth all that the plaintiff was demanding because they could say a machine run only in the summer months, and put away and housed during the winter months, and *in fine condition* needing no repairs except tires which it got, would not depreciate from use or damage, inherent in the machine,

to the extent of \$500 or more than that, which it would be necessary to find in order for the loss to fall below what plaintiff was demanding. In other words, even if the depreciation *subsequent to the date of the policy* amounted to 25 per cent., which would be \$500, still this deducted from the \$2,000 would not reduce plaintiff's loss below the face of the policy, nor show it to have been less than the amount he was demanding. According to the evidence of defendant, the depreciation subsequent to the policy was this precise amount, namely, 25 per cent. So that, according to defendant's evidence, the loss did not fall below the amount demanded.

[5] As to the evidence which defendant claims was erroneously excluded, the record shows that plaintiff's counsel expressly stated that he had no objection to the defendant showing the depreciation, if any, on the insured machine from the date of the policy up to the time of the fire. And the court permitted defendant to show what was the depreciation subsequent to the issuance of the policy. Many of the questions asked by defendant, which the court excluded, were questions which, in reality, attacked the value of the car at the date of the policy. To have allowed them to be answered would have violated section 7030, which says the value at that date shall not be questioned. The other questions excluded did not attempt to show the actual depreciation in the machine itself from inherent deterioration through lapse of time, use, injury, or damage thereto, but were based upon the theory of depreciation merely because it was, at the time of the fire, a *used* car. Of course, at the time of the fire, the automobile could not have been sold for as much on the market as a new car of the same make and model; for, compared with the latter, the automobile in question would then be what is commonly called a "secondhand" car. But, as between parties hereto, the value of the car, in respect of insurance, means its actual value as an instrumentality for continued use. If, through no depreciation inherent in the car itself by reason of the lapse of time, use, injury, or damage, the car, as an instrumentality for continued use by the plaintiff, is worth as much or more than the amount claimed, the defendant cannot complain. He cannot add to that actual inherent depreciation the decrease in the price it would bring simply because it is not a new, but is now a used or secondhand, car. One might buy a set of furniture, and, after using it in the house for one day without a particle of injury or damage thereto in any way, would be unable to sell it for anything like the price it would command if it had never left the store; and yet the furniture, as subject of insurance between the owner and the insurance company, would be as valuable as ever, because the insurance company insures it as used property intended for further use by the insured.

We are, therefore, of the opinion that the court did not err in the exclusion of evidence.

[6] We come now to the question of the allowance of an attorney's fee. Section 7068, R. S. Mo. 1909, provides that "if it shall appear from the evidence that the company has vexatiously refused to pay, the jury may allow a penalty not exceeding ten per cent. of the loss and a reasonable attorney's fee. The jury did not allow the penalty, but did allow \$150 for attorney's fee. The statute seems to join the two, penalty and fee, and appears to make the fee subsequent to, if not dependent upon, the allowance of the penalty. We do not hold that, if the jury finds there has been a vexatious refusal to pay, it cannot award the fee where it has withheld the penalty, though it does seem that if the jury thought there was a vexatious refusal they would have allowed all that the statute authorized them to give. The verdict says nothing about whether the jury found a vexatious refusal or not. It merely assesses the damages on account of the loss and further assessed "the plaintiff's damages as and for a reasonable attorney's fee in this suit in the sum of \$150." There is room for the suspicion that the jury did not think there had been vexatious refusal, but concluded that plaintiff, notwithstanding that fact, was entitled, as *additional damages*, to an attorney fee because he had incurred that expense in bringing the suit. However we need not decide the point here discussed, since, as we view the record, the objection to the allowance of an attorney's fee can be placed upon another ground.

As said before, the company had a right to question the value of the car at the time of the fire. The condition of the car and its value at that time was a matter within the knowledge of the plaintiff and not of the defendant. The extent of the depreciation inherent in the car itself was a matter vitally affecting defendant's rights. It therefore had a right to inquire of plaintiff as to the extent of that depreciation and to learn from him the exact condition of the car. But on this matter plaintiff testified as follows:

"I made out a proof of loss, which was furnished to the company. Afterwards Mr. Keller, an adjuster, and I think on the 10th or the 11th, came to my office, commenced to figure with me about the depreciation, and I said, 'Well, Mr. Keller, I have a policy which calls for \$1,500 insurance, and I paid the premium for that amount of insurance, and your company issued the policy, and you can't talk depreciation to me.'"

On cross-examination he said:

"In the conversation with Mr. Keller I stated I would not take into consideration any depreciation on account of wear and tear on the car, and insisted on the payment of the full amount of the policy, and I have been insisting upon that

all the time. Q. You insisted upon the payment of the full amount of the policy, didn't you? A. Yes, sir. Q. And you absolutely refused to talk about a settlement upon any other basis? A. No, sir. Q. You mean that you would not consider terms of settlement upon any other basis, but you insisted upon the payment of the full amount? A. I did."

It thus appears that no opportunity was given the company to adjust the question of even the depreciation of the car that could properly be considered, nor does it appear that the depreciation then sought to be adjusted before suit was brought was anything other than such as was proper to be considered. The company had a right to ascertain, before it paid, what was the condition of the car, and how much it had depreciated since the policy was issued. As the plaintiff would not allow the defendant to even talk depreciation to him, we do not think the defendant could be said to have vexatiously refused to pay; for plaintiff was the one person best qualified to know what that depreciation was, and defendant had a right to obtain its information from the one in the best position to know, and there is no evidence that defendant was able to get it anywhere else. Indeed, it appears that it was unable to do so, since its witnesses as to depreciation were not able to speak of this particular car because they knew nothing of it, but only testified, as experts, as to what the depreciation from use could ordinarily be expected to be in that length of time with good care and handling. So far as the record shows, the defendant could not ascertain, without litigation, what was the true condition and value of the car at the time of the fire. In addition to this, from plaintiff's own evidence it appears that he had "a policy which calls for \$1,500 insurance"; in other words, he was demanding that sum; he "insisted upon payment of the full amount of the policy"; and yet, when suit was brought, the sum demanded and the amount recovered was reduced by the amount of the salvage. It may be this \$50 was credited on the policy at the time of the demand. If so, possibly this latter consideration would have no bearing upon the question of vexatious refusal to pay. But the record nowhere shows this to be the fact; and, on the contrary, plaintiff says he "insisted on the payment of the full amount of the policy," which was \$1,500. We are of the opinion that, under all these circumstances, the allowance of \$150 attorney fee was improper.

If, therefore, the plaintiff will, within 10 days from the announcement of this opinion, file a remittitur of that part of the judgment which includes the attorney fee, the rest of the judgment will be affirmed; otherwise the cause will be reversed and remanded.

It is so ordered. All concur.

LINDEN v. McCLINTOCK. (No. 12033.)
(Kansas City Court of Appeals. Missouri.
June 12, 1916.)

1. APPEAL AND ERROR ¶927(5)—DEMURRER TO EVIDENCE—REVIEW.

In reviewing the sustaining of a demurrer to the evidence, plaintiff's evidence can be accepted as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. ¶927(5).]

2. HUSBAND AND WIFE ¶335—ALIENATION OF WIFE'S AFFECTIONS — ACTIONS — EVIDENCE.

In a suit for the alienation of a wife's affections, evidence held sufficient to go to the jury.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 706; Dec. Dig. ¶335.]

3. HUSBAND AND WIFE ¶335—ALIENATION OF AFFECTIONS—JURY CASE.

Where a stranger, by his wrongful acts, estranges husband and wife, proof of such fact is sufficient to carry the case to the jury.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 706; Dec. Dig. ¶335.]

4. HUSBAND AND WIFE ¶324—ALIENATION OF AFFECTIONS—RECOVERY.

To recover for the alienation of his wife's affections, it is not necessary for plaintiff to show that defendant's acts were the sole cause.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 692; Dec. Dig. ¶324.]

5. HUSBAND AND WIFE ¶324—ALIENATION OF AFFECTIONS—RIGHT OF ACTION.

The husband has a right of action for partial alienation of his wife's affections.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 692; Dec. Dig. ¶324.]

6. HUSBAND AND WIFE ¶324—ALIENATION OF AFFECTIONS—RECONCILIATION.

A stranger has no right to interfere to prevent a reconciliation between spouses or prevent the husband from regaining his wife's affections.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 692; Dec. Dig. ¶324.]

7. HUSBAND AND WIFE ¶324—ALIENATION OF AFFECTIONS—RIGHT OF ACTION.

It is not necessary, to recover for alienation of a wife's affections, that her debauchment be shown.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 692; Dec. Dig. ¶324.]

8. HUSBAND AND WIFE ¶333(1)—ALIENATION OF AFFECTIONS—BURDEN OF PROOF.

Where a stranger is the cause of estrangement between spouses, he has the burden, in an action for alienation of affections, to prove that his motives were proper, and that what he did was without intent to cause a separation.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124; Dec. Dig. ¶333(1).]

9. HUSBAND AND WIFE ¶333(9)—ALIENATION OF AFFECTIONS—SUFFICIENCY.

Alienation of a wife's affections may be shown by circumstantial evidence.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124; Dec. Dig. ¶333(9).]

Appeal from Circuit Court, Jackson County; Clarence A. Burney, Judge.

"Not to be officially published."

Action by John F. Linden against T. R. McClintock. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Broaddus & Crow, of Kansas City, for appellant. Harry E. Longenecker, of Kansas City, for respondent.

TRIMBLE, J. Plaintiff brought this suit charging that the defendant, while living in the home of plaintiff and his wife, obtained such an influence over her as to control her in all family affairs; that defendant influenced her against plaintiff, prevented her from living with him as his wife, destroyed plaintiff's home, and alienated his wife's affections.

The petition does not charge that defendant debauched the wife. It alleges that:

Plaintiff "is not in a position to state positively the relation that exists between defendant and his wife, but that said parties are now living in one house, and that this plaintiff, the husband, is excluded therefrom for reasons best known to defendant and plaintiff's wife."

The acts charged against defendant are alleged to have been done willfully and maliciously upon his part. At the close of plaintiff's case, a demurrer to the evidence was sustained. An involuntary nonsuit was thereupon taken with leave to move to set the same aside. Said motion being duly filed and overruled, plaintiff appealed.

[1] In passing upon a demurrer to the evidence, the court must accept plaintiff's evidence as true and give it the benefit of every inference which can be reasonably drawn therefrom. *Heine v. St. Louis, etc., R. Co.*, 144 Mo. App. 443, 129 S. W. 421; *Alexander v. Scott*, 150 Mo. App. 213, 129 S. W. 991.

[2] In order to properly apply these well-established rules to the case in hand, it is first necessary to clearly understand the precise nature of plaintiff's cause of action, what it is he charges, what is sufficient to establish a prima facie case under the charge; and then the evidence must be examined to see whether it presents facts from which a jury might reasonably infer that plaintiff's charge is true.

Plaintiff and his wife were married in 1893 and lived happily together until 1912, when the troubles hereinafter stated arose. For a number of years, plaintiff and his wife and her father lived together in the same house. The plaintiff and his father-in-law bought a lot, and the home was erected thereon with money borrowed from a building and loan association. Plaintiff's evidence is to the effect that he helped pay this off. Some time in 1905 defendant's wife died. He had a large house, and, being a friend of plaintiff's wife's family, invited plaintiff to move with his wife, child, and father-in-law to his (defendant's) home. Plaintiff did not want to do so, saying they had just built and furnished a new home of their own. Whereupon, at the suggestion of plaintiff's wife, the defendant moved to plaintiff's home, and all of them lived amicably together until the death of the plaintiff's father-in-law.

on December 26, 1911. Defendant paid \$3 a week board.

About two months before the father-in-law's death, he, believing he was going to die, wanted to transfer his interest in the home to his daughter. The defendant attended to this matter, and, on his advice, the father-in-law and plaintiff joined in a deed to the defendant and immediately he made a deed to plaintiff's wife, thus putting the entire title to the home in the wife.

Plaintiff's evidence is that he and his wife got along well together until after her father's death. He further testified that after the death of his wife's father, the defendant "would interfere with my domestic relations, by telling my wife that everything she did was all right, and would tell me to let her alone and go ahead about my own business."

It seems that the wife began going to tango dances, tango teas, and card parties, something she did not do before her father's death, and the husband objected. In these matters the defendant sided with plaintiff's wife and daughter telling the plaintiff they were doing all right—to let them alone. The daughter at this time was 18 years of age, and it is quite likely the wife began going on her account. There is no showing that the defendant took them to these places, nor is it to be inferred that either the wife or daughter should receive an imputation upon their moral character for these things. However, the daughter appeared at both public and private dances, giving exhibitions in costume with a young man as her dancing partner, and having her picture taken with him in dancing poses.

The plaintiff objected to his wife going to the hotels and other places where these dances were given, and to his daughter appearing there as she did. But the defendant would advise the wife and daughter, in plaintiff's presence, to continue going; and they did so. In justice to the mother and young lady, we say again that there seems to be nothing in the way of a stain upon their moral character for having done these things. But they were of such a nature as that a father might be reasonably apprehensive about and have a right to object to, especially the giving of public dancing exhibitions in scanty costume with a young man dancing partner and having their pictures taken in the poses shown in the pictures presented in the record. Nor do we say that the defendant's siding with the wife and daughter and against the husband, and advising them to pursue their course against his wishes, would of itself constitute ground for a suit for alienation of the wife's affections. But it is mentioned as a circumstance to be taken into consideration in viewing the entire situation to determine whether or not there is room for a legitimate inference which the jury might draw as to whether the defendant aided in the turning away of the wife's love from her husband.

About three months after the father-in-law's death, the wife refused to occupy the same bed with plaintiff, but slept in a bedroom on third floor, while her husband's bedroom remained on the second floor. The stairway to the third floor led almost directly from the door of defendant's room to the wife's room on third floor. As the wife was not living with plaintiff in a wifely relation, naturally the suspicions of the plaintiff were aroused, and he placed cards and pieces of paper so arranged that they would be disturbed if the door at the foot of the stairway were opened during the night. Several times these papers were found to have fallen, indicating that the door had been opened during the night. But the plaintiff frankly admits that he does not know whether there was any clandestine meeting or any immoral act between defendant and his wife or not.

On one occasion, about 9 o'clock at night, the usual retiring time in that household, plaintiff's wife was in his bedroom and he tried to induce her to stay with him in the room, locking the door in the attempt to keep her and trying to induce her to live with him as his wife. While he was thus trying to get his wife to live with him as she had before, the defendant came to the bedroom door and told plaintiff if he did not open the door he would "shoot it up." Whereupon plaintiff opened the door and his wife left the room, and the men went to bed in their respective bedrooms.

There is evidence to the effect that plaintiff protested against defendant's interference with his domestic affairs; that finally plaintiff requested the defendant to leave his home and that the defendant refused to go until after the daughter graduated; that on another occasion the plaintiff told defendant to leave, and he did so, but plaintiff's wife and daughter went also. In a few days they returned, took possession of the house, changed the locks on the doors, and when plaintiff returned to the house he was not allowed to enter. Shortly thereafter plaintiff, in company with a friend, visited the home about 10 o'clock at night and knocked at the front door. The defendant came to the door in his nightclothes and, upon learning who it was, threatened to shoot plaintiff, if he did not leave at once. Whereupon they left and the defendant called the police and had plaintiff arrested. From that time on, the defendant has lived in the home and was living there at the time of the trial.

Now, it may be that plaintiff himself was the cause of the loss of his wife's affection, but the evidence does not conclusively show that his conduct was the sole cause thereof. It does appear that plaintiff drank, but, if he drank to excess, such as to disrupt the family, the evidence is that he did not begin to drink to excess until after trouble had arisen between him and his wife; and we must take the record as we find it and accept it at its face value. According to that evi-

dence, defendant indulged in no conduct toward his wife which would cause her to cease her affections for him.

[3-7] In this case, the defendant is not a father nor a near relative, though he does seem to be an old friend of the wife's family. He occupies, therefore, the position of a stranger, and if the evidence is sufficient to justify the jury in inferring that his wrongful acts were the principal or controlling factors which caused the estrangement between the husband and wife, then the showing was sufficient to make a case for the jury. 3 Elliott on Ev. § 1643. It is not necessary to show that defendant's acts were the sole and only cause of the loss of the wife's affection. Rath v. Rath, 2 Neb. (Unof.) 600, 89 N. W. 612; Prettyman v. Williamson, 1 Pennewill (Del.) 224, 39 Atl. 731; Rice v. Rice, 104 Mich. 371, 62 N. W. 833; Bathke v. Krasin, 78 Minn. 272, 80 N. W. 950. The husband has a right of action even for the partial alienation of his wife's affections. 15 Am. & Eng. Ency. of Law (2d Ed.) 862. And a stranger has no right to interfere to prevent a reconciliation or to cut off all chance of the husband regaining his wife's affections. Fratini v. Caslini, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843; Prettyman v. Williamson, 1 Pennewill (Del.) 224, 39 Atl. 731. It is not necessary, in order to maintain the action, that debauchment of the wife be shown. 15 Am. & Eng. Ency. of Law (2d Ed.) 863.

"The wife may have a just cause for separation, * * * but she may elect to abide by her situation, and remain with her husband nevertheless. If she chooses to do so, no stranger has the right to intermeddle with the domestic and marital relations of husband and wife, and if he voluntarily does so he is amenable for the consequences." Modisett v. McPike, 74 Mo. 636, loc. cit. 646.

[8, 9] Unquestionably the evidence does tend to show that the defendant intermeddled with plaintiff's domestic affairs. It may be that defendant acted honestly and in good faith and from proper motives. But, so far as plaintiff's evidence is concerned, there is no showing that it was necessary for him to interfere to protect the wife from ill treatment, nor is his interference, in the light of the evidence as it now stands, compatible with an honest motive and a sincere desire to serve the welfare of both parties. Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468. If the evidence is such that the jury might reasonably infer that the defendant's advice and interference was one of the effective causes of the estrangement, then it is for the defendant, who is a stranger, to show that his motives were proper, and that what he did was without intention to cause a separation. Higham v. Vanosdol, 101 Ind. 160, loc. cit. 166; Johnson v. Allen, 100 N. C. 131, loc. cit. 140, 5 S. E. 666; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468. Plaintiff is not required to prove, by direct and positive testimony, that the defendant's advice and in-

terference was the effective cause of his wife's estrangement; that may be proved by the circumstances, and it, as well as the motives of defendant's advice and interference, are questions for the jury to determine. Modisett v. McPike, 74 Mo. 636, loc. cit. 640; Westlake v. Westlake, 34 Ohio St. 621, loc. cit. 635, 32 Am. Rep. 897; 3 Elliott on Ev. § 1644.

We think that the situation presented by plaintiff's evidence was one calling for the decision of a jury, and that it was error to sustain the demurrer.

The judgment is therefore reversed, and the cause remanded. All concur.

UNDERWOOD v. WEST et al. (No. 1499.)
(Springfield Court of Appeals. Missouri. June 17, 1918.)

1. RAILROADS \Leftrightarrow 312(3)—OPERATION—DUTY TO WARN—NEGLIGENCE.

Where the locomotive bell was not rung for 100 feet preceding crossing, the fireman having stopped ringing to consult his time card, the railroad's negligence per se was established as to one injured at the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 990; Dec. Dig. \Leftrightarrow 312(3).]

2. RAILROADS \Leftrightarrow 338(2)—OPERATION—INJURIES TO TRAVELERS—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, driving his team about 5 miles per hour, could have observed a train approaching at right angles to his course, at 12 miles per hour and about 90 feet away, 30 feet before he reached the track, and looked in the opposite direction but not toward the train, he was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1081; Dec. Dig. \Leftrightarrow 333(2).]

3. EVIDENCE \Leftrightarrow 574 — OPINION EVIDENCE — WEIGHT AND SUFFICIENCY.

Evidence based on estimates and opinions must yield to physical facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2400; Dec. Dig. \Leftrightarrow 574.]

4. RAILROADS \Leftrightarrow 327(1)—OPERATION—INJURIES TO PERSONS—DUTY TO WATCH.

The duty of one approaching a railroad track, which is of itself a warning of danger, to look and listen, is absolute, and failure to perform it, when it would have been effective, is negligence as a matter of law, and cannot be excused by forgetfulness or mental absorption.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043, 1045; Dec. Dig. \Leftrightarrow 327(1).]

5. RAILROADS \Leftrightarrow 327(5)—OPERATION—INJURIES TO PERSONS—DUTY TO WATCH.

The duty of a traveler about to cross a railroad is to look both ways for coming trains, and the fact that he looked one way, though he thought that was the most likely source of danger, when to look both ways takes but an instant, does not absolve him from being negligent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1048; Dec. Dig. \Leftrightarrow 327(5).]

6. RAILROADS \Leftrightarrow 335(1)—INJURIES TO PERSONS—COMPARATIVE NEGLIGENCE.

Although defendant railroad was negligent in operating its train, plaintiff cannot recover if

he was guilty of contributory negligence, though it was comparatively slight.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1084; Dec. Dig. § 335(1).]

Robertson, P. J., dissenting.

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by Cecil Underwood against Thomas H. West and others, receivers of the St. Louis & San Francisco Railroad. Judgment for plaintiff, and defendants appeal. Reversed.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellants. Bradley & McKay, of Kennett, for respondent.

STURGIS, J. Plaintiff recovered \$2,000 for personal injuries received by being struck by defendants' locomotive at a grade street crossing in the town of Campbell. The railroad crosses the street in question at right angles, and plaintiff, with a companion, plaintiff doing the driving, was, when injured, traveling west in a two-horse buggy. The negligence on which the case went to the jury is that the train in question was running at a speed in excess of that allowed by city ordinance, five miles per hour, and that no signals by bell or whistle were being given as the train approached the crossing.

[1] There is but one issue here, that of plaintiff's contributory negligence duly pleaded in the answer; for, while the evidence is conflicting as to the speed of the train, the jury has settled that question, and defendants' trainmen concede that, while the whistle was sounded some distance back and the bell was rung for a time thereafter, it was not being rung during the time the train passed over the last 100 feet, or thereabouts, before reaching the crossing. The fireman who was ringing the bell says that he stopped doing so in order to consult his time card. These facts established the defendants' negligence per se, and the facts as to the speed of the train and the failure to give warning signals are important only as they bear on the question of plaintiff's contributory negligence. The contributory negligence asserted is that plaintiff could, if he had looked, have seen the approaching train, and that he heedlessly drove on the track immediately in front of it.

[2] The train was coming from the north and plaintiff approached the crossing on one of the principal streets of the town from the east on the evening of a hot June day; the plaintiff and his team being tired from a long day's drive to some country towns with plaintiff's companion, a traveling man, who jumped out of the buggy just in time to escape injury. Stating the facts most favorably to plaintiff, his view of the track and any train coming from the north was obstructed and practically cut off for some distance while passing a store building fronting east,

its side flush with the street on which plaintiff was driving, and the rear end extending to a point within 41 feet from the track. Whether plaintiff had a clear view of the track northward for the next 10 or 12 feet after passing the rear end of this store building is perhaps in doubt, as there was a shed of that width with wooden framework and covered with woven wire, attached to the west end of the store building. Plaintiff testified that the wire shed was partially filled with something which prevented his seeing through it, though he does not say he tried to do so; but other witnesses, including the proprietor of the store and shed, deny this and say that the open shed constituted no obstruction. Resolving this in plaintiff's favor there would yet be 30 feet between the shed or wareroom and the track. It is conceded that, for this distance after passing this building and shed, plaintiff had a clear view of the track for at least 200 or 300 feet north of the crossing, unless it be that his vision was further obstructed by a coal shed on defendants' right of way between the wire shed or wareroom joined to the store building and the railroad track. This coal shed was back north from the side of the street, the exact distance not being shown, but it was 40 or 50 feet from where plaintiff was driving in the street. Nor is its exact size shown, but the front was some 12 to 14 feet. There was a driveway of 8 or 9 feet between the wire-covered shed and the coal shed, which was wholly unobstructed, and a like distance or a little more, unobstructed, between the coal shed and the track. The important thing in determining as to this coal shed being an obstruction is its height. Plaintiff's witnesses say the coal shed was 8 or 9 feet high and would obstruct a view of the track, which we may concede, but did it obstruct the vision in such a way as to prevent a person riding in a buggy from seeing a coming train? Plaintiff's principal witness, Kennedy, said: "The coal house is 8 or 9 feet high, and think a person sitting in a buggy could see over it." The undisputed evidence is that the track was on an embankment $2\frac{1}{2}$ feet above the grade as it passed the coal shed and crossing, the street being somewhat, upgrade for 10 or 12 feet before reaching the track. A number of disinterested witnesses familiar with the surroundings said the coal shed was about 5 feet high next to the track and 6 feet on the east side with a shed roof; but, grant that it was 8 or 9 feet high, yet is it not certain that with the well-known height and size of a locomotive and two cars attached, running on a track $2\frac{1}{2}$ feet above grade, that this coal shed would not prevent plaintiff, looking at an angle, if he looked at all, from seeing the train?

The evidence of plaintiff is that the train was running 10 or possibly 12 miles per hour. The plaintiff was driving in a slow

trot, did not check up for the crossing, and was certainly driving one-third to one-half as fast as the train. The engine struck the buggy about center, the horses being over the track, so that, while plaintiff was covering the 30 feet between the shed attached to the store building and the track, the train covered not more than 60 to 90 feet. Therefore, when plaintiff emerged from behind the store and attached shed, the train was not over 90 feet away and the coal shed near halfway between them. Three photographs are in evidence taken shortly after the accident, the correctness of which are not questioned, showing a horse and buggy with a man in it, the one just as the man emerges from behind the store building and attached shed, and the others at intervals of about 10 feet further toward the track; and in each an engine and cars appear beyond and considerably higher than the coal shed, and the view of same not materially obstructed. These photographs and the evidence showing the physical facts demonstrate beyond controversy that the coal shed did not constitute such an obstruction as prevented the plaintiff in his buggy from seeing the approaching train; and that plaintiff could, had he looked at any time after he passed the store building and shed, have seen this approaching train. So heedlessly did plaintiff drive on this track that, though the coming train attracted the attention of a number of people nearby, and one man across the track ahead of plaintiff and in apparent plain view waived and hallowed to him to stop, he failed to see or hear this additional warning.

[8] Any evidence, especially when based on estimates and opinions, must yield to the physical facts. *Hayden v. Railroad*, 124 Mo. 566, 573, 28 S. W. 74; *Payne v. Railroad*, 136 Mo. 562, 38 S. W. 308; *Zalotuchin v. Metropolitan Street Railway Co.*, 127 Mo. App. 577, 106 S. W. 548; *Wray v. Electric Light & Water Power Co.*, 68 Mo. App. 380. In *Baker v. Railway*, 122 Mo. 533, 589, 26 S. W. 20, 36, the Supreme Court said:

"This matter of denying probative force, even to direct and affirmative testimony, when such testimony is plainly at war with the physical facts and surroundings, has passed into precedent."

The courts have repeatedly held that where the physical facts are such that one could not have looked, at a given point constituting safety, without seeing an approaching train, his saying that he did so but saw none is taken for naught and his contributory negligence declared as a matter of law. *Dyrcz v. Railroad*, 238 Mo. 33, 141 S. W. 861; *Huggart v. Railway*, 184 Mo. 673, 36 S. W. 220; *Payne v. Railroad*, supra. In this case, however, plaintiff does not claim that he even tried to look for a train to the north till his horses were going upon the track and then the train was right on him—too late to stop. He says he looked to the south toward the depot, thinking a train was more

likely to come from that direction, and that he did not look north till his team was right on the track and the train right at him. His only excuse is that, even if he had looked, he could not have seen sooner, or at least in time to have averted the collision. The plaintiff testified:

"I didn't pay any attention as I was coming down here as to whether there was any trains on the track or not; I didn't hear or see any. I was watching the crossing just like anybody would going to go across, didn't see any train until just before I was struck, and then I saw it coming right down the track."

And again:

"I just looked down toward the depot and saw nothing there and then looked up and saw the train right at me. When I looked north I was right at the track, wasn't plumb on the track, the horses might have been going upon the track."

[4] The case narrows itself to this one proposition: Was plaintiff guilty of contributory negligence as a matter of law in not looking to the north as well as the south within this space of 30 feet, when to look would have been to discover the train? Plaintiff was perfectly familiar with this crossing and the surroundings, having passed there many times. We have assumed as most favorable to him that plaintiff approached the crossing, as he says he did, at a moderate rate of speed, $3\frac{1}{2}$ to 5 miles per hour, though the evidence shows his team was trotting and he did not check the speed for the crossing. If he was going faster and knowing that his sight and hearing were obstructed by this building until so near the track, he would be guilty of contributory negligence in that respect. Had he been alert and looking for a train, he could have stopped his team almost instantly. He was not in a dangerous situation, and his team hardly became frightened when the buggy was torn loose from them by the train.

The law applicable to cases of this character is so well known and has been stated and restated so often that there is no difficulty in that respect. The only difficulty is in applying the law to the facts of the particular case. We merely repeat when we say that a railroad is in and of itself a warning of danger to one about to cross it. Such person must take note of the danger and act with care to discover approaching trains. It is his duty to be alert and to actively use his eyes and hearing to ascertain whether trains are approaching or not. Forgetfulness, thoughtlessness, mental absorption, or reliance on signals being given will not excuse the duty of looking and listening before venturing on the track. The duty of looking and listening is absolute, and a failure to do so when same would be effective is negligence as a matter of law. *Sanguinette v. Railroad*, 196 Mo. 466, 489, 95 S. W. 386; *Farris v. Railroad*, 167 Mo. App. 892, 398, 151 S. W. 979; *Barrett v. Delano*, 187 Mo. App. 501, 506, 174 S. W. 181; *Hayden v. Railroad*, 124 Mo. 566, 28 S. W. 74; *Schmidt v. Rail-*

road, 191 Mo. 215, 228, 90 S. W. 136, 8 L. R. A. (N. S.) 196; Harshaw v. Railroad, 173 Mo. App. 459, 159 S. W. 1; Jackson v. Railroad, 171 Mo. App. 430, 449, 156 S. W. 1005; Walker v. Wabash Railroad, 193 Mo. 453, 92 S. W. 83. What is said by the court in the Farris Case, *supra*, is applicable here.

"This duty to look and listen, before attempting to cross the track, includes the obligation to see and hear a train; and, where the undisputed evidence shows that the deceased, by looking, had an opportunity to see the approaching train before the time of the accident, and that his opportunity was such that he could not have failed to have seen or heard the train in time to avoid the injury, if he had used ordinary care in looking, then under the law he will be deemed to have seen and heard the train, although there was no testimony that he did see it. Under such circumstances, the traveler is deemed to have seen what was plainly to be seen. This doctrine is applied in cases where it was daylight and the engine or train in plain view, and could unquestionably have been seen if the traveler had looked in the direction from whence it came. * * *

Granting that on account of the obstructions the deceased could not have seen the approaching train from the time he left the saloon until he had reached the northeast corner of the box car, it does not help the plaintiff's case. On the contrary, the very fact that the view was obstructed until he reached this point made it all the more necessary for him, when he had reached that point, to look for the approaching train before attempting to pass over the track."

This case holds that a pedestrian was negligent as a matter of law when he had a clear space of 6 feet to look after passing an obstruction. So short a space as that might not be applicable to one driving a team, but here the clear space was 30 feet. See Jackson v. Railroad, 171 Mo. App. 430, 451, 156 S. W. 1005. This is quite a different case than that of Woodward v. Railroad, 152 Mo. App. 468, 133 S. W. 677, in which the court held that, where plaintiff looked *once* after passing an obstruction at 35 feet in the direction that the train came from and saw that the track was clear for a distance of 400 feet, then plaintiff could not be held guilty of negligence as a matter of law for not looking a second time nearer the railroad where she could see further, her attention being distracted by an engine in the other direction. That was the strongest case we could find in plaintiff's favor in deciding the Jackson Case, 171 Mo. App. 430, 156 S. W. 1005, and on that case principally we affirmed the Jackson Case by a divided court. The facts of this case also differ materially from those in Barrett v. Delano, *supra*, on which plaintiff relies; for in that case the train was running at a much higher rate of speed and is described as—

"running down grade, with minimum noise, behind the barrier of the embankment which screened it from plaintiff's view and obstructed the transmission of its sounds."

As to the evidence, the court said:

"The testimony of this witness corroborates that of plaintiff and tends to show that he could not have seen the train until the heads of his team had entered, or were just on the point of entering, the zone of danger."

Here the plaintiff could have seen the train by looking north when his horses' heads were some 20 feet from the track and the train was running at a low rate of speed.

[5] The duty of a traveler about to cross a railroad is to look both ways for coming trains; and the fact that he looked one way, though he thought that was the most likely source of danger, when to look both ways takes but an instant, does not absolve him from being negligent. Porter v. Railway, 199 Mo. 82, 96, 97 S. W. 880; Kelsay v. Railway, 129 Mo. 362, 372, 30 S. W. 339; Sims v. Railway, 116 Mo. App. 572, 92 S. W. 909.

[6] In such cases it is obvious that the fact that defendant was negligent in either or both the specified grounds of exceeding the ordinance speed limit and of failing to give the statutory signals on approaching a public crossing does not help plaintiff's case; for that is merely proving that both were negligent, and in such case plaintiff cannot recover. Hayden v. Railroad, 124 Mo. 566, 573, 28 S. W. 74; Keele v. Railroad, 258 Mo. 62, 77, 167 S. W. 433; Jackson v. Railroad, 171 Mo. App. 430, 449, 156 S. W. 1005. The law in this state is that if plaintiff's negligence, though comparatively slight, contributes to the accident causing his injury, he cannot recover, though defendant's negligence is inexcusable. Until the Legislature adopts the rule of comparative negligence, we are compelled to follow the law in this respect.

The result is that the case is reversed.

FARRINGTON, J., concurs. ROBERTSON, P. J., dissents.

TAYLOR et al. v. LUSK et al. (No. 1722.)
(Springfield Court of Appeals. Missouri. June 17, 1916.)

1. RAILROADS ⚡484(1)—FIRES—ACTIONS—EVIDENCE.

In an action against a railroad company for firing a sawmill, evidence held sufficient to carry the case to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740, 1746; Dec. Dig. ⚡484(1).]

2. RAILROADS ⚡482(1)—FIRES—ACTIONS—EVIDENCE.

That a railroad company fired premises adjacent to its tracks may be established by circumstantial evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1730; Dec. Dig. ⚡482(1).]

3. RAILROADS ⚡485(4)—FIRES—ACTIONS—INSTRUCTIONS.

In an action for the destruction by fire of premises adjacent to a railroad right of way, an instruction given on behalf of the plaintiffs, authorizing verdict in their favor if the jury believed that it was more likely that their property was set on fire by an engine being operated on defendants' track than from any other cause, was erroneous, not requiring the jury to find that the premises were so fired, even though such

an instruction as a cautionary instruction upon behalf of the defendants may have been proper. [Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1761; Dec. Dig. § 485(4).]

Robertson, P. J., dissenting in part.

Appeal from Circuit Court, New Madrid County; Sterling H. McCarty, Judge.

Action by G. R. Taylor and others against James W. Lusk and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellants. Perkins & Baynes, of Lilbourn, for respondents.

STURGIS, J. We all agree that this case should be reversed and remanded, but for somewhat different reasons. The case was first assigned to ROBERTSON, P. J., and the following statement of facts prepared by him, with some slight modifications, will be adopted: Plaintiffs' sawmill, near defendants' railroad, was destroyed by fire. They sued defendants and obtained a judgment, from which defendants have appealed. The trial was to a jury, and the defendants submit here that the verdict should have been directed for them, and that an instruction given in behalf of plaintiffs which authorized a verdict in their favor if the jury believed "from all the evidence in the case that it was more likely that plaintiffs' mill was set on fire by an engine being operated on defendants' track than from any other cause" was erroneous. The plaintiffs' mill was situated on the west side of defendants' railroad, parallel therewith, and about 90 feet from the center of the track. At that point the railroad runs nearly southwest and northeast and curves to the east. On the night of April 24, 1915, at about 11 o'clock, a freight train passed on defendants' railroad going north, and about half an hour later the south end of the mill was discovered in flames. The mill was a frame building, two stories high, and with an old plank roof which was partly open (40 feet downstairs, and 10 or 12 feet upstairs on the south end) on the side toward the railroad. On the night of the fire, and for some days prior thereto, there was a high wind blowing from the direction of the railroad toward the mill and the weather was dry. There was testimony that the track was about level at the place where the defendants' railroad passed the mill, and the train "slowed up and then speeded up." One witness who resided a short distance north of the mill, less than 1,000 feet, testified that she observed the train when it passed her, but did not notice it throwing any sparks. Some other witnesses testified that they had seen engines at that point throw sparks 40 feet high at night, as high as the trees, and one witness testified that three days before the mill burned she put out two or three small fires during the

daytime between the mill and the railroad, started within about 5 feet of the mill, and that these were started by a passing train. Other witnesses testified that they had seen live sparks going beyond the right of way. The mill was not in use at the time it burned, and had not been operated for over a year. No other origin of the fire is suggested. Defendants offered no testimony. Some of the witnesses stated that the mill was 40 feet from the right of way, and all who spoke of the distance from the track placed it at about 90 feet. The witness who put the fire out a few days before the mill burned said the mill was 30 feet from the right of way fence, and that the fires she extinguished were 25 feet from the fence. On the day on which this witness discovered the fire near the mill there must have been a high wind, and the weather was evidently dry; as the witness testified that these conditions had existed some days prior to this fire. Assuming that it is found that the engine was emitting sparks, and that the conditions were as testified to, then we would, in order to uphold this verdict, have to reason about as follows: At one time a few days before the mill burned a live spark was carried to within 5 feet of the mill, and there ignited the dry vegetation. Therefore at this time, practically the same weather conditions prevailing, it would be carried 5 feet further and ignite the mill. The fire was discovered about half an hour after the train passed, and the whole mill was then on fire, showing that it had been burning approximately that long. For this reason it cannot be told just where the fire first started.

Under these facts ROBERTSON, P. J., is of the opinion that the testimony is not sufficient to fix liability upon defendants for this fire under the rulings in *Gibbs v. Railroad*, 104 Mo. App. 276, 282, 78 S. W. 835; *Manning v. Railroad*, 137 Mo. App. 631, 635, 119 S. W. 464; *Fritz v. Railroad*, 243 Mo. 62, 148 S. W. 74.

[1-3] FARRINGTON, J., and the writer are of opinion that plaintiff made a case for the jury under proper instructions, but that the instruction complained of is erroneous, for these reasons: The evidence in the case is purely circumstantial, but facts may be proven by circumstantial evidence as well as by direct evidence. We all agree that the instruction is not erroneous, however, because not requiring the facts proven to be such as to exclude every reasonable possibility of the fire having some other origin. The statement in the opinion (*Sheldon v. Railroad*, 29 Barb. [N. Y.] 226) quoted from in *Peck v. Railroad*, 31 Mo. App. 123, 128, to the effect that the proof in this kind of cases must be such as to leave no reasonable doubt as to the origin of the fire, has not received the sanction of our Supreme Court in subsequent cases which have come to our attention. *Kelley v. Railroad*, 151 Mo. App.

307, 310, 311, 131 S. W. 718, and cases there cited. In the case of Big River Lead Co. v. Railroad, 123 Mo. App. 394, 400, 101 S. W. 336, the statement of the law quoted from in the Peck Case was condemned and the decisions to the contrary reviewed. We think our Supreme Court has, in effect, repudiated that doctrine, and the New York Court of Appeals, in the same case (Sheldon v. Railroad, 14 N. Y. 223, 67 Am. Dec. 155) repudiated the utterances of said quotation. In Campbell v. Railway, 121 Mo. 340, 349, 25 S. W. 936, 937 (25 L. R. A. 175, 42 Am. St. Rep. 530), it is said:

"The evidence was all circumstantial. It was important, then, to show that there was a possibility that sparks may have been thrown a distance sufficient to reach the building in which the fire originated, and that they contained heat enough to set it on fire. The fact that live sparks were thrown from engines, and did ignite grass, and other combustible materials, would tend to prove the probability that the fire was communicated from an engine."

And again:

"We think the evidence tended to prove the possibility, and consequent probability, that the fire was communicated to plaintiff's property from one of defendant's engines, and that the evidence was admissible, and its probative force was for the determination of the jury."

See, also, the Manning Case, supra.

The mere use of the word "likely" instead of "probable" in the instruction is of little consequence, as we think they carry much the same meaning, though the word "probable" should be used to avoid criticism and as being more accurate and less likely to be misunderstood in this connection.

We consider that it is sufficient to sustain a verdict for plaintiffs in a case of this character based on circumstantial evidence, that the evidence shows that the fire could have been communicated from the engine, and that which is the most probable source of its origin. It will be noticed, however, that the instruction first mentioned, given for plaintiffs, directs a finding for them in case the jury found that the origin of the fire was more likely from the engine than from any other cause disclosed by the evidence; in other words, that plaintiff is entitled to a verdict whenever the jury finds that the evidence points to the engine as the most probable source of the fire without requiring a finding that the engine did, in fact, start such fire. We think the jury should be required in all cases, and especially so when the evidence is purely circumstantial, to find that defendant's engine did, in fact, set fire to the destroyed property, and that there is a substantial difference between requiring the jury to find that the engine was the source of the fire and in finding that it was the most probable source. Here the jury were told to base their verdict on a finding that it was more likely that plaintiff's mill was set on fire by an engine operated on defendant's track than from any other cause," without requiring a finding that it did do

so. A jury might readily find that the engine was the most probable cause, but be unwilling to find that defendant's engine did, in fact, set the mill on fire; and no less a finding should be allowed in determining defendant's liability.

In Fritz v. Railroad, 243 Mo. 62, 78, 148 S. W. 74, 78, speaking of a case similar to this, the court said:

"The evidence relied on to show the origin of the fire is strictly circumstantial; that is, the main fact, viz., the cause of the fire, stands to be proved by the proof of surrounding conditions and circumstances 'whose existence is a premise from which the existence of the principal fact may be concluded by the necessary laws of reasoning.' Bl. L. Dict., under 'Circumstantial Evidence.' 'The soundest test of the validity of that sort of evidence is that no other theory but the hypothesis upon which the conclusion is based can be formed.' Per Hughes, J., in Musselwhite v. Receivers, 4 Hughes, loc. cit. 169 [Fed. Cas. No. 9,972]. In circumstantial evidence the principal and ultimate fact is got at by way of argument and by method of demonstration in the nature of reductio ad absurdum. Will's Cir. Ev. p. 17. Therefore, in cases turning on circumstantial (or what is called by the civilians oblique and by the Scotch jurists argumentative) evidence, the proof should have a tendency to exclude any other reasonable conclusion than the principal fact. Says the author just quoted (page 17): 'The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove.'"

1 Greenleaf on Evidence, § 13, speaking of proof by circumstantial evidence, says:

"And from these facts, if unexplained by the prisoner, the jury may or may not deduce or infer or presume his guilt according as they are satisfied or not of the natural connection between similar facts and the guilt of the person thus connected with them."

In speaking of the proof required and what the jury must find in a case similar to this, the court, in Lead Co. v. Railroad, 123 Mo. App. 394, 402, 101 S. W. 636, 638, said:

"That evidence showing no more than a probability that the source of a fire was a railroad engine is sufficient to submit to the jury was decided, in effect, in Campbell v. Railroad, supra; Sheldon v. Railroad, 14 N. Y. 223 [67 Am. Dec. 155]; Field v. Railroad, 32 N. Y. 339; Railroad v. Richardson, 91 U. S. 470 [23 L. Ed. 356]; Smith v. Railroad, 63 N. H. 25; and numerous other cases. But, of course, the probative force of the evidence must be strong enough to induce a belief in the minds of the jury that the fire in fact originated from a locomotive, not merely that it might have done so. The evidence ought to warrant more than a conjecture as to the source of the fire—ought to suffice to induce a conclusion regarding the matter in the minds of reasonable men."

And in the same case the court commented favorably on an instruction to the effect:

That a verdict "could not be found for plaintiff on a mere conjecture as to the cause of the fire, but the jury must find that it was communicated by an engine on defendant's road while passing Irondale, and the burden of proving this fact by the greater weight of the evidence was on the plaintiff; that the evidence to prove the origin of the fire was purely circumstantial, and, if the jury found the circumstances were more consistent with the theory that it caught from some other source than defendant's engines

than with the theory that it was communicated by an engine, the verdict should be for defendant."

The last instruction mentioned by the court was given for defendants, and it would be entirely proper to give on defendants' behalf a cautionary instruction, as was done in that case, that there should not be a finding for plaintiff unless the evidence showed that the engine was the most probable cause of the fire, or to the effect that before plaintiff could recover he must prove that the fire was more probably caused by the engine than by any other cause. These, however, are cautionary instructions in defendants' favor. For the plaintiffs, on whom is the burden of proof, the instructions should require a positive finding that the defendants' engine set on fire the plaintiffs' mill. A mere finding that such cause is more probable than any other is not sufficient to fix liability. The objection to and danger in proving a fact by circumstantial evidence is that it is based on deductions from other facts, and that, all the facts not being known, a wrong conclusion is possible, if not probable. It would render proof by such evidence far more dangerous to not require the jury to make a finding that the ultimate fact is true, but only that such is more probable than anything else.

For the reasons given, the cause is reversed and remanded.

FARRINGTON, J., concurs. ROBERTSON, P. J., is of the opinion that the instruction is not erroneous, but concurs in the result, as stated in the opinion.

BOYKEN v. SHARP. (No. 11985.)

(Kansas City Court of Appeals, Missouri.
May 22, 1916. Rehearing Denied
June 12, 1916.)

1. JUDGMENT \S 735—RES JUDICATA.

Judgment for plaintiff in proceedings by an administrator in the probate court under the statute for the discovery of assets, in which he charged that defendant had in her possession and was concealing property belonging to the estate, was not res judicata in defendant's claim against decedent's estate for services, in which the claimant alleged that decedent, before dying, attempted to transfer the property which the administrator had retaken, but did not complete the transfer, so that it went into the hands of the administrator, since the first judgment was merely an adjudication that decedent did not transfer title.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263, 1265; Dec. Dig. \S 735.]

2. JUDGMENT \S 739—RES JUDICATA.

The principle of res judicata that one is bound by what he might and should have litigated in the first proceeding, though he did not do so in fact, does not apply to judgment in proceedings to discover assets so as to bar defendant in subsequent action to recover for services.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1106, 1267; Dec. Dig. \S 739.]

Appeal from Circuit Court, Vernon County; B. G. Thurmond, Judge.

Claim by Laura Boyken against I. G. Sharp, administrator. From a judgment allowing the claim, defendant appeals. Judgment affirmed.

J. M. Hull and M. T. January, both of Nevada, Mo., for appellant. W. M. Bowker and W. H. Hallett, both of Nevada, Mo., for respondent.

ELLISON, P. J. Plaintiff presented a claim in the probate court against the estate of Mary J. Cooper, deceased, for services rendered her, including waiting upon her in her last sickness. The claim, amounting to \$740, was allowed. The administrator appealed to the circuit court, where she again prevailed, and defendant has brought the case here.

In the circuit court plaintiff filed an amended claim to which she attached an affidavit. The amended paper alleged plaintiff's services whereby deceased in her lifetime became indebted to her in the sum of \$740. She further alleged that deceased was the owner of certain personal property at her death, consisting of certificates of deposit in certain banks amounting to \$740, and that deceased promised and agreed to give her in payment of her services whatever personal property she had at her death; that deceased before dying attempted to transfer this property to plaintiff, "but did not complete the transfer, and said property went into the hands of the administrator. Wherefore claimant prays judgment for said sum of \$740, the amount due her." Defendant then filed a plea of res adjudicata and offered the record of the probate court to sustain it. The trial court refused the offer, and that is the sole error assigned.

The plea of res adjudicata is that, on the death of Mary J. Cooper and the appointment of the administrator, he instituted a proceeding in the probate court, under the statute for the discovery of assets, in which proceeding he charged that plaintiff had in her possession and was concealing this same property which he alleged belonged to the estate. A citation was issued, interrogatories propounded, and answers made. Plaintiff's answers to the interrogatories were a denial of having any property belonging to the estate. "But she admits that she has in her possession as her own property certain evidence of debt turned over to the affiant by Mary J. Cooper, in her lifetime, and that the affiant is absolute owner of all of said personal property, and that the estate of Mary J. Cooper has no right, title, or interest in the same; that said personal property consists of the items set forth in the interrogatories 2, 3, and 4, filed by the administrator." The plea then further alleged a judgment against plaintiff for the property by the

probate court and that no appeal was taken by her.

[1] We think it clear that the proceedings and judgment in the probate court were not res adjudicata. That judgment merely amounted to an adjudication that Mary Cooper did not transfer the title to the property to plaintiff, and that it was property, the title to which was in the estate; while the present demand is based on a claim for services for which Mary Cooper was to pay by transferring the property to plaintiff, but which she failed to do, wherefore she, or rather the estate, owes her the value of the property. In the first the property itself was sought. In the latter claim, a judgment is asked in a certain sum, measured by the value of the property, it is true, but which must be realized upon as any other like demand against the estate.

While counsel have not cited a case with like facts, they have referred us to several which determine the rule to be followed in ascertaining whether one adjudication bars another. *Womach v. St. Joseph*, 201 Mo. 467, 476, 100 S. W. 443, 10 L. R. A. (N. S.) 140; *Fritsch Foundry v. Goodwin*, 100 Mo. App. 414, 74 S. W. 136; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214.

[2] Defendant has called our attention to the rule that in applying the principle of res adjudicata one is bound by what he might and should have litigated in the first proceeding, even though he did not do so in fact. That rule does not affect this case, for here plaintiff could not have litigated in the first proceeding the cause of action she now asserts.

The judgment must be affirmed. All concur.

PUCKETT v. HAYNES et al. (No. 1699.)

(Springfield Court of Appeals. Missouri. May 25, 1916. Rehearing Denied June 24, 1916.)

1. MASTER AND SERVANT \Leftrightarrow 285(5)—INJURIES TO SERVANT—QUESTION FOR JURY.

In a servant's action for injuries caused by the explosion of a stick of dynamite given to plaintiff by a fellow servant after attempting to light the fuse with a lantern which was blown out by the wind, whether the fuse was lighted when handed to plaintiff by reason of coming in contact with the blaze of the lantern, or exploded without apparent cause, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1016; Dec. Dig. \Leftrightarrow 285(5).]

2. TRIAL \Leftrightarrow 251(8)—INSTRUCTIONS—APPLICATION TO PLEADING.

In a servant's action for injuries caused by the explosion of a stick of dynamite given to plaintiff by a fellow servant, where the petition sufficiently alleged negligence, an instruction which required the jury to find on the ultimate fact of negligence without referring to the various elements constituting that negligence was not erroneous, since it is not necessary that any instruction be given on negligence, and general

terms not misleading to the jury amount only to nondirection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 593; Dec. Dig. \Leftrightarrow 251(8).]

3. MASTER AND SERVANT \Leftrightarrow 259(2)—INJURIES TO SERVANT—PLEADING—PETITION.

In a servant's action for injuries caused by the explosion of a stick of dynamite given to plaintiff by a fellow servant, an allegation in the petition that the fellow servant was guilty of negligence in handling such stick of dynamite to plaintiff after having lighted the same, or placing the end of the fuse in contact with a fuse that could have lighted it without telling plaintiff that he had done so, was a sufficient allegation of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 838; Dec. Dig. \Leftrightarrow 259(2).]

4. MASTER AND SERVANT \Leftrightarrow 279(6)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—NEGLIGENCE OF FELLOW SERVANT.

In a servant's action for injuries caused by the explosion of a stick of dynamite given to plaintiff by a fellow servant after attempting to light the fuse with a lantern which was blown out by the wind, evidence *held* sufficient to sustain a jury finding that the fellow servant was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 979; Dec. Dig. \Leftrightarrow 279(6).]

Sturgis, J., dissenting.

Appeal from Circuit Court, Barton County; B. G. Thurman, Judge.

Action by W. F. Puckett against Jonathan Haynes and others. Judgment for plaintiff, and defendants appeal. Affirmed.

R. M. Sheppard, of Joplin, and J. P. McCammon, of St. Louis, for appellants. H. W. Timmonds, of Lamar, and W. M. Bowker, of Nevada, Mo., for respondent.

ROBERTSON, P. J. Plaintiff lost his right arm below the elbow as the result of an explosion of a stick of dynamite while he was working in defendants' coal mine. In this action to recover damages for said injury he obtained a verdict for \$1,500, and from the judgment entered thereon, defendants have appealed.

The negligence alleged is that of a fellow servant, and is governed by our fellow servant act. Plaintiff and defendant Hockman, plaintiff's fellow servant, were working at night. Plaintiff had drilled a hole through a layer of coal for the purpose of dropping the dynamite therein after the cap and 12 or 18 inches of fuse were connected with the dynamite and the fuse lighted. Hockman got the dynamite, put the cap on the fuse and in the dynamite, and asked plaintiff for a match. Plaintiff told him that he had none, when Hockman remarked that he would have to light the fuse with a lantern, which he thereupon picked up. Plaintiff at the same time turned to pick up some tools. It was dark and rainy, and the wind was blowing. When Hockman raised the globe of his lantern the wind blew out the light. All this occurred evidently in the regular and

continuous course of the events we have just narrated. When the light went out Hockman handed the dynamite to plaintiff and told him to take it, and he (Hockman) would go and get some matches. Hockman then went to a steam shovel about 20 feet away. What further took place is related by plaintiff as follows:

"I took the stick of dynamite and held it for a minute or so; then I laid my shovel down to lay on the fuse, and started to lay the dynamite on it, when it went off in my hand."

The fuse had a powder core wrapped with a cord, some of which is coated with tar, and some with a waterproof composition.

[1, 2] The instruction complained of by defendants referred to the testimony as to what occurred prior to when Hockman undertook to light the fuse by the use of his lantern, and then tells the jury that, if "he started to light the same in his lantern, and carelessly and negligently exposed the same to the blaze therein, and then said to the plaintiff that his lantern had gone out, and that he would have to go to the engine to get some matches to light the same, and handed the stick of dynamite to the plaintiff, and carelessly and negligently asked him to hold the same until he returned, and that plaintiff had no knowledge of the fact that said stick of dynamite had been exposed to the fire in said lantern, and was not notified by the defendant Hockman of that fact, and that while in the act of putting it down the same exploded by reason of having been exposed to said fire," etc., then the verdict should be for plaintiff. One of the defects in this instruction is said to be the omission of the requirement of the jury to find that Hockman knew, or by the exercise of ordinary care could have known, that the fuse was lighted when he handed it to plaintiff. Along with this contention it is stated in the brief filed here in behalf of defendants that:

"The direct and positive evidence of the plaintiff and of the defendant Hockman is to the effect that there was not anything about the fuse which would indicate or suggest that it had come in contact with the blaze of the lantern and was burning."

This does not quite put this question in the proper way. Both plaintiff and Hockman testified that they did not notice that the fuse was lighted when it was handed to plaintiff, but in the face of this testimony we cannot hold as a matter of law that it was not lighted, because all of the circumstances must be taken into consideration in ascertaining if the jury may not have been justified in finding that the fuse was lighted at that time, and that, had not Hockman been negligent, he would have known it. The defendants' testimony is to the effect that, when a fuse is lighted, it always sputters. One of their witnesses who had been engaged in the powder business for 27 years said he "had never known the time when you could light one of these fuses and have the fire come in contact with the powder in the fuse with-

out it causing a sputter and flash." Another witness for defendants testified that he had worked in the mines and for a powder company handling powder all his life, and that "when you first light a fuse and the fire comes in contact with the powder core, you get a sputtering noise; and also fumes, or smoke; you also get a flash and kind of hissing noise; that is true of any kind of fuse; it happens in all of it; in all different kinds of fuse I have used." These two witnesses testified that they had known of dynamite exploding without any apparent cause, but whether in this case it so exploded was for the jury to decide. We think there was testimony from which the jury could have found that Hockman should have known the fuse was lighted by the blaze of the lantern. Considering the fact that the accident occurred at night when it was raining and the wind blowing, and that the conclusion is justified that the fuse was lighted by reason of coming in contact with the blaze of the lantern, it was then a question for the jury to determine whether or not Hockman was guilty of negligence in handing the dynamite to plaintiff, if the jury found the fuse was lighted, and before the jury could conclude that Hockman was negligent they must have found that he knew, or by the exercise of ordinary care could have known, that the fuse was lighted. This brings us to the question of the sufficiency of the instruction upon the objection urged against it.

The instruction, to which we have referred, in effect, required the jury to find the ultimate fact of negligence on the part of Hockman without referring to the various elements which constituted that negligence. In the case of *Lanning v. Chicago Great Western Ry. Co.*, 196 Mo. 647, 662, 94 S. W. 491, where an engineer backed a locomotive engine against cars and forced them onto plaintiff, the instruction did not require the jury to find that the engineer knew, or by the exercise of ordinary care could have known, of the dangerous position of plaintiff, yet it was said:

"The jury were at liberty to consider his knowledge of the danger to plaintiff, even though it was not made a condition of plaintiff's recovery in the instruction. Under the general allegation of negligence it was entirely competent to prove such knowledge, and the instruction was well enough in view of the evidence and the theory upon which both parties tried the cause."

In behalf of the defendants in the case at bar the jury was instructed that the burden was on the plaintiff to prove "that plaintiff's injuries were caused by the negligence of the defendant Hockman." *Rippetoe v. Missouri, K. & T. R. Co.*, 138 Mo. App. 402, 407 and 408, 122 S. W. 314. No instruction was asked in behalf of defendants more specific than the one given for plaintiff. The defendants undertake to distinguish this case from the *Lanning Case*, supra, on the question of the instruction, because it is said in that case the allegation was in the petition that the engineer knew, or by the exercise

of ordinary care could have known, of the dangerous position of the plaintiff; but that phase of the case we will discuss later.

In behalf of defendants some decisions are cited to sustain the proposition that before defendants could be held liable Hockman must have known, or by the exercise of ordinary care could have known, that the fuse was lighted before he handed it to the plaintiff, and this proposition we concede, and think that it needs no discussion. But, conceding that to be the law, it does not follow that an instruction which omits this is defective, because that is simply an element that makes a certain act negligent. It is not necessary that any instruction be given on the question of negligence (*Wilson v. Kansas City Southern Ry. Co.*, 122 Mo. App. 677, 673, 99 S. W. 265, and cases there cited; *Hooper v. Metropolitan St. Ry. Co.*, 125 Mo. App. 329, 332, 102 S. W. 58), so that, when the general terms are used ordinarily, it amounts to no more than a failure to instruct. When instructions on negligence are given they must not be such as to mislead the jury, but they may be so general as to not lead them all the way, and yet amount to only nondirection. Some confusion may be avoided in considering decisions on this question by bearing in mind that sometimes the facts themselves imply negligence as a matter of law (*Prash v. Wabash R. Co.*, 151 Mo. App. 410, 415, 132 S. W. 57, and again others do not, and must be found by the jury to be negligent. The instruction in the case at bar cannot be pronounced fatally defective upon this point, as it required a finding that the facts hypothetically submitted constituted negligence.

It may well be argued that, if the instruction had contained the clause contended for in behalf of defendants, it would not have yet been fair to plaintiff. At the time Hockman was undertaking to light the fuse with the lantern plaintiff's attention was diverted elsewhere, and it may be argued that before Hockman handed him so dangerous a thing as dynamite he should have advised plaintiff of what he had undertaken to do, even though Hockman honestly believed it had not been exposed to the blaze therein, and given plaintiff an opportunity to take such precautionary measures as he saw fit.

Again, it is said the instruction is fatally defective because it is predicated on facts not proven in assuming that Hockman handed the dynamite to plaintiff and asked him to hold the same. They were engaged in preparing the shot for the hole plaintiff had drilled. They had tried to light the fuse with matches and failed. Hockman undertook to light it with his lantern, and it was blown out, and plaintiff testified that Hockman then said, upon handing him the dynamite, "Take this and I will go get some matches." The conclusion from these facts may well be that Hockman did not hand the dynamite to plaintiff to throw down, as

Hockman could as well have done that. It was raining, and likely Hockman did not want it laid down so as to get wet.

[3] It is said that the Lanning Case is distinguishable, on the question of instructions, from the case at bar, by reason of the allegations we have above noticed. We think that reference was made to the petition in that decision solely for the purpose of disclosing that the facts which the jury were authorized to consider under the instruction in that case were alleged in the petition, and in the case at bar we think the allegations are sufficient to justify a finding of the negligence of Hockman. The allegation in the petition is, after stating what had previously transpired, that:

Hockman "was guilty of negligence in handing such stick of dynamite to the plaintiff after having lighted the same or placing end of said fuse in contact with a fuse that could have lighted it without telling this plaintiff that he had done so."

So far as we are aware, it has always been held in this state that, when the facts involved are set forth and in general terms alleged to be negligent, then the petition is sufficient. *Hill v. Mo. Pac. Ry. Co.*, 49 Mo. App. 520, 531; *Id.*, 121 Mo. 477, 26 S. W. 576.

It seems clear to us that under the allegations of the petition the defendants were duly notified of the facts they were required to meet, and that under the instructions the jury unquestionably understood the issues involved.

[4] In behalf of defendants it is stated that there was an entire failure of proof of any negligence in this case, but from what we have heretofore stated we think it clear that this contention should not be upheld. Even if dynamite does sometimes explode from causes unknown, yet in this case the facts and circumstances justified the conclusion that the fuse was lighted by coming in contact with the blaze of the lantern. This fact being found, the defendants are met with their own testimony to the effect that when a fuse is lighted it always gives visible (at night at least) and audible evidence of that fact; hence it was not a case without evidence on the question of Hockman's negligence in not seeing or hearing it.

Having considered and discussed all of the questions raised in behalf of defendants, and found them without merit, the judgment should be affirmed.

It is so ordered.

FARRINGTON, J. (concurring). It seems to me that the question of whether Hockman knew or had reasonable cause to know that the fuse was lighted is unimportant under the facts of this case. That he knew what he had done that caused the fuse to light is an undisputed fact, and it was the failure to prudently act on that undisputed knowledge that constitutes his negligence.

The charge of negligence in the petition is as follows:

"Plaintiff says that Hockman, the fellow servant of this plaintiff, was guilty of negligence in handing such stick of dynamite to this plaintiff after having lighted the same or placing the end of said fuse in contact with a fire that could have lighted it without telling this plaintiff that he had done so. * * *

Defendants accepted this charge as a good ground of negligence, offering no demurrer, but filing an answer setting up assumption of risk and contributory negligence. The instruction complained of is as broad as the charge in the petition.

The jury, on evidence to support it, has found that Hockman put the fuse into the flame of the lantern or so close thereto as to ignite it, and that it, being so lighted, caused the explosion which injured the plaintiff. Hockman handled not only the fuse, but the lantern also, and is in law bound to know what he was doing because opportunity to know is the same as knowledge where there is a duty owing. Knowing that what he had done would or could cause the fuse to ignite, he had no right as an ordinarily prudent man if the jury so find to hand the stick of dynamite to the plaintiff, who was ignorant of what Hockman had done without giving plaintiff warning of the conditions to which the fuse had been exposed. This was due to the plaintiff that he might exercise his own judgment about whether there was danger. The negligence charged, as I conceive it to be, is the act of Hockman in handing the stick of dynamite to plaintiff having full knowledge of the conditions to which the fuse had been subjected, without giving plaintiff the benefit of a knowledge of those conditions.

I am for affirming the judgment.

STURGIS, J. (dissenting). The ground of my dissent in this case is that the only negligence justified by the evidence was neither alleged in the petition nor submitted to the jury by the instructions. The majority opinion correctly states the law as follows:

"Both plaintiff and Hockman testified that they did not notice that the fuse was lighted when it was handed to plaintiff, but in the face of this testimony we cannot hold as a matter of law that it was not lighted, because all the circumstances must be taken into consideration in ascertaining if the jury may not have been justified in finding that the fuse was lighted at that time, and that had not Hockman been negligent he would have known it. [Italics mine.]

* * * In behalf of defendants some decisions are cited to sustain the proposition that before defendants could be held liable that Hockman must have known, or by the exercise of ordinary care could have known, that the fuse was lighted before he handed it to the plaintiff, and this proposition we concede, and think that it needs no discussion."

That plaintiff's fellow workman who handed him the stick of dynamite was not negligent if he did not know, or have reason to believe, the fuse was lighted, and could not have known it by using due care, the only care the law required of him, is perfectly

obvious. The very statement that he did not know the fuse was lighted and had used due care in that respect negatives negligence; for, when a man uses due care he is not negligent. This the majority opinion concedes is the very heart of the case, and it is also conceded and obvious that the fellow servant's negligence in this respect is neither alleged in the petition nor a finding thereof required by the instructions.

The only negligence alleged or submitted by the instructions is in the fellow servant trying to light the fuse at the lantern—"negligently exposed the same to the blaze therein"—and in negligently asking plaintiff to hold the stick of dynamite when plaintiff did not know it had been exposed to the fire in the lantern, and was not notified by the fellow servant of that fact. There is no pretense here that it was negligence to try to light the fuse in the lantern, or that the fellow servant did it in a negligent way, and that ground of negligence, though submitted to the jury, is without evidence to support it. As to handing the dynamite to plaintiff without notifying him that the fuse had been exposed to the fire of the lantern, granting, of course, that plaintiff did not know this, as the jury found, negligence of the fellow servant depends wholly on whether the fellow servant knew or by due care could have known this fact himself; and so the majority opinion concedes. There was no negligence in the fellow servant not notifying the plaintiff that he had tried to light the fuse at the lantern and that the lantern had been blown out in so doing; for plaintiff knew this as well as his coworkman. The plaintiff testified:

"He came back with the dynamite and lantern and asked me for a match to light the fuse. I told him I didn't have a match, and he said, 'I will have to light it with the lantern.' He reached down and picked up his lantern. I turned around to pick up the tools, and then the light went out of his lantern. He says, 'Take this [the dynamite] and I will go get some matches.'"

This action was an assurance by the fellow servant that he thought, and honestly so, that the fuse had not come in contact with the flame so as to be lighted. His act of handing him the fuse after the lantern was blown out by the wind spoke just as loudly and definitely as words, and gave plaintiff just as much information, taking into consideration what the plaintiff observed him trying to do, as if he had said to him, "The wind blew the flame out before it touched and lighted the fuse." His act was also an assurance that the fuse had not sputtered or given indication of being lighted. Why, then, should the court say the fellow workman should have notified plaintiff when his acts gave all the information that words could have done? His opportunity for observation on this point, however, was better than that of plaintiff, whose attention was distracted by other matters, and the whole question of negligence turns on whether the

fellow workman could, by exercising due care, have known of the fuse being lighted, or was negligent in forming a belief that it was not lighted. The jury were permitted to find the defendants liable without being required to find any negligence in this respect—the only negligence possible in the case. It will not do to say that the coworkers must be held to have known that the fuse was, in fact, lighted by the lantern, because the jury have found that it was, and he had an opportunity to know. The jury so found because it exploded soon after, but the coworker acted before the explosion. Hindsight is often better than foresight. Opportunity to know is negligence only when the person having the opportunity has failed to use the same as a reasonably careful man should. Of course, one's opportunity to know a fact, like any other issue, may at times be such as to be declared on either way as a matter of law, but certainly is not so here.

It will not do to say that the failure of the fellow servant to use due care in ascertaining whether the fuse was lighted is only "an element that makes a certain act negligence"; for it is the *sine qua non* of negligence in this case. It is an absolutely essential element of any negligence in this case, and no instruction defining and predicated negligence and authorizing a recovery thereon can be correct which does not require the jury to find that which is essential to make negligence and without a finding of which there is no negligence.

And to my mind, when the court does undertake to instruct the jury as to what constitutes negligence permitting plaintiff to recover, such instruction must be correct, and not omit the essential element which alone makes an act negligence. It will not do to say that such instruction is good as far as it goes, thus implying that defendants could, if they desired, supply the omission by another instruction. It is fundamental that plaintiff must allege and prove the things which are essential to his case, and the jury must find the same to be true, and it is just as logical to say that the proof is good as far as it goes as an instruction, when same relates to the essentials of plaintiff's right to recover. The omission of an essential element going to make plaintiff's case, in an instruction authorizing a finding for plaintiff on the requirements contained in the instruction, is, in fact, telling the jury that no such finding is necessary. A different rule applies at times to matters of defense.

This is not a case of the character where general allegations of negligence are permissible either in the petition or instructions, and any reference to such principle is inapplicable. The principles of law here contended for are so well known that no citation of authorities is deemed necessary.

The case should be remanded for new trial.

**WINKLEBLACK v. GREAT WESTERN
MFG. CO. (No. 11892.)**

(Kansas City Court of Appeals, Missouri.
April 8, 1916. Rehearing Denied
June 12, 1916.)

**1. APPEAL AND ERROR ¶999(1)—QUESTIONS
OF FACT—VERDICT.**

In a servant's action for personal injury, a verdict for him settled all controverted issues of fact in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3915, 3917-3921; Dec. Dig. ¶999(1).]

**2. MASTER AND SERVANT ¶5—RELATION—
SERVANT OF INDEPENDENT CONTRACTOR.**

A teamster employed by a transfer company, which alone had the right to discharge him, which assigned him to the duty of driving a team which his employer used exclusively for hauling freight for a manufacturing company at a stipulated price, and who was placed under the direction of the manufacturing company, and by it was placed under the direct control of its shipping clerk who required him to assist in loading freight in the warehouse and trucking it to the wagon, stood in the relation of a servant to the manufacturing company and was entitled to have it exercise reasonable care to furnish him a reasonably safe place to work; so that for injury resulting from a failure to do so the manufacturing company was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 5; Dec. Dig. ¶5.]

**3. MASTER AND SERVANT ¶5—RELATION—
SERVANT OF INDEPENDENT CONTRACTOR.**

As a general rule, the relation of master and servant does not exist between an employer and the servant of an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 5; Dec. Dig. ¶5.]

4. NEGLIGENCE ¶119(7)—PROOF—VARIANCE.

Where the plaintiff specifies in his petition, he must be held to his specification and cannot recover on proof of a different statement of facts, and, where the petition contains a general statement of negligence, followed by the averment of specific facts of the alleged negligence, the plaintiff will be confined to a recovery upon the specific facts.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 212-216; Dec. Dig. ¶119(7).]

**5. MASTER AND SERVANT ¶264(4)—ACTION
FOR INJURY—PLEADING—EVIDENCE.**

In an action for injury to a teamster, a petition, alleging that defendant permitted the floor or a loading platform and the floor of its warehouse near the doorway over which plaintiff ran a loaded truck, to be and remain depressed and worn and the wood of the floor of the dock and of the warehouse to be in a defective and worn-out condition, with a hole or holes therein, into which the wheel of the truck dropped at the time of his injury, the locus of the hole was not precisely defined, and thereunder plaintiff might show that it was just over the line in the dock platform.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 865; Dec. Dig. ¶264(4).]

**6. MASTER AND SERVANT ¶208(1)—SAFE
PLACE TO WORK—ASSUMPTION OF RISK.**

A servant does not assume the risk of injury caused by the master's negligence in failing to exercise reasonable care to furnish him a reasonably safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 551; Dec. Dig. ¶208(1).]

7. MASTER AND SERVANT \Leftrightarrow 289(15)—ACTION FOR INJURY—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In a teamster's action for personal injury when the wheel of a truck fell into a hole in the floor, evidence held to make his contributory negligence a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1106; Dec. Dig. \Leftrightarrow 289(15).]

8. APPEAL AND ERROR \Leftrightarrow 499(1)—REMARKS OF COUNSEL—NECESSITY OF OBJECTION AND EXCEPTION.

Objection to the remarks of counsel in his argument could not be considered, where the record did not show that objection was made at the time of the remarks or that an exception was taken to the ruling of the court thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2295; Dec. Dig. \Leftrightarrow 499(1).]

9. DAMAGES \Leftrightarrow 30—PERSONAL INJURY—ELEMENTS OF DAMAGES.

In a servant's action for injury to his foot, the loss of time while it was healing, the pain and suffering, past and future, and the humiliation of being crippled, were elements for which he was entitled to recover reasonable compensation.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 222; Dec. Dig. \Leftrightarrow 30.]

10. DAMAGES \Leftrightarrow 132(7)—PERSONAL INJURY—EXCESSIVE DAMAGES—INJURY TO FOOT.

A verdict of \$5,000 for injury to a teamster 54 years of age earning \$10.50 per week, whereby certain bones of a foot were broken but healed as well as could be expected in one of his age, making him unable to work for about four months, and leaving a permanent flat foot and a limp, and a liability to some pain and inconvenience, where he obtained employment at pay not materially reducing his earning capacity, was excessive, and would not be sustained without a remittitur of \$2,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 378; Dec. Dig. \Leftrightarrow 132(7).]

Appeal from Circuit Court, Jackson County; I. N. Watson, Special Judge.

"Not to be officially published."

Action by James W. Winkleblack against the Great Western Manufacturing Company and the Newby Transfer & Storage Company. Dismissed as to the Transfer Company, and judgment for plaintiff against the Great Western Manufacturing Company, and it appeals. Affirmed on condition that plaintiff file a remittitur of \$2,000; otherwise, reversed, and cause remanded.

Wm. W. Hooper, of Leavenworth, Kan., and Griffin & Orr, of Kansas City, for appellant. T. J. Madden and E. C. Whitesitt, both of Kansas City, for respondent.

JOHNSON, J. Plaintiff, a teamster, sued the Newby Transfer & Storage Company and the Great Western Manufacturing Company to recover damages for personal injuries he alleged were caused by negligence of the defendants, his employers, in failing to exercise reasonable care to furnish him a reasonably safe place in which to work and with reasonably safe appliances. The answer of each defendant was a general denial and pleas of assumed risk and contributory negligence. At the close of plaintiff's evidence,

the court sustained a peremptory instruction asked by the transfer company, but overruled a similar instruction asked by the Great Western Company, and thereafter the trial proceeded against the latter defendant alone. The verdict and judgment were for plaintiff in the sum of \$5,000, and defendant appealed.

Plaintiff had been employed by the transfer company many years as a teamster, and for a long time had been assigned to the duty of driving a team and wagon which his employer used exclusively for hauling freight for the Great Western Company. The transfer company charged the Great Western Company a stipulated price for such service and employed and paid plaintiff, who therefore was the servant of the transfer company. Plaintiff testified that as such teamster his duty should have been to receive loads to be hauled at his wagon, but that his employer directed him to obey the orders of the Great Western Company, and that he had been required frequently by the foreman or shipping clerk of the latter company to assist in trucking heavy articles from its warehouse to the wagon. There was a loading dock at the rear of the warehouse the platform of which practically was on a level with the floor, and the petition alleges that the boards of the platform and floor at and near the doorway were decayed and in a dangerous condition.

On the occasion in question, plaintiff, the shipping clerk, and another employé of the Great Western Company, drove to the warehouse to load some iron shafting into the wagon for transportation and delivery to a customer. Arriving at the warehouse, they loaded a shaft 16 feet long and weighing about 350 pounds lengthwise on a two-wheel truck, and plaintiff, moving backward, proceeded to pull the truck and load from inside the warehouse through the doorway on to the dock and thence to the wagon. The surface of the floor and dock was rough and somewhat uneven, and he was compelled to exercise care to keep the shaft from rolling off the truck. While thus employed, one of the wheels dropped into a hole near the doorway, the truck shifted, and the shaft rolled off and fell on his foot, severely and permanently injuring it. Plaintiff testified:

"I had to pull kind of hard on account of the floor being kind of rough and on account of going backwards and pulling. I got to the door just by the doorway, the dock was rough, and the truck frame did jiggle and turn the shafting and make it uneven on the dock, and in trying to right it I went into the hole, as I came out into the door. I didn't see the hole. I was going backward and I didn't see the hole. The truck in coming out and running sideways run into that hole and started to turn, and turned the truck over, and the shafting fell on my foot. That was right in the doorway. That was a hole broken through there at the time by the truck falling into that worn place. It was rotten, and the truck broke the hole—the truck wheel. The wheel did not go clean down,

but it broke the place through so the wheel stuck in the place and it turned the truck up."

It appears from the evidence of plaintiff that the hole was in the dock platform at the doorway and not in the floor of the building; that plaintiff knew the floor and platform were in a defective condition and had complained about them to the shipping clerk, but did not know they were so defective as to threaten him with imminent danger; and that in moving the truck he obeyed the order of the shipping clerk, who was the foreman in charge of the work of loading the shafting.

The evidence of defendant contradicts that of plaintiff in many vital particulars. The shipping clerk described the floor and dock as being sound but rough along the course followed by the truck, though there were some rotten places at the sides which were some distance from the course through the doorway. There was a knot hole just outside the doorway, but it was not large enough to have disturbed the equilibrium of the truck if a wheel passed over it. He denied that he ordered plaintiff to move the truck, and says that, after he and his helper had placed the shaft on the truck and had turned to some other task, plaintiff voluntarily undertook to pull the truck out to the wagon. Defendant's evidence tends to show that, under the terms of its arrangement with the transfer company, plaintiff was to receive all loads at the wagon, was to do no work in the warehouse, had never been ordered to do such work, and that the shipping clerk was not a foreman nor authorized to enlist plaintiff in the service of defendant.

[1] The verdict for plaintiff settled all controverted issues of fact in his favor and, finding substantial evidentiary support for his contention that he was placed by his employer under the control and direction of defendant, under a general order to do whatever defendant ordered him to do, and that defendant, in turn, had placed him under the direct control of the shipping clerk, who followed the practice of having him assist in the work of loading freight in the warehouse and trucking it to the wagon, we must assume, for the purposes of the demurrer to the evidence, that such was the nature of his employment and of the duties his master compelled him to perform for defendant. But counsel for defendant argue that these facts do not disclose that plaintiff was the servant of defendant in the work of moving the truck and that, since the petition alleges a cause of action founded on a breach of duty defendant owed plaintiff as its servant, there is a variance between allegation and proof which should preclude a recovery in this action. Much of counsel's brief and argument on this branch of the case is bottomed on defendant's version of the facts which the jury rejected.

[2, 3] We need not discuss the case from the viewpoint that plaintiff was a mere volunteer

in moving the truck and therefore, at best, was no more than a licensee of defendant, since his evidence shows and the jury found that he was in the actual performance of duties of his employment imposed upon him by his master, the transfer company. He was hired and paid by the transfer company, which alone had a right to discharge him, but that company, according to the testimony of its president, "hired this team to them (defendant) by the year, and the team reported to them every morning for their instructions. * * * When he (plaintiff) went there he was entirely under their control. We didn't even pay any attention in any way, shape, or form after we sent him there of a morning." Under such agreement and practice, defendant certainly assumed towards plaintiff, with respect to the carrying out of orders given pursuant to the exercise of the rights of mastership over him, the reciprocal duty to exercise reasonable care to furnish him a reasonably safe place in which to work. As a general rule, the relation of master and servant does not exist between an employer and the servants of an independent contractor; but, where the employer assumes control over such servant and the work performed by him, the relation of master and servant exists, and the employer will be held liable to the servant for the injurious consequences to him of a negligent breach of the most primary duty of mastership, as well as for injuries to others inflicted by the negligent acts of the servant in the discharge of his employment. 26 Cyc. 970, 971; 1 Labatt on Master & Servant (2d Ed.) 56, 60.

The idea that an employer may hire and assume complete control over the servant of an independent contractor, and yet not owe him the same duty he would owe a servant of his own, is without the support of either reason or authority. The right to control plaintiff—to order him to wheel the load out of the warehouse—made plaintiff defendant's servant in the performance of that task. He was neither trespasser, licensee, nor invitee, but a servant entitled to the protection of a reasonable performance by defendant of a master's duty towards him. There is no variance between allegation and proof relating to the status of plaintiff with defendant.

[4, 5] Counsel for defendant argue, further, that there is a variance between essential specifications in the petition and the proof with respect to the place of the defect, and therefore that a recovery was allowed on a cause not pleaded. The precise point is that the petition placed the hole in the floor of the warehouse, at the doorway, while the proof of plaintiff placed it in the dock platform, just over the dividing line between the floor and platform.

The rule is well settled that, where the plaintiff specifies in his petition, he must be held to his specifications and cannot be al-

lowed to recover on proof of a different state of facts—this is, on the theory that the defendant when called upon to meet proof of certain specified facts must not be confronted at the trial with the burden of meeting proof of something entirely different—and the further rule is just as well settled that, where the petition contains a general statement of negligence followed by the averment of the specific facts of the alleged negligence, the plaintiff will be confined to a recovery upon the specific facts. *Thompson v. Livery Co.*, 214 Mo. 487, 118 S. W. 1128.

Turning to the petition, we find upon an analysis of all its expressions defining the negligent act which, of course, must be read together, that they leave the precise locus of the hole uncertainly defined, doubtless for the purpose of enabling plaintiff to recover on proof that it was on either side of the dividing line between the warehouse floor and dock platform. The charge of negligence is that:

"Defendants allowed and permitted said floor of said loading dock or platform and the floor of said warehouse near said doorway over which plaintiff ran said truck in the doing of said work to be and remain depressed, worn, rough, and uneven, and the wood composing floor of said dock and the floor of said warehouse at said point to be and remain in a soft or rotten and defective and worn-out condition, and with a hole or holes therein into which the wheel of said truck dropped at the time of plaintiff's injury, thereby rendering same unsafe and dangerous."

In the preceding description of the way in which the injury occurred, language was used which might be understood to indicate the location of the hole as being in the floor; but the charge of negligence we have quoted left its place uncertain and clearly advised defendant to prepare to meet proof that it was on one side or the other of the doorway. Defendant did not file a motion to make the petition more definite and certain, but accepted it as sufficient, and the proof that the hole was just over the line in the dock platform was within the scope of the specifications.

[6, 7] The defense of assumed risk may be disposed of with the observation that plaintiff did not, and could not, assume the risk of injury caused by negligence of defendant in failing to exercise reasonable care to furnish him a reasonably safe place in which to work, and, since his proof tends to show that such negligence was the cause of his injury, the defense of assumed risk could not be regarded as established in law. Nor would we be warranted in holding that plaintiff was guilty in law of contributory negligence. Though he knew that the course he would be compelled to travel was in bad repair and was dangerous, his position that he did not and could not know that it was so dangerous as to threaten him with imminent risk of injury cannot be declared unreasonable, and, considering that his attention was centered on the task of keeping the shaft in place, we cannot say that he

should have discovered and avoided the hole. His conduct presents issues of fact which the court properly sent to the jury for solution. The court did not err in overruling the demurrer to the evidence.

Instruction A given at the request of plaintiff is criticized on the grounds that it is too long and verbose and assumes that plaintiff was the servant of defendant. Counsel do not point out, nor have we been able to discover, any unnecessary fact included in the hypothesis on which a verdict was directed; nor do we find any repetitious or confused or misleading phrasing of the elements of the hypothesis. The instruction was long, but necessarily so. The second criticism has been sufficiently answered in what we have said in the discussion of the relationship between plaintiff and defendant. Other criticisms of this instruction are passed with the comment that they are not well grounded.

[8] Objections to certain remarks of counsel for plaintiff in his argument to the jury are urged, but cannot be considered, since the record fails to show that objections were made at the time of the remarks, or to show the taking of exceptions to the rulings of the court on such objections.

[9, 10] The point of an excessive verdict seems to be well taken. Plaintiff was 54 years old at the time of his injury and was earning \$10.50 per week. Certain bones in his foot were broken, but the fracture healed as well as could be expected in a person of his age. His foot was kept in a plaster cast until it healed, and he was unable to work for about four months. He has a flat foot, and this condition will be permanent, and he will always limp in walking and, of course, will "favor" that foot and will suffer some pain and inconvenience. He is now employed by a railroad company as a flagman at \$40 per month and is able to do that kind of work. He incurred no expense for surgical and medical treatment, and his earning capacity has not been diminished to any appreciable pecuniary extent, though, of course, he could not engage in some employments that he could follow if he had not been injured. Loss of time while his foot was healing, pain and suffering, past and to come, and the humiliation of being crippled, are the elements for which he is entitled to recover reasonable compensation. Measured by the standard employed by the Supreme and Appeal Courts in measuring damages in personal injury cases to ascertain whether or not the verdict transcended reasonable bounds, we think the verdict is excessive, and that the judgment should be reduced to \$3,000, and we require plaintiff, as a condition for the affirmance of the judgment, to enter a remittitur of \$2,000.

Counsel for plaintiff make the point that the bill of exceptions was not properly authenticated, but there is no merit in it, and we shall not discuss it.

On condition that within 10 days from the

giving of this opinion plaintiff shall file a remittitur of \$2,000, the judgment will be affirmed; otherwise, it will be reversed and the cause remanded. It is so ordered. All concur.

COMMERCIAL BANK v. AMERICAN BONDING CO. (No. 1765.)

(Springfield Court of Appeals. Missouri. May 25, 1916. Rehearing Denied June 24, 1916.)

1. APPEAL AND ERROR — REVIEW — REFEREE'S FINDING—CONCLUSIVENESS.

A referee's finding on the issues, supported by the evidence, is conclusive on such issues in the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4006, 4007; Dec. Dig. ¶ 1018.]

2. INSURANCE — FIDELITY INSURANCE—STATUTE.

Rev. St. 1909, § 7024, relating to the construction of warranties of fact, section 7026, forbidding the evasion of provisions relating to warranties, etc., and section 6937, providing that no misrepresentation made in obtaining a policy of life insurance shall be deemed material to render the policy void unless the representation shall have actually contributed to the contingency on which it is payable, do not cover fidelity bonds.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 539; Dec. Dig. ¶ 250(1).]

3. INSURANCE — CONTRACT—WARRANTY.

A warranty is a parcel of the contract, and must be absolutely true, whether material to the risk or not.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 567; Dec. Dig. ¶ 267.]

4. INSURANCE — RENEWAL — CONSTRUCTION OF CONTRACT.

A renewal of a policy or bond constitutes a separate and distinct contract for the period covered thereby, and, where the renewal receipt recites a renewal in accordance with the terms of the bond, it is a contract with the same terms as evidenced by the bond renewed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 276, 278-283, 287-291; Dec. Dig. ¶ 145(1).]

5. INSURANCE — FIDELITY BOND—RENEWAL—WARRANTIES.

The original warranties run through any renewal of a fidelity bond, and the insurer, in case demand is made on it under the terms of the contract, may show that any statements in the original application made for the bond were untrue; but this does not mean that such statements are promissory covenants or warranties which will render the bond void if the conditions existing between the employé and the insured have become changed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 276, 278-283, 287-291; Dec. Dig. ¶ 145(1).]

6. INSURANCE — FIDELITY BOND — RENEWAL RECEIPT—REPRESENTATION.

Where a bonding company, issuing a renewal receipt, required the statement from the insured asserting that the employé had faithfully and honestly accounted for all moneys and property and always had sufficient securities on hand to balance his accounts, and was not then in default, which statement was not made a warranty by any of the terms of the contract, the statements were only representations, and not warranties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 560; Dec. Dig. ¶ 265.]

7. INSURANCE — REPRESENTATIONS—EFFECT.

Representations are not a part of the contract in the sense that warranties are, but are inducements to a contract, though not facts which are contracted to be true, and they do not have to be literally true, as do warranties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 538-542; Dec. Dig. ¶ 253.]

For other definitions, see Words and Phrases, First and Second Series, Representation.]

8. INSURANCE — FIDELITY INSURANCE—REPRESENTATION—EFFECT.

A representation in the renewal receipt of a fidelity bond that the employé was not in default was a representation material to the risk, and which if falsely or fraudulently made would avoid the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 548, 549; Dec. Dig. ¶ 255, 256(1).]

9. INSURANCE — FIDELITY BOND — REPRESENTATIONS.

In the case of a representation, although material to the risk, if made in good faith, its falsity will not render the contract induced thereby void or voidable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 540; Dec. Dig. ¶ 256(2).]

10. INSURANCE — FIDELITY BOND — RENEWAL CONTRACT—REPRESENTATIONS.

Where a fidelity bond provided that all representations made by the employer to the surety were warranted to be true, the employer's statements or representations on the issuance of a renewal receipt that the employé had not to the knowledge of the employer been in default in the position covered by the bond and a renewal receipt, and had faithfully accounted for all moneys in his custody, and was not in default, made when none of the officers of the insured bank knew, or had any reasonable ground for knowing, that the employé was in default, were not made recklessly, but in the honest belief that they were true, and their untruth would not defeat the renewal bond.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 540; Dec. Dig. ¶ 256(2).]

Appeal from Circuit Court, New Madrid County; Sterling H. McCarty, Judge.

Action by the Commercial Bank against the American Bonding Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Everett Reeves, of Caruthersville, for appellant. John A. Hope, of St. Louis, and Riley & Riley, of New Madrid, for respondent.

FARRINGTON, J. The plaintiff (respondent) recovered a judgment for the full penalty of an indemnity bond, and the defendant appealed.

Walter L. Meier, a bookkeeper in the employ of the plaintiff bank at New Madrid, Mo., was required in October, 1907, to give a bond to cover any defalcations or embezzlements. This bond was bought of and signed by the defendant. In the application for the bond were certain questions asked the president of the bank which he as such answered in writing and signed, among which are the following:

"5. Is the applicant now, or has he been from any cause, indebted to the bank or its officers?

If so, give particulars, stating amount, how incurred, and how payment is secured. Answer: No.

"8. (a) Is the applicant now or about to be engaged or interested in any other business or employment other than in the bank's service? Answer: No."

"12. (a) Has applicant always faithfully, honestly, and punctually accounted to you for all moneys and property heretofore under his control or custody as your employé? Answer: Yes. (b) Are applicant's accounts at this date in every respect correct and proper securities, property, and funds on hand to balance his accounts? Answer: Yes."

Immediately after these and other questions and answers in the application the following appears:

"It is agreed that the above answers shall be warranties and form a part of and be conditions precedent to the issuance, continuance, or any renewal of or substitution for the bond that may be issued by the American Bonding Company of Baltimore in favor of the undersigned upon the person above named."

The bond was renewed each year before the issuing of a renewal receipt, and before each renewal receipt was issued the cashier of the bank made the following written statement:

"This is to certify that since the issue of the above bond Mr. Walter L. Meier, hereinafter called employé, has faithfully, honestly, and punctually accounted for all moneys and property in the said employé's control or custody as my or our employé, has always had proper funds and securities on hand, and is not now in default as such employé."

Each renewal receipt provided:

"In consideration of the sum of twelve and 50/100 dollars, American Bonding Company of Baltimore hereby continues in force its surety bond No. 282440 for the fidelity of Walter L. Meier, in favor of the Commercial Bank, New Madrid, Missouri, from the 4th day of October, 1908, to the 4th day of October, 1909 (dates being appropriate, of course), in the penalty of five thousand dollars, covering the same position and subject to all the covenants and conditions set forth and expressed in said bond heretofore issued by this company on the 17th day of October, 1907."

It is uncontroverted that at the times the renewal receipts were issued covering the defalcations and embezzlements allowed by the judgment of the trial court Meier was heavily overdrawn at the bank in sums ranging from \$1,000 to \$4,000, which overdrafts were made by him without the knowledge or consent of the bank, and it is further beyond controversy that when such overdrafts were discovered Meier was told by the officers of the bank to reduce them. They were afterwards reduced and taken care of, being paid to the bank by friends of Meier who were also officers and stockholders in the bank. It is admitted that he owed the president of the bank who signed the original application several thousand dollars when the renewals on which the recovery was based were issued. It is a fact that Meier ventured in the automobile business and became indebted therein several thousand dollars, buying such business and giving his notes and a mortgage to secure the same to the man who was pres-

ident of the bank, and who signed the original application. It is also a fact beyond question that Meier had little or no property to stand good for his indebtedness, which included the overdrafts and the individual indebtedness to officers of the bank, and that the fact of his indebtedness and the amount of property he owned were well known to the bank's officers. It appears that he became engaged in the picture show business when these renewals were issued. His salary from the bank was \$1,000 per year. All his business ventures were failures, and he defaulted and embezzled from the bank between \$6,000 and \$7,000, which he states was lost by him in gambling at a game designated in the record as "shooting craps." The following admission was made during the trial:

"It is admitted that the plaintiff gave the defendant American Bonding Company no notice of any kind or character of the alleged overdrafts, defaults, errors, embezzlements, or any other misconduct of Walter L. Meier in his employment with the Commercial Bank prior to W. H. Garanto's letter dated November 8, 1912, which has been offered in evidence, and that no other notice than the notice and proof of loss heretofore offered in evidence in this case by the plaintiff was ever given to the defendant American Bonding Company."

The bond contained the following provisions:

"15. This bond is made, issued, and accepted or renewed upon the following conditions:

"(1) This bond shall not lapse at the end of the above time if it shall be continued in force by a renewal receipt or receipts, executed by the surety, but shall continue in force for the term or terms of such renewal. The liability of the surety, however, shall not be cumulative.

"(2) That all the representations made by the employer, his or its officers, to the surety are warranted by the employer to be true; that the employé has not to the knowledge of the employer, his or its officers, been in arrears or a defaulter in the position covered by this bond or in any other position. * * *

A number of defenses were set up by the defendant, including the knowledge of the officers of the bank as to Meier's gambling, the question of the good faith of the bank's officers in relation to the overdrafts, the failure on their part to notify the defendant of these overdrafts, the failure on their part to properly investigate the books and accounts of Meier, and the failure on their part to use ordinary diligence to discover the false charges and actual embezzlements that took place.

[1] The case was referred to a referee who found all the issues as to good faith, knowledge, and the like, in favor of the bank, and, there being evidence to support such findings, this disposes of these questions here. *Lackland v. Renshaw & Surety Co.*, 256 Mo. loc. cit. 152, 165 S. W. 314. He found that Meier had embezzled \$6,013.69 between November 27, 1911, and October 9, 1912, the false charges on the books being 21 in number, and ranging in amount from \$55 up to \$1,000. The finding of the referee treated of Meier's overdrafts, debts, and ventures into other business in this fashion:

"I do not find that the bank was prohibited from making loans to Meier or to his auto company, or to his picture show company, nor was Meier deprived of the right to engage in other business under his contract with the bond or with the bank."

[2] Sections 7024, 7026, and 6987, R. S. 1909, do not cover this character of contract, and, as was held in *Pacific Mutual Ins. Co. v. Glaser*, 245 Mo. loc. cit. 386, 150 S. W. 549, 45 L. R. A. (N. S.) 222, this section was not intended to restrict the freedom of contract except in those instances falling within its provisions.

[3] This case is to be governed by the general law of contracts. That general law is well settled, and is that a warranty is "parcel of the contract" (*Salts v. Prudential Insurance Co.*, 140 Mo. App. 142, 120 S. W. 714), and that warranties must be absolutely true whether material to the risk or not (*Aloe v. Mutual Reserve Life Ass'n*, 147 Mo. 561, 49 S. W. 553; *Pacific Mutual Life Ins. Co. v. Glaser*, supra; *Krey Packing Co. v. U. S. Fidelity & Guar. Co.*, 189 Mo. App. loc. cit. 598, 175 S. W. 322; *Lyons v. National Surety Co.*, 243 Mo. 607, 147 S. W. 778; *Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253; *McDermott v. Modern Woodmen of America*, 97 Mo. App. 636, 71 S. W. 833).

[4] It is held in *Long Bros. Grocery Co. v. U. S. Fidelity & Guar. Co.*, 130 Mo. App. loc. cit. 430, 110 S. W. 31:

"The rule is generally recognized that a renewal of a policy constitutes a separate and distinct contract for the period of time covered by such renewal. It is, however, a contract with the same terms and conditions as is evidenced by the bond which is renewed, because the renewal receipt recites that it is renewed in accordance with the terms of the bond." *De Jernette v. Fidelity & Casualty Co. of N. Y.* [98 Ky. 558] 33 S. W. 823; *Railroad v. American Surety Co.*, 99 Fed. 674 [41 C. C. A. 45]; *Insurance Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Brady v. Insurance Co.*, 11 Mich. 425."

The opinion (continuing) holds that the only warranties on which the company could be held to rely are those contained in the original application as modified or changed in a subsequent application for a renewal.

[5] In our case there is no evidence whatever that at the time the original application was made there were any of the statements which were warranted to be true which were false or untrue. The bond nowhere makes the statements made in the application for a renewal warranties, and, as the bond is not cumulative, but on a renewal, liability thereon is extended not only over defalcations made within the first year, but also during the renewal period, the penal sum named therein being the full extent of the company's liability, it can be readily seen that the consideration given by the company for the premium on a renewal is less than the consideration given for the first year a bond is issued. It is true that the original warranties run through any renewal, which

means that, where a bond is renewed the company has a right, in case demand is made on it, under the terms of the contract, to show that any statements in the original application made for the bond were untrue, but this does not mean that such statements are promissory covenants or warranties which will render the bond void if the conditions existing between the employé and his employer become changed.

[6] The bonding company in this case did issue a renewal receipt and thereby renewed its contract, but before doing so it required a statement which it prepared and requested the cashier to sign, making only the assertion that the employé had faithfully, honestly, and punctually accounted for all moneys and property and always had proper securities, property, and funds on hand to balance his accounts, and was not then in default. This statement, as said before, was not made a warranty by any of the terms of the contract before us, and can therefore be considered only as a representation. And on examining the bond it will be seen (in section 2 hereinbefore copied) that the representation was "that the employé has not to the knowledge of the employer, his or its officers, been in arrears or a defaulter in the position covered by this bond or in any other position." The renewal certificate required by the company was practically a reiteration of that clause of the original bond. We therefore hold that the statements made in the renewal certificate were by the terms of the agreements between the parties nothing more than representations and not warranties. This being true, it becomes important to view the question from the standpoint that such representations made in the renewal certificate were, in fact, false and untrue, because at that time Meier was in arrears, and was a defaulter, as the amount sought by the plaintiff in its petition discloses.

[7, 8] The law is well settled that representations are not a part of the contract in the sense that warranties are; that is, they are inducements to a contract, but not facts which are contracted to be true. It is also settled that a representation does not have to be literally true as does a warranty. However, a representation which is material to the risk—and we hold that the representation made in this case was undoubtedly material to the risk—and which is falsely or fraudulently made, will avoid the contract.

[9] There is yet another distinction to be noted between a fact which is warranted to be true and one which is represented to be true, and that is that in the case of a warranty the statement must be true, whether material to the risk or not, and must also be true in fact (*Aloe v. Mutual Reserve Life Ass'n*, 147 Mo. 561, 49 S. W. 553; *McDermott v. Modern Woodmen of America*, 97 Mo. App. 636, 71 S. W. 833; *Krey Packing Co. v. U. S. Fidelity & Guar. Co.*, 189 Mo. App. loc. cit. 598, 175 S. W. 322), whereas, in the case of

a representation, the fact stated, although material to the risk, if made in good faith, will not, because the statement is untrue, render the contract which was induced by such statement void or voidable.

Joyce on Insurance, vol. 2, § 1884, p. 1875, defines a misrepresentation as follows:

"A misrepresentation in insurance is an oral or written statement made by the assured or his authorized agent to the underwriter or his authorized agent of something as a fact which is untrue, is known to be untrue, and is stated with intent to mislead or deceive, or which is stated positively as true without its being known to be true, and which has a tendency to mislead; such statement relating in both cases to material facts."

Bacon on Benefit Societies and Life Insurance (3d Ed.) vol. 1, § 234, p. 512, states this to be the rule:

"The rule therefore is that, where the answers to questions in the application are representations, the death of the applicant from a latent disease which existed at the time of the application, but unknown to the applicant, he answering all questions in good faith, will not avoid the policy. But, where the answers are warranties, then the death of the applicant from a latent disease which existed at the time when he warranted himself to be free from it will avoid the policy."

In the case of *McDermott v. Modern Woodmen of America*, 97 Mo. App. loc. cit. 646, 71 S. W. 833, Judge Goode recognizes the distinction between a warranty and a representation as to good faith, holding, in effect, that in order to avoid a policy on a false representation the answer must be false from a corrupt motive, while on a warranty it is only necessary that the answer be false in fact.

25 Cyc. 801, following certain cases cited, declares that a misrepresentation of a material matter will avoid a policy, although not fraudulently made; but this is qualified by stating that questions which are propounded in the application call for answers founded on knowledge or belief of the applicant, and that a misstatement not knowingly made and not made with intent to deceive will not avoid the policy; also (page 802) that, if the language of the policy and application reasonably indicate to the assured that his statements are to be as to his honest belief, such stipulations will not be construed as amounting to a warranty.

[10] Turning to the contract in our case, as before pointed out, there were none of the statements which were warranted in the original application shown to have been false. Those same questions and answers were not carried forward at each renewal period, but only the questions as to whether Meier had faithfully accounted for all moneys and property and had proper securities, property, and funds on hand to balance his accounts and was not in default, were asked by the company and answered by the cashier. The

bond, under section 15, subsec. 2, only held the employer to a knowledge of the employé being in default or in arrears; and, as the evidence taken before the referee did not disclose that any of the bank's officers knew or had reasonable ground for knowing at the time the certificate for a renewal was made that Meier had not faithfully, honestly, and punctually accounted for all money and property, or that he had not proper securities, property, and funds on hand to balance his accounts, or that he was in default, and as the finding of the referee was to the effect that none of the bank's officers had knowledge of the falsity of these facts which were stated in the certificate for renewal, we hold, with him, that the misrepresentations were not known to the cashier making the statement, and that he did not make it recklessly. The only statements shown to be false which were made by the bank's officers were those contained in the certificate of renewal. Such statements were not made warranties under the contract, and the finding of the referee, supported by evidence, is that these statements, although false, were unknown to the cashier making the certificate, and that they were made in the honest belief that they were true. This will not defeat the bond. See *Moulou v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 468, 28 L. Ed. 447; *Fidelity Mutual Life Ass'n v. Jeffords*, 107 Fed. 402, 46 C. O. A. 377, 53 L. R. A. 193, loc. cit. 208, 209.

The overdrafts were treated by the bank as indebtedness and were paid up. They are not connected in any way with the amount allowed by the referee and approved by the circuit judge in the judgment rendered. There was one overdraft which was unauthorized and which was known to the cashier at the time he made the renewal certificate. The overdrafts, however, were made by Meier in the operation of his automobile and picture show business, and were treated by the bank as debts, and not defalcations, and, in fact, they were debts, and not misappropriations in the sense of embezzlements. The one overdraft above referred to, of \$510, which was known to the cashier when he made the renewal certificate, was included in plaintiff's suit for recovery. This is explained by the plaintiff's witnesses, who say that after they found that Meier had defaulted and embezzled they then included everything he owed in the suit on the bond. It was not allowed, however, by the judgment in the circuit court, and there is no pretense that it constituted a theft or embezzlement.

The judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

COMMERCIAL BANK v. MARYLAND CASUALTY CO. (No. 1796.)

(Springfield Court of Appeals. Missouri. May 25, 1916. Rehearing Denied June 24, 1916.)

1. APPEAL AND ERROR ⇨1022(2)—REFEREE'S FINDING—CONCLUSIVENESS.

A referee's finding approved by the trial court is a special verdict, and, where supported by substantial evidence, is binding on the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ⇨1022(2).]

2. INSURANCE ⇨146(3) — CONTRACTS — CONSTRUCTION.

The contract of a surety company executing its fidelity bond for a consideration must be construed most strictly in favor of the obligee.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295; Dec. Dig. ⇨146(3).]

3. INSURANCE ⇨285—FIDELITY BOND—APPLICATION—MISREPRESENTATIONS.

In an application by the president of a bank for a bond for an employe, the answer to a question whether he was indebted to the officers of the bank that he was indebted to about \$3,500 on personal indorsements, and the answer to the question whether he was interested in any other business that he owned a motor car company, without stating that he owned a motion picture business, and the answer that, so far as the president knew, he had always faithfully accounted for all moneys in his custody and had proper funds on hand to balance accounts, were not misrepresentations, where they were made in good faith, and where it appeared that the balance was sometimes "long" and sometimes "short," and that such items were clerical errors which were from time to time straightened up, and that his balance was "long" when the answer was made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 657; Dec. Dig. ⇨285.]

Appeal from Circuit Court, New Madrid County; Sterling H. McCarty, Judge.

Action by the Commercial Bank against the Maryland Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Oliver & Oliver, of Cape Girardeau, for appellant. John A. Hope, of St. Louis, and Riley & Riley, of New Madrid, for respondent.

FARRINGTON, J. This case was tried at the same time, having been referred to the same referee whose report was approved in a judgment by the same trial court, as that of Commercial Bank v. American Bonding Company, 187 S. W. 99, which was likewise appealed, and in which we have this day handed down an opinion. Practically the same defenses were set up to a recovery on the bond in this case that were relied on in the American Bonding Company Case.

[1] We have carefully read the record before us, and find that there is substantial evidence to support the finding of the referee, and this, being a special verdict, is binding on this court. Lackland v. Renshaw & Surety Co., 256 Mo. 183, 182, 185 S. W. 314; Long Brothers Grocery Co. v. U. S. Fidelity

& Guar. Co., 130 Mo. App. 421, 110 S. W. 29. The judgment was for the full penalty of the bond, \$5,000. The referee's report, after setting out the dates and amounts of the defalcations and embezzlements of Meier, continues:

"Said losses or embezzlements were not known or discovered by said bank until about November 5, 1912, whereupon plaintiff notified the defendant on the 9th day of November, 1912, and afterwards furnished proof of said loss. The defendant, the casualty company, complains in its answer and denies liability on said bond because it requested said Meier and the Commercial Bank to make true answers to certain questions at the time said bond was issued.

"I find that said Meier made answers not true to some of said questions, that he falsely stated he owned personal property worth \$6,000 and that he had an income of one thousand dollars per year from the auto business, and that the bond applied for was to replace the one then in force. But, whether or not these untruthful statements affect the risk, I find in the second paragraph of said policy or bond that the employer, the bank, made representations and promises which were warranted to be true; and, by the inclusion of the employer's statements in said paragraph, I understand other statements are excluded, and that the bank is not bound or affected by the false statements of Meier.

"The bond was written in advance by the casualty company, and should be construed against it and in favor of the bank in case of doubt. The casualty company complains that the said bank made false representations in its answers in the application for said bond, that it had no knowledge of any habit of said Meier unfavorable to the issuing of the bond, and that the bank represented that Meier was engaged only in the automobile business, and refused to inform the defendant of the motion picture business and that his accounts were overdrawn. It further complains that the passbooks of depositors were not balanced as stated by said bank in said application, and further complains that the bank neglected to notify the defendant immediately on the discovery of the claim against the defendant under said bond. But I find the bank acted in good faith and made true answers to the questions in said application. If said answers were not full and satisfactory, the defendant should not have accepted same and issued its policy: but, as the defendant wrote the bond and propounded the questions, and passed on their sufficiency, it should not now complain, unless said answers were untrue. And I find the bank did not know of the dishonesty of Meier, and did not know that he was gambling, and did not know that he was in default in his accounts as an officer of said bank, until about the 5th day of November, 1912; that his interest in the auto business and picture show business were not contrary to his contract with the bank or the terms of his bond; that his overdrafts known to the bank were treated as loans, which the bank afterwards collected.

"I find that the bank had the passbooks of its customers compared and balanced 'mostly monthly,' as agreed. The state bank commissioner wrote the bank in the fall of 1912 that he found the bank was well managed and in good condition. The bank officers and directors were representative business men of that community, and, I find, acted, in regard to the affairs of the bank, as such officers in such towns usually do. Meier was competent and trusted, and had been known to the officers of the bank for many years.

"The bond in this case was obtained by the ut-

most good faith; the loss occurred; the bank paid the casualty company to carry the risk; it accepted the responsibility; and I see no reason why it should be excused. * * *

This finding, which is supported by substantial evidence, necessarily disposes of many of the questions raised on this appeal.

[2, 3] In the application made by the president of the bank we find one point of difference from the application in the American Bonding Company Case; in this application, when asked if Meier was indebted to the officers of the bank, the answer is, "Yes." In giving the particulars the answer was, "About \$3,500 personal indorsement." When asked if Meier was engaged or interested in any other business, the answer in this application was, "He owns the New Madrid Motorcar Company." The answer in this application did not state that Meier was of good habits, and that there were no circumstances unfavorable to the issuing of the bond applied for, but, on the other hand, the question only asked whether the officers had knowledge of such things, and the evidence amply supports the finding of the referee that they did not have knowledge of his gambling proclivities and his defalcations and embezzlements. It is contended by appellant that there was a breach of warranty arising out of the following question and answer:

"Q. Had he always faithfully accounted to you for all money and property heretofore in his control or custody as your employé, and has he always had proper securities and funds on hand to balance accounts? A. So far as I know."

It will be noted that this answer does not affirm that Meier had always faithfully accounted, and that he had always had proper securities and funds on hand to balance accounts, but merely answered that he had so far as the signer of the application on the part of the bank had knowledge. It is true that the books as to cash had for a considerable period of time before and after this answer was made been out of balance—sometimes several hundred dollars "long" and sometimes several hundred dollars "short"—but the testimony shows that these items were clerical errors and were from time to time straightened up. On the day that the president of the bank signed this application the books showed Meier's account to be \$500 "long." A strict construction—and this we must place on defendant's contract (Lackland v. Renshaw & Surety Co., 256 Mo. loc. cit. 140, 165 S. W. 314)—makes the above question and answer mean that, so far as the president knew, Meier had always had proper securities and funds on hand to balance accounts. As to the "longs" and "shorts" in his accounts prior to that time, the errors have been corrected, so that the president could truthfully state that Meier had had sufficient securities and funds on hand to balance accounts. While they might not always have balanced on any

particular day, Meier evidently had enough funds and securities on hand on the day the president signed the application, for the books on that day showed that he was "long" on cash. The question asked did not require the statement that Meier's accounts always balanced, but the president was asked whether Meier had always had proper securities and funds on hand to balance his accounts, and the answer merely was, "So far as I know," which is not shown to have been a misrepresentation.

Finding as we do from this record that the defendant has failed to show a breach of any of the warranties in this contract the judgment should be affirmed; and it is so ordered.

ROBERTSON, P. J., and STURGIS, J., concur.

BRENARD MFG. CO. v. FREEMAN & WESCOTT. (No. 1861.)

(Springfield Court of Appeals. Missouri. June 17, 1916.)

1. PRINCIPAL AND AGENT ⇐124(2)—AUTHORITY—QUESTION FOR JURY.

In an action on notes given subject to an advertising contract providing for a contest, etc., held, that whether the plaintiff's agent had either express or implied authority to accept and submit other or different propositions than those contained within the printed blanks furnished him by the plaintiff was for the jury.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 724; Dec. Dig. ⇐124(2).]

2. PRINCIPAL AND AGENT ⇐170(2) — CONTRACT—AGENT'S AUTHORITY—ACCEPTANCE.

If such agent had authority to accept and submit propositions other than those contained within the printed forms furnished him by the plaintiff, defendant's delivery of the contract notes, etc., to him, was delivery to the plaintiff for acceptance, and plaintiff's letter acknowledging receipt and approval of order meant, so far as defendant was concerned, the acceptance and approval of the contract made with the agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 639, 640; Dec. Dig. ⇐170(2).]

3. PRINCIPAL AND AGENT ⇐170(2)—AUTHORITY OF AGENT—CONTRACT—ACCEPTANCE.

Where the agent in the apparent scope of his authority solicited defendant's order for certain goods to be used in carrying out an advertising contest scheme, and incorporated certain provisions as to service to be rendered by the plaintiff, after defendant's receipt of plaintiff's letter referring to plaintiff's co-operation the defendant might assume that such order contract, etc., were forwarded to the plaintiff, and, on receiving an acknowledgment of the order in general terms, might assume that the contract had been approved by plaintiff.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 639, 640; Dec. Dig. ⇐170(2).]

Appeal from Circuit Court, Howell County; W. N. Evans, Judge.

Action by the Brenard Manufacturing Company against Freeman & Wescott. Judgment for defendant, and plaintiff appeal. Affirmed.

J. L. Van Wormer, of West Plains, for appellant.

ROBERTSON, P. J. In the petition it is alleged in so many different counts that the defendants executed and delivered to plaintiff their six promissory notes aggregating the principal sum of \$400 and asking judgment for that amount. A verdict was returned for defendants, judgment entered thereon, and plaintiff appeals.

The defendants admitted the execution of the notes, but alleged that at the time they were executed, and as the consideration therefor, the plaintiff and defendants entered into a written contract wherein it is stated that:

Plaintiff agreed "to install the Claxton Piano deal, and secure co-operation of young ladies in furthering the proposition and keep them lined up and instructed in the work, to put on the sales and assist them in promoting their businesses.

"The second part [defendants] is to have gross receipts for six months to be six thousand dollars (\$6,000.00), and furthermore the second party is only to pay pro rata of installments, per gross receipts, and they agree to notify first party in case of the lack of interest shown in contest, so as to enable first party to remedy the same.

"These notes are not transferable and are bound together with printed order and agreement and this additional contract to be in full force and effect to be protected by the first party's bond to be deposited in bank designated by second party, and to remain there until second party is thoroughly satisfied. Also to make contract for newspaper ads at Brenard Co.'s expense."

The plaintiff's place of business was in Iowa City, Iowa.

The defendants then alleged that the plaintiff failed to perform each and every agreement contained in the contract and ask for judgment in their behalf. No reply was filed, but the trial proceeded as though the facts alleged in the answer were in issue.

The testimony discloses that the notes offered in evidence are made payable to the order of the plaintiff, and each contained the clause that "this note is subject to contract." The pleadings are not very explicit, as the answer does not connect the contract therewith with the transaction to which it refers, so that the answer standing alone is most meaningless; but both parties have raised the pleadings as sufficient to have the issues tried and submitted to the jury. From the testimony it appears that the transaction involved was that of defendants, who were engaged in some kind of small mercantile business, adopting an advertising scheme promoted by the plaintiff. On September 18, 1912, the plaintiff wrote a letter to the defendants, in answer to one from them, stating that the proposition consists of conducting a piano contest." In the letter it is said that:

"With our method, we start with from 150 to 200 contestants the names of course to be supplied by you, and under this method, we can keep practically all of them active for almost

the entire period. * * * The cost of our plan, which includes all the necessary advertising material, our co-operation and instructions, together with the piano is \$300, less 3 per cent. ten days, or thirty days net, or in cases where the merchant wants to pay for it in installments, they can pay for it by giving us their six notes of \$50.00 each."

About September 27, 1912, an agent for the plaintiff appeared at the place of business of the defendants in West Plains resulting in the defendants executing the instruments sued upon and signing an order to the plaintiff for the piano and various other items which apparently are offered as premiums in the contest to be given to the holders of tickets issued by the defendants upon the sale of their goods. The price of these articles is stated to be "\$240; less allowance for settlement with order, \$20; net \$400." At this time, and as part of the same transaction, the contract set up by defendants was signed by the defendants and in the name of the plaintiff by the agent. At the same time a letter addressed to the plaintiff was signed by the defendants reading, so far as necessary to copy, as follows:

"On your approval of this order, delivered to me at your earliest convenience, f. o. b. factory or distributing point the piano, silverware and advertising matter described on this and reversed side, in payment for which I herewith hand you my six notes payable to your order aggregating \$400. If order is not approved and shipped by you the notes are to be canceled and returned to me.

"My last twelve months' sales were \$10,000.00. My next twelve months' sales to be \$12,000.00, and that if 3½ per cent. of my gross sales does not amount to four hundred dollars (\$400.00) for the next twelve months you will pay me the deficiency in cash, and send your bond for \$400.00 to cover this agreement with me. * * *

"I agree to take the shipments promptly, carry out the contest plan, promptly meet all obligations entered into under this agreement, keep the piano well displayed in my store, issue piano notes for each cent purchased and every sixty days of this contract to report to you my gross sales, and promptly furnish you all information you request to enable you to assist in pushing the contest."

This letter appears to have been written upon a printed form furnished by the plaintiff. These papers were all signed and delivered to the agent, who placed them in an envelope and proposed to immediately mail them to the plaintiff. On the same day the agent made a report to the plaintiff, apparently upon a written blank provided therefor, concerning the defendants, their ages, financial standing, and other facts, and concluded as follows:

"I made no verbal or written agreement in securing this order, other than is shown on original order which was signed by the customer and is hereto attached."

The uncontradicted testimony is that plaintiff did not receive the contract relied on by defendants.

Under date of September 30, 1912, the plaintiff acknowledged receipt of the order of defendants and advised them that same had been approved and the goods would be sent at once. With that letter was inclosed a

copyrighted "book of suggestions for pushing the contest." The letter also contained this:

"Important. Right now, by special delivery mail, forward me a list of 150 names of persons whom you desire as contestants, so we can make up your contest voting register, and forward to you at once, thus having everything ready to push the campaign. * * * Rest assured that we will take pleasure in assisting you in making this contest a complete success in every way."

Just what part the plaintiff was to take in this contest is not easy to gather, either from the contract set up in the answer of the defendants, or from the testimony in the case. The order and letter of the defendants is extremely ambiguous; but, irrespective of the contract relied upon by the defendants, it appears to be conceded in the letters written by the plaintiff, the one before the order was given and the one afterwards, and in other letters to which we have not referred, that certain assistance was to be rendered by the plaintiff in carrying out the scheme into which defendants had entered.

The testimony on behalf of plaintiff is to the effect that the agent was employed for the purpose of securing orders on blank forms furnished him by the plaintiff; that he could not make any change in the terms or conditions of the contract, "unless such alteration or addition was made in writing and made a part of the same." All of the orders were taken subject to the approval of plaintiff after they were sent to it, and, as the witness stated:

"If the terms and conditions were satisfactory, we approved the order, notified the customer of the approval and shipped the goods. He had no authority to make any supplementary contract, or to make sales outright."

[1-3] The contest in the trial court appears, as the case is submitted to us here, to have turned solely on the question of the authority of the agent.

The real issue here is as to whether or not the testimony tended to prove such facts as justified the conclusion that the agent of the plaintiff had the authority, express or implied, to accept and submit other or different propositions than those contained within the printed forms furnished him by the plaintiff. We say this because, if he did, the delivery to him was delivery to plaintiff for acceptance, and when defendants received the letter of September 30, 1912, acknowledging receipt and approval of order, this meant, so far as defendants were concerned, the acceptance and approval of the contract set out in their answer. The fact that the letter accompanying the order and contract referred only to what appeared thereon was not conclusive on defendants, because further along it refers to plaintiff assisting "in pushing the contest." It is evident from all the testimony that in this letter and order the things plaintiff was to do were not mentioned in detail, if at all. The letter defendants signed to go with the order per-

tained more to an agreement to take the piano and other things included therewith, and did not purport to cover what plaintiff was to do about the contest. It will be observed from what we have already stated that the transaction had with the agent did not purport to become binding until approved by the plaintiff. It is also true that the subject-matter of the scheme into which defendants entered was not fully disclosed by the instruments to which plaintiff now seeks to confine the defendants. This case, we repeat, involves, not so much a question of authority of the agent to make a contract, as it does the right of the defendants to assume that the proposal which they gave to the agent was forwarded to and accepted by the plaintiff. The agent contracted conditionally and agreed with the defendants to submit the proposition to the plaintiff for acceptance or rejection. That what he did was within the apparent scope of his authority we think cannot be questioned. He solicited of the defendants their order for certain goods to be used in carrying out the scheme and incorporated therewith certain provisions for services to be rendered in behalf of the plaintiff, and this was done after defendants had received from the plaintiff the letter in which reference was made to "our co-operation" and to what plaintiff would do in the contest. These papers the defendants had a right to assume were all forwarded to the plaintiff, and when they received an acknowledgment in general terms of the order they had a right to assume that the controverted contract had also been received and approved by the plaintiff.

But, accepting and adopting the theory upon which the case was tried, we are of the opinion that, considering the facts and circumstances in this case, it was a question for the jury, and not a question for the court, to declare whether as a matter of fact the agent had the authority to make the contract involved in this case, if we say he did make the contract as defendants contend.

STURGIS and FARRINGTON, JJ., concur.

VASSILOPOULOS v. FABIANOFF et al.
(Kansas City Court of Appeals. Missouri.
June 12, 1916.)

1. APPEAL AND ERROR \S 364 — RETURN OF APPEAL.

Where, pursuant to Rev. St. 1909, \S 2043, allowing such appeals, one of the judges of the Kansas City Court of Appeals in March granted an appeal, such appeal is returnable to the following October term.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 1969-1976; Dec. Dig. \S 364.]

2. APPEAL AND ERROR \S 151(6) — PERSONS ENTITLED TO APPEAL.

Under Rev. St. 1909, \S 2038, declaring that any party to a suit aggrieved by any judgment may appeal, a surety bound to pay any judg-

ment rendered against his principal may appeal from such a judgment, though not a party of record, for he is aggrieved by such judgment, and the statute, before amendment, provided that any person aggrieved by any final judgment might appeal, and it was the intention of the Legislature not to change such law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 951, 952; Dec. Dig. ☞ 151(6).]

3. APPEAL AND ERROR ☞363 — ALLOWANCE OF APPEAL—RIGHT TO ALLOWANCE.

Under Rev. St. 1909, § 2043, declaring that no judge of the Court of Appeals shall allow an appeal unless it shall appear from inspection of a copy of the record that error was committed, a showing that judgment was rendered on an amended complaint not served on the defendant as required by the rules of that circuit is enough showing of error to warrant the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1962-1968; Dec. Dig. ☞ 363.]

4. APPEAL AND ERROR ☞430(1)—PERFECTION OF APPEAL—NOTICE.

Where an appeal allowed by the Kansas City Court of Appeals was returnable to the October term, but appellant failed to serve notice on respondent 20 days before the commencement of such term, as required by Rev. St. 1909, § 2046, though it appeared that respondent lived at the address he had given in his testimony at trial until after the time for the filing of notice, the appeal will be dismissed; for, the right to appeal being statutory, an appellant must comply with the statutes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2173; Dec. Dig. ☞430 (1).]

Action by Louis Vassilopoulos against Gust Fabianoff. From a judgment for plaintiff, the National Surety Company appeals, though not a party of record. On motion to dismiss appeal. Motion granted.

Clyde Taylor, of Kansas City, for appellant. L. A. Laughlin, of Kansas City, for respondent.

TRIMBLE, J. [1] The appeal herein was granted the National Surety Company by one of the judges of this court under section 2043, R. S. Mo. 1909. The order granting the appeal was made March 15, 1915, and the appeal was therefore returnable to the October term, 1915.

The case in which the appeal was allowed was that of Louis Vassilopoulos v. Gust Fabianoff, in which a judgment for \$1,000 was rendered against the latter on December 19, 1914, by the circuit court of Jackson county, Mo. It seems that, as originally instituted, the suit was brought July 2, 1914, by Louis Vassilopoulos against John J. Grier and Gust Fabianoff in which the petition alleged a contract whereby defendants agreed, in consideration of \$427 paid to them by plaintiff, to furnish employment for 86 men on the tracks of the Chicago, Rock Island & Pacific Railway Company at Davenport, Iowa; that plaintiff kept 80 men waiting in Kansas City for defendants to furnish with said employment, but that said defendants violated said

contract and failed to furnish said employment; that plaintiff was damaged not only in the loss of the money he paid, but also by the loss of the services of the 80 men and the cost of their board and lodging since making the agreement, aggregating in all the sum of \$5,000, for which judgment was prayed. Summons was issued and served upon both defendants. Grier appeared and filed answer, but Fabianoff never appeared. On December 2, 1914, the cause was by agreement dismissed as to Grier.

On December 14, 1914, the plaintiff filed an amended petition against Fabianoff only. In this amended petition it was alleged that defendant conducted an employment agency in Kansas City, Mo., and was by the city duly licensed so to do; that on or about February 25, 1914, defendant, with intent to deceive and defraud plaintiff, represented to the latter that he had positions for 86 men as track laborers for the Chicago, Rock Island & Pacific Railway Company at Davenport, Iowa, which he was authorized to fill, and that plaintiff by paying \$427 could select said men to fill such positions; that said representations were false, and known by defendant to be false at the time they were made; that plaintiff relied upon said representations, and was thereby induced to pay defendant \$427 and to keep said men on expense and in idleness for four weeks waiting for defendant to ship them to Davenport; that by reason of the premises plaintiff was damaged in the sum of \$1,000, for which he asks judgment.

Rule 6 of the Jackson circuit court required that, whenever an amendment of a petition was made before trial, the adverse party must be served with a copy of such amended pleading, as prescribed by law for service of notice, and, unless otherwise ordered, any appropriate pleading thereto should be filed within three days after such service. No service of such amended petition was had upon Fabianoff. But on December 19, 1914, as hereinbefore stated, judgment by default was entered against him in the sum of \$1,000.

On the 12th day of January, 1915, Vassilopoulos began a suit in the circuit court of Jackson county, Mo., on the bond of Fabianoff, given by him in accordance with the ordinances of Kansas City to obtain a license to conduct an employment agency in said city. Said bond was to the said city in the sum of \$1,000 and conditioned for the full compliance on the part of said Fabianoff with the ordinances of the city governing said business, and also conditioned that said Fabianoff would pay all judgments rendered against him on account of any willful misrepresentations or for willfully deceiving any person transacting business with him, or for being guilty of any deception whatever toward any person who might employ any person to work for any other person. Said

suit on said bond was entitled "Kansas City, at the Relation and to the Use of Louis Vassilopoulos, Plaintiff v. Gust Fabianoff and National Surety Company, Defendants." The petition therein set out the section of the ordinance under which the bond was given. It also alleges the execution of said bond by the National Surety Company as surety thereon, a verified copy of which was attached. It further alleged the bringing of the suit against Fabianoff upon the grounds hereinbefore stated and the recovering of the judgment of \$1,000 against him; that the defendants were guilty of a breach of said bond in that no part of said judgment had been paid; wherefore judgment for \$1,000 was asked against both defendants on said bond. Said suit was returnable to the March, 1915, term of said court.

Thereupon the National Surety Company applied to one of the judges of this court for an appeal under section 2043, as above stated. The application for the appeal sets out the foregoing facts, together with a copy of the record in the suit wherein judgment was obtained, and a copy of the petition in the suit against appellant herein on the bond, together with a copy of rule 6 of the Jackson circuit court, requiring a notice of the amended petition in the case against Fabianoff to be served upon him, which the plaintiff failed to do.

The application for appeal further sets out that the amended petition in the case against Fabianoff wholly changed the cause of action alleged against him in the original petition; that no notice of such change was ever served upon said Fabianoff as required by said rule, and that he had no notice thereof; that in said suit on the bond said plaintiff was attempting to proceed on said judgment against Fabianoff as conclusive of the rights of the parties, and as binding and conclusive upon the rights of the National Surety Company as surety on said bond. It is further alleged in the application for an order granting an appeal that certain errors were committed which rendered the said judgment a nullity; that from an inspection of the record error was committed against the rights of Fabianoff and the National Surety Company which materially affects the merits of said action.

[2] It thus appears that the National Surety Company, appellant herein, was not a party to the suit in which the judgment was rendered on account of which the surety company claims to be aggrieved, and from which it appeals. Section 2038, R. S. Mo. 1909, says: "Any party to a suit aggrieved by any judgment" may take an appeal. Plaintiff, Vassilopoulos, therefore moves to dismiss the appeal because the National Surety Company is not a party to the suit aggrieved by the judgment.

Prior to the amendment of section 2038 in 1891 it read: "Every person aggrieved by any final judgment or decision of any circuit

court," etc., could take an appeal. But the amendment of 1891 changed the section to read: "Any party to a suit aggrieved," etc. Under the section as it formerly stood, giving to "every person aggrieved" a right to appeal, the appellant herein clearly had such right. *Nolan v. Johns*, 108 Mo. 431, 18 S. W. 1107. And it might seem that the change to "any party to a suit" would take away such right. But in *Thomas v. Elliott*, 215 Mo. 598, loc. cit. 603, 114 S. W. 987, 989, the Supreme Court say they do not construe the change in the statute as taking away from any one the right of appeal which he had under the statute as it formerly stood, even though the one says "every person," and the other says "any party to a suit." It is true that on page 604 of 215 Mo., on page 989 of 114 S. W., the court say:

"But, as we have already seen, the right of appeal given by that act was given only to a party to the suit. And, when we consider that the dominant purpose in the mind of the law-maker was to confer a right of appeal that would necessarily suspend the progress of the cause in the trial court and delay the final judgment, we can well see why it should be limited to a party to the suit then pending and undetermined."

But these remarks were made in view of the fact that the appellant in that case was appealing from an order setting aside a sale in partition. He was the purchaser at the sale, and was not a party to the suit. The statute at the same time it was amended as above was also amended to allow an appeal "from any interlocutory judgments in actions of partition." The court, by the remarks last above quoted, meant merely to say that, as to this new ground of appeal given by the statute, the only one who could avail himself of it and thereby suspend the proceeding before a final judgment was reached must be a party to the suit. But as to any one appealing from a final judgment the amended statute left the same right of appeal that was given under the old statute.

This view is fortified by the remarks of the Supreme Court in *State ex rel. v. Shelton*, 238 Mo. 281, loc. cit. 297, 142 S. W. 417, where in speaking of this change in the statute the court say:

"It will thus be seen that to meet the ends of justice we have given to the present act the same wide range of meaning imported by the language of the former act. Hence decisions construing the former act are in point."

As the bond on which appellant is surety binds appellant to "pay all judgments" rendered against the principal for violation of duty as manager of an employment agency, and the judgment complained of is one of them, it would seem that the surety company is aggrieved by the judgment, and, being aggrieved, has the right of appeal under our statute, construed as it is by the Supreme Court. Construed thus, the statute allows an appeal to every person aggrieved, and therefore appellant comes within its

terms, even though the bond on which it is surety was not given in a judicial proceeding. In 2 Cyc. 638, it is said:

"The sureties in an official bond become parties to the record by a judgment against the principal on the bond, and may appeal from such judgment."

But, whether or not a bond such as the one now in question makes the surety a party to the record by operation of law, still under our statute authorizing appeals the surety may appeal even if it be bound only according to the terms of its contract. That contract provides that the surety will pay the judgment if the principal does not. Hence the surety is aggrieved and has the right to appeal.

[3] Section 2043, authorizing an appeal, says the same shall not be granted "unless it appear from an inspection of a copy of the record that error was committed," etc. It is urged that no error appears. Of course, for us to decide that finally now would be to conclude the matter, or platform ourselves upon that question, before the hearing of the appeal. We do not do this, but merely hold that apparently there is enough showing of error to warrant an appeal being allowed so that it may be heard.

[4] The last ground of the motion to dismiss is that no notice in writing of the appeal was given to the respondent 20 days before the commencement of the term of the appellate court to which such appeal is to be sent, as provided by section 2046, R. S. Mo. 1909. As before stated, the appeal was returnable to the October term, 1915, of this court.

The suit against the surety company on the bond was brought January 12, 1915. Until then, or at least until service was obtained, the surety company presumably was without notice of the judgment. It applied to this court for an order granting an appeal on March 15, 1915. The respondent, Louis Vassilopoulos, on the date of the rendition of the judgment in his favor, December 19, 1914, testified in the case that he lived at "305 Kansas Avenue." It appears, however, from an affidavit attached to the motion to dismiss, that Vassilopoulos resided at 305 Kansas avenue, Kansas City, Kan., "continuously for about four years prior to December, 1915, when he left for Greece. The appellant has filed an affidavit stating that ever since the granting of said appeal appellant has made diligent effort and search to find the respondent in order to serve notice on him, but has been unable to do so. The appellant had from March 15, 1915, to 20 days before the first Monday in October, 1915, to serve said notice. During all that time the residence of respondent was disclosed in the evidence taken at the trial, and he did not leave for Greece till December, 1915.

The right of appeal being purely statutory, a person to avail himself of any such

right must comply with the requirements of the statute granting that right. *Mahopaulos v. Chicago, etc., R. Co.*, 256 Mo. 249, 165 S. W. 310; *State ex rel. v. Broadus*, 216 Mo. 342, 115 S. W. 1018. The affidavit saying it was impossible to find Vassilopoulos in order to serve notice is vague and unsatisfactory, and does not show the facts as to the diligence claimed, even if such showing could be allowed to avail.

The appeal therefore should be dismissed for failure to comply with section 2046. Consequently the motion to dismiss must be, and is, sustained. All concur.

PEPER AUTOMOBILE CO. v. ST. LOUIS UNION TRUST CO. (No. 14416.)

(St. Louis Court of Appeals. Missouri. June 6, 1916. Rehearing Denied June 20, 1916.)

1. ACTION \Leftrightarrow 53(1)—SPLITTING CAUSES.

A single demand cannot be split and separate suits maintained thereon.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-551, 553-562, 565; Dec. Dig. \Leftrightarrow 53(1).]

2. JUDGMENT \Leftrightarrow 592 — BAR — SPLITTING CAUSES.

A judgment in an action for a portion of a single demand bars a right of action to the residue thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1107; Dec. Dig. \Leftrightarrow 592.]

3. ACTION \Leftrightarrow 53(3)—SPLITTING CAUSES—RUNNING ACCOUNT.

An open continuous running account constitutes a single demand, which cannot be split.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 593-623; Dec. Dig. \Leftrightarrow 53(3).]

4. ACTION \Leftrightarrow 53(3)—SPLITTING CAUSES—RUNNING ACCOUNT.

Evidence held sufficient to show that various items of debit for balance due on the purchase price of an automobile and for oils, repairs, and supplies, etc., constitute a running account, which cannot be split, although a portion thereof had been entered in a separate book and presented by a separate bill.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 593-623; Dec. Dig. \Leftrightarrow 53(3).]

5. APPEAL AND ERROR \Leftrightarrow 173(9) — REVIEW — OBJECTIONS NOT RAISED ON TRIAL.

Objections that recovery cannot be had on running accounts because a portion thereof had already been recovered cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1102; Dec. Dig. \Leftrightarrow 173(9).]

6. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 251—DISPUTED CLAIMS—PLEADING—OBJECTIONS TO SPLITTING DEMAND.

In an application in probate court for the allowance of a running account, formal pleadings are unnecessary to raise the objection that plaintiff is attempting to split his demand, having already recovered a portion of the same account.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 896-900; Dec. Dig. \Leftrightarrow 251.]

7. TRIAL \Leftrightarrow 150 — DEMURRER TO EVIDENCE — OBJECTION TO SPLITTING CAUSE OF ACTION.

Where it is shown by evidence received without objection that plaintiff's demand is a running account on which recovery had been had

of a part, an objection, though not pleaded, to recovery on the ground that a single demand cannot be split is properly raised by demurrer to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 346-348; Dec. Dig. ¶150.]

8. TRIAL ¶84(4)—EVIDENCE—GENERAL OBJECTIONS.

A general objection to the admission of an account does not sufficiently present the specific objection that plaintiff cannot recover because of splitting his demand.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 217; Dec. Dig. ¶84(4).]

9. TRIAL ¶89 — EVIDENCE — MOTION TO STRIKE.

A motion to strike the account sued upon is appropriate to raise the question that plaintiff cannot recover because of having split a single demand.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228-234; Dec. Dig. ¶89.]

10. TRIAL ¶143—EVIDENCE—DIRECTED VERDICT.

The rule that where plaintiff makes out a prima facie case, the oral uncontroverted testimony in behalf of defendant, no matter how strong and convincing, does not authorize a directed verdict, has no application where unimpeached documentary evidence precluding a recovery is adduced.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. ¶143.]

11. ACCOUNT, ACTION ON ¶8—JURY QUESTION—INDEBTEDNESS ON RUNNING ACCOUNT.

In an action on running account, the indebtedness, under conflicting evidence, held a question for the jury.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 18-23, 30; Dec. Dig. ¶8.]

Appeal from St. Louis Circuit Court; Geo. C. Hitchcock, Judge.

"Not to be officially published."

Action by the Peper Automobile Company against the St. Louis Union Trust Company, executor. From a judgment for the plaintiff, defendant appeals. Reversed.

Leahy, Saunders & Barth, of St. Louis, for appellant. Jones, Hocker, Sullivan & Angert and Vincent L. Boisabuin, all of St. Louis, for respondent.

ALLEN, J. This is an action founded upon a claim filed by respondent, a corporation, in the probate court of the city of St. Louis, against the estate of one Adolphus S. Peper, deceased. The claim, consisting of an account covering the period from May 15, 1907, to July 15, 1909, aggregating \$3,350.97, was disallowed by the probate court. Upon plaintiff's appeal to the circuit court and a trial there de novo, before the court and a jury, there was a verdict and judgment for plaintiff in the sum of \$4,395.50, being the full amount of the claim with interest, and the case is here on the appeal of the defendant, executor.

Plaintiff corporation was engaged in selling automobiles and automobile parts, accessories, and supplies, and conducted an auto-

mobile repair shop. The business was conducted by two young men, Clarence Peper, and Charles Peper, relatives of the deceased, Adolphus Peper, who were owners of the stock of the corporation. The company began business in May, 1907, and Adolphus Peper at once began to deal with it. The account sued upon, which was entered by Clarence Peper in a book kept by him for plaintiff company, begins with an item, under date of May 15, 1907, charging a balance of \$300 due from Adolphus Peper on the purchase of an automobile, the purchase price of which was \$850. The account then continues with various items for repairs, parts, accessories, gasoline, oil, etc., furnished to Adolphus Peper, and contains a number of items for each month from and including May, 1907, to and including July, 1909.

Plaintiff's evidence is that nothing was paid on the account; that when it had run for some time, and had grown to about \$900 or \$1,000, plaintiff tried to collect the amount due, but did not succeed; that the owners of plaintiff company—i. e., Clarence Peper and Charles Peper—were prevailed upon by Adolphus Peper, and in part by the latter's brother, Fred Peper, to continue furnishing supplies and rendering services to Adolphus on open account; and that bills were thereafter sent to him, on certain occasions, to which he made no response.

Though the account sued upon extends only to July 15, 1909, it appears that the course of dealing between plaintiff and the deceased, as shown above, continued long after that date. The evidence discloses that plaintiff furnished Adolphus Peper supplies or services, or both, in the months of August, September, November, and December, 1909, and in January, February, March, April, and September, 1910; the amount charged for such supplies and services after July, 1909—not included in the claim sought to be enforced—being \$396.35. Plaintiff's account with Adolphus Peper to and including the month of July, 1909, was kept in the book introduced in evidence below; but the evidence is that this book became filled, and that beginning with the items of August, 1909, the account was continued in a new book which was shown to contain the above-mentioned charges for the period beginning in August, 1909, and ending in September, 1910.

In 1911 Adolphus S. Peper was by the probate court of the city of St. Louis declared to be of unsound mind, and that court appointed Edwin W. Lee, Esq., guardian of his person and curator of his estate. Thereafter plaintiff presented to such curator a claim for \$396.35, founded upon the said account of plaintiff with Adolphus Peper, which is said to have accrued subsequent to July, 1909; i. e., beginning August 13, 1909, and ending September 2, 1910. This claim was duly allowed by the probate court, and was

paid by the curator to a person to whom it had been assigned.

It developed in plaintiff's case that the above-mentioned claim for \$396.35 had been presented by Clarence Peper and Charles Peper, in behalf of the corporation, against the estate of Adolphus Peper then in the hands of his curator, and that it had been duly allowed and paid. The testimony of Clarence Peper and Charles Peper is that the allowed claim was but "a small part of the bill"—"the last part of the bill." And their further testimony (first brought out on cross-examination) is to the effect that the "entire bill" was not presented to the curator for the reason that they had been informed by relatives that the rents derived from the estate of Adolphus Peper, who was then confined in an asylum at considerable expense, "were not sufficient to meet any such obligation as that."

Defendant put in evidence, without objection, the allowed claim for \$396.35 above mentioned; and the curator testified respecting its presentation and allowance. It appears that when the claim was presented to the curator he satisfied himself, by an examination of plaintiff's book entries shown him (evidently contained in the "new book" mentioned), and otherwise, that the amount was justly due and consequently waived notice and called upon the claimant to furnish evidence in support thereof. The curator testified that this was the only claim presented to him.

It was also shown that on December 19, 1909, plaintiff company executed a note to Adolphus Peper for \$1,200, for money advanced by him to plaintiff company, and pledged two automobiles as security therefor. This unpaid note was found by the curator among the papers of Adolphus Peper within a folded insurance policy. There is considerable testimony in the record concerning the transaction attending the execution thereof, but it need not be here rehearsed.

I. The only assignment of error which we need notice is that pertaining to the ruling of the trial court on the demurrer to the evidence. It is argued for appellant that the court should have peremptorily directed a verdict for defendant, as requested both at the close of plaintiff's case and at the close of the entire case, for the reason that the evidence conclusively shows that plaintiff split its original account which, it is said, was an entire, indivisible claim, by presenting the claim for \$396.35 and causing it to be allowed against the estate of Adolphus Peper, non compos mentis; that such allowance of part of the entire account of plaintiff against Adolphus Peper operates to preclude a recovery on so much thereof as is involved in this action.

[1, 2] It is well settled that a single demand cannot be split and separate suits maintained for various parts thereof. Where

the demand is essentially an entirety, but one action may be predicated upon it. *Wagner v. Jacoby*, 26 Mo. 532; *Union, etc., Co. v. Traube*, 59 Mo. 355; *Wheeler Savings Bank v. Tracey*, 141 Mo. 252, 42 S. W. 946, 64 Am. St. Rep. 505; *Donnell v. Wright*, 147 Mo. 639, 49 S. W. 874; *Bircher v. Boemler*, 204 Mo. 554, 103 S. W. 40; *Rundelman v. Boiler Works Co.*, 178 Mo. App. loc. cit. 650, 651, 161 S. W. 609. And if a judgment is obtained upon a portion of a demand of such character, the right of action is gone as to the residue thereof not embraced within the judgment. The judgment will conclude the rights of the parties with respect to the cause of action arising upon the entire demand, whether the judgment in fact includes the whole or only a part thereof, in accordance with the maxim, *nemo debet bis vexari pro eadem causa*. See *Union, etc., Co. v. Traube*, supra; *Hoffmann v. Hoffmann's Executor*, 126 Mo. 486, 29 S. W. 603; *Puckett v. Annuity Ass'n*, 184 Mo. App. 501, 114 S. W. 1039; *Rundelman v. Boiler Works Co.*, supra. While there is no conflict of authority as to the general rule against splitting a single cause of action, some difficulty is frequently encountered in determining whether a demand is single and entire, constituting but one cause of action, or arises out of two or more separate and distinct causes of action. It is said that:

"The true distinction between demands or rights of action which are single and entire, and those which are several and distinct is, that the former immediately arise out of one and the same act or contract and the latter out of different acts or contracts." *Alkire Grocer Co. v. Tagart*, 60 Mo. App. loc. cit. 393.

"When there is an account for goods sold, or labor performed, where money has been lent to, or paid for, the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exists, will, in each case, depend upon whether the case is covered by one or separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work, or advance money; and usually in the case of a running account it may be fairly implied that in pursuance of an agreement an account may be opened and continued either for a definite period or at the pleasure of both the parties. But there must be either an express contract, or the circumstances must be such as to raise an implied contract embracing all the items to make them, when they arise at different times, a single or entire demand or cause of action." *Alkire Grocer Co. v. Tagart*, supra; *Ruddle v. Horine*, 34 Mo. App. 616; *Secor v. Sturgis*, 16 N. Y. 548.

[3] The facts of the case before us are such, in our opinion, as to present no serious difficulty on this phase of the case. In our judgment plaintiff's entire account against Adolphus Peper, which ran from May 15, 1907, to September 2, 1910, was conclusively shown to be an open, continuous, running account which constituted but one single indivisible demand, and gave rise to but one cause of action. Not only are the circumstances such as to "raise an implied con-

tract embracing all the items," the implication being that the account was opened and continued indefinitely in pursuance of one general agreement and understanding between the parties, but it affirmatively appears from the testimony of the owners of plaintiff company that the account was thus opened and continued, and throughout treated as one entire account. According to this testimony the account was merely opened and Adolphus Peper was furnished supplies and services which were charged to him. Bills were rendered to him from time to time after the account became "rather large." One of them was for \$1,821.57; another was for \$1,925.97; and a later one was for \$3,245.77. The account was not paid, but the owners of plaintiff company were induced to allow it to continue. When the book containing the items sued for in this action became filled, the account was transferred to and continued in the "new book." There is no suggestion that the account in this new book arose out of a separate contract, or that there was anything to distinguish that part of the open account from the remainder thereof, beyond the mere physical fact that it was entered in a different book, and this for the sole reason that the old book was filled.

On cross-examination Clarence Peper was asked:

"How did you determine the amount you wanted to collect was only \$390 (\$396.35) at that time? A. Well, that is the amount in the other book. Q. That was the amount in the other book? A. Yes; in the new book. The account only amounted to whatever it was, \$390."

Both Clarence Peper and Charles Peper repeatedly referred to the allowed claim as being but a small part of the entire "bill." And their testimony shows that they were induced to withhold the major portion of their bill, and that they presented to the curator merely the latter part thereof; the amount presented being determined solely by the fact that so much of the whole account was entered in the new book. The fact that it was so entered did not separate it from the earlier portion of the entire running account so as to give rise to separate causes of action.

[4] Respondent, in reliance upon what was said by this court in *Ruddle v. Horine*, supra, 34 Mo. App. loc. cit. 622, 623, says that for aught that here appears the indebtedness represented by the claim of \$396.35 may have been incurred under a separate and distinct contract from that under which the other goods and services were furnished, and that the burden was on plaintiff to show that the whole was furnished under one contract and constituted but one indivisible demand. This contention may be sufficiently disposed of by saying that the evidence, as we view it, affirmatively shows, beyond dispute, that the allowed claim of \$396.35 was but a part of one open, continuous, running account, having its origin in one contract; and that plaintiff merely selected this much

of the account for representation to the curator because of the fact that it happened to be contained in the new book.

Where a recovery is had of a part of an indivisible demand it will be regarded as an election to accept that part for the whole. 28 Cyc. 437. Even where claims are payable at different times, as where installments, arising out of the same contract, fall due at different times, if an action is brought when two or more of such installments are due, then all due must be included in that action, and if any be omitted the judgment will operate as a bar to the maintenance of another action therefor. See *Rundelman v. Boiler Works Co.*, supra, 178 Mo. App. loc. cit. 650, 651, 161 S. W. 609, and cases cited.

Under the authorities, supra, and the decisions in *Bircher v. Boemler*, 204 Mo. 554, 103 S. W. 40, and *Fullerton Lumber Co. v. Massard*, 144 Mo. App. 61, 128 S. W. 831, which are here much in point, plaintiff must be denied a recovery herein, as a matter of law, unless it be because of appellant's failure, as respondent contends, to properly raise this question in the trial court.

[5, 6] II. It is very earnestly and ably contended by respondent's learned counsel that appellant has waived any right to complain of the splitting of the cause of action, if any, by failing to either plead the former recovery in bar or to make any distinct objection on this ground in the trial court. It is true that this rule of law here invoked by appellant is enforced for the protection of the debtor; and he may waive its benefits by expressly or impliedly consenting to the institution of separate actions where but one would otherwise lie, or by his conduct at the trial. And it is elementary that a party will not be permitted to adopt a theory in the appellate court not advanced in the trial of the case below. But we think that the proposition of law asserted and relied upon by appellant was squarely presented in the case below, and that, under the circumstances, the question was one to be determined by the trial court in passing upon the demurrer to the evidence.

Defendant did not plead the former adjudication; i. e., the allowance of the claim for \$396.35, in bar of the present action. But the case arose in the probate court, and formal pleadings were unnecessary; and so far as concerns the matter of pleading the former recovery of a part of the account, it is sufficient to say that it came into the case without objection. Indeed it developed fully in plaintiff's own case, and was unqualifiedly conceded by the owners of plaintiff company who testified that the claim was presented to the curator and allowed by the probate court. And when defendant's counsel later offered the allowed claim it was admitted in evidence without objection. It is therefore wholly immaterial that the former recovery was not pleaded.

But it is insisted that appellant did not,

so far as this record shows, either by objection, instruction, or otherwise, distinctly raise the point now relied upon. It is said that there was no suggestion below that appellant contended that the claim in suit and that previously allowed in the probate court together constituted one indivisible demand which could not be split; nor that the adjudication in the probate court on a part of the whole account operated as a bar to the prosecution of the action predicated upon the remainder thereof.

[7-9] While the account offered was objected to, that objection was a mere general objection and avails nothing. But when the account was offered the fact that the claim or \$396.35 had previously been allowed had not appeared in the case. When this later appeared in plaintiff's case, and was conceded, and the facts concerning the nature of the account as a whole were developed, a motion to strike out the account previously admitted, based upon the proposition that plaintiff had split its demand, would have been appropriate. However, under the circumstances, we are of the opinion that the matter was one reached by the demurrer to the evidence. Not only was the splitting of the demand and the former recovery shown and fully developed in plaintiff's case, but defendant put in evidence the allowed claim without objection. Neither the court nor plaintiff's counsel could have had any doubt to the purpose of offering the evidence adduced which conclusively showed a former adjudication upon a part of plaintiff's entire account. As the items of the allowed claim of \$396.35 were not included in the claim in suit, the evidence mentioned constituted no defense to plaintiff's action, except on the theory that the splitting of the account by a former recovery upon a part thereof operated to preclude any recovery in the present action.

In *Garton v. Botts*, 73 Mo. 274, it was held that a former judgment, in an action between the same parties, put in evidence, though not admitted, was as conclusive in its effect as if it had been specifically pleaded by way of answer. In the case at bar the former adjudication came into evidence without objection—naturally so since plaintiff's own proof negated the existence of the judgment. Under the circumstances it was conclusive of the fact that a recovery had been had of a part of the original account; and if it conclusively appeared that the entire account constituted one indivisible demand, as we hold, that was the end of plaintiff's case.

[8] While a prima facie case once made could not be overthrown by mere oral testimony, though uncontradicted (*Gannon v. Leide Gaslight Co.*, 145 Mo. 502, 48 S. W. 47 S. W. 907, 43 L. R. A. 505), it is not true, as here, documentary evidence is introduced which, standing unimpeached, precludes a recovery. Nor do we think that

plaintiff made out a prima facie case since plaintiff's proof showed the former recovery and showed too that the original account was such as to constitute an indivisible demand which could not be split into two or more causes of action.

[11] III. Plaintiff's evidence tends to show that the whole account, which was allowed to accumulate to such proportion because of the relationship of the parties, was originally a valid indebtedness. It is true that the evidence shows that the deceased advanced money to plaintiff company while the account, it is said, remained unpaid; and it is suggested that this is a "suspicious circumstance." But plaintiff's evidence concerning this transaction makes it appear consistent with the testimony that the account was then unpaid and so remained. And it is said that Adolphus Peper retained the two cars pledged with the note, of value greater than the indebtedness which it evidenced. The matter would clearly be a jury question, were the case otherwise one for the jury.

Likewise plaintiff's evidence tends to dispel any imputation of bad faith in presenting the small claim to the curator, and withholding the major portion of the account and asserting a claim thereupon after the death of the alleged debtor. But by pursuing this course plaintiff has forfeited its right to recover on the claim in suit. To permit a further recovery against the estate would not only be a dangerous precedent, but would be to run counter to the entire policy of the law on the subject in hand.

It follows that the judgment must be reversed, and it is accordingly so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

CROSSLEY v. SUMMIT LUMBER CO.

(No. 14403.)

(St. Louis Court of Appeals. Missouri. June 6, 1916.)

1. CONTRACTS § 28(1), 29 — QUESTIONS OF LAW AND FACT—BURDEN OF PROOF.

The legal effect of the correspondence between the parties to an alleged sale is a question of law for the court, and the question whether defendant accepted the contract as proposed may become a question of fact for the jury, and the burden of showing that the proposed contract was accepted as made is on the plaintiff.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 141-143, 1755, 1824; Dec. Dig. § 28(1), 29.]

2. PRINCIPAL AND AGENT § 70—AGENCY FOR ADVERSE PARTIES.

One cannot act as agent for two parties whose interests are antagonistic, as in case of a buyer and seller.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 146; Dec. Dig. § 70.]

3. CORPORATIONS § 429—REPRESENTATION BY AGENT—SECRET INSTRUCTIONS.

Secret instructions given by a lumber company to its officer, not known to a buyer who dealt with such officer, did not affect the compa-

ny's liability, unless the buyer had knowledge of such facts that a reasonably prudent man in the conduct of his business would have been led to make inquiry which would have advised him of such instructions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1720-1723, 1725; Dec. Dig. ¶ 429.]

4. CORPORATIONS ¶ 429—REPRESENTATION BY AGENT—QUESTION FOR JURY.

In a lumber buyer's action for nondelivery, question whether plaintiff buyer had knowledge of facts that would have led a reasonably prudent man to make inquiry as to the authority of the general manager of defendant company to take orders for his own sawmill in the name of the company held for the jury.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1720-1723, 1725; Dec. Dig. ¶ 429.]

5. TRIAL ¶ 253(10)—INSTRUCTION.

In a lumber buyer's action for nondelivery, an instruction that, if the jury believed that the buyer knew that the mill at C. was owned by the manager of defendant lumber company individually, and, if they believed from the evidence that the directors of the lumber company did not, in fact, authorize its officers or agents to sell the output of the C. mill in its name, their verdict should be for defendant, was correctly refused as entirely omitting any reference to defendant lumber company's acts on which ratification of its manager's unauthorized selling from his own mill in the name of the company might rest.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 621, 622; Dec. Dig. ¶ 253(10).]

6. SALES ¶ 418(3) — ACTION BY BUYER — FAILURE TO DELIVER LUMBER—DAMAGES.

In a lumber buyer's action for nondelivery, plaintiff was entitled to recover for lumber secured elsewhere by him, whether borrowed or bought, on the basis of its market value.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1181; Dec. Dig. ¶ 418(3).]

7. TRIAL ¶ 253(1)—INSTRUCTIONS—OMISSION OF FACTS.

Instructions failing to present all the facts of the case for the consideration of the jury were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613, 614; Dec. Dig. ¶ 253(1).]

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

"Not to be officially published."

Action by G. R. Crossley against the Summit Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Judson, Green & Henry, of St. Louis, for appellant. Elliot, Chaplin, Blayney & Bedal, of St. Louis, for respondent.

REYNOLDS, P. J. This is an action to recover damages for nondelivery of a lot of long leaf yellow pine lumber, known in the trade as "export lumber," said to have been purchased by plaintiff of the defendant corporation, to be delivered at various dates, commencing in December, 1911, and running into February, 1912, at various named Florida coast points. There were five counts in the petition, one of the counts, however, the fourth, was dismissed by plaintiff at the close of the evidence in the case. The trial was

before the court and a jury and at its conclusion the jury returned a verdict in the aggregate sum of \$3,724.53. Judgment following, defendant has duly appealed.

It appears that the transaction on the part of defendant with plaintiff for the purchase and sale of this lumber was, so far as defendant was concerned, conducted mainly by one A. E. Silverthorne, who was a director and the secretary and general manager of the company, although the sales manager, Mr. Goss, who was under the immediate direction of the secretary, also appears to have written some of the letters. The defendant is a corporation organized and doing business under the laws of the state of Arkansas but its principal office and chief place of business is at St. Louis, where it was represented by the secretary, the president and other general officers and directors residing outside of this state. The several transactions here referred to were carried on by correspondence between plaintiff, who had his office in New York, and the Summit Lumber Company, generally from its St. Louis office. The Summit Lumber Company was engaged in the business of manufacturing and selling lumber. It had a mill at Randolph, La., and one at Columbus, Miss. A. K. Silverthorne was the president, W. E. Silverthorne, vice president, and A. E. Silverthorne, secretary and general manager, as before stated; and while the president and possibly other officers had been in St. Louis occasionally, A. E. Silverthorne was located there and in general charge of the business of the corporation. The beginning of the correspondence appears to have been in August, 1911, when Mr. Goss, the general sales manager, wrote plaintiff to the effect that the Summit Lumber Company was in a position to ship from "their mill" at Carrabelle, Fla., "export lumber," meaning long leaf yellow pine. The letter head upon which this was written, as far as it is here necessary to note, was as follows:

"Summit Lumber Company

"Incorporated

"Manufacturers Soft Short Leaf Yellow Pine

"Soda Dipped and Steam Dried

"Mills

"Summit Lumber Co., Randolph, La.

"Interstate Lumber Co., Columbus, Miss.

"Carrabelle Saw Mill Co., Carrabelle, Fla.

"St. Louis, Missouri.

"Quotations subject to change without notice.

All contracts and agreements are contingent upon strikes, accidents and other occurrences beyond our control. All contracts are subject to the approval of the general office at St. Louis."

The Summit Lumber Company had no mill at Carrabelle, Fla., that mill being owned by a corporation in which A. E. Silverthorne was the principal and controlling stockholder.

Some of the correspondence was by telegraph and while many of the telegrams were signed in the name of the Summit Lumber Company, others were in the name of A. E.

Silverthorne. The letters and telegrams from plaintiff to defendant were generally addressed to the Summit Lumber Company, sometimes to A. E. Silverthorne, at St. Louis, several of them, however, being addressed to A. E. Silverthorne, care Carrabelle Saw Mill Co., Carrabelle, Fla. One or more of the telegrams were addressed to A. E. Silverthorne at Cincinnati, Ohio, and others to him at other places.

While in a letter to A. E. Silverthorne, the then president, A. E. Silverthorne, cautioned A. E. Silverthorne against mixing up the business of the Summit Lumber Company with the Carrabelle Company, and in another forbade him to use the name of the Carrabelle Company on the letter heads, it does not appear that any notice of these, or limitation of the powers of A. E. Silverthorne, was given to plaintiff or the public and the same letter head seems to have been used throughout the correspondence.

Along the first of January, 1912, a change in the officers of the Summit Lumber Company was made and Mr. J. S. Blackwell became its president, A. E. Silverthorne being retired as an officer and director. On January 17th, 1912, Mr. Blackwell, as president, wrote to plaintiff on the letter head theretofore in use by the Summit Lumber Company and which we have set out, in reference to an order for the shipments of the export lumber covered by the order, to the effect that the Summit Lumber Company had nothing to do with this matter and requesting plaintiff to correspond directly with the Carrabelle Saw Mill Company or with Mr. A. E. Silverthorne, president of that company, adding that at the time of the writing of the letter Mr. A. E. Silverthorne was at Carrabelle, Fla., and would be there for several days. By another letter of January 22nd, 1912, Mr. Blackwell, as president of the Summit Lumber Company, and on the same letter head which had been in use in previous correspondence, wrote to plaintiff asking for a copy of any acceptance by the Summit Lumber Company of an order designated as "Billa," this being the code term designating a particular order for export lumber. Mr. Blackwell further wrote in this letter that the Summit Lumber Company had nothing whatever to do with Carrabelle Saw Mill Company or its orders and that since January 10th (1912), the Summit Lumber Company had nothing whatever to do with Mr. A. E. Silverthorne; that it was impossible for anyone to think that the Summit Lumber Company could fill this order from their Randolph, La., saw mill, and that they had nothing whatever in the office to show that the order had ever been accepted. He further writes:

"Whatever business you have with Mr. A. E. Silverthorne of the Carrabelle Saw Mill Company does not concern the Summit Lumber Company in the least and we do not see how you can hold the Summit Lumber Company for this order and we refuse to have anything to do with the order in any way, shape, or form."

This letter was written after all the orders for long leaf yellow pine lumber had been sent to the Summit Company, and was signed by Mr. Blackwell, as president and general manager. Following other correspondence in which the new management of the Summit Lumber Company repudiated all the transactions of A. E. Silverthorne in connection with these orders of the plaintiff, this action was commenced. None of the lumber which plaintiff claimed had been contracted for was ever delivered, and it appears that the only lumber of the kind wanted by plaintiff, that is long leaf yellow pine, which was manufactured by any of the mills named on the letter head of the Summit Lumber Company, was manufactured by the Carrabelle Saw Mill Company, at Carrabelle, Fla.

There was evidence in the case on the part of defendant, tending to show that plaintiff knew during the time he was endeavoring to contract for this export lumber, and while corresponding and giving orders for this lumber, that the Carrabelle Saw Mill Company, while a corporation, was the individual property of A. E. Silverthorne, he owning all or the controlling stock in it, the Summit Lumber Company and its officers, other than A. E. Silverthorne, having no connection with it. While plaintiff admitted that he knew this, he also testified that he understood that A. E. Silverthorne also owned the controlling interest in the Summit Lumber Company.

In the first instruction given at the instance of plaintiff the court told the jury, as a matter of law, that there was a contract of purchase and sale shown by the letters and correspondence between the parties. This is assigned as error.

[1] While the legal effect of the correspondence is always a question of law for the court (*Wilbur Stock Food Co. v. Bridges*, 160 Mo. App. 122, loc. cit. 131, 141 S. W. 714, and cases there cited), the question whether defendant had accepted the contract as proposed may become a question of fact for the jury, and the burden of showing that the proposal as made was accepted as made, would be on plaintiff (*Robertson v. Tapley*, 48 Mo. App. 239, loc. cit. 242). But in the case at bar there was no room for submission of any such issue to the jury. The correspondence discloses an unequivocal acceptance—a meeting of the minds of the contracting parties. That was not so in the *Robertson Case*, supra, and hence in that case it was a question for the jury. Here the trial court properly instructed on the correspondence, that there was a contract. 9 Cyc. p. 776, subsec. 2.

The appellant asked the following instruction:

"The court instructs you that if you believe from the evidence that plaintiff, Crossley, knew in November and December, 1911, that the mill at Carrabelle, Fla., was owned by A. E. Silverthorne individually, and if you further believe

from the evidence that the board of directors of the Summit Lumber Company did not in fact authorize its officers or agents to sell the output of the said Carrabelle Mill in its name, then your verdict herein must be for defendant on all the counts of the petition."

[2] This was refused and error is assigned on the refusal. The theory upon which this instruction was asked was that if respondent knew of the individual ownership by A. E. Silverthorne of the Carrabelle Mill, then he was put on inquiry as to the authority of A. E. Silverthorne, as an agent and officer of appellant, to bind the latter in contracts for the benefit to himself for the Carrabelle Company. But there was more in this case than a knowledge of the private interest of A. E. Silverthorne. It is a well settled general rule that one cannot act as agent for two parties whose interests are antagonistic, as in case of a buyer and seller. See *Lee v. Smith*, 84 Mo. 304, loc. cit. 309 (54 Am. Rep. 101), in which our Supreme Court held:

"The law will not permit an agent's private interest to come between himself and his principal. Its actual presence always disables the agent from binding his principal in the transaction."

See, also, *White Sewing Machine Co. v. Betting*, 46 Mo. App. 417; *St. Louis Charcoal Co. v. Lewis*, 154 Mo. App. 548, 136 S. W. 716; *St. Charles Savings Bank v. Orthwein Investment Co.*, 160 Mo. App. 369, 140 S. W. 921. But there are limitations in the application of this rule.

[3] As presenting their view on this point, the trial court, at the instance of counsel for respondent, told the jury that secret instructions given by defendant to A. E. Silverthorne "not known to the plaintiff did not affect defendant's liability, unless plaintiff had knowledge of such facts that a reasonably prudent man in the conduct of his business would have been led to make inquiry as to the said instructions and said inquiry would have advised plaintiff thereof." While this is not as clear as it might be, we think that it substantially states the law as here applicable and gave the appellant the benefit of its testimony as to the knowledge respondent had of the individual ownership of A. E. Silverthorne of the Carrabelle Mill.

[4] It is to be said in the present case that there is no evidence of any express authority by the board of directors of the Summit Lumber Company, given to the secretary, to bind the Summit Lumber Company for any deals connected with the output of the Carrabelle Saw Mill. But in its letter heads which were used throughout the correspondence, the name of the Carrabelle Company appears as that of a mill, the output of which (to say the least) was at the disposal of the Summit Lumber Company, and as we have said, it does not appear that any lack of control of that was brought home to respondent or anyone else. Substantially all of the correspondence on the part of appellant was in its corporate name. It opened negotiations through Mr. Goss, its general sales manager;

all the orders for lumber given by respondent were addressed to the Summit Lumber Company at its St. Louis office; no one, for the appellant, ever questioned the authority of the secretary, until after the close of the deals. Even if plaintiff here had actual knowledge that the Carrabelle Mill was practically the individual property of A. E. Silverthorne, we think that respondent even as a prudent man, was led by the conduct of appellant's representative to believe he could deal with A. E. Silverthorne for the output of the Carrabelle Saw Mill.

In 2 Thompson on Corporations (2d Ed.) § 1576, it is said:

"The governing principle with reference to the general power of a manager is that where he has the actual charge and management of the business, by the appointment of or with the knowledge of the directors, the corporation will be bound by his acts and contracts which are necessary or incident in the course of the business, without other evidence of actual authority."

In section 1579, it is said:

"Where a general manager is acting within the line of his duty, or within the apparent scope of his employment, third persons in their dealings with him in the business of the corporation of which he has charge may rely on the apparent authority with which he is clothed."

In *Rosenbaum v. Gilliam, Assignee*, 101 Mo. App. 126, loc. cit. 134, 74 S. W. 507, 509, our court said:

"The principles of the law of agency in Missouri applicable to natural persons and legal entities are the same, and where an officer of a corporation has been put in control of its affairs and permitted to manage and conduct its business, his authority to bind the corporation will be inferred from the ostensible authority thus conferred upon him, and a party with whom such managing agent has dealt respecting the affairs of the corporation, where no knowledge of the want of authority is disclosed, may hold the corporation for the acts of the agent on its behalf, although the latter may transcend his authority."

In *Dadeville Union Warehouse & Wholesale Grocery Co. v. Jefferson Fertilizer Co.*, 69 South. 918, loc. cit. 919, defendants, wholesale grocers, were held liable on a contract for the purchase of fertilizers made by its general manager, the Supreme Court of Alabama saying that although purchase of fertilizer was a new line of trade and privately prohibited by the company itself, the company was bound by the act of its general manager, the court adding:

"Business is based largely on confidence, and any other rule would, as often noted by courts, permit a ruinous deception of innocent persons, and an unfair evasion of just liability by those who have chosen to give apparent authority to their alter ego managers."

These statements of the law are particularly applicable to the acquiescence by the officers and directors of the appellant in the use of the letter head in which it was distinctly set out that the Carrabelle Saw Mill was one of the mills, the product of which was controlled by appellant. While there is no evidence that this use of the name was directly and expressly authorized, it appears that it was in use for so long a time and

throughout all of the correspondence concerning these transactions and without any warning to respondent or to the public generally, that the jury might conclude that respondent had a right to assume that A. E. Silverthorne, even if known to him to be the sole owner of the Carrabelle Mill, was authorized to deal in the name of appellant for its product. That is the natural inference to be drawn from the use of this letter head and the correspondence concerning these deals, commenced by the general sales manager of the company, Mr. Goss, and carried on subsequently by A. E. Silverthorne.

In *Hanover National Bank of New York v. American Dock & Trust Co.*, 148 N. Y. 612, 3 N. E. 72, 51 Am. St. Rep. 721, a case in which a certificate had been issued by the defendant which had been negotiated for value by a purchaser, the certificate, it being alleged, having been issued by the president of defendant (a Mr. Stone), to his own order without authority from the board of directors and in which it appeared that the president had express authority to sign and issue warehouse receipts for cotton deposited with the defendant by persons other than himself, it had no such authority to sign or issue warehouse receipts in his own favor even for cotton that had been actually deposited by him, it was held by the New York Court of Appeals, 148 N. Y. loc. cit. 620, 43 N. E. 74, Am. St. Rep. 721:

"As the certificate on its face gave a purchaser notice as should put a prudent person upon inquiry in regard to Stone's authority, the plaintiff, in order to succeed, was required to show that implied authority had been conferred upon him to issue certificates to himself for cotton that he had actually deposited. If he was authorized, either expressly or impliedly, to issue certificates to himself for his own cotton on deposit, and he issued a receipt, on his personal account, for cotton not on deposit, * * * the defendant would be liable to respond to a bona fide holder for value of such receipt." * * * It is upon the ground that an agent may bind principal within the limits of the authority which he has apparently been clothed in respect to the subject-matter. Thus the authority of an agent is enlarged, as to third persons, by publication, when the principal permits him to act not expressly authorized. For the protection of innocent persons the law will imply authority in an agent to do acts which, although disavowed by the principal before they are done, are nevertheless, recognized by him as valid when they are done. If, through inattention or otherwise, the principal suffers his agent to act and his authority without objection, he is bound to those who are not aware of any want of authority to the same extent as if the requisite power had been directly conferred. * * * Under such circumstances the principal is estopped from asserting the truth, by his own conduct in inducing third persons to believe that the agent had due authority to act in the given case."

The Supreme Court of the United States in *Martin v. Webb*, 110 U. S. 7, loc. cit. 3 Sup. Ct. 428, 433 (28 L. Ed. 49), that saying:

"Directors 'have something more to do than, from time to time, to elect the officers of the corporation, and to make declarations of dividends.

That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

Our conclusion is that the instruction of the court at the instance of respondent, and which we have quoted in part, correctly submitted this question to the jury.

[5] We further hold that the instruction asked by appellant, and which we have set out, was correctly refused. That instruction is insufficient in that it does not embrace all the elements necessary for the consideration of the jury in determining the authority of A. E. Silverthorne to deal with his individual property in transactions in which he was representing the appellant, in that it entirely omits any reference to the acts of appellant on which ratification may rest.

[6] Other points are urged for reversal, as for instance the measure of damages and the refusal of the court to give two other instructions asked by appellant. We do not think that there is any merit in either of these assignments. As to the measure of damages, it is urged that there should have been an instruction for nominal damages as to the lumber covered by the first count in the petition, for the reason that there was testimony to the effect that this lumber had been "borrowed" by the respondent. This was disputed. But whether "borrowed" or bought, respondent was certainly entitled to recover on the basis of its market value and the evidence showed what that was. On that evidence it would have been error to confine the respondent to recovery of nominal damages.

[7] The other two instructions which were asked by learned counsel for appellant were properly refused as they failed to present all the facts of the case for the consideration of the jury.

We find no reversible error to the prejudice of appellant and the judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

THATCHER IMPLEMENT & MERCANTILE CO. v. BRUBAKER. (No. 12025.)

(Kansas City Court of Appeals. Missouri. June 12, 1916.)

1. ARBITRATION AND AWARD §18—AGREEMENT TO SUBMIT—WHAT LAW GOVERNS.

Where the parties agreed in writing to submit their controversy in writing to arbitrators with knowledge that the hearing would be held and the award made and published at the office of the arbitrators, in Indiana, and the contract was neither entered into nor performed in Missouri, and did not become effective until filed in Indiana, the questions of the validity

of the proceedings and award are to be determined by the law of Indiana relative to arbitrations.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 77-81; Dec. Dig. ¶¶ 18.]

2. ARBITRATION AND AWARD ¶2—SUBMISSION—CONSTRUCTION.

Disputants may agree to a common-law arbitration, the statutory and common-law methods of arbitration being regarded as distinct and concurrent remedies aiming at the same result.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 7-10; Dec. Dig. ¶¶ 2.]

3. ARBITRATION AND AWARD ¶2—SUBMISSION—CONSTRUCTION.

A submission to arbitration in writing is within the statute, although there is no clause authorizing a circuit court judgment upon the award made pursuant to the submission, although at common law the submission agreement may be either parol or in writing.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 7-10; Dec. Dig. ¶¶ 2.]

4. ARBITRATION AND AWARD ¶2—SUBMISSION—CONSTRUCTION.

Where the parties by writing agreed to submit to arbitration a controversy arising out of a contract under the law of Indiana which governs the agreement, the contract not containing a provision "that such submission be made a rule of any court of record designated in the instrument," it was an agreement for common-law arbitration.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 7-10; Dec. Dig. ¶¶ 2.]

5. ARBITRATION AND AWARD ¶85(3)—ACTION ON AWARD—PLEADING AND PROOF.

In an action upon an award made upon a common-law agreement of arbitration, the burden is on the plaintiff to plead and prove not only the award but the submission, since the arbitrators have no power to bind the parties beyond the terms of the submission.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 497-499; Dec. Dig. ¶¶ 85(3).]

6. ARBITRATION AND AWARD ¶85(3)—ACTION ON AWARD—PROOF OF AGREEMENT.

A formal agreement of submission to arbitration, defining the subject-matter of the arbitration and referring to a rejected agreement and its accompanying documents, treated by the committee as a bill of particulars, it being assumed in the absence of evidence to the contrary that the particulars equaled in scope the subject-matter and cause defined in the formal agreement, was a sufficient proof of the agreement of arbitration.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 497-499; Dec. Dig. ¶¶ 85(3).]

7. ARBITRATION AND AWARD ¶85(3)—ACTION ON AWARD—PRESUMPTION.

The same presumptions being indulged in favor of an award as apply to judgments of courts of record, an award will be presumed to be within the submission, unless the contrary expressly appears, placing the burden on a party objecting to an award to show its illegality.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 497-499; Dec. Dig. ¶¶ 85(3).]

8. ARBITRATION AND AWARD ¶3—SUBMISSION—REQUISITES.

All that is required of a submission to arbitration is that a cause of action shall appear to exist, in order that a frivolous or absurd claim shall not be the grounds of the proceedings.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 11-21; Dec. Dig. ¶¶ 3.]

9. ARBITRATION AND AWARD ¶12—ARBITRATORS—NECESSITY OF KNOWLEDGE OF LAW.

The award of arbitrators on a submission to be decided according to the rules of an association cannot be attacked on the ground of a mistake of law, since arbitrators not being presumed to know the law, unless partiality or corruption, gross miscalculation in figures, or decision in a matter not submitted, be shown, the courts will not interfere either at law or in equity.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 32-51; Dec. Dig. ¶¶ 12.]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by the Thatcher Implement & Mercantile Company against J. A. Brubaker, trading in the name of J. A. Brubaker & Co. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Grant I. Rosenzweig, Chas. E. McCoy, and Sam M. Hutchison, all of Kansas City, for appellant. Guthrie, Gamble & Street, of Kansas City, for respondent.

JOHNSON, J. Plaintiff, a mercantile corporation doing business as a dealer in hay in Thatcher, Ariz., brought this suit in the circuit court of Jackson county against defendant, a dealer in the same commodity in Kansas City, to recover upon an award rendered in favor of plaintiff by the committee on arbitration of the National Hay Association, which, as its name implies, is an association composed of dealers in hay doing business in the United States. The principal office of the association where its arbitration committee, consisting of five members, sits and transacts business, is in Winchester, Ind.

Defendant was a member of the association, but plaintiff was not, when they entered into a contract which gave rise to the controversy between them; nor was plaintiff a member when this controversy was submitted to the committee and the award was made and published. The contract provided for the sale by plaintiff to defendant of 60 cars of alfalfa hay to be shipped from Thatcher via El Paso to New Orleans by a designated route. When the hay arrived at destination, defendant refused to receive it on the ground of plaintiff's failure to comply with the routing stipulation which resulted in delay in the transportation and consequent loss in the value of the hay. A controversy ensued which the parties, on July 3, 1912, agreed in writing to submit to the decision of the arbitration committee.

and this agreement, together with a mass of documentary evidence and a written statement of plaintiff's claim, were forwarded to the committee at Winchester. The committee received and filed the agreement and accompanying documents, but refused to proceed unless the parties would make out, sign, and file a written submission of the controversy on blanks conforming to the rules of the committee. Pursuant to this ruling, a new agreement to submit the pending controversy was drawn on an approved blank, was signed by plaintiff at Thatcher, and by defendant at Kansas City, and was forwarded to and filed with the committee at Winchester. It recited that:

"A controversy has arisen between the complainant and J. A. Brubaker of Kansas City, Mo., * * * over the purchase of sixty cars of hay by J. A. Brubaker from the complainant, as more particularly set out in the agreement for arbitration not on the blanks of the National Hay Association but now on file with the secretary of the association in connection with the papers setting forth the contention of the complainant and the evidence in support thereof," and followed with the stipulation of the parties "to submit hereinbefore referred to differences and controversies to the arbitrator and decision of the committee on arbitration and investigation regularly appointed by the National Hay Association or any three of them who may be present at the time fixed for the hearing or who may concur in the finding of any one of them according to the by-laws, rules and regulations of said National Hay Association, and we do further authorize and empower the said committee * * * or any three of them who may be present at the time fixed for the hearing, or who may concur in the finding of any one of them to arbitrate, award, adjust and determine the differences and controversies now existing between us for the matter aforesaid. We do further agree that the award so made * * * shall in all things by us * * * be well and faithfully performed, that we will stand to and abide by and fulfill the same and that we will pay whatever sum of money may be awarded as aforesaid, and further that we will abide by the by-laws, rules and regulations of said National Hay Association relating to arbitration. And we do hereby release the said committee jointly and severally from any and all claims or demands by reason of error in judgment or findings of law."

This agreement is in evidence, but for some reason the informal agreement of July 3, 1912, to which it refers for a more particular statement of the controversy, was not introduced in evidence.

The committee, without taking and subscribing to an oath and without hearing any testimony or arguments of the parties, but proceeding solely from an inspection of the written statements and documents filed by the respective parties, made and published on November 7, 1913, the following written award, signed by four of the five members of the committee:

"After reviewing carefully the entire pleadings and evidence with rebuttal and surrebuttal, we, the undersigned members of the arbitration committee, find as follows:

"Citation 1. The original contract was not complete and was faulty, it not being in accordance with National Hay Association trade rule No. 1, which reads as follows: 'It shall be the

duty of both buyer and seller to include in their original articles of trade, whether conducted by wire or mail, the following specifications: Numbers of cars or tons. Number of bales. Size of bales. Grade of hay or straw. The point of shipment or delivery or rate point. The time of shipment or delivery. The route and terms, except as follows: The specifications of rule 1 shall apply except in cases where the buyer and seller have been trading on agreed terms and conditions, in which event it shall be sufficient for the words "usual terms" to be used in telegrams, and the use of such words shall imply that such terms and conditions as govern previous trades of like character shall govern."

"Citation 2. Trade rule No. 8, in the absence of a proper confirmation, shall govern this transaction. This rule reads as follows: "'Terms of sale' shall mean that the weights and grades of shipment shall be determined by the terminal or destination market rules, unless otherwise specified at time of the sale."

"Citation 3. The shipper violated this contract when he assumed authority to divert cars without instructions from buyer.

"Citation 4. The committee considered the buyer, J. A. Brubaker & Co., was justified in repudiating this contract inasmuch as the shipper violated his contract as set out in citation 3.

"Citation 5. The committee decided unanimously that in view of the fact that had the defendants handled this hay as per original contract, they would have suffered a loss of \$2.00 per ton on 1,437,325 pounds, by reason of decline in the market and we, therefore, assess loss against the defendants in the amount of \$1,437.32 with interest at 6 per cent. from May 31, 1912, until November 15, 1913, making a total amount due the plaintiffs of \$1,563.09, which should be paid within fifteen (15) days from the date of award."

As might be expected, neither party was satisfied with this award, which we must regard as the product of a faithful observance by the arbitrators of the stipulation of the parties that their dispute should be settled by the rules and laws of the association, and not by the principles and rules of the juridical contract law of the land.

The contract of sale was pronounced "faulty" because the parties, one of whom was a stranger to the association, had not drawn it in accordance with the laws of the association; but it escaped being denounced as void, and the arbitrators found that plaintiff had breached its terms by diverting the shipment to another route without the consent of defendant, and ruled that defendant was justified by such breach in rescinding the contract and refusing to accept the hay. This would have ended the case in favor of defendant in a court of law; but the committee, in an honest effort to do what they conceived to be complete justice, found that, if plaintiff had fully performed the contract and defendant had received the hay at New Orleans, he would have lost \$2 per ton, or \$1,437.32, and adjudged that defendant, though fully justified in rescinding the contract, must, nevertheless, pay over to plaintiff the amount of the loss he would have sustained. Concluding it was wiser to take this half loaf than to risk all by refusing it, plaintiff accepted the award and

brought this suit to enforce it. Feeling that the juridical law which, at first, he despised but now applauds, would have given him a complete victory under the committee's findings of fact, defendant seeks to escape the award by attacking its validity. His answer interposes a number of defenses, but in his brief and argument he contends: First, that the arbitrators were required "to keep inflexibly within the limits of the particular matter submitted to them in the submission agreement," and since plaintiff, upon whom devolved the burden of proving not only the award but also the submission agreement containing the matters submitted to the committee, failed entirely to prove that agreement, there was such a failure of proof as to preclude a recovery on the award; and, second, that "the award is inconsistent on its face, and therefore is invalid." The alleged inconsistency consists of the error of law involved in the award to plaintiff in the face of the finding that defendant was not in the wrong but was justified in refusing to receive the hay.

At the close of plaintiff's evidence, the court directed a verdict for defendant, whereupon plaintiff took an involuntary nonsuit with leave, and in due course of procedure brought the case here by appeal.

[1-4] That the parties agreed in writing to submit their controversy to arbitration and chose the arbitration committee of the National Hay Association as their arbitrators, with the knowledge that the hearing would be held and the award made and published at the office of the committee in Winchester, Ind., are conceded facts which compel the conclusion that the questions of the validity of the proceedings and award are not to be determined by the law of this state relating to arbitrations. An agreement to arbitrate a dispute is a contract (*Searles v. Lum*, 81 Mo. App. 611, and cases cited), and, since the contract in question was neither entered into nor performed in this state, there is no ground upon which it might be pronounced a Missouri contract. It did not become effective as a contract until it was filed with and accepted by the committee in Indiana, and, since it was made and performed in that state, the question of its validity must be judged by the laws of that state. So judged, its terms disclose an agreement for a common-law and not a statutory arbitration. In this state the right of disputants to agree to a common-law arbitration is recognized—the statutory and common-law methods of arbitration being regarded as distinct and concurrent remedies aiming at the same result—and the test of whether the parties intended a common-law or a statutory arbitration is the form of the agreement of submission, i. e., whether it was parol or in writing. It was held by the Supreme Court, in *Bridgman v. Bridgman*, 23 Mo. 272, that a submission to arbitration in writing is within the statute, although there is no clause

authorizing a circuit court judgment to be entered upon the award made pursuant to the submission. See, also, *Hamlin v. Duke*, 28 Mo. 166; *Wolfe v. Hyatt*, 76 Mo. 156; *Williams v. Perkins*, 88 Mo. 379; *Searles v. Lum*, supra, 81 Mo. App. loc. cit. 610; *Triplett v. Sims*, 89 Mo. App. loc. cit. 330; *Cochran v. Bartle*, 91 Mo. loc. cit. 644, 3 S. W. 854; *Tucker v. Allen*, 47 Mo. loc. cit. 490. At common law the submission agreement may be either in parol or in writing. *Searles v. Lum*, supra. In Indiana, an agreement of submission to be regarded as one for a statutory arbitration must be in writing and must provide "that such submission be made a rule of any court of record designated in such instrument." *Boots v. Canine*, 58 Ind. 450. In that case the court held the agreement which was in writing to be an agreement for a common-law arbitration because of the absence of the second of "the two essential requisites to a statutory arbitration."

[5] In an action, such as this, upon a common-law award, the burden is on the plaintiff to plead and prove, not only the award, but also the submission. It is elementary that arbitrators have no power to bind the parties beyond the terms of the submission (*Lorey v. Lorey*, 60 Mo. App. 420), and "if they assume to act on questions not submitted, or fail to follow the directions in the submission in a material point, their award in reference to such matters will not be binding, either on questions of law or of fact." *Squires v. Anderson*, 54 Mo. 193, and cases cited. The submission furnishes the source and prescribes the limits of the arbitrator's authority, and a failure to prove the agreement for submission is fatal to a recovery upon the award. 3 Cyc. 674.

[6] But plaintiff did prove the agreement under which the cause in controversy was submitted to the arbitrators, and its failure to introduce the rejected agreement which, with its accompanying documents, was treated in the formal agreement and held by the committee as a mere bill of particulars, and their supporting evidence, was not a failure to prove the terms of the submission to which the documents under consideration bore the relationship of mere evidentiary exhibits. The formal agreement defined the subject-matter and cause of action to be submitted as "a controversy between the parties over the purchase of 60 cars of hay by defendant from plaintiff," and, while it may be conceded that the award could not stand as to matters not embraced in the bill of particulars to which the agreement referred, we must assume, in the absence of a showing to the contrary, that the particulars in their totality equaled in scope the subject-matter and cause defined in the formal agreement; that is to say, they included every part of the entire controversy which had arisen between the parties "over the purchase of 60 cars of hay."

[7] The same presumptions must be in-

duled in favor of an award that apply to judgments of courts of record, and the party objecting to the award must show the fact of its illegality. *Kendrick v. Tarbell*, 26 Vt. 416. An award will be presumed to be within the submission unless the contrary expressly appears (*Bush v. Davis*, 34 Mich. loc. cit. 198), and to embrace all that was, and nothing that was not, submitted (*Dickerson v. Rorke*, 30 Pa. 390). As is pertinently observed in *Ebert, Ex'r, v. Ebert, Adm'rs*, 5 Md. 353:

"A more liberal and reasonable interpretation is now adopted by the courts, than formerly existed, as to awards. Every reasonable intendment will be made in their favor, and a construction given to them that will support them, if possible, without violating the rules adopted for the construction of instruments. It will be intended that the arbitrators have not exceeded their powers; that all matters have been decided by the arbitrators, unless the contrary shall appear on the face of the award; that it is certain, final, and legal. * * * Unless, therefore, it shall appear upon the face of the award that the arbitrators have exceeded their powers, it will not be intended that they have, for every intendment will be made in favor of the award."

And it is said in *Sperry v. Ricker*, 4 Allen (Mass.) 17:

"It is the legal presumption, unless the contrary appears, that arbitrators pursue the submission and decide only the matters therein contained, and also that they decide all matters submitted to them."

See, also, *Hadaway v. Kelly*, 78 Ill. 286; *Tank v. Rohweder*, 98 Iowa, 154, 67 N. W. 106.

[8] We hold that plaintiff proved the submission, that on its face the award shows no material variance therefrom, and that in the absence of proof of the particulars to which reference was made the presumption will be indulged that they were as broad as the subject-matter defined in the formal agreement. All that is required of a submission to give it validity is that a cause of action shall appear to exist in order that a frivolous claim, or one which would be manifestly absurd, might not be the ground of the proceedings. *Skillings v. Coolidge*, 14 Mass. 48; *Rixford v. Nye*, 20 Vt. loc. cit. 137; *Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96; *Littleton v. Patton*, 112 Ga. 438, 37 S. E. 755.

[9] Passing to the second ground of attack, it must be conceded the assessment therein in favor of plaintiff could not be justified in law, but the parties agreed to submit their dispute to judges untrained in the law who were to be governed in their decision by the laws and rules of the association relating to business transactions between members. Certainly defendant, who was a member, could have no reason to complain of his rights being determined under the rules he selected in preference to the law of the land which he rejected; but, if the agreement had not substituted the association's laws and rules, the result would be the same in this case. A tribunal of this character is not supposed to

know anything of law, and unless partiality or corruption, gross miscalculation in a matter of figures, or decision in a matter not submitted, be shown, the courts cannot interfere, either at law or in equity. *Relly v. Russell*, 34 Mo. 524; *Shawhan v. Baker*, 167 Mo. App. loc. cit. 34, 150 S. W. 1096; *Vaughn v. Graham*, 11 Mo. 576; *Bridgman v. Bridgman*, 23 Mo. loc. cit. 274; *Shroyer v. Barkley*, 24 Mo. loc. cit. 352; *Mitchell v. Curran*, 1 Mo. App. 453; *Allen v. Hickam*, 156 Mo. loc. cit. 58, 56 S. W. 309; 5 Corp. Juris, 180, 72, 244.

As is said in *Vaughn v. Graham*, supra:

"Arbitrators may be governed in their decisions by principles of equity as well as law, and, though their decision be not according to law, yet their report will not be set aside, unless it appears that they have misapplied the principles by which they profess to be governed, or have been misled in the application of them."

We cannot regard the error in question as anything more than a mere error of law to be expected of untrained judges who, authorized by the terms of the submission not to decide the case according to law but according to their own conceptions of justice and equity, have rendered a decision which expresses neither law, justice, nor equity, but was a kind of decision the parties bargained for. Courts will give no relief against errors of that sort. The court erred in directing a verdict for defendant.

The judgment is reversed, and the cause remanded. All concur.

SOUTHWEST NAT. BANK OF KANSAS
CITY v. McDERMAND et al.
(No. 11672.)

(Kansas City Court of Appeals. Missouri.
June 12, 1916.)

1. APPEAL AND ERROR \S 286—PRESERVATION
OF OBJECTIONS—MOTION FOR NEW TRIAL—
DEMURRER.

A motion to dismiss, regarded as a demurrer, preserves itself without the aid of a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1713; Dec. Dig. \S 286.]

2. DISMISSAL AND NONSUIT \S 81(7)—REIN-
STATEMENT—EFFECT.

Where defendants' motion to strike out an amended petition and to dismiss a suit as to them was sustained, the reinstatement of the case as to them put it back where it was before the dismissal.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 188, 190, 192; Dec. Dig. \S 81(7).]

3. JUDGMENT \S 106(1)—DEFAULT IN PLEAD-
ING.

The fact that the term at which the defendants' motion to make the petition more definite and certain was sustained so as to require the filing of an amended petition expired before the amendment was made did not ipso facto work a judgment in favor of the defendants.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 162, 180; Dec. Dig. \S 106(1).]

4. APPEAL AND ERROR ⇐962—DISCRETION OF TRIAL COURT—REINSTATEMENT OF DISMISSED CAUSE.

The reinstatement of a dismissed cause was within the discretion of the trial court, where nothing appeared in the record proper to show that it was forbidden by law or rule of court or that its discretion was unsoundly exercised.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3888; Dec. Dig. ⇐962.]

5. LIMITATION OF ACTIONS ⇐127(1)—TIME OF COMMENCING ACTION — AMENDMENT — NEW SUIT.

Where an original suit to enforce a materialman's lien was brought in due time and its dismissal as to the defendant owners was set aside and the case reinstated at the same term, the case, upon the refiling of the amended petition, was still in court, not as a new suit, but merely as a continuation of the original suit.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 543; Dec. Dig. ⇐127(1).]

Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.

"Not to be officially published."

Suit by the Southwest National Bank of Kansas City against Frank R. McDermard and wife and the J. B. Neevel & Sons Construction Company. Dismissed as to defendants McDermard and personal judgment against the defendant company, and plaintiff appeals. Reversed and remanded.

See, also, 177 S. W. 1106; 181 S. W. 998.

Ellis, Cook & Barnett, of Kansas City, for appellant. Robinson & Goodrich, of Kansas City, for respondents.

TRIMBLE, J. This was a suit to enforce a materialman's lien. The materials were sold by the Kansas City Terra Cotta Company to the J. B. Neevel & Sons Construction Company, contractor for the erection of a building on lots in Kansas City owned by the defendants Frank R. and Myrtle A. McDermard, which materials were used in the construction of said building. The first item of the account was sold and delivered about July 1, 1912, and the last was on September 17, 1912; the account then amounting to \$1,276. Not receiving payment, the terra cotta company, within four months from the accruing of the account, filed its lien statement in proper form in the office of the clerk of the circuit court of Jackson county, Mo., after having given ten days' previous written notice thereof to the owners, the McDermards. Thereafter, on March 31, 1913, the terra cotta company assigned said account and all rights therein to the plaintiff bank. The latter, within 90 days from the date of the filing of the lien, brought this suit to enforce same. The suit was filed April 8, 1913, and summons was at once issued and served upon all defendants, returnable to the May term of court. On May 12, 1913, the McDermards appeared and filed a motion to make the petition more definite and certain. At the November term, November 29, 1913, this motion was sustained. At the January term,

January 19, 1914, the plaintiff filed an amended petition. At the same term, to wit, on February 9, 1914, the McDermards filed a motion to strike out this amended petition and to dismiss the suit as to them. At the same term, on April 15, 1914, this motion was sustained, and the case was dismissed as to the McDermards. At the same term, to wit, on April 12, 1914, plaintiff filed a motion to reinstate the dismissed cause and for leave to file its amended petition. This motion was on April 22, 1914, at the same term, sustained, and the amended petition filed on January 19, 1914, was again filed. At the same term, to wit, April 25, 1914, the McDermards again filed a motion to dismiss the case as to them. The first ground of said motion, and the one upon which the court acted as shown by its order, was:

"Because the record shows on its face that, if plaintiff ever had any right to establish and enforce a mechanic's lien upon property of said two defendants or of either of them, such right, if any, had expired, and this court was without jurisdiction to establish or enforce said lien, at the time when the last-amended petition in said action as against said two defendants was filed on, to wit, the 22d day of April, A. D. 1914; and that said court is without jurisdiction to establish or enforce a mechanic's lien on property of said two defendants or of either of them in said action."

On June 13 (May term) 1914, the motion of the McDermards to dismiss as to them was sustained "as to the first ground." The cause was thereupon dismissed as to the McDermards, and judgment was rendered against the defendant construction company. Afterwards, at the same term, and on June 25th, the judgment against the construction company was set aside, and the case was heard, after which a personal judgment was rendered against the construction company for the amount of plaintiff's demand; the judgment reciting that, the "said cause having heretofore been dismissed by the court as to defendants Frank R. McDermard and Myrtle A. McDermard, the court declines to hear evidence touching a mechanic's lien on the property involved, to which ruling of the court in favor of defendants Frank R. McDermard and Myrtle A. McDermard the plaintiff excepts," and further adjudging that:

"Said action having been heretofore dismissed by the court on the 13th day of June, 1914, as to the defendants Frank R. McDermard and Myrtle A. McDermard, upon their motion, plaintiff recover nothing of the defendants Frank R. McDermard and Myrtle A. McDermard and have no lien upon the property of the said Frank R. McDermard and Myrtle A. McDermard, herein involved, and that the said Frank R. McDermard and Myrtle A. McDermard go hence without day and have judgment against the plaintiff herein for their costs herein expended, for all of which let execution issue, to which judgment of the court in favor of defendants Frank R. McDermard and Myrtle A. McDermard the plaintiff excepts."

Without filing a motion for a new trial, the plaintiff appealed; the complaint being

that the court erred in dismissing the case as to the McDermans and in refusing to allow plaintiff to enforce the lien against the property owned by defendants.

The basis of defendants McDermans' motion of February 9, 1914, to strike out the amended petition, was that said amended petition, which was filed at a subsequent term without leave of court, was not filed within the time, nor according to other terms and requirements, prescribed by the rules of court. The plaintiff, in its motion to reinstate the case, alleged matters outside the record as an excuse for plaintiff's failure to file the amended petition within the time required, and to show that the other conditions required by said rules were, in fact, complied with. Evidence was heard pro and con on said motion.

The first ground of defendants McDermans' motion to dismiss, dated April 25, 1914, which said first ground is hereinabove quoted and is the ground upon which the court acted in again dismissing the case as to the owners, had for its basis the same reason as before, though obscurely stated in a somewhat different way from the other motion. That evidence was heard covering that particular ground of said motion to dismiss is shown by the record, and that such evidence was necessary was, in effect, conceded by appellant in filing a bill of exceptions and printing the evidence adduced, as well as the motion, as a part of the abstract in this appeal.

As it appeared from the course pursued by both sides that evidence on the motion was necessary, this court held, in an opinion by Judge Johnson handed down June 14, 1915 (177 S. W. 1106), that the motion could not be treated as a demurrer, and, since no motion for new trial was filed, the appeal could not be considered on its merits, and affirmed the judgment. The view of this court was that, although the motion to dismiss said "the record shows on its face" the matters relied upon as reasons for the dismissal of the suit, yet, if the motion depended upon evidence allunde the record, it could not be treated as a demurrer; that the motion could not be made to "lift itself by its bootstraps," in this manner, from a motion to dismiss into the dignity of a demurrer to the petition. It seemed to this court that the decision of the trial court upon the motion to dismiss called for the consideration of evidence; for while the trial court could take judicial knowledge of its own rules and of the violation thereof, as if they were matters appearing upon the face of the record proper, yet the trial court, in deciding whether it would enforce the rule, was called upon to exercise, not an arbitrary, but a sound judicial, discretion, and consequently whether that discretion was exercised soundly or not would depend upon the evidence showing that there was good reason for not enforcing the rule. And, as said before, the

appellant, by filing a bill of exceptions and preserving the evidence, appeared to have confessed that situation.

On certiorari, however, the Supreme Court (State ex rel. Southwest Nat. Bank v. Ellison, 181 S. W. 998) held that no evidence in relation to the first paragraph of the motion was necessary or even proper; that, if evidence was offered of matters of which the court could take judicial knowledge, the offering of such evidence was useless and ineffectual; that if there were offered, and the court received, evidence of things which did not appear on the face of the record, such action went beyond the scope of the motion and unwarrantedly broadened the issue which it tendered; and that the motion to dismiss was, in effect and should be treated as, a demurrer.

[1-3] As the motion to dismiss must be regarded as demurrer, it preserves itself without the aid of a motion for a new trial. *Shohoney v. Quincy, etc., R. Co.*, 231 Mo. 181, loc. cit. 149, 132 S. W. 1059, Ann. Cas. 1912A, 1143. *Knisely v. Leathe*, 256 Mo. 341, 166 S. W. 257. Taking the case, therefore, upon the record proper, and without considering the fact of the introduction of evidence, which the appellant so carefully but unnecessarily (and, it seems, unfortunately), preserved in its bill of exceptions and brought to this court, we find no reason for sustaining a demurrer to the plaintiff's amended petition. Although the defendants' motion to strike out and dismiss, dated February 9, 1914, was sustained on April 15, 1914, yet the court afterwards, on April 17, 1914, and at the same term, reinstated the case as to the owners of the property, and this put the case back where it was before the dismissal was made. 14 Cyc. 465; *Brown v. Foote*, 55 Mo. 178; *Miller v. Earle*, 15 S. W. 916; *Crane Co. v. Hawley, etc., Co.*, 54 Mo. App. 603. The fact that the November term, 1913, at which defendants' motion to make the petition more definite and certain was sustained, which required the filing of an amended petition, expired before the amendment was made did not ipso facto work a judgment in favor of defendants, the McDermans. *Robinson v. County Court of Morgan County*, 32 Mo. 428; *Berry v. Zimmerman*, 43 Mo. 215; *Ruch v. Jones*, 33 Mo. 393, loc. cit. 394; *Plattsburg v. Allen*, 84 Mo. App. 432; *Louthan v. Caldwell*, 52 Mo. 121.

[4] The reinstatement of the cause by the court on April 17, 1914, was within the discretion of the court, since no facts appear in the record proper to show that it was forbidden by law, or rule of court, or that the discretion to reinstate was unsoundly exercised. 14 Cyc. 460; *Cooney v. Murdock*, 54 Mo. 349; *State ex rel. v. Bird*, 22 Mo. 470; *Davis v. Carp*, 139 Mo. App. 650, loc. cit. 754, 123 S. W. 1009; *Crane Co. v. Hawley, etc., Co.*, supra.

[5] Since the original suit was brought within the 90 days, and the dismissal of the

case was in effect set aside and the case reinstated at the same term as that at which the dismissal order was made, which action was within the discretion of the court, so far as appears in the record proper, the case, upon the refile of the amended petition, was still in court and was pending there at all times from the date of the institution thereof. The amended petition was not a new suit, but was merely the continuation of the one originally brought. The right of plaintiff, therefore, to proceed against the owners of the property, was in no way lost or barred.

The judgment is reversed, and the cause remanded.

VAN TRUMP v. SANNEMAN. (No. 12088.)
(Kansas City Court of Appeals. Missouri.
June 12, 1916.)

1. COSTS §70—FEE BILL—CONFESSION OF ERROR.

In an action for an accounting between partners, where a referee was appointed who filed a report showing defendant's indebtedness to the plaintiff, the overruling of exceptions thereto without the rendition of any judgment in the circuit court left no ground upon which a fee bill could be issued against plaintiff for costs made by the defendant, and defendant's silence should be construed as a confession of error therein.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 290-296; Dec. Dig. §70.]

2. COSTS §70—REFEREE'S FEES—STATUTES—WITNESSES.

Under Rev. St. 1909, § 2016, providing that, in the absence of any special agreement, referees shall receive such compensation for their services as the court in which the case is pending may allow, the compensation of referees may be taxed as costs; but, as the statutes do not include referees or referees' stenographers among the court officers entitled to a fee bill, the fees of the referee or the referee's stenographer or of defendant's witnesses were not properly included in a fee bill issued after reference and report, but before judgment had been entered.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 290-296; Dec. Dig. §70.]

3. COSTS §2—STATUTES—CONSTRUCTION.

The allowance and collection of the costs of litigation are governed entirely by statute, and such statutes must be strictly construed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 4, 26; Dec. Dig. §2.]

4. COSTS §279—FEE BILL—EXECUTION.

Without a judgment for one or the other of the parties to a cause, an incidental judgment for costs cannot be rendered, and, as an execution for costs must run in the name of the party in whose favor the judgment was rendered, a fee bill cannot be treated as an execution for costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1061-1071; Dec. Dig. §279.]

5. COSTS §279—REMEDY—FEE BILL.

A fee bill is the proper remedy of officers and witnesses to recover fees for services rendered by them.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1061-1071; Dec. Dig. §279.]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by R. W. Van Trump against R. H. Sanneman. From a judgment overruling plaintiff's motion to strike out certain items from a fee bill issued against him, he appeals. Reversed, and cause remanded.

Frank G. Warren, of Kansas City, for appellant. W. F. Zumbunn, of Kansas City, for respondent.

JOHNSON, J. This is an appeal from a judgment overruling plaintiff's motion to strike out certain items from a fee bill issued against plaintiff by the clerk of the circuit court and placed in the hands of the sheriff for collection.

The action brought by plaintiff was for an accounting between partners. A referee was appointed, and after hearing the evidence he made and filed a report finding the issues in favor of plaintiff and that defendant was indebted to plaintiff upon an accounting in the sum of \$422.43. Defendant's exceptions to this report were overruled, but no judgment against defendant was entered in the circuit court. The referee appended an itemized bill of costs to his report which included the fee of witnesses called by defendant and compensation to the referee and the stenographer employed by him to preserve the evidence, and an order was entered in the circuit court allowing these fees and charges which plaintiff concedes were reasonable and proper items of costs. Such was the state of the record when the clerk issued the fee bill containing the mentioned items and delivered it to the sheriff for collection against plaintiff.

[1-3] Counsel for respondent filed no brief and did not appear and argue the case. From our inspection of the record and the light we have received from appellant's brief and argument we are convinced that palpable error was committed against appellant, and that the silence of respondent should be construed as a confession of error. Since no judgment has been rendered against plaintiff, it is difficult to perceive any ground upon which a fee bill could be issued against him for costs made by defendant. Clearly the motion should have been sustained as to the fees of defendant's witnesses. And it is just as clear that the fees of the referee and the referee's stenographer should have been stricken from the bill. No final judgment having been rendered for plaintiff on the referee's report, the cause is still pending in the circuit court. The allowance and collection of the costs of litigation are governed entirely by statute, and the rule is well settled that such statutes must be strictly construed. They provide that:

"Referees, in the absence of any special agreement, shall receive such compensation for their services as the court in which the case is pending may allow, not exceeding ten dollars per day." Section 2016, R. S. 1909.

And this statute has been construed to authorize the compensation of the referee to be taxed as costs. *Schawacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935; *Turner v. Butler*, 66 Mo. App. 380; *Conroy v. Frost*, 38 Mo. App. 351.

[4] But, since the statutes do not include referees or referees' stenographers among the court officers who are entitled to a fee bill, none may be issued in their favor pending the final disposition of the cause in the circuit court. *Manewal v. Proctor*, 112 Mo. App. loc. cit. 319, 87 S. W. 30; *Conroy v. Frost*, supra; *Dempsey v. Schawacker*, 62 Mo. App. 166; *Trall v. Somerville*, 22 Mo. App. loc. cit. 311; *Watkins v. McDonald*, 70 Mo. App. loc. cit. 357. Nor may we treat the fee bill as an execution for costs. Without a judgment for one or the other parties to the cause an incidental judgment for costs could not be rendered, and an execution for costs must run in the name of the party in whose favor the judgment was rendered. *Hoover v. Railway*, 115 Mo. 77, 21 S. W. 1076; *Dempsey v. Schawacker*, supra, 62 Mo. App. loc. cit. 168.

[5] A fee bill is the proper remedy of officers and witnesses to recover fees for services rendered by them (*Hoover v. Railway*, supra), and, as we have shown, is not a remedy available to a referee during the pendency of the suit.

The judgment is reversed, and the cause remanded. All concur.

SUMMERS v. CHICAGO, R. I. & P. RY. CO. (No. 12022.)

(Kansas City Court of Appeals. Missouri.
June 12, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 997(2)—DEMURRER TO EVIDENCE.

In an action for personal injuries, where a demurrer to the evidence was overruled, question is not whether the evidence as a whole will sustain two or more probable causes of the injury for one or more of which the defendant would not be liable, but did plaintiff adduce substantial evidence, which, if accepted by the triers of fact, will point to the pleaded cause as the proximate and sole cause of injury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. \Leftrightarrow 997(2).]

2. DAMAGES \Leftrightarrow 208(2)—QUESTIONS FOR JURY—SUFFICIENCY OF EVIDENCE.

In an action for personal injuries alleging to have been caused by a fall across the edge of a two-inch plank, occasioned by stepping on a defective running board along the fence of defendant railroad's loading chute, evidence consisting of the opinion of plaintiff's expert witness that the plaintiff's condition could not have resulted from overlifting, although contradicted by the opinion of defendant's expert, *held* sufficient to take the issue to the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 533, 534; Dec. Dig. \Leftrightarrow 208(2).]

3. APPEAL AND ERROR \Leftrightarrow 1068(4)—HARMLESS ERROR—INSTRUCTIONS.

In an action for personal injuries alleged to have been sustained in defendant railroad's load-

ing chute, where the petition alleged that plaintiff was compelled to expend \$700 for medical attention, nursing, and hospital accommodations, error in plaintiff's instruction on the measure of damages authorizing an assessment for the money spent in this way, if any, without restricting the assessment to the pleaded sum, was harmless, where the only evidence could not have induced a higher assessment than the petition authorized.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. \Leftrightarrow 1068(4); Trial, Cent. Dig. §§ 475, 480, 553, 558.]

Appeal from Circuit Court, Jackson County; I. N. Watson, Special Judge.

"Not to be officially published."

Action by Samuel J. Summers against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Paul E. Walker, of Topeka, Kan., and Se-bree, Conrad & Wendorff, of Kansas City, for appellant. Robinson & Goodrich, of Kansas City, for respondent.

JOHNSON, J. This is an action for personal injuries plaintiff alleges were caused by negligence of defendant. A trial of the issues raised by the pleadings resulted in a verdict and judgment for plaintiff in the sum of \$2,000, and defendant appealed. At the time of his injury which occurred October 30, 1913, plaintiff, who lived at Scandia, Kan., and was in the business of buying and shipping horses, was engaged in loading horses into a car at defendant's yards in Scandia for shipment over defendant's railroad. In driving the horses through a loading chute he climbed over one of its fences and stepped down on to a plank walk or running board along the fence on the outside. The plank on which he stepped was decayed and broke under his weight, which was 230 pounds, and he fell astride the supporting brace, a 2x6 plank set edgewise, striking the edge of the brace in a position to hurt his rectum and testicles. He suffered intense pain in those parts for about two hours, and lay on the ground 15 minutes while a negro assistant named Willis finished loading the horses into the car, and then he walked to his home unassisted. That afternoon he rode out into the country in an automobile to transact some business, and on the following day he made another such trip; but on the third day after the injury he was able only, as he states, "to hobble around the best he could and try to get rid of the pain." Eight days after the injury he called in Doctor Haggman of Scandia who treated him three days, and then decided that he should be removed to a hospital at Concordia, the county seat, for a surgical operation. On his arrival at the hospital, Dr. Pierce of Concordia, assisted by Dr. Haggman, performed an operation on him for an abscess which had formed in the prostate gland.

Plaintiff had developed a high tempera-

ture at that time and was thought by the doctors to be in a critical condition. Dr. Pierce testified that he opened up one lobe of the gland and there was pus in it. He said—

"the tissues were all swollen, congested, but afterwards abscesses formed, one or two formed in the region of the urethra; that is, when he had the second rise of fever, when he seemed in the critical condition several days after opening him up; I think he had a temperature of 106 at that time; used serum on him and one thing and another; but at the time of the operation the only abscesses I discovered at that time, as I remember it, was the abscess in the prostate gland; the parts seemed to be all swollen and congested. Q. That would be probably the natural result from the bruise or the abscess in the gland? A. That would be a factor. Q. Probably the abscess in the gland had caused that condition around the gland? A. It would have some influence on it. For instance, in an older man you very frequently open the prostate gland on some men, you will find pus and no condition of swelling around the urethral rectal tissues. That is due to a degenerated condition—age."

He found no abrasion or discoloration of the skin, but the absence of a noticeable discoloration might have been due to the natural color of the skin, which was very dark. Three weeks before his fall, plaintiff had strained himself lifting heavy bags of alfalfa seed; and, when the witness interrogated him to ascertain, if possible, the cause of the condition of the prostate gland, plaintiff first told of this incident. The witness did not think it would afford a reasonable cause for such an injury to the gland, but when plaintiff told him about his fall across the scantling, he accepted that as the probable cause of his injury, and his expert testimony is to the effect that such a cause could have produced that condition.

Doctor Haggman testified:

"They called me over the telephone to come to see Summers; he was sick. I went down and found him lying down * * * and I examined him and found him to have some fever, pulse rate a little increased; I examined his rectum and found a great deal of tenderness in the region of the rectum, and prostate gland enlarged and tender, a swelling and tenderness to the right side and towards the back of the rectum. Q. Was the swollen condition between the rectum and scrotum? A. No, sir. Q. What occurred after that, Doctor? A. I saw him on the 8th, 9th, 10th, and 11th of November, and his fever seemed to get higher, the pain increased, the swelling increased, and I advised him to either call a surgeon or go to a surgeon somewhere, and he decided to come to Concordia to Doctor Pierce and we took him down then in a car; came down, Dr. Pierce examined him, and he was operated on that evening. * * * Q. What did you operate upon Summers for, Doctor, did you operate on him yourself? A. I gave the anæsthetic. Q. Why was there an operation upon Summers? A. Because of swelling and the pain there and the enlargement and tenderness of the prostate gland, to relieve the swelling and the pain, of course. Q. Where is the prostate gland located, with reference to the scrotum and rectum? A. At the neck of the bladder, that is between the scrotum and rectum, only deeper, higher; depends on the position the body is in. Q. I will ask if you have made any examination of Summers since that time? A. Yes, I have. Q. State what the examination consisted of, when you made the examination, and what you

found, Doctor. * * * A. I examined him some time last summer (I can't place the date right now), and then a few days ago I saw him and I examined him then and found the coccyx knuckling in or bent into the rectum, and on touching that he complained of pain, or tenderness, and complained of pain every time he goes to stools. One testicle, or rather epididymis, and that is connected on the testicle, that is enlarged and tender. Q. Did you get a clinical history of the case? A. From the hospital? Q. On the examination of Summers, of course, you did, but what I want to get at is this: In treating any one you take naturally a history of the case, do you not? A. Written. * * * Q. When was the last time, Doctor, you made an examination of Summers, if you recall? A. It was very recently. Q. Approximate within a week or two. A. It must have been within a week. Q. What did you find, Doctor? A. The same condition after examining him last summer. Q. What was it? A. Knuckling in or bending of the coccyx, which he complained of being tender, I moved it and felt it bend and give, and the enlargement of the epididymis, tenderness; it was enlarged."

Plaintiff told the witness about lifting alfalfa and riding horseback, but said nothing at first about his fall. As to causes that may produce an abscess in the prostate gland, the witness testified:

"Q. What are some of the causes that affect the prostate gland in the condition in which you found this prostate gland? A. A bruise is the usual thing, a bruising of the tissues there with infection. Q. What kind of infection? A. Any kind."

Expert witnesses introduced by defendant expressed the positive conviction that an abscess in the prostate gland could not be caused by a fall astride a two-inch beam, owing to the peculiarities of the structure and position of the gland in the body.

[1, 2] There is evidence introduced by defendant which tends to show there was no rotten board in the runway and that plaintiff did not fall. This evidence finds support in the circumstance that plaintiff, in giving the history of the case to his doctors, did not, at first, mention a fall across the beam; but we have concluded from a careful examination of all the evidence that we would not be justified in holding that the evidence of plaintiff was without sufficient probative force to take to the jury the issue of whether or not he fell and was hurt in the manner he described. The negro who was helping to load the horses testified that the board broke under plaintiff's weight, and that plaintiff fell heavily astride the beam and appeared to suffer intense pain, and another witness testified to seeing him fall. The jury were entitled to infer that plaintiff did fall, since such inference has the support of substantial evidence.

But counsel for defendants earnestly, and with much plausibility, insist that the evidence falls to show a causal connection between the fall across the beam and the condition which subsequently developed in the prostate gland and therefore that the verdict awarding damages for that condition must be regarded as the product of guess or conjecture. If, as counsel contend, the evi-

dence most favorable to plaintiff discloses two or more probable causes of the injury for only one of which defendant would be liable, the verdict and judgment should be set aside as the offspring of mere speculation and conjecture. *Rogers v. Packing Co.*, 167 Mo. App. 49, 150 S. W. 556, and 180 Mo. App. 227, 166 S. W. 890; *Goransson v. Manufacturing Co.*, 186 Mo. 800, 85 S. W. 338; *Fowler v. Elevator Co.*, 143 Mo. App. 422; 127 S. W. 616; *Eyerly v. Light Co.*, 130 Mo. App. 593, 109 S. W. 1065; *Powell v. Railroad*, 255 Mo. 420, 164 S. W. 628; *Purcell v. Shoe Co.*, 187 Mo. 276, 86 S. W. 121.

There is no proof that plaintiff sustained any injury from horseback riding; but the evidence as a whole will support an inference that the strain resulting from overlifting did produce the abscess in the prostate gland, or it will support a contrary inference that the abscess had no traumatic origin, but was caused solely by infection or disease. The question we are called upon to decide is, not whether the evidence as a whole will sustain two or more probable causes of the injury for one or more of which defendant would not be liable, but did plaintiff adduce substantial evidence which, if accepted by the triers of fact, would point to the pleaded cause as the proximate and sole cause of the injury? His evidence describes him as a strong, healthy man 38 years old and, therefore, as one who would not be afflicted by the degenerative processes which sometimes attack the prostate gland in old men and, aided by infection, cause the formation of abscesses; and it excludes the theory that the abscess might have been the result of some venereal infection. The opinion of Doctor Pierce that it could not have resulted from overlifting but could have been caused by a heavy fall across the edge of a two-inch plank appears reasonable, though contradicted by the opinion of defendant's experts. This evidence was sufficient to take the issue in question to the jury as one of fact but still stronger support is found in the evidence of injury to the coccyx, which manifestly would not have been caused by overlifting or infection. The demurrer to the evidence was properly overruled.

[3] The petition alleged that "plaintiff was compelled to and has expended large sums of money in procuring medical attention, medicines, nursing, and hospital accommodations in the sum of, at least \$700." Plaintiff's instruction on the measure of damages authorized an assessment for "the money, if any, expended by plaintiff in procuring medical attention, nursing and hospital accommodations," without restricting the assessment for such damage to the pleaded sum of \$700. This omission is assigned as prejudicial error.

The uncontradicted evidence of plaintiff showed that his total outlay for doctors' bills, nursing, and hospital accommodations

did not exceed \$315. We must assume the jury were guided by the evidence and did not assess a greater sum for such special damage than the evidence warranted; and we would not be justified in disturbing the judgment because of an error in the instruction which, if the jury did follow the only evidence bearing on the subject, could not have induced a higher assessment than the petition authorized. *Shinn v. Railroad*, 248 Mo. 173, 154 S. W. 103.

The point that one of the attorneys of plaintiff was allowed to indulge in improper argument to the jury is found to be without merit. A constitutional question urged in the briefs was withdrawn on oral argument and will be treated as abandoned.

There is no prejudicial error in the record and the judgment is affirmed. All concur.

JACKSON v. CITY OF SEDALIA.

(No. 11997.)

(Kansas City Court of Appeals. Missouri. May 22, 1916. Rehearing Denied June 12, 1916.)

1. MUNICIPAL CORPORATIONS \S 759(2) — DEFECTS IN STREETS—DUTY TO REPAIR—"GOVERNMENTAL CAPACITY."

A city in accepting a street acts in its governmental or legislative capacity and cannot be held liable for any neglect of duty until it has acted in its ministerial capacity by giving the street to the public for use, and it also is a governmental matter for the city to say to what extent it will offer a street to public for use.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 1506; Dec. Dig. \S 759(2).]

For other definitions, see *Words and Phrases*, Second Series, Governmental Function.]

2. MUNICIPAL CORPORATIONS \S 759(1)—INJURY ON STREET—STREETS NOT IN USE.

One injured on a portion of a street which a city has neither actually nor impliedly invited him to use cannot recover damages from the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 1595; Dec. Dig. \S 759(1).]

3. MUNICIPAL CORPORATIONS \S 818(1)—DEFECTS ON SIDEWALKS—EVIDENCE.

Although the fact that a city has improved, or has sought to repair, the portion of a street where an injury occurs, is evidence that such portion has been given and opened to the public for use, an invitation to use it can be shown in other ways.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 1726; Dec. Dig. \S 818(1).]

4. MUNICIPAL CORPORATIONS \S 759(3)—DEFECTS IN STREETS—LIABILITY—INVITATION.

Where a strip was left on each side of a well-defined roadway, corresponding to the place where a constructed sidewalk would be placed, the street being level and smooth and fit for travel, and the space on the side in good condition for use as a sidewalk, although there was no actually constructed sidewalk, the invitation being that every part of a street thrown open for public use that is suitable for travel may be used, and a crossing led directly to the strip, there being no other place so suitable for travel by pedestrians, there was a sufficient invitation to the public to use the strip as a sidewalk to render the city liable for defects, since it is not

the improvement of a street that fixes liability, but the invitation of the public to use that portion on which the traveler is injured.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1597, 1598; Dec. Dig. ¶ 759(3).]

5. MUNICIPAL CORPORATIONS ¶821(24)—DEFECTS IN SIDEWALK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for personal injuries received by falling over stakes which plaintiff knew were set in a sidewalk, but because of the darkness she veered a few feet to one side of the center of the walk, whether plaintiff was exercising ordinary care held for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1755; Dec. Dig. ¶ 821(24).]

6. TRIAL ¶191(7)—INSTRUCTIONS—ASSUMING FACTS.

In an action for personal injuries on a sidewalk, an instruction, which submitted the question whether the strip on which the accident occurred had been left as a sidewalk for the use of the public and had been used as such for a long time prior to the accident was not improper, as assuming that the city had thrown the portion of the street in controversy open to public use.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 430; Dec. Dig. ¶ 191(7).]

7. MUNICIPAL CORPORATIONS ¶821(2)—DEFECTS IN SIDEWALK—TRIAL—ISSUES.

In an action for personal injuries received from a fall over stakes set in a sidewalk, where the evidence on both sides agrees upon facts which show that the public had been invited to use the strip as a sidewalk, the question of invitation to the public is no longer contested.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1746; Dec. Dig. ¶ 821(2).]

8. MUNICIPAL CORPORATIONS ¶822(1)—DEFECTS IN SIDEWALK—TRIAL—INSTRUCTIONS.

In an action for personal injuries from falling over stakes in a sidewalk, refusal of instructions making the question of the city's invitation to use the strip as a sidewalk depend entirely on whether it had manifested that invitation by placing or maintaining a prepared or constructed walk was proper.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1758; Dec. Dig. ¶ 822(1).]

9. TRIAL ¶252(1)—ABSTRACT INSTRUCTION.

The refusal of an instruction not based on evidentiary facts is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 612; Dec. Dig. ¶ 252(1).]

10. TRIAL ¶252(1)—INSTRUCTIONS.

The refusal of instructions in conflict with conceded facts is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 612; Dec. Dig. ¶ 252(1).]

11. TRIAL ¶260(1)—INSTRUCTIONS.

The refusal of instructions, the proper elements of which are contained in given instructions, is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ¶ 260(1).]

Appeal from Circuit Court, Pettis County; H. B. Shain, Judge.

"To be officially published."

Action by Laura Jackson against the City of Sedalia. Judgment for plaintiff, and defendant appeals. Affirmed.

Hall, Robertson & O'Bannon, of Sedalia, for appellant. W. D. Steele and A. L. Shortridge, both of Sedalia, for respondent.

TRIMBLE, J. This is an action for damages arising from a fall by plaintiff while walking on a public street in the city of Sedalia. She recovered judgment for \$1,000, and defendant has appealed.

The facts are as follows: Engineer street, in said city, runs north and south and is intersected at right angles by Eighteenth street running east and west. Nineteenth street is parallel to and the next street south of Eighteenth. Plaintiff lived on Nineteenth street one house east of Engineer street. For many years Engineer has been one of the traveled streets of the city. About four years prior to the plaintiff's fall the city had graded this street from curb line to curb line. The street was level and smooth from property line to property line, and the grading consisted merely of taking out the dirt to a depth of eight or ten inches at the curb line on each side and making a well-defined roadway between the two curb lines and leaving a space on each side of the roadway about eight feet wide. This space was between the property line and what is ordinarily the curb, and in other streets is the space that is occupied by the sidewalk and parking adjacent thereto. Along the south side of Eighteenth street from the west side of Engineer is a concrete sidewalk which extends west to the principal part of the city and the nearest car line. From the east end of this sidewalk at the southwest corner of Eighteenth and Engineer streets, a crossing extends west across Engineer street to the southeast corner of Eighteenth and Engineer.

Some three years prior to plaintiff's fall, Mr. Hocker, who then was and ever since has been an alderman of the city, drove a number of stakes in a row, commencing at a point about 20 feet south of the crossing at the southeast corner of Eighteenth and Engineer streets and running south for several feet. There was a woven wire fence on the property line on the east side of Engineer street, and this row of stakes was 7 feet west of the fence. They were perhaps a few inches, perhaps a foot, east of the edge of the graded part, and therefore between the property line and the curb line and within the space left on the east side of the street for the sidewalk. From the southeast corner of Eighteenth and Engineer streets there is no sidewalk running east along Eighteenth street, nor has any sidewalk been constructed along the east side of Engineer street. But for many years the public, and especially the people living south and east of the last above-mentioned corner, have traveled upon this 8-foot space on the east side of Engineer street as a sidewalk in going from Eighteenth to Nineteenth, and vice

versa. For several years the city has maintained a street sign with the number on it on the east side of Engineer street at Eighteenth. This 8-foot space, thus used as a sidewalk, was level and smooth and required nothing to be done to it to put it in condition for pedestrians to walk upon it as a sidewalk, though, as has been stated, no walk was ever built there; the people merely using the smooth ground as a sidewalk.

On the night of November 15, 1914, which was very dark, plaintiff was returning home from a neighbor's. She came east along the south side of Eighteenth street and, reaching Engineer street, continued east across that street on the crossing till she came to the southeast corner of Eighteenth and Engineer. Here she turned south on the space used as a sidewalk and attempted to proceed in the middle of the walk to Nineteenth street. In doing so, she unwittingly veered slightly from a due south course and stumbled over one of the stakes above mentioned and fell upon some of the others, they striking her in the groin and abdomen and injuring her severely. These stakes were about six inches high and perhaps two inches square.

It is the contention of the defendant that its demurrer to the evidence should have been sustained. This contention proceeds upon the idea that inasmuch as there was no constructed sidewalk, made of wood, stone, brick, or other materials built on this eight-foot space, the city could not be deemed to have undertaken the duty of keeping it in reasonably safe repair, and therefore could not be held liable. In support of this contention, defendant cites *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168; *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612; *Curran v. St. Joseph*, 143 Mo. App. 618, 128 S. W. 203.

[1, 2] The doctrine of these cases is well established, and no one would attempt to controvert or question them. It is quite true that a city, in merely accepting a street, or by declaring that it is such, or in deciding to what extent the street shall be given to the public for use, acts in its governmental or legislative capacity, and cannot be held liable for any neglect of duty until after the city has acted in its ministerial capacity by giving the street to the public for use and inviting the public to travel the same; and since it is a governmental matter for the city to say to what extent it will offer a street to the public for use, if an individual attempts to use a portion which the city has neither actually nor impliedly invited him to use, and he is injured thereon, he cannot look to the city for damages.

[3] But it must always be remembered that it is not the improvement of the street that fixes liability for neglect of duty. It is the invitation on the part of the city to use that portion of the street on which the traveler is injured that renders the city liable for neglecting to keep such portion in a

reasonably safe condition for travel. Of course, the fact that the city has improved, or has sought to repair, the portion of the street where the injury occurred, is evidence that such portion has been given and opened to the public for use; but, if that can be shown by other facts, it will be sufficient.

[4] In this case the street was level and smooth, fit for travel from property line to property line without anything being done to it. When it is shown that such a street has been opened to the public for use, the invitation is that every part thereof suitable for travel may be used. When the roadway between the curb lines was graded and properly shaped up leaving an eight-foot space on the east side of the street for a sidewalk, and in good condition for use as such without anything further to be done to it in order to make it suitable for travel, there is nothing to indicate to the traveling public that the invitation to use the street is limited to the roadway portion. Nor, indeed, was the invitation limited thereto in this case, for a crossing led from the southeast corner of Eighteenth and Engineer streets west across the latter to the north end of the sidewalk space in question. And as no actually constructed sidewalk led on from the termination of this crossing, it was in itself an invitation to the public to use the strip running south along the east side of Engineer street as a sidewalk. The city engineer admitted on cross-examination that there was a walk there, and that the strip was "left there for people to walk on," but said there was no grout or other paved walk there. For several years the public had accepted the invitation, thus extended, and had used the strip as a sidewalk, and, after these conditions had become established, a row of stakes was driven in the space thus left for and used as a sidewalk, and these stakes rendered it dangerous and unsafe. A "sidewalk," as its name indicates, is nothing more than a sidewalk; that is, a path or way for the use of foot passengers at the side of a street. Usually it is paved, and this is so often the case that in using the term "sidewalk" we think of the construction as constituting the sidewalk. But, as stated before, it is not the constructing of a paved pathway that renders the city liable for a failure to keep it reasonably safe; it is the invitation on the part of the city to the public to use the way for a walk, and that invitation may be extended, as in this case, by other ways than by having a paved walk constructed thereon. This is not a case where a portion of a street is left in a state of nature so unfitted for use as a walk that the city cannot be said to have invited the public to use it. The conceded facts show that the strip was left for people to walk on; that it was fit and suitable for that purpose; that a crossing led directly to it and nowhere else, since there was no built walk

from there on in any other direction. And the injury was caused, not by some natural and inherent defect in the strip, but from something placed there after the invitation to use the walk has been extended and accepted.

"A city like the humble village or country town may leave its streets as dirt roads, and yet be liable for defects negligently allowed to exist in them." *Benton v. St. Louis*, 217 Mo. 687, loc. cit. 701, 118 S. W. 418, 422 (129 Am. St. Rep. 561).

As said in *Brennan v. City of St. Louis*, 92 Mo. 482, loc. cit. 487, 2 S. W. 481, 482:

"While it must be conceded that much discretion lies with the city government, as to how and of what material the streets and sidewalks shall be made, yet, when a street is thrown open to public use, as this one was, it is the duty of the city to keep the same in a condition reasonably safe for persons traveling thereon with ordinary care and prudence."

To the extent that the city sanctions the use of a street by the public as a thoroughfare can the city be justly held liable for lack of ordinary care to maintain the thoroughfare in a reasonably safe condition for such use. *Baldwin v. City of Springfield*, 141 Mo. 205, loc. cit. 212, 42 S. W. 717. And in the case at bar, the conceded facts show that the city's invitation to use the street was not limited merely to the roadway, but extended also to the space left as a sidewalk for the people to travel on. It not only formed a suitable sidewalk for pedestrians, but there was no other place so suitable for them to travel as here, and a crossing led directly to it so that it might be used. The proof that the city has invited the public to use a thoroughfare is not confined to the ordering of a constructed walk thereon. It may be shown in other ways. *Melners v. City of St. Louis*, 130 Mo. 274, loc. cit. 284, 32 S. W. 637.

[5] The charge that plaintiff can be held guilty of contributory negligence as a matter of law is untenable. She knew the stakes were in the ground, but walked east on the crossing to the corner and then turned south on the sidewalk space, as she says "going along just as cautious and careful as I could." In going to the corner she went to where she would get upon the walk, and, if she had kept on due south walking on the middle or east portion of the seven-foot strip, she would have missed the stakes; but, in the darkness, she veered a few feet to one side and fell over the pegs. The question whether she was exercising ordinary care or not was one for the jury. While her knowledge of the stakes was important as bearing on the question of her negligence, yet it does not result in declaring absolutely as a necessary conclusion of law that she was negligent. *Graney v. St. Louis*, 141 Mo. 180, loc. cit. 185, 42 S. W. 941; *Maus v. City of Springfield*, 101 Mo. 613, loc. cit. 618, 14 S. W. 630, 20 Am. St. Rep. 634; *Beauvais v. City of St. Louis*, 169 Mo. 500, 69 S. W. 1043.

The fact that the pegs were located near

the west edge of the strip of ground left as a sidewalk can have no conclusive bearing upon the matter. Defendant seems to argue that, as the stakes were west of and outside the line of ordinary travel, the city is not liable. The evidence is the entire strip had been left for people to walk upon; there was no designation of any portion thereof for sidewalk exclusively and the rest for parking between the walk and curb, unless it be by the marks made thereon in the line of ordinary travel. Defendant contends that plaintiff must have known she was near the outside portion of the strip, from the difference in the grass and herbage under her feet; but she says she could not tell any difference by that. Besides, Mr. Hocker, a witness for defendant, says he kept the grass mowed with a lawn mower. The photographs offered in evidence do not show such a difference conclusively, because they were taken in May when the herbage was growing, and the accident happened in November when the herbage, if any, was dry and dead.

Even if the stakes were too far west to be in the space where the walk could be said to be, or where a constructed sidewalk would have been, still this does not convict plaintiff of contributory negligence as a matter of law or exculpate the city from liability. There was nothing to differentiate the parking from the walk proper in this case, and, even in cases where there was a differentiation, the city has been held liable for an obstruction on the parking. *Fockler v. Kansas City*, 94 Mo. App. 464, 68 S. W. 363. See, also, *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Fairgrieve v. City of Moberly*, 39 Mo. App. 37; *Coffey v. Carthage*, 186 Mo. 573, 85 S. W. 532; *Kossmann v. St. Louis*, 153 Mo. 293, 299, 54 S. W. 513; *Wiggin v. St. Louis*, 135 Mo. 559, 566, 37 S. W. 528; *Hutchinson v. Mullins*, 189 Mo. App. 438, loc. cit. 452, 176 S. W. 1083.

[6, 7] Plaintiff's instruction No. 1 does not assume that the city had thrown the portion of the street in controversy open to public use. On the contrary, it submits the question whether the strip in question "had been left as a sidewalk" for the use of the public and had been used as such for a long space of time prior to plaintiff's fall. But in this case the evidence on both sides agrees upon the facts which show that the public had been invited to use the strip as a sidewalk. When these facts appear undisputed and from the evidence on both sides, the question of invitation to the public is no longer a contested issue in the case. The case is wholly unlike *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612. There the accident occurred on a portion of the street which the city had never thrown "open to public travel or invited the public to use." 190 Mo. 220, 88 S. W. 614. The unimproved portion where the accident happened was "rough, full of holes, grown up" with

weeds, and in no sense an improved street or sidewalk." It was much lower than the improved roadway of the street; and on page 228 of 190 Mo., on page 617 of 88 S. W., the court say the case is wholly unlike those cases "where the full width of the street had been thrown open to public use." In the case at bar, the entire width of the street was fit for public use when in a state of nature. It needed no artificial preparation to make it suitable for travel and had it not been for the stakes, driven to keep the city's gutter and drain from caving or washing, no injury would have befallen plaintiff. And the conceded facts show that the public was invited to use the space on the side as a sidewalk.

[8] Defendant's instructions on this point, the refusal of which is complained of, are so drawn as to make the question of the city's invitation to use the strip as a sidewalk depend entirely on whether or not it had manifested that invitation by placing or maintaining a prepared or constructed walk thereon, and in effect telling the jury the invitation could be extended in no other way.

[9-11] The defendant asked seventeen instructions, of which the court refused seven. We think they were properly refused. Some of them were incorrect and were refused because of their own vice. Still others were without evidentiary facts upon which to base them, or were in conflict with the conceded facts, or else were more properly covered by other instructions given in the case. This is especially true of defendant's refused instruction No. 9, as the proper elements thereof were contained in instructions 11, 12, and 13.

As the case was tried without prejudicial error, the judgment is affirmed. All concur.

BOWLES v. QUINCY, O. & K. C. R. CO.
(No. 12020.)

(Kansas City Court of Appeals. Missouri.
June 12, 1916.)

1. COMMERCE §35—"INTERSTATE COMMERCE"—TRANSPORTATION OF STOCK.

Where a shipment of hogs was consigned from one point in Missouri to another, but the route of the connecting carrier went into Kansas passing through several towns where the hogs were unloaded and fed, although the shipping contract by the initial carrier specified that it was to carry the shipment to Kansas City and there deliver it to the connecting carrier, it was an interstate shipment.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 23, 26, 89; Dec. Dig. §35.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. CARRIERS §131—INTERSTATE COMMERCE—CARMACK AMENDMENT—CONTRACT OF SHIPMENT—NECESSITY OF WRITING.

Under the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11 and 12, 34 Stat. 595 [U. S. Comp. 1913, § 8592]), requiring that a contract for a shipment in interstate commerce should be in writing but not stating that if the

contract is not in writing it shall be void, a plaintiff in an action for damages to an interstate shipment is not compelled to plead a written contract of shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 569-577, 593; Dec. Dig. §131.]

3. CARRIERS §119—LIABILITY FOR LOSS—INTERSTATE COMMERCE—STATUTE—EFFECT ON COMMON-LAW RIGHTS.

While federal legislation upon the liability of carriers in interstate commerce supersedes state regulations and policies, it did not destroy but was intended to continue in force any right which the shipper had under the common law, not inconsistent with the federal and the common-law rule, making a carrier liable for any loss or damage not the act of God or the public enemy, was not affected thereby.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 523-530; Dec. Dig. §119.]

4. CARRIERS §227(2)—LIVE STOCK—ACTION FOR DAMAGE—PLEADING.

In an action against a carrier for damages to an interstate shipment of hogs, if defendant wished to rely upon any defensive terms in the written contract not pleaded by the plaintiff, it could set up the written contract to obtain the benefit of its provisions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 954; Dec. Dig. §227(2).]

5. PLEADING §248(10)—CARRIAGE OF HOGS—ACTIONS FOR DAMAGE—PLEADING.

In an action against a carrier for damages to an interstate shipment of hogs, that the original petition declared on a written contract of shipment, and an amendment to the petition was on an implied contract, was immaterial, being a mere matter of procedure governed by the state practice.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 693, 694, 696; Dec. Dig. §248(10).]

6. PLEADING §420(3)—OBJECTIONS—AMENDMENT—WAIVER BY ANSWERING OVER.

In an action against a carrier for damages to an interstate shipment of hogs, a variance between the original petition and an amended petition was waived by answering over.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1411; Dec. Dig. §420(3).]

7. CARRIERS §39—CARRIAGE OF HOGS—CONNECTING CARRIERS.

Although under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, a connecting or succeeding carrier would ordinarily be required to take an interstate shipment, yet, if before the shipment reached the defendant's line its bridge was out, so that it was impossible to carry the hogs to destination within a reasonable time, defendant had the right to refuse to take the shipment unless the shipper would agree to make the shipment subject to delay on account of the bridge, provided it notified the shipper before accepting the shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 98; Dec. Dig. §39.]

8. COMMERCE §35—CARRIAGE OF HOGS—CONTRACT FOR TRANSPORTATION.

Where a shipper and succeeding carrier made an additional contract for the transportation of hogs, this did not change the through shipment from an interstate to an intrastate transaction, but became a part of the original contract of through shipment.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 23, 26, 89; Dec. Dig. §35.]

9. PLEADING §180(3)—CARRIAGE OF HOGS—ACTION—DEPARTURE.

In an action against a carrier for damages to an interstate shipment of hogs, where plain-

tiff declared upon a contract of shipment, without saying whether it was written or created by delivery and acceptance, and defendant set up a written contract, plaintiff's reply denying the validity of the written contract alleged by defendant, did not make any change in his cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 361, 365; Dec. Dig. ⚡180(3).]

10. PLEADING ⚡207—PLEADING AFTER REPLY—NECESSITY OF DEMURRER—CHANGE OF CAUSE OF ACTION.

Rev. St. 1909, § 1830, providing that no further pleading of facts after the reply is necessary to put a case at issue, does not obviate the necessity of special demurrer, attacking a plaintiff's cause of action if changed by reply.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 511, 512; Dec. Dig. ⚡207.]

11. PRINCIPAL AND AGENT ⚡171(9)—CONTRACT OF AGENT—RATIFICATION.

Plaintiff, by suing three times on a contract with the succeeding carrier alleged to have been signed by his agent without authority, ratified it and cannot now assert that the agent had no authority to sign.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 655; Dec. Dig. ⚡171(9).]

12. CARRIERS ⚡62—CARRIAGE OF HOGS—CONTRACT—CONSIDERATION.

Where a shipment was subject to delay on account of a bridge of a connecting carrier being out, a contract that the shipment was subject to delay on account of the bridge, not agreed to before the shipment was accepted for transportation, was without consideration, and plaintiff's subsequent ratification could not give it vitality.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 195-206½; Dec. Dig. ⚡62.]

13. CARRIERS ⚡207(2)—CARRIAGE OF HOGS—CONTRACT—"CONSIDERATION."

Under Interstate Commerce Act, § 1, as amended by 34 Stat. 584, providing that a shipper is entitled to accompany live stock if accepted for shipment, the fact that defendant carrier's conductor told plaintiff's agent, who was accompanying a shipment of hogs, that he could not do so unless he signed the contract did not furnish consideration for the contract.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. ⚡207(2).]

For other definitions, see Words and Phrases, First and Second Series, Consideration.]

14. CARRIERS ⚡230(3)—CARRIAGE OF HOGS—ACTIONS—QUESTION FOR JURY.

In an action against a succeeding carrier for damages to an interstate shipment of hogs because of delay in delivery, whether an understanding between the shipper and the defendant, that the shipment should be subject to delay because of a bridge being out, was made before the defendant accepted the shipment for transportation held for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. ⚡230(3).]

15. CARRIERS ⚡230(4)—CARRIAGE OF HOGS—ACTIONS—QUESTION FOR JURY.

Where there was evidence that the hogs had become warm by piling up in the car, and then were unloaded into pens over the protest of the plaintiff's agent, the question as to the disease from which the hogs died, or what caused it, held for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. ⚡230(4).]

16. CARRIERS ⚡230(8)—TRIAL ⚡251(3)—INSTRUCTIONS.

An instruction which told the jury that, before a verdict for plaintiff could be returned,

they must find that defendant failed to transport the hogs in a reasonable time, and that by reason of the failure the hogs were injured so that some of them died, was not improper and did not submit a different case from that alleged, since it told the jury that the disease must be caused by the unreasonable delay or failure to transport within a reasonable time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 961; Dec. Dig. ⚡230(8); Trial, Cent. Dig. § 590; Dec. Dig. ⚡251(3).]

17. TRIAL ⚡260(1)—INSTRUCTIONS ALREADY GIVEN.

The refusal of requested instructions which are fully covered by given instructions is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⚡260(1).]

18. TRIAL ⚡139(1)—QUESTION FOR JURY.

Because a question of fact is close is no reason for taking it out of the jury's hands.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. ⚡139(1).]

Appeal from Circuit Court, Jackson County; Clarence A. Burney, Judge.

"Not to be officially published."

Action by James J. Bowles against the Quincy, Omaha & Kansas City Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

O. D. Jones, of Edina, and J. G. Trimble, of Kansas City, for appellant. Atwood & Hill, of Kansas City, and Thomas Harley, of Lawrence, Kan., for respondent.

TRIMBLE, J. Plaintiff's cause of action grows out of a shipment of hogs claimed to have been damaged through defendant's failure to well and safely transport within a reasonable time. The hogs were, on the 29th of December, 1909, delivered by plaintiff to the St. Louis & San Francisco Railroad Company at West Plains, Mo., for transportation to Kansas City, to be there delivered to a connecting carrier for transportation to Edina, Mo., named as "the place of destination" in the written contract of shipment. In going from West Plains to Kansas City, the line of the St. Louis & San Francisco Railroad Company runs out of Missouri into Kansas passing through the cities of Ft. Scott and Olathe in that state, and then comes back into Missouri. And the hogs, in coming over this line, were unloaded and fed in Olathe, Kan. The defendant's line of railroad runs from Kansas City to and through Edina & West Quincy, Mo. Plaintiff testified that the hogs were billed from West Plains to Edina and the evidence on both sides is that, when the hogs arrived in Kansas City, plaintiff paid the freight due both roads and the fees charges, all in one payment, to the defendant the Quincy, Omaha & Kansas City Railroad Company. The hogs reached Kansas City January 3, 1910, and at 6:30 p. m. left for Edina over the defendant's line. They reached there at 9 o'clock a. m. January 5.

Edina is in Knox county, and on May 7, 1910, plaintiff brought suit there against

defendant alleging that the hogs were delivered to the St. Louis & San Francisco Railroad Company to transport them from West Plains to Kansas City and then over connecting lines to Edina, the shipping contract being filed therewith and marked Exhibit A; that the hogs were transported to Kansas City and delivered to the defendant railroad company which demanded from the agent of plaintiff in charge of said hogs an additional contract of shipment therewith filed, marked Exhibit B; that under said contracts it was the defendant's duty to immediately transport said hogs from Kansas City to Edina, but that in violation thereof defendant detained and unloaded his hogs in unhealthy pens and shipped them in unhealthy cars, whereby they contracted a disease from which many of them died. A trial resulted in a verdict for plaintiff. The case was appealed to the St. Louis Court of Appeals where it was reversed and remanded for the reason that there was no proof of unhealthy pens and cars, and no cause of action arising out of damage from disease caused by negligent delay was pleaded in the petition, though evidence was introduced sufficient to sustain, and the case was submitted upon, said last named issue. See *Bowles v. Quincy, etc., R. Co.*, 167 Mo. App. 268, 149 S. W. 1041.

On December 2, 1910, plaintiff filed an amended petition in the Knox circuit court, setting up the same facts as to the two shipping contracts as before, and referring to them as being attached to the original petition and marked Exhibits A and B respectively, and pleading that, by virtue of said contract, it became the duty of the defendant to transport the hogs from Kansas City to Edina, within a reasonable time, but that the defendant in violation of said contracts negligently failed to do so, but detained the hogs whereby they were exposed to inclement weather and contracted a deadly disease, from which 120 of them died. A change of venue was thereupon taken to Marion county where defendant's motion to strike out the amended petition was sustained and the cause was dismissed.

Afterwards, on June 6, 1914, the present suit was instituted in the circuit court of Jackson county, Mo., the petition alleging that on the 29th day of December, 1906, plaintiff delivered to the St. Louis & San Francisco Railroad Company at West Plains 146 head of hogs for transportation to Kansas City, Mo., there to be delivered to the defendant company to be transported to Edina; that the St. Louis & San Francisco Railroad Company did transport said hogs to Kansas City, Mo., and on January 8, 1910, delivered said hogs, in a healthy condition, to defendant; that defendant accepted them for transportation and contracted with plaintiff to transport them from Kansas City to Edina to be there delivered to plaintiff, said contract of shipment being thereto attached

and marked as an exhibit. This written contract was the one designated as being marked B in the two former petitions in the Knox circuit court. The petition further alleged that under said contract it became the duty of the defendant to transport the hogs within a reasonable time, but that it negligently failed to do so; that because of the negligent failure so to do the hogs were exposed to cold and storms en route, and, as a direct result of such unnecessary exposure and delay, 120 of them became sick and died; wherefore damages were prayed, etc.

To this the defendant filed an answer admitting that it received the hogs and executed the contract sued on, but denied all else. The answer then alleged that during the night or early in the morning of January 3, 1910, a bridge on its line was destroyed by fire and, before executing the live stock contract attached to plaintiff's petition, defendant informed plaintiff of this fact and accepted said hogs with the understanding, and as a part of the contract expressed therein, that the same were received subject to delay on account of said bridge being out; that said bridge was rebuilt as quickly as possible and said hogs were carried forward as soon as said bridge was ready for use, which was on the morning of the 4th day of January, 1910; that it was true the hogs were not delivered at Edina until the morning of the 5th of January, but that said delay was not negligent, but caused solely by destruction of said bridge which was known to plaintiff at the time the contract was entered into, and against delay on account of which said contract provided.

On January 11, 1915, plaintiff filed an amended petition, being the one on which the case was tried. This amended petition alleged the filing of the suit in Knox county and the subsequent dismissal thereof, and the bringing of the present suit within one year after the order of dismissal. The amended petition further alleged that plaintiff—

"delivered to the St. Louis & San Francisco Railroad Company at the city of West Plains, Mo., 146 head of hogs for transportation from West Plains, Mo., to Edina, Mo., to be transported from West Plains, Mo., to Kansas City, Mo., by the St. Louis & San Francisco Railroad Company and to be transported by the defendant above named to Edina, Mo., over the line of the defendant railroad company."

The petition further alleged that on January 8, 1910, plaintiff paid to the defendant, Quincy, Omaha & Kansas City Railroad Company, the sum of \$75, "being the freight charges from West Plains, Mo., to Edina, Mo."; that on the 8d day of January, 1910, said shipment was received by defendant and accepted for transportation from Kansas City to Edina, Mo.; that by reason of the payment of said charges and the acceptance of said shipment it became the duty of the defendant to well and safely transport said shipment within a reasonable time; that a

reasonable time was 13 hours and that defendant, by the exercise of reasonable care and diligence, could have transported the hogs in that time, but did not deliver them at Edina until after the lapse of about 39 hours, after the hogs were accepted for shipment and left Kansas City; that defendant delayed the shipment in transit and unloaded the hogs at Milan, Mo., and there delayed them unreasonably and unnecessarily; that, had they been transported in a reasonable time, it would not have been necessary to unload them at Milan, and, by reason of the delay in transit and the unloading at Milan, the hogs were exposed to cold and stormy weather and, as a direct result of said delay and unnecessary unloading, 122 of said hogs died within two or three weeks after they were unloaded at Edina. It will be noticed that the plaintiff makes no mention of any written contract of shipment in this amended petition, merely alleging the delivery to, and the acceptance by, the defendant railway of the hogs, and the consequent duty of the defendant to well and safely transport within a reasonable time, and the contracting of disease by the hogs as a result of such delay.

The defendant unsuccessfully moved to strike out this amended petition, and then, on February 12, 1915, filed an answer thereto. Said answer admitted that it received the hogs on January 3, 1910, at Kansas City, to be transported by it to Edina, and alleged that plaintiff and defendant then and there executed the written contract attached to and sued upon in plaintiff's original petition. The answer then set up the destruction of its bridge, as before, that defendant informed plaintiff it could not accept said shipment, except on condition that it be subject to delay on account of said bridge being out, and that the shipment was received subject to delay and that this was expressly stipulated in the contract. The answer further set up that the bridge was rebuilt as quickly as possible, and said hogs carried forward as soon as the bridge was ready; that the delay was caused solely by the destruction of the bridge, which was known to plaintiff at the time the contract was entered into and against delay on account of which said contract provided. The answer further pleaded a stipulation in the contract that defendant should not be liable for injury to the hogs on account of heat or cold, or any other cause which might result from the nature of the animals.

To this answer, plaintiff, on February 18, 1915, filed a reply denying generally the new matter, and then set up that the contract referred to in defendant's answer was not executed until after the hogs had been delivered to and accepted by the defendant, and the freight charges from West Plains to Edina had been paid and the hogs were actually in course of transit on the train; and that then the conductor in charge of the train pre-

sented said contract to one Murphy, who was plaintiff's agent in charge of and accompanying the hogs, and the same was signed by said Murphy without authority from plaintiff, and without plaintiff's knowledge or consent; that signing such a contract was outside the scope of his employment; and that, at the time the hogs were accepted by defendant, no notice was given plaintiff of any bridge being destroyed or that the transportation of the hogs would be delayed thereby; and that the contract set up by defendant was null, void, and without consideration.

The case was then tried and the jury returned a verdict for plaintiff in the sum of \$938.10. The defendant has appealed.

[1-4] It will be observed that the plaintiff in both the original and amended petitions in this suit, pleaded facts showing a through shipment from West Plains to Edina, by way of Kansas City, and payment of the charges for such entire transportation in one sum. Not only do the two petitions in this suit show the shipment to have been a through shipment from West Plains, via Kansas City, to Edina, but the two petitions filed by plaintiff in the Knox circuit court allege the same thing and state that there was a written contract for said shipment entered into at West Plains; and the evidence in the present suit shows that said written contract entered into at that place, between plaintiff and the St. Louis & San Francisco Railroad Company, called for transportation of the hogs from West Plains to Kansas City, there to be delivered to a carrier whose line formed "a part of the route to Edina, Mo., the place of destination." The conceded facts show that the shipment, for a portion of the way, went into the state of Kansas, going through several towns therein, at one of which the hogs were unloaded and fed. The shipment, therefore, was an interstate shipment. *Hanley v. Kansas City, etc., R. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333. The Carmack Amendment required that the contract for the shipment by the initial carrier should be in writing. 34 U. S. Stats. at Large, 595; *Adams Express Co. v. Croninger*, 226 U. S. 491, loc. cit. 504, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. And the fact that the shipping contract, issued by the San Francisco railroad at West Plains, specified that it was to carry the shipment to Kansas City and there deliver it to the connecting carrier makes no difference, because "it is the character of the service rendered, not the manner in which the goods are billed, which determines the interstate character of the service." *United States v. Union Stockyards*, 226 U. S. 286, loc. cit. 304, 33 Sup. Ct. 83, 57 L. Ed. 226. See, also, *Southern, etc., Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 810; *Railroad Comm. v. Worthington*, 225 U. S. 109, 32 Sup. Ct. 653, 56 L. Ed. 1004; *Railroad Comm.*

v. Texas & Pacific Ry. Co., 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215.

Very likely, however, the fact of the shipment herein being interstate in its character cannot make any material difference in this case. For, while the federal legislation upon the liability of carriers in interstate commerce supersedes all state regulations and policies on the subject, yet it did not destroy, but was intended to continue in force, any right which the shipper had under the general common law, not inconsistent with federal laws. Texas, etc., R. Co. v. Abilene Cotton Mills, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Adams Express Co. v. Croninger, 226 U. S. 507, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. And since the right sought to be enforced by the plaintiff herein is one under the general common law, which the federal act continues in force, the rights of the parties hereto can be affected, by the fact of the shipment being interstate, only by reason of something in the contract of shipment which, under federal law, has an influence upon such rights. The federal law requires the initial carrier to execute a written shipping contract but it does not say that if the contract is not in writing it will be void. So that there is nothing in this case to compel plaintiff to state a written contract of shipment, but he may, as he did in the amended petition, merely allege a contract of shipment without saying whether it was in writing or not. In such case the defendant, if it desired to rely upon any defensive terms thereof, could set up the written contract and obtain the benefit of same. Neither is plaintiff limited by the federal act to a suit based solely on negligence, since, as stated, the common-law rule of liability was not affected thereby, and such common-law liability went beyond negligence and made the carrier liable for any loss or damage not the act of God or of the public enemy. Adams Express Co. v. Croninger, 226 U. S. 491, loc. cit. 509, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Collins v. Denver, etc., R. Co., 181 Mo. App. 213, 167 S. W. 1173.

[5-7] Neither does it make any difference that the original petition declared upon a written contract of shipment and asked for damages based upon negligent delay, while the amended petition says nothing about a written contract and sues upon the violation of an implied contract to well and safely transport and deliver within a reasonable time, because this is a mere matter of procedure to be governed by state methods. If, under our procedure, the amended petition was not a departure, or if a departure, was cured by answering over, then there can be no complaint upon that score. And although, under the federal act, defendant as the connecting or succeeding carrier would ordinarily be required to take the interstate shipment at Kansas City under the West Plains

contract, yet, if before the shipment reached defendant's line, its bridge was out so that it was impossible to carry the hogs to Edina within a reasonable time, defendant had a right to refuse to take the shipment unless the shipper would agree to make it subject to delay on account of said bridge; and defendant had a right to demand that such a provision be inserted for its protection in the shipping contract, provided it notified plaintiff and got his consent thereto before accepting the shipment and starting the hogs from Kansas City. This right existed and was the same whether the shipment was inter or intra state. In either case the defendant must insist upon the bridge clause and notify plaintiff thereof before accepting the hogs.

[8] Nor would the making of the new contract, which defendant relies on, change the through shipment from West Plains to Edina to one only from Kansas City to Edina, nor reduce the through shipment, as to this defendant, from an interstate to an intrastate transaction. If the new or additional contract is valid and binding upon the parties, its effect was merely to add an additional feature to the through contract of shipment executed at West Plains, said additional feature being made necessary by the bridge being out on defendant's line. If valid, said additional contract became a part of the original contract for through shipment the same as if it had been inserted in said contract at West Plains. So that, as the case now presents itself, the fact that the shipment was in reality a through shipment from West Plains to Edina and was an interstate shipment, even as to this defendant, does not seem to be of vital importance. For while the liability of the connecting, as well as that of the initial, carrier is governed by federal laws and decisions (Kansas, etc., R. Co. v. Carl, 227 U. S. 639, 648, 33 Sup. Ct. 391, 57 L. Ed. 683), yet it is not shown wherein they afford either of the parties any different rights than they have under state laws or would have had were the shipment an intrastate one. The fact that the contract at West Plains was one for a through shipment and that, as the transportation was one in interstate commerce, the defendant herein would ordinarily take, and be required to take, the shipment on that contract without executing one of its own, may be a circumstance tending to corroborate plaintiff in his claim that no shipping contract was demanded by defendant before accepting the hogs at Kansas City, and that the contract defendant relies upon was not presented to, nor signed by, his agent, Murphy, until after the hogs had left Kansas City on their way to Edina. It should be stated here that said contract contains a provision stating that the shipment is "subject to delay account of bridge out." Plaintiff says that Murphy was without authority to sign same and that, as it was

signed after the hogs had been accepted and the contract of shipment had thereby become complete, there was no consideration therefor; and that plaintiff was not informed of any bridge being out before the hogs started. The fact that the West Plains contract was for through shipment and the transportation was interstate tends to make reasonable the claim of plaintiff that defendant took the hogs and started with them before demanding the contract of shipment it now relies on.

Having failed to find any reason why plaintiff's case should fail because of the interstate nature of the shipment, we proceed to consider other points.

The point that the amended petition was a departure from the original cannot avail defendant. For even if it be a departure (which we do not decide), yet defendant waived the same by answering over. *Blanchard v. Dorman*, 236 Mo. 416, 139 S. W. 395; *Liese v. Meyer*, 143 Mo. 547, 45 S. W. 282; *White v. St. Louis, etc., R. Co.*, 202 Mo. 539, 101 S. W. 14.

[9] We do not understand that the reply filed by plaintiff made any change in the cause of action he alleged. The cause of action alleged by him was upon a violation of a shipping contract. This contract was, in reality, under the circumstances as hereinabove shown, the through shipping contract made at West Plains plus the amendment thereto, made by the alleged contract relied upon by defendant if it was valid. If it was not valid, either because not signed by any one having authority or because of no consideration, then the contract of West Plains, without modification, was the shipping contract. In the amended petition plaintiff declared upon a contract without saying whether it was written or was merely created by delivery and acceptance of the hogs. Defendant set up the contract it says it obtained at Kansas City. The reply merely says that the instrument defendant claims was the contract is, in fact, no contract at all; in other words, that said instrument cannot affect the rights of the parties as shipper and carrier. There is no question but that the hogs were received and carried by defendant; and although the shipment was, in fact, governed by the West Plains contract, either modified or not modified by the alleged Kansas City contract according to whether the latter was valid or void, still, as we have seen, there is nothing to prevent plaintiff from declaring upon a contract arising from delivery and acceptance and without pleading a written contract. If there was anything in the West Plains contract which made the parties' rights differ from that implied by law, or if said contract contained any defensive clause, the defendant was at liberty to set up that fact. But it did not do so. The element it relies upon is contained solely in the Kansas City contract. If now, it should turn out that the Kansas

City contract was void and of no effect, then plaintiff can, on the cause of action stated in its amended petition, proceed in his effort to obtain a judgment. In other words, plaintiff's cause of action remains the same throughout; but whether it may or may not be affected by the Kansas City contract depends upon whether it is valid or not.

[10] Defendant, however, says that the reply changed the cause of action and, as it was not filed until February 18, 1915, which was more than five years after the injury, the claim is barred. But, even if the reply changed the cause of action (which we do not think it did), nevertheless the bar of the statute was not raised. Defendant says it had no opportunity to plead the statute as the change arose on the reply. It is true, under section 1830, R. S. Mo. 1909, no further pleading of facts after the reply is necessary to put a case at issue; but this does not obviate the necessity of attacking the plaintiff's cause of action by special demurrer. Section 1811, R. S. Mo. 1909; *Rickets v. Hart*, 73 Mo. App. 647, loc. cit. 654; *Hoff & Frerichs, etc., Co. v. Lackawanna Line*, 100 Mo. App. 164, 73 S. W. 346.

[11, 12] Even if plaintiff's agent, Murphy, who accompanied the hogs, was without authority to sign the Kansas City contract, still plaintiff, by three times suing on the contract, ratified it and cannot now assert he had no authority to sign. But this ratification cannot give vitality to the contract if there was no consideration therefor. And if the contract, that the shipment was subject to delay on account of the bridge, was not agreed to before the hogs were accepted for transportation, there was no consideration for such contract. If the hogs were accepted for transportation without notifying plaintiff or his agent of the bridge being out, and without an understanding that the shipment was subject to delay on that account, then the contract to carry in a reasonable time was complete, and there was no consideration to plaintiff for any addition to or amendment of that contract.

[13] The fact that the conductor told plaintiff's agent Murphy that he could not carry him unless he signed the contract did not furnish any consideration; since Murphy was entitled under the law to accompany the hogs if accepted for shipment. See section 1 of Commerce Act as amended June 29, 1906, 34 Stats. at Large, 584. So that the question of the defensive provision that the shipment was accepted "subject to delay" comes, after all is said and done, down to the question as to when this understanding of contract was had, whether before or after the hogs were accepted by defendant for shipment from Kansas City.

[14] Upon this feature of the case, the verdict of the jury must be accepted as determinative of the fact that there was no understanding that the shipment should be subject to delay before the hogs left Kan-

City, as the plaintiff offered ample testimony to support that finding.

[15] It is claimed that there is no evidence upon which the jury could find that the exposure of the hogs to cold and stormy weather during the delay in transit from Kansas City to Edina caused the disease from which they died. As to what causes or produces disease is frequently a subtle and difficult thing to discover. But nevertheless the question is for the jury, if there is any substantial basis for a reasonable inference as to the cause. It is true, the weather was cold and stormy at Olathe, Kan., where the hogs were unloaded before they came into defendant's hands. But the evidence is that the hogs were all right and in good condition when they left Kansas City; that during the delays at places between Kansas City and Edina they were exposed to extremely cold weather and were in transit for 89 hours, being 13 hours longer than reasonable and ordinarily required; that they suffered and manifested their suffering by squealing and piling up in the car; that they were unloaded at Milan into pens, over the protest of Murphy who had signed a 36-hour release to avoid unloading them in compliance with the federal 28-hour law (Act June 29, 1906, 3594, 34 Stat. 607 [U. S. Comp. St. 1913, §§ 351-3654]), and said hogs remained in the pens for 9 hours; and that they were in bad condition when they arrived at Edina. There was evidence that the getting of the hogs very warm by piling up in the car and then exposing them to cold will bring on pneumonia, and that the disease of which these hogs died was pneumonia. It was for the jury to say what was the disease of which they died and what caused the disease. We cannot say, as a matter of law, that the evidence of other possible causes, such as to make it mere conjecture on the jury's part as to the disease the hogs died of, or as to the cause of the disease or when such cause arose. There is evidence that the hogs did not manifest the symptoms of vertebrae claimed to be one of the possible causes. And as to the hogs having cholera there is evidence that they did not have it; that they had not been exposed to it; that hogs fed right by them with only a once or lane between did not take cholera and become diseased, and that pneumonia is not a contagious disease, while cholera is. One of defendant's experts testified that exposure will bring on pneumonia in hogs, and pneumonia, by lowering the vitality, will make them more susceptible to the disease of cholera. If, in this way, the exposure brought on cholera, plaintiff would still be entitled to recover since his petition did not specify that the disease was.

[16] Plaintiff's instruction No. 1 did not submit a different case from that alleged in the amended petition. Before a verdict in plaintiff's favor could be returned, the in-

struction, among other things, required the jury to find that defendant failed to transport the hogs in a reasonable time and that by reason of said failure the hogs were injured, so that 122 of them died. This told the jury that the disease must be caused by the unreasonable delay or failure to transport within a reasonable time. Defendant's instruction No. 16 told the jury that if such delay was not the sole cause of the death of the hogs the verdict must be for defendant; and its instructions No. 14 and 15 told the jury that the delay must be shown to have been a negligent delay and that it was the sole cause of the death of the hogs. Were it not for these instructions given in defendant's behalf, the refusal of defendant's instruction 3 would have been error, but as No. 3 was fully covered by instructions 14, 15, and 16, its refusal did no possible harm.

[17, 18] We have carefully gone through the voluminous record in this case to see whether or not there is reversible error in it. The questions as to what the hogs died of and as to what was the cause of their death may be subtle and difficult of ascertainment. No doubt there is room for suspicion of the claim that the hogs had pneumonia caused by exposure, and reasonable minds might hesitate at accepting that view; but, under the evidence in this case, disinterested reasonable minds could reasonably draw different conclusions therefrom, and this makes it a question, not for us, but for the jury. Because a question of fact is close is no reason for taking it out of the jury's hands.

Finding no reversible error in the case, we must affirm the judgment.

It is so ordered. All concur.

TUIITE v. SUPREME FOREST WOODMEN CIRCLE. (No. 12030.)

(Kansas City Court of Appeals. Missouri.

June 12, 1916.)

1. INSURANCE §712—FRATERNAL BENEFICIARY INSURANCE — BENEFICIARIES — WHAT LAW GOVERNS.

Under Rev. St. 1909, § 7190, providing for the payment of death benefits to the families, heirs, blood relatives, or persons dependent upon the member, and in view of Rev. St. 1909, §§ 1671-1678, making an adopted child the heir of the adopting parent, a foreign fraternal beneficiary society licensed to do business in the state and to issue to beneficiaries, certificates including the "adopted children" or "other relatives," the term "other relatives," appearing by the context to refer to blood relatives, would be accorded the benefit of the laws of this state relating to such insurance, as there was no substantial difference between the classes of beneficiaries.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 173-175, 293, 1934; Dec. Dig. §712.]

2. INSURANCE §724(1)—FRATERNAL INSURANCE—CONTRACT—ULTRA VIRES—WAIVER.

A fraternal beneficiary association, chartered by a state whose laws forbade the issuance of a death benefit certificate to any one over 65

years of age, and whose charter fixed the maximum rate at 52, and which on investigation after the death of a member and its conviction that he had intentionally misrepresented his age as 50 instead of 60 or 61 years, could not waive or estop itself from setting up the defense that the certificate was ultra vires and void, as the association could not be bound by waiver or estoppel to a contract which its charter would not authorize.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1837, 1866, 1868; Dec. Dig. ¶ 724(1).]

8. INSURANCE ¶743—FRATERNAL INSURANCE—CONTRACT—ULTRA VIRES—REMEDY OF INSURER.

If the insured was older than the maximum age at the time he applied for his certificate and membership, the only remedy which his beneficiary might enforce against the insurer would be to recover back the money insured had paid for insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1888; Dec. Dig. ¶ 743.]

4. INSURANCE ¶783 — FRATERNAL INSURANCE—INTEREST OF BENEFICIARY.

The interest of a beneficiary in a certificate before the death of the insured, is only an expectancy, and not a vested interest.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1949; Dec. Dig. ¶ 783.]

5. EVIDENCE ¶252—DECLARATIONS AGAINST INTEREST—AGE.

In an action on a fraternal beneficiary certificate under which the beneficiary before the death of the insured had only an expectant and not a vested interest, evidence for the defendant of declarations respecting his age, made by the insured and which were against his interest, were admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 989-993; Dec. Dig. ¶ 252.]

6. INSURANCE ¶586—LIFE INSURANCE—INTEREST OF BENEFICIARY.

Where a contract is one of ordinary life insurance, the beneficiary acquires a vested interest therein from the date of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1470; Dec. Dig. ¶ 586.]

7. EVIDENCE ¶252—DECLARATIONS AGAINST INTEREST—ADMISSIBILITY.

In such case, declarations of the insured impairing the validity of the insurance are not admissible in an action by the beneficiary to recover the insurance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 989-993; Dec. Dig. ¶ 252.]

8. EVIDENCE ¶285—HEARSAY—"PEDIGREE."

An important exception to the general hearsay rule is that hearsay testimony is competent in case of "pedigree," which term embraces, not only descent and relationship, but also the facts of birth, marriage, and death, and the time when these events happened, but not necessarily the question of age.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1143; Dec. Dig. ¶ 285.]

For other definitions, see Words and Phrases, First and Second Series, Pedigree.]

9. EVIDENCE ¶285 — HEARSAY—PEDIGREE—ISSUE.

In an action on a fraternal beneficiary certificate, evidence of self-serving declarations made by the insured respecting his age when he enlisted did not put his pedigree in issue, and hence were inadmissible under the hearsay rule.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1143; Dec. Dig. ¶ 285.]

10. EVIDENCE ¶501(1) — OPINION EVIDENCE—AGE.

Where the age of the insured was in issue, opinions based entirely on his appearance, and not accompanied by evidentiary description of his appearance from which they were formed, were inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2295, 2299, 2302; Dec. Dig. ¶ 501(1).]

11. INSURANCE ¶724(1)—FRATERNAL INSURANCE—RIGHTS OF INSURED—RECOVERY OF PREMIUM—TENDER.

In an action on a fraternal beneficiary certificate, where the insurer if sustaining the defense of ultra vires would be liable for the premiums received of the insured as for money had and received, it was not bound to make a sufficient tender or any tender on pain of waiving its rights to defend on the ground of ultra vires.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1837, 1866, 1868; Dec. Dig. ¶ 724(1).]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

Action by Mrs. C. E. Tuite against Supreme Forest Woodmen Circle. Judgment for plaintiff, and, from an order setting aside the verdict and ordering a new trial, plaintiff appeals. Affirmed.

Noyes & Heath, of Kansas City, for appellant. Harding, Murphy & Harris, of Kansas City, for respondent.

JOHNSON, J. This is an action on a death benefit certificate for \$1,100 issued April 30, 1900, by defendant, a fraternal beneficiary society incorporated in Nebraska, to Michael T. Tuite, a resident of Missouri. Plaintiff, the wife of Tuite, was designated in the certificate as the beneficiary. Tuite was a member of a local lodge of the order in Kansas City and paid all dues until his death, which occurred at the Soldiers' Home in Leavenworth, Kan., on August 6, 1913.

[1] The answer alleges, and the proof shows, that when Tuite joined the order and applied for the certificate, and at all times thereafter, defendant was a fraternal beneficiary society incorporated in Nebraska and regularly licensed to do business as such in this state. Plaintiff argues that the contract in question does not fall within the purview of the laws of this state relating to fraternal beneficiary societies for the reason that the laws of Nebraska and the charter of defendant authorized the inclusion of "adopted children * * * or other relatives" among the classes eligible to designation as beneficiaries in death benefit certificates. The statutes of this state provide that:

"Payments of death benefits shall be to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member." Section 7109, R. S. 1909.

Plaintiff invokes the rule we recognized in *Dennis v. Modern Brotherhood*, 119 Mo. App. 210, 95 S. W. 967, that a foreign association would not be accorded the benefits of the laws of this state relating to fraternal beneficiary societies where there was a substan-

tial difference between the classes of beneficiaries such association was authorized by its charter to recognize as eligible, and the classes mentioned in our own statutes. But that rule will not aid plaintiff. A fraternal society incorporated in this state may designate an adopted child of the member as the beneficiary in a death benefit certificate, since such child, being an heir of the member (article 1, c. 20, R. S. 1909), belongs to a class specifically mentioned in the statute. And we find the class "other relatives" appears by its context to refer to blood relatives, and therefore is identical with a class mentioned in our statute. We hold the proof of defendant sufficient to warrant us in treating the contract and the rights of the parties thereunder as being governed by the laws and rules relating to fraternal beneficiary insurance.

[2, 3] The principal defense is that the certificate is void because its execution by defendant was ultra vires the power conferred upon defendant by its charter from the state of Nebraska. The laws of that state forbid the issuance of a death benefit certificate to any person over 55 years of age, and defendant's charter fixed the maximum age at 52 years. In his application dated April 13, 1900, Tuite declared he was "50 years of age at my nearest birthday" and "was born on the 29th day of September, 1850, in Ireland."

An investigation made after his death convinced defendant that he had intentionally misrepresented his age, which, at the time of his application, was 60 or 61 years, instead of 50; but, as stated, the defense is that the certificate is ultra vires and void, and not that it was merely voidable on the ground of false and fraudulent representations respecting the age of the insured. As to such defense, there could be no waiver or estoppel, since defendant's officers, even if they had afterward been informed of the falsity of the representation, could not have bound the society by waiver or estoppel to a contract which its charter from the state would not authorize. *Edmonds v. Modern Woodmen*, 125 Mo. App. 214, 102 S. W. 601; *Steele v. Fraternal Tribunes*, 215 Ill. 190, 74 N. E. 121, 106 Am. St. Rep. 160; *State v. Bankers' Union*, 71 Neb. 622, 99 N. W. 531; *Gray v. Benefit Ass'n*, 111 Ind. loc. cit. 534, 11 N. E. 477.

If Tuite was older than 52 years at the time he applied for the certificate and membership, plaintiff has no cause of action on the certificate which would be void, and the only remedy she could enforce against defendant would be to recover back the money Tuite had paid defendant for insurance.

The answer alleged the total amount so paid was \$270.30, which, with interest, defendant offered to refund and has paid into court. At the trial the parties introduced evidence on the issue of Tuite's age when he made the application, and the jury were in-

structed, in substance, that plaintiff would be entitled to recover if he "was under the age of 52 at the time he made application and became a member of the defendant association," and could not recover if his age was over 52 at that time. The jury decided this issue in favor of plaintiff, but the court, on hearing the motion for a new trial, set the verdict aside for the reason, stated in the order:-

"That the court erred in admitting in evidence, over the objection of the defendant, self-serving declarations of Michael Tuite, the insured, in the contract sued on."

Plaintiff appealed from the order and judgment granting a new trial.

Defendant introduced in evidence the laws of Nebraska and its own charter and by-laws, which show that defendant was not authorized to issue a death benefit certificate to any person over 52 years of age, and also introduced both documentary and oral evidence which tended to show that Tuite was over 60 years old when he made the application. The muster roll of Company I, 169th New York Volunteers, showed his enlistment as a private on September 9, 1862, and that he was 23 years old. Plaintiff admitted that a witness named in an application for a continuance would identify a record book kept at a parish church in Ireland and that the book would show that Tuite was born September 29, 1836. A number of sworn statements made by Tuite at different times to secure a pension, and an increase thereof, refer to the date of his birth as September 29, 1836.

There was more evidence of the same kind introduced by defendant, and, on the other hand, there is evidence offered by plaintiff tending to prove that Tuite's age was not misstated in the application. Plaintiff and two other witnesses were permitted, over the objection of defendant, to testify that Tuite had told them that he was only 14 or 15 years old when he enlisted in 1862, and had made oral declarations about his age which, if true, would corroborate his representation in the application; and, further, plaintiff was allowed to show by several prominent citizens of Kansas City who had known Tuite that judging from his appearance his age was not over 50 years at the time of application.

[4-7] The evidence introduced by defendant of declarations respecting his age made by Tuite which were against his interest were properly admitted, since the interest his beneficiary had in the contract before his death was only expectant and was not a vested interest. Where the contract is one of ordinary life insurance, the beneficiary acquires a vested interest therein from the date of the contract, and declarations of the insured impairing the validity of the insurance are not admissible in an action by the beneficiary to recover the insurance. *Callies v. Modern Woodmen*, 98 Mo. App. loc. cit. 523,

72 S. W. 713; *Reid v. Ins. Co.*, 58 Mo. 425. But evidence of such declarations is admissible in an action on a fraternal beneficiary certificate because of the lack of any vested interest in the beneficiary before the death of the insured. *Callies v. Modern Woodmen*, supra; *Masonic Ass'n v. Bunch*, 109 Mo. 580, 19 S. W. 25; *Wells v. Mutual Benefit Ass'n*, 126 Mo. 630, 29 S. W. 607; *Supreme Knights v. O'Connell*, 107 Ga. 97, 32 S. E. 946; *Van Frank v. Benefit Ass'n*, 158 Ill. 580, 41 N. E. 1005; *Niblack on Benefit Soc.* §§ 212-235.

[8, 9] Evidence of declarations made by the insured in his own interest were self-serving and inadmissible, unless plaintiff is right in her contention that they related to a question of pedigree involved in this action. An important exception to the general hearsay rule is that hearsay testimony is competent in cases of pedigree, and "the term 'pedigree' embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened." *Topper v. Perry*, 197 Mo. loc. cit. 542, 95 S. W. 205, 114 Am. St. Rep. 777, and authorities cited. But a question of age is not necessarily one of pedigree, and "such declarations are deemed to be relevant only in cases in which the pedigree to which they relate is in issue, and not in cases in which it is only relevant to the issue." *Bowen v. Accident Co.*, 68 App. Div. 844, 74 N. Y. Supp. loc. cit. 102; *Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; *Insurance Co. v. Schwenck*, 94 U. S. 593, 24 L. Ed. 294; *Haynes v. Guthrie*, 13 Q. B. Div. 818; *State v. Marshall*, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63.

As is pertinently observed in *Eisenlord v. Clum*, supra:

"As to what is a case of pedigree, an examination of the question shows that a case is not necessarily one of that kind, because it may involve questions of birth, parentage, age, or relationship. Where these questions are merely incidental and the judgment will simply establish a debt, or a person's liability on a contract, or his proper settlement as a pauper and things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death, or birth are incidentally inquired of. *Whittuck v. Waters*, 4 C. & P. 375."

In the present case, the question of pedigree was impertinent to any issue, since the action is merely one for the collection of a death benefit. Proof of age was not offered for any purpose connected with a subject of pedigree, and evidence of self-serving declarations made by Tuite respecting his age when he enlisted were the purest hearsay and should have been excluded under the general hearsay rule.

[10] The opinions expressed by witnesses for plaintiff respecting the age of Tuite which were based entirely on his appearance

should not have been admitted over the objection of defendant, since they were not accompanied by an evidentiary description of the appearance from which the opinion was formed. The pertinent rule announced by our Supreme Court is that:

"Where the age of a party is in issue, the court may admit an expression of opinion by a witness as to that age, based on the appearance of the party at the time, accompanied with a description of the appearance from which such opinion was formed." *Elsner v. Supreme Lodge*, 98 Mo. loc. cit. 645, 11 S. W. 992.

As is well said in *Hartshorn v. Met. Life Ins. Co.*, 55 App. Div. 474, 67 N. Y. Supp. 14:

"To entitle such evidence to any weight, the facts and circumstances upon which the opinion is based should be given, and the witness should first describe, as far as practicable, the appearance of the individual whose age is in question."

See, also, *Life Ass'n v. Teewalt*, 79 Va. 421; *State v. Grubb*, 55 Kan. loc. cit. 679, 41 Pac. 951.

The reason of the rule is obvious. Some people naturally grow old in appearance faster than others. Conditions of health, modes of living, dress, associations, care, or freedom from care, are important factors which hasten or retard the appearance of Time's ravages. That species of vanity which prompts a person, after reaching middle age, to seem younger than he is, is common and leads to deceptive practices and devices which sometimes are successful. The average person is not an accurate judge of ages from appearances, especially of those of persons not in his own period of life. To the eye of 16, or of 30, for that matter, there is little, if any, noticeable difference between 50 and 60. Opinions of age deduced from appearances are the least reliable of all opinion evidence, and, as is said in the *Hartshorn* case, are worthless as evidence if unaccompanied by the descriptive facts and circumstances from which the opinion is drawn.

The court did not err in granting a new trial on the reason assigned in the order.

[11] The point urged by plaintiff that the tender by defendant of the money paid into the order by Tuite was insufficient in amount, if well taken, could not create a liability on the certificate by waiver or estoppel, since the defense of ultra vires, as we have said, cannot be waived. If defendant had no power to enter into the contract, it has no power to bind itself to become liable under such void contract. Defendant is liable, if its defense is well grounded, as for money had and received, and must restore all that it has received from Tuite with interest, but is not bound in this action on the certificate to make a sufficient, or indeed any, tender on pain of waiving its right to defend on the ground of ultra vires.

The judgment is affirmed. All concur.

DONOHOO v. MISSOURI PAC. RY. CO.
(No. 10537.)

(Kansas City Court of Appeals. Missouri.
June 12, 1916.)

1. COURTS \S 97(1) — DECISIONS OF UNITED STATES COURTS—INTERSTATE COMMERCE.

The law as expounded by the Supreme Court of the United States governs the construction of contracts for shipment in interstate commerce and supersedes the doctrines expounded by state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 329; Dec. Dig. \S 97(1).]

2. CARRIERS \S 159(1, 3)—CONTRACTS FOR CARRIAGE OF GOODS—STIPULATIONS.

The provision of a contract of shipment in interstate commerce between carrier and shipper requiring written notice of loss or damage is valid and cannot be waived.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 668-671, 700, 711, 714; Dec. Dig. \S 159(1, 3).]

3. CARRIERS \S 160—CONTRACTS FOR CARRIAGE OF GOODS—STIPULATIONS.

A contract between shipper and carrier limiting the time in which actions may be brought for loss or damage to an interstate shipment is valid and reasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 231, 673; Dec. Dig. \S 160.]

4. CARRIERS \S 158(1) — CONTRACTS FOR CARRIAGE OF GOODS—STIPULATIONS.

A contract provision limiting the amount of recovery in case of loss or damage to an interstate commerce shipment is valid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 668, 708; Dec. Dig. \S 158(1).]

Appeal from Circuit Court, Jackson County; J. E. Goodrich, Judge.

Action by Lester Donoho against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Transferred by Supreme Court (184 S. W. 1149).

White, Hackney & Lyons, of Kansas City, for appellant. D. C. Finley and Ben T. Hardin, both of Kansas City, for respondent.

ELLISON, P. J. Plaintiff shipped a horse from Independence, Mo., to Denver, Colo. The contract of shipment required written notice of any loss or injury to be given to the defendant. It also provided that the recovery for any injury to the horse should be limited to \$100 and that any suit should be brought within six months of injury. The trial court practically ignored these provisions. No notice was given as stipulated, and this suit was not brought for more than one year after the injury. Evidence was admitted to show the horse was a valuable racer and that the damage done to him was from \$900 to \$1,500. The verdict and judgment were for \$900.

[1] The shipment being interstate, the law governing it, and the contract under which it was made, is exclusively as expounded by the Supreme Court of the United States, and the law as heretofore expounded by the Su-

preme and appellate courts of the state is now superseded in cases arising on such shipments. *Donovan v. Wells Fargo Co.*, 265 Mo. 291, 177 S. W. 839.

[2] Under the decisions of the Supreme Court of the United States, the contractual provision as to notice is valid, and it cannot be waived. *Banaka v. Railroad*, 186 S. W. 7, and *Kemper Milling Co. v. Railroad*, 186 S. W. 8 (decided by us at this term). In these cases we have cited rulings of the Supreme Court of the United States as late as May 8, 1916. *Georgia, Flor. & Ala. Railroad v. Blush Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. —.

[3] So, too, a contract limiting the time in which actions may be brought for loss of shipments, or injury thereto, is legal and reasonable. *Mo., Kan. & Tex. Ry. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690.

[4] So the right to limit the amount of recovery in case of loss by stipulation in the contract of shipment is upheld. *Adams Express Co. v. Growinger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, and *C. & Q. Ry. v. Miller*, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323.

It follows that the judgment must be reversed. All concur.

R. L. BURKE MUSIC CO. v. MILLER.
(No. 1782.)

(Springfield Court of Appeals. Missouri.
June 17, 1916.)

1. EVIDENCE \S 441(9)—PAROL EVIDENCE—RULE — ADMISSIBILITY TO VARY WRITTEN INSTRUMENT.

Where a contract for the sale of a player piano on installments provided for payment in money, parol evidence is inadmissible to show that it was agreed that payment should be made in services and other ways; such provision being part of the contract not susceptible of variation by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1787, 1793; Dec. Dig. \S 441(9).]

2. APPEAL AND ERROR \S 1061(4)—HARMLESS ERROR—DIRECTION OF VERDICT.

Where the direction of a verdict for plaintiff in replevin for a player piano was proper, defendant cannot object that the jury were not required to find that his possession was unlawful, etc.; the verdict in effect being a finding that plaintiff was entitled to possession.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4211; Dec. Dig. \S 1061(4).]

Appeal from Circuit Court, Jasper County; D. E. Blair, Judge.

Action by the R. L. Burke Music Company against Harry C. Miller. From a judgment for plaintiff, defendant appeals. Affirmed.

Owen & Davis, of Joplin, for appellant. H. S. Miller, of Joplin, for respondent.

STURGIS, J. Suit in replevin for a player piano. The piano in question was sold by plaintiff to defendant, and the purchase

price, to be paid in installments, was secured by a chattel mortgage thereon. This mortgage contains the usual provisions that in case of default in any of the secured payments the plaintiff, mortgagee, could foreclose the mortgage by taking the piano and selling the same for the purpose and on the terms specified. It is not questioned but that the defendant had made default in these payments, was in possession of the piano, and refused to allow plaintiff to take same for the purpose of foreclosure. The amount secured by the mortgage is \$810, of which the defendant had paid \$267.85, and there was due and unpaid when the suit was instituted \$172.15.

At the trial the defendant testified that he was engaged in the automobile repair and storage business at Joplin when he purchased this piano, and then offered to testify and to prove by other witnesses that at the time of the purchase, and as a part of the agreement of purchase, it was verbally agreed that the plaintiff would furnish defendant sufficient work upon its automobiles and auto trucks and storage for automobiles and trucks to pay for said piano without obligation or expenditure of any cash or money payment thereon whatsoever, and to furnish said labor, employment, and storage in sufficient quantity to meet the monthly payments and installments of the note and mortgage read in evidence, that plaintiff ceased to furnish defendant with work and employment as aforesaid, and failed to furnish storage of said cars and trucks long before the institution of this suit, and that defendant has been and is now ready, willing, and able to carry out and perform his part of said oral agreement. The court refused to admit this evidence on the objection that such testimony would contradict, vary, and enlarge the terms of the written contract contained in the note and mortgage. No other defense was offered, and, as the facts warranting a finding for plaintiff were admitted, and no issue was left for the jury to decide, the court directed a verdict for plaintiff. The court's ruling on this evidence is therefore the only question before this court.

[1] The note and mortgage constitute a single written instrument, and, so far as necessary to be noted here, reads as follows:

"\$810.00.

July 21, 1913.

"We are not responsible for any written or verbal contract or promise other than written or printed on the face of this agreement. For value received, the undersigned, residing in Joplin, 1806 Kentucky, county of Jasper, and state of Missouri, promise to pay to the order of Burke Music Company eight hundred dollars at their office, as follows: Thirty-five dollars in trade, and \$20 September 1, 1913, and \$20 the 1st of each succeeding month till fully paid, with interest on each payment at the rate of 6 per cent. per annum from the date hereof until fully paid with exchange and a reasonable attorney's fee if this note is placed in the hands of an attorney for collection. To secure the payment of the sum of money in the foregoing

note, contracted to be paid, together with interest, exchange, and attorney's fees, as herein provided, I, the undersigned, hereby mortgage to the said Burke Music Company one Packard player piano," etc.

We hold that the trial court was correct in its ruling, and that the evidence offered would, if admitted, be violative of the rule that a written agreement between parties cannot be contradicted, enlarged, or varied by parol evidence, since all prior and contemporaneous verbal agreements are merged in the written agreement. The general rule is well stated in *Dexter v. MacDonald*, 196 Mo. 373, 391, 95 S. W. 359, 364, thus:

"It is fundamental that, when an undertaking by parties is reduced to writing, in the absence of fraud, accident, or mistake, it is conclusively presumed that the whole engagement and manner and extent of their undertaking were reduced to writing. This was so ruled by this court in *Plumb v. Cooper*, 121 Mo. 665 [28 S. W. 678]."

There are some well-recognized exceptions to this rule, and it is often a nice and difficult question to determine when parol evidence is admissible when the parties have reduced the agreement to writing. One of the exceptions is, and on this defendant relies, that the general rule is not violated by allowing parol evidence to be given of a distinct contemporaneous agreement not reduced to writing when same is not in conflict with the provisions of the written agreement. *Jones on Evidence*, § 495; *Roe v. Bank of Versailles*, 167 Mo. 406, 67 S. W. 303. It is also said that the exception to the general rule which admits evidence of a distinct collateral agreement is especially applicable when such collateral agreement relates to the consideration of the contract or the inducement for entering into it. 17 Cyc. 717.

Whatever may be the rule elsewhere, it is the law of this state that, where matters pertaining to the consideration of a contract are contractual, then such matters are no more subject to be contradicted or varied by parol evidence than any other material part of the contract. The question of the admissibility of parol evidence in such cases can generally be settled by determining whether the part or terms of the contract relating to the consideration are contractual in their nature or inserted merely by way of recital of past or existing facts. Thus in *Jackson v. Railroad*, 54 Mo. App. 687, 644, the court said:

"So that it must follow that, if parties express their contracts as to the consideration in terms which show that it is a contract, then, if complete upon its face, it can no more be altered or varied than any other contract. Whenever the statement of the consideration leaves the field of mere recital and enters into that of contract, as shown by the intention of the parties to be gathered from the instrument, it is no longer open to contradiction."

In *Pile v. Bright*, 156 Mo. App. 301, 137 S. W. 1017, the law is stated thus:

"There has been some variation between the early and later cases in this state upon the question of explaining, or contradicting by

parol, an expressed consideration of a written contract, but the law is now well settled that, when the recital of a consideration in a written contract can be fairly regarded as a mere recital, or a statement of the receipt of money, then such recital may be explained by parol, and the actual consideration for the contract shown, even though to do so may apparently contradict the recital in the contract. In this class of cases the recital as to the consideration is regarded in the same light as a receipt for money and may be explained, or even contradicted by parol; but, if the statement in a written contract in relation to the consideration shows upon its face that the expressed consideration is a part of the terms of the contract itself, then that part of the writing stands as any other part, and it cannot be contradicted, added to, nor subtracted from by parol."

This court considered this same question in *Stringer v. Manufacturing Co.*, 177 Mo. App. 234, 162 S. W. 645, and there held that, when a mortgage distinctly contracts when and how much money is to be paid by the mortgagor, this matter is contractual, and cannot be contradicted or varied by parol evidence of a contemporaneous agreement. In accordance with this same principle the court, in the case of *Trustees v. Hoffman*, 95 Mo. App. 488, 69 S. W. 474, held that (syllabus):

"An instrument of writing promising absolutely to pay a certain sum of money cannot be defeated by oral evidence to the effect that the amount promised was to be paid only on condition that an endowment fund of \$50,000 was raised before a certain date."

See, also, *Davis v. Gann*, 63 Mo. App. 430.

Turning to the agreement in question here, we find that the very gist of the contract is the amount, time, and terms of payment for this piano. There is a distinct specification of the amount to be paid in trade, and the balance is stipulated to be paid absolutely in fixed amounts and at fixed intervals. To be allowed to prove that the mortgagor was not, in fact, obligated to pay any amount at any time, but only to do certain work for plaintiff, if plaintiff furnished such work for him to do, and that the plaintiff obligated itself to furnish him sufficient labor and employment to meet the stipulated payments, is to prove a radically different contract than that made in the writing. That these matters are contractual and are not to be contradicted and varied by parol evidence seems too plain for argument.

[2] It is further suggested that the jury should have been required to find that the defendant was in possession of this property and wrongfully detained the same. The verdict which the jury was directed to find is, in substance, that the jury find the issues in favor of the plaintiff, and that plaintiff was, at the commencement of this action, entitled to the possession of the player piano. *Barnes v. Plessner*, 137 Mo. App. 571, 119 S. W. 457, and *Grant v. Stubblefield*, 158 Mo. App. 555, 120 S. W. 647, are cited. The defendant, however, did not raise any such issue. The defendant was concededly in possession of this piano, and his detention there-

of was wrongful as a matter of law when it was shown that he had defaulted in the payments secured by mortgage and refused on plaintiff's demand to surrender the piano for the purpose of foreclosing the mortgage. The court might well have directed the jury to include these findings in the verdict, but mere errors in the form of a directed verdict are not material.

The right of this defendant to pay off the amount due under this mortgage and retain the property in controversy was not and is not controverted. The plaintiff gave bond and took the property into its possession. We are not advised as to what further steps, if any, have been taken in foreclosing the mortgage. The possession of the piano is by the judgment in question awarded to the plaintiff only for the purpose of permitting it to foreclose the mortgage in accordance with the terms thereof, and defendant's right to redeem the same or to receive the surplus, if any, after a sale under the provisions of the mortgage, is not questioned, and his rights in this respect are not before us for adjudication.

The judgment being for the right party, the case will be affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

JOHNSON et al. v. MAIER et al. (No. 1798.)
(Springfield Court of Appeals. Missouri. June 17, 1916.)

1. MORTGAGES \Leftrightarrow 280(3)—TRANSFER OF PROPERTY—ASSUMPTION OF INCUMBRANCE.

Where plaintiffs, who held a note secured by a deed of trust on land which was afterwards conveyed to defendant, were not misled because the deed contained a fraudulent covenant obligating defendant to pay off the deed of trust, such covenant is not, being without consideration, binding on defendant, though he retained the deed after learning of its fraudulent insertion and subsequently conveyed the land.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 742, 744; Dec. Dig. \Leftrightarrow 280(3).]

2. MORTGAGES \Leftrightarrow 280(3)—TRANSFER OF PROPERTY—ASSUMPTION OF INCUMBRANCE—RESCISSIION.

Where defendant's grantor was in possession of the property given in exchange for the land and was then contending that defendant had assumed the covenant, the holder of the incumbrance cannot predicate liability on the ground that defendant should have rescinded.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 742, 744; Dec. Dig. \Leftrightarrow 280(3).]

3. APPEAL AND ERROR \Leftrightarrow 1064(1)—REVIEW—HARMLESS ERROR.

In an action based on a covenant included in a deed obligating a grantee to discharge an incumbrance where the deed was not recorded and was not produced at trial, an instruction that, if the covenant was inserted after delivery, the grantee was not liable, is harmless, though erroneous, where the grantee did not see the deed for some time after delivery to a codefend-

ant, and the sole question was whether the covenant was supported by consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064(1); Trial, Cent. Dig. §§ 475, 525.]

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

Action by W. D. P. Johnson and another against Albert A. Maier and another. From a judgment for the first-named defendant, plaintiffs appeal. Affirmed.

Watson & Livingston, of Rolla, for appellants. Lorts & Breuer, of Rolla, for respondents.

ROBERTSON, P. J. Plaintiffs sued respondents to recover the amount due on a \$1,000 note which it is alleged they assumed and agreed to pay as part of the consideration for some real estate conveyed to them by one Wiggins. The note was secured by a second deed of trust on the land, the first deed of trust securing a note for \$1,500. As the result of a jury trial, a judgment was obtained in favor of defendant Maier, and plaintiffs have appealed. Judgment by default was entered against defendant Adams, hence he is only a nominal respondent, and, where reference is made herein to defendant, Maier is meant.

The deed to defendants from Wiggins contained a clause to the effect that the grantees assumed and agreed to pay the total amount secured by both deeds of trust. The controversy was over whether or not the defendants assuming these debts constituted a part of the consideration for the land conveyed to them by Wiggins, and whether the clause was placed in the deed with the knowledge and consent of defendant Maier, or whether, if it was not, he thereafter learned that it was in there, and so accepted the deed and recognized this provision as to bind him.

Involved in this case is solely the question of the sufficiency of the instructions, as there was ample testimony tending to prove the facts therein hypothetically submitted. In behalf of plaintiffs, the instructions told the jury (1) that, even if the clause was put in the deed by mistake, the defendants were liable if they retained the deed and conveyed the land after learning the clause was therein, unless inserted fraudulently, and fraud was defined (2), at the request of plaintiffs, to mean:

"That there was caused to be inserted in said deed the clause wherein grantees assumed and agreed to pay the note in question when the same was not agreed to by the defendants, with intent to wrong the said defendants and to cause them to accept the said deed with conditions therein to which there had been no agreement by them."

On the part of the defendant, instructions were given telling the jury: (1) That unless the clause was in the deed when executed the defendant was not liable, even if he bought the land subject to the deeds of

trust; (2) that if the clause was inserted in the deed after its delivery to defendant without his consent he was not bound thereby; (3) that even if the clause was inserted before the deed was delivered, yet if it was fraudulently inserted, and defendant did not agree to assume and pay plaintiffs' debt, the verdict should be for defendant; and (4) that if there was not an agreement between Wiggins and defendant that he should assume and pay the plaintiffs' note the verdict should be for defendant.

[1] Plaintiffs first complain that their instruction 1 was improperly modified by the court inserting the clause concerning the alleged fraud. The argument in behalf of plaintiffs is that, if the defendants conveyed the land after they discovered the clause was therein, such conduct amounted to a ratification thereof, irrespective of how it got there. There might be some merit in this contention if the plaintiffs were thereby misled to their injury; but, in the absence of any such question, the basis of defendant's liability in this case is that they for a valuable consideration assumed and agreed to pay plaintiffs' debt. *Raithel v. Smith*, 68 Mo. 258, and *Davis v. Dunn*, 121 Mo. App. 290, 493, 97 S. W. 226. When it is shown that there was fraud, as defined, or even mistake, in the absence of some facts to invoke equitable principles in behalf of plaintiffs, it was thereby shown that the defendants neither contracted to pay nor received any consideration for the alleged agreement.

[2] It appears that defendants reconveyed the land after they learned the clause was in the deed, but then Wiggins was in the possession of property defendant traded him at the time he made the deed to him, and, as he was then contending that defendants had assumed the debt, he would have resisted and did object to making a change in the deed. The plaintiffs are in no position to invoke the doctrine of rescission which is applicable to one seeking relief from fraud or mistake in equity. As this case stands, the question was as to whether or not the defendants as a matter of fact agreed to pay this debt. The jury on instructions favorable to plaintiffs found they did not.

[3] It is said defendant's instructions 1 and 3 should not have been given, because there was no testimony on which to base them. We apprehend the objection is really aimed at instruction 2, wherein it refers to a change in the deed after delivery. The deed was not produced at the trial, it had not been recorded, and Maier did not see it for some time after its execution and delivery to his codefendant, Adams. To concede the most for this objection, it may properly be said that there is no error therein justifying a reversal.

There are cited a number of cases in behalf of plaintiff (among them *Priddy v. Bank*, 132 Mo. App. 279, 111 S. W. 865) and

Conway, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602; and Nelson v. Brown, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755) to sustain the assertion that the mere acceptance of the deed with the clause assuming and agreeing to pay the note is sufficient to bind the grantee; but in those cases there was no question as to the consideration or the agreement, the very foundation of the liability, and the expressions therein contained must be considered in the light of the issues involved and under review.

The judgment is affirmed.

FARRINGTON and STURGIS, JJ., concur.

BURNS v. POLAR WAVE ICE & FUEL CO. (No. 14365.)

(St. Louis Court of Appeals. Missouri. June 6, 1916.)

1. WITNESSES §144(1) — DISQUALIFICATION — STATUTE.

Under Rev. St. 1909, § 6354, touching disqualification of witnesses, in an action against a corporation for injuries caused by the driver of its wagon, who died before suit, plaintiff, on proper objection, should not have been allowed to testify to the acts of the driver which it was claimed caused the accident.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 625, 626, 629, 632; Dec. Dig. § 144(1).]

2. WITNESSES §180 — COMPETENCY — OBJECTIONS.

In an action against a corporation for injuries caused by the driver of its wagon, deceased before suit, general objection to plaintiff's competency as a witness was properly overruled, though on proper objection he was incompetent to testify to the acts of the driver which caused the accident.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 726-730; Dec. Dig. § 180.]

3. TRIAL §228(2) — INSTRUCTION — REFERENCE TO OTHER CHARGES.

In an action for injuries in a collision between wagons, an instruction which specifically referred to other instructions in the case for facts necessary to a recovery was not erroneous as directing a verdict and not covering all the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 511; Dec. Dig. § 228(2).]

4. APPEAL AND ERROR §1064(2) — HARMLESS ERROR — INSTRUCTION.

In an action for injuries received in collision between wagons, where the fact of the collision was not disputed or questioned, the defect in an instruction that it assumed the collision was not important.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4221, 4222; Dec. Dig. § 1064(2); Trial, Cent. Dig. §§ 475, 525.]

5. MUNICIPAL CORPORATIONS §706(4) — COLLISION BETWEEN WAGONS — ACTION — EVIDENCE — ORDINANCES.

In an action for injuries received in a collision between plaintiff's and defendant's wagons, sections 2 and 5 of Ordinance 25104, which are parts of sections 1827, 1830, Rev. Code St. Louis 1912, requiring a teamster to drive at the right side of a street, were admissible in evidence, not being incompetent, irrelevant, and immaterial, nor not tending to prove anything,

the facts in evidence showing a violation by defendant's employé.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706(4).]

6. TRIAL §192 — INSTRUCTION — ASSUMING EXISTENCE OF ORDINANCE.

In an action for injuries in collision between plaintiff's and defendant's wagons, where objections made to sections of an ordinance of the city, when offered, in no manner challenged the existence of the particular sections, an instruction, not setting out such sections or requiring the jury to find they were in force, merely stating their effect, was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.]

7. MUNICIPAL CORPORATIONS §705(1) — COLLISION BETWEEN WAGONS — "ORDINARY CARE" — "NEGLIGENCE."

The "ordinary care" which the driver of a wagon must use to turn a corner as near the right-hand curb as possible, as required by city ordinance, is such care as a reasonably prudent man would have used under the circumstances, while negligence is failure, when it was possible by the exercise of ordinary care, to turn nearer the right-hand curb than the center of the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. § 705(1).]

For other definitions, see Words and Phrases, First and Second Series, Negligence; Ordinary Care.]

8. MUNICIPAL CORPORATIONS §705(4) — COLLISION BETWEEN WAGONS — LIABILITY.

Where plaintiff's wagon, having a right to be standing on the far side of the street, and no right to be on any other part, was struck by defendant's consequently upon defendant's servant's violation of sections of a city ordinance requiring wagons, in turning corners, to keep as near as possible to the right-hand curb, defendant was liable, whether its driver knew that plaintiff's wagon was standing in the street or not.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515, 1516; Dec. Dig. § 705(4).]

9. TRIAL §252(1) — INSTRUCTIONS — ABSTRACTNESS.

Instructions must be predicated on the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 612; Dec. Dig. § 252(1).]

10. MUNICIPAL CORPORATIONS §706(8) — COLLISION BETWEEN WAGONS — ACTION — INSTRUCTION.

In an action for injuries in a collision between plaintiff's and defendant's wagons, where there was evidence that defendant's wagon came along and struck plaintiff's with such impact and speed that it hurled it against a lamp post 40 feet north of where the collision occurred, an instruction was justified that if the jury believed that after defendant's wagon struck plaintiff's, defendant's employé did not use ordinary care to stop or check defendant's wagon, so that plaintiff's wagon was dragged after the collision and plaintiff was thrown out of the wagon, defendant was liable, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706(8).]

11. DAMAGES §208(3) — EVIDENCE §570 — EXPERT TESTIMONY — ADVISORY CHARACTER.

In an action for injuries received in collision between plaintiff's and defendant's wagons, though the surgeon who testified refused to state

in so many words that injuries to plaintiff's abdomen were permanent, where it was in evidence that at the time of trial, 9 months after the accident, plaintiff was still suffering in his abdomen, the submission to the jury of the question whether plaintiff's injuries were permanent was proper, since the opinions of witnesses as experts are merely advisory and not binding, and the jury can accord them such weight as they believe from all the facts and circumstances in evidence they are entitled to receive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 533, 534; Dec. Dig. ¶¶ 208(3); Evidence, Cent. Dig. § 2395; Dec. Dig. ¶¶ 570.]

12. DAMAGES ¶132(1)—PERSONAL INJURY—EXCESSIVE VERDICT.

In an action for personal injuries in collision between defendant's and plaintiff's wagons, where plaintiff, a teamster owning two teams, received serious injuries, among others, to his abdomen, which prevented him from doing very hard work with safety, and he was still suffering from them at the time of trial, 9 months after the accident, verdict for \$7,500 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 372; Dec. Dig. ¶¶ 132(1).]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

"Not to be officially published."

Action by Samuel C. Burns against the Polar Wave Ice & Fuel Company. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

Jones, Hocker, Sullivan & Angert and Vincent L. Boisaubin, all of St. Louis, for appellant. Brownrigg & Mason, of St. Louis, for respondent.

REYNOLDS, P. J. This is an action by plaintiff, respondent here, against the defendant to recover damages alleged to have been sustained by plaintiff to his person and property, plaintiff at the time driving a team attached to a wagon in which he was seated, by being run into by a wagon of defendant, in charge of one of its employes, it being charged in the petition that the act was a negligent act on the part of defendant, through its employé. The accident is charged to have occurred February 12th, 1913, in the city of St. Louis. Violation of a city ordinance—sections 2 and 5 of ordinance No. 25104, is charged, those sections, 1327 and 1330, providing that a vehicle, except when passing a vehicle ahead, shall keep as near the right-hand curb as possible, and that in turning to the right into another street a vehicle shall turn the corner as near the right-hand curb as possible. Judgment is demanded for \$15,000.

When the cause was called for trial before the court and a jury, defendant objected to the introduction of any evidence because, as it was alleged, the petition did not state facts sufficient to constitute a cause of action. This objection was overruled.

Plaintiff, as the first witness on his own behalf, having been sworn and having given his name, counsel for defendant objected to him testifying in the cause, for the reason that

defendant is a corporation and can only act by and through its agents and servants, and defendant asked to be then allowed to offer evidence to prove that one Johnson, who was the driver of the wagon belonging to defendant at the time of the accident, was now dead; that this being so, then under section 6354, Revised Statutes 1909, plaintiff is an incompetent witness. The court allowed defendant to introduce its evidence as requested and that being done, it was admitted that Johnson was the employé of the defendant "alleged to have been in charge of the wagon and who ran into plaintiff's wagon," and that he, Johnson, has since died. Thereupon the court overruled the objection of defendant's counsel, counsel excepting.

Plaintiff was thereupon permitted to testify and did testify as to the circumstances connected with the accident; that he was a married man, with two children; was engaged in teaming, owning two teams, and drove one of his teams on the day of the accident; that while driving south on Compton avenue, and along the west side of that street, he saw a Polar Wave three-horse team coming down that street and that the driver was whipping with one hand, pulling his lines with the other, and "cussing"; that the street was 40 feet wide and that he (plaintiff) was a hundred feet from this wagon when he first noticed it; had known the driver of that wagon, Johnson, for three or four years and that he (Johnson) was then driving a wagon belonging to the defendant company; that he (plaintiff) had stopped in his wagon against the west curb of the street when the front end of the defendant's wagon, driven by Johnson, struck the front end of the body of his (plaintiff's) wagon and the bodies of the two wagons rubbed for about 14 or 16 inches; that he (plaintiff) was thrown into the air, knocked unconscious, and when he regained consciousness he was 10 or 20 feet from where he had been in his wagon, the wagon some 30 or 40 feet north from where it had been and a lamp post broken by his (plaintiff's) wagon having been shoved against it. He further testified to the damage to his wagon and to his person, as to which latter it is sufficient to say that there was evidence tending to show that it was of a serious character, so serious as to prevent plaintiff doing very hard work, his abdomen being injured, and that he was still suffering from these injuries; whether permanent or not the physicians for plaintiff declined to say. Plaintiff also introduced testimony as to his expenditures, value of his time lost and of the extent of his suffering.

Other witnesses to the accident gave testimony practically corroborating plaintiff's version of the happening of the accident.

There was a verdict for plaintiff in the sum of \$7500; judgment followed, from which, filing its motion for a new trial as

well as in arrest, defendant has duly appealed.

The first assignment of error made by counsel for appellant is to the action of the court in allowing plaintiff, over the objection of defendant, to testify, it being claimed that under section 6354, Revised Statutes 1909, he was an incompetent witness.

[1] The decision of our court in *Leavea v. Southern Ry. Co.*, 171 Mo. App. 24, 153 S. W. 500, and that of the Supreme Court in the same case, not yet officially reported but to be found in 181 S. W. 7, are cited in support of this contention. In those decisions it is held that the testimony of plaintiff as to the accident should not have been admitted. It having been admitted that Johnson was the driver of the team at the time of the accident, was an employé of defendant in charge of the team at that time and on that occasion, and that he is dead, plaintiff, on proper objection, should not have been allowed to testify to the acts of Johnson which it is claimed caused the accident and rendered defendant liable. So it was held in the *Leavea* Case, the objection there made being to plaintiff testifying to what took place between himself and the deceased employé of defendant. But in the case at bar the objection was not limited to that testimony, but challenged the competency of plaintiff to testify at all; that is, was founded on the claim that the agent of defendant, who represented it in the matter or stood for defendant, being dead, plaintiff was an incompetent witness in the case.

It is held by our Supreme Court in *First National Bank v. Payne*, 111 Mo. 291, loc. cit. 298, 20 S. W. 41, 33 Am. St. Rep. 520, *Mann v. Balfour*, 187 Mo. 290, loc. cit. 304, 86 S. W. 103, *Weiermueller v. Scullin*, 203 Mo. 466, loc. cit. 473, 101 S. W. 1088, and *Eaton v. Cates et al.*, not yet officially reported, but see 175 S. W. 950, loc. cit. 953, and in *Kille v. Gooch et al.*, not yet officially reported, but see 184 S. W. 1158, and by our court in *Diggs v. Henson*, 181 Mo. App. 34, loc. cit. 46, 163 S. W. 565, that a party to the action is only disqualified under section 6354 from testifying to transactions which took place between himself and the deceased agent and representative of defendant in the transaction, but is not disqualified generally as a witness from testifying in the case. Thus plaintiff here was a competent witness to testify as to his injuries and the damage to himself and his outfit and his expenditures, but he cannot testify as to the acts of the driver of defendant's wagon.

[2] It follows that the learned trial court committed no error in overruling the objection here interposed, that being a general objection to plaintiff testifying at all in the case.

It is not out of place to say that outside of the testimony by plaintiff there was ample testimony of the fact of the collision and of the acts of the driver of defendant's team.

[3] The second assignment of error is that respondent's instruction No. 1 is erroneous in that it directs a verdict and does not cover all the facts in the case. We do not think this instruction is subject to this criticism. Specifically, and in the body of the instruction, it refers to other instructions in the case for facts necessary to a recovery.

The third assignment is levelled at the fourth instruction given at the instance of plaintiff. It tells the jury that if they believe from the evidence that defendant's team and wagon, just prior to the collision, was turning to the right into Compton avenue and out of Adams street, then it was the duty of defendant's servant in charge of the wagon turning into Compton avenue as aforesaid, to exercise such care as a reasonably prudent man would have used under the circumstances to turn the corner as near the right-hand curb as it was possible so to turn by the exercise of ordinary care; and if the jury further believe from the evidence that defendant's servant, turning into Compton avenue from Adams street, did not turn the corner as near the right-hand curb as, by the exercise of ordinary care, it was possible, as aforesaid but turned past the center of the street, and that it was possible for the defendant's servant, by the exercise of ordinary care, to turn the corner nearer the right-hand curb than the center of the street; and if the jury further believe from the evidence that plaintiff's injuries and damages as elsewhere specified in these instructions were the direct result of the failure of defendant's servant, as aforesaid, to keep as near the right-hand curb as possible, as aforesaid, their verdict should be for plaintiff.

[4] It is urged against this instruction that it assumes the collision. That is true, but the fact of the collision was not only undisputed but in fact was admitted, as we have noted when setting out the admissions made under the objection to plaintiff testifying. The defendant's own witnesses, on direct examination, testified to seeing the collision. In fact it was not disputed, but as before said, admitted. Where, as here, the fact of the collision is not questioned or disputed, this assumed defect in the instruction is unimportant. *Hall v. Manufacturers Coal & Coke Co.*, 260 Mo. 351, loc. cit. 370, 168 S. W. 927.

[5, 6] It is further urged that this instruction fails to require the jury to find under the evidence that there was any ordinance in St. Louis requiring a teamster to drive as near as possible to the right-hand side of the street. That was not necessary. Sections 2 and 5 of Ordinance 25104, which are parts of 1327 and 1330 of the Revised Code of St. Louis of 1912, relied upon and which we have set out in the statement, were offered in evidence. The only objections to them were that they were incompetent, irrelevant and immaterial and did not tend to

prove anything in the case. This was overruled, defendant excepting. None of these objections urged against these sections of the ordinance are tenable. They were competent, relevant and material and the facts in evidence showed a violation or non-observance of the sections on the part of defendant's employé, and that was correctly covered by the instruction. It is true that these sections of the ordinance were not set out in *hæc verba* in the instruction, but their effect was stated and the instruction is undoubtedly founded on them. It was unnecessary to specifically refer the jury to these sections of the ordinance or to require the jury to find that they were in force, for the objections made to them, when offered, in no manner challenged the existence of these sections of the ordinance. In point of fact the existence of the ordinance was not only uncontroverted but practically admitted. In *Ghio v. Metropolitan Street Ry. Co.*, 125 Mo. App. 710, loc. cit. 717, 103 S. W. 142, 144, it appeared that by instructions given for plaintiff the court submitted to the jury the question whether a certain ordinance of Kansas City was in force at the time of plaintiff's injury. The Kansas City Court of Appeals held as to this:

"Technically speaking, the criticism is well founded. Whether the ordinance was in force as such was a question alone for the court, it being a question of law."

[7] It is finally urged against this instruction that it omits an essential element of the case, that is, that the driver knew or by the exercise of ordinary care might have known that respondent's wagon was standing at the point where the collision occurred. It is to be noted, in connection with this instruction, that the court properly defined the terms "ordinary care" and "negligence," as used in the instructions.

[8] As said by the Kansas City Court of Appeals in *Ghio v. Metropolitan Street Ry. Co.*, supra, so it may be said of this objection to this instruction—that it was purely technical. The undisputed evidence in the case tended to show—in fact did show—that defendant's employé had grossly violated the ordinance by driving so far away from the right-hand curb that he struck plaintiff's wagon, that wagon being near the west curb of a 40-foot street; so that the striking of plaintiff's wagon was directly due to the violation of these sections of the ordinance, and defendant was liable, whether its driver knew that plaintiff's wagon was there or not, even though there had been a question of knowledge. Plaintiff had a right to be there and had no right to be on any other part of the street, and the defendant's employé, going in that direction, had no right to drive on the far curb, so that even if plaintiff had come there suddenly, so that he could not be seen or was not seen, defendant's negligence in the violation of the ordinance and the resulting injury to plaintiff as clearly made out plain-

tiff's cause of action as if defendant's driver had known of the presence of plaintiff. Furthermore, the evidence, by the testimony of defendant's own witnesses, showed that defendant's employé did know of the presence of plaintiff's wagon, calling out as he came along the street and made the turn, "Get over! Get over!" the horses' heads of the two teams being then about 20 feet apart. Hence when defendant's employé saw plaintiff's wagon in the position it occupied in the street the wagons must have been 40 or 50 feet apart. We do not think there is anything in this instruction so far as this point is concerned to the prejudice of defendant.

[9, 10] The third instruction given at the instance of plaintiff is attacked on the ground that the dragging of plaintiff's wagon had nothing to do with plaintiff's injury, and that any negligence in so dragging the wagon could not have directly contributed to plaintiff's injury. It is said in support of this assignment of error that instructions must be predicated on the evidence. That is true. But we think that the evidence in this case justified that instruction, which told the jury that if they believed from the evidence that after defendant's wagon struck plaintiff's wagon, defendant's employé in charge of it did not use ordinary care to stop or check defendant's wagon, and that, as a result of failure on the part of defendant's employé to use ordinary care to stop or check defendant's wagon after striking plaintiff's wagon, plaintiff's wagon and team were dragged after the collision between the two wagons, and plaintiff was thrown out of the wagon so that he struck the ground with great force and violence, "then such failure on the part of defendant's servant to use ordinary care to check said wagon as aforesaid constituted negligence for which defendant is liable, if you further believe from the evidence that plaintiff's injuries and damages were the direct result of said negligence."

It was in evidence in the case that defendant's wagon came along and struck plaintiff's wagon with such an impact and speed that it hurled plaintiff's wagon against a lamp post at or near the alley, about 40 feet north of the place of the collision. That was a relevant and an important factor in the case in showing the negligent speed at which defendant's employé was driving his team.

[11] It is further assigned as error to this third instruction that it submitted the question as to whether plaintiff's injuries, in his abdomen particularly, are permanent. It is true that the surgeons who testified refused to state in so many words that these injuries were permanent. It was in evidence, however, that at the time of the trial, which occurred nearly a year after the accident, to be more accurate, some 9 months, plaintiff was still suffering, not only in his limb but in his abdomen. It is a well settled rule of decision in our state that the opinions of wit-

nesses, as experts, are merely advisory and not binding on the jury, and the jury should accord to them such weight as they believed from all the facts and circumstances in evidence they are entitled to receive. See for illustration *Markey v. Louisiana & Missouri River R. R. Co.*, 185 Mo. 848, 84 S. W. 61. In the *Markey Case*, *supra*, *Hoyberg v. Hencke*, 153 Mo. 68, 55 S. W. 88, is approvingly referred to as deciding that an instruction was correct, submitting to the jury the question of the permanence of the injury even in a case where the expert testimony was in reference to an abstruse scientific subject.

In *Frazier v. St. Louis Smelting & Refining Co.*, 150 Mo. App. 419, loc. cit. 480, 180 S. W. 485, 488, a case in which it appeared that there was no evidence given as to the permanent nature of the injury, and in which an instruction was given submitting to the jury the question of their permanency, our court said:

"The objection to the instruction as to the permanency of the injury is not well taken. We have set out the testimony as to that. Plaintiff testified that even down to the day of the trial he felt the effects of this shock, and the allegations of his petition were broad enough to allow the jury to take that into consideration in determining the amount of damage."

That is nearly the situation here. While we have not set out the testimony in full, it is sufficient to say of it, that it shows that even down to the day of the trial plaintiff was suffering from the effects of the injury. It is true that he testified that he had done some labor after the accident but nothing like the amount of labor or the sustained labor that he could do before that, and a very competent and experienced surgeon, who had testified to the serious nature of the injuries to plaintiff, when asked if plaintiff had testified to doing certain work after his injuries, whether he would change his opinion as to plaintiff's ability to do this kind of work in the condition in which he was, particularly with reference to the hurt in his abdomen, said he would not; that if plaintiff was doing that he was doing what, in his condition, he could not safely do. The plaintiff was before the jury; they saw him; they had the testimony as to the nature and extent of his injuries still present at the time of the trial, and it was for them to determine the probable duration of the injury, independent and even in the face of testimony to the contrary by experts, the latter testimony, as before remarked, being merely advisory and not binding upon the jury.

[12] Finally it is urged that the verdict is excessive. We do not think this is tenable. With the nature of the injuries received by plaintiff before it, the occupation and condition and life of the plaintiff before them, the diminution of his earning capacity before it, we are not prepared to say that the verdict in this case is excessive.

Discovering no reversible error to the prejudice of plaintiff in the case, the judgment of the circuit court should be and is affirmed.

NORTONI and ALLEN, JJ., concur.

CUDAHY PACKING CO. v. ATCHISON, T. & S. F. RY. CO. (No. 12062.)

(Kansas City Court of Appeals. Missouri. May 1, 1916. Rehearing Denied June 12, 1916.)

1. CARRIERS \S 177(3)—CARRIAGE OF GOODS—CARMACK AMENDMENT.

The common-law rule of liability of a carrier for goods shipped was not changed by the Carmack Amendment (Act June 29, 1906, c. 3591, \S 7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. 1913, \S 8592]), the purpose of which was to make the first carrier liable as at common law.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. $\S\S$ 779-789; Dec. Dig. \S 177(3).]

2. CARRIERS \S 108—CARRIER OF GOODS—INJURY—LIABILITY OF CARRIER.

At common law, the carrier is liable for any loss or damage to a shipment not the act of God or the public enemy, or not caused by a vice or infirmity in the goods.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. $\S\S$ 471-495; Dec. Dig. \S 108.]

3. CARRIERS \S 132—CARRIER OF GOODS—ACTIONS FOR LOSS—BURDEN OF PROOF.

At common law, the burden is on the carrier to show that a loss or damage to goods shipped comes within one of the required exceptions to liability.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. $\S\S$ 578-582, 605; Dec. Dig. \S 132.]

4. CARRIERS \S 131—CARRIER OF GOODS—ACTIONS FOR LOSS—PLEADING.

At common law, in action against a carrier for loss or damages to goods shipped, the shipper need not allege or prove the carrier's negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. $\S\S$ 569-577, 593; Dec. Dig. \S 131.]

5. CARRIERS \S 134—CARRIER OF GOODS—ACTIONS FOR LOSS—PRESUMPTIONS.

Under common law, a prima facie case against a carrier for loss or damages to goods shipped is made by showing a delivery to the carrier in good condition and properly packed, and subsequent delivery after transportation in bad condition.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. $\S\S$ 588-592, 607; Dec. Dig. \S 134.]

6. CARRIERS \S 132—CARRIER OF GOODS—ACTIONS FOR LOSS—BURDEN OF PROOF.

In action against carrier for damage to shipment, the plaintiff has the initial burden of showing that he delivered the goods to the carrier in good condition properly prepared for shipment.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. $\S\S$ 578-582, 605; Dec. Dig. \S 132.]

7. CARRIERS \S 134—CARRIER OF GOODS—DELIVERY TO CARRIER—ADMISSION BY CARRIER—"APPARENT GOOD ORDER."

Where meat shipped was delivered to the carrier sealed at plaintiff's plant in plaintiff's own refrigerator car, the bill of lading for the car acknowledging receipt in "apparent good order," contents and condition of contents unknown, and packer's certificate of United States inspection, did not show that the meat was ship-

ped in good order and properly prepared for shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 583-592, 607; Dec. Dig. ¶134.]

For other definitions, see Words and Phrases, First and Second Series, Apparent Good Order.]

8. CARRIERS ¶133—CARRIER OF GOODS—ACTION—ADMISSIBILITY OF EVIDENCE—INHERENT DEFECTS.

Defendant carrier, to prove the meat spoiled from inherent defects or improper preparation, may introduce direct evidence or circumstantial evidence tending to eliminate every other cause.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 583-587, 606; Dec. Dig. ¶133.]

9. CARRIERS ¶136 — CARRIER OF GOODS — QUESTION FOR JURY—INHERENT DEFECT.

Where there is evidence that there was no delay or failure to ice that would cause the meat to decay, the question of the cause of the spoiling of the meat is for the jury, since they could infer such cause was an inherent defect in or improper preparation of the meat.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 478, 596-598; Dec. Dig. ¶136.]

10. CARRIERS ¶133—CARRIER OF GOODS—ADMISSIBILITY OF EVIDENCE — INHERENT DEFECTS.

Evidence by defendant, that the capacity of ice bumpers in plaintiff's refrigerator cars is not sufficiently large to keep the meat cool enough to preserve it from decay, is admissible on the question of proper preparation by the plaintiff of meat for shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 583-587, 606; Dec. Dig. ¶133.]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"To be officially published."

Action by the Cudahy Packing Company against the Atchison, Topeka & Santa Fe Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Thomas R. Morrow, George J. Mersereau, and Slogan Turgeon, all of Kansas City, for appellant. C. E. Cooley, P. E. Reeder, and New, Miller, Camack & Winger, all of Kansas City, for respondent.

TRIMBLE, J. The Cudahy Packing Company shipped from its packing plant in Wichita, Kan., two carloads of fresh meat, one to its branch house in Springfield, Ill., and the other to another of its houses in Pittston, Pa. When the cars arrived at their respective destinations, the meat was spoiled. The packing company brought this suit under the Carmack Amendment to the Hepburn Act against the defendant, as the initial carrier, to recover the loss.

The meat was shipped in Cudahy refrigerator line cars owned and furnished by plaintiff. They were loaded, iced, and sealed by plaintiff at its packing plant and delivered to defendant for transportation under uniform bills of lading signed by both parties. These bills contained instructions, inserted by plaintiff, to re-ice the cars to full capacity at certain stations therein named, adding 12% salt, and to re-ice oftener if delayed.

The petition is in two counts, one for each car, and is based upon the common-law liability of the carrier as an insurer, no negligence being charged; it being merely alleged that the meat, loaded in said refrigerator cars fully iced and at the proper temperature, was delivered to and received by defendant in good condition, but, when delivered by the carrier at destination, was spoiled and badly damaged.

The defendant's answer pleaded, first, a general denial; second, a full compliance with plaintiff's icing instructions; and, third, that the damage, if any, to the meat was caused by its condition, or by its natural tendency to spoil and decay.

The plaintiff introduced evidence tending to show that the cars were delivered to the defendant with the meat in good condition, and that when they were received at destination the meat was slimy and spoiled. The evidence on both sides is to the effect that the cars were transported throughout the entire journey under their original seals, which shows that the doors were not opened in transit nor the interior of the cars disturbed in any way. In fact, it was not intended that the defendant should have, nor did it have, anything whatever to do with the inside of the cars, except to re-ice them. And the instructions to re-ice the cars did not require any entrance into or disturbance of that part of the car containing the meat, since the car was so constructed that the ice receptacles could be replenished from the outside without that.

The evidence of the parties also agrees that the car for Springfield, Ill., left Wichita, Kan., August 19th, at 5:10 p. m. and arrived at Springfield August 21, at 8:45 a. m., and was set at the Cudahy plant for unloading at 11 a. m. of that day. There was no delay en route of this car and the proof is that it went forward by the fastest trains.

Plaintiff's instructions in the bill of lading required the car to be re-iced at Argentine, Kan., and Roadhouse, Ill., and oftener if delayed; but, since there was no delay, the car was not iced except at those two places. Defendant introduced evidence tending to show that the car was iced at these two points in strict accordance with plaintiff's instructions.

The evidence on both sides shows that the car destined to Pittston, Pa., left Wichita, September 11, at 4:30 p. m. and arrived at Pittston and was delivered to the Cudahy plant at that place about 6 o'clock in the morning of September 17th. Plaintiff's instructions in this bill of lading required the car to be re-iced at Argentine, Kan., Ft. Madison, Iowa, Blue Island, Ill., Junction Yards, Mich., and Manchester, Pa., and oftener if delayed. Defendant introduced evidence tending to show that the car was properly iced at all of these places, with the possible exception of Blue Island. The proof of the

icing at that place consisted of reports of the icing foreman attached as exhibits to his deposition which was taken and filed by plaintiff but not introduced by any one. Defendant introduced these exhibits but offered no part of the deposition to identify the reports or to show that they were correct, and the trial court excluded them as not being identified or supported by the testimony of any one.

The car arrived in Pittston 24 hours late; but plaintiff's manager testified that this short delay would not affect the meat if the car was properly iced and salted according to plaintiff's instructions.

At the close of all the evidence the court, upon motion of the plaintiff, struck out all of defendant's evidence as to the icing of the cars en route and all evidence as to the cars at different points along the journey for the reason that all such facts taken together constituted no defense to plaintiff's cause of action. This covered all of defendant's defensive evidence; and, in addition to striking it out, the court instructed the jury, in behalf of plaintiff, to disregard all evidence introduced by defendant as to its compliance with the icing instructions and as to the manner in which the cars were iced en route. Thereupon the court instructed the jury that they must find for the plaintiff on both counts of the petition, but left it to the jury to determine the amount of damages on each count.

[1, 2] Defendant makes the point that the petition fails to state a cause of action in that it contains no allegation of negligence. The contention is that the liability imposed upon the initial carrier by the Carmack Amendment is for damage "caused" by it or by any connecting carrier, and, hence, in a suit under the amendment, the plaintiff must allege negligence. But it has been held by the Supreme Court of the United States that the amendment imposed upon the initial carrier the same liability which the common law imposed. In other words, the common-law rule of liability was not changed by the act. That rule was not limited to negligence, but went beyond that and made the carrier liable for any loss or damage not the act of God or the public enemy. *Adams Express Company v. Croninger*, 226 U. S. 491, loc. cit. 500, 33 Sup. Ct. 148, 57 L. Ed. 814, 44 L. R. A. (N. S.) 257; *Collins v. Denver, etc., R. Co.*, 181 Mo. App. 218, 167 S. W. 1178. The purpose of the act was to make the first carrier liable as at common law. *Storm Lake, etc., Factory v. Minneapolis, etc., R. Co.* (D. C.) 209 Fed. 895, loc. cit. 908; *Missouri, etc., R. Co. v. Harriman*, 227 U. S. 657, loc. cit. 673, 33 Sup. Ct. 397, 57 L. Ed. 690; *Kansas City, etc., R. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 688.

But in course of time an exception to the carrier's common-law liability was added, namely, that, if the property transported became damaged by reason of its own vice or

inherent infirmity, and without fault on the part of the carrier, the latter was not liable. And defendant takes the position that, even in a suit based upon the carrier's common-law liability as an insurer, the real basis of the carrier's liability is negligence; and since fresh meat is of a highly perishable nature and the shipment in the present case is one where the shipper does his own original icing, loading, inspection, closing, and sealing of the car, and the carrier has no opportunity to inspect the meat and nothing to do with the inside of the car, the mere pleading of a delivery to the carrier in good condition and the delivery by it after transportation in a damaged condition should create no presumption of negligence; because the damage is as likely to have been caused by the inherent infirmity of the meat as by any negligence of the carrier. We do not agree with the statement that the real foundation of the carrier's common-law liability is negligence because, unless the loss or damage is shown to have been occasioned solely by some one of the causes which exempts the carrier from liability at common law, the carrier was held liable regardless of the care it took. But even if defendant's contention as to the real foundation of liability in the case of perishable shipments like the one at bar be correct, still the fact that fresh meat was delivered in good condition and properly iced, and was received for shipment by the carrier and was delivered by it in bad condition, would raise the presumption that something occurred to it during transit to produce that condition and, therefore, the carrier, under the common law, would be liable as an insurer, unless it sustained the burden of proof resting upon it to show that the meat deteriorated through its own infirmity. The reasons for holding the carrier to its strict common-law liability in such a case are as strong as in any other case of an unaccompanied shipment, where the means of knowing what has happened to the property in transit are all in the possession of the carrier.

[3-5] Of course, there might be a case where the shipment would be for such a great distance covering such a length of time as that, from the known tendency of meat to spoil in that time, no presumption of fault on the part of the carrier would arise from the mere fact that it spoiled in the time necessarily occupied in the journey; but the petition in the case at bar presents no features of this character. It cannot be presumed that the shipper delivered bad meat to the carrier, nor that the meat spoiled of its own infirmity, in spite of all care to prevent it, in the time these shipments occupied. Under the common law, the burden is on the carrier to show that the loss or damage came within one of the well-recognized exemptions from liability, and, since the burden is on it to show this, the shipper does not have to allege and prove neglect on the part of the

carrier. A prima facie case is made by showing a delivery, in good condition and properly packed, to the carrier and the subsequent delivery after transportation in bad condition. *Collins v. Denver, etc., R. Co.*, 181 Mo. App. 213, 167 S. W. 1178; *Stiles v. Louisville, etc., R. Co.*, 129 Ky. 175, 110 S. W. 820, 18 L. R. A. (N. S.) 86, 130 Am. St. Rep. 429; *Lindsley v. Chicago, etc., R. Co.*, 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692; *Chicago, etc., R. Co. v. Woodward*, 164 Ind. 360, 72 N. E. 558, 78 N. E. 810; *St. Louis, etc., R. Co. v. Kilberry*, 88 Ark. 87, 102 S. W. 894; *Dow v. Portland Steam Packet Co.*, 84 Me. 490, 24 Atl. 945; *Toledo, etc., R. Co. v. Hamilton*, 76 Ill. 393; *Swiney v. American Express Co.*, 144 Iowa, 342, 115 N. W. 212, 122 N. W. 957; *Railway Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; 6 Cyc. 876, 517, 519; *Hurst v. St. Louis, etc., R. Co.*, 117 Mo. App. 25, loc. cit. 36, 94 S. W. 794; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199; *Yontz v. Missouri Pac. Ry. Co.*, 174 Mo. App. 482, 160 S. W. 832; *Grier v. St. Louis, etc., R. Co.*, 108 Mo. App. 565, 84 S. W. 158; *Dean v. Toledo, etc., R. Co.*, 148 Mo. App. 428, 128 S. W. 10.

But it is said that plaintiff in its evidence in chief attempted to show the cause of the damage to the meat by showing that its icing instructions were not properly carried out by defendant on the journey and thereby assumed the burden of showing negligence, and will, therefore, be held to that theory on appeal. We have examined the record and find that plaintiff was not basing its cause of action upon a failure to ice, or upon any negligent conduct. In proving that it delivered the meat in good condition properly packed and iced, and that it was received in a bad condition, some evidence did develop tending to show that the cars were not properly iced en route; but it came out as a part of the conditions present in the car when delivered at destination, and this evidence was offered to show delivery in bad condition, and the facts and circumstances which came out along with it, which had a tendency to show negligence, were wholly insufficient to show an election or intention on the part of plaintiff to base its cause of action on negligence. The plaintiff did not, therefore, try its case upon a theory different from that presented by its petition.

[6] But although the burden is on defendant to show that the loss arose through one of the causes for which a shipper is exempt as an insurer, yet the plaintiff has the prior burden of showing that it delivered the meat to the defendant in good condition, properly prepared for shipment. While the burden is on defendant to establish nonliability as an insurer, yet that burden does not arise until after the shipper has, by proof, established the facts necessary to create that burden. In this case, plaintiff's petition alleged that it delivered to the carrier the meat loaded in the shipper's own cars, known as Cudahy Re-

frigerator Cars, and that each car, thus loaded with meat, "was properly filled with ice and at the proper temperature, and that said meat was in good marketable condition." Under these allegations, it was incumbent upon plaintiff to prove these facts, and it introduced evidence to establish them. The defendant did not admit these facts but denied them. The general denial in the answer raised an issue as to them making it incumbent on plaintiff to prove them. Hence, unless the bills of lading contained a written admission on the part of the defendant that the meat was in good condition and properly iced and packed for shipment, the court could not give a peremptory instruction to find for plaintiff because this would be tantamount to telling the jury it must believe plaintiff's evidence as to the good condition and proper icing by plaintiff. It is contended that the bill of lading contains such an admission, but we do not think so.

[7] It will be borne in mind that these shipments were in plaintiff's own cars; that they were loaded, iced, and sealed by plaintiff at its packing plant and delivered for shipment as a sealed car, and that defendant had nothing to do with the inside thereof. The bill of lading only acknowledged receipt of the property "in apparent good order, contents and conditions of contents of packages unknown." As the evidence shows that the cars were loaded, iced, and sealed by plaintiff before delivery to defendant, the bill of lading cannot be said to contain an admission that the meat was properly iced nor that it was in good condition itself; otherwise there is no meaning to be given to the word "apparent." Indeed, when the bills of lading were offered in evidence, plaintiff disclaimed any other purpose in offering them except "for the purpose of showing receipt of the goods by the Santa Fé and for no other purpose." Neither does the certificate of the Cudahy Packing Company, placed on the bill of lading by it, that the meats had been inspected according to Act of Congress and "are sound, healthful, wholesome, and fit for human food" bind the defendant. That was simply a certificate signed only by the shipper and not by the defendant, and did not relieve plaintiff of the necessity of proving that the meat was in good condition and had been properly iced for the beginning of the journey; and plaintiff, at the trial, recognized this by offering evidence to establish those facts otherwise. It was error, therefore, to tell the jury that plaintiff's evidence was that the meat was in good condition, properly packed, iced, and was of the right temperature when delivered to defendant.

[8] This was a shipment in a sealed car of plaintiff's own make and choosing, and defendant had nothing to do with the inside thereof, except to follow the icing instructions. The defendant, as a common carrier,

did not insure against the meat spoiling from its inherent tendency to decay, not influenced, affected, or brought about in any way by any failure of defendant to perform its public duty. Therefore the defendant should have been permitted to lay before the jury any competent evidence which would tend to show that the meat spoiled solely because of its own tendency. The defendant is not required to prove this by evidence of an express and positive character directly to that effect. It may be shown by circumstantial evidence which tends to eliminate every possible cause but that. And, in this case, the meat's inherent tendency to decay includes a failure on the part of plaintiff to properly pack, ice, and prepare the meat for shipment in a proper car with proper icing instructions; because, the plaintiff having undertaken these, if the meat spoils because of the inefficiency of such things, the meat has spoiled from its inherent tendency so far as defendant's liability is concerned. Where there is evidence tending to show that the meat spoiled from its own tendency, either by direct evidence to that effect, or by circumstantial evidence which tends to eliminate every other cause but that, it is for the jury to say whether defendant should be held liable or not; because if the meat did spoil from its own tendency, unaffected by any failure of duty on the carrier's part, then, under the law, defendant did not insure against that.

[9] There was no delay as to one of the cars, the one going to Springfield; and as to the other, although there was a delay of 24 hours, yet plaintiff's evidence is to the effect that this would have no effect on the meat if plaintiff's icing instructions were followed. It being conceded that the meat was shipped in plaintiff's own cars, that they were inspected, iced, loaded, closed and sealed by it, that they moved forward without any delay (that is, at least none sufficient to cause decay if instructions were obeyed), and that the cars went forward to destination with seals unbroken, it would seem that the decay of the meat arose either because the defendant failed to follow icing instructions, or because of the meat's inherent tendency to decay. If the meat decayed from the former cause the defendant would be liable; if it decayed from the latter cause, the defendant would not be liable. If the defendant introduced testimony tending to show that it followed icing instructions strictly *and the jury believed that it did so follow them*, then, since under the circumstances of this case every other reasonable cause for the decay of the meat is excluded except its natural tendency, the jury would have the right to say that the meat spoiled from the latter cause and that the defendant was not liable. And where defendant introduces evidence which, either directly or by a process of elimination, tends to show that the decay

arose through the meat's own infirmity, or to create a reasonable inference to that effect, unaffected by any failure of the carrier's public duty, then the question is for the jury to say whether the meat did or did not spoil from its own tendency. In short, whenever the evidence is in such condition that the jury can reasonably draw the inference either that the meat was not spoiled, or that, if spoiled, it was caused by plaintiff's improper packing, icing, or instructions, or because of its inherent tendency, unaffected by anything in the carrier's treatment or conduct, then the question of the latter's liability is for the jury. *Funsten Fruit Co. v. Toledo, etc.*, R. Co., 163 Mo. App. 426, 143 S. W. 839; *Blake v. St. Joseph, etc.*, R. Co., 159 Mo. App. 405, 141 S. W. 24; *Thompson v. Quincy, etc.*, R. Co., 136 Mo. App. 404, 117 S. W. 1193.

[10] The evidence, offered on the part of the defendant, tending to show that the capacity of the ice bunkers in the Cudahy refrigerator cars is not sufficiently large to keep the meat at the proper point of refrigeration so as to preserve it from decay, should have been admitted; since it went to the question of whether the plaintiff had properly done its part in preparing the shipment, and also whether the meat spoiled from this cause and not because of any fault on the part of the carrier.

The judgment is reversed and the cause is remanded. All concur.

BUSH v. BLOCK et al. (No. 12026.)

(Kansas City Court of Appeals. Missouri.
June 12, 1916.)

1. JUDGMENT \S 683 — CONCLUSIVENESS — MATTERS INVOLVED.

A judgment in suit on a note was conclusive as to all facts involved therein in a suit by the assignee of the judgment to foreclose the interest of the maker of the note in the policy of life insurance assigned to secure the note.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1206; Dec. Dig. \S 683.]

2. JUDGMENT \S 614(2)—JUDGMENT FOR DEBT — REMEDY BY ENFORCEMENT OF LIEN.

The obtaining of a general judgment for a debt does not bar the remedy for the enforcement of a lien upon the security for the debt.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1127; Dec. Dig. \S 614(2).]

3. INSURANCE \S 222 — LIFE POLICY—RIGHT OF ASSIGNEE.

The assignee of a life insurance policy taken as security for the insured's note had the right, upon insured's refusal to pay further premiums, to convert the policy into a paid-up policy, upon notice to the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 492; Dec. Dig. \S 222.]

4. INSURANCE \S 222 — ASSIGNMENT OF LIFE POLICY—OBLIGATION TO PAY PREMIUMS.

The assignment of a life insurance policy as security for a note did not relieve the insured of the obligation to pay premiums.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 492; Dec. Dig. \S 222.]

5. INSURANCE §222 — NECESSARY PARTY — STATUTE.

Under Rev. St. 1909, § 1732, providing that any person who has or claims an interest in a controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved, may be made a defendant, in suit by an assignee of judgment on a note to foreclose insured's interest in a life policy assigned by him as security for the note, which policy, upon insured's failure to pay premiums, the holder of the note converted into a paid-up policy, the insurance company, not claiming an interest, was not a necessary party.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 492; Dec. Dig. §222.]

6. LIMITATION OF ACTIONS §168—STATUTE OF LIMITATION — LIEN ON LIFE INSURANCE POLICY.

The lien on a life policy assigned to secure insured's note is regarded as an incident thereto, and, so long as the debt for which the security is given is kept alive, the lien remains alive, and suit to foreclose is not barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 654; Dec. Dig. §168.]

7. ALTERATION OF INSTRUMENTS §29—LIFE INSURANCE—ASSIGNMENT OF POLICY—SUFFICIENCY OF EVIDENCE.

In suit to foreclose insured's interest in a life policy assigned to secure his note, evidence held sufficient to show that the words "or when payment is demanded" were in the assignment when it was signed.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 259-263; Dec. Dig. §29.]

8. PARTIES §52—AMENDMENT—NEW PARTY—STATUTE.

Under Rev. St. 1909, §§ 1848, 1849, 1854, 1857, permitting amendments before final judgment by bringing in new parties, etc., in suit to foreclose insured's interest in a life policy assigned to secure his note, amendment of the petition, after submission of the case, to bring in as a party insured's attorney, to whom insured assigned after submission, was allowable where the new facts alleged were not inconsistent with the facts on which the case was tried, being merely those arising since submission and not affecting the issues, but possibly affecting the validity of any judgment that might be rendered for plaintiff.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 83; Dec. Dig. §52.]

9. PARTIES §59(2)—SUBSTITUTION OF PARTY—STATUTE.

By Rev. St. 1909, § 1924, touching substitution of parties upon transfer of an interest, in suit to foreclose insured's interest in a life policy assigned as security for a note, insured's attorney, upon assignment by insured to him after submission of the case, could be substituted as defendant for insured.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 91, 92; Dec. Dig. §59(2).]

10. PARTIES §63 — AMENDMENT — SUBSTITUTION OF PARTY.

As a general rule, the substituted party takes up the litigation where the original party left it.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 99; Dec. Dig. §63.]

11. APPEARANCE §24(5)—GENERAL APPEARANCE—SUBSTITUTED PARTY—FAILURE TO ISSUE AND SERVE SUMMONS.

The fact that no summons was issued and served upon a party made a defendant after sub-

mission of the case upon assignment to him of the subject-matter could not be relied upon by him to destroy the judgment rendered, where, by filing motion to strike out the amended petition, he voluntarily entered his general appearance to the merits of the case, such an appearance being in fact general, though the moving party says his appearance is special only, the motion filed being an absolute submission to the jurisdiction of the court.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 126; Dec. Dig. §24(5).]

12. DEPOSITIONS §90—USE AS EVIDENCE—PRESENCE IN COURT OF DEPONENT.

In suit to foreclose insured's interest in a life policy assigned by him as security for his note, the exclusion of insured's deposition taken by plaintiff, a notary public, was proper where insured was in court and was himself called to the stand and allowed to testify.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 248-255, 258-260; Dec. Dig. §90.]

13. EVIDENCE §211 — ADMISSION BY CALLING WITNESS—DEPOSITION.

The taking of defendant's deposition by a notary public who was plaintiff in the suit did not constitute defendant plaintiff's witness, so as to make his statements admissions of plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 738-744; Dec. Dig. §211.]

14. WITNESSES §178(1) — COMPETENCY — TRANSACTIONS WITH DECEDENT—WAIVER.

In suit to foreclose insured's interest in a life policy assigned by him as security, the taking of insured's deposition by the assignee of the widow of the deceased and original holder of the note waived insured's incompetency as a witness, on account of the holder's death, to testify concerning transactions had with the latter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 722-724; Dec. Dig. §178(1).]

Appeal from Circuit Court, Jackson County; E. E. Porterfield, Judge.

"To be officially published."

Suit by Charles M. Bush against Maurice Block and another. From a judgment for plaintiff, defendants appeal. Affirmed.

F. Titus and S. A. Dew, both of Kansas City, for appellants. R. W. Crimm and Chas. M. Bush, both of Kansas City, for respondent.

TRIMBLE, J. This suit in equity was brought originally against the defendant Block alone, to foreclose his interest in a policy of life insurance for \$2,000 issued to said Block by the Equitable Life Assurance Society of the United States, dated July 18, 1891. The foreclosure was sought upon the ground that the policy had been assigned as security for a debt now held and owned by plaintiff, and which defendant Block had failed to pay.

It seems that on October 30, 1896, Block executed to John P. Loomas his promissory note for \$500 due December 30th, after date, bearing 8 per cent. interest from date until paid; that Block delivered to said Loomas, as security, the aforesaid policy of insurance with the following assignment or mortgage attached thereto:

"Kansas City, Mo., Dec. 22, 1896.

"I hereby assign policy number 540329, which is hereto attached, to J. P. Loomas, his heirs and assigns, as his interest may appear.

"This assignment is made to protect said J. P. Loomas against loss on my note for (\$500.00) five hundred dollars, which he holds, and also to protect him against loss by reason of his indorsement on the note of the M. Block Produce Co. now held by the American Nat. Bank for (\$900.00) nine hundred dollars. These notes will be reduced from time to time and the assignment of this policy is made to protect and pay these notes for whatever amount remains unpaid at my death, or when payment is demanded.

"[Signed] Maurice Block."

Afterwards, in May, 1901, Loomas died leaving a will in which his widow was made residuary legatee. While the said note, policy, and assignment were in the hands of the executrix of the will as a part of the assets of said estate, said Block appeared before a notary public (plaintiff herein) on the 5th of December, 1902, and acknowledged the assignment to be his free act and deed, and the certificate of said acknowledgment was duly indorsed upon said assignment. After Loomas' estate was duly settled in the probate court, said \$500 note, with the security therefor, passed to and became the property of said widow, Mary I. Loomas, on November 25, 1903.

It seems that the premium on the policy due October 2, 1903, was not paid, and, as Block could not be induced to pay further premiums, the policy was, after due notice to Block, forwarded to the company to be converted into a paid-up policy, in accordance with the terms thereof, for as many twentieths of the original policy as there were complete annual payments made, and the insurance company accordingly converted said policy into a paid-up policy for \$1,200. This was done April 29, 1904.

Afterwards, Mrs. Loomas brought suit on said note against Block in the circuit court of Jackson county, Mo., in which personal service was obtained, and judgment in her favor was rendered March 7, 1907.

On August 31, 1906, Mrs. Loomas assigned, in writing, said judgment and also all interest in the policy (now changed to a paid-up policy for \$1,200) to the plaintiff, Charles M. Bush. He instituted the present suit to foreclose on April 25, 1914. The defendant Block, through his counsel Frank Titus, filed an answer setting up various defenses which will be stated and considered later. The cause was heard at the September term, September 29 and 30, 1914, and was taken under advisement. At the time of the institution of the suit on down to and during the hearing of the case and after the submission to the court, the defendant Block was the sole owner of the equity of redemption in said policy. While said cause was being held by the court under advisement and waiting for briefs, the defendant Block, on October 7, 1914, executed a bill of sale attempting to transfer and assign said policy to his said attorney Titus. Thereupon, on October 16,

1914, at the same term, plaintiff filed an amended petition which stated the same cause of action as the original petition, but which made Titus a defendant also, and alleged that defendant Block was the sole owner of the equity of redemption in the policy down to and after the taking of the case under advisement, and that, while said case was so under advisement, said Block, for a consideration of \$1, had assigned said policy to said Titus, who received same with full knowledge of plaintiff's rights and of the proceedings in the trial of the case, and that the purpose of said assignment was to take the title to said equity of redemption out of defendant Block and beyond the scope of any judgment that might be rendered, making it necessary that said Titus be made a party, and praying, in addition to the prayer of the former petition, that Titus be enjoined from transferring the equity of redemption to other persons, and thereby render it impossible to secure an adjudication of plaintiff's rights and cause him irreparable injury, since Block was insolvent and could not be compelled to respond in damages. The court set the hearing on the restraining order for October 17, 1914, after bond had been filed and approved. On that day the hearing was reset for October 20, 1914. On October 19, 1914, defendant Frank Titus appeared and filed motion to strike out the amended petition, which was taken under advisement by the court and on January 16, 1915, was overruled; the defendant Titus excepting. The case was then set down for further hearing on March 22, 1915, at which time defendant Block appeared by his counsel Titus, but the latter for himself individually declined to plead to the amended petition and was adjudged to be in default. At the final hearing on this date, defendant Block, through his attorney Titus, disclaimed any desire to have further time to introduce evidence. Whereupon the plaintiff introduced evidence showing the transfer to Titus after the submission of the case. No evidence was offered in behalf of either defendant upon this branch of the case. The court thereupon rendered judgment in favor of plaintiff, finding that plaintiff had a lien or mortgage on the policy superior to the rights of said defendants, and that the title of Titus was subject to the rights of plaintiff; that there was due on the indebtedness to plaintiff the sum of \$1,303.43. The court then decreed that the equity of redemption in the policy be foreclosed, and that defendants and each of them be restrained and enjoined from disposing of the policy, and that defendant Block take nothing on account of his counterclaim. Both defendants appealed.

[1, 2] The point that the original petition failed to state facts sufficient to constitute a cause of action is without merit. A number of objections are made to the petition, each on the ground that it fails to state a certain fact, but a reading of the petition

discloses that the claim that such facts are omitted is groundless. Other facts which defendants claim were not stated were not necessary to be stated in view of the general judgment obtained against Block on said \$500, which was pleaded in the petition, and which judgment conclusively settled all facts involved therein. One of the objections, however, deserves special notice. It is contended that Mrs. Loomas and plaintiff as her assignee must be deemed to have elected, as a matter of law, to look to the defendant Block in person and not to the security offered by the policy because the right to foreclose was lost by suing Block personally on the note. The rule, however, is that the obtaining of a general judgment for a debt does not bar the remedy for the enforcement of a lien upon the security for that debt. *Funk v. Seehorn*, Adm'r, 99 Mo. App. 587, loc. cit. 600, 74 S. W. 445; *Maffat v. Greene*, 149 Mo. 48, 50 S. W. 809; *Board of Trustees v. Fry*, 192 Mo. 552, loc. cit. 561, 91 S. W. 472; *McCauley v. Brady*, 123 Mo. App. 558, loc. cit. 563, 100 S. W. 541; 23 Cyc. 1193. Nor does the amended petition state any different cause of action, as to the foreclosure sought, from the original. A comparison of the two amply demonstrates this.

[3, 4] The assignee of the policy had the right, upon Block's refusal to pay further premiums, to convert it into a paid-up policy. Block, in the policy, contracted to pay the premiums. The value and life of the policy depended upon their regular payment. If premiums stopped, the only right, of value under the policy, was to have it converted into as many twentieths of its face value as there were premiums paid. The assignment of the policy to Loomas as security for the note did not relieve Block of the obligation to pay premiums. *Grant v. Alabama Gold Life Ins. Co.*, 76 Ga. 575; *In re Davison* (D. C.) 179 Fed. 750; 25 Cyc. 774, 775; *Killoran v. Sweet*, 72 Hun, 194, 25 N. Y. Supp. 295, affirmed 144 N. Y. 703, 39 N. E. 857; 19 Am. & Eng. Ency. of Law (2d Ed.) 88. It was still his duty to pay them. From 1902 there was difficulty in getting Block to pay them. Finally, in October, 1903, he refused to pay any longer, and, in 1904, he was notified in writing that on a certain date Mrs. Loomas would apply to the insurance company for a paid-up policy. On default in the payment of premiums the policy could be converted into a cash surrender value or into paid-up insurance. Of course, the former would be much smaller than the latter. With Block refusing to pay premiums, Mrs. Loomas was in a position where she must either pay the premiums herself or take the cash surrender value or a paid-up policy. If she paid the premiums, there was no telling how long she would be compelled to do so, and, if the insured lived long, the premiums would equal or exceed the policy, and the debt would still be unpaid. Mrs. Loomas was under no obligation to pay them. She

therefore, upon notice to Block, had it converted into a paid-up policy, which she had a right to do. *In re Davison* (D. C.) 179 Fed. 750; 25 Cyc. 775, 776. As said by Jackson, J., in *Grant v. Alabama, etc., Ins. Co.*, 76 Ga. 575, loc. cit. 582:

"It would be manifestly unjust to give a security, kill it by failure to keep it alive by feeding it, and then claim a judgment * * * for his own wrong."

The reason the policy is now a paid-up policy for \$1,200, instead of a going policy for \$2,000, on which the obligation to pay premiums would still continue, is because of Block's failure to perform his duty in keeping up his premiums. Hence he cannot take advantage of his own wrong nor demand damages on a counterclaim for the conversion of the policy into a paid-up policy for \$1,200. And, as we have seen, Mrs. Loomas had the right to have it changed under the circumstances.

[5] This leads us to another contention of defendants closely related to the one just considered. That is that the insurance company was a necessary party to this proceeding. Under the statute, any person who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved, may be made a defendant. Section 1732, R. S. Mo. 1909. But the insurance company neither has nor claims an interest in this controversy either adverse to or in favor of plaintiff, nor is it a necessary party to a settlement of the question in this suit. That question is whether plaintiff has a lien on the policy for the debt, and whether that lien shall be enforced by foreclosure. The insurance company was not a party to the assignment, nor is it interested in the subject-matter of the suit, viz., the policy, or in the ownership thereof. Even if it were or had been made a party, it could not be required to change the policy from \$1,200 back to \$2,000, since, by virtue of Block's refusal to pay premiums, the obligation and liability of the insurance company have become fixed. Besides, for a better reason, any such claim on the part of Block against the insurance company, even if it had been asserted, would be outside the scope of this suit. The insurance company was not a necessary party. *Baldwin v. Jordan* (Tex. Civ. App.) 171 S. W. 1016, loc. cit. 1017.

[6] Nor was the present action barred by the statute of limitation. The lien or mortgage on the policy to secure the note is regarded as an incident thereto, and so long as the debt, for which the security is given, is kept alive, the lien remains alive. *Johnson v. Johnson*, 81 Mo. 331, loc. cit. 336; *Berryman v. Becker*, 173 Mo. App. 346, loc. cit. 356, 158 S. W. 899.

[7] It is claimed that the assignment has been fraudulently altered, in that the concluding words "or when payment is demand-

ed" were added after its execution. But there is no evidence showing that these words were added after the document was signed. Block swore he did not read the assignment when it was signed. He therefore could not say whether the words were there or not. Every handwriting expert says the words are in the same handwriting as the rest of the paper. There is sufficient evidence to show that these words were in the assignment when it was signed. The evidence is that Mr. Loomas wrote the assignment, and consequently he wrote the words said to have been added. Before Mr. Loomas' death, Block wrote him one or two letters which, in effect, are admissions that Loomas did not have to wait until Block's death to realize on the note or to foreclose the policy. In addition to this, after Mr. Loomas' death, which was clearly after the words could possibly have been put in there, since they were in Loomas' handwriting, Block acknowledged the assignment as it now appears before a notary public. The fact that said notary public now happens to be the plaintiff herein makes no difference. At that time he had no interest in said assignment.

[8-10] It is also urged that the court had no authority to allow the amended petition to be filed after the case had been tried and submitted. As heretofore stated, the only addition made to the original petition by the amended one was to make Titus a party and set up the transfer to him of the title to the equity of redemption since the substitution. It was perhaps necessary to the validity of any judgment that might be rendered in plaintiff's favor that Titus be made a party. Section 2835, R. S. Mo. 1909; *McMuley v. Brady*, 123 Mo. App. 558, 100 S. W. 1. But Titus did not become a necessary party until after the submission of the case and did so with the most full and complete notice of plaintiff's rights and claims. The amendment was allowable. *Pratt v. Walther*, Mo. App. 491. And it could be made even after submission of the case. Sections 1848, 49, R. S. Mo. 1909; *Reyburn v. Mitchell*, 3 Mo. 365, 379, 16 S. W. 592, 27 Am. St. p. 350; *O'Fallon v. Clopton*, 89 Mo. 284, 3 S. W. 302; *Coats v. Elliott*, 23 Tex. 606. In reality, the amendment was a substitution of Titus for Block, and the former could be substituted for the latter. Section 1924, R. S. Mo. 1909. As a general rule, the substituted party takes up the litigation at the point where the original party left it. 20 Ency. of & Pr. 1061; *Wellman v. Dismukes*, 42 Mo. 1; 2 Am. & Eng. Ency. of Law, 1079. The amended petition was confined to the same subject-matter as before. The new facts alleged were not inconsistent with the facts on which the case was tried. Indeed, the same facts were alleged, and the new facts were only those arising since the submission of

the case and in no way affecting the issues involved, but did perhaps affect the validity of any judgment that might be rendered for plaintiff. Hence the amendment was proper. Sections 1848, 1854, and 1857, R. S. Mo. 1909; *Cohn v. Souders*, 175 Mo. 455, 467, 75 S. W. 413; *Ward v. Davidson*, 89 Mo. 445, 453, 1 S. W. 846.

[11] The fact that no summons was issued and served upon Titus cannot now be relied upon by him to destroy the judgment rendered; for, by filing a motion to strike out the amended petition, he voluntarily entered his general appearance. This motion did not go to the jurisdiction of the court over him nor to the question of service or lack of service. It went to the merits of the case. Such appearance is, in effect, general, even if the moving party says his appearance is special only. *Edgell v. Felder*, 84 Fed. 69, 28 C. C. A. 382; *Wicecarver v. Mercantile, etc., Ins. Co.*, 137 Mo. App. 247, 255, 117 S. W. 698. The motion filed was an absolute submission to the jurisdiction of the court, and that made the appearance general. 3 Cyc. 502, 503, 511; *Thomasson v. Mercantile Town Mut. Ins. Co.*, 114 Mo. App. 109, 115, 89 S. W. 564, 1135. By challenging the sufficiency of the amended petition the defendant Titus entered his general appearance whether he intended to do so or not. *King v. Hyatt*, 51 Kan. 516, 34 Pac. 461; 3 Cyc. 504, 508, 509; *Albert v. Olarendon Land, etc., Co.*, 53 N. J. Eq. 623, 23 Atl. 8; *Welch v. Ayres*, 43 Neb. 326, 61 N. W. 635; *Pry v. Hannibal, etc., R. Co.*, 73 Mo. 123, 127; *State ex rel. v. Grimm*, 239 Mo. 135, loc. cit. 174, 143 S. W. 483. See, also, *Tower v. Moore*, 52 Mo. 118, loc. cit. 120.

[12-14] The exclusion of the defendant Block's deposition taken by plaintiff was not error. Defendant offered the deposition; but, upon the attention of the court being called to the presence of Block, the deposition was excluded and Block himself called to the stand and allowed to testify. The taking of Block's deposition did not constitute him plaintiff's witness so as to make his statements admissions of plaintiff. The taking of said deposition waived Block's incompetency, on account of Loomas' death, to testify concerning transactions had with the latter. But the matters Block desired to testify about, which were excluded, were matters which the judgment on the notes rendered in Mrs. Loomas' favor had made res adjudicata. These were that he had paid the note to Loomas; that the note should have been made to the American National Bank; that Loomas suffered no loss on account of the note, etc.

Other objections are made to the decree, but we think they are covered by the foregoing.

The judgment is affirmed. All concur.

CITIZENS' BANK OF SENATH v. DOUGLASS et al. (No. 1548.)

(Springfield Court of Appeals. Missouri.
June 17, 1916.)

1. EVIDENCE \S 183(14)—DOCUMENTARY EVIDENCE—COPY—LOSS OF ORIGINAL.

In a bank's action on a note, where the testimony was sufficient to justify the conclusion that its cashier, when agreeing with the maker and certain third persons that such third persons would pay the note, was acting for the bank, and a letter of such third person to the bank, stating that the cashier and another party had assumed the payment of the note, and that he also agreed to pay it if they did not, was found among the cashier's personal letters, the loss of the original was properly accounted for, and there was no error in the admission of a copy thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 615, 634; Dec. Dig. \S 183(14).]

2. TRIAL \S 25(4)—ARGUMENT—RIGHT TO OPEN AND CLOSE.

In a bank's action on a note, where the defendants admitted execution and delivery of the note, but did not admit the ownership and nonpayment, and where plaintiff voluntarily assumed to prove such facts, but they were not made issues in the case either by the pleadings or by the conduct of defendants at the trial, defendant had the right to open and close.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 47, 60-75; Dec. Dig. \S 25(4).]

3. TRIAL \S 129—REMARKS OF COUNSEL—INVITATION—ESTOPPEL.

Where an alleged objectionable remark by defendants' counsel in his closing argument was made in answer to an improper argument on behalf of plaintiff, the latter cannot urge it as error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 310; Dec. Dig. \S 129.]

4. APPEAL AND ERROR \S 261 — REVIEW — REMARKS OF COUNSEL—EXCEPTION.

It is essential for a review by an appellate court as to improper remarks of the counsel in argument, that there be an exception to the court's refusal to reprimand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1500; Dec. Dig. \S 261.]

5. APPEAL AND ERROR \S 1064(1)—HARMLESS ERROR—INSTRUCTIONS.

In an action on a note, where the defense which the plaintiff bank set up to the alleged extension of time of payment was that its so-called cashier was not in fact its cashier when the extension was made, and where, if he was then cashier, he was authorized to make the extension, an instruction for defendants that if the cashier undertook or agreed to extend the note, he was estopped to deny his authority therefore, though erroneous, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4219; Dec. Dig. \S 1064(1); Trial, Cent. Dig. \S 475, 525.]

Appeal from Circuit Court, Bollinger County; Peter H. Huck, Judge.

Action by the Citizens' Bank of Senath against W. H. Douglass and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Bradley & McKay, of Kennett, for appellant. W. H. Douglass, of St. Louis, and W. M. Morgan, of Marble Hill, for respondents.

ROBERTSON, P. J. This case has been before the St. Louis Court of Appeals, 178 Mo. App. 664, 161 S. W. 601. The facts were there stated. After the case reached the circuit court of Dunklin county from that appeal a change of venue was taken and the cause sent to Bollinger county, where, upon a jury trial, a verdict was returned for defendants, and plaintiff has appealed. The St. Louis Court of Appeals decided that where third parties agreed with the makers of a note, for a valuable consideration, to assume and pay the note and the payee thereafter extends it for said parties so assuming without the knowledge or consent of the makers, that thereby the makers of the note are released, but not by reason of anything found in our present negotiable instrument law. Since then that court has reaffirmed that doctrine. *Calloway v. McKnight*, 180 Mo. App. 621, 624, 163 S. W. 932; *Moore v. McHaney*, 191 Mo. App. 686, 694, 178 S. W. 258. Upon this theory of law the case was retried, after defendants filed an amended answer, resulting as above stated. The facts which were before the St. Louis Court of Appeals and upon which it based its judgment are not materially different than those developed at the trial which is now before us for review. Most of the objections now submitted to us in behalf of the plaintiff have been disposed of adversely to it in the opinion of that court, hence we shall undertake to refer only to such questions as may be necessary in passing upon the new points made.

It is urged that there is no evidence that Canear ever extended the time of payment of the note or that he had any authority to do so. The St. Louis Court of Appeals held that this contention was untenable, and while the testimony upon which it was so held was not fully set out, we apprehend that it was of no less weight than what is submitted here. We are of the opinion that what is before us is sufficient to show his authority.

[1] In the last trial there was offered in evidence a copy of a letter from Gardner to the plaintiff bank stating that, Canear and Gillespie having assumed the payment of the note, he also had agreed to pay it on September 11, 1909, in the event Canear and Gillespie did not. The insistence is made that this copy should not have been offered in evidence without showing that the original had been sent to or received by the bank. Since it has been held that the testimony was sufficient to justify the conclusion that Canear, when the transaction was had in St. Louis, was acting for the bank and the letter of which this was a copy was afterwards found among his personal letters the loss of the original was properly accounted for, and we hold there was no error in the admission of this copy.

It is unnecessary for us to notice the ob-

jections now urged to the instructions given to the jury, as all of the points now made against them have been settled adversely to the plaintiff by the decision of the St. Louis Court of Appeals.

[2] In addition to the alleged error in the admission of the copy of the letter it is said that the appellant had the right to open and close the argument, which was requested and refused. The defendants admitted the execution and delivery of the note, but it is asserted that they did not admit the ownership, and that the note was unpaid. In this we think the contention is defective. The plaintiff appears to have voluntarily assumed to make the proof of these two facts, but they were not made issues in the case; neither under the pleadings nor by the conduct of defendants in the trial. Unquestionably the opening and closing of the argument to the jury was properly allowed in behalf of the defendants.

[3] It is earnestly urged in behalf of the appellant that reversible error was committed by the trial court in not properly rebuking an argument made in behalf of defendant in the closing remarks in the last address to the jury. These remarks were addressed to something that had been previously said to the jury in an argument before it in behalf of the plaintiff. What those remarks were that had previously been made is not disclosed by the record. The counsel for the plaintiff objected to the statement in behalf of defendants and asserted that there was nothing in the evidence to warrant such a statement. The trial judge said he knew of no such fact developed by the evidence; the counsel for the plaintiff requested the court to rebuke counsel for defendant; the attorney for defendant then said that the attorney for the plaintiff had gone out of the record and that he was only finishing what the attorney for the plaintiff began. Then the attorney for the plaintiff stated: "Well, we are objecting and excepting to that statement. We only want to make our record." The trial judge remarked that he remembered no such facts and that "you have both said enough. Now, proceed with the argument." Nothing further appears in behalf of plaintiff. From the remarks of the trial judge, and from what is said about the previous remarks in behalf of the plaintiff, and undenied, it is evident that the remarks made in behalf of defendants were made to answer the improper argument in behalf of the plaintiff. Inflammatory remarks thus evoked cannot be made the basis of an error on the part of the party who is first guilty. *Hays v. Estate of Miller*, 189 Mo. App. 72, 82, 173 S. W. 1096; *Yost v. Union Pac. R. Co.*, 245 Mo.

219, 251, 149 S. W. 577; *State v. Snead*, 259 Mo. 427, 433, 168 S. W. 602.

[4] It is also held that it is essential for a review by an appellate court of the matters here complained of by the appellant that there must be an exception to the court's refusal to reprimand. *Tawney v. United Rys. Co.*, 262 Mo. 602, 611, 172 S. W. 8; *State v. Phillips*, 238 Mo. 299, 307, 135 S. W. 4; *Torreyson v. United Rys. Co.*, 246 Mo. 696, 708, 152 S. W. 32, and same case 164 Mo. App. 366, 375, 145 S. W. 106; *Burns v. United Rys. Co.* 176 Mo. App. 330, 336, 158 S. W. 394.

[5] Appellant complains of an instruction given in behalf of defendants, which stated, in substance, that a person cannot undertake to do a thing as an agent of another, which affects the interest of third parties, and after the thing has been done deny his authority, and that, if the cashier undertook or agreed to extend the time of payment of the note, he was estopped to deny his authority therefor, and that the jury should disregard his testimony to the effect that he was not so authorized. This instruction, as an abstract proposition, is erroneous. There might be some reason for holding it otherwise had the cashier been the plaintiff. It is not, however, necessary to reverse and remand a case on every erroneous instruction given. In fact there are few instructions that some defect may not be found therein. Before we reverse and remand a case for this reason we must be convinced that the alleged error was injurious. In this case the defense which the plaintiff set up to the alleged extension of time of the payment of the note was that the so-called cashier was not in fact a cashier of plaintiff bank at the time the extension was made. The cashier's authority to extend the note turned solely on the question of whether or not he was at that time, as a matter of fact, cashier, and if he was he had the authority to make the extension. If he was cashier then, on the theory of the plaintiff, it would have been improper for the jury to consider his statements that he had no authority to extend the time of payment, because its position presupposed his authority if the fact of his official position was established. The error was harmless.

Without discussing the questions now urged here we may say in our opinion the case was tried in perfect harmony with the law as declared by the St. Louis Court of Appeals, and as the jury resolved the facts against the plaintiff it is our duty to affirm the judgment, which is accordingly done.

STURGIS and FARRINGTON, JJ., concur.

TANCRED v. FIRST NAT. BANK OF FT. SMITH. (No. 365.)

(Supreme Court of Arkansas. May 1, 1916.)

1. BILLS AND NOTES \Leftrightarrow 523—**EVIDENCE—LIABILITY ON NOTE.**

In a foreclosure suit, evidence held to show that a defendant signed a note to the plaintiff as accommodation indorser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822-1825; Dec. Dig. \Leftrightarrow 523.]

2. BILLS AND NOTES \Leftrightarrow 242—**INDORSEMENT—BEFORE DELIVERY—JOINT MAKER.**

One indorsing a note before delivery becomes, so far as the face of the note is concerned, a joint maker thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 542, 547, 548, 550, 551; Dec. Dig. \Leftrightarrow 242.]

3. EVIDENCE \Leftrightarrow 423(6)—**PAROL EVIDENCE—LIABILITY ON NOTE.**

One who appears on the face of a note to be a joint maker may show by parol testimony the real fact that he signed only as surety.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1962; Dec. Dig. \Leftrightarrow 423(6).]

4. BILLS AND NOTES \Leftrightarrow 256—**ACCOMMODATION INDORSER—RELEASE—DISCHARGE OF PRINCIPAL.**

An accommodation indorser on a note is released from obligation thereon by release of one of the principal makers by the holder with knowledge of the accommodation indorsement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 581-599; Dec. Dig. \Leftrightarrow 256.]

5. RELEASE \Leftrightarrow 28(1)—**OPERATION—JOINT DEBTORS.**

A release of one of three joint makers of a note, the contract of release containing an express reservation as to the liability of another one of the makers, but making no mention to reserve the liability of the third maker, he not being a party, and not consenting to the release, completely releases him.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 57, 62; Dec. Dig. \Leftrightarrow 28(1).]

Appeal from Sebastian Chancery Court; W. A. Falconer, Chancellor.

Suit by C. W. L. Armour, trustee, against M. T. Tancred and others; the named defendant filing a cross-complaint against the First National Bank of Ft. Smith. From a decree for the bank, said Tancred appeals. Reversed, with directions.

Read & McDonough, of Ft. Smith, for appellant. H. C. Mechem, of Ft. Smith, for appellee.

McCULLOCH, C. J. Harper & Wilson, a partnership composed of George W. Harper and C. P. Wilson, who were engaged in the mercantile business in the city of Ft. Smith, became indebted to the appellee, First National Bank of Ft. Smith, in the sum of \$40,000 for borrowed money, and their indebtedness to other creditors amounted to about the same sum. The partnership owned a large amount of property, both real and personal, and each partner possessed individual property. Harper died in the year 1913, leaving surviving his widow, Annie A. Harper, to whom he be-

queathed and devised all of his property. After the death of Harper, the appellee became desirous of obtaining security for the debt of Harper & Wilson, and the surviving partner, C. P. Wilson, and Mrs. Harper, the widow of George W. Harper, were desirous of giving security and also of obtaining an additional loan of money to use in payments to other creditors. There was a conference between the interested parties, appellee being represented by its president, Mr. Handlin, and C. P. Wilson and the attorney for the firm of Harper & Wilson were present at the conference. Appellant, M. T. Tancred, who is Mrs. Harper's brother, was also present. Wilson stated that he needed \$20,000 in cash to make payment to other creditors sufficient to satisfy pressing demands. His statement was that it would pay about 50 cents on the dollar of the amounts owing to general creditors, and that that would satisfy them for the present, and he offered to execute a mortgage to the bank to secure the indebtedness of \$40,000 to the bank, and also the further sum of \$20,000 which he desired to borrow. Mr. Handlin offered to lend the sum of \$15,000, but said that that was the limit of the amount he was willing to lend, for the reason that he would subject the management of the bank to criticism by the Comptroller of the Currency if as much as \$20,000 additional was loaned. Wilson thought that he could not get along with only \$15,000 in addition to the indebtedness to the bank, as that sum would be insufficient to satisfy the general creditors.

Finally it was suggested by Mr. Handlin to appellant that his credit was good for \$5,000 with the bank, and that that sum would be loaned on his credit, and would make up the additional amount of \$20,000 which was thought necessary to use in the settlement with the creditors of Harper & Wilson. Appellant at first demurred, but finally an arrangement was made whereby the full amount of \$20,000 was advanced. There is some conflict in the testimony as to the precise language used in the conversation, but the substance of the agreement was that \$15,000 was to be loaned directly to Harper & Wilson, and to be secured by a mortgage which also secured the original debt of \$40,000, making a total direct indebtedness of \$55,000 from Harper & Wilson, and that the additional sum of \$5,000 was to be advanced to and to be used by Harper & Wilson, but was to be put in the form of a loan to Tancred, the appellant. This agreement was carried out, and the mortgage was executed to the bank by Wilson, as surviving partner of the firm of Harper & Wilson, and by him individually, and by Mrs. Harper, on real estate of the partnership, and also some owned by Wilson himself, to secure the said sum of \$55,000. A note was also executed in the sum of \$5,000, and signed by Wilson and

Mrs. Harper, and indorsed by appellant. This occurred on May 12, 1913, and on the same date Wilson and Mrs. Harper executed a mortgage to appellant which contained the recital that appellant had "upon his credit obtained from the First National Bank, of Ft. Smith, Ark., the sum of five thousand dollars (\$5,000), which he has loaned to C. P. Wilson and Annie Harper to apply upon debts owing by the late firm of Harper & Wilson," and conveyed the property described in the mortgage to appellant on condition that:

"Should the said C. P. Wilson as surviving partner and C. P. Wilson individually, or Annie Harper, save the said M. T. Tancred harmless from the indebtedness which he has incurred to the First National Bank of Ft. Smith, Ark., for \$5,000 for the benefit of said parties, and pay said indebtedness or cause the same to be paid without any liability upon the said M. T. Tancred, then this conveyance to be of no further force and effect."

The mortgage embraced the property which is embraced in the mortgage to appellee and certain other property owned by Wilson. The mortgage to the bank was placed of record first. The additional funds thus received by Harper & Wilson, including the \$5,000 embraced in the transaction in which appellant was a party, were all placed to the credit of Harper & Wilson on the books of the bank, and checked out by Wilson, as surviving partner, in making payments to other creditors. None of the funds ever, in any form, passed through the hands of appellant, but were, as before stated, placed by the bank directly to the credit of Harper & Wilson.

Subsequently there arose a controversy between appellee and Mrs. Harper as to the latter's right to renounce under the will of George W. Harper, and take her statutory allotment of dower, instead of the provisions of the will, and in settlement of the controversy an agreement was reached whereby certain property of the decedent's estate was released from the mortgage, and Mrs. Harper was released from certain portions of the debts secured by the mortgage in consideration that she would not renounce the will of her deceased husband. A written agreement was entered into, dated September 19, 1914, and among its recitals concerning the debt secured by the mortgage is a recital of the "note of C. P. Wilson and Annie A. Harper to First National Bank, indorsed by M. T. Tancred." The clause releasing Mrs. Harper reads as follows:

"Fifth. That all individual estate of George W. Harper, except said seven lots and stock in the Harper Coal & Coke Company, and the liability of Annie A. Harper for the said debts owned by said bank, including the Parker Distilling Company debt, be and the same is hereby released, in consideration of said Annie A. Harper not renouncing the will of George W. Harper."

The agreement was signed by appellee, and by Mrs. Harper, and also by Wilson, and contained a clause whereby Wilson expressly

consented to the release of Mrs. Harper and the estate of George W. Harper; and an express agreement on the part of Wilson that he would pay the indebtedness of the firm of Harper & Wilson after exhausting the partnership assets for that purpose. Appellant was not a party to that agreement, and there is no evidence showing that he consented thereto. The point of the controversy in the present litigation is whether or not the release of Mrs. Harper by appellee discharged appellant from the obligation.

[1] There is, as before stated, a conflict in the testimony as to the exact language used by the parties when the loan of \$5,000 was procured; but there is no dispute about the fact that the substance of the transaction was the procurement of \$5,000 from the bank for the use of Wilson, as surviving partner of the firm of Harper & Wilson, and of Mrs. Harper, in discharging pro tanto the indebtedness of that firm to general creditors other than the bank itself, which was the heaviest creditor. The sole purpose of placing the loan in the form of an extension of credit to appellant, Tancred, was to satisfy the Comptroller of the Currency and to shield the officials of the bank from any criticism because of having made too large a loan to one party. Whatever may have been the form in which the parties intended to place the loan, it was only in the form of a loan to Tancred, which in fact was made for the use and benefit of Harper & Wilson. The evidence shows that appellant was selected merely as the conduit through whose hands, or rather whose name, the funds were to be conveyed, so as to reach the hands of Harper & Wilson, and the funds were in fact paid over to Harper & Wilson, not through appellant, but directly, by placing the same to the credit of Harper & Wilson on the books of the bank.

[2-4] The recitals in the contract between the bank and Mrs. Harper, releasing her from liability, show that the bank treated Harper & Wilson as the primary debtors, and appellant merely as a surety, because the note is referred to in that instrument as the "note of C. P. Wilson and Annie A. Harper to First National Bank, indorsed by M. T. Tancred." The indorsement by appellant of his name on the note made him a joint maker so far as the face of the note is concerned, but it was competent to show by parol testimony the real facts that he signed only as a surety for the other makers. *Vandeventer v. Davis*, 92 Ark. 604, 123 S. W. 766. The release by the bank of Mrs. Harper, one of the principals, with knowledge of the fact that appellant was merely an accommodation indorser, operated as a release of the latter from the obligation of the contract.

[5] But, even if we discard the testimony showing the real facts as to the transaction and treat appellant as a joint-maker of the note, as he appears to be on the face thereof, still a release of one of the joint makers

releases him from the obligation. This would not be true if the instrument amounted only to a covenant not to sue Mrs. Harper, but it amounts to more than that, and is an unqualified release of Mrs. Harper from the obligation. The distinction between a release of a debtor and a covenant not to sue is fully discussed in the case of *Pettigrew Machine Co. v. Harmon*, 45 Ark. 290, where it was said that in order to have the effect of discharging other obligors a release "must contain a plain and distinct remission of the claim, and in that event parol testimony cannot be heard to show a contrary intention." It is further said that the whole instrument should be considered together in determining whether it was intended by the parties to be a release, and to remit the claim, or merely to create an undertaking not to sue one of the parties. In that case there was an express reservation of liability of the other obligors, and it was held that the effect of the instrument was to constitute merely a covenant not to sue. In the present case the instrument on its face shows all three of the obligors to be joint makers, and in the contract of release there was an express reservation as to the liability of Wilson, one of the makers. There was no mention, however, to reserve the liability of appellant. He was not a party to the instrument and did not consent thereto. An unqualified release of one of his co-obligors necessarily deprived him of the right of contribution and must therefore, as to him, be treated as a complete satisfaction of the obligation. 34 Cyc. 1081; *Carroll v. Corbitt*, 57 Ala. 579; *Hale v. Spaulding*, 145 Mass. 482, 14 N. E. 534, 1 Am. St. Rep. 475.

We are of the opinion, therefore, that the release of Mrs. Harper operated as a discharge of appellant from all liability, whether he be treated as a surety according to the real purport of the transaction, or whether he be treated as a joint maker of the note according to the face thereof.

The decree is reversed, with directions to enter a decree in favor of appellant.

PARKER et al. v. FRIERSON, Chancellor.
(No. 40.)

(Supreme Court of Arkansas. June 5, 1916.)

1. DISMISSAL AND NONSUIT — STATUTORY PROVISIONS.

Kirby's Dig. § 6168, providing for the plaintiff's dismissal of an action in the clerk's office during vacation, does not authorize the entry of a consent decree of dismissal containing admissions by the state of Arkansas, plaintiff, that defendants were the owners of certain submerged lands involved in the action.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. § 67; Dec. Dig. — 40.]

2. PROHIBITION — 10(2) — GROUNDS — DEFENSES.

Where the court had jurisdiction to expunge a consent decree from the record and order the

case to proceed, prohibition will not lie to prevent it from exercising such power.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 44-56; Dec. Dig. — 10(2).]

Proceeding by B. S. Parker and others for writ of prohibition against Chas. D. Frierson, Chancellor, to prevent his proceeding in the suit of State of Arkansas against B. S. Parker and others, with a prayer, also, for mandamus requiring him to enter a dismissal of such suit. Petition denied.

This proceeding is for a writ of prohibition to the chancellor, to prevent his further proceeding in the suit of State of Arkansas v. B. S. Parker et al., with a prayer also for a mandamus, requiring him to enter of record the order of the prosecuting attorney dismissing said suit.

The state of Arkansas, through her prosecuting attorney for the Second circuit, with other counsel assisting, filed a complaint in the Crittenden chancery court against B. S. Parker, president of the Five Lakes Outing Club, a voluntary unincorporated association, organized for the purpose of maintaining a game and fish preserve and certain others, employes, members and officers of the association. It was alleged that the association and individuals named constructed a pumping station in the waters of Horse Shoe Lake, a navigable lake in Crittenden county, about 600 feet from high-water mark, and were engaged in constructing a fence from Happy Jack Island on a designated section of land, to a point in the lake, known as Lone Cypress, and then southwardly to the club house; that said fence was being constructed wholly within the navigable waters of the lake, and when completed inclosed over 800 acres of lake bed, the property of the state of Arkansas; and that the fence and the pumping station constituted an obstruction to the navigability of the lake. A restraining order was prayed against the construction of the fence, and, upon final hearing, a decree requiring the defendants to remove the pumping station. An answer was filed admitting that the lake was a navigable body of water, but denying that defendants had constructed a pumping station within the waters of said lake or that they were engaged in constructing a fence within the bed of the lake. Alleged that the outing club owned certain lands to the original meander line of said lake as established by the government in sectionizing the land in 1834; that certain of their lands, describing them, were low lands, bordering on the lake, and had become overflowed and submerged to a depth of from two to five feet by the pounding of the waters of the lake thereon due to the construction of a levee by the St. Francis levee board in 1905, across the mouth of Buck Bayou, the only outlet for the waters of the lake; that said submergence of its lands worked no forfeiture of title; that they were still the owners thereof and

had the right to fence the same for the purpose of preventing trespassing thereon by the general public; and, also, that in *Barboro v. Boyle*, 178 S. W. 378, the Supreme Court had held that they had the right to inclose said lands and upon doing so would have the exclusive right to hunt and fish thereon; that unless permitted to fence the lands because of the peculiar character of the bank of the lake, they could not prevent trespassing. It is further alleged that it was their intention to construct their fence within the original meander line of the lake, but by mistake eight of the piles or posts had been driven north of said line which they offered to remove; and that the pumping station was within 150 feet of the present bank of the lake and well within the original meander of the lake and on land owned by the defendants.

In November, 1915, the state by her prosecuting attorney, and the defendants by R. G. Brown, their attorney, agreed that the case should be dismissed upon payment of the costs by defendants. A consent decree dismissing the complaint was drawn up, marked approved by counsel, filed in the office of the clerk on November 10th, and by him entered upon the chancery record in vacation, which was ordered by the chancellor expunged on January 24, 1916, "because, under the rules of this court, nothing in the form of a decree can be entered without the signature of the chancellor." Said consent decree is as follows:

"In this cause, in vacation, comes the parties by their attorneys of record, the state of Arkansas being represented by M. P. Huddleston, Esq., and the defendants by R. G. Brown, Esq., and by consent this cause is dismissed and the restraining order heretofore granted herein is set aside and for naught held, it appearing from the answer filed herein by the defendants that they claim the right only to build their fence within the original meander line of the lands owned by them within the peninsula formed by Horse Shoe Lake, and the state of Arkansas admitting of record that the defendants have the right to build and construct their fence within said original meander line, title to the lands within the meander line being admitted by the plaintiff to be in the defendants to this action. By consent, the costs of this proceeding will be paid by the defendants. The clerk is directed by both parties to this proceeding to enter this decree at once in vacation."

On the first day of the January term, 1916, the defendants appeared and moved the court to enter of record said consent order of dismissal. On the 24th of January, Miles Thompson filed a motion in the cause, alleging that he was a citizen and taxpayer of Crittenden county and as such entitled to the use of Horse Shoe Lake and to the privilege of hunting and fishing therein in all parts, and prayed to be made a party plaintiff, which motion was granted. The court further overruled petitioners' motion to enter as a decree of the court said consent order already set out, and expunge the entry thereof from the record as erroneous, it being done in vacation and contrary to the

rules, without the signature of the chancellor, and further ordered that the action proceed to trial, as the State of Arkansas, on Relation of Miles Thompson, Plaintiff, v. B. S. Parker et al. The defendants excepted to all of the court's rulings and prayed and were granted an appeal, and also filed a petition here for a writ of prohibition to the chancellor to prevent further proceedings in the case, and a writ of mandamus as stated.

Brown & Anderson, of Memphis, Tenn., for petitioners. A. B. Shafer, of Memphis, Tenn., Hugh Hayden, of Crawfordsville, and Ed L. Westbrook, of Jonesboro, for respondent. N. F. Lamb, Eugene Sloan, and J. R. Turney, all of Jonesboro, for the Chancellor. M. P. Huddleston, of Paragould, pro se.

KIRBY, J. (after stating the facts as above). It is insisted that the suit was properly dismissed in vacation, and that the chancery court was without jurisdiction thereafter to proceed further in the hearing thereof. Appellants in support of their position rely upon *Lyons v. Green*, 68 Ark. 205, 56 S. W. 1075, and sections 7779 and 6168 of Kirby's Digest, which provide:

"Sec. 7779. All actions in favor of and in which the state is interested shall be brought in the name of the state in the circuit court of the county in which the defendant may reside or be found, and shall be prosecuted by the prosecuting attorney for the state prosecuting in such circuit."

"Sec. 6168. The plaintiff may dismiss any action in vacation, in the office of the clerk, on the payment of all costs that may have accrued therein, except an action to recover the possession of specific personal property, when the property has been delivered to the plaintiff."

[1] There is no question but that a plaintiff may dismiss his action in vacation in accordance with said section 6168, nor that all actions in favor of and in which the state is interested are required to be brought in its name by the prosecuting attorney of the circuit court of the county designated; and conceding without deciding that such official would have the right to dismiss such a suit for the state, brought by him, in vacation, it does not follow that said consent order now claimed to be only a dismissal of the suit was entitled to entry upon the record as a matter of course upon its presentation to the clerk.

In *Lyons v. Green*, it was held proper, under the authority of said section 6168, for the clerk as custodian of the record to enter up the order of dismissal at the request of the plaintiff's attorney, and that, if by misprision of the clerk the actual order desired by the plaintiff as to the dismissal was not entered, it could and should be corrected in the court by proper notice and proceedings before the final decree was taken.

It is claimed that the consent decree of dismissal was not such a dismissal of the action in vacation as is authorized by law, that it contained an admission of record by the state of Arkansas that the plaintiffs were

the owners of the lands claimed in the action and had the right to build the fence within the original meander line of the lake as they were attempting to do, a recital which was certainly not necessary if the purpose was only to dismiss the suit and which may have been, and doubtless was, beyond the power of the prosecuting attorney to make for the state if the rights of individuals or the public were thereby concluded. It was in form a consent decree, including matters of importance in addition to the direction for dismissal of the action, and there was no authority under the law permitting its entry of record in vacation.

[2] The court, upon presentation of the matter at the next term upon motion of petitioners requesting the order of dismissal entered of record, refused to grant the relief and ordered the said decree, as erroneously entered by the clerk in vacation, expunged from the record. It was acting within its authority and jurisdiction in making such order, and, if error was committed therein or in permitting other parties to intervene in the suit and ordering that it proceed to a hearing, it must be taken advantage of and corrected by appellee, and prohibition will not lie to prevent such further procedure.

The petition is, accordingly, denied.

CANNON v. HARMON et al. (No. 38.)
(Supreme Court of Arkansas. June 5, 1916.)
MORTGAGES \Leftrightarrow 413—**RESTRAINING FORECLOSURE—ACTION BY PARTNER.**

All the partners are proper and necessary parties plaintiff in an action to enforce a partnership claim, since, as a contract made in the name of a partnership is a contract made with all the partners jointly, all must join in an action to enforce it, and, where there was nothing to show that one partner, suing to foreclose a deed of trust to satisfy the pro rata part of the partnership indebtedness alleged to be due to him, had acquired the other partner's interest in the deed and note, or that the other partner refused to join in its foreclosure, the suit will be enjoined.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1187-1201; Dec. Dig. \Leftrightarrow 413.]

Appeal from Union Chancery Court; Jas. M. Barker, Chancellor.

Action for injunction and for cancellation of a deed of trust by W. M. Cannon against J. W. Harmon, trustee, and another. Decree for defendants, and plaintiff appeals. Reversed, and cause remanded, with directions to enjoin the defendants from foreclosing the mortgage.

Geo. M. Le Croy, of El Dorado, for appellant.

HART, J. On the 26th day of March, 1912, W. M. Cannon executed a deed of trust on 30 acres of land in Union county, Ark., to J. W. Harmon, as trustee, to secure a note for \$60 payable to McWilliams & Sample,

a partnership. The note represented the purchase price of a mule sold by the partnership to Cannon. After the note became due, F. L. Sample, a member of the firm of McWilliams & Sample, caused the trustee named in the deed of trust to advertise the land for sale to satisfy an indebtedness of \$33.75 which he claimed to be the amount of the partnership debt due him. Cannon instituted this action in the chancery court against the trustee and Sample to restrain them from foreclosing the deed of trust, on the ground that one member of the partnership could not foreclose the same to satisfy his pro rata of the indebtedness due the partnership. He further alleged that the execution of the note was procured by false representations, and that the mule was wholly worthless at the time he purchased it. He asked that the note and mortgage be canceled and that the foreclosure of the deed of trust be enjoined. The defendants denied the material allegations of the complaint.

The plaintiff, Cannon, testified in his own behalf. He admitted the execution of the note and mortgage. He stated that Sample, one of the members of the firm, represented to him that the mule was perfectly sound and was only 10 years old, and that he relied upon this representation, because he did not know anything about mules. Other witnesses for the plaintiff testified that the mule was about 30 years old, and was what is known as a "snide" mule; that is to say, they testified that the mule was a good-looking one, but was not capable of doing any work. Sample testified that he made no representations whatever to Cannon when he purchased the mule, and did not tell him that the mule was only 10 years old. He admitted that he and McWilliams owned the mule as partners. The chancellor found in favor of the defendants, and from the decree entered of record the plaintiff has appealed.

All the partners are proper and necessary parties plaintiff in an action to enforce a partnership claim. 30 Cyc. 561; *Coleman v. Fisher*, 67 Ark. 27, 53 S. W. 671; *Summers v. Heard*, 66 Ark. 550, 50 S. W. 73, 51 S. W. 1057; *Matthews v. Paine*, 47 Ark. 54, 14 S. W. 463; *Ingham Lumber Co. v. Ingersoll*, 93 Ark. 447, 125 S. W. 139, 20 Ann. Cas. 1002. The reason is that a contract made in the name of a partnership is a contract made with all of the partners jointly. Hence all must join in an action to enforce it. There is nothing in the record to show that Sample had acquired from McWilliams his interest in the note and mortgage which was demanded to be foreclosed, and that he had become the exclusive owner thereof. Nor does it appear from the record that McWilliams refused to join in the foreclosure of the mortgage. He was a necessary party to the proceeding to foreclose the mortgage, and the court should

have granted an injunction to the plaintiff to prevent Sample from foreclosing the mortgage without making his partner a party to the proceedings. Having reached this conclusion, it is not necessary to determine whether the chancellor should have sustained the plea of no consideration, or that the execution of the note was procured by false representations.

It follows that the decree must be reversed, and the cause will be remanded, with directions to the chancellor to enjoin the trustee and Sample from foreclosing the mortgage to satisfy the pro rata part of the partnership indebtedness alleged to be due Sample.

GRIFFIN et al. v. BOSWELL et al.
(No. 89.)

(Supreme Court of Arkansas. June 5, 1916.)

1. HIGHWAYS §90—ROAD DISTRICT—CREATION.

The formation of a road district under Acts 1915, p. 1400, is a special statutory proceeding.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. §90.]

2. HIGHWAYS §90 — HIGHWAY DISTRICT—CREATION.

When forming a road district under Acts 1915, p. 1400, a compliance with subdivision "b" of section 1 thereof, requiring the filing of a preliminary survey, etc., with the county court, is a jurisdictional requisite.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. §90.]

3. COURTS §35—JURISDICTION TO BE SHOWN BY RECORD—SPECIAL JURISDICTION.

Where special statutory jurisdiction is conferred upon a statutory court of record, its judgment can be supported only by a record which affirmatively shows the jurisdictional requisites.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 140, 141, 145, 146; Dec. Dig. §35.]

4. CERTIORARI §28(2)—GROUNDS—WANT OF JURISDICTION—COURTS.

Certiorari is an appropriate remedy to review a county court's judgment where its lack of jurisdiction is urged.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 41; Dec. Dig. §28(2).]

5. CERTIORARI §64(2) — DETERMINATION—MATTERS CONSIDERED.

In a certiorari proceeding, a county court's jurisdiction is determined solely by an inspection of its record.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 175; Dec. Dig. §64(2).]

6. HIGHWAYS §90—HIGHWAY DISTRICT—CREATION.

A county court's establishment of a road district under Acts 1915, p. 1400, is void for lack of jurisdiction where its record does not show a compliance with subdivision "b" of section 1 thereof, requiring filing of a preliminary survey, etc., with the county court.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. §90.]

Appeal from Circuit Court, Pope County;
A. B. Priddy, Judge.

Certiorari proceedings by Van Boswell and

others against Ira Griffin and others. Judgment for petitioners, and respondents appeal. Affirmed.

J. T. Bullock and Wilson & Williams, all of Russellville, for appellants. J. G. Wallace & Son, of Russellville, for appellees.

HART, J. On the 25th day of March, 1916, appellees filed their petition in the circuit court praying for a writ of certiorari requiring appellants to produce the records and proceedings of the county court of Pope county relating to the formation of road improvement district No. 1 of Pope county, Ark., to the end that the proceedings and orders establishing said road improvement district be quashed. Appellants answered and made a copy of the records of the county court a part of their answer, and demurred to the petition of appellees. Appellees demurred to the answer of appellant. The court overruled the demurrer of appellants and sustained the demurrer of appellees to the answer of appellants. A judgment was accordingly entered, quashing and annulling all the orders and proceedings of the county court relating to the formation of said road improvement district. The case is here on appeal.

The district was created under a general act of the Legislature of 1915. Acts Ark. 1915, p. 1400. The record affirmatively shows that the provisions of the act were in all respects complied with, except that it does not show that a preliminary survey, plans, specifications, and estimates of the costs of improvement were filed with the county court before the petitions for formation of the district were circulated, and appellees allege that no such plans, specifications, or estimates were filed. They contend that the judgment of the county court establishing the road district is void because of the failure to comply with the act in this respect.

On the other hand, it is the contention of appellants that appellees' remedy to correct the alleged error was by appeal, and that the time for appeal having elapsed, they cannot now complain of jurisdictional defects or irregularities in the formation of the district. In other words, they contend that the present proceeding is a collateral attack upon the judgment of the county court, and for that reason cannot be maintained.

[1-4] As we have already seen the road district in question was formed under Act No. 338 of the Acts of 1915. In *Lamberson v. Collins*, 185 S. W. 268, the court held that a compliance with both subdivisions of section 1 of the act is necessary in order that the formation of a road district under said act shall be held valid. The record does not show that there was any attempt to comply with subdivision "b" of section 1 of the act in the matter of procuring a preliminary survey and plans, specifications, and esti-

mates from the state highway commission before circulation of the original petition among the landowners. The effect of our decision in the case of *Lamberson v. Collins* just referred to is that the proceedings for the formation of road improvement districts under the act are statutory and not according to the course of the common law. It is also apparent from the decision that the procuring a preliminary survey, plans, specifications, and estimates from the highway commissioner as required by the act is a jurisdictional fact, and under the statute further proceedings are a nullity, unless the record affirmatively shows a compliance with the statute in this respect. It is now too well settled in this state to require or admit of discussion that when a matter of special jurisdiction is conferred by statute upon a superior court of record, and the jurisdiction is to be exercised in a special manner, the judgment can only be supported by a record which shows jurisdiction affirmatively and no presumption as to jurisdiction will be indulged. *St. L., I. M. & S. R. Co. v. Dudgeon*, 64 Ark. 108, 40 S. W. 786; *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707; *Beakley v. Ford*, 185 S. W. 796; *Ex parte Tipton*, *Adm'r*, 185 S. W. 798.

A compliance with subdivision "b" of section 1 of the act is a condition precedent to the exercise of jurisdiction in the matter of forming a road improvement district under the act, and failure to comply with its provision renders all subsequent proceedings void.

[5, 6] Hence it is not necessary to decide whether the present proceeding is a direct or collateral attack upon the judgment of the county court. It is true an appeal was taken in *Lamberson v. Collins and Churchill v. Vaughan*, 185 S. W. 447, but it is well settled in this state that where there is a want of jurisdiction in the court to act, certiorari is an appropriate remedy to review the proceedings of the county court. *School Dist. No. 60 v. School Dist. No. 53*, 111 Ark. 79, 162 S. W. 53; *Lyons v. Green*, 68 Ark. 205, 56 S. W. 1075; *Street v. Stuart*, 38 Ark. 159; *Baxter v. Brooks*, 29 Ark. 173. In such cases the trial is solely by inspection of the record, and no inquiry as to any matter not appearing by the record is permissible. If the want of jurisdiction appears by the record the proper judgment is that the record be quashed. Here it appears that the county court exceeded the limits of its jurisdiction and certiorari was the proper remedy to review its proceedings. The proceedings in the county court being statutory and not according to the course of the common law, every material requirement must be observed and the proceedings must show on their face a substantial compliance with the statute.

Not having done so, the circuit court was

right in quashing the proceedings in the county court, and its judgment will be affirmed.

WOOLBRIGHT v. STATE. (No. 26.)

(Supreme Court of Arkansas. May 29, 1916.)

1. CRIMINAL LAW — 422(6) — ASSAULT — EVIDENCE — DECLARATION OF CODEFENDANT.

In a prosecution for assault with intent to kill, committed by defendant's son in his presence with his approval and encouragement, testimony of a witness, as to statement made by the son shortly before the assault, that if he caught up with the assaulted party he would cut his throat, made in the absence of defendant, was admissible against defendant to show the intent or disposition of mind of the son in making the assault.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 984; Dec. Dig. 422(6).]

2. HOMICIDE — 100 — ASSAULT WITH INTENT TO KILL — ELEMENTS OF CRIME.

In a prosecution for assault with intent to kill, where defendant was present while his sons committed the assault, approved, and encouraged it, and had a short time previous stated that he was going to beat h— out of the assaulted party and had suggested before the assault that he had a pistol, defendant was guilty as a principal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 130; Dec. Dig. 100.]

3. HOMICIDE — 257(1) — ASSAULT WITH INTENT TO KILL — EVIDENCE — SUFFICIENCY.

In a prosecution for assault with intent to kill, committed by defendant's sons in his presence and with his approval and encouragement, evidence held sufficient to show concert of action between the parties.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 543, 544, 552; Dec. Dig. 257(1).]

4. CRIMINAL LAW — 422(6) — EVIDENCE — ADMISSIBILITY.

In a prosecution for assault with intent to kill, committed by defendant's sons in his presence, and with his approval and encouragement, there being a concert of action shown between the parties, a statement, made by the son shortly before the assault in the absence of defendant, that if he caught the assaulted party he would cut his throat, was admissible against the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 984; Dec. Dig. 422(6).]

5. HOMICIDE — 310(1) — ASSAULT WITH INTENT TO KILL — TRIAL — INSTRUCTIONS.

In a prosecution for assault with intent to kill, committed by defendant's sons in his presence, with his approval and encouragement, court's refusal to give defendant's requested instruction, directing the jury that they must find beyond a reasonable doubt that defendant had in mind a specific intent to kill the assaulted party before they could find him guilty, was not error, as instructions were given correctly defining the offenses of murder and assault with intent to kill, and since defendant was guilty of the offense if his son who committed the assault did it with the intent required by law.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 657; Dec. Dig. 310(1).]

6. HOMICIDE — 310(1) — ASSAULT WITH INTENT TO KILL — TRIAL — INSTRUCTIONS.

In a prosecution for assault with intent to kill, committed by defendant's sons in his presence and with his approval and encouragement, where defendant's witnesses stated that they

went away with the son, upon his suggestion, in order not to be arrested for the offense, and the court made no reference to their flight in its charge, refusal to give defendant's requested instruction that the fact that the son fled after the crime should not be considered as proof against the defendant was not error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 657; Dec. Dig. ¶310(1).]

7. HOMICIDE ¶257(1) — ASSAULT WITH INTENT TO KILL—SUFFICIENCY OF EVIDENCE.

In a prosecution for assault with intent to kill, committed by defendant's sons in his presence and with his approval and encouragement, where it appeared that before the assault both defendant and one of the sons had made threats against the assaulted party, evidence held sufficient to sustain a verdict of guilty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 543, 544, 552; Dec. Dig. ¶257(1).]

Appeal from Circuit Court, Cross County; W. J. Driver, Judge.

Henry Woolbright was convicted of assault with intent to kill, and he appeals. Affirmed.

This appeal is prosecuted by Henry Woolbright from a judgment for assault with intent to kill one B. F. Palmer. It appears from the testimony that bad feeling was engendered as the result of appellant's failure to win a lawsuit brought by him against Palmer, his tenant, in the justice court. He was greatly dissatisfied with the judgment, refused to pay the costs, and made threats in the presence of several persons that he would beat h— out of Palmer the first time he caught him out. As the parties were leaving town in the afternoon of the day of the trial, appellant rode out a part of the way with W. R. Palmer, who stated, he said:

"Well I fed him all the year, and now he has beat me out of it," or something to that effect. Of course I can't remember everything, but during the conversation he said, 'If he don't look sharp or ain't careful, I will beat h— out of him.'"

Witness replied, "You have had trouble enough," and advised it would be better not to have any more. Wash and Leman, sons of appellant, and Sam Rogers, a boy about 18 years old, started out of town, riding in his wagon, overtook appellant, who got in with them and came upon B. F. Palmer, a man about 57 years of age, who in company with his wife was walking home from Vann-dale, each carrying some packages of groceries. They drove up to Palmer, stopped the wagon, and all got out except appellant, and with clubs assaulted and beat him, knocking him down two or three times or more, and he remained unconscious from the beating for a week thereafter. Two gashes were cut in his head, to the skull, one three or more inches long and the other two. Mrs. Palmer testified that she and her husband left Vann-dale about 4 o'clock with an armful of groceries, and were in a half mile of their home when overtaken by the assailants; that

Wash came running with a club in his hand about four feet long, holloed and told Ben:

"Hold on there, you g— d— s— of a b—; we are going to settle with you now.' He knocked my husband down, then the wagon came up with Henry, Leman and Sam Rogers. Leman jumped out, picked up a club, and drewed back to hit Ben. He said to me, 'Shut your g— d— mouth,' and throwed and hit Ben on the left shoulder, and Wash knocked him down again, and then turned to his father, Henry, who was driving the wagon, and asked him if that would do, and Henry replied, 'Them is baby licks, why don't you use your pistols?'"

After Ben knocked her husband down again, she asked him not to hit him any more, and he replied:

"Now you have paid for what you eat,' and I said, 'Yes, and more too.' Then he told Sam to hit him, and Henry said, 'Come on; that will do.' They left laughing."

She identified the sticks that were used in beating her husband, who made no attempt to resist the assault, and said he never spoke from the time he was knocked down for more than two weeks thereafter. Neither appellant nor his son Wash testified, and Leman and Sam Rogers stated that when they came in the wagon to the turn in the road, they saw Wash talking to old man Palmer. Rogers said they were pointing their fingers at each other like they were quarreling, and just before they reached them with the wagon, Wash struck at Palmer, who had his knife out, with his fist, and Leman ran up and asked what he meant by that, and Palmer ran at Leman with the knife, and Wash knocked him down; that the knife struck and cut Leman's coat. Palmer said something else to him that witness could not hear, and Wash hit him again in the back of the head, struck him with a white oak stick witness thought. "Did not think the stick was as big as the one that was shown in court." He testified that Henry Woolbright was in the wagon, a short distance away, all the time the fight was going on, and said nothing that he heard to encourage the fight, and that he was as close to him as Mrs. Palmer. Said they went up to where the Palmers were and stopped the fight, and after Wash knocked Palmer down the last time Mrs. Palmer said, "You fellows will have a job in court, if you don't mind." Wash said, "Get up and go on up the road." The first thing Wash said afterwards was, "We will have to go off somewhere to keep from paying a fine," and they did go to Helena that night and stayed away a day or two. Leman stated: That they were driving out in a wagon, and his father got in after they left town, and at that time they did not know where Wash was. That later he saw him and Mr. Palmer up the road, and remarked, "I believe they are quarreling," and said to Sam Rogers, "Let's walk up there." When he got there, he asked, "What does this mean?" and Mr.

Palmer ran at him and struck at him twice with a knife, and Wash knocked him down. That his father drove up about the time Wash struck Palmer with the club the second time, and they got in and drove off. That his father said nothing whatever during the fight. That he and Sam jumped out of the wagon to go to where they were fighting because his father said, "That old man has got a pistol." Will Campbell stated, over appellant's objection, that Wash Woolbright, before he got in the wagon going home, asked, "How far down the road is old man Palmer," and said, "If I catch up with him, I am going to cut his throat." The court instructed the jury, refusing to give appellant's requested instruction that the fact that Wash fled after the crime was committed should not be considered as proof against the defendant, and before the jury could find him guilty of assault with intent to kill, they must find beyond a reasonable doubt that at the time of the assault, the defendant Henry Woolbright had in mind a specific intent to kill B. F. Palmer.

Killough & Lines, of Wynne, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

KIRBY, J. (after stating the facts as above). [1] Appellant was indicted as a principal for assault with intent to kill, and the testimony of the witness Will Campbell of the statement made by Wash Woolbright shortly before he assaulted Palmer with the club that if he caught up with him he was going to cut his throat, made in the absence of appellant, was competent to show the intent or disposition of mind of the said actor in the crime in making the assault.

[2] The undisputed testimony shows that appellant was personally present when Palmer was brutally assaulted with the clubs by his sons, and although he did not get out of the wagon and engage in the difficulty, he approved of it and encouraged the assailants and suggested after the old man had been knocked down twice that the blows were only "baby licks, that they should use their pistols." He had stated before leaving town that he was going to beat h— out of Palmer as soon as he caught him out, and his son Leman testified that he suggested that the old man had a pistol before he and Sam Rogers got out of the wagon and went to where they were fighting. Under these circumstances, he was as guilty of the offense as was the principal actor who wielded the club. *Hunter v. State*, 104 Ark. 246, 149 S. W. 99.

[3, 4] The proof was sufficient to show a concert of action between the parties, and the threat made by Wash Woolbright in the presence of Campbell, when his father, appellant, was not present, would have been

admissible in any event against him. *Turner v. State*, 180 S. W. 211.

[5] The court did not err in refusing to give appellant's requested instruction, directing the jury that they must find beyond a reasonable doubt that he had in mind a specific intent to kill B. F. Palmer, before they could find him guilty. Instructions were given, correctly defining the offenses of murder and assault with intent to kill, and appellant was guilty of the offense if his son, Wash Woolbright, who wielded the club, did it with the intent required by law to constitute the offense as the jury found.

[6] Appellant's witnesses Leman Woolbright and Sam Rogers voluntarily stated, without objection, that they went that night to Helena with Wash upon his suggestion, in order not to be arrested for the offense, and the court made no reference to their flight in its charge to the jury herein, and no error was committed in refusing appellant's requested instruction relative thereto.

[7] The instructions given by the court correctly declared the law, and the testimony is sufficient to sustain the verdict.

We find no prejudicial error in the record, and the judgment is affirmed.

HIGH v. REED et al. (No. 12.)

(Supreme Court of Arkansas. May 22, 1916.)

BILLS AND NOTES \S 503—CONSIDERATION—SURRENDER OF LIEN—PRE-EXISTING DEBT.

In action on a note, the defense being that defendants signed as sureties without consideration, exclusion of plaintiff's evidence, that at the time of the execution of the note the principal on the note sold a horse on which plaintiff had a lien, as showing surrender of such lien and a new trade made as a new consideration for the note, was error.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1733-1739; Dec. Dig. \S 503.]

Appeal from Circuit Court, Lonoke County; Thos. C. Trimble, Judge.

Action by Mrs. Lena High against James B. Reed and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

W. J. Waggoner, of Lonoke, for appellant. Manning, Emerson & Morris, of Little Rock, for appellees.

SMITH, J. Appellant prosecutes this appeal from a judgment adverse to her, which was rendered upon a verdict returned under the directions of the court. The suit was upon a promissory note signed by appellees and one J. M. Swalm, payable to appellant's order. The note was dated March 21, 1911, and was for the sum of \$150, and was due October 21, 1911. Appellees defended upon two grounds. The first defense was that the note as signed was for the sum of \$100 only, and the second defense was that the note was

executed by appellees as sureties for Swaim, and that it was without consideration as to them.

In support of the first defense appellee Reed testified that he was only asked to sign a note for \$100, and that, to the best of his knowledge, the one he signed was for only \$100, but he did not testify unequivocally that the note was not for \$150. The other surety testified that he was not certain whether the note was for \$100 or for \$150. As it read at the trial the note was for \$150, and we think the evidence presents a question for the jury as to whether the note had been altered after its execution.

Appellees insist in support of their second defense that the evidence shows that appellant had loaned her brother \$150 on February 18th or 20th under an oral agreement that she should have a lien on a horse which he owned, and that on the 21st of March thereafter, for this consideration, the note in question was signed by them. Appellant admitted that she had loaned her brother \$150 in February under an oral agreement that she should have a lien on a horse owned by him, but she also says that it was agreed that the money should be repaid when the horse was sold, and that the horse was sold on the date of the note, and that after selling the horse Swaim offered to give her either the money or the note, and she accepted the note. And she says the note was signed by all the parties before it was delivered to her. Over appellant's objection and exception the court excluded evidence showing the sale of the horse and the payment of the money on the date the note was executed. We think the excluded evidence was competent and relevant. It tended to support appellant's contention that a new trade was made and a new consideration furnished for the note.

In 3 R. C. L. 928, it is said:

"The general rule sustained by the great weight of authority is that the undertaking of one not a party to the original transaction, who, in pursuance of some subsequent arrangement, signs as surety, guarantor, or indorser after the original contract has been fully executed and delivered, is a new and independent contract, and to be binding must be supported by a new and independent consideration from that of the original contract. But it is a well-established exception to this rule that if the original contract is induced by the promise of one of the parties that he will procure the signature of the person who subsequently signs in pursuance of such agreement, no new consideration is necessary to support the latter's undertaking."

Among other cases cited in support of the text is that of Killian v. Ashley, 24 Ark. 511, 91 Am. Dec. 519. See, also, Williams v. Perkins, 21 Ark. 18; Platt v. Snipes, 43 Ark. 21; Kissire v. Plunkett-Jarrell Gro. Co., 103 Ark. 473, 145 S. W. 567. Appellees insist on the authority of these cases that the verdict was properly directed in their favor. But we do not think so. The authority of the case of Harrell v. Tenant, Walker & Co., 30

Ark. 684, has not been impaired by the cases cited, nor by any other subsequent decision. The syllabus of that case is:

"An antecedent indebtedness is a good consideration to support a new note, as to one who signs the note as surety."

Applying this rule of law to the facts of that case, which were very similar to the facts, as appellant states them in this case, Judge English said:

"If the Johnsons thought proper to give their note to the appellees for an old debt, and appellant thought proper to sign the note as their surety, the old debt was a sufficient consideration to uphold the note against both principal and surety." "If the Johnsons had made the note and delivered it to appellees for the old debt, and afterwards they had induced appellant to sign it without consideration, it might perhaps have been invalid as to him."

So, therefore, if subsequent to the execution and delivery of the note it was signed by appellees solely on account of the loan previously made Swaim, and it was no part of the consideration that appellees should subsequently sign it, then the note was without consideration as to them. However, if the note was executed to be used in lieu of the cash upon the sale of the horse, or was executed by appellees before its delivery to appellant, then appellees are liable, although there was no other consideration.

A verdict should not, therefore, have been directed, and for this error the judgment will be reversed, and the cause remanded.

ARKANSAS, L. & G. R. CO. v. MORSE et al. (No. 57.)

(Supreme Court of Arkansas. June 12, 1916.)

RAILROADS \Leftrightarrow 447(3)—OPERATION—INJURIES TO HORSE ON TRACK—INSTRUCTION—BURDEN OF PROOF.

In action for injuries to horse falling back and being injured trying to climb out of a cut ahead of a train, where the engineer stopped 75 feet before reaching the horse, an instruction was proper that, if the horse was injured by reason of the running of the train, either by actual collision or by fright caused thereby, the burden was on the company to prove the damage not caused by its negligence, since the condition of the cut may have cast upon the engineer the duty of stopping sooner.

[Ed. Nota.—For other cases, see Railroads, Cent. Dig. § 1645; Dec. Dig. \Leftrightarrow 447(3).]

Appeal from Circuit Court, Ashley County; Turner Butler, Judge.

Action by Sam Morse and another against the Arkansas, Louisiana & Gulf Railroad Company. From judgment for plaintiffs, defendant appeals. Affirmed.

This appeal is prosecuted by the railroad company from a judgment against it for \$25 damages for injury to a horse of appellees. The facts are substantially as follows:

As defendant's south-bound freight train approached Whitlow station, two horses belonging to appellees came from out of the woods onto the railroad track about 100

feet ahead of the engine and about 100 yards from the beginning of a cut, which was 530 feet long, from 5 to 6 feet deep, with steep sides and with a cattle gap or guard at the far end 8 feet wide and 10 to 12 feet long. There was no way for the horses to escape from the cut without climbing the embankment or jumping the cattle gap. There was a place on the east side of the track and north of the gap which had been worn down by the cattle.

The engineer, after sounding the alarm, began to slow up the speed of the train when the horses entered the cut running, and continued sounding the alarm, and brought the train to a stop 75 feet before he reached the injured animal. He stated that the horse attempted to climb the side of the cut and fell back and was injured. Others said that the injured horse attempted to cross from the west to the east side of the track north of the trestle, and when he stepped between the rails that he fell and was injured by the fall.

One witness said that when the running horse fell he "skelped the ties" or slid for a distance of from 20 to 30 feet, knocking the hair off his hip and tearing a great hole in his shoulder or neck. The train stopped within 30 to 60 feet of where the horse fell. The other horse cleared the cattle guard and escaped.

The court instructed the jury, giving among others, over appellant's objection, instruction numbered 2, as follows:

"If the jury believe from the evidence that the horse was injured by reason of the running of the train, either by actual collision with the engine or on account of fright caused by the running of the train, then the burden is on the defendant railway company to prove that such damage did not occur on account of the negligence of the employees operating the train."

Henry & Harris, of Monticello, for appellant. Williamson & Williamson, of Monticello, for appellees.

KIRBY, J. (after stating the facts as above). Appellant contends that the court erred in the giving of said instruction, and that the evidence is not sufficient to support the verdict.

It is true the horse was not injured by being struck or coming in contact with the train, nor by falling into a trestle or cattle guard upon the track in attempting to escape therefrom. It is also true that the operatives of the train were keeping a lookout and discovered the horses when they first came on the track 100 feet ahead of the engine. The alarm was immediately given, and the engineer began to slow up the train, seeing that the distance was so short between where they came onto the track, evidently to cross and the mouth of the cut, that they would prob-

ably go into it. He continued sounding the alarm, and finally stopped the train from 30 to 75 feet from the place where the horse fell. Certainly the horse would not have been injured but for the running of the train and the sounding of the alarm, frightening and causing it to run into the cut from which it could not have been expected to escape except at the one place near the cattle guard, without jumping the cattle guard, which was 8 feet wide. The trainmen knew the condition of the track in the cut and the cattle guard, and could have anticipated that injury would probably result if the horse was followed by the train until the cattle guard was reached. They also knew that it was well-nigh impossible for the horse to leave the track except across the cattle guard. They regarded it necessary to stop the train, and did so, but the jury might have found from the testimony that they were negligent in not stopping the train sooner and before the injury occurred.

If the horse fell back and injured himself from trying to climb the side of the cut, as may have been the case, or if it fell in trying to cross from the west to the east side of the track, as the evidence tended to show, near the lowest place on the side of the cut, its action might have been anticipated. Necessarily it was more frightened with the noise of the train coming into the cut and might be expected to do anything possible to escape the danger.

The instruction complained of, in the opinion of the majority, was not incorrect in placing the burden upon the railway company to prove that the damage did not occur on account of its negligence in operating the train after the horse was shown to have been injured by reason of the running of the train either by actual collision with the engine or on account of fright caused by the running of the train.

Under the peculiar circumstances of the case there being the hindrance and obstruction in the way of the animal's getting off the track, of both the steep sides of the cut and the cattle guard at the end thereof, the trainmen, seeing the condition, might have foreseen as a probable consequence of not sooner stopping the train the injury to the animal, or that it would in its fright attempt to climb out of the cut or pass over the cattle guard and be injured, and the fact that it was not injured by falling into the cattle guard, but by falling on the track in its attempt to cross and escape by climbing the cut on the opposite side of the track at the lowest place, was reasonably to be foreseen by them.

No error was committed in the giving of said instruction, and the testimony is sufficient to sustain the verdict.

The judgment is affirmed.

W. D. REEVES LUMBER CO. v. DAVIS.

(No. 7.)

(Supreme Court of Arkansas. May 22, 1916.)

1. PARTIES \Leftrightarrow 35—PLAINTIFFS AND DEFENDANTS—STATUTES.

Under Kirby's Dig. § 6007, providing for parties united in interest being joined as plaintiffs or defendants, but, when necessary for purpose of justice, permitting one who should have been joined as plaintiff to be joined as defendant, one of the two members of a firm with which defendant contracted, having, in effect, refused to join in an action for breach thereof, by releasing defendant from further performance, could be joined as defendant by the other partner suing for the breach.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 54, 55; Dec. Dig. \Leftrightarrow 35.]

2. TRIAL \Leftrightarrow 11(2) — DOCKETS — TRANSFER TO EQUITY.

There was no error in refusing to transfer to equity, at instance of defendant R., an action by D., one of two partners, for breach by defendant R. of its contract with the firm, the other partner, who was made a defendant, by cancelling the contract and relinquishing all his rights thereunder to R., having absolved it from any further liability to him thereunder, and R. not being interested in any partnership equities between D. and G.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 29; Dec. Dig. \Leftrightarrow 11(2).]

3. TRIAL \Leftrightarrow 260(1) — INSTRUCTIONS COVERED BY OTHERS.

There is no error in striking from defendant's requested instruction a part in effect stated in an instruction given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. \Leftrightarrow 260(1).]

4. PARTNERSHIP \Leftrightarrow 17 — FORMATION — CONTRACT.

Two persons by jointly contracting with another to cut and haul the timber on its land at a stipulated price per 1,000 feet, a matter of speculation, manifest their intention to form a partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 3; Dec. Dig. \Leftrightarrow 17.]

5. PARTNERSHIP \Leftrightarrow 284 — RETIREMENT OF PARTNER—CONTINUATION OF CONTRACT.

The contract of a partnership to cut and haul the timber on certain lands is not for personal services, and so one of the partners can carry it out on retirement of the other.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 629; Dec. Dig. \Leftrightarrow 284.]

6. PARTNERSHIP \Leftrightarrow 139—POWER OF PARTNER—CANCELLATION OF CONTRACT.

Where cancellation of a firm's contract would practically terminate the business for which the firm was formed, one of the partners cannot cancel it without the authority of the other, as this would call for exercise of a power not incident to the conduct of the firm's business in the ordinary manner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 206-211, 213, 240; Dec. Dig. \Leftrightarrow 139.]

7. CONTRACTS \Leftrightarrow 328(1)—CANCELLATION BY PARTNER—ACTION BY OTHER PARTNER—DEFENSES.

Though an attempted cancellation by G., a member of a firm, of its contract to cut and haul defendant's timber, could not affect the rights of D., the other partner, yet D.'s inability to perform after G. had abandoned, and refused to assist in the performance of the contract, is available as a defense to his action for its

breach by defendant refusing to permit further work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1571-1580, 1583, 1584; Dec. Dig. \Leftrightarrow 328(1).]

8. CONTRACTS \Leftrightarrow 349(6) — CANCELLATION BY PARTNER—ACTION BY OTHER PARTNER—DEFENSES—EVIDENCE.

As discrediting plaintiff's testimony that he was financially able, and as affirmative evidence tending to establish the defense that he was not able to perform his contract with defendant, after plaintiff's partner attempted to cancel it, and abandoned and refused to assist in performing it, evidence that at the time he was indebted to defendant in a large sum, and attempted to borrow a small amount from it for expenses of sickness and household, is competent.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1796, 1797, 1807; Dec. Dig. \Leftrightarrow 349(6).]

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Action by J. M. Davis against the W. D. Reeves Lumber Company; C. O. Giles being joined as defendant. Judgment for plaintiff, and defendant Company appeals. Reversed and remanded for new trial.

Fink & Dinning and Moore, Vineyard & Satterfield, all of Helena, for appellant. Bevins & Mundt, of Helena, for appellee.

HART, J. J. M. Davis sued the W. D. Reeves Lumber Company to recover the sum of \$8,000 for the alleged breach of a written contract whereby J. M. Davis and C. O. Giles agreed to cut and haul for the W. D. Reeves Lumber Company the timber on the lands described in the contract for a stipulated price per 1,000 feet. The complaint alleged that Giles had released all his right in the contract to the Reeves Lumber Company, and he was also made a party defendant to the action. The jury returned a verdict for the plaintiff for \$3,375. Judgment was rendered in favor of the plaintiff against the W. D. Reeves Lumber Company for that amount. The lumber company has appealed. The material facts are as follows: The W. D. Reeves Lumber Company entered into a written contract with J. M. Davis and C. O. Giles to cut and haul to a certain point on the Mississippi river the timber on lands described in the contract at a stipulated price per 1,000 feet. It was provided in the contract that the timber should be cut and hauled by the 1st day of September, 1916, and the contract was executed on July 8, 1914. Davis and Giles at once entered upon the land with a full line of equipment, including about 30 teams, for the purpose of performing the contract on their part. On August 10, 1914, the Reeves Lumber Company notified them to stop hauling the timber that was already cut because financial conditions were such that the lumber company could not get money to meet the pay rolls. Giles and Davis stopped the work, and Davis thereafter asked the president of

the lumber company several times when they would be allowed to commence operations again, and was told by him that they could do so when conditions would permit. A short time after this Giles called Davis up and told him that he wanted to get out of the contract. On October 1, 1914, the president of the lumber company told Davis that the contract had been canceled by Giles, and that he would not permit any work to be done under the contract until Giles and Davis had a settlement. Davis told the president that Giles had no right to cancel the contract, and that he knew nothing about him having done so. He also told him that he would not waive any of his rights under the contract and expected to carry it out. About October 16th Davis entered upon the land again and proceeded to perform the contract. On October 20, 1914, the lumber company notified him to quit cutting lumber under the contract, and stated that it would not pay for the cutting and denied the authority of Davis to proceed with the work.

Davis testified that he was financially able to perform the contract, and also testified in regard to the profits he could have made under it. It is not necessary to abstract the testimony on this point, but it is sufficient to say that under the evidence adduced by the plaintiff his profits would at least have equaled the amount recovered by him before the jury.

On the part of the defendant it was shown that Giles entered upon the land soon after the contract had been executed, and that he did nearly all the work that was done before the lumber company requested them to cease working. On the 1st of October, 1914, Giles canceled the contract with the lumber company.

[1] It is first contended by counsel for the defendants that the demurrer of the defendant lumber company to the complaint should have been sustained. The demurrer was based on the ground that the plaintiff could not bring the action in his name alone, but should have joined his partner, Giles, in the complaint. Section 6007 of Kirby's Digest provides:

"Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but when, for any cause, it may be necessary for the purpose of justice, a person who should have been joined as plaintiff may be made a defendant, the reason therefor being stated in the complaint."

In *Ingham Lumber Co. v. Ingersoll*, 93 Ark. 447, 125 S. W. 139, 20 Ann. Cas. 1002, the court held that in a suit upon a contract made by a firm all of the partners have an interest in the subject-matter and are necessary parties. In that case, in construing section 6007 of Kirby's Digest, it was said that, where a partner refuses to join in an action to recover a claim of the firm, he may be made a party defendant. In the instant case the complaint of Davis alleges that Giles

had released and relinquished all of his rights in the contract to the Reeves Lumber Company. Giles in his answer admitted that he had canceled the contract and released the Reeves Lumber Company by a written release in the name of Davis and Giles. If Giles had canceled the contract and by an instrument in writing had released the Reeves Lumber Company from further performance of the contract, this was equivalent to a refusal on his part to join in an action to recover damages for an alleged breach of the contract. Therefore under the section of the statute above quoted the plaintiff properly made Giles a party defendant to the action.

[2] It is next contended by counsel for the lumber company that the court erred in not sustaining its motion to transfer the cause to the chancery court. There was no error in this regard. The action of Giles in canceling the contract and the relinquishment of all his rights thereunder to the lumber company absolved it from any further liability to him under the contract. The lumber company was not interested in any partnership equities between Davis and Giles. The court did not err in refusing to transfer the action to equity.

[3] The court was requested by counsel for the lumber company to give instruction No. 4, which reads as follows:

"The jury is instructed that before the jury can find for the plaintiff in any event they must find from the testimony that the plaintiff could have made a profit in carrying out said contract, in accordance with its terms, after the cancellation."

The court refused to give the instruction as asked, but struck out the words "after the cancellation," and gave the instruction as thus modified. Counsel for the lumber company contend that the words stricken from the instruction should have been given, because the right of recovery must necessarily have been from the date of the breach of the contract. The court, however, did give instruction No. 2, which reads as follows:

"If you find for the plaintiff in this case, his damages are to be measured by the value of the contract to him at the time it was broken, and this value is estimated by the profits he would have realized during the continuance of the contract had it been faithfully carried out by the parties but in estimating the profits which a party under such contract would realize allowance must be made for every item of cost and expense necessarily attending a full compliance on his part."

This instruction plainly tells the jury the damages are to be measured by the value of the contract to plaintiff at the time it was broken.

The plaintiff acquiesced in stopping the work in August, and under the undisputed evidence there was no breach of the contract until it was canceled on October 1, 1914, by Giles and the lumber company. Therefore instruction No. 2 was a correct instruction on the measure of damages, and was as favor-

able to the theory of the lumber company as it was entitled to.

[4-§] It was the theory of the lumber company that Davis and Giles under the contract were partners in cutting and hauling the timber. The lumber company offered to introduce testimony to the effect that Davis was indebted to it in the sum of \$12,000 during the summer and fall of 1914. It also offered to introduce in evidence a letter dated September 16, 1914, to it from Davis. In this letter Davis stated that he was confined to his house on account of his eyes, and that his physicians had advised him to go to Memphis or some other city and have them examined; that for this and some household expenses he needed from \$150 to \$200, which he wanted to borrow from the lumber company. The action of the court in refusing to admit the offered oral testimony, and this letter is assigned as error by counsel for the lumber company. We think the refusal of the court to admit the oral testimony and the letter was erroneous and calls for a reversal of the judgment. Davis and Giles entered into a contract with the lumber company jointly to cut and haul the timber on the land of the lumber company for the purpose of speculation. Under the terms of the contract, manifestly it was their intention to form a partnership. See *Beebe v. Olentine*, 97 Ark. 390, 134 S. W. 936. The contract of partnership was not for the performance of personal services, and either partner could carry out the contract. *Smith v. Hill*, 13 Ark. 173. It is not claimed that Giles had any express authority to cancel the contract, but it is claimed such authority was implied. The cancellation of the contract practically terminated the business for which the partnership was formed. Such act on the part of Giles was a fraud upon Davis, and he had a right to avoid it. The rescission called for the exercise of a power by Giles which was not incident to the conduct of the firm's business in the ordinary manner, and it could not bind Davis unless he authorized it or assented to it. *Phoenix Insurance Co. v. Fleenor*, 104 Ark. 119, 148 S. W. 650; 30 Cyc. 491 and 495. While Giles had no authority to cancel the contract as far as the rights of Davis were concerned, still the lumber company might interpose as a defense to the action the inability of Davis to perform the contract after Giles had abandoned it and refused to assist in the performance of it.

Davis had testified that he was financially able to perform the contract, and the excluded testimony was competent to discredit his testimony, and also as affirmative evidence tending to show that he was not able to perform the contract after Giles had terminated it, as far as he was concerned, and thus to establish the defense of the lumber company that Davis was not able to perform it.

For the error in refusing the offered testimony the judgment will be reversed, and the cause remanded for a new trial.

MISSOURI STATE LIFE INS. CO. v. CRABTREE. (No. 33.)

(Supreme Court of Arkansas. June 5, 1916.)

1. INSURANCE \Leftrightarrow 310(2)—LIFE INSURANCE — OPTIONS—NOTICE.

A life policy provided that, in event of nonpayment after payment of two premiums, the policy should be continued as term insurance for such a period as the surrender value would purchase term insurance. A note given by insured for the payment of the third premium declared that, in event of nonpayment, the insured should be personally liable for a sum equal to one-half of the principal, but that the insurer should have an option to treat such liability as indebtedness on account of the policy reducing the surrender value. *Held*, that the insurer was bound to give notice of its option to treat the indebtedness evidenced by the note as indebtedness against the policy, and, having retained the note without notice, could not deduct one-half of the amount thereof from the surrender value of the policy so as to reduce the period of term insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 804; Dec. Dig. \Leftrightarrow 310(2).]

2. INSURANCE \Leftrightarrow 588 — LIFE INSURANCE — RIGHTS OF BENEFICIARY.

An insurer cannot by contract with the insured change the vested rights of the beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1470; Dec. Dig. \Leftrightarrow 588.]

Appeal from Circuit Court, Greene County; W. J. Driver, Judge.

Action by Mary M. Crabtree against the Missouri State Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jones, Hocker, Sullivan & Angert, of St. Louis, Mo., and Block & Kirsch, of Paragould, for appellant. M. P. Huddleston, Robert E. Fuhr, and J. M. Futrell, all of Paragould, for appellee.

McOULLOCH, C. J. This is an action on a life insurance policy issued by appellant, the defense asserted being that there was a forfeiture of the policy on account of nonpayment of the third annual premium. The policy, which was on the ordinary life plan, was issued on April 29, 1912, to J. S. Crabtree, and the sum named was made payable to appellee, Mary M. Crabtree, the wife of J. S. Crabtree, in the event of the death of the latter and due proof thereof being made to the home office. The annual premium was the sum of \$34.13, payable on the 29th day of April of each year during the life of the assured. The facts of the case are undisputed, and the question presented on this appeal is whether or not the trial court, before whom, sitting as a jury, the case was tried, erred in rendering judgment against appellant.

[1] The policy contained the following clause with respect to payment of premium

and the options allowed on nonpayment thereof:

"After completion of premium payments for the first two policy years if any subsequent premium is not paid on the date when due, and remains unpaid during the month of grace, the insured shall, during said month, have the following options: (1) To surrender this policy at the home office of the company for its cash value; or (2) to surrender this policy at the home office of the company for a paid-up life policy; or (3) to let the insurance for the face amount hereof continue as term insurance.

"If the insured shall not within the month of grace surrender this policy at the home office of the company for its cash value as provided in option 1, or for a paid-up life policy as provided in option 2, the insurance will be automatically continued as provided in option 3."

There is a further stipulation in the policy that the term of continued insurance mentioned in the third subdivision quoted above "will be such as the cash value of this policy less any indebtedness hereon to the company, will purchase at the company's single life and term rates, respectively, for the attained age of the assured, counting each completed quarter of policy year in arriving at such age."

The first two premiums were paid when they fell due, and it is agreed that the length of the term of the continued insurance was one year and seven months from the date of the expiration of the time for the payment of the third premium; that is to say, that length of time from the expiration of the 30-day grace period running from April 29, 1914. The insured gave the company a promissory note for the amount of the third premium due and payable six months from April 29, 1914, the day that premium was due, which said note contained the following stipulation:

"That if this note is not paid on or before the day it becomes due, said policy shall be deemed to have ceased and determined on the date when said premium was due and all rights to extended or paid-up insurance shall be for the term and amount secured by said policy on and from the day when said premium became due; but, nevertheless, the maker of this note shall be personally liable to the company for a sum equal to one-half of the principal, of this note, said sum to be due and immediately collectible as compensation for the rights and privileges hereby granted and as the earned premium for the insurance granted from maturity of this note (or at the pleasure of the company said sum, with interest at 6 per cent. may be treated as an indebtedness on account of the policy to reduce any of its nonforfeiture values or benefits in accordance with the terms of the policy); and the payment to or collection by said company of said sum shall not revive said policy or any of its provisions."

The note was not paid, and appellant charged the sum equal to one-half of the principal of the note against the assured in reduction of the amount of the nonforfeiture value, which left of the original cash value of the policy on the last premium date a sufficient balance to purchase extended insurance for 102 days. No notice, however, was given to the insured of the company's election to so apply the so-called earned premiums evi-

denced by the note. The assured, J. S. Crabtree, died on April 15, 1915, which was within the original term of extended insurance.

The contention of appellant, therefore, is that under the contract specified in the note it had the right to charge the earned premium against the cash surrender value, and thus reduce the amount which went under the policy towards the purchase of extended insurance, and that, inasmuch as the sum left was only sufficient to purchase extended insurance for the period of 102 days, the policy was automatically terminated on the due date of the note without any further action on the part of the company. On the other hand, the appellee contends, and the court so held, among other things favorable to appellee, that upon the nonpayment of the premium note the company was put to an election whether it would apply the unpaid amount of the earned premium to the cash surrender value, and thus reduce the term of the extended insurance, or hold the amount as indebtedness against the insured, and that, in order to exercise the option to reduce the extended insurance, notice to the assured was essential.

We are of the opinion that the court was correct in holding that appellant's option could not be exercised by applying the sum of the unearned premiums in reduction of the terms of the extended insurance without notice to the insured. It will be observed from consideration of the express terms of the note that the amount of the earned premiums was to be a personal liability of the maker of the note to the company, unless the company elected to treat it "as indebtedness on account of the policy to reduce any of its nonforfeiture values or benefits," and in order to exercise that option it was necessary to furnish some evidence thereof by notice to the other party to the contract. The note itself was the evidence of the liability, and the company by retaining this evidence, without any notice to the maker of the note, elected to treat the amount as a continuing personal liability of the maker. If the assured had outlived the original term of extended insurance, the company, by retaining the note and failing to make an election to the contrary, might have sued him for the amount of this personal liability, and there is no reason why a recovery could not have been had upon that liability. Of course, the company had no right to speculate on the result by retaining the evidence of liability and at the same time treating the liability as extinguished by application of the sum in reduction of the amount of extended insurance.

This is not a question of the necessity of declaring a forfeiture which under the terms of the contract results automatically but it is a question of exercising an option, and in that case it is necessary to give some notice of what the intention of the party is with

respect to the election. The principle has been settled by this court in several cases. *Lenon v. Mutual Life Ins. Co.*, 80 Ark. 563, 98 S. W. 117, 8 L. R. A. (N. S.) 193, 10 Ann. Cas. 467; *Patterson v. Equitable Life Assurance Society*, 112 Ark. 171, 165 S. W. 454.

Appellant relies upon the case of *Citizens' National Life Ins. Co. v. Morris*, 104 Ark. 288, 148 S. W. 1019, but we think the principles announced in that case have no application to the present one.

[2] There is another question in the case, whether or not the company had a right to stipulate in the note a restriction upon the term of the extended insurance; there being nothing in the policy which authorized it. The policy is payable to appellee, but there is a stipulation that the insured could change the beneficiary at any time. Whatever vested interest the beneficiary had in the policy was beyond the power of the company to restrict by an additional contract not authorized by the term of the policy itself. However, we pretermitt any further discussion of that question, for the reason that the point already decided is conclusive of the case and calls for an affirmance of the judgment.

It is ordered, therefore, that the judgment be affirmed.

CLOW v. WATSON. (No. 55.)

(Supreme Court of Arkansas. June 12, 1916.)

1. APPEAL AND ERROR ⇐934(3) — REVIEW — PRESUMPTIONS.

Only in cases of appeal from default judgments will the court determine whether the averments of the complaint are sufficient to uphold the judgment, for in other cases it will be presumed that every fact which could have aided the plaintiff was proved, and that the defects were so cured.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8773; Dec. Dig. ⇐934(3).]

2. APPEAL AND ERROR ⇐901 — REVIEW — PRESUMPTIONS.

Every judgment of a court of competent jurisdiction is presumed right, unless the party aggrieved affirmatively shows it was erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1771, 3670; Dec. Dig. ⇐901.]

3. APPEAL AND ERROR ⇐889(3) — REVIEW — PRESUMPTIONS.

Where there was no objection to any evidence introduced by plaintiff, the complaint will on appeal be treated as amended to conform to the proof.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3622; Dec. Dig. ⇐889(3); *Pleading*, Cent. Dig. §§ 1355, 1418.]

Appeal from Circuit Court, Baxter County; J. B. Baker, Judge.

Action by Charles A. Watson against C. C. Clow. From a judgment for plaintiff, defendant appeals. Affirmed.

Z. M. Horton, of Mountain Home, and Allyn Smith, of Cotter, for appellant. S. W. Woods, of Marshall, for appellee.

HART, J. Chas. A. Watson employed C. C. Clow to act as his agent in the purchase of a tract of land. He sued Clow to recover \$200, which he claimed that the latter received from him to be used in payment of the land and converted it to his own use. The case was tried before a jury, which returned a verdict for Watson in the sum of \$200, and from the judgment rendered Clow has appealed.

[1] It is insisted by counsel for defendant that the judgment should be reversed because the allegations of the complaint are not sufficient to authorize the judgment, and, this being the only assignment of error relied upon for reversal of the judgment, counsel has set out the complaint in full. It is only in cases of appeal from a judgment by default that the question for the consideration of the Supreme Court is whether the allegations of the complaint are sufficient to authorize the judgment. *Nelmeyer v. Claiborne*, 87 Ark. 72, 112 S. W. 387; *Euper v. State*, 85 Ark. 223, 107 S. W. 179. In the instant case there was no motion for a new trial and no bill of exceptions. Under such circumstances this court will presume that every fact susceptible of proof that could have aided plaintiff's case was fully established.

[2] The salutary rule of law is that every judgment of a court of competent jurisdiction is presumed to be right, unless the party aggrieved will make it appear affirmatively that it is erroneous. *McKinney v. Demby*, 44 Ark. 74; *Young v. Vincent*, 94 Ark. 115, 125 S. W. 658. Hence we must presume that the judgment below is right if the complaint states a cause of action.

[3] The court had jurisdiction of the subject-matter and of the person of the defendant. It is not necessary that the complaint should state a cause of action in every particular, for if it contains the substance of a cause of action imperfectly stated, the presumption would be that the defects in the complaint were cured by the proof at the trial. *Sorrels v. Self, Adm'r*, 43 Ark. 451. So far as the record discloses there was no objection made to any evidence introduced by plaintiff, and in such cases the well-settled rule in this state is that the complaint will be considered as amended to conform to the proof. *Townslley v. Yentsch*, 98 Ark. 312, 135 S. W. 882; *Citizens' Fire Ins. Co. v. Lord*, 100 Ark. 212, 139 S. W. 1114; *Pulaski Gas Light Co. v. McClintock*, 97 Ark. 576, 134 S. W. 1189, 1190, 32 L. R. A. (N. S.) 825; *Griffin v. Anderson-Tully Co.*, 91 Ark. 292, 121 S. W. 297, 134 Am. St. Rep. 73; *Wrought Iron Range Co. v. Young*, 85 Ark. 217, 107 S. W. 674; *Roach v. Richardson*, 84 Ark. 37, 104 S. W. 538.

In the application of this settled rule of law it is not necessary to set out the complaint, and it follows that the judgment must be affirmed.

LUSK et al. v. CRAFT. (No. 61.)

(Supreme Court of Arkansas. June 12, 1916.)

CARRIERS — 318(11) — PASSENGERS — INJURIES — ACTION — EVIDENCE — SUFFICIENCY.

In passenger's action for injuries received by stepping off the train onto a box provided by train porter, evidence of insufficient lighting of station platform and improper placing of box by porter, causing plaintiff's foot to turn, held to support verdict for plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1314; Dec. Dig. 318(11).]

Appeal from Circuit Court, Lawrence County; Dene H. Coleman, Judge.

Action by Kate Craft against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendants appeal. Affirmed.

W. F. Evans, of St. Louis, Mo., W. J. Orr, of Springfield, Mo., and H. L. Ponder, of Walnut Ridge, for appellants. Baker & Sloan, of Jonesboro, for appellee.

SMITH, J. Appellee recovered judgment for damages to compensate an injury sustained by her while debarking from one of appellant's passenger trains at Trumann, Ark. Exceptions were saved to the instructions given by the court. But these instructions declared the law as announced in numerous decisions of this court, and were as favorable to appellant as it had the right to demand.

The real question in the case is whether or not the evidence is legally sufficient to support the verdict. There was no testimony in regard to the manner in which appellee sustained her injury except that offered in her behalf, and in testing its legal sufficiency to support the verdict we must, of course, give it its highest probative value. This evidence may be summarized as follows: Appellee was an elderly lady, and appears not to have had very good sight, neither of which facts, however, were called to the attention of the operatives of the train. The train reached Trumann at about 8:10 p. m. on July 8th, at which time several passengers debarked from the train in advance of appellee and, in doing so, each of these passengers stepped on a box provided and placed by the train porter on the station platform, beneath the lower step of the car. It does not appear how this box was placed when these passengers debarked, but it does appear that they left the coach safely and, in doing so, stepped on this box. Appellee was unaccustomed to traveling and was paying a first visit to her son, who resided at Trumann, and he was accompanying her there. Appellee preceded her son as they left the car, and was assisted by the brakeman as she undertook to step on the box. Her son followed immediately behind and supported her with his hand, but when

the box turned as appellee stepped on it his hold was wrenched loose.

A witness named Dame, who stood on the platform and saw the incident, described it as follows: Mrs. Craft started to step off to the box, which was just a little too far from the step, about 12 or 15 inches, and the toe of her shoe caught just a little bit on the edge of the box next to the train and her foot slipped and went back underneath the step and she fell. This proof was offered in connection with proof from which the jury might have found that the platform was not sufficiently lighted for appellee to see, as she stepped from the train, just how far the box was from the step. Dame's testimony is to the effect that the box was not placed where one would ordinarily have anticipated it to be, and that if the box had been a few inches nearer the step of the car, as it should have been, that the ball of appellee's foot, instead of her toe, would have rested on the box and the box would not have turned under her. The evidence is not harmonious as to the amount of light afforded by a station lamp at the corner of the depot about 30 or 35 yards away, and the lights of the train and the brakeman's lantern; but there is evidence to support a finding that there was not sufficient light for the location of the box to be plainly discernible to one leaving the train. If this was the fact, it imposed upon the railroad company the duty to use the greater care to see that the box was properly placed.

We are unable to say that the evidence is legally insufficient to support the verdict of the jury, and the judgment will therefore be affirmed.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN v. HOWLE. (No. 35.)

(Supreme Court of Arkansas. June 5, 1916.)

1. APPEAL AND ERROR — 1195(1) — REVIEW — LAW OF CASE.

Where on the second appeal it was adjudged there could be no recovery under the by-laws of a fraternal insurer where a violation of the law on the part of the member resulted in his death, such holding is the law of the case on a subsequent trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4661; Dec. Dig. 1195(1).]

2. TRIAL — 200(9) — INSTRUCTION — REFUSAL.

In an action on a fraternal insurance certificate issued subject to a by-law denying recovery should insured meet his death while in violation of law, where the court at the request of plaintiff charged that, if at the time deceased made an assault on the marshal he knew right from wrong and knew it was wrong to make the assault, he was sane, unless he was acting under an irresistible impulse arising from a defect in his will caused by the diseased condition of his mind, sufficiently covered defendant's requested instruction that one who, in possession of a sound mind, commits a criminal act under the impulse of passion or revenge, which may

temporarily dethrone his reason, cannot defend his act on the plea of insanity.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 658; Dec. Dig. ¶ 260(9).]

3. INSURANCE ¶ 787—FRATERNAL INSURANCE—DEATH WHILE VIOLATING LAW—INTOXICATION.

Where the by-laws of a fraternal insurance association barred recovery if the insured should meet his death while in violation of law and the insured was killed when assaulting a marshal, his voluntary intoxication was not, under Kirby's Dig. § 1557, declaring that voluntary intoxication is no excuse for crime, any excuse, and an instruction so declaring the law was improperly refused.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1955, 1957-1959; Dec. Dig. ¶ 787.]

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Action by Laura O. Howle against the Eminent Household of Columbian Woodmen. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Plaintiff's instruction No. 9 is as follows:

The jury is instructed that, if you find from the evidence that at the time the deceased, Howle, made the assault upon the marshal, Sowell, he knew right from wrong, and he knew it was wrong to make said assault, then, under the law, he was sane, unless you find that at the time he was acting under an irresistible impulse arising from a defect in his will caused by the diseased condition of his mind, and was not acting from mere anger or revenge.

Brundidge & Neelly, of Searcy, for appellant. Rachels & Yarnell and Jno. E. Miller, all of Searcy, for appellee.

WOOD, J. This is the third appeal in this case. Eminent Household of Columbian Woodmen v. Howle, 109 Ark. 400, 160 S. W. 238; Id., 118 Ark. 226, 176 S. W. 313. The facts are stated in the first opinion.

John W. Howle was shot and killed while a member of appellant fraternal insurance company. This suit was brought by the appellee, his wife, as beneficiary in a policy for the sum of \$1,000. Howle was killed by the marshal of the town of Searcy. Howle made an attack upon the marshal by shooting at him twice.

First. The first question to be determined on this appeal is whether or not the appellant can contest the policy under the clause which reads:

"This covenant shall not be contested except for misrepresentation in the application or in the health statement, providing this guest has complied with the conditions of this covenant."

[1] On the second appeal we said:

"It is too late to raise the question now that under a clause in the policy appearing to limit the grounds for contest thereof to two, not including the death of the insured while engaged in the violation of the law, such provision cannot be considered a defense, it having been held in the former opinion, which is the law of the case, that such provision of the by-laws became a part of the contract of insurance and constituted a defense to the suit."

Appellee contends that this was not a correct statement of the holding on the first appeal. But, be this as it may, the declaration in the last opinion to the effect that the provision in the policy holding that a violation of the law on the part of Howle resulting in his death was a defense to the action under the by-laws of appellant is the law of this case; for the facts on this hearing are precisely the same as they were on the second appeal, and what we said on this issue in the opinion on that appeal is the law of the case. Morgan Engineering Co. v. Cache River Drainage Dist., 184 S. W. 57.

The court did not err therefore in allowing appellant to go to the jury on the issue as to whether or not the death of Howle occurred while he was engaged in a violation of the law.

[2] Second. Witnesses on behalf of the appellee testified to the effect that they had known Howle for periods ranging from 8 to 25 years; that they had been intimately acquainted and closely associated with him; that when they talked with him about his trouble with Sowell at times he would go crazy mad and nothing could be done with him. One witness stated that "he would go to pieces and looked like his mind would leave him." Another witness stated that when he talked with him concerning his trouble with Sowell "he acted like a crazy man." Another stated that "he would go off and go wild when the subject of his trouble with Mr. Sowell was raised; he would not have any reason about him at all." These witnesses testified that, in their opinion, Howle at the time of the killing was crazy. The witnesses sufficiently detailed the facts upon which their testimony was based to make the same competent, although they were not experts, and the case is ruled in this particular by Williams v. Fulkes, 103 Ark. 196, 146 S. W. 480. Several of the witnesses testified that he was crazy on the subject of his troubles with Sowell. Some of them testified that when he was in this frame of mind he would be drinking, while the testimony of others showed that he seemed to be crazy on the subject of his troubles with Sowell when not drinking.

There was testimony tending to prove that Howle and Sowell had had trouble before the killing, and that on the day and at the time of the killing Howle "looked like he was drinking pretty heavy." It was shown that Howle had made frequent threats to kill Sowell, covering a period of about three months before the killing. One of the witnesses stated that he never made these threats except when he was drinking. This witness also stated that Howle did not appear to be insane or crazy. There was testimony to show that it was the habit of Howle to get drunk. It was shown that he had conducted a restaurant in Searcy and had carried the mail to Kensett. One wit-

ness stated that Howle went about his business, attended to it all right, carried the mail, and ran a restaurant. This witness stated that, in his opinion, Howle was crazy, because he would get very angry and would want revenge.

Among other alleged errors of which appellant complains was the refusal of the court to give the following prayers for instructions:

"(1) The court instructs the jury that one who, in possession of a sound mind, commits a criminal act under the impulse of passion or revenge which may temporarily dethrone his reason, or for the time being control his will, cannot be shielded from the consequences of the act by the plea of insanity."

"(8) The jury are instructed that, if you believe from the evidence in this case that at the time the deceased, Howle, made an attack upon the town marshal of the city of Searcy he was temporarily insane, and that such temporary insanity, if such there was, was produced by the voluntary recent use of ardent spirits, it would afford no excuse for the assault made by him upon the officer, if the act was otherwise criminal."

Instruction No. 1 was sufficiently covered by instruction No. 9, given at the request of appellee. (Reporter copy in note).

[3] While instruction No. 8 might have been more aptly drawn, it was a correct declaration of law, and was applicable to the facts above set forth, and should have been given. This instruction was intended to submit the issue covered by that phase of the testimony which tended to prove that sometimes when Howle would get mad and threaten to kill Sowell that he would be drinking. The instruction was intended to declare the well-known doctrine of the criminal law that voluntary drunkenness is no excuse for crime. Kirby's Digest, § 1557; Harris v. State, 34 Ark. 469, 475; 1 Bishop, Cr. Law, §§ 400, 401.

Where one has threatened to kill another, and with that purpose in his mind has imbibed intoxicating liquors in order to embolden him to the deed, and he commits the deed while his reason is temporarily dethroned from the use of intoxicants, he is nevertheless guilty of a crime. When one has been "in his cups" so often and so long as to produce a disease of the mind which renders him incapable of forming a specific intent, and, acting under the influence of and impelled alone by such disease, he kills another, he will not be guilty. But temporary insanity caused by voluntary intoxication is not such a disease of the mind. 1 Bishop, Cr. Law, § 406.

The instruction is in accord with the doctrine of criminal law often announced by this court. See the recent case of Bell v. State, 180 S. W. 186-196, where we said:

"But it must be remembered that one who is otherwise sane will not be excused from a crime which he has committed while his reason is temporarily dethroned, not by disease, but by anger, jealousy, or other passion."

See, also, Casat v. State, 40 Ark. 511-519.

The instruction was essential to make the

charge of the court as a whole a correct statement of the law.

We have carefully examined the other instructions to which objection is urged, and find no reversible error in any of them. But for the error in refusing to give appellant's prayer No. 8 the judgment is reversed, and the cause remanded for a new trial.

FEARS v. WATSON. (No. 37.)

(Supreme Court of Arkansas. June 5, 1916.)

1. SALES ~~§~~ 474(1)—RESERVATION OF TITLE—INTEREST OF BUYER.

Where the seller of articles of personal property by provision in the buyer's note reserved the title until the purchase price was paid, the buyer could vest no absolute title in another until he paid the purchase money, hence could not by affixing the articles to land leased by him vest title in his landlord.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391-1396, 1398-1402; Dec. Dig. ~~§~~ 474(1).]

2. EVIDENCE ~~§~~ 441(9) — PAROL EVIDENCE — NOTE.

Where articles were sold, and the seller took the buyer's note expressly providing for a reservation of title until the purchase price was paid, and on the back of which the articles were itemized, such items became a part of the written contract, and it was not competent to show by parol testimony that it was not the seller's intention to reserve title.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1729-1731, 1787-1789, 2039, 2035; Dec. Dig. ~~§~~ 441(9).]

Appeal from Circuit Court, Greene County; W. J. Driver, Judge.

Replevin by B. M. Fears against R. L. Watson. Judgment for defendant upon a directed verdict, and the plaintiff appeals. Reversed, and cause remanded for a new trial.

M. P. Huddleston, Robert E. Fuhr, and J. M. Futrell, all of Paragould, for appellant.

HART, J. B. M. Fears sued R. L. Watson in replevin to recover some wire fencing, some pump pipe, and a pump point. The material facts are as follows:

John Zollman leased certain lands from R. L. Watson. During the life of the lease, Zollman purchased from Bertig Bros. some wire fencing, a pump point, and some pump pipe for the sum of \$13.60; for which he executed a note due October 15, 1914. Ben Fears signed the note as surety. The note contained the following:

"It is expressly agreed that the title and ownership of all said property shall remain in Bertig Bros. until the full purchase price is paid," etc.

The note was made on the regular printed form prepared and used by Bertig Bros. when they sold personal property and retained title in themselves until it was paid

for. On the back of the note was indorsed the following:

pump	13.60
pipe75
point	14.35
wire	

Bertig Bros. assigned the note to Ben Fears, and also gave him a bill of sale of the personal property above described. After the articles were purchased by Zollman, he attached them to the leased property. It was shown by parol evidence that Bertig Bros. did not intend to retain title to the articles in question, but that form of note was used because it happened to be lying upon the desk at the time the purchase was made. The court directed a verdict for the defendant Watson, and the plaintiff, Fears, has appealed.

[1] In the case of Peck-Hammond Co. v. Walnut Ridge School Dist., 93 Ark. 77, 123 S. W. 771, where a heating apparatus was sold to the contractor of a public schoolhouse, to be installed there upon condition that the title should remain in the vendor until the purchase price was paid, but the school board had no knowledge of such condition, and the apparatus was installed in the building, it was held that the reservation of title could not be enforced. In that case the vendor knew that the articles sold were to be installed in the building, and that the building was not erected for the contractor, but was being built for use as a schoolhouse by the public. The principle there announced has no application to the facts of the present case. Here the vendor of the articles expressly reserved the title until the purchase price was paid, and the vendee could vest no absolute title in another until he paid the purchase money.

[2] Zollman could not, by affixing the article to the land leased by him from Watson, vest the title in the latter. This point was so ruled in the case of Butler v. Adler-Goldman Commission Co., 62 Ark. 450, 35 S. W. 1110. It was not competent to show by parol testimony that it was not the intention of Bertig Bros. to reserve title in themselves until the property was paid for. The admission of this testimony violated the well-known rule that parol evidence is not admissible to contradict or to vary or add to any of the terms of a written contract. When Bertig Bros. sold the articles to Zollman and took his note therefor on the printed form of contract, their previous negotiations became merged in the written contract, and it could not be varied by parol testimony. The note in plain terms reserved the title to the property sold in the vendors until it was paid for. The printed form of contract did not have room enough to place more than one article, and, there being more than one article sold, these articles were placed upon the back of the printed form.

This was done for the purpose of identifying the articles, and the indorsement became a part of the written contract.

It follows that the court erred in directing a verdict for the defendant, and for this error the judgment will be reversed, and the cause remanded for a new trial.

MEMPHIS ST. RY. CO. v. CAVELL.

(Supreme Court of Tennessee. June 10, 1916.)

1. CARRIERS \S 280(3)—CARRIAGE OF PASSENGERS—DEGREE OF CARE.

The degree of care imposed on a carrier of passengers, such as a street railway, by law and on grounds of sound public policy, is the exercise of the utmost diligent skill and foresight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1089-1091; Dec. Dig. \S 280(3).]

2. NEGLIGENCE \S 121(2)—RES IPSA LOQUITUR.

In general, mere proof that an accident injurious to plaintiff has occurred does not justify a verdict or judgment imposing liability therefor upon the defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 218, 225, 271; Dec. Dig. \S 121(2).]

3. NEGLIGENCE \S 121(1)—BURDEN OF PROOF.

The law imposes on plaintiff suing for injuries caused by negligence the burden of showing by a preponderance of the evidence that the negligence was the cause of his injury, and that defendant was responsible for the negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 217, 220, 224, 227; Dec. Dig. \S 121(1).]

4. NEGLIGENCE \S 119(7) — PLEADING AND PROOF.

Plaintiff suing for injuries caused by negligence is under the burden that his proof in substance shall correspond with the averments of his pleadings.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 212-216; Dec. Dig. \S 119(7).]

5. APPEAL AND ERROR \S 1066 — HARMLESS ERROR—INSTRUCTION.

In an action against a railway for injuries, where, under all the evidence, there was no material issue of fact for the jury to determine on the question of defendant's negligence, error in charging the doctrine of res ipsa loquitur was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4220; Dec. Dig. \S 1066.]

6. CARRIERS \S 320(1) — INJURIES — NEGLIGENCE—QUESTION FOR JURY.

In an action against a street railway for injuries to a passenger, where, under all the evidence, no reasonable difference of opinion can exist as to the negligent character of the acts of defendant's employes at a railroad crossing under the particular circumstances and at a particular time, the act was negligent in law, and there is no issue for the jury on the question of the negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1315, 1317; Dec. Dig. \S 320(1).]

7. CARRIERS \S 300—CARRIAGE OF PASSENGERS—NEGLIGENCE.

Where a street railway's conductor in charge of a motor and trailer after walking upon straight railroad tracks gave the signal to the motorman to attempt the crossing, so that, though the motor got over the tracks, the trail-

er was struck by a train, the street railway was negligent, though the dust and noise of another train, which the motor had stopped to let go by, hindered the conductor's seeing and hearing the approaching train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1211, 1212; Dec. Dig. ¶300.]

8. CARRIERS ¶300—CARRIAGE OF PASSENGERS—NEGLIGENCE.

The negligence of a railroad in running a freight over a street railway crossing did not excuse such street railway, whose conductor was negligent in not making sure of the approach of the freight before attempting to cross, from liability to an injured passenger, since the passenger's injuries were the proximate result of the conductor's failure to discharge his duty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1211, 1212; Dec. Dig. ¶300.]

Certiorari to Court of Civil Appeals.

Action by G. C. Cavell against the Memphis Street Railway Company. There was judgment for plaintiff, and to review and reverse the judgment of the Court of Civil Appeals, affirming this judgment, the Railway Company petitions for certiorari. Judgment affirmed.

Roane Waring, of Memphis, for plaintiff.
R. H. Stickley, of Memphis, for defendant.

BUCHANAN, J. The Court of Civil Appeals affirmed a judgment rendered by the circuit court of Shelby county in favor of Cavell for the sum of \$3,500, against the railway company, and the latter, by its petition for certiorari, seeks a review and reversal of the judgment of the Court of Civil Appeals.

The point made by the assignment of error is that the court charged the doctrine of res ipsa loquitur, and that this doctrine can never apply where there is a collision between a vehicle belonging to the defendant and one belonging to some other party.

We will first consider the assignment upon the hypothesis that when the evidence was all in there was an open issue of fact on the question of defendant's negligence for the jury to determine.

The declaration was in one count and on the facts of the case, and showed the relation of passenger and carrier to have existed between plaintiff and the company when the injuries were inflicted for which he sued, and that the damages sought resulted from a breach by the carrier of the duty which the law imposed upon it when plaintiff was accepted as a passenger.

The declaration also averred divers particulars in which the servants of the company were negligent in the discharge of the duty so imposed. The company interposed its plea of the general issue.

[1] The degree of care imposed on the carrier by law and on grounds of sound public policy is the exercise of the "utmost diligence, skill, and foresight." *Ferry Companies v. White*, 99 Tenn. (15 Pickle) 256, 41 S. W. 583; *Railroad v. Flake*, 114 Tenn. (6

Cates) 671, 88 S. W. 326; *Railroad v. Kuhn*, 107 Tenn. (23 Pickle) 106, 64 S. W. 202.

The doctrine laid down by Sir James Mansfield as to the degree of care required in such cases is that the duty of the carrier is to provide for the safety of its passengers "as far as human care and foresight will go." *Christie v. Griggs*, 2 Camp., 79. See, also, *Hutchinson on Carriers* (3d Ed.) vol. 2, § 896, and authorities cited at page 111 et seq. of 107 Tenn., 64 S. W. 202, in *Railroad v. Kuhn*, supra. The Supreme Court of the United States, speaking through Justice Lamar, has said:

"Since the decision in *Stokes v. Saltonstall*, 88 U. S. (13 Pet.) 181 [10 L. Ed. 115], and *N. J. R. & Transp. Co. v. Pollard*, 89 U. S. (22 Wall.) 341 [22 L. Ed. 877], it has been settled law in this court that the happening of an injurious accident is, in passenger cases, prima facie evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight." *Gleason v. Va. Midland Ry. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458.

But qualifying the doctrine of this case as to the burden of the evidence, see *Sweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815. As to the degree of care, see, also, *Inland & Seaboard Co. v. Tolson, Adm'r*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270. See, also, the authorities collated in a note accompanying *Chicago Union Traction Co. v. Mee*, 218 Ill. 9, 75 N. E. 800, 2 L. R. A. (N. S.) 725, 4 Ann. Cas. 7.

[2] In general mere proof that an accident injurious to plaintiff has occurred does not justify a verdict or judgment imposing liability therefor upon the defendant.

The burden of proving negligence as the causal basis or origin of the injury as well as the burden of proving the responsibility of the defendant for the negligence the law imposes on the plaintiff.

[3, 4] The maxim is *ei qui affirmat, non ei qui negat, incumbit probatio*. Not only so, but the law imposes on the plaintiff the burden of showing the two essential elements of liability above mentioned by a preponderance of the evidence, and another burden imposed on the plaintiff is that his proof must in substance correspond with the averments of his pleadings.

As a general rule, proof that an accident injurious to plaintiff has happened, without more, is not evidence of negligence, and of course until the existence of negligence is shown no one is responsible for the injury, and in such case it is the plaintiff's misfortune. But while the law imposes the burdens we have mentioned, "when a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, the accident itself affords reasonable

evidence, in the absence of an explanation by the party charged, that it arose from the want of proper care." In the same case it is further said:

"If the act which caused the injury was shown by direct evidence, and all of the circumstances of the accident were shown in the proof, and if the only reasonable explanation of the accident should give rise to an inference of negligence, then the rule of '*res ipsa loquitur*' would apply; but there can be no foundation for the application of this maxim where both the act which caused the injury and the negligence of defendant in relation to the act must be inferred from the accident itself. You cannot well say that an act is negligent, unless you know what it is. It is said in one case that the maxim under consideration can have no application where the injured person and the alleged negligent person were both in the exercise of an equal right and were each chargeable with the same degree of care." *De Gloppe v. Railway & Light Co.*, 123 Tenn. (15 Cates) 633.

Some of the English cases discussing the application of the doctrine are: *Per Ourlam*, 3 H. & C. 601; *per Bovil*, C. J., *Simpson v. Lond. Gen. Omnibus Co.*, L. R. 8 C. P. 390, 392; 42 L. J. C. p. 112; *The Annot Lyle*, 11 P. D. 114; 55 L. J. Adm., 62; *The Indus*, 12 P. D. 46; 56 L. J. Adm. 88; *Carpus v. L., B. & S. C. R. Co.*, 5 Q. B. 747; *Skinner v. L., B. & S. C. R. Co.*, 5 Exch. 787; *Scott v. London Dock Co.*, 3 H. & C. 596; 34 L. J. Ex. 220; *Kearney v. L., B. & S. C. R. Co.*, L. R. 5 Q. B. 411, L. R. 6 Q. B. 759, 40 L. J. Q. B. 285; *Byrne v. Boadle*, 2 H. & C. 722. See, also, *Briggs v. Oliver*, 4 H. & C. 403; and *per Lord Halsbury* (1891) A. C. 335; *Broom's Legal Maxims*, pp. 253, 254.

"The accurate statement of the law is not that negligence is presumed, but that the circumstances amount to evidence from which it may be inferred by the jury. In cases where the duty is not absolute, like that of the common carrier to exercise the highest care and skill in regard to the safety of a passenger who has committed himself to its charge, but arises in the ordinary course of business, it is essential that it shall appear that the transaction in which the accident occurred was in the exclusive management of the defendant, and all the elements of the occurrence within his control, and that the result was so far out of the usual course that there is no fair inference that it could have been produced by any other cause than negligence. If there is any other cause apparent to which the injury may with equal fairness be attributed, the inference of negligence cannot be drawn." *Cooley on Torts* (3d ed.) § 1424.

See, also, *Hutchinson on Carriers* (8d Ed.) vol. 2, § 923 (3d Ed.) vol. 3, § 1414.

On the same subject see *Brown v. Union R. Co.*, 81 Kan. 701, 106 Pac. 1001, 29 L. A. (N. S.) 808; *McGinn v. N. O. Ry. & Light Co.*, 118 La. 811, 43 South. 450, 13 R. A. (N. S.) 601, and note; *Southern P. v. Hogan*, 13 Ariz. 34, 108 Pac. 240, 29 R. A. (N. S.) 813; *Cleveland, Cincinnati, Chicago & St. L. Ry. Co. v. Hadley*, 170 Ind. 4, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527, 16 Ann. Cas. 1; *Hughes v. Atlantic City & Shore Railroad Co.*, 85 N. J. 212, 89 Atl. 769, L. R. A. 1916A, 927; *weeney v. Irving*, 228 U. S. 283, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905.

In this last-named case Mr. Justice Pitney discussed the doctrine of *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115, cited supra, and said:

"Reading of the report shows that the case turns upon the high degree of care owing by carrier to passenger, and that the court did not rule that the circumstances of the occurrence shifted the burden of proof upon the main issue. Such is the effect that has uniformly been given to the decision."

After citing authorities to sustain the above quotation he concludes:

"In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well-considered judicial opinions."

[5] What we have said would be a good answer to the first assignment on the hypothesis first mentioned, but we think a correct view of all the evidence is that there was no material issue of fact for the jury to determine on the question of the negligence of the defendant, and therefore if the court erred in charging the doctrine *res ipsa loquitur*, it was innocuous error, for error which does not injure the complaining party is not reversible. *Lowry v. Railroad*, 117 Tenn. (9 Cates) 507, 101 S. W. 1157.

[6] If, upon all the evidence, no reasonable difference of opinion can exist among men as to the negligent character of the act of defendant's employés in carrying the street car on the crossing under the circumstances and at the time then that act was negligent in law, and there was no issue for the jury on the question of negligence. *Traction Co. v. Carroll*, 113 Tenn. (5 Cates) 514, 82 S. W. 313.

[7] Passing now to a consideration of the evidence in order to determine if the act was negligent in law—when the street car, on which plaintiff was a passenger and had paid his fare, was on its way from Memphis to Raleigh and had reached the intersection where its track running east and west crossed double tracks of the railroad company running north and south at Binghampton, a freight train composed of 52 cars running south at a high rate of speed on the west track was about to pass over the crossing. When the street car reached this crossing it was about 6:30 p. m. on September 17, 1914. The street car train was composed of a motor car and a trailer. On the motor car were a conductor and a motorman, and on the trailer there was an additional conductor. The motor car and the trailer were each

equipped with gates or doors worked by levers managed by the employes in charge, and through these doors passengers boarded and were discharged from the cars. The windows in the cars were lowered, and the operatives in charge had a clear view of the railroad tracks both north and south of the crossing. These railroad tracks for a mile north and a mile south of this crossing were straight, and the view from the crossing in either direction was wholly unobstructed, if the persons in charge of the operation of the street car had not left their respective places therein, but had been in the exercise of even ordinary care. It is clear that they need not have attempted to cross on this particular occasion until it was safe so to do. It was, however, the duty of the conductor to precede the motor car upon the crossing, and after satisfying himself by looking north and south along the railroad tracks that the crossing was safe, to signal the motorman to come over. This duty it appears was required of him by the company, and by making this requirement we think the company was only in the exercise of the high degree of care which the law imposed upon it. The conductor who undertook to discharge this duty on this occasion had been running on that line for about a year. He was familiar with this crossing, and used it as many as eight times every day. The conductor on the trailer and the motorman were each likewise familiar with the crossing. The motor car reached a point on its track about 15 feet west of the western railway track, and stopped to allow the south-bound train to pass on the western track. After that train had passed the conductor, while the motor car was still at rest, walked across the west railroad track, then across the east railroad track. He then signaled the motorman to come over, and the latter obeyed. The motor car had passed over both railroad tracks and the trailer was crossing the east railroad track when it was struck about midships by a north-bound freight engine, hauling a train of about 90 cars on the east railway track. This railway train was running at a rate of speed variously estimated at from 18 to 30 miles an hour. The result of the collision was an appalling wreck. Nine passengers on the street car train were killed, and many severely injured, including the plaintiff. The trailer car was derailed, and overturned, and the freight engine, after having run about 214 feet north of the crossing, was derailed and ditched.

It is true that the operatives of the street car did not control the operation of the north-bound railway train, but it was their duty to exercise the utmost care, skill, and foresight in the operation of the street car train and theirs was the sole right and duty to so control the operation of that train that it would not attempt to occupy the crossing except when it was safe so to do. The oper-

atives of the street car had the right of selection as to the time when the street car would attempt to make the crossing. There was no exigency requiring them to attempt a crossing when it was unsafe. There was no vis major on the street capable of compelling them to attempt an unsafe crossing, or threatening the safety of their passengers in the event of failure to make such an attempt at the particular time. The fear that the street car train might not reach its destination according to schedule did not justify crossing at the time it was attempted. The existence of the intersection of the railway tracks was an admonition of danger; a warning that either a north or south bound train might be expected to use the crossing at any time.

It is no exculpation to say that the smoke and dust which followed in the wake of the south-bound train so obscured the north-bound freight that it could not be seen by the conductor. Such a condition of the atmosphere called for additional caution on his part; he should have withheld his signal to the motorman until he had sufficient evidence that the crossing was safe. In a case where a plaintiff was seeking damages for injuries received while he was driving on the track of a street railway in Memphis, at night, when darkness and dust made it impossible for him to see or be seen at a greater distance than 30 or 40 feet, and his injuries resulted from a collision with a street car moving toward him at 30 miles an hour, it was held that he could not recover, because of his lack of ordinary care. *Railroad v. Roe*, 118 Tenn. (10 Cates) 601, 102 S. W. 343.

Nor is it a sufficient answer to say that the conductor could not hear the noise of the approach of the north-bound freight because of its commingling with noise from the south-bound freight. He knew the south-bound freight had just passed; he saw and heard it pass; he was bound to take notice of the danger that it might as it did pass a north-bound freight only a few hundred feet south of the crossing, and that he would be unable to distinguish the noise of one from that of the other. If he had waited only a very short time he could not have failed to make the distinction and to hear the roar from the north-bound freight as it bore down upon the crossing. Whether a bell was rung, or a whistle blown, or not, common knowledge and the least bit of common sense, aside from special training and observation, should have suggested to him that he withhold his signal until he could determine by hearing, if not by sight, whether the crossing could be made in safety.

The considerations mentioned irretrievably stamp negligence upon the conduct of this servant of the company. The facts to which we have referred are not in dispute upon them alone, a directed verdict for liability

in some amount was maintainable. When all the evidence was in there was indeed no question for the jury on the question of negligence. The only matter which should have been submitted to the jury was the amount of damages to which plaintiff was entitled.

Whatever may be said of the charge, it was more favorable to defendant than it might have been if the trial court *mero motu* or on motion of plaintiff had directed a verdict in his favor, and submitted the cause to the jury only on the amount of the damages.

[8] Whether the railroad company was or was not in any manner negligent in the operation of the colliding north-bound train we do not consider material. However great its negligence may have been, no harm would have come to plaintiff if defendant's conductor had kept the street car clear of the sweep of the railway train. Plaintiff's injuries were the direct and proximate result of the failure of the conductor to discharge his duty. It was a breach of the high degree of care required of defendant for its servants to enter on the crossing: if, at the time, their view of the railroad track north or south were in any manner obstructed by the recent passage of the south-bound train, they should have waited until such obstructions were removed. Indeed it was a lack of ordinary care not so to do. *Wallenburg v. Missouri P. R. Co.*, 86 Neb. 642, 128 N. W. 289, 37 L. R. A. (N. S.) 135, and cases cited in note, subdivisions B and C. See, also, *New York & H. R. R. Co. v. Maidment*, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794, and *Brommer v. Penn. R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924.

The first assignment of error is overruled.

The second, third, fourth, and fifth assignments of error each rest on the predicate that the court erred in declining a special instruction. The questions made by them

are that the conductor of the street railway train had the right to assume that those in charge of any approaching railway train would exercise reasonable care, etc., and that the railroad locomotive would be equipped with a proper headlight that could be seen, etc., and would sound a warning, and that under chapter 46, Acts 1871, it was the duty of those in charge of the north-bound train to stop the same before crossing the track of the Memphis Street Railway Company.

To sustain any one of the foregoing assignments of error would be to unsay all we said in our discussion of the first assignment. Whether a passenger on becoming such contracts for it or not by express terms the law by implication and on grounds of public policy burdens a carrier of passengers with the high degree of care we have mentioned, *supra*, and it does not allow that the carrier may escape the burden by shifting it to other shoulders than his own. Whether those in charge of the north-bound freight were negligent or not the street car company is not relieved of liability to the passenger for damages caused by the negligent management of its train. See *Parker v. Des Moines City R. Co.*, 153 Iowa, 254, 133 N. W. 373, Ann. Cas. 1913E, 174, and cases cited in note; *Vincennes Traction Co. v. Curry* (Ind. App.) 109 N. E. 62, 9 Neg. and Com. Cas. 983, and note.

The only remaining assignment is that the amount allowed by the verdict as damages was so grossly excessive as to evince passion, prejudice, or caprice on the part of the jury. We have examined the evidence on this point, and in our opinion the assignment is without merit.

We find no error in the judgment of the Court of Civil Appeals.

Special Judges GHOLSON and SWIGGART took no part in the decision of this cause.

Judgment affirmed at petitioner's cost.

GULF, T. & W. RY. CO. v. DICKEY.
(No. 2863.)

(Supreme Court of Texas. June 7, 1916.)

**1. RAILROADS §276(4)—INJURIES BY SERV-
ANT—DUTY TO THIRD PERSON.**

A railroad's engine hostler who permitted an eight year old boy to get upon an engine while he was in charge, was under obligation to use the care of an ordinarily prudent person, under like circumstances, in turning on the injector, to see if the valve connecting a hose with the injector was closed, to prevent injury to the boy.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 884, 885; Dec. Dig. §276(4).]

**2. TRIAL §296(3) — INSTRUCTIONS—CONTRA-
DICTION.**

In an action for injuries to an eight year old boy while on a locomotive in charge of an hostler, an instruction, telling the jury in the second paragraph that the exercise of ordinary care was the measure of duty under which the road rested, did not cure error in the third paragraph that the law required those in charge of dangerous machinery to use "great" care and prudence, since the giving of a contradictory charge does not correct the error committed in another part of the charge upon a material issue, and the only way to make the correction is to withdraw the erroneous instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. §296(3).]

**3. COURTS §247(1) — SUPREME COURT — AP-
PELLATE JURISDICTION—STATUTE.**

The mere refusal of the Court of Civil Appeals to consider an assignment of error for reasons deemed by it sufficient does not present a question of substantive law necessary to the jurisdiction of the Supreme Court under Rev. St. 1911, art. 1521, subd. 6, as amended by Acts 33d Leg. c. 55, defining the appellate jurisdiction of the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 749, 754; Dec. Dig. §247(1).]

**4. COURTS §247(1)—QUESTIONS REVIEWABLE
—QUESTION OF SUBSTANTIVE LAW.**

Where the charge of the trial court upon a material issue was prejudicially erroneous, and the Court of Civil Appeals has improperly refused to consider the assignment of error touching it, a question of substantive law is presented to the Supreme Court, and, in cases in which the jurisdiction of the Court of Civil Appeals is not final, is entitled to review in such court on writ of error.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 749, 754; Dec. Dig. §247(1).]

**5. APPEAL AND ERROR §544(1)—RESERVA-
TION OF GROUNDS OF REVIEW—OBJECTION TO
CHARGE—BILL OF EXCEPTIONS—NECESSITY.**

Under Rev. St. 1911, arts. 1970-1972, relative to the time and manner of submitting instructions to the jury, to obtain a review of the general charge of the court on appeal because of any error therein, an objection to the charge in the particular complained of must be presented to the trial judge before it is read to the jury, and, when such objection is made, it is the right of the complaining party to have the error considered by the appellate court without reserving a bill of exceptions to the charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2412; Dec. Dig. §544(1).]

**6. APPEAL AND ERROR §2—RESERVATION OF
GROUNDS OF REVIEW—STATUTE.**

Rev. St. 1911, art. 1972, providing that the charge, after presentation of objections, shall be filed and constitute a part of the record and be regarded as excepted to and subject to re-

vision for error without the necessity of taking any bill of exceptions thereto, was not repealed by implication by Acts 33d Leg. c. 59, amending Rev. St. 1911, arts. 1974, 2061, relative to the presentation of objections to the charge, as articles 1974 and 2061 concern only special instructions, and not the general charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3-7, 1882, 2421; Dec. Dig. §2.]

**7. APPEAL AND ERROR §233(1)—PRESENTA-
TION OF GROUNDS OF REVIEW—OBJECTION
TO CHARGE—STATUTE.**

Where, before the charge was read to the jury, defendant's counsel presented to the court in writing the specific objection to an erroneous instruction raised on assignment of error presented to the Court of Civil Appeals, the objection being duly considered by the trial court, and, by its order then duly entered in the minutes, being overruled, defendant duly reserving exceptions, there was a substantial compliance with Acts 33d Leg. c. 59, relative to the presentation of objections to the charge, amending Rev. St. 1911, arts. 1954, 1970, 1973, 1974, 2061, and adding article 1984A.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §233(1); Trial, Cent. Dig. § 192.]

**Error to Court of Civil Appeals of Second
Supreme Judicial District.**

Action by William Dickey against the Gulf, Texas & Western Railway Company. To review a judgment of the Court of Civil Appeals (171 S. W. 1097) for plaintiff, defendant brings error. Judgments of the Court of Civil Appeals and district court reversed, and cause remanded to the district court for further trial.

Ben B. Cain, of Dallas, Sporer & McClure, of Jacksboro, and J. A. Wheat, of Seymour, for plaintiff in error. D. A. Holman, of Seymour, for defendant in error.

PHILLIPS, C. J. The action was by William Dickey for the recovery of damages because of personal injuries suffered by his eight year old son, Maryland Dickey, through the act of Ed Moss, an engine hostler in the employ of the defendant railway company. The boy was scalded by steam and hot water escaping from a hose in an engine cab where he was at the time, the engine being then at a station in the charge of Moss who was preparing it for a run. The hose was used to sprinkle coal in the engine tender. It was connected with an injector by means of a valve. The injector was used to refill the engine boiler with water from the engine tank. When the valve connecting the hose with the injector was closed, no water or steam could escape through the hose. Just before the boy's injury Moss had been loading the engine tender with coal, and had used the hose for sprinkling the coal. He loaded some more coal into the tender and then proceeded to fill the engine boiler with water by turning on the injector. This caused steam and hot water to escape from the hose and scald the boy, the valve referred to being then open. Moss testified that after

sprinkling the coal with the hose, he closed the valve, and that when he turned on the injector to fill the boiler with water he did not know the valve was open. A defense of the railway company was, that after Moss had closed the valve it was opened, without Moss's knowledge, by either Maryland Dickey or his brother, who was also upon the engine with him, or some unknown person. A verdict in favor of the plaintiff was returned in the sum of \$750.00, for loss of the boy's services, extra services rendered by the plaintiff and his wife in nursing him, and for medical expenses incurred in his treatment.

[1] The case for the plaintiff being that his minor son was upon the engine with the consent of the defendant's employé, Moss, —then in charge of the engine, the duty owing by the defendant under such circumstances was the use by Moss of ordinary care to avoid any injury to the boy while he was upon the engine. While Moss, in his use of the hose which caused the injury, was under the obligation of using the care of an ordinarily prudent person under like circumstances to prevent any injury to the boy by that means, this, according to the settled law, marked the extent of his duty. Moss having testified, as already stated, that he had previously closed the valve which connected the hose with the injector and that when he turned on the injector to fill the boiler he did not know the valve was open, if the jury believed his testimony and that an ordinarily prudent person would, under the same circumstances, have turned on the injector in the belief that no harm would result to the boy from the hose, the defendant would have been entitled to be acquitted of liability. On the other hand, the plaintiff would have been entitled to have the issue of Moss's negligence resolved against the defendant if the jury believed that under like circumstances an ordinarily prudent person would not have turned on the injector at the time without positively seeing that the valve connecting the hose with the injector was closed. After, in the second paragraph of the charge, defining negligence to be "the failure to do that which a person of ordinary prudence resting under legal obligations would have done under the particular circumstances, or the doing of that which such person under such obligation should not have done under like circumstances; the essence of the fault may lie in the omission or commission," the court, in the third paragraph of the charge, gave this instruction to the jury:

"You are further instructed that the law requires those in charge of dangerous machinery to use great care and prudence in operating such machinery as to avoid damage and injury to the persons and property of other people, and if by the want of such care and prudence injury is inflicted upon others without the fault of such others, such persons or companies operating such machinery must pay for such injuries or damages."

In the fourth paragraph the jury were told, "if the defendant delegates to its agents or employes a certain work, and the agent or employé in discharge of such work is guilty of negligence, as in the court's charge defined, such negligence would be that of the defendant, and if the servant of a railway company in charge of an engine was negligent, the company was responsible therefor."

No attempt was made in the charge to present, as the predicate for a recovery in favor of the plaintiff, the distinct issue of negligence pleaded in the petition, that is to apply the proper rule of law to the particular grounds of recovery relied on in the petition and raised by the testimony, in respect to Moss's turning on the injector with the valve connecting the hose with the injector, open; but, omitting any instruction of that character, in the eighth paragraph the jury was told, "if you find for the plaintiff under the instructions heretofore given you, you will allow him such damages," etc.

[2] The instruction embodied in the third paragraph of the charge, above quoted, to the effect that the law requires those in charge of dangerous machinery to use "great care and prudence" in operating such machinery, and that if through the want of such care and prudence injuries inflicted upon others without their fault, such persons or companies operating such machinery must pay for such injuries or damages, was clearly an erroneous charge, since it defined the measure of the defendant's duty to be greater than the law imposes. It was in manifest contradiction of the second paragraph of the charge wherein, in substance, the jury was told that the exercise of ordinary care was the measure of duty under which it rested. Under the charge as a whole the jury was left without any proper direction for the determination of the question of the defendant's negligence. Looking to one part of the charge they would find an instruction that the defendant's employé Moss was negligent if he failed to use ordinary care, whereas in another portion of the charge was the instruction, in effect, that he would be guilty of negligence if he failed to use "great" care and prudence. It is settled in the decisions of this court, having been announced many times, that the giving of a contradictory charge does not correct the error committed by the court in another part of the charge upon a material issue; and that the only way to make the correction is to withdraw the erroneous instruction. *M., K. & T. Ry. Co. v. Rodgers*, 89 Tex. 675, 38 S. W. 243; *I. & G. N. Ry. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390, 40 Am. St. Rep. 829; *So. Kansas Ry. Co. v. Sage*, 98 Tex. 438, 84 S. W. 814. This plainly erroneous instruction requires a reversal of the judgment if it was properly objected to by the defendant under the Act of the Thirty-third Legislature, Chapter 59, page 113, in relation to

the presentation of objections to the court's charge, so as to make the error reviewable on appeal. The Court of Civil Appeals declined to consider the railway company's assignment of error in respect to this instruction, as well as all other assignments of error directed at the court's charge because, as held by it, no proper bills of exception were reserved thereto. We are accordingly called upon to construe this Act in connection with the method employed by the defendant's counsel in the presentation of their objections to the charge in the trial of the case.

[3, 4] The mere refusal of the Court of Civil Appeals to consider an assignment of error for reasons deemed by it sufficient does not present a question of substantive law, necessary to the jurisdiction of this court under subdivision 6 of Article 1521 as amended by the Act of the Thirty-third Legislature, Chapter 55, page 107, defining the appellate jurisdiction of the Supreme Court. For this reason, while differing from the view expressed in some of the decisions of the Courts of Civil Appeals, that by the Act in question a formal bill of exception is required in order to entitle a complaining party to a review on appeal of any particular part of the court's general charge, we have customarily declined to assume jurisdiction of cases involving the construction of this Act where the question presented to us was the mere refusal of the Court of Civil Appeals to consider an assignment of error in relation to the charge because of the failure, according to its view, to observe the requirements of the Act. If, however, the charge upon a material issue is prejudicially erroneous and the Court of Civil Appeals has improperly refused to consider the assignment of error touching it, a question of substantive law is presented; and, in cases in which the jurisdiction of the Courts of Civil Appeals is not final, is entitled to be reviewed here on writ of error.

[5-7] There appears in the transcript a document, shown to have been a paper filed in the case on the same day as the charge, denominated "Defendant's Exceptions to the Court's General Charge," duly signed by the attorneys for the defendant. It contains two specific objections or exceptions to the erroneous paragraph of the charge to which attention has been above directed, one of them being that it imposed upon the defendant a greater measure of duty than required by law and urging that under no phase of the case could the defendant be held under a greater duty than the exercise of ordinary care. In the transcript it is immediately followed by an order of the court, also of the date shown by the file mark of the charge, denominated "Order of the Court Overruling Defendant's Objections to Court's Charge," showing that it was then filed and duly entered in the minutes of the court, as follows:

"On this day came on to be heard the objections and the exceptions of the defendant to the court's general charge, which were presented to the court before the reading of his charge to the jury, and the court having heard the same is of the opinion that the law is against the said objections and exceptions, and it is therefore ordered and considered by the court that the same be and the same are hereby in all things overruled, to which the defendant excepted."

It thus appears from the record of the case that before the charge of the court was read to the jury the defendant's attorneys presented to the court in writing the specific objection to the erroneous instruction raised in an assignment of error presented to the Court of Civil Appeals which it declined to consider; that the objection was duly considered by the court, and by order of the court made at the time and duly entered in the minutes, was overruled, to which action, as shown by the entry of the order in the minutes, an exception was duly reserved by the defendant. Was this a substantial compliance with the Act of the Thirty-third Legislature, entitling the defendant to a review of the objection to the charge on its appeal? We think it was.

This Act amends Article 1954, Chapter 12, Title 37; Articles 1970, 1971, 1973, and 1974 of Chapter 13, Title 37; Article 2061, Chapter 19, Title 37, and adds Article 1981a to Chapter 14, Title 37, of the Revised Statutes of 1911. The change worked in Article 1954 is to require the reading of the charge and special instructions given by the court to the jury before the beginning of the argument instead of at the conclusion of the argument as formerly provided.

Added Article 1981a to Chapter 14 deals with the submission of special issues. It is unnecessary to notice it in this connection.

Chapter 13, Title 37, before its amendment by the Act and under the amendment, consisted and now consists of six different articles, 1970, 1971, 1972, 1973, 1974, and 1975. Articles 1970 and 1971 dealt only with the general charge of the court. Article 1972 was unamended and deals also with the general charge of the court. As amended by the Act, Articles 1970 and 1971, with the exception of a single reference to the subject of special issues in Article 1970 and a clause in Article 1971,—that special charges shall be given just as written, still deal only with the general charge of the court. Before its amendment, Article 1970 merely provided for the giving of a written charge by the judge to the jury on the law of the case in open court, unless waived by the parties. As amended, it provides:

"In all civil cases the judge shall, unless the same be expressly waived by the parties to the suit, prepare and in open court, deliver a written charge to the jury on the law of the case, or submit issues of fact to the jury if said cause is submitted to the jury on special issue of fact at the time, in the manner and subject to the restrictions hereafter provided, provided that failure of the court to give reasonable time to the parties or their attorneys for examination

of the charge shall be reviewable upon repeal [appeal] upon proper exception."

The provisions of Article 1971, before its amendment, in substance were, that the charge should be in writing and signed by the judge and read exactly as written; that the judge should not charge or comment on the weight of the evidence; that he should so frame the charge as to distinctly separate the questions of law from the questions of fact; that he should decide on and instruct the jury as to the law on the facts, and should submit all controverted questions of fact solely to the decision of the jury. As amended, with some parts italicized, the Article reads:

"The charge shall be in writing and signed by the judge; after the evidence has been concluded the charge shall be submitted to the respective parties or their attorneys for inspection and a reasonable time given them in which to examine it and *present objections thereto, which objections shall in every instance be presented to the court before the charge is read to the jury, and all objections not so made and presented shall be considered as waived*; before the argument is begun, the judge shall read his charge, and all special charges given by him to the jury in the precise words in which they were written; he shall not charge or comment on the weight of evidence; he shall so frame the charge as to distinctly separate the questions of law from the questions of fact; he shall decide on and instruct the jury as to the law arising on the facts, and shall submit all controverted questions of fact only to the decision of the jury."

Article 1972 was not expressly repealed by the Act, nor, as stated, was it in anywise amended. It reads:

"Such charge shall be filed by the clerk and shall constitute a part of the record of the cause, and *shall be regarded as excepted to, and subject to revision for errors therein, without the necessity of taking any bill of exception thereto.*"

Without immediate reference to amended Articles 1973 and 1974 of Chapter 18, and amended Article 2061 of Chapter 19, which will be later noticed, the effect of amended Article 1971 and unamended Article 1972, in relation to the general charge of the court, when construed together, is plainly this:

1. At the conclusion of the introduction of the testimony, the judge is required to submit the charge to the respective parties or their attorneys for their examination and the presentation of objections to it. A reasonable time must be given them for this purpose. Objections to the charge shall in every instance be presented to the court before it is read to the jury. All objections not so made and presented shall be considered as waived.

2. Since, by Article 1972, the charge is made a part of the record of the cause and is to be regarded as excepted to and subject to revision for errors without the necessity of taking any bill of exception to it, no bill of exception is necessary to entitle a party to a review of the errors in the charge, provided, in the particular complained of, it

was objected to before read to the jury. In other words, construing the two articles together, the change worked in the law is to require that for errors in the general charge to be reviewable on appeal they must be brought to the court's attention before the charge is read to the jury; otherwise they are waived. Since in the passage of the Act, Article 1972 was left intact by the Legislature, though it amended the two articles in the same chapter which immediately preceded it and the two succeeding articles, as well, it is evident, we think, that, in respect to the general charge, the concern of the Legislature was not directed to the subject of bills of exception. It is difficult to credit it with the purpose to change the law upon the subject of the general charge being regarded as "excepted to" without the necessity of any bill being reserved, when it is seen that by the amendatory Act it left Article 1972 untouched. As revealed by the terms of the amendatory Act, the larger purpose of the Legislature, in relation to the general charge, was to give the trial judge an opportunity to correct any errors in his charge before giving it to the jury, so as to avoid new trials or reversals on that account. To accomplish this purpose the method devised was the requirement of amended Article 1971, that all objections to the charge shall be presented to the court before it is read to the jury, upon the penalty of a waiver of the error. In its dealing with the general charge, the amendatory Act here stopped, leaving, so far as disclosed by its express terms, Article 1972 still in full force, with its distinct provision that the general charge "shall be regarded as excepted to and subject to revision for errors therein, without the necessity of taking any bill of exception thereto." The three articles, that is amended Articles 1970 and 1971 and unamended Article 1972, in our opinion simply mean that in order to obtain a review of the general charge of the court on the appeal because of any error therein, an objection to the charge in the particular complained of must be presented to the trial judge before the charge is read to the jury, and that when such objection is so made, it is the right of the complaining party to have the error considered by the appellate court, without the necessity of going through the formal procedure of reserving a bill of exception to the charge, inasmuch as Article 1972, left unamended by the Act, distinctly provides that no bill of exception to the charge is necessary for its revision on appeal on account of error.

We think there can be no doubt that such is the plain effect of these articles, unless it be that Article 1972 was repealed by implication in consequence of the amendment by the Act of Article 1974 of Chapter 18, or the amendment of Article 2061 of Chapter 19. That question is important and will now be considered.

The title of Chapter 13 in the Revised Statutes is "Charges and Instructions to the Jury." The title and the body of the chapter plainly recognize the distinction between the general charge of the court and special instructions requested by the parties. As already stated, the general subject of Articles 1970 and 1971, before their amendment, as well as that of Article 1972, was the general charge of the court. This is still true of amended Articles 1970 and 1971. The chapter, before the amendatory Act, after dealing with the general charge in these articles, turned to special instructions requested by the parties as a subject, and specifically dealt with them in Articles 1973 and 1974. These two latter articles before the amendatory Act read:

"Art. 1973. Either party may present to the judge, in writing, such instructions as he desires to be given to the jury; and the judge may give such instructions, or a part thereof, or he may refuse to give them, as he may see proper, and he shall read to the jury such of them as he may give."

"Art. 1974. When the instructions asked, or some of them, are refused, the judge shall note distinctly which of them he gives and which he refuses, and shall subscribe his name thereto; and such instructions shall be filed with the clerk, and shall constitute a part of the record of the cause, subject to revision for error without the necessity of taking any bill of exception thereto."

The change worked in Article 1973 by the amendment is to add to the original article the following proviso:

"Provided, such instructions shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination."

It is apparent that the addition of this proviso in nowise affects the force of Article 1972.

Article 1974 under the amendatory Act reads:

"When the instructions asked, or some of them, are refused, the judge shall note distinctly which of them he has given and which he refused, and shall subscribe his name thereto, and such instruction shall be filed with the clerk and shall constitute a part of the record of the cause, subject to revision for error."

The change in Article 1974 effected by the amendatory Act is to omit the concluding clause of the original article,—following the phrase, "subject to revision for error", namely "without the necessity of taking any bill of exception thereto." This indicates, plainly, an intention to make an important change in the law with respect to the subject of taking bills of exception to special charges in order to obtain their review on appeal. It reveals very clearly we think a purpose to hereafter require the reserving of a bill of exception to the action of the court on special instructions as necessary to its revision on appeal. But inasmuch as both the original article and the amended article relate, not to the general charge of the court, but specifically to special instructions re-

quested by parties, it is evident, we think, that this change in Article 1974 does not repeal or impair the force of Article 1972. The established rule is that repeals by implication are not favored, and will not be indulged unless the two statutes are in irreconcilable conflict. Since these two statutes deal with different subjects, as distinctly recognized in their terms, no conflict between them is presented.

Article 2061 of Chapter 19, before its amendment by this act, read:

"The ruling of the court in the giving, refusing or qualifying of instructions to the jury shall be regarded as excepted to in all cases."

It is plain to us that this article related, not to the general charge of the court, but only to special instructions requested by the parties. It is to be noted that not only is the term, "instructions" used in the article, whereas elsewhere in the statutes the term "charge" is used wherever the general charge of the court is intended and the distinction between the general charge and special instructions is plainly recognized, but, in addition, the subject of the article is "*the giving, refusing or qualifying*" of "instructions." These are proper terms with reference to the action of the trial court in the matter of special instructions, but they are altogether inappropriate terms as applied to the action of the trial court in respect to the general charge of the court. For instance, to conceive "the refusing" of the general charge of the court, is difficult. Added force is given to the view that this article related, and, as amended, still relates to only special instructions by the fact that the same rule embodied in the article had been, as applied to the general charge, already expressed in Article 1972, and is the specific subject of the latter article; and it would hardly be necessary therefore to repeat it in Article 2061. We are of opinion therefore that Article 2061, before its amendment, applied only to special instructions, and, as amended, applies only to them.

As amended by the Act, Article 2061 now reads:

"The ruling of the court in the giving, refusing or qualifying of instructions to the jury shall be regarded as approved unless excepted to as provided for in the foregoing articles."

The phrase, "the foregoing articles" very clearly relates, we think, to the articles which would and do precede it in Chapter 19, giving amended Article 2061 its proper place in that chapter. Article 2058, one of the articles of Chapter 19, requires that "when, in the progress of a cause, either party is dissatisfied with any ruling, opinion or other action of the court, he may except thereto at the time the same is made or announced, and at his request time shall be given to embody such exception in a written bill." The effect, therefore of amended Article 2061 is to require the taking of a written bill of exception to the giving or refusing of a special

instruction in order to have a revision of the court's action on the appeal.

Article 2062, was not expressly repealed by the amendatory act, nor was it amended. It reads:

"Where the ruling or other action of the court appears otherwise of record, no bill of exception shall be necessary to reserve an exception thereto."

As applied to special instructions, Article 2062 is in plain conflict with amended Article 2061, above quoted, and, as related to special instructions, it was by implication repealed by the amendment of Article 2061. But, as already indicated, there is not any conflict between Article 1972 of Chapter 13 and amended Article 2061, since the former deals with the general charge and the latter with special instructions; and accordingly Article 1972 was not affected by the amendment of Article 2061.

The amendatory Act is silent with respect to the manner in which it is to be evidenced of record what objections were made to the general charge of the court, and that those made were presented to the court before the reading of the charge to the jury, as is plainly required by amended Article 1971. To accomplish the purpose of the amendatory Act in its relation to the general charge, there should, of course, be some authentic record that the objections to the general charge urged on the appeal were in fact presented to the trial court, and presented before the charge was read to the jury. We think a filed paper in the cause setting forth the objections, with some due authentication of the fact that they were presented to the court, and before the reading of the charge to the jury, substantially complies with the requirement of amended Article 1971. In this case the record distinctly shows what the objections to the general charge were as presented by the attorneys for the defendant, as recited and set forth in a filed paper in the cause; and, as above shown, there is in the record the order or judgment of the court, taken from the minutes of the court and therefore necessarily approved by the judge, plainly reciting that the objections to the charge were presented to the court before the reading of the charge to the jury; were duly considered, and were overruled. We do not think there could be a more reliable authentication of record presented that the objection urged on the appeal to the erroneous paragraph of the general charge above noted was in fact made as required by amended Article 1971; and the assignment of error in relation thereto was accordingly entitled to be considered. It has been duly carried forward and presented in the petition for writ of error, and we have therefore considered it. An answer to the petition for writ of error having been filed by the defendant in error, the case is subject to decision here.

Because of the erroneous charge, the judgments of the Court of Civil Appeals and the

District Court are reversed and the cause remanded to the District Court for further trial.

GULF, T. & W. RY. CO. v. DICKEY. (No. 2864.)

(Supreme Court of Texas. June 7, 1916.)

1. APPEAL AND ERROR \S 233(1)—RESERVATION OF GROUNDS OF REVIEW—OBJECTION TO INSTRUCTION—STATUTE.

In an action for personal injuries, where a charge was objected to by defendant before being read to the jury, the objection was considered by the court and overruled, all of which appeared in the record from the defendant's written filed objections to the charge, and the order or judgment of the court, taken from the minutes, recited the fact that the objection was made before the charge was read to the jury, and was overruled by the court, the procedure was a substantial compliance with Acts 33d Leg. c. 59, relative to the time and manner of submitting instructions to the jury, and the assignment of error embodying the objection to the instruction presented at the trial was entitled to be considered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. \S 233(1).]

2. RAILROADS \S 282(10)—INJURIES TO THIRD PERSONS—NEGLIGENCE OF SERVANT—QUESTION FOR JURY.

In an action against a railroad for injuries to plaintiff, a small child, when he was scalded by defendant railroad's employe turning on the injector of an engine without examining the valve of the squirt hose, issue of negligence held for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 919; Dec. Dig. \S 282(10).]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by Maryland Dickey, by next friend, against the Gulf, Texas & Western Railway Company. To review a judgment of the Court of Civil Appeals (173 S. W. 967), affirming judgment for plaintiff, defendant brings error. Judgments of the Court of Civil Appeals and the district court reversed, and cause remanded to the district court for further trial.

Ben B. Cain, Sporer & McClure, and J. A. Wheat, all of Jacksboro, for plaintiff in error. D. A. Holman, of Seymour, for defendant in error.

PHILLIPS, C. J. This is a companion case to the Gulf, Texas & Western Railway Company v. William Dickey, 187 S. W. 184, this day decided, and is the action by Maryland Dickey against the railway company for injuries sustained by him under the circumstances stated in the opinion filed in the other case,—that being the action brought by his father, the issues in the case being substantially identical with those in the other suit.

In submitting the case for the plaintiff the trial court instructed the jury as follows:

"If you believe from the evidence that Maryland Dickey went into the defendant's engine with the knowledge and by permission of defendant's employees in charge of said engine,

and if said employees, knew the tender age of Maryland Dickey, and the dangers to which he was exposed in going on said engine, and failed to warn him of such dangers and knowingly permitted him to go upon said engine, or if you believe from the evidence that defendant's employee in charge of said engine saw Maryland Dickey in the cab of said engine, in connection with his tender age, and failed to put him out or guard him against danger, and after such discovery defendant's employee in charge of said engine turned the injector and caused the steam and hot water to pass from said engine and burn and scald said Maryland Dickey, then the defendant would be liable in damages for his injury, if any."

[1] In affirming the judgment in the plaintiff's favor as rendered by the trial court, the honorable Court of Civil Appeals in its opinion recognized this to be virtually a peremptory instruction that the defendant was liable, but declined to consider the defendant's assignment of error attacking the charge because, as stated in the opinion, a proper bill of exception was not taken to it. The charge was objected to by the defendant through its attorneys before read to the jury; the objection was considered by the court and overruled, all as appears in the record from the defendant's written filed objections to the charge, and the order or judgment of the court taken from the minutes, distinctly reciting the fact that the objection was made before the charge was read to the jury and was overruled by the court. We held this same procedure to be a substantial compliance with the Act of the Thirty-Third Legislature, chapter 59, page 113, in the other case, in relation to the general charge of the court, and are therefore of opinion that the defendant's assignment of error, embodying the same objection presented at the trial was entitled to be considered.

[2] This instruction authorizes a verdict for the plaintiff, wholly without regard to whether Moss's turning on the injector while Maryland Dickey was in the cab of the engine constituted a negligent act. It cannot be sustained unless, as a matter of law, Moss's act constituted negligence. As is stated in the opinion in the other case, Moss turned on the injector for the purpose of refilling the engine boiler with water,—the purpose, according to his testimony, for which the injector was used, and in doing this it was that the hot water or steam escaped from the squirt hose and injured young Dickey. This is a portion of Moss's testimony:

"The water that scalded Maryland Dickey came from the squirt hose. I caused the water to come through the hose by putting on the injector. Previous to the time I turned the injector I had been coaling. I put on the injector to refill the boiler with water; that is, the purpose for which the injector was used. When I sprinkled the coal I cut off the valve leading to the squirt hose, that is the valve down in front of the boiler. Then I cut off the injector,

and left the hose in the gang-way; the gang-way is the passage between the tender and the fire door, just on a level. I got in and out of the engine through the openings on the side; the gang-way is the flooring that leads to the boiler, where the cab comes back on the side; that valve extends out something like 24 inches from the bottom of the floor. When I discontinued sprinkling, the first thing I did was to turn off that valve to the squirt hose; then up and turned off the injector; and after that I went into my coal car to finish coaling. When I came in there and turned on the injector it was to blow out the boiler or mud valve. In blowing out you use both. You use the injector on while you are blowing, and that pumps water into the boiler. When I came into the cab and turned on the injector Floyd Bradley and Maryland Dickey were sitting on the seat box. If the valve to the squirt hose had been closed there would have been no danger of the accident that occurred. I did not know or have any suspicion that the valve was not closed when I turned on the injector. When the hot water came out and scalded Maryland Dickey I was in the gang-way directly in front of the boiler. The water came out almost in a second's time after turning on the injector. I had stepped down from the deck, possibly a little higher than this platform to the floor. When the hot water came I grabbed this boy and threw him out. I made an effort to cut the squirt hose off, first. I could not find it. Then I grabbed this boy, the smaller boy, that is Maryland Dickey. I did not see the other boy; he got out of the way, and Maryland Dickey climbed down out of the engine himself; after I pulled him out of the gang-way, he climbed down and went home. I picked Maryland Dickey up off the floor in front of the seat box. I got some of the hot water in my gloves and in my shoes, but my clothing must have been too thick, I guess. I had on a suit of clothes under my overalls. I got it in my shoes and in the gauntlet of my glove."

Moss, according to his testimony, did not make an examination of the valve before he turned on the injector, but he stated that this was not customary. At another place in his testimony he reiterated the statement that if the valve was closed, the boys in the engine cab were in no apparent danger, and that when he turned on the injector he knew they were not in danger. Under his testimony, that before he turned on the injector, that is after discontinuing his sprinkling of the coal, he turned off the valve to the squirt hose, and that when he turned on the injector,—which act it was that caused the steam or hot water to come through the hose, "he did not know or have any suspicion that the valve was not closed," it in our opinion was clearly a question of fact as to whether his act was a negligent one; and the issue of negligence ought therefore to have been submitted to the jury. Since the charge of the court assumed the issue, and in effect instructed the verdict for the plaintiff, the judgment must be reversed. The judgments of both courts are therefore reversed and the cause remanded to the district court for further trial.

BEENE v. WAPLES et al. (No. 2875.)

(Supreme Court of Texas. June 24, 1916.)

1. ELECTIONS \Leftrightarrow 122—NOMINATIONS—POLITICAL PARTIES—REGULATIONS.

In the absence of constitutional or statutory restrictions upon their duties and powers, the duly existing authorities of a political party, such as state and county executive committees, in accordance with party usage, may make and enforce all reasonable regulations relating to nominations within such party, including reasonable assessments against any and all candidates for such nomination.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 114, 114½, 116; Dec. Dig. \Leftrightarrow 122.]

2. ELECTIONS \Leftrightarrow 120—PRIMARIES—STATUTES—LAWS IN PARI MATERIA.

Acts 33d Leg. (Sp. Sess.) c. 39, § 34 (Vernon's Sayles' Ann. Civ. St. 1914, art. 3174w), providing that at each primary held for nomination of candidate for United States Senator the election shall be conducted by the duly constituted election officers, "who shall be paid as provided by law for holding elections in other cases," and the General Primary Election Law (Acts 29th Leg. [1st Ex. Sess.] c. 11) Rev. St. 1911, art. 3084 et seq., are to be construed together as one act, since both deal with the one general subject of party primaries, and are intended to constitute one general scheme of legislation thereon, especially in view of section 3 of the 1913 act providing that every law regulating primaries shall apply to election of United States senators.

[Ed. Note.—For other cases, see Elections, Dec. Dig. \Leftrightarrow 120.]

3. ELECTIONS \Leftrightarrow 126(3)—PRIMARY ELECTION—UNITED STATES SENATOR—ELECTION OFFICERS—COMPENSATION.

So construed, said section 34 means that election officers are to be paid out of funds provided by reasonable assessments against candidates for party nominations as provided by the general primary election law.

[Ed. Note.—For other cases, see Elections, Dec. Dig. \Leftrightarrow 126(3).]

4. CONSTITUTIONAL LAW \Leftrightarrow 209, 251—STATES \Leftrightarrow 119—TAXATION \Leftrightarrow 37, 38—DIVERSION OF PUBLIC MONIES—EQUAL PROTECTION—DUE COURSE OF LAW—TAXATION BY GENERAL LAWS.

So construed, said section 84 is not unconstitutional as violating Const. art. 1, §§ 3, 19, guaranteeing equal rights and due course of law, or article 3, § 52, as to use of public money for public purposes, or article 8, § 3, requiring taxation by general laws only.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 678, 726, 727, 732; Dec. Dig. \Leftrightarrow 209, 251; States, Cent. Dig. § 118; Dec. Dig. \Leftrightarrow 119; Taxation, Cent. Dig. §§ 64-67, 133; Dec. Dig. \Leftrightarrow 37, 38.]

5. COURTS \Leftrightarrow 247(5)—APPELLATE JURISDICTION—SUPREME COURT—CERTIFICATION OF SUBSTANTIVE LAW QUESTION.

Under the direct terms of Rev. St. 1911, art. 1522, as amended by Acts 33d Leg. c. 55 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1522), a question which is one of "substantive law" because not included within the classes of cases in the Courts of Civil Appeal in which the Supreme Court has jurisdiction, enumerated in the first five subdivisions of Rev. St. 1911, art. 1521, as amended by Acts 33d Leg. c. 55 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1521), can be presented to the Supreme Court only by writ of error, and cannot be carried to the Su-

preme Court by certificate from the Court of Civil Appeals.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \Leftrightarrow 247(5).]

Certified Questions from Court of Civil Appeals of Second Supreme Judicial District.

Suit by Sam S. Beene against Paul Waples and others. On appeal by complainant to the Court of Civil Appeals from a judgment for defendants, questions were certified to the Supreme Court.

Baskin, Dodge, Baskin & Eastus, of Ft. Worth, for appellant. Capps, Cantey, Hanger & Short, of Ft. Worth, for appellees Waples and others. David Trammell, of Ft. Worth, for appellees Smith and others.

HAWKINS, J. Appellant seeks to restrain, by injunction, the levy of an assessment to defray expenses of a second senatorial primary election under Acts of 1913, 1 S. S., c. 39, p. 101 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 3174a-3174z), known as the "Senatorial Primary Statute."

The issues of law are presented here upon a certificate from the Court of Civil Appeals for the Second Supreme Judicial District which discloses the essential facts and the contentions of the parties, and states the questions, as follows:

"Appellant sued appellees in the district court of Tarrant county, Tex., averring that appellees constituted, respectively, the chairman and members of the state Democratic executive committee, and the chairman and members of the Tarrant county Democratic executive committee; that appellant was a candidate for Democratic nomination for justice of the peace of precinct No. 1, place No. 1, of Tarrant county, Tex., at the ensuing July primaries; that the appellees composing the state Democratic executive committee had instructed the appellees who were members of the Tarrant county Democratic executive committee to assess against appellant and the other candidates for district, county, and precinct offices at said July primaries, a sufficient amount to defray the expenses of said July primaries, and as well also the expense of a second senatorial primary in Tarrant county, to be held on August 26th as provided by chapter 39, p. 101, General Laws of Texas, passed at the Special Session of the Thirty-Third Legislature; that no second primary had ever been held in Tarrant county, but that appellees composing the Tarrant county Democratic executive committee were intending to comply with the instructions of the state executive committee, and were threatening to assess appellant his pro rata part of the expense necessary to meet said second senatorial primary. Appellant further averred that said senatorial primary act was unconstitutional for various reasons, particularly: (a) That the same is contrary to article 1, section 3, of our state Constitution; (b) that said act is in violation of article 1, section 19 of our state Constitution; and (c) that the same provides for the payment of the remuneration of the election officers out of the public funds in contravention of section 52 of article 3, and section 3 of article 8, of our state Constitution, section 84 of said act being likewise attacked on the ground last mentioned. Appellant further averred that by virtue of the provisions of said act he was prohibited under a penalty from contributing

to the expense of said second senatorial primary, and that the state and county executive committees were also thereby prohibited from making any assessment against him for such purpose; that unless such contemplated assessment was paid by appellant the county executive committee would refuse to allow his name to be placed upon the ballot as a candidate for the office above mentioned. Appellant further averred that the action of the two committees in making an assessment for said second senatorial primary was premature, and therefore void, in that the time for calling said second senatorial primary had not arrived, and it was not known whether such primary would be necessary. Appellant's petition contained further allegations of fact substantially as contained in the agreed statement of facts hereinafter set forth, and he prayed for an injunction restraining the appellees, and each of them, from assessing or attempting to assess him any sum of money to be used directly or indirectly in defraying the expenses of said second senatorial primary, and also prayed for general relief.

"Appellees demurred generally to the sufficiency of appellant's petition, specially demurring on the ground that it appeared from the allegations thereof that the sole purpose for which suit was brought was to restrain appellees from performing certain acts as members of the state and county Democratic executive committees, without prayer for other relief, and answered substantially that they composed, respectively, the state and Tarrant county Democratic executive committees; that said Democratic party, and said appellees as officials thereof, was a collection or association of individuals organized solely for the purpose of furthering the principles of Democracy in the state of Texas; that all acts complained of were done and performed by them as officials of said party, in the management, control, and determination of the internal affairs, organization, and procedure of said Democratic party, within the scope of their duties as prescribed by the members of the Democratic party of this state; and appellees specially pleaded a want of jurisdiction in the district court to grant appellant's prayer for relief and thus control the action of appellees in the respects complained of.

"Appellees further averred that they were informed and believe that said senatorial primary act was valid and constitutional, and provided the only way by which nominees for the office of United States Senator might legally be selected; that said act imperatively requires a second primary in the event no candidate for the nomination for such office receives a majority of the votes cast at the senatorial primary to be held July 22, 1916; that it was imperatively necessary for the good of the Democratic party to properly select a candidate for United States Senator to be elected at the next ensuing general election; and that the acts of all appellees herein was in an endeavor to discharge the duties imposed upon them as officials of said Democratic party, without any intent or purpose to oppress or in any way discriminate against any person whomsoever.

"It was further averred, and the agreed facts show, that there are eight candidates for the Democratic nomination for the office of United States Senator from this state, required to be filled at the next ensuing general election, in November of this year, and in the opinion of appellees, as officials of said party as aforesaid, no one of said candidates will secure a majority of the ballots cast for nominees for said office at the general primary election in July of this year, and that such belief was the basis for the course adopted by the appellees.

"Appellees further aver, and the agreed facts also show, that at a meeting of said state executive committee held at Hillsboro, April 7, 1916, a resolution was passed recommending that pri-

mary elections be held for the nomination of all officers, including United States Senators, on July 22, 1916, and that, in event no candidate for United States Senator received a majority of the votes cast for all the candidates for such office, the chairman be directed to call a second senatorial primary, at which only the names of the two highest candidates for such office should be submitted; that the several county executive committees be directed to assess the district, county, and precinct candidates, and collect from them the necessary funds to pay the expenses of both said primaries, etc., and a copy of such resolution, together with a letter asking the co-operation of the Tarrant county executive committee, was mailed by the secretary of the state executive committee to appellee W. D. Smith, chairman of the Tarrant county executive committee.

"The agreed facts further show that the Tarrant county Democratic executive committee does not intend to hold a second primary for the selection of nominees for such county, district, and precinct places for which no candidate receives a majority vote at the general primary on July 22, 1916, but intends to comply with the resolution and request of said Democratic executive committee and assess all district, precinct, and county candidates pro rata for the expense necessary to hold said second senatorial primary, also assessing candidates for state offices the amount allowed by law; that the amount which would be assessed against candidates for the office for which appellant aspires, for the purpose of paying the expenses of the July primaries, would not be greater than \$80; that an additional sum of \$10 would be assessed against him as his pro rata part of the expenses for the second senatorial primary; but that said county Democratic executive committee would refund to appellant his pro rata part of the excess of the total amount realized from all the assessments, over and above the expenses of the general primary election to be held on July 22, 1916, in the event, for any reason, no second senatorial primary was held. It further appears from the agreed statement of facts that the emoluments of the office of justice of the peace, precinct No. 1, place No. 1, for the ensuing two years would probably amount to the sum of \$3,000 per year, and that appellant had six opponents in his race for nomination for said office.

"The case was submitted to the trial court upon an agreed statement of facts substantially as hereinabove set forth (and which by order of this court accompanies this certificate as a part hereof), who finally refused any relief whatsoever to appellant, from which judgment this appeal was taken, appellant presenting in this court the questions hereinafter certified.

"In view of the gravity of the questions presented by this record, the importance of the issues involved, and of an early and final determination thereof, all parties have agreed and we deem it advisable to certify unto your honors for decision the following questions, viz.:

"(1) Is section 34 of said act above referred to (General Laws 1913, Special Session, c. 38, p. 101), unconstitutional?

"(2) If the preceding question be answered in the affirmative, are the remaining provisions of said law affected by the invalidity of said section 34, or is said senatorial primary act otherwise subject to the constitutional objections urged by appellant?

"(3) If section 34 should be held invalid, is the contemplated action of the Tarrant county Democratic executive committee in assessing appellant for his pro rata part of the expense of holding such second senatorial primary, under the provisions of the act above referred to, for any reason illegal?

"(4) In view of the number of candidates for the Democratic nomination for the office of

United States Senator, and the probability of the necessity for the second senatorial primary, can the contemplated assessment against the appellant, if otherwise valid, be made at this time, under the stipulation to refund the excess as contained in the agreed statement of facts herein, in event such primary be not held, or is such assessment premature?"

Section 34 of said act of 1913 is as follows:

"Sec. 34. At each and every primary held for the nomination of a candidate for United States Senator, the election shall be conducted by the duly appointed and constituted election officers of the several polling places and voting precincts throughout the state who shall be paid as provided by law for holding elections in other cases."

Said provisions of our state Constitution are as follows:

"All freemen, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public service." Article 1, § 3.

"No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by * * * due course of the law of the land." Article 1, § 19.

"The Legislature shall have no power to authorize any county, city, town, or other political corporation, or subdivision of the state, to lend its credit or to grant public money or thing of value in aid of, or to, any individual, association or corporation whatsoever. * * *"

Article 3, § 52.

"Taxes shall be levied and collected by general laws and for public purposes only." Article 8, § 3.

[1] In the absence of constitutional or statutory restrictions upon their duties and powers, the duly existing authorities of a political party, such as state and county executive committees, in accordance with party usage, may make and enforce all reasonable regulations relating to nominations within such party, including reasonable assessments against any and all candidates for such nominations.

Our state Constitution seems silent upon that subject. The amount of the assessment involved is not alleged to be excessive, and it does not appear to be unreasonable. The complaint, and the certified questions, alike relate, solely, to the validity, operation, and effect of said statute, and, especially, of said section 34. Is that section of said statute unconstitutional? We think it is not.

Our state Legislature saw fit, in 1905, in the exercise of unquestionable powers, to regulate the making of party nominations for various state, district, county, and precinct offices, and, incidentally, to declare how the expenses thereof shall be defrayed. Acts 1905, 1 S. S., c. 11, p. 520; article 3084 et seq., R. S. 1911.

Likewise, in 1913, the Legislature undertook to regulate the making of party nominations for the office of United States Senator from Texas, and, incidentally, to prescribe how the expenses thereof shall be defrayed. Acts 1913, 1 S. S., c. 39, p. 101; Vernon's Sayles' Statutes, art. 3174a et seq.

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Unlike said act of 1905 relating to primary elections generally, said act of 1913 does not set out, specifically, provisions for payment of primary election expenses contemplated by the act, but does declare, in general terms, and by unmistakable reference to pre-existing laws, how such expenses are to be defrayed.

[2] Because those two statutes deal with the one general subject of party primaries for the making of party nominations, and are therefore essentially cognate, and because, obviously, the latter was intended to supplement the former, thereby completing one general scheme of legislation upon a particular subject, and because the latter statute presents strong and conclusive intrinsic evidence of a legislative purpose and intent that, in so far as their phraseology will permit, the two statutes are to be treated, construed, applied, and enforced as one, we regard it as too plain for argument that accordingly, said two statutes should be read and construed together. Certainly they are statutes in pari materia, and in their interpretation the settled rules of statutory construction which are applicable in such instances should prevail. *Conley v. Daughters of the Republic*, 106 Tex. 80, 156 S. W. 197, 157 S. W. 937.

If section 34 should be construed as meaning that the election officers referred to therein (by which are meant, we think, the primary election officers provided for in said act of 1905) are to be paid, for their services, out of public funds, such provision for payment is, plainly, unconstitutional, as directing a misuse of public funds. *Waples v. Marrast*, 184 S. W. 180, recently decided by this court.

[3] But if section 34 is to be construed and held to mean that such election officers are to be paid out of funds provided by reasonable assessments against candidates for party nominations, in all respects as set forth in and provided by said act of 1905 in its relation to the primary election officers referred to therein, there exists no conflict whatever between said section 34 and any other provision of that Constitution or of the Constitution of the United States, and in that event section 34 will stand as a valid expression of legislative will and authority.

[4] We here adopt, as sound, said latter construction of said section 34, and affirm its constitutionality.

It will be noted that the above-quoted section 34 of the Senatorial Primary Law does not provide that the expense of holding senatorial primary elections shall be paid out of public funds. Instead of containing any such declaration, it says that that expense shall be paid "as provided by law for holding elections in other cases." As provided by what law? This means necessarily, we think, the General Primary Law. The section (section 34), and the act of 1913, of which it is a part, do not deal with general

elections. They deal with only primary elections for a particular purpose—the nomination of candidates for United States Senator. There could be no reasonable warrant, therefore, for looking to the General Election Law as the law intended by the reference in said section 34 in its relation to the payment of expenses of senatorial primaries, since the General Election Law is not a law upon the same subject. As a matter of reason, if there be a general law upon the same general subject, that is the law to be looked to as, necessarily, the law which the Legislature, in framing section 34, intended shall govern the matter.

We have the General Primary Law with its distinct provision for the method of defraying the expenses of primary elections, and resort should, accordingly, be made to that law as the law on the subject intended by the reference in section 34. The provision of the General Primary Law (the act of 1905) is for the payment of such expenses, not out of public funds, but by assessment against state, district, county, and precinct candidates.

Our conclusion as to the true meaning of said act of 1913, and particularly as to the legal effect of section 34 thereof, is strengthened and confirmed by the unambiguous provisions of a preceding section thereof, as follows:

"Sec. 3. Every law regulating or in any manner governing elections or the holding of primaries in this state shall be held to apply to each and every election or nomination of a candidate for a United States Senator so long as they are not in conflict with the Constitution of the United States or of any law or statute enacted by the Congress of the United States regulating the election of United States Senators or the provisions of this act."

Undoubtedly that adoption by reference includes all applicable provisions of said act of 1905 relating to payment of expenses of primary elections.

Therefore we answer said first certified question negatively, from which it follows that further answers to the second and third questions are unnecessary.

[5] Because the fourth certified question is one of "substantive law," merely, and is not embraced by any of the first five subdivisions of article 1521, R. S. 1911, as amended by Acts of 1913, c. 55, p. 107, it is not a proper question for certification, and, inasmuch as this cause is not before us upon an application for a writ of error under subdivision 6 of said amended article, this court is utterly destitute of present jurisdiction or authority over that issue of law. Wherefore we decline to answer said fourth question. Article 1522, R. S. Upon appeal the duty of passing upon such questions rests, primarily, upon the Court of Civil Appeals. This precise point was expressly so decided by this court in *First State Bank of Archer City v. Power*, 106 Tex. 210, 168 S. W. 581.

COULTRESS v. CITY OF SAN ANTONIO
et al. (No. 3516.)

(Supreme Court of Texas. June 21, 1916.)

1. COURTS ⇐209(2)—PREVIOUS CONFLICTING DECISIONS—MANDAMUS.

Upon motion for rehearing in a suit for mandamus to require certification of decision, under Rev. St. art. 1623, by a Court of Civil Appeals upon the ground of conflict with the decision of another Court of Civil Appeals, the Supreme Court will not consider as a basis of conflict any decision not mentioned in the petition for mandamus.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 765; Dec. Dig. ⇐209(2).]

2. COURTS ⇐247(7)—CERTIFICATION TO SUPREME COURT—CONFLICT.

Under Rev. St. art. 1623, providing that where a Court of Civil Appeals arrives at a decision in conflict with the prior decision of another Court of Civil Appeals, it shall certify the question of law with the record to the Supreme Court for adjudication, mandamus to require certification on the ground of conflict cannot be based on conflict between decisions of the same court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 752; Dec. Dig. ⇐247(7).]

3. COURTS ⇐247(7)—RIGHT TO—EQUITIES.

In determining whether the Supreme Court shall require a certification of a decision by a Court of Civil Appeals, under Rev. St. art. 1623, on the ground that it conflicts with the decision of another court, equitable considerations, showing that petitioner has been denied some rights, cannot be considered.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 752; Dec. Dig. ⇐247(7).]

On rehearing. Denied, and former opinion affirmed.

For former opinion, see 179 S. W. 515.

HAWKINS, J. In this action, for mandamus only, we are not called upon to decide, and have not undertaken to determine, and do not decide, whether any of the decisions of the several Courts of Civil Appeals in *City of Houston v. Albers*, 32 Tex. Civ. App. 70, 73 S. W. 1085, *City of Paris v. Cabiness*, 44 Tex. Civ. App. 587, 98 S. W. 925, and *City of San Antonio v. Coultriss*, 169 S. W. 918, was correct. The real and only issue before us is, Does the decision in said Coultriss Case conflict, upon any question of law, with either of said other decisions? And that defines the full extent of our jurisdiction in the premises.

Whether the petition in the last-mentioned case was substantially like the petition in both or either of the two other cases is not the controlling inquiry. In determining the issue involved we must consider the cases as a whole, including the city charters, the ordinances in issue, if any, and the facts, and not simply the petitions only. Upon consideration, accordingly, of relator's motion and supplemental motion for a rehearing we find no statutory conflict in the decisions mentioned, and we adhere to our former views denying the writ.

Relator insists that the provisions of the

Paris charter relating to the establishment of the police force (Special Laws of 1889, p. 112; 9 Gammel p. 1347) were to the same legal effect as the corresponding provisions of the San Antonio charter, and call our attention to section 24 of the Paris charter, which section seems not to have been quoted or mentioned by the Court of Civil Appeals in the Cabiness Case, or by us in our original opinion in this case.

Whether said provisions of said two charters are to the same legal effect, and whether the Paris charter required that the establishment of the police force should be "by ordinance," are questions which, perhaps, are immaterial in this action; but we incline to the view that the Paris charter did not so require, and, in any event, we decline to hold herein that the decision of the decision of the Court of Civil Appeals at Dallas to that effect, in the Cabiness Case, was erroneous.

Whatever may be the proper construction of the applicable provisions of the Paris charter and of the San Antonio charter, respectively, the fact remains that the two Courts of Civil Appeals construed them differently, one holding that the San Antonio charter did, and the other that the Paris charter did not, require that the establishment of the police force should be by ordinance of the city; from which it is evident that the fundamental difference between those decisions was as to the legal effect of the charters, respectively, rather than as to the mere sufficiency of petitions.

Relator's petition for mandamus does not specifically allege conflict in constructions placed upon similar charters, or conflict as to the sufficiency of similar city ordinances under similar charters, but does, in effect, allege conflict as to the sufficiency of what he alleges to be substantially similar petitions; and the questions which we are asked to have certified were framed accordingly.

Moreover, in the San Antonio Case Coultriss sought to have his appointment upheld by virtue of an ordinance which the Court of Civil Appeals held to be not in compliance with charter requirements; but the Cabiness Case, under the Paris charter, did not involve, on appeal, any issue or decision concerning the sufficiency of any city ordinance, none creating a police force, or the office of policeman, having been enacted by the city council, so far as shown; and, likewise, the Albers Case, under the Houston charter, did not present, upon appeal, any issue or express decision as to the sufficiency of any city ordinance.

The supplemental motion avers that, whereas the Court of Civil Appeals in said Coultriss Case held the city ordinance relied upon insufficient in that it did not definitely fix the number of policemen, that same court, "in several lengthy and carefully consid-

ered opinions held the same ordinance valid, and permitted the policemen to recover their money under identical circumstances with those of Coultriss. See the following cases, to wit: City of San Antonio v. Serna, 45 Tex. Civ. App. 341, 99 S. W. 875; City of San Antonio v. Beck, 101 S. W. 263; City of San Antonio v. Tobin, 101 S. W. 269; City of San Antonio v. Bodeman, 163 S. W. 1043."

[1] Even though it should be assumed or found that said averment correctly reflects the effect of said four decisions, (a point upon which we express no opinion), still, for two reasons, neither of them can now be considered, in this action, as grounds of "conflict":

1. They were not presented in relator's petition for mandamus. Upon motion for rehearing in a suit for mandamus to require certification, under R. S. art. 1623, by a Court of Civil Appeals, upon the ground of conflict in decisions, this court will not consider, as a basis of such conflict, any decision not mentioned in the petition for mandamus.

[2] 2. Said four decisions are by the same Court of Civil Appeals which rendered said decision in the Coultriss Case, and not by "some other Court of Civil Appeals." Article 1623, R. S.; Smith v. Conner, 98 Tex. 434, 84 S. W. 815. Very candidly relator's counsel concede that reversal by a Court of Civil Appeals of one or more of its own former decisions upon a question of law does not constitute "conflict" under our statute; but, in that connection, and for the sake of equity, we are asked to resolve in favor of relator any doubt which we may entertain as to the existence of statutory conflict charged by the petition for mandamus. We have no such doubt; and, as stated in our original opinion, the writ of mandamus issues, in such matters, only where the conflict is clear and the duty of the Court of Civil Appeals to certify the question of law involved is correspondingly plain.

[3] Said supplemental motion avers, also, as part of relator's plea for equity, that when his petition in said Coultriss Case was filed in the trial court, and, in addition to the ordinance which in that case was held insufficient, there existed certain city ordinances of dates December 4, 1905, August 5, 1907, and September 3, 1912, fixing a definite number of policemen, which relator now indicates he would have pleaded had his case been remanded by the Court of Civil Appeals to the trial court. Manifestly this new and extraneous matter cannot be considered by us herein for any purpose. Whatever difficulties or equities, if any, may inhere in the situation, we cannot deal with them in this action.

The motions are overruled.

NEYLAND v. STATE. (No. 4079.)

(Court of Criminal Appeals of Texas. May 17, 1916. Rehearing Denied June 14, 1916.)

1. HOMICIDE \S 340(4) — HARMLESS ERROR—INSTRUCTIONS INAPPLICABLE.

On appeal from conviction of manslaughter, where accused received the lowest penalty, error in charging on murder was harmless.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 720; Dec. Dig. \S 340(4).]

2. HOMICIDE \S 340(4)—HARMLESS ERROR.

In such case, where no error in charging on manslaughter is pointed out which could have tended to bring about a conviction, other errors in the charge will not be considered.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 720; Dec. Dig. \S 340(4).]

3. HOMICIDE \S 300(7)—INSTRUCTIONS—SELF-DEFENSE.

In a murder trial, it is not error in the charge to submit affirmatively the state's theory of the claim of self-defense, where the defendant's theory of self-defense is also fully charged.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 622; Dec. Dig. \S 300(7).]

4. HOMICIDE \S 188(2)—EVIDENCE—SELF-DEFENSE—PRIOR VIOLENT ACTS OF DECEASED.

In murder trial, it was not error to exclude evidence by the accused of the details of specific acts of violence previously committed by deceased on others than accused, where there was no evidence that defendant knew of these matters prior to the homicide; accused being permitted to testify at length to all he knew about deceased and his violent acts toward others.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 392; Dec. Dig. \S 188(2).]

5. CRIMINAL LAW \S 1169(9)—HARMLESS ERROR—OPINION EVIDENCE.

In a murder trial, admission of opinion evidence as to manner of killing was not cause for reversal, where other testimony amply proved such manner.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3138; Dec. Dig. \S 1169(9).]

6. CRIMINAL LAW \S 982—EVIDENCE—ADMISSIBILITY—SUSPENSION OF SENTENCE.

In a murder trial, testimony that accused had been residing in a house of prostitution was admissible as showing accused's habits on the issue of suspended sentence asked by him; it having been proved that the keeper of the house was accused's wife.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2500, 2501; Dec. Dig. \S 982.]

7. WITNESSES \S 345(2)—IMPEACHMENT—ARREST FOR VAGRANCY.

In a murder trial, it was not error to exclude proof, to impeach a witness, that he had been arrested for vagrancy the night before testifying, since vagrancy is a mere misdemeanor not imputing moral turpitude.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1126; Dec. Dig. \S 345(2).]

8. CRIMINAL LAW \S 1141(2)—APPEAL—PRESUMPTION.

On appeal the presumption is that the ruling of the trial court was correct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3015, 3022; Dec. Dig. \S 1141(2).]

9. HOMICIDE \S 171(1) — EVIDENCE—ATTENDANT CIRCUMSTANCES.

In a murder trial, where the killing occurred in dispute between deceased and accused's wife,

her acts and conduct in the transaction were admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 351, 353, 358; Dec. Dig. \S 171(1).]

10. CRIMINAL LAW \S 1170½(6) — HARMLESS ERROR—EVIDENCE—CURE BY INSTRUCTIONS.

In a murder trial, a question, on cross-examination of a witness, if it was not true that accused was supported by prostitutes, it not appearing the question was answered, and the court instructing the jury that it could only be considered by them in passing on whether or not they would suspend accused's sentence should that question arise, and could not be considered in passing on his guilt or innocence, did not injure defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3134; Dec. Dig. \S 1170½(6).]

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

T. L. Neyland was convicted of manslaughter, and appeals. Affirmed.

Heldingsfelders, of Houston, for appellant. C. C. McDonald, Asst. Atty. Gen., John H. Crooker, Cr. Dist. Atty., T. J. Harris, and E. T. Branch, all of Houston, for the State.

HARPER, J. Under an indictment charging him with the murder of Tom Gardner by cutting and stabbing him with a knife and with some sharp instrument, the name and description of which was unknown to the grand jury, appellant was convicted of manslaughter, and his punishment assessed at the minimum term of two years; and from the judgment thereon he has appealed, and his case has been so thoroughly digested, and the issues raised disposed of in the brief filed in behalf of the state by Messrs. C. C. McDonald, Assistant Attorney General, John H. Crooker, Criminal District Attorney, T. J. Harris, and E. T. Branch, we have concluded to adopt it, in the main, as the opinion, omitting such parts as we do not deem necessary to a proper disposition of the case:

"1. Appellant admitted on the trial that he stabbed deceased, claiming that it was done with a spring-back knife in self-defense while deceased had him down and was choking him and trying to open a knife. The state's testimony shows that deceased was stabbed to the heart with a dirk or sharp two-edged instrument while he was unarmed. According to the testimony for the state, appellant's wife was running a public bawdyhouse in the restricted district of the city of Houston, known as the 'reservation,' and, when deceased entered the house with some companions, she sought to order them away, using very vile and vulgar language, and struck deceased, when appellant rushed out of a room there and attacked deceased, and in a short time deceased was stabbed fatally, dying in a few minutes. Appellant testified to an assault on his wife and himself; that deceased attempted to cut him with a knife, and he thought his life was in danger. The state's case amply supports the verdict, and the conflict in the testimony was settled by the jury in favor of the state, and that finding was approved by the trial judge. We think it unnecessary to make a detailed statement of the testimony, since in briefing the contentions of appellant we call attention to whatever testimony we think bears on the point involved. From the description of the wound, and the other circumstances of the case, it is almost evident that deceased was stabbed

to death with a dirk. This would sustain the allegations of the indictment as to the means, since in proving means only the substance of the issue need be proven. *Chisom v. State*, 179 S. W. 1063.

[1] "2. Appellant contends that the court erred in charging on murder; but it is unnecessary to determine whether or not the issue of murder was in the case, since appellant was convicted of manslaughter and received the lowest term for that grade of homicide, and any error in charging on murder or any errors in the charge on murder pass out of the case, since in no way did such error, if any, prejudice the other issues in the case. *Dougherty v. State*, 59 Tex. Cr. R. 464, 128 S. W. 396; *Cukierski v. State*, 68 Tex. Cr. R. 868, 158 S. W. 315; *Condron v. State*, 69 Tex. Cr. R. 513, 155 S. W. 253.

[2] "3. Appellant also excepted to the court's charge because it did not state as a matter of law that insults to a female relative would as a matter of law be adequate cause. An inspection of the charge shows that the court did so charge the jury, probably in response to such exception, and, as appellant was convicted of manslaughter with the minimum punishment assessed, any errors, if any, in charging on manslaughter, would pass out of the case, since there is no error pointed out which could have tended to bring about a conviction. *Munos v. State*, 58 Tex. Cr. R. 147, 124 S. W. 941.

[3] "4. Appellant's third exception to the court's charge complains that the charge 'too prominently calls the jury's attention to the fact what the defendant's rights were, and erroneously states the converse thereof, thereby calling the jury's special attention to that feature of the charge which is set out in the last paragraph on self-defense.' Any error of the court in too prominently stating what the rights of appellant were would be in his favor. The charge on self-defense was liberal to appellant, but of this he will not be heard to complain. As to the 'converse' of his rights, the court charged the jury: 'If, however, you find from the evidence, after viewing the facts from the defendant's standpoint at the time of the homicide, that it did not reasonably appear to defendant that he or his wife was in danger of losing his or her life nor of suffering serious bodily injury at the hands of deceased, then and there at the time he cut the deceased, if you find he did cut him, then if you should so find you will find against his plea of self-defense.'

"This charge is almost identical with the charge in the case of *Logan v. State*, 46 Tex. Cr. R. 574, 81 S. W. 721, and the charge is not a 'limitation' on the theory of self-defense, but is simply submitting the state's theory of self-defense. In section 1942 of Branch's Annotated Penal Code, the proposition is laid down that the charge of the court may submit the state's theory of the claim of self-defense, citing *Humphries v. State*, 25 Tex. App. 132, 7 S. W. 663; *Garner v. State*, 34 Tex. Cr. R. 356, 30 S. W. 782; *Logan v. State*, 46 Tex. Cr. R. 575, 81 S. W. 721; *Howard v. State*, 53 Tex. Cr. R. 382, 111 S. W. 1038; *Arnwine v. State*, 54 Tex. Cr. R. 216, 114 S. W. 797; *Bordeaux v. State*, 58 Tex. Cr. R. 71, 124 S. W. 646; *Roberts v. State*, 71 Tex. Cr. R. 77, 158 S. W. 1003.

"In *Howard v. State*, supra, the court uses the following language, which is again referred to and approved in *Bordeaux v. State*, supra: 'Counsel for appellant sometimes overlook the fact that it is just as necessary and as much required of the court to submit to the jury issues raised by the state's evidence, and on which, under the law, a conviction could be had and ought to be had, as it is to submit matters wholly defensive.'

"In the case at bar, appellant claimed that deceased was choking him and was trying to open a knife with his teeth when appellant stabbed him, while in fact no knife of deceased was found, and many witnesses testify that deceased

had no knife. The court fully charged on appellant's theory of self-defense and was authorized to submit the state's theory thereof. The right of self-defense is founded on the law of nature, and is not, nor can be, superseded by any law of society. Instinct teaches it to wild beasts, custom to all nations, and reason to enlightened people. All self-defense rests upon necessity; when there is no necessity to kill, it cannot be self-defense. At common law one attacked was compelled to retreat to the wall before being entitled to defend himself, but our statutes do not require one assailed to retreat in order to avoid the necessity of killing his assailant. Our laws were made in the interest of brave and law-abiding citizens, and for the protection and cultivation of true manhood; but the right of self-defense was never intended to be used as a cloak for the assassin or as a shield for one who would use unnecessary violence or excessive force. When the assault or threatened injury to another does not amount to enough to create a reasonable apprehension or fear of death or serious bodily injury, then all means reasonably proper and effective should be first invoked before resorting to a right which, under the most favorable aspect of any case, must be deemed lamentable in its exercise. Our laws demand and require an affirmative presentation of any defensive theory, though it be impliedly included in the presentation of the state's theory, and even though it is impossible to find in favor of the state's theory without finding against the defensive testimony, and there is in reason and on principle no good nor just ground for complaint that the state's theory of a proposition is affirmatively given when in juxtaposition therewith and untrammelled thereby, the defensive theory is also affirmatively submitted.

"5. Appellant contends that the court erred in not charging on the theory that appellant had a right to eject deceased from the house of himself and wife, and that if in so doing he killed him he would not be guilty. The testimony raised no such issue. The court's charge on self-defense covered fully every right appellant had in the premises, and the law knows no reasonable rules or regulations for the protection of a public bawdyhouse situated in the reservation and where prostitution is openly conducted in violation of law. What is said in *Pierce v. State*, 21 Tex. App. 540, 1 S. W. 463, where the same right was contended as to a gambling room, is applicable here. The court in no way limited appellant's right of self-defense by referring to appellant's being in such a house, and gave him the perfect right of self-defense on every possible phase of the case. There is a manifest difference between the sanctity of a home, and the purlieu of crime as evidenced by a public house of prostitution, where the general public is invited to visit.

"6. Bills of exception Nos. 1 to 6, inclusive, complain of the refusal of the court to give certain requested instructions. It is unnecessary to set them out. Some, if not all, are incorrect as a matter of law, since they authorize an acquittal on a state of facts which would not justify the homicide, and such as suggest any defensive theory are covered by the general charge, and what has already been said is applicable to these requested charges.

[4] "7. The seventh bill of exceptions presents what we think the only serious question on this appeal, but we think a careful review of the real situation will disclose that the court was correct in excluding the details of the specific acts of violence committed by deceased on others than appellant, although he may not have assigned the correct reason for the ruling. Every case must necessarily depend on its own environments, and we think it proper to discuss both the correctness of the ruling and the effect thereof. The two remarks of the court quoted in the bill show such disconnection as that it is ob-

vicious that the court sought more light after his first remark and before his final ruling.

"It must first be noted that what the court remarked as to his reasons for his ruling was said in the absence of the jury, and therefore could have in no way affected the testimony already and afterwards introduced by appellant as to the bad general reputation for violence of deceased, nor have affected the jury. Appellant was permitted to at length testify to all he knew about deceased and to testify to all that he had heard as to specific and isolated acts of violence of deceased towards others. It will also be seen from the statement of facts that the state did not, either by cross-examination or by offering testimony, attempt to dispute any of the testimony offered by appellant and his witnesses as to the character of deceased. The bill of exceptions itself fails to show that appellant knew of these extraneous acts prior to the homicide, or that he had ever heard of them. The first paragraph of section 2094, Branch's Annotated Penal Code, reads as follows: 'Proof of specific acts of violence on the part of deceased is not admissible if there is no evidence that defendant knew of these matters prior to the homicide. *Patterson v. State*, 58 S. W. 59; *Willis v. State*, 49 Tex. Cr. R. 142, 90 S. W. 1100; *Lubbock v. State*, 147 S. W. 258; *Smith v. State*, 70 Tex. Cr. R. 62, 156 S. W. 215; *Wilson v. State*, 70 Tex. Cr. R. 627, 158 S. W. 513; *Harper v. State*, 170 S. W. 723; *Echols v. State*, 170 S. W. 789.'

"It is well settled that a bill of exceptions taken to the exclusion of evidence should disclose the relevancy and materiality of the proposed evidence, and that inferences will not be indulged to supply the omission of such essentials. Branch's Annotated Penal Code, § 212. This court is not required to, and will not, look to the statement of facts in aid of a bill of this character. *Conger v. State*, 63 Tex. Cr. R. 327, 140 S. W. 1122; *Banks v. State*, 62 Tex. Cr. R. 552, 138 S. W. 406; *Golden v. State*, 146 S. W. 945; *Harris v. State*, 67 Tex. Cr. R. 251, 148 S. W. 1074.

"The case of *Smith v. State*, 67 Tex. Cr. R. 27, 148 S. W. 699, was reversed because the accused was not permitted to prove by himself that he knew of his personal knowledge and from hearsay of several unlawful attacks made by deceased on others, even though he had already proven the general reputation of deceased; in the case at bar appellant was permitted to, and without objection did, prove all that he desired in regard to the reputation of deceased, and did himself testify, without objection, to all he knew, either from hearsay or from personal knowledge, about any specific or isolated act of violence committed by deceased. The bill of exceptions shows that appellant went into detail in regard to these specific acts, and that he testified fully in regard thereto. We quote from the bill: 'The defendant having testified to his knowledge by hearsay and by actual personal knowledge of facts which are as follows: That he had heard of a violent assault on the part of deceased Tom Gardner, herein, on a negro, in the presence of Sam Bateria, said assault being without any cause or provocation whatsoever, and that in said assault the deceased threw two or three bottles of beer at the negro, and at the time of said occurrence many people were in Bateria's store. That he also had heard that the deceased had assaulted one George Walker, without any cause or provocation whatever, a short time prior to the date of the homicide, and that the deceased drew a knife on George Walker and attempted to cut him, and that the deceased followed the said George Walker several blocks and went into different places, and the said George Walker went into one place, and the deceased attempted to cut him, as well as cut George Walker's brother, but that he was prevented from so doing by one Harry Arnold, who lived in Houston Heights. He further tes-

tified that he knew of a violent assault made by the deceased on one Charlie Danna, without any cause or provocation, which took place some few months prior to the homicide, and that he had heard that the deceased had beat and struck the said Charlie Danna over the head twice with a rock. He further testified that he had heard that the deceased had threatened one Mag Smith, to do him serious bodily harm with a knife, all of which was some few months prior to the homicide, and that said act on the part of the deceased was unprovoked by the said Smith, and that the deceased was prevented from cutting the said Mag Smith by bystanders, and that he had heard that the deceased, prior to the homicide, frequented negro sporting houses in the reservation, and that whilst intoxicated, about two weeks prior to the homicide, without any cause or provocation whatsoever, the deceased beat and struck an inmate of that house.' He was also permitted to introduce evidence that the reputation of deceased was that of a violent and dangerous man. To none of this testimony did the state offer any contradictory evidence.

[5] "8. Bill No. 8 relates to the ruling of the court in refusing to strike out an answer of the witness Frank Samaratina. After the witness had testified that he saw appellant strike deceased in the breast below the heart and saw the blood on the shirt of deceased and had seen the wound, he was asked, 'What kind of a wound was that?' and without objection he answered, 'about an inch wide, a dirk knife.' Appellant moved to strike out the answer as calling for a conclusion of the witness, and his motion was overruled. That deceased was killed with a dirk or two-edged instrument is amply shown by other testimony, and, under such circumstances, this bill would present no reversible error.

"In his Penal Code, § 1853, Mr. Branch states the following proposition: 'If the opinion of the witness as to the manner in which the injuries were inflicted, though incompetent, did not and could not operate to the prejudice of defendant, its admission is not ground for reversal'—citing *Steagald v. State*, 24 Tex. App. 207, 5 S. W. 853. The *Steagald* Case, in which a life penalty was assessed for murder, supports the proposition stated.

[6] "9. Bill No. 9 shows that the witness Samaratina was asked by the state if he knew how long the defendant had been living in that sporting house in the reservation, and that the witness answered: 'No, I never knew. I knew he was out there, laying up out there; that is all.' The objection was made that the question was irrelevant and immaterial and inadmissible for any purpose, and highly prejudicial. The object or purpose of the state in asking the question is not shown, and nothing is stated in the bill from which it can be determined whether or not the ruling was correct. The record shows that appellant had asked for a suspended sentence, and the jury was entitled to know what kind of man he was and what he did in passing on that issue. It was shown that the keeper of the house of prostitution was the wife of appellant, and, from the whole of the testimony, we think the testimony admissible on the issue of suspended sentence.

[7] "10. The tenth bill complains of the ruling of the court in refusing to permit appellant to prove by the witness Samaratina, on cross-examination, that the witness had on the night before, while the trial was in progress, been arrested for vagrancy in a sporting house in the reservation. The bill recites that the purpose of this testimony was to affect the credibility of the witness. In section 169, Branch's Annotated Penal Code, citing many authorities from this court, the rule is thus stated: 'Defendant or any other witness cannot legally be impeached by proof that he was arrested for or charged with or convicted of a misdemeanor that does not impute moral turpitude.'

"One of the cases cited, *Ellis v. State*, 56 Tex. Cr. R. 15, 117 S. W. 978, 133 Am. St. Rep. 953, is directly in point, since in that able opinion by Judge Davidson it is held that vagrancy is not one of those violations of the law which would justify proof of an arrest or conviction therefor as a matter of impeachment.

"11. Bill No. 11 is a blanket bill covering objections to three questions asked the wife of appellant. Two of these questions were not answered so far as the bill discloses, and the objections to the only question answered are in no way verified as true. In section 152 of Branch's Annotated Penal Code, on page 37, the rule governing a bill of exceptions taken because of going into new matter on cross-examination of the wife is thus stated: 'A bill of exceptions taken to the action of the state in going into new matter on cross-examination of the wife of the defendant must, to be sufficient, show as a fact that she had not been asked as to such matter on her direct examination, or the direct examination must be set out in the bill of exceptions'—citing *Brown v. State*, 65 Tex. Cr. R. 121, 144 S. W. 285; *Golden v. State*, 146 S. W. 945.

[8, 9] "The answer of the witness that she did not remember whether or not she went out and hid deceased with a bunch of keys is in no way shown not to have been legitimate cross-examination. On appeal, the presumption necessarily is that the ruling of the trial court was correct unless it is shown otherwise, and we are unable to find either in this bill or in the statement of facts anything showing any improper cross-examination of appellant's wife, although the court is not required to go to the statement of facts to aid a bill of this character. It is unquestionably shown that the trouble first arose with the wife, and her acts and conduct were admissible that the transaction might be shown to the jury, she being a party to the entire trouble, whether the state's view or appellant's view is correct.

[10] "12. Bill No. 12 complains of a question asked on cross-examination of the witness Fife, who had testified to the good reputation for peace of the appellant, as to whether it was true that appellant had the reputation of being kept up by sporting women and being a pimp. The bill does not show that the question was answered, and as the bill shows that the court informed the jury that it could only be considered by them in passing on whether or not they would suspend his sentence should that question arise, and could not be considered by them in passing on his guilt or innocence, no injury is shown."

The judgment is affirmed.

QUILLIN v. STATE. (No. 4055.)

(Court of Criminal Appeals of Texas, May 17, 1916. On Motion for Rehearing, June 14, 1916.)

1. TAXATION — 571 — TAX COLLECTORS—CRIMINAL OFFENSES.

The offenses by state officers having state money in their custody denounced in Pen. Code 1911, arts. 96, 97, by article 144, and by article 107, are separate and distinct, and neither is in conflict with or repeats the other, as they denounce, respectively, fraudulent and willful failure of a tax collector to pay tax funds into the state treasury at the end of each tax year, mere failure of a tax collector to remit to the state treasurer at the end of each month, and willful and negligent failure of a tax collector to account for and pay over tax funds when required by the comptroller.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1130, 1131; Dec. Dig. ¶ 571.]

2. EMBEZZLEMENT — 24 — PERSONS LIABLE—"PRINCIPAL."

Under Pen. Code 1911, art. 74, defining "principals" as all persons who are guilty of acting together in the commission of an offense, and articles 96, 97, defining and penalizing misapplication of public money by public officers, one not a public officer nor employed in such service may be prosecuted as a principal for misapplication of public money, although he could not commit it alone.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 36; Dec. Dig. ¶ 24.

For other definitions, see *Words and Phrases*, First and Second Series, *Principal*.]

On Motion for Rehearing.

3. INDICTMENT AND INFORMATION — 83 — CHARGING ACCUSED AS "PRINCIPAL."

An indictment of one not a public officer nor employed in such service, for misapplication of public moneys as a principal under Pen. Code 1911, art. 74, defining "principals" as all persons who are guilty of acting together in the commission of an offense, and articles 96, 97, defining and penalizing misapplication of public money by public officers, need not allege the facts relied on to show accused to be a principal, although the offense may not have been actually or personally committed by him.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 226; Dec. Dig. ¶ 83.]

Appeal from Criminal District Court, Travis County; A. S. Fisher, Judge.

C. C. Quillin was convicted for the misapplication of state tax money, and appeals. Affirmed.

Worth S. Ray, of Austin, and McLean, Scott & McLean, of Ft. Worth, for appellant. Odell & Ramsey, of Ft. Worth, amici curiæ. C. A. Sweeton and C. O. McDonald, Asst. Attys. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted as a principal for the misapplication of state tax money; one Druesedow, as tax collector of Harris county, alleged to have actually committed the offense. His punishment was assessed at seven years in the penitentiary. The sole question in the case is one of pleading. We will therefore state the indictment and the grounds on which it is attacked.

The Indictment: There were several counts. All of them except the third were eliminated. Outside of the necessary preliminary and concluding allegations, which are usual, the third count alleges: That Karl L. Druesedow, in Harris county, Tex., on or about May 1, 1914, and before this indictment was presented, was an officer of the government of said state, to wit, was the duly elected, qualified, and acting collector of taxes in and for Harris county, in said state, and was then and there by law and in virtue of his said office the receiver and depository of public money belonging to said state, and as such officer, by virtue of said office, there had come into his hands and was then and there in his possession a certain sum of public money belonging to said

state, to wit, the sum of \$29,750.34, current money of the United States, of that value, said sum of money being balances then and there in his hands of tax money belonging to said state, collected by him for said state by virtue of his said office during the period of time from May 1, 1913, to April 30, 1914, and which said sum of money he, said Druesedow, did then and there unlawfully, willfully, and fraudulently fail to pay into the treasury of said state at the time prescribed, the time prescribed by law being on or before the 1st day of May, 1914, and that on or about May 1, 1914, C. C. Quillin, did then and there unlawfully, willfully, and fraudulently act together with the said Druesedow in the commission of said offense.

[1] The indictment was based on articles 96, 97, and 74 of our Penal Code, in connection with the duties of collectors prescribed by our Revised Civil Statutes. We will now state these articles of the Code and the substance of the Revised Civil Statutes applicable herein.

Article 96: If any officer of the government who is by law a receiver of public money, or any clerk or other person employed about the office of such officer, shall fraudulently misapply any part of such public money, he shall be punished by confinement in the penitentiary for a term of not less than two nor more than ten years.

Article 97: Within the term "misapplication of public money" are included the following acts: (Subdiv. 6.) The willful failure of any officer to pay into the state treasury at the time prescribed by law whatever funds he may have on hand.

Article 74: All persons are principals who are guilty of acting together in the commission of an offense.

The substance prescribed by the Revised Statutes and actual practice is to this effect: The tax collector is authorized and required to collect all taxes due the state and county of his county, and he is charged as a liability on his part with all of said taxes. This perhaps, besides others, includes all ad valorem, poll, and occupation taxes.

Article 7618: At the end of each month he is required, on forms furnished by the comptroller, to make an itemized report to the comptroller, showing each and every item of said taxes collected by him during said month, accompanied by a summarized statement showing full disposition of all state taxes collected. He is also required to then present such report together with the tax receipt stubs to the county clerk, who shall within two days compare said report with said stubs. If they agree in every particular, the clerk shall certify to the correctness of said report. The tax collector then immediately forwards it to the comptroller, and is required to pay to the state treasurer all moneys collected by him for the state during said month, with certain exceptions and his

commissions on total amount collected. Then at the end of the tax year, which is fixed at May 1st of each year, he is required to finally adjust and settle his account for the whole year with the comptroller, and "shall pay over to the state treasurer all balances in his hands belonging to the state." In order to enable him to do so, the commissioners' court is required to convene on or before the third Monday in April for the purpose of examining and approving his final settlement papers. In this settlement the commissioners' court is required to allow the collector for all delinquent and insolvent taxpayers, in which event the court itself must certify that such insolvent or delinquent taxpayers have no property out of which to make the tax which is assessed, or that they have moved out of the county, or that no property can be found in the county belonging to them out of which to make the taxes.

This annual settlement is entirely additional to, and embraces additional matters from the monthly reports and remittances otherwise required, and failure to make which monthly remittances is made a misdemeanor by article 144, P. C. This prosecution was not had under either articles 107 or 144 of our Code.

Our law expressly makes the comptroller supervisor of the tax collectors, authorizes and requires him to furnish them various blanks for the transaction of their business and reports, and also expressly authorizes and requires him to notify the collectors to make remittances to the state treasury of all taxes collected by them from time to time during each tax collecting year, in addition or otherwise than said monthly remittances expressly required by statute of them, and they are required to comply with his instructions and requirements.

Formerly our laws required tax collectors to remit to the state treasury the state taxes collected by them only quarterly, or perhaps only annually. But, as the state necessarily, in order to run the government, had to pay out large sums monthly to its employes, officers, and at times pay special appropriations, etc., it became necessary, in order to prevent the state from being on a deficiency basis from time to time, to require the collectors to remit monthly to the treasury taxes collected by them, which was done. The legislation of the state from time to time, and the records of our courts, clearly show that the state has had to deal with at least three different classes of collectors: One careless and indifferent, who merely failed to make remittances monthly; another who fraudulently and willfully withheld from the treasury taxes collected by them and thereby misapplied them; and still another who willfully and negligently failed to account for tax money in their hands and pay it to the state treasury whenever expressly required and notified to do so by the comptroller.

This first class was distinctly embraced by said article 144, which made it a misdemeanor only for a collector to merely fail at the end of each month, or within three days thereof, to remit to the state treasurer the amount due by him to the state for taxes collected for the preceding month.

The second class is embraced in said articles 96, 97, wherein it is made a penitentiary offense, with a term of not less than two nor more than ten years, if such collector fraudulently and willfully fails to pay into the state treasury at the end of each tax year, and thus misapplies, whatever of the tax funds he at that time may have on hand.

The other class is embraced by article 107, which makes it an offense for any tax collector who shall willfully and negligently fail to account for all moneys in his hands belonging to the State, and pay the same over to the state treasurer whenever and as often as he may be directed to do so by the comptroller; and, if he violates that article, his punishment is fixed at not less than three nor more than ten years.

This makes it clear that neither articles 144 nor 107 are in conflict with or repeal or modify the offense prescribed in articles 96, 97, but each provides for a separate and distinct offense. If this indictment had been preferred under said article 144, it would have been necessary only for it to have alleged that the tax collector of Harris county had failed within three days after the end of any given month to promptly remit to the state treasury the amount due by him to the state, alleging that amount, and that indictment could not have embraced the offense prescribed by either articles 96, 97, or 107. If the indictment had been preferred under article 107, it would have been necessary for it to have alleged that the comptroller on a given date had directed said tax collector to account for and pay over to the state treasurer the tax money he had collected belonging to the state, alleging the amount, and that such tax collector had willfully and negligently failed to do so, thus making additional and different allegations from that under article 144, and without such additional allegations no conviction could have been obtained under article 107. Without doubt the indictment in this case by its face shows that it was preferred under said articles 96, 97, and that every allegation made therein complies and is in strict conformity to said articles, which is an entirely distinct offense, as stated, from those prescribed by either article 107 or article 144. We see no necessity of further discussing or illustrating the distinct and different offenses prescribed by said articles. A mere reading and application of them clearly demonstrates that neither is in conflict with the other, and that the Legislature intended that they should not be, and that the Legislature intended al-

so that neither should repeal or affect the other.

Appellant's objection to the indictment wherein he claims the failure of the state to allege the failure of Druesedow "to pay the money over to the state treasurer as prescribed by law," etc., is untenable. And so is his other like objection that the indictment fails to charge that Druesedow failed to pay over to the state treasurer all balances, etc.; he basing his objections on the idea that this indictment was preferred under article 144, instead of articles 96, 97, as stated. The allegation in the indictment that he failed to pay the money into the state treasury clearly follows the statute under which the indictment herein was preferred. Besides, the payment of such taxes to the state treasury would, in law and in fact, be the same thing under these statutes as paying it to the state treasurer, and vice versa.

[2] This brings us to the discussion of appellant's objections to the indictment most earnestly insisted upon in oral argument and by his printed brief herein, which, in substance and effect, is that, as the offense denounced applied to a tax collector only, and that the offense could be committed by no one except a tax collector, no other outside party could be a principal with him in the commission of the offense; in other words, that as appellant was not alleged to be a clerk or other person employed about the office of Druesedow, he could not therefore legally be a principal in the offense alleged.

We have thoroughly considered this question and extensively investigated the authorities applicable thereto, and we are clearly of the opinion, both upon authority and reason, that appellant's contention is not sound. The indictment speaks for itself, and is in plain and unequivocal language. Briefly summarized, it alleges that Druesedow was tax collector of Harris county, and as such collected \$29,759.34 of state taxes belonging to the state, and had that sum on hand as balances on May 1, 1914, and that he unlawfully, willfully, and fraudulently failed to pay it into the treasury at the time the law required him to do so, which was May 1, 1914, and that appellant unlawfully, willfully, and fraudulently acted together with said Druesedow in the commission of said offense. Now, let us apply the law to the allegations, or the allegations to the law. The law, summarized, is that, if Druesedow, tax collector of Harris county, fraudulently and willfully failed to pay said money into the state treasury at the said time prescribed, he would be guilty of misapplying it, and that, if appellant acted together with him in doing this, he (appellant) would be a principal with him in the commission of that specific offense. Our statute as to who are principals is applicable to each and every

offense denounced by law, exactly the same as if it was incorporated in each article prescribing a specific offense (with possibly some exceptions not necessary to mention). Of course, it would be wholly inapplicable where one person only should be concerned in the commission of a specific offense. On the other hand, it is specifically applicable to every offense where another than the actual doer acts together with the doer in committing the offense. Our statute on principals was intended to, and actually does, embrace everyone who acts together with another who actually commits an offense. Otherwise the more guilty of the two might escape all punishment for the most heinous crime. To illustrate this case: Under the allegations in this indictment, it might be shown that Druesedow was an honest and faithful officer, scrupulously discharging all the duties thereof; that Quillin came in contact with him and showed him how easy and safe it would be for him to rob the state of the tax money which he had collected, and actually induced him to do so. As compensation for this cunningly devised and iniquitous plan of robbing the state he (Druesedow) might turn over, or pay, to him (Quillin) a part of this very money. The intent, even if first entertained by Druesedow, to withhold and misapply the money, would not alone constitute the offense. It must be combined with the act of fraudulently and willfully doing so. And Druesedow could appear in Austin, or elsewhere, with the money in his pocket to turn into the treasury, as an honest man should do, and at the last moment just before he actually pays it into the treasury Quillin should approach him and induce him to then and there commit the act, and then and there pay to him (Quillin) a part of the fund which he induced Druesedow to then and there withhold from the treasury, and thus complete the crime. Under such circumstances it would be an outrage on justice and law that Quillin, the more guilty party, should escape, and that Druesedow alone should be punished for the crime which Quillin induces and acts together with him in committing, and is, in fact, responsible for Druesedow committing. Other illustrations might be given, but we think it unnecessary. We have not distinguished between accessories and accomplices and principals under our law. This is wholly unnecessary, as the sole question we are passing upon is as to the sufficiency of the indictment.

The authorities clearly establish the principle that one can be a principal of another when physically or actually incapable of committing the offense himself; for instance, in rape, in order to commit that offense, whether by force, or on a girl under 15, it is absolutely essential that a male shall with his sexual organ penetrate the sexual organ of the female. It would, of course, be impos-

ble for a woman to do this, but she can be and is a principal when she acts together with the male who actually does this. This is well settled by the authorities. We cite only some of them. *Campbell v. State*, 63 Tex. Cr. R. 595, 141 S. W. 232, Ann. Cas. 1913D, 858, and authorities therein cited; *State v. Burnes*, 82 Conn. 218, 72 Atl. 1083, 16 Ann. Cas. 465, wherein it is said, "that a person may be guilty as a principal * * * of a crime which he is personally incapable of committing alone is too well settled to require extended citation of authorities;" *State v. Jones*, 83 N. C. 605, 35 Am. Rep. 586; *State v. Comstock*, 46 Iowa, 285; *Strang v. People*, 24 Mich. 1. And while it is held that a man cannot be guilty of rape by himself forcibly having sexual intercourse with his own wife, yet he can be and is a principal if he assists another to thus have intercourse with her. *People v. Chapman*, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857; *State v. Dowell*, 106 N. C. 722, 11 S. E. 525, 8 L. R. A. 297, 19 Am. St. Rep. 568. And see *Law v. Com.*, 75 Va. 885, 40 Am. Rep. 750. So an unmarried man who himself could not be guilty of bigamy by marrying a single woman yet is a principal when he aids, etc., a married man to thus marry. *Boggus v. State*, 34 Ga. 275. In *State v. Rowe*, 104 Iowa, 323, 73 N. W. 833, it was held that, while a county treasurer could only himself embezzle county funds in his hands, yet another who could not himself have committed embezzlement of those funds could and would be guilty as a principal if he acted with the officer and aided him in committing the offense. So in *People v. McKane*, 143 N. Y. 455, 38 N. E. 950, it was held that a person who is not a member of a board of registry, who alone as such was required to do a certain thing, could not himself commit an offense which only a member of the board could do, yet he could be, and was, a principal of such officer if he induced the other to commit the crime, the court saying: "The fact that he may, for some reason, be incapable of committing the same offense himself, is not material so long as it can be traced to him as the moving cause by instigating others to do what he could not do himself."

To the same effect are *U. S. v. Snyder* (C. C.) 14 Fed. 554, and *U. S. v. Bayer*, 4 Dillon, 407, Fed. Cas. No. 14,547, and other cases and text-books which could be cited, but we think it unnecessary.

In oral argument appellant presented and relied upon a case from Michigan. At the time we took no memorandum of the case, presuming it would be cited somewhere in appellant's brief, but we failed to find it there, or elsewhere in the record. We have been informed, however, that that case was *Shannon v. People*, 5 Mich. 72. We have carefully read that case, and, in our opinion, instead of being an authority in appellant's favor, it is against him. Under the peculiar statute of that state and indictment therein it was held that the proof offered did not

sustain the offense as alleged, and that he was indicted under the wrong statute, having been indicted directly as committing the offense, without any allegation that another who alone could commit the offense had done so. The very defect in that case was expressly met by the allegations in this. The fact that the laws of Michigan made an accomplice a principal would not make that case authority under our law to hold the indictment invalid.

We are clearly of the opinion that the indictment in this case is unquestionably valid, and the judgment will therefore be affirmed.

On Motion for Rehearing.

In the original opinion we stated that in oral argument appellant relied upon a certain Michigan case, and that at the time we took no memorandum of it, presuming it would be cited in his brief, "but we failed to find it there." That was the statement of this writer. Neither of my Associates are in any way responsible therefor. I was absent and did not hear the oral argument when the case was submitted. In some unaccountable way I overlooked the citation of the case in appellant's brief. However, as a matter of fact, it was cited therein in a paragraph to itself with other matter. When I thus overlooked it, I was anxious to be certain to get the right case and study it; for I understood it was insisted upon as an important case in point in this case. I inquired of others who heard the oral argument to know what case it was. None of them could inform me at the time. Later I was informed it was the Michigan case discussed in the original opinion. However, as I was apprehensive that might not be the case, but it might be some other, I made said statement. Otherwise, if I had been sure I had the right case, I would have made no statement at all on the subject; for, under the circumstances, it would have made no difference whether it was cited in the brief or not. When, as stated, I in some unaccountable way overlooked it in the brief, I thought appellant's attorneys had not cited it therein, as it is not infrequent that attorneys read to the court in oral argument cases not cited in their briefs. I make this explanation and correction of my mistake in justice to all concerned. The mistake, however, in no possible way affected appellant or any question in his case. It turned out he got the full benefit and consideration of the case cited by his attorneys.

[3] Appellant contends that the indictment is fatally defective because it did not allege what he said or did which would make him a principal, claiming that it was necessary that this should be done. This is never necessary. The authorities so holding are many and uniform. We know of no case, and none has been cited, holding, or intimating a holding, to the contrary. Judge White, in his form for an indictment under our statutes of prin-

cipals, specifically shows that no such allegation is necessary. White's Ann. P. O. § 85. Under article 74, P. C., in section 86, he says:

"It is not necessary to allege the facts relied upon to show the defendant to be a principal, although the offense may not have been actually committed by him. If he is a principal by reason of the part performed by him in the commission of the offense, he may be convicted under an indictment charging him directly with its actual commission"—citing *Williams v. State*, 42 Tex. 392; *Gladden v. State*, 2 Tex. App. 508; *Davis v. State*, 3 Tex. App. 91; *Tuller v. State*, 8 Tex. App. 501; *Mills v. State*, 13 Tex. App. 487.

Judge Willson, in his Forms (4th Ed.) No. 733, under the articles of our Code (74-78, inclusive) on principals, likewise shows that it is wholly unnecessary to allege the facts which make one a principal. His form shows that a party is to be charged directly with the commission of the offense without any allegation of what he did or said to make him a principal. He says:

"It is unnecessary to allege the particular facts which constitute each a principal. Under a general indictment charging the defendant, or defendants, directly with the commission of the offense, any acts which make him a principal may be proved"—citing some of the cases cited by Judge White and others.

In some recent cases we have had occasion to quote Mr. Branch also on this subject with approval. We again do so. He says:

"The acts which make the defendant a principal need not be alleged in the indictment. A principal offender may be charged directly with the commission of the offense, although it may not have actually been committed by him. *Cruit v. State*, 41 Tex. 477; *Williams v. State*, 42 Tex. 392; *Bell v. State*, 1 Tex. App. 593; *Davis v. State*, 3 Tex. App. 93; *Tuller v. State*, 8 Tex. App. 501; *Mills v. State*, 13 Tex. App. 489; *Farris v. State*, 26 Tex. App. 105, 9 S. W. 487; *Watson v. State*, 28 Tex. App. 40, 12 S. W. 404; *Finney v. State*, 29 Tex. App. 184, 15 S. W. 175; *Gallagher v. State*, 34 Tex. Cr. R. 306, 30 S. W. 557; *Campbell v. State*, 63 Tex. Cr. R. 595, 141 S. W. 233 [Ann. Cas. 1913D, 858]; *Oliver v. State* [65 Tex. Cr. R. 150] 144 S. W. 616; *Madrid et al. v. State* [71 Tex. Cr. R. 420] 161 S. W. 95; *Dillard v. State*, 177 S. W. 102." 1 Branch's Ann. P. C. § 676; *Arensman v. State*, 187 S. W. 471, and other cases recently decided, but not yet reported.

Exactly to the same effect is 1 Vernon's Cr. Stat. § 23, p. 42.

Each of the cases cited by Judges White and Willson and Mr. Branch are directly in point. We will quote from but two of them.

Before this court was created, and when the Supreme Court had criminal jurisdiction, *Cruit* and *King* were jointly indicted for stealing two bales of cotton with the intent to appropriate them to their use and benefit. *Cruit* alone was tried. The court instructed the jury, if *King* stole the cotton with the intent to appropriate it to his and *Cruit*'s use, and *Cruit* was present when the cotton was stolen, and, knowing the unlawful intent of *King*, did aid by acts in taking, etc., the cotton, to convict him. The jury did convict him. The Court said:

"It is admitted that all who are present at the commission of a crime and give aid are principals. But it is insisted in an ingenious argument that the indictment does not warrant a verdict against appellant on the proof of the facts indicated in the charge to which we have referred. If the indictment had charged King with stealing the cotton, and that appellant, knowing the unlawful intent, was present, aiding and assisting him therein, it is conceded the charge of the court would have been strictly correct. But it is said appellant is charged with stealing the cotton, and not with aiding King to steal it, and, to convict him under this charge, the proof must show that he took the cotton with intent of converting it to his own use. With however much force we may concede the objection has been urged, we regard it as more specious than sound. The indictment does not, as it seems to be supposed, charge the taking to have been with the intent to appropriate the cotton to the use of King alone, but to the joint use of appellant and King. And, if the objection should be sustained, it would result that in all cases where there are two or more principal offenders it would be necessary to set forth in the indictment the particular acts done by each of the parties connected with the transaction. This certainly has never been the practice in prosecutions of this character, and has always been held to be unnecessary." *Cruit v. State*, 41 Tex. 477.

In *Mills v. State*, 13 Tex. App. 489, *Mills* was indicted separately for shooting *Berry*. *Dart* was in no way mentioned in the indictment. This court said:

"Upon the trial the defendant excepted to all evidence tending to prove that *Dart* shot *Berry*, upon the ground that there was no allegation in the indictment to that effect. The court overruled the objection, and the defendant excepted. We are of the opinion that the ruling of the court was correct. The state proved that *Dart* did the shooting, and that defendant was present, and, knowing the unlawful intent of *Dart*, abetted and encouraged him in the commission of the offense.

"The question here raised is this: Must the indictment charge all of the parties engaged in the commission of the offense, in order to the admission of evidence to prove that a party not on trial committed the act, and that the defendant (the party on trial) was present, and, knowing the unlawful intent of such person, aided him by acts or encouraged him by words or gestures? We are of the opinion that this question must be answered in the negative. If the party is present and knows of the unlawful intent, and aids by acts or encourages by words or gestures the party who actually commits the unlawful act, he is held a principal actor, and can be prosecuted and convicted as such. In this case defendant told *Dart* to shoot; that he would stand by him. *Dart* shot. *Dart's* act was the act of defendant to the same extent and to all purposes in law as if defendant had actually shot *Berry* himself; and it is proper for the indictment to charge him with the actual shooting of *Berry*, omitting any or all others engaged in the commission of the act."

If the offense in this instance had been murder, arson, rape, or any other felony, it would have been wholly unnecessary to have made any allegation at all about *Druesedow*. *Quillin* could have been charged directly with having committed the offense, although *Druesedow* himself committed it, and *Quillin* was merely a principal by reason of what he did or said. It was only because under this particular law *Druesedow* was in a class who alone could directly commit such a crime

that it was necessary to allege what he did at all. Then, after making the necessary allegations which the indictment did as to *Druesedow*, it was only necessary as to *Quillin* to allege as it did, that he did unlawfully, willfully, and fraudulently act together with *Druesedow* in the commission of the said offense; this is the very language of the statute. No other allegation whatever as to what *Quillin* said or did was necessary.

All other questions were discussed and correctly decided in the original opinion. No further discussion of any of them is necessary.

The motion is overruled.

THOMPSON v. STATE. (No. 4068.)

(Court of Criminal Appeals of Texas. May 10, 1916. On Motion for Rehearing, June 14, 1916.)

1. HOMICIDE \S 219—EVIDENCE—ADMISSIBILITY.

In a prosecution for murder, a conflict in testimony as to whether deceased was conscious when making alleged dying declarations would not render the statements inadmissible, but would go to the weight to be given them by the jury.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. \S 460; Dec. Dig. \S 219.]

2. WITNESSES \S 379(1)—IMPEACHMENT.

In a prosecution for murder, where defendant's witness testified that she believed the deceased was unconscious when she made the statement that defendant inflicted the injuries on her head, statements made by the witness to the physician who attended deceased, prior to so testifying, were admissible as tending to impeach her.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. \S 1209, 1247; Dec. Dig. \S 379(1).]

3. CRIMINAL LAW \S 595(1)—TRIAL—CONTINUANCE.

In a prosecution for murder, the fact that a witness would testify that he knew the deceased was quarrelsome and knew of two men who had made threats, it not being shown that either was in a position to commit the crime, was immaterial and not ground for a continuance.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 1323; Dec. Dig. \S 595(1).]

4. CRIMINAL LAW \S 595(1)—TRIAL—CONTINUANCE.

In a prosecution for murder, where witnesses for the state testified that they had heard defendant make threats against the deceased, testimony of an absent witness that he had never heard such threats would be immaterial and not ground for a continuance, unless the absent witness is shown to have been in a position to have heard the threats testified to.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 1323; Dec. Dig. \S 595(1).]

5. CRIMINAL LAW \S 814(17) — TRIAL — INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

In a prosecution for murder, where the case depended on direct and positive evidence consisting of dying declarations of deceased, the court properly refused to charge on circumstantial evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 1883, 1979; Dec. Dig. \S 814(17).]

On Motion for Rehearing.

6. CRIMINAL LAW §366(6)—HOMICIDE §202—EVIDENCE—ADMISSIBILITY—RES GESTÆ—DYING DECLARATIONS.

In a prosecution for murder, where the doctor who attended the deceased within 15 minutes after the blows were inflicted believed her about to die and told her so, and, although he gave her morphine to ease her pain, believed her to be thoroughly conscious, his testimony as to her replies by nods to his questions as to who hit her, she not being able to speak plainly because of a fractured jaw, was admissible as res gestæ and as dying declarations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 820; Dec. Dig. §366(6); Homicide, Cent. Dig. § 429; Dec. Dig. §202.]

7. CRIMINAL LAW §366(3)—HOMICIDE §207—EVIDENCE—DYING DECLARATIONS—RES GESTÆ.

Testimony of another witness who arrived before the doctor as to the statements of the deceased in response to the doctor's questions as to who struck her, although in answer to a question, were admissible as dying declarations and as res gestæ, since it is no objection to a dying declaration that it is made in answer to questions, if the questions were not calculated to lead the deceased to make any particular statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 819; Dec. Dig. §366(3); Homicide, Cent. Dig. § 439; Dec. Dig. §207.]

8. HOMICIDE §216—EVIDENCE—ADMISSIBILITY.

Statements made to the undertaker some time after the statements made to the doctor, while he was preparing to shave the head of deceased, tending to show that deceased was conscious, were admissible as dying declarations.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 457; Dec. Dig. §216.]

9. CRIMINAL LAW §1133—APPEAL AND ERROR—PRESENTATIONS IN LOWER COURT OF GROUNDS FOR REVIEW.

In a prosecution for homicide, an objection that no predicate was laid for impeaching testimony cannot be presented for the first time on motion for rehearing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2984; Dec. Dig. §1133.]

10. HOMICIDE §166(2)—EVIDENCE—ADMISSIBILITY.

In a prosecution for murder, testimony of a previous quarrel between deceased and defendant, and that he knew another negro was going to the house of the deceased on the night of the crime, was admissible as tending to show motive for the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 321, 322; Dec. Dig. §166(2).]

11. CRIMINAL LAW §1092(11)—TRIAL—OBJECTIONS.

In a prosecution for murder, an objection by defendant to the court's qualification of one of his bills of exceptions should have been made before filing the bill as qualified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2837, 2841; Dec. Dig. §1092(11).]

12. CRIMINAL LAW §456—EVIDENCE—OPINION EVIDENCE.

In a prosecution for murder, where a witness testified that she had seen the deceased moaning and raising her body while the doctor was examining her wounds, and heard what the witnesses said to her, and her answers, her opinion that the deceased was conscious was admissible, although opinion evidence, since it is one of the instances where a witness in language

cannot portray what she sees and observes and is permitted to express an opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1045; Dec. Dig. §456.]

13. HOMICIDE §234(6)—EVIDENCE—SUFFICIENCY.

In a prosecution for murder, where several witnesses testified as to statements made by deceased immediately after the crime accusing the defendant, evidence held sufficient to sustain a verdict of guilty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 487; Dec. Dig. §234(6).]

Appeal from District Court, Wichita County; Wm. N. Bonner, Judge.

Charles Thompson was convicted of murder, and he appeals. Affirmed.

Ralph P. Mathis and Wayne Somerville, both of Wichita Falls, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of the murder of Pearl Bransford, and his punishment assessed at death.

Dr. MacKechney testified to being called to see the woman, that he had her carried to the sanitarium, and that the wounds she received were the cause of her death. He testified her face was literally torn all to pieces; that her upper jaw was broken, and all her teeth on the right side were broken loose, her lower jaw was broken, and there were seven distinct wounds on her head; that he found a hammer there bloody; that there were wounds practically all over her entire scalp, and there were several places where the outer table of her skull was broken. He says he told Mr. Nelson and his wife that he thought it was useless to attempt to do anything for her, but at their request he treated her; that in his opinion the woman was conscious; and he furthermore testified that he informed the woman she was going to die and that she wanted to tell the truth. Mrs. Nelson says the woman was informed that she was going to die, and the doctor thought she was dying.

The doctor's testimony and Mrs. Nelson's testimony would be admissible both under the res gestæ rule and as dying declarations. While the statements made to the undertaker were some time after the statements were made to the doctor, yet his testimony would tend strongly to show that she was conscious, and his testimony would be admissible as a dying declaration.

[1] There are a number of bills objecting to testimony wherein, when asked who did it, she would answer to "Charles," to others Charles Thompson, and to others would nod her head in the affirmative when asked the question. It is true that witnesses for appellant testified they did not think she was conscious, but this would not render the testimony inadmissible, but go to the weight to be given it by the jury. When the state's

witnesses testified that she was conscious and informed that she was going to die, this made a prima facie case, and rendered the testimony admissible. When the defendant offered testimony that she was not conscious of what she was saying, this rendered it a question of fact to be determined by the jury. None of the bills complaining of the admissibility of this testimony present error.

[2] The testimony of Dr. MacKechney as to what Miss Gossler said to him was admissible. Appellant introduced Miss Gossler and had her testify that in her opinion the woman was unconscious when she made the statement that appellant inflicted the injuries on her head. Any statement she had made to Dr. MacKechney prior to her so testifying would be admissible as tending to impeach her, and the court in approving the bill says he so limited the testimony.

The testimony of a previous quarrel between deceased and appellant was admissible as tending to show motive for the crime. The witnesses testify that appellant had told the negro woman that "no other man should have her." It was shown another man called on her that evening and was to call again that night, and when he did call he found the negro woman murdered. It is shown that appellant could have and probably did know that Ben Henderson had called that evening and was to call again that night.

[3, 4] The court did not err in overruling the application for a continuance. While it is always permissible to show that another probably committed the crime, or that another had made threats, or had ill will, if the testimony goes further and would place such person in such proximity to the person that he might or could have committed the deed, the fact one absent witness would testify that he "knew the woman was quarrelsome, and knew of two men who had made threats," would be immaterial, unless such other two persons, or one of them, were placed in such position where they had an opportunity to commit the offense. There is no allegation in the motion as to where the two persons were on the night of the homicide, nor is the name of either of them given. The fact that the absent witnesses had never heard appellant make any threats toward deceased would be immaterial, nor would such testimony tend to weaken the testimony of the state's witnesses who heard and testified to the threats. Doubtless any number of men could have been picked up who would have testified, and testified truthfully, they had never heard appellant make a threat. Before the testimony of such witnesses would become material, they would have to place themselves in position to have heard the threats testified to by the witnesses for the state. There is no allegation they were present on such occasion, nor is it so contended in the record before us.

[5] Three or four witnesses testify to the fact that deceased, in her dying declaration, said appellant committed the offense, and the court did not err in refusing to charge on circumstantial evidence. It was a case depending on direct and positive testimony. If the jury had not believed the woman was conscious when she made the statements charging appellant with having inflicted the wounds which caused her death, they should not and would not have convicted him, much less assess the highest penalty known to the law.

The judgment is affirmed.

On Motion for Rehearing.

Appellant has filed a motion for rehearing, and, as the death penalty was assessed, we have again gone over the entire record, and will again take up each question presented by appellant in his motion.

[6] He first contends we erred in holding the testimony of Dr. MacKechney admissible as *res gestæ*. The testimony shows the doctor was called as soon as the woman was discovered, and this is shown by the record to have been very soon after the blows were inflicted. The doctor testified that:

"From my examination of her, and observation of her, and talking with her, I believe she was thoroughly conscious. I convinced myself of that fact, and asked her if Sam hit her, and she gave me to understand that he did not. She did not distinctly say, 'No,' because in her condition she could not speak plainly; but she said, as I understood it, 'No,' and shook her head. I then asked her if Charlie did this, and she indicated, 'Yes,' nodded her head."

He says that this was about 15 minutes after he got to the house, and that the woman was suffering intense pain, and he gave her a dose of morphine; that he did not give her enough morphine to render her unconscious. He testified:

"All of the upper right side of her jaw was badly fractured, and her lip and cheek lacerated, and the teeth on the right hand side were loosened clear back."

He describes her other wounds also, but we have named these to show why she could not speak plainly. In Branch's Penal Code, p. 52, the rule is laid down that:

"Statements made by the deceased a short time after the homicide as to how it occurred are admissible as *res gestæ*, * * * where * * * suffering excludes idea of fabrication," citing a number of authorities beginning with *Boothe v. State*, 4 Tex. App. 208; *Lewis v. State*, 29 Tex. App. 204, 15 S. W. 642, 25 Am. St. Rep. 720; *Chapman v. State*, 43 Tex. Cr. R. 328, 65 S. W. 1098, 96 Am. St. Rep. 874.

[7] Appellant also insists that the testimony of Mrs. Walter Nelson was inadmissible. This lady testifies to going right to the woman and getting there before Dr. MacKechney did, and she says: That the doctor told the woman: "Now, Pearl, you are going to die. You probably will die. I think you are dying, and you try to tell who killed you." And the woman replied, "Charles." That when this statement was made to her by the doctor, the woman raised herself up

on her elbow and said, "Charles." This would be admissible both as dying declaration and as *res gestæ*. Appellant says it was in answer to a question. That is true, but the statement or question was not such as to suggest the answer to be made. It left her free to name the person who had struck her, without any suggestion as to whom she should name. It has always been the rule that it is no objection to a dying declaration that it was made in answer to questions, if the questions were not calculated to lead the deceased to make any particular statement. *Hunnicutt v. State*, 13 Tex. App. 516, 51 Am. Rep. 330; *Pierson v. State*, 18 Tex. App. 562; *White v. State*, 30 Tex. App. 655, 18 S. W. 462; *Grubb v. State*, 43 Tex. Cr. R. 75, 48 S. W. 314; *Hunter v. State*, 59 Tex. Cr. R. 455, 129 S. W. 125.

[8] Appellant next insists that the testimony of E. G. Hill was inadmissible wherein the witness testified that he was preparing to shave her hair off and cleaning her head for that purpose, that he knew she was conscious, for when he told her to put her hand in a pan of water she did so, and while shaving her head, he would tell her to turn her head and she would do so. He says this was not in regard to nor descriptive of the manner of the death. But this testimony was admissible on the issue of consciousness and was but introductory to permitting the witness to testify that the woman told him that Charlie did it, and that he hit her with a hammer. Under the testimony of Mrs. Nelson above as to what the doctor told the woman about her going to die, we think the testimony admissible.

[9] Appellant now contends that there was no predicate laid to impeach Miss Gossler, and therefore Dr. MacKechney should not have been permitted to testify to the impeaching statement without a predicate being laid. It is sufficient to say that the bill does not show that any such objection was urged in the trial court, and it cannot be presented now for the first time on motion for rehearing in this court. It comes too late.

[10, 11] Previous quarrels are always admissible to show motive. Appellant insists we were in error in quoting the substance of the threat testified to by Mike Osborn. The exact language is, after the woman had refused to let appellant stay with her, "if you can't stay with me, you will never live for nobody else." This was peculiarly admissible in the light of the facts that another negro was to go to the house the night she was killed, and she was killed before he got there. Appellant was also placed in position that he could have known that the other negro was going to deceased's home. As to appellant's objection to the court's qualification of one of his bills, he should have done this before filing the bill as qualified. *Blain v. State*, 34 Tex. Cr. R. 448, 31 S. W. 368.

[12] After Mrs. Dolman had testified to

seeing the woman moaning and swaying her body, raising her body on her elbows, and screaming when the doctor examined her wounds, and heard what the witnesses said to her, and her answers, there was no error in permitting her to state that in her opinion the witness was conscious. This is one of the instances in which the witness in language cannot portray what she sees and observes and is permitted to express an opinion.

[13] The only other objection is that the testimony is insufficient to sustain the death penalty. If the evidence will not sustain the death penalty, it is wholly because appellant is not sufficiently identified as the person who committed the crime, and, if that is true, no penalty should be sustained. The mode and manner of killing this woman was most cruel and wanton. The doctor testified:

"When I arrived, in the servant house I found a negro woman lying on the floor, with her face literally beat all to pieces. I have practiced medicine for 20 years, and I have never seen anything like it. This upper jaw was broken, and all of her teeth on this side, right side, were knocked loose. Her lower jaw was broken, and she was beat over the head. I think there was seven distinct marks on her head. It looked like this had been done with a hammer, and, in fact, I found a hammer lying there on the floor, bloody, that compared with it; that is, the bit of a hammer compared with the size of the wounds on her head."

Appellant's counsel made an able defense and undertook to fasten the crime on another and prove an alibi for appellant. The jury solved these questions against him, and we cannot say they were not authorized to do so.

The motion for rehearing is overruled.

WILSON v. STATE. (No. 4111.)

(Court of Criminal Appeals of Texas, June 7, 1916. On Motion for Rehearing, June 23, 1916.)

1. HOMICIDE \Leftrightarrow 250—EVIDENCE—SUFFICIENCY—MURDER.

Evidence held to sustain a conviction for murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. \Leftrightarrow 250.]

2. HOMICIDE \Leftrightarrow 300(2)—INSTRUCTION—SELF-DEFENSE.

An instruction that accused was justified in killing deceased if he asked for a knife and said he would kill accused, or made either statement, is not error, since the coupling of the statements is cured by the alternative clause.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 616; Dec. Dig. \Leftrightarrow 300(2).]

Appeal from District Court, Uvalde County; R. H. Burney, Judge.

Kid Wilson was convicted of murder, and he appeals. Affirmed.

L. Old and Paul R. Ellis, both of Uvalde, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of murder and given 5 years in the penitentiary.

[1] There are no bills of exception in the record except objections to the court's charge. The first exception to the charge is, the court was in error in submitting the issue of murder. We are inclined to believe, under the evidence, the court did not in this matter commit error. A statement, briefly, of some of the facts, will show that appellant was a boy 17 or 18 years of age, and deceased a man about 30. The difference in weight was in favor of the deceased by about 40 pounds. Deceased and his wife were not living together. The testimony indicates that it is probable that the defendant may have been a contributing cause of their separation. On the night of the trouble Williams and his wife and the wife of deceased were in company on the street walking. Defendant met them, stopped deceased's wife and engaged her in conversation. Just prior to meeting the deceased's wife appellant borrowed a knife from one of the state's witnesses, who testified in this connection:

"As we come down the street the defendant asked me to lend him my knife, and I handed it to him right in front of Mr. Pilgreen's house. At that time he and I and Rastus, who was Andrew Gordon, were walking down the street, and after I had let him have the knife, Andrew Gordon and I stopped because I had broken my suspenders and wanted to fix them. When we stopped defendant, Kid Wilson, walked on. It was after dark, and I could not see him all the way, but we went right behind him. The next time I saw him was when we overtook him; he was standing on the sidewalk talking to Agnes Davis, and I walked by them while they were standing there talking, and right after I passed them I met Henry Davis, and I walked on by a little way, and turned around and watched them, as I expected trouble. I was in sight of them at the time, and Kid Wilson was standing there talking to Henry Davis' wife, and I saw Henry Davis go straight down the sidewalk and go straight towards them, and when he got to where they were they went together and began fighting, and Mrs. Agnes Davis spoke to them, and said, 'You all quit,' and repeated it two or three times. While they were fighting Richard Wilson, who was a brother to Kid, came up to them. He was back down the street behind them with Nettie Grant, and he came up there, and when he got there I saw Richard Wilson push them apart, and then they went back together, and at that time Mrs. Davis had hold of Henry, at least it looked that way to me. About the time that Richard Wilson got there Sol Williams came up, and then immediately after that the third fight took place; that is, they went together the third time, and immediately after they had gone together the third time I heard Henry Davis say, 'Oh, Lordy! I am cut all to pieces!' and about that time I ran off."

The knife is described to be:

"A large bone-handled knife, with a big blade about 3 inches long, which length of the blade was admitted to be correct by the attorney representing the defendant, and the attorney representing the state."

It is also shown by Williams that when he and his wife and deceased's wife, Agnes Davis, met appellant he asked Agnes Davis

to stop and talk to him. While talking deceased came up and a fight ensued. It might be further added that the previous witness testified:

"Yes; this is the knife I loaned defendant on the street about 150 yards from where the fight took place. It is my knife, and at the time that I loaned it to him he did not say what he wanted with it, and there was nothing said about it; he just said, 'Howard, lend me your knife,' and I handed it to him, open. At the time I loaned this knife to Kid Wilson he carried it off in his hand, and it was open at the time I gave it to him, and I never saw him close it up, or put it in his pocket. I never saw any knife or arm at any time on Henry Davis during the fight."

The defendant's theory of the case was that he was talking with the wife of the deceased at the time he came up; that deceased rushed at him, struck him with his fist, and broke his glasses, injuring his eye, and knocking him down. This was the beginning of the fight. He also testified to some expression of the deceased who called on his wife for a knife, stating that he expected to "kill the damn black son of a bitch," referring to defendant.

We are of opinion that under this state of facts the court was not in error in submitting the issue of murder to the jury. We think the facts justified the court to so charge.

[2] There is an exception to the charge, which should be noticed. It is what is styled in the exception as subdivision or paragraph No. 17 of the court's charge, wherein he applies the law of self-defense to the facts. Numerous cases are cited by appellant to sustain his criticism of the charge. After giving paragraphs Nos. 15 and 16, the usual stereotyped definition of self-defense, the court gave what is styled paragraph No. 17, as follows:

"You are further instructed on the law of self-defense as applied to the facts of this case, that if you find from the evidence that the defendant did on or about the time alleged, and with a knife, cut and stab, and thereby kill the said Henry Davis, but you further find that at the time, or just prior to the time that he did so, the said Henry Davis had made an assault upon the defendant and knocked him down, and that thereafterwards in the pursuance of the difficulty between them, if any, the deceased, Henry Davis, called to his wife to give him his knife, and remarked at the same time that 'I will kill the black son of a bitch,' or if he made either of said statements, and thereupon approached the defendant, or made an assault upon him in the nighttime, and that, as viewed from the standpoint of the defendant at the time, he believed that he was in danger of serious bodily injury or death at the hands of the said Henry Davis, from such attack, or threatened attack, if any, and that while so believing, he pulled his knife and cut and stabbed the said Henry Davis and thereby killed him, then in case you so find the facts to be, or if there is a reasonable doubt in your mind that such were the facts, you will acquit the defendant," etc.

Appellant's proposition is that the coupling of conditions and statements as was done in the first portion of this charge was error. Had the charge stopped at that point

the case should be reversed, but after stating those he then instructed the jury that if deceased made either of said statements and approached the defendant or made an assault upon him in the nighttime, they should give him the benefit of the doubt and acquit him. Several cases are cited by appellant to sustain his criticism of the charge in regard to coupling of conditions upon which the jury should base self-defense. Among those is *Lara v. State*, 48 Tex. Cr. R. 568, 89 S. W. 840. An examination of the *Lara* Case discloses the conditions coupled were not alternative or in the disjunctive of those conditions. In the instant case the court, after joining these together and informing the jury if these matters occurred, defendant would be entitled to an acquittal, then to guard against any supposed error, and state the law favorable to defendant, he instructed them if they believed either statement or condition, that appellant would be entitled to an acquittal, or if they had a reasonable doubt thereof they should acquit. We are of opinion that this charge, while inartistic, gave the benefit to the defendant of the law of self-defense from the standpoint that if either one of these statements or conditions existed, or there was a reasonable doubt about it, he should be acquitted.

It is also insisted that the evidence is not sufficient to justify the verdict of murder, and that no higher offense than manslaughter is in the case by the testimony. We have stated enough of the testimony, we think, with reference to the charge submitting the issue of murder, to show the jury was justified in finding against appellant's contention on that proposition.

We are of opinion there is no such error in the record as would require a reversal of the judgment. It is therefore affirmed.

On Motion for Rehearing.

On a former day of the term the judgment herein was affirmed. Appellant in his motion for rehearing attacks the following expression in the original opinion:

"Deceased and his wife were not living together. The testimony indicates that it is probable that the defendant may have been a contributing cause of their separation."

The motion contends that this statement is not supported by the record. The writer was responsible for the expression in the original opinion, and in the light of the criticism has reviewed the testimony to ascertain if an injustice has been done appellant by reason of the statement.

The state's case, through the witness Williams, is to the effect that he and his wife and the wife of deceased, Agnes Davis, were walking along the street together and met appellant, who stopped Agnes Davis and stated to her he wanted to see her a moment. Witness says he and his wife walked on down the street and met deceased; that

he and his wife stopped and turned around and watched deceased go down the street.

"Immediately after that I heard some one say something, but could not tell what it was that was said and who said it, and then I heard some blows passed, and then I started back down there, and left my wife standing on the sidewalk. When I got to where they were they were not fighting, but just as I got there they went together again, and I heard Agnes Davis holler for some one to come there; that there was a fight."

Just as they were pushed apart by Richard Wilson, brother of defendant, appellant reached for something in his pocket and rushed up to deceased "and made two swipes with his right hand on the left side of Henry Davis, the dead man. He just ran at Henry Davis and struck him, and then the defendant and Richard Wilson, his brother, ran." This witness further says:

"Yes; before that time Kid Wilson had told me that he liked Mrs. Agnes Davis, the wife of the deceased, and liked her company because she was so jolly and pleasant."

This witness further testified he had not heard of any previous trouble between deceased and defendant. These witnesses seemed to have been impressed with the idea that when deceased approached where appellant and the wife of deceased were engaged in conversation that something was going to happen. The witness further testified:

"I had never seen Kid Wilson at Agnes Davis' house since she and her husband had separated; he used to go there while they lived together, but I have never seen him there since they separated."

The testimony further shows from another witness:

"The next time I saw him was when we overtook him [appellant] and he was standing on the sidewalk talking to Agnes Davis, and I walked by them while they were standing there talking, and right after I passed them I met Henry Davis, and I walked on by a little way and turned around and watched them, as I expected trouble. I was in sight of them at the time, and Kid Wilson was standing there talking to Henry Davis' wife, and I saw Henry Davis go straight down the sidewalk, and go straight towards them, and when he got to where they were they went together and began fighting."

The witness further testified:

"I heard Henry Davis say, 'Oh, Lordy! I am cut all to pieces!' and about that time I ran off. At the time that I loaned this knife to Kid Wilson he carried it in his hand, and it was open at the time I gave it to him, and I never saw him close it up, or put it in his pocket. I never saw any knife or arm at any time on Henry Davis during the fight."

The defendant himself testified, referring to deceased:

"I had never had any trouble before. I had been to his house some, while he and his wife lived together, but was never there except while he was there, and after they separated I never went back any more."

The defendant denied being the cause of the separation. Other testimony of a kindred nature might be added to the above. If this does not justify the statement in the original opinion, the writer is still of the

opinion that it would be rather difficult to understand what this testimony means. That they were separated is not contested. Every witness who testifies in regard to the matter shows that deceased and his wife were separated. Defendant said there had never been any trouble before this occasion, yet he stopped the wife of deceased on the street, having prepared himself with a large knife beforehand, and deceased evidently anticipating something, approached defendant and his (deceased's) wife, rapidly, and immediately upon reaching them defendant says deceased knocked him down and broke his glasses, then rushed on him again, and he (appellant) stuck his knife in him. We are still of opinion that the statement criticized by counsel found in the original opinion might be intensified and yet be within legitimate deduction from the facts. It is not my purpose to take up the facts and argue and discuss that question further. That every witness who testified in regard to the matter seemed to have anticipated there would be trouble at the time is not to be questioned by this record, and the fact that appellant was talking to deceased's wife, having prepared himself with a large open knife loaned to him by a witness who testifies and whose evidence is quoted in the original opinion, is also not debatable, there having been no other trouble between the parties and no occasion for it, as shown by the testimony of the defendant, and it was before the jury for their consideration. The deduction or conclusion is fully fair that the wife of deceased and deceased's separation from her entered into this case.

I do not care to discuss the court's charge as set forth in the original opinion. The cases relied upon by appellant (*Lara v. State*, 48 Tex. Cr. R. 568, 89 S. W. 840, *Dodson v. State*, 45 Tex. Cr. R. 574, 78 S. W. 514, and *McMillan v. State*, 73 Tex. Cr. R. 343, 165 S. W. 576) are not in point. Had the court's charge terminated with coupling the conditions as found in the charge and gone no further, those cases would have been in point and required a reversal of this judgment. But the court, after giving these conditions in his charge on self-defense, gave the converse of it favorable to the defendant, and instructed the jury that if either of these statements or conditions occurred and deceased made an attack which brought actual or apparent danger to defendant, he had a right to kill. It occurs to us this was favorable to defendant so far as that phase of the charge is concerned. The court gave a full charge on both actual and apparent danger. Having given a charge that would have been reversible by coupling all the conditions, the court then instructed the jury that if either statement was made or any condition occurred followed by the attack, real or apparent, on the part of deceased,

the defendant should be acquitted. It presents the opposite side or the reverse proposition favorably we think to the defendant. The first part of the charge should not have been given, but, having given it, the court then instructed the jury favorably to defendant's side of the case. But in any event, the jury was instructed that if either of these matters occurred or any other statement was made by deceased, appellant was entitled to an acquittal, provided it presented to him either actual or apparent danger.

The motion for rehearing, therefore, will be overruled.

CUILLA v. STATE. (No. 4073.)

(Court of Criminal Appeals of Texas. May 31, 1916. Rehearing Denied June 21, 1916.)

1. RECEIVING STOLEN GOODS \S 1—STATUTE. Pen. Code 1911, art. 1349, forbids either the receiving or concealing of stolen personal property.

[Ed. Note.—For other cases, see *Receiving Stolen Goods*, Cent. Dig. $\S\S$ 1-3; Dec. Dig. \S 1.]

2. RECEIVING STOLEN GOODS \S 7(6)—SUFFICIENCY OF ACCUSATION—CONSTRUCTION.

An indictment alleging that accused received and concealed certain personal property will warrant a conviction for either receiving or concealing.

[Ed. Note.—For other cases, see *Receiving Stolen Goods*, Cent. Dig. \S 14; Dec. Dig. \S 7(6).]

3. RECEIVING STOLEN GOODS \S 8(3) — EVIDENCE—SUFFICIENCY.

Evidence held to sustain an attorney's conviction for receiving and concealing a revolver stolen by his client.

[Ed. Note.—For other cases, see *Receiving Stolen Goods*, Cent. Dig. $\S\S$ 16, 17; Dec. Dig. \S 8(3).]

4. CRIMINAL LAW \S 1166½(12)—TRIAL—CONDUCT OF TRIAL—CONDUCT OF JUDGE—EXAMINATION OF WITNESSES.

It was not prejudicial error for the trial court to ask accused if he intended to testify that it was his policy as an attorney to withhold from the authorities information as to stolen property in his possession.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 3125; Dec. Dig. \S 1166½(12).]

Appeal from Harris County Court, at Law; Murray B. Jones, Judge.

Jack Cuilla was convicted of receiving and concealing stolen property, and appeals. Affirmed.

K. C. Barkley and Cooper & Merrill, all of Houston, for appellant. John H. Crooker, Cr. Dist. Atty., E. T. Branch, Frank Williford, Jr., and L. M. Williamson, all of Houston, and C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of receiving and concealing stolen property worth \$15, and his punishment assessed at a fine of \$100 and six months in

jail. The statute is: If any person shall receive or conceal property which has been stolen, knowing it to have been so acquired, he shall be punished the same as if he had stolen the property. P. O. art. 1349.

[1,2] It is not necessary for a person to be guilty under this statute that he shall both receive *and* conceal, but the offense is if he shall do either—receive it or conceal it—knowing at the time that it was stolen. This statute is clear as to this, and has always been held by this court as stated, and it has always been held that it is not necessary to charge nor prove the accused with having received or concealed the property with intent to defraud any particular person.

"If the receiver of stolen property received it for the purpose of aiding the thief, or for concealing it, without expecting to receive any reward thereby, he is equally guilty as if he had bought it from the thief, with a knowledge that it was stolen with the intent to defraud the owner." *Nourse v. State*, 2 Tex. App. 314.

In the same case it is held:

"When the receiver knows that the goods have been stolen by the thief, then, if after the offense of theft is complete he receives or conceals the stolen property, to aid the thief in escaping detection, or to assist him in disposing of it, the offense is complete."

See, also, 2 Bishop's New Crim. Law, § 1138; *Arcia v. State*, 26 Tex. App. 205, 9 S. W. 685; *State v. Rushing*, 69 N. C. 29, 12 Am. Rep. 641; *Com. v. Bean*, 117 Mass. 141.

The indictment herein alleged that appellant did receive *and* conceal. Under such allegation the accused can be convicted of either receiving or concealing. *Branch's Crim. Law*, § 907.

"The word 'conceal' is not to be given the literal construction of hiding, but the handling of property in a manner that would throw the owners off their guard in their search and investigation for the same." *Polk v. State*, 60 Tex. Cr. R. 150, 131 S. W. 580; *Davis v. State*, 61 Tex. Cr. R. 611, 136 S. W. 45.

"Property can be concealed by carrying it off." *Moseley v. State*, 36 Tex. Cr. R. 578, 37 S. W. 736, 38 S. W. 197, and the *Polk and Davis Cases*, *supra*.

[3] Appellant contends that the evidence is insufficient to sustain the conviction. We have carefully read and studied the testimony. In our opinion, it is amply sufficient to sustain a conviction for both receiving and concealing the stolen property. The great preponderance of the testimony clearly establishes both a fraudulent receiving and a concealing of the stolen property. Most of the facts were established by both positive and circumstantial testimony without contradiction. It is true, there was some conflict in the testimony on some points, but, even where there was conflict, the jury were clearly authorized to believe the incriminating testimony which they evidently did.

We will not recite the testimony in detail, but we will give the substance of what it established and what the jury were clearly authorized to believe and find therefrom:

Will Curtis burglarized the store of A.

Tomasino, and at the time stole therefrom a lot of dry goods in piece bolts and a Smith & Wesson 38 caliber pistol. He at once took this property to the house of his "kept woman," Elnora Pero. She undertook to conceal the property, and did conceal it about her premises, hiding said pistol and another Colt pistol also at a different place from the other stolen property. About December 5th the officers, in hunting for this and other stolen property, searched several houses therefor in her immediate neighborhood. She became alarmed, fearing she might get in trouble about it. On the morning of December 5th, which was Sunday, the officers arrested Curtis and placed him in jail. She telephoned to appellant and his partner, asking them to come to her house. His partner first went and had an interview with the woman. A little later appellant himself went to her house and interviewed her. She told both of them that said goods and said Smith & Wesson pistol had been stolen by Curtis, and that she had concluded to burn them, fearing that, if the officers found her in possession, she would get in trouble. She employed appellant and his partner to represent Curtis. They had her then to put all of those stolen goods, including the pistols, in two packages, and that they would take them. Later that evening they both went to her house, got all of said stolen goods and pistols, and took them to their office.

About the same time of the burglary of Tomasino's house Curtis burglarized another store and stole some dry goods therefrom belonging to the Schaeffers. Elnora Pero told them about this burglary and theft also. They procured from her the address of Curtis' wife and went to see her, and told her they were employed to represent Curtis, and that they had been informed that there were concealed about her premises some of the Schaeffer stolen goods. They induced her (Curtis' wife) to turn over to them those stolen goods also, and they carried them to their office. In their office they placed said pistols in the drawer of appellant's desk, where they were concealed from observation. They placed both of the other sets of stolen dry goods in a closed trunk. The next morning the officers learned from Curtis' wife that appellant had gotten from her some stolen dry goods. The officers first took the Schaeffers there to see if they could identify any of those goods as theirs, not then having any knowledge that appellant had procured said stolen goods from the Pero woman. Appellant at first declined to permit them to examine the goods, demanding that they should describe them so as to identify them before seeing them, but finally, after being insisted upon by the officer, permitted them to examine the goods. Upon this examination the Schaeffers identified some of the goods as those stolen from their store. Later the officers had Tomasino up to see if he could identify any of those goods as his.

Because those which had been stolen from Tomasino were piece goods, and all marks had been taken off of them, Tomasino could not with certainty identify any of those goods as his stolen goods, and none of them at that time were identified as his goods. These parties examined these goods more than once for the purpose of identifying them, if they could, but in the condition they were Tomasino could identify none of them as his at that time. The appellant at no time when the officers or these parties were attempting to identify these goods called their attention to the fact that at the same time they had gotten the goods from the Pero negro woman they also got from her as a part of the same stolen goods said pistols. They said nothing about it whatever to any of these parties.

On December 18th an examining trial of Curtis was held on the burglary charge against him. Appellant and his partner represented him, were present at the examining trial, and heard the testimony of all the witnesses. They heard the testimony of Tomasino, wherein he told about the burglary of his house and the stealing from him of said dry goods and said Smith & Wesson pistol. He accurately described the Smith & Wesson pistol so as to clearly identify it. Appellant at that time failed to disclose to Tomasino, the justice of the peace who held the examining trial, or any of the officers, the fact that he had received that pistol from the Pero negro at the same time he received the other goods from her. On that examining trial Tomasino testified that he had examined the dry goods in the trunk in their office, but could not identify any of them as his property. On that same day, after the examining trial, appellant told Tomasino that he had a Colt pistol, but did not then or at any other time tell him that he had that Smith & Wesson pistol. Tomasino swore:

That he knew the Colt pistol could not be his, because no Colt pistol had been stolen from him; that he had been at appellant's office several times, both before the examining trial of Curtis and several times afterwards, and appellant "never told me that he had in his possession any Smith & Wesson pistol, the kind I had lost. Cuilla had heard me testify as a witness at the examining trial, and heard me describe the gun which I now identify in court as the one that was stolen from me at the time Will Curtis burglarized my house. It's a Smith & Wesson pistol."

On this trial this pistol, having later been procured from Cuilla, was thoroughly identified by Tomasino as the pistol stolen from him by Curtis, and appellant and his partner both conceded that that was one of the pistols they got from the Pero woman when they got it and the other stolen goods of Tomasino's. A few days after said examining trial appellant met one of the officers who had been active in trying to have the goods identified and in the prosecution of Curtis, laughed, and asked him if he had found

that pistol of Tomasino's yet. The officer replied that he had not. He continued to smile and walked away. The Pero woman did not testify in the examining trial. After this incident, about December 23d, the officer learned from the Pero woman that at the time she turned over the other Tomasino stolen goods to appellant and his partner she also turned over to him a pistol. The officer, after learning this, repeatedly went to appellant's office to see and get this pistol, but failed to find him in his office. Later he sent another officer to get that pistol, and upon that officer's demand of appellant of the pistol he delivered it to that officer. The appellant and his partner both admitted in their testimony that the Smith & Wesson pistol that they then turned over to this officer, which was not until December 23d, or afterwards, was the same identical pistol that Tomasino had accurately described in his testimony on the examining trial as having been stolen from him at the time his other goods were stolen.

[4] Appellant's partner, Mr. S. J. Schnitzel, testified that he and appellant attended the corporation court on December 6th in an upper story of the building in which were situated the headquarters of the city detectives, and in coming down therefrom they were bound to pass, and did pass, by the detectives' offices and saw them therein. He swore:

"The stolen goods had been in our office from 12 to 14 hours then. Cuilla and I both knew there had been a burglary committed, and the stuff had been turned over to us by the Pero woman with the information that the alleged burglar, Will Curtis, had brought them to her house, and we had information that this alleged burglar had been arrested, and we were representing him. Mr. Cuilla and I said nothing to the detectives about us having the alleged stolen property in our possession. We, as lawyers, realized the fact that we were employed in representing Will Curtis, and probably the woman, if anything turned up against her, and it would not have been good policy for us as lawyers, in coming from down in the corporation court, to tell the detectives anything we knew about these goods, or where the goods could be found."

Appellant in his cross-examination swore that, when the Pero woman turned over said dry goods to him and his partner, she told him that Curtis had turned over those goods and said Smith & Wesson pistol to her as stolen property; that he was present at the examining trial of Curtis and had heard Tomasino therein testify that his house had been burglarized and a 38 caliber Smith & Wesson pistol had then been stolen from him. He swore:

"I kept the gun in my office from the 5th day of December to the 23d day of December, and did not say anything about it, simply because nobody called for it nor identified it. I did not mention the fact that I had the pistol and I concealed it for the simple reason that nobody called for it." That he did not tell Tomasino at any time that he had that pistol in his office nor that he had gotten that pistol from the Pero woman. "I would not have given it up till doomsday if the detectives had not come and

asked for it. I represented Will Curtis in the district court, and advised him to plead guilty, which he did."

He further testified that Curtis pleaded guilty to burglarizing Tomasino's store upon his advice, and that he also pleaded guilty to stealing said pistol from Tomasino.

Appellant on this trial further testified:

"I heard Mr. Tomasino testify that he had lost a pistol and like the one now shown me. I heard him testify to this at the examining trial of Will Curtis, which was held in the justice court on the 13th day of December. Yes; I remember him being interrogated about some goods that were stolen out of his store at the same time the pistol was stolen, but they were not able to identify the goods. I heard him testify that in that burglary he had lost a .38 caliber Smith & Wesson, and this examining trial was the examining trial of Will Curtis charged with this particular burglary of Tomasino's house. Elnora Pero had told me at the time she gave me the pistol that Will Curtis had left it at her house. I kept the gun in my office from the 5th day of December to the 23d day of December, and did not say anything about it simply because nobody called for it or identified it. I did not mention the fact that I had the pistol, and I concealed it for the simple reason that nobody called for it."

The partner of appellant testified:

"Cuilla and I both knew there had been a burglary committed, and the stuff had been turned over to us by the Pero woman with the information that the alleged burglar, Will Curtis, had brought them to her house, and we had information that this alleged burglar had been arrested, and we were representing him. Mr. Cuilla and I said nothing to the detectives about us having the alleged stolen property in our possession. We, as lawyers, realized the fact that we were employed in representing Will Curtis, and probably the woman, if anything turned up against her, and it would not have been good policy for us as lawyers, in coming down in the corporation court, to tell the detectives anything we knew about these goods or where the goods could be found."

We cannot understand how any one could seriously contend that the testimony in this case was insufficient to sustain the verdict. We cannot see how any honest juror therefrom could come to any other conclusion and find any other verdict than that of guilty against appellant. It clearly authorized the jury to find him guilty for fraudulently both receiving and concealing said stolen pistol with the full knowledge at the time that it was stolen when he both received and concealed it.

When appellant's partner testified as last quoted above this occurred, which we quote from his bill as qualified by the trial judge:

"The court, wishing to understand the witness correctly, propounded this question to him: 'Do you mean to tell this jury and court that it is your policy as a practicing lawyer to conceal from the officers your knowledge of the whereabouts of stolen property then in your possession?' The witness did not answer the question, and the court, over objection of defendant, asked this question: 'Do you say it would not have been policy where lawyers are representing a man charged with theft and burglary that it is not policy to inform the detectives' department where stolen goods can be found, if such

stolen property was then in your possession?' To which the witness replied: 'You asked me if I thought it was policy to fail to give information to the detectives' department as to the whereabouts of that goods at that time?' The court then states: 'No, sir; the question was as to the stolen goods, whether you considered it policy to refuse to give information to the detectives about stolen property if such property was then in your possession.' To which question the witness answered: 'I did not testify that I refused to give such information.'"

He made many objections to the court's asking these questions and eliciting these answers. As thus qualified, this bill shows no reversible error. This court has held that it is perfectly proper for the court in order to understand a witness to reiterate a question, or have the witness explain his meaning. *Elsworth v. State*, 52 Tex. Cr. R. 1, 104 S. W. 903. The court by this, we think, made no such intimation to the jury as would call for a reversal. The fact that the trial judge himself interrogates a witness will not require reversal when there is no showing that probable injury was done the accused thereby. *Harrell v. State*, 39 Tex. Cr. R. 225, 45 S. W. 581; *Strapp v. State*, 65 Tex. Cr. R. 331, 144 S. W. 941; *Mitchell v. State*, 65 Tex. Cr. R. 545, 144 S. W. 1012; *Wragg v. State*, 65 Tex. Cr. R. 131, 145 S. W. 343.

The court committed no error in overruling appellant's motion for a continuance because of the claimed absence and inability of his attorney to be present to represent him on this trial. His attorney was present and did represent him.

The only other bill appellant has is to the claimed exclusion of their attempt to have the negro woman Pero to prove up that she had signed a deed to them. The bill in no way discloses how this testimony on this point could have been material nor what her answer would have been. The best we can make of it is that it was an apparent attempt at most to impeach her on a wholly immaterial matter.

There is no reversible error shown in this record, and the judgment will be affirmed.

PIPPINS v. STATE. (No. 4094.)

(Court of Criminal Appeals of Texas. May 31, 1916. Rehearing Denied June 21, 1916.)

HUSBAND AND WIFE ~~§~~302—WIFE DESERTION—GUILT.

Where defendant left his wife and children with some supplies merely because he did not like the manner in which his wife's people treated him, he was guilty of willfully deserting them in destitute and necessitous circumstances, though his mother would have supplied the wife with necessities.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1100; Dec. Dig. ~~§~~302.]

Appeal from Taylor County Court; E. M. Overshiner, Judge.

Guince Pippins was convicted of willfully

deserting his wife and children, and he appeals. Affirmed.

Scarborough & Davidson, of Abilene, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted under article 640a, Vernon's Ann. Pen. Code 1916, for willfully deserting his wife and minor children, they being in destitute and necessitous circumstances.

Appellant offers no testimony tending to show any justification for the desertion of his family. The desertion is shown beyond doubt, and his only excuse for deserting them is he did not "like the manner in which her people treated him." He does not say his wife mistreated him in any way, nor state in what way her people had mistreated him. He contends that she had some supplies when he left, and his mother would have supplied her necessities. We do not think the law contemplates that a wife and children shall be left upon the charity of the mother of the man deserting his wife.

The evidence will sustain the verdict, and the judgment is affirmed.

Ex parte VILLAREAL. (No. 4112.)

(Court of Criminal Appeals of Texas. May 31, 1916. Rehearing Denied June 21, 1916.)

1. HABEAS CORPUS \S 109—COMMITMENT FOR GRAND JURY.

Where there is cause or probable cause for believing an offense has been committed, the district court on habeas corpus may hold the party for an investigation by the grand jury.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. \S 97, 98; Dec. Dig. \S 109.]

2. HABEAS CORPUS \S 85(1) — BURDEN OF PROOF.

The burden of proof, in habeas corpus trials before a district judge for a reduction of bail and a discharge from custody, is upon the state, which must show probable cause for holding the arrested party.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. \S 77, 78; Dec. Dig. \S 85(1).]

3. LARCENY \S 22—BRINGING STOLEN PROPERTY INTO STATE FROM FOREIGN COUNTRY.

One who commits robbery, or steals, in Mexico, and brings the proceeds into Texas, is amenable to the laws of Texas, under the statute for bringing the stolen property or property acquired by robbery into the state.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. \S 49; Dec. Dig. \S 22.]

4. CRIMINAL LAW \S 225—PRELIMINARY EXAMINATION—WAIVER OF INTRODUCTION OF EVIDENCE.

Where defendant, charged by complaint on information and belief with robbery and theft and bringing the stolen property into Texas, waived examination and gave bond, he could not complain, in habeas corpus proceedings, of being held under reasonable bond for appearance before the grand jury, having waived the introduction of evidence by the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 468-471; Dec. Dig. \S 225.]

Appeal from District Court, Val Verde County; Joseph Jones, Judge.

Application for habeas corpus by R. R. Villareal. There was judgment holding defendant for his appearance before the grand jury, and he appeals. Affirmed.

David E. Hume, of Eagle Pass, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was arrested on a complaint charging him with robbery and theft and bringing the stolen or acquired property into Texas and into the county of Terrell. The complaint is on information and belief. Upon his arrest he was carried before the examining court, and there waived examination. The court fixed his bond at \$500. Later he applied to the district judge, for habeas corpus on two propositions: First, a reduction of bail, and second, for his discharge from custody. There was no evidence introduced on the trial as to the facts attending the robbery or theft. So the case stands upon the papers.

[1-4] There had been no indictment returned prior to the hearing of the writ of habeas corpus. The rule, generally stated, with reference to matters involved is that where there is cause or probable cause for believing an offense has been committed the court may hold the party for an investigation by the grand jury. The burden of proof in habeas corpus trials of this character is upon the state, and it must show probable cause for holding the arrested party. Where there is no evidence introduced, the court, of course, must act upon the case as presented. If appellant committed the robbery or the theft in Mexico and brought the proceeds acquired by means of the robbery or the theft into Texas, he would be amenable to the laws of Texas under our statute, which prohibits bringing stolen property or property acquired by robbery into the state. Appellant, having waived an examining trial and given bond, could not complain of what occurred in the examining court. He could have demanded a trial on the facts if he so desired. Having waived an examination and given bond, he could not complain of being held under reasonable bond. Had he required the introduction of evidence, the state would have had to produce it, but this matter he waived, it being within his power and right to do so. We are of opinion that, under the record as we have it, the court was not in error in holding appellant for his appearance before the grand jury. Evidence was not introduced in either trial that he was unable to give bond or the amount of bail which he could give. He stood upon the record as made. We are of opinion that the case as presented justified the court in holding appellant for his appearance before the grand jury. If he gave bond he would be discharged; failing to give

it, he would be kept in custody. The evidence may or may not have been sufficient to hold him, but it is not before the court, and we think the record raises a sufficient probable ground to hold him for his appearance before the grand jury.

The judgment, therefore, will be affirmed.

GUILD v. STATE. (No. 4089.)

(Court of Criminal Appeals of Texas. June 7, 1916. Rehearing Denied June 23, 1916.)

1. CRIMINAL LAW — 1092(16), 1099(13) — BILLS OF EXCEPTIONS—TIME FOR FILING—STATUTE.

In a prosecution for violation of the pure feed law, a misdemeanor, where the bills of exceptions and statement of facts were filed in the lower court after the adjournment of the term at which a conviction was had, without an order authorizing the filing, the court will not review them on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2847, 2876; Dec. Dig. — 1092(16), 1099(13).]

2. INDICTMENT AND INFORMATION — 110(2)—INFORMATION—SUFFICIENCY.

Under Acts 29th Leg. c. 108, as amended by Acts 30th Leg. c. 131, relating to pure feed-stuff and making a violation of its provisions a misdemeanor, and using terms "concentrated commercial feeding stuff" and "concentrated feed stuff" interchangeably, not attempting to make any difference between them so far as the offense is concerned, an information naming the cotton seed cake described therein as "concentrated feeding stuff" omitting the word "commercial," was sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 290-294; Dec. Dig. — 110(2).]

3. ADULTERATION — 2—STATUTES—VALIDITY—CONSTITUTIONALITY—PUBLIC POLICY.

Acts 29th Leg. c. 108, as amended by Acts 30th Leg. c. 131, relating to pure feeding stuffs and prescribing as a punishment for its violation a fine and imprisonment, is not void as against public policy because it makes the agent of a principal guilty of an offense instead of making the principal so only, since the person who actually commits a crime will be punished therefor whether he is acting on his own initiative or is an agent for a principal, and it is with rare exceptions that a corporation is punished for violation of a criminal statute.

[Ed. Note.—For other cases, see Adulteration, Cent. Dig. §§ 1, 2; Dec. Dig. — 2.]

Appeal from Hemphill County Court; J. L. Jennings, Judge.

Frank Guild was convicted of violating the pure feedstuff law, and he appeals. Affirmed.

Hoover & Dial, of Canadian, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of violating our pure feedstuff law, and the lowest punishment assessed.

[1] The record shows that what purports to be bills of exceptions and a statement of facts were filed in the lower court some time after the adjournment of the term at which the conviction occurred without any order authorizing this to be done. The statute and the uniform decisions of this court are clear-

ly to the effect that under such circumstances in misdemeanor cases this court can consider none of them. Hence the Assistant Attorney General's motion to strike them out must be, and is, sustained. Some of these cases are collated in 2 Vern. Crim. Stats. p. 827.

[2] Appellant's contention in his motion in arrest of judgment that the information is insufficient because he named the cotton seed cake described therein as "concentrated commercial feeding stuff," when the statute makes it "concentrated feeding stuff," omitting the word "commercial," is untenable. The original act of 1905 (page 207), with certain sections of it amended by the Act of 1907 (page 243), uses the terms "concentrated commercial feeding stuffs" and "concentrated feed stuffs" rather interchangeably. At least under the terms of this statute, there is no difference between the two. The statute does not attempt to make any difference between them, so far as the offense is concerned, but, as stated, treats them as if they were the same.

[3] Neither is there anything in appellant's contention that said law is unreasonable, against public policy, and void for the reason that it makes the agent of the principal guilty of an offense instead of making the principal so only. It is the general principle of law in this state that the person who actually commits a crime shall be punished therefor, whether he be acting on his own initiative or is an agent for a principal, and especially is this true in misdemeanor cases, as this case is. It is with rare exceptions our law provides for the punishment of a corporation for the violation of a criminal statute. In some instances it does so by prescribing a penalty to be recovered by suit in contradistinction from a fine or imprisonment therefor. In this case appellant's principal was a corporation as he claimed. The statute prescribes as a punishment for its violation a fine, or imprisonment in the county jail, or both. If a corporation was insolvent, there would be no way whatever of enforcing a conviction of it. It could not be imprisoned either as a part of the punishment or for failure to pay the money fine. Hence, in order to enforce the law, it is essential that the agent who commits the crime shall be punished therefor instead of his principal, a corporation.

The judgment is affirmed.

SOVEREIGN CAMP OF WOODMEN OF THE WORLD v. ROBINSON.*

(No. 7544.)

(Court of Civil Appeals of Texas. Dallas. May 18, 1916. Rehearing Denied June 17, 1916.)

1. CONSTITUTIONAL LAW — 175 — VESTED RIGHTS—RULES OF EVIDENCE.

No person has a vested right in the rules of evidence, which may be changed by the state,

if its action relates only to evidence, without violating the contract clause of the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 519, 520; Dec. Dig. ¶ 175.]

2. INSURANCE ¶693 — FRATERNAL INSURANCE—DISAPPEARANCE CLAUSE—VALIDITY.

A subsequently adopted by-law of a fraternal society, as to a certificate holder, who, in his application, had agreed that all existing or subsequent by-laws should form a part of his certificate, providing that a member's absence or disappearance from his last place of residence should not be any evidence of his death, nor create any right to recover on any certificate, without proof of his actual death, until the full term of his life expectancy at his entry had expired, and that it should be construed as a waiver of any statute or rule of the common law to the contrary, contravened Rev. St. 1911, art. 5707, providing that absence for seven years shall raise a presumption of death and was invalid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1833; Dec. Dig. ¶693.]

3. CONTRACTS ¶127(1)—FRATERNAL BENEFICIARY INSURANCE—DISAPPEARANCE CLAUSE—RULES OF EVIDENCE—OUSTING COURT OF JURISDICTION.

Such by-law, in effect stipulating that certain evidence only should be admissible in case of litigation subsequently arising under the contract, could not be allowed to control the action of the court in the admission of or the effect to be given the evidence, as courts will not permit the course of justice to be affected by stipulations so as to defeat the ends to be subserved by such litigation, or allow the parties to a contract to agree to oust the court's jurisdiction over such contracts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 608-610, 613-616; Dec. Dig. ¶ 127(1).]

4. INSURANCE ¶693 — FRATERNAL BENEFICIARY INSURANCE—BY-LAWS—REASONABLENESS.

A by-law of a fraternal beneficiary association, to be valid, must be reasonable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1833; Dec. Dig. ¶693.]

5. DEATH ¶2(1) — PRESUMPTION FROM ABSENCE.

The law or rule of evidence embodied in Rev. St. 1911, art. 5707, that the presumption of the duration of life ceases at the end of seven years' unexplained absence, does not limit the presumption of death to an absence for the space of seven years, but, on proper evidence, death before the expiration of such time may be inferred.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1, 2; Dec. Dig. ¶2(1).]

6. DEATH ¶2(1) — PRESUMPTION FROM ABSENCE—EVIDENCE.

Evidence of character, habits, domestic relations, etc., making the abandonment of home and family improbable, and showing the want of all the motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard of may be inferred without regard to the duration of such absence, even though he was not shown to have been exposed to any peril likely to shorten his life.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1, 2; Dec. Dig. ¶2(1).]

7. DEATH ¶2(2) — PRESUMPTION FROM ABSENCE—TIME.

Where one has been absent and unheard of for seven years, the presumption arises that he is then dead, but not that he died at any particular time theretofore, and, if important to establish death at any particular time, it must be done by evidence.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 3; Dec. Dig. ¶2(2).]

8. DEATH ¶4 — ABSENCE — SUFFICIENCY OF EVIDENCE.

In a widow's action upon a certificate of insurance issued upon life of her husband, evidence held to sustain the finding that the insured was dead, and that he died at or about the time of his disappearance from home after which time nothing was heard or known of him.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 5, 6; Dec. Dig. ¶4.]

Appeal from District Court, Dallas County; Murphy W. Townsend, Special Judge.

Action by Mrs. Carrie Robinson against the Sovereign Camp of the Woodmen of the World. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur H. Burnett, of Omaha, Neb., and Flippen, Gresham & Freeman, of Dallas, for appellant. Henry P. Edwards and Cockrell, Gray & McBride, all of Dallas, for appellee.

TALBOT, J. The appellee, as the surviving wife of James W. Robinson, sued the appellant on a certificate of insurance issued upon the life of the said James W. Robinson for the sum of \$3,000 to be paid, under the terms of the certificate, upon the death of the said Robinson. The regular judge being disqualified, the case was tried in the district court of Dallas county, without a jury, before the Honorable Murphy W. Townsend, special judge duly selected by agreement of counsel, and the trial resulted in a judgment in favor of the appellee. The trial court, at the request of the appellant, filed conclusions of fact and law. The court's conclusions of fact are substantially as follows: Appellee's husband, James W. Robinson, became a member of Post Mountain Camp No. 56, of the appellant, located at Burnet, Tex., May 23, 1906, and the appellant then insured the life of the said Robinson by its written policy of insurance or benefit certificate in favor of his wife, Mrs. Carrie Robinson, in the sum of \$3,000. About the year 1910, the said James W. Robinson transferred his membership to a local camp of the appellant at Grand Prairie, in Dallas county, Tex., where the same thereafter remained. The said James W. Robinson and the appellee, his wife, on September 14, 1914, and for about two years prior thereto, resided in Oak Cliff, Dallas, Tex., with their two small children. On or about said date the said James W. Robinson disappeared from Dallas and from his home therein, since which time he has never been seen, heard from, or heard of by any known person, either in Dallas or at any other place where he had

at any time theretofore lived, notwithstanding diligent search and inquiry for him have been made, kept up, and continued since his said disappearance, which inquiry has been made by the appellee, by her many friends, by relatives of the said James W. Robinson, by the sheriff of Dallas county, the chief of detectives of said county, and many other persons. James W. Robinson at the time of his disappearance was 47 years old, a man of exemplary habits, contented and respected, residing with his wife and family at their home in Oak Cliff in the city of Dallas, Tex., his family consisting of the appellee, his wife, and of two children, William, a boy then six years old, and Edmond, a boy then four years old. The said James W. Robinson was a most devoted husband and father and exceedingly happy in his domestic and family relations, sober in his habits, contented and respected among his friends and in the community, and there was no incentive for his disappearing from his home and family and absenting himself therefrom. The said James W. Robinson is dead. He died on or about the time of his said disappearance and prior to June 1, 1913, and while said insurance policy was in full force. The appellant is a fraternal beneficiary association, as defined by title 71, c. 7, of the Revised Statutes of Texas of 1911, and chapter 113 of the Regular Session Laws of 1913, and is doing business in all states of the Union, including Texas, and has a permit to do business in Texas. The benefit certificate was issued to the said James W. Robinson upon his written application to the appellant therefor, which application became and is a part of said insurance contract. In said application Robinson agreed that:

"All the provisions of the constitution and laws of the order now in force or that may hereafter be adopted shall constitute the basis for and form a part of any beneficiary certificate that may be issued to me by the Sovereign Camp of the Woodmen of the World, whether printed or referred to therein or not."

He further consented and agreed in said application that if he failed to comply with the laws, rules, and usages of the order, then in force or thereafter adopted, his beneficiary certificate should become void and all rights of any person or persons thereunder should be forfeited. The said James W. Robinson was 41 years of age at the time he became a member of the appellant order, and, by the terms of the appellant's said laws, was required to pay \$3.75 monthly rate of assessment under said policy on the 1st day of each and every month. The payments under said policy were all made continuously and regularly up to and including May, 1913, after which time no payments whatsoever were made under or upon said policy. Said payments were made by said James W. Robinson up to the time of his disappearance, and thereafter first for a

time by the appellee and then said local camp at Grand Prairie. By the terms of said insurance contract, same became ipso facto null and void on and after June 1st for non-payment of assessments provided the said James W. Robinson was then living. In May, 1907, the Sovereign Camp of the appellant, being its supreme legislative and governing body, enacted a by-law reading as follows:

"The absence or disappearance of a member from his last known place of residence for any length of time shall not be sufficient evidence of the death of such member, and no right shall accrue under his certificate of membership to a beneficiary or beneficiaries, nor shall any benefits be paid until proof has been made of the death of the member while in good standing."

This by-law was continued in force and re-enacted by the Sovereign Camp at its eighth biennial session regularly convened in June, 1909, and the Sovereign Camp in June, 1911, at its ninth biennial session, amended the disappearance by-law, and as so amended it was re-enacted and adopted in words as follows:

"The absence or disappearance of the member herein named, whether admitted heretofore or hereafter, from his last known place of residence and unheard of shall not be regarded as any evidence of the death of such member nor give or create any right to recover any benefits on any certificate or certificates issued to such member, or on account of such membership, in the absence of proof of his actual death, aside from and unassisted by any presumption arising by reason of such absence or disappearance, until the full term of his life expectancy at his age of entry, according to the Carlisle table of life expectancy, has expired, and then only in case all assessments, dues, special assessments and all other sums now or hereafter required under the laws of the order be paid on behalf of such member within the time required until the expiration of the term of such life expectancy, and the conditions of this certificate shall operate and be construed as a waiver of any statute of any state or country and of any rule of the common law of any state or any country to the contrary."

In September, 1912, at the time of said Robinson's disappearance, he being then 47 years of age, the term of his life expectancy at that time, according to said Carlisle Table of Mortality, was 22.7 years. After September 14, 1912, and prior to the filing of this suit on June 4, 1914, the defendant was notified of the fact of said James W. Robinson having disappeared, and of the fact that plaintiff claimed that said James W. Robinson was dead, and that demand was made by plaintiff for the payment of said benefit certificate, which claim was refused by the defendant; it denying liability thereon. The benefit certificate on its face provided as follows:

"This certificate is issued and accepted subject to all of the conditions on the back hereof, and subject to all of the laws, rules and regulations of this fraternity now in force or that may hereafter be enacted, and shall be null and void if said Sovereign does not comply with all of said conditions and with all of the laws, rules and regulations of the Sovereign Camp of the Woodmen of the World, that are now in

force or which may hereafter be enacted, and with the by-laws of the camp of which he is a member."

James W. Robinson, on June 14, 1906, accepted the certificate by signing a document, which was attached to appellant's answer as "Exhibit B." (It is unnecessary to copy this document.) The appellant denied that James W. Robinson was dead, and pleaded specially the by-laws above set out to the effect that the absence or disappearance of a member of appellant's order, whether admitted before or after their passage, from his last known place of residence and unheard of, should not be regarded as any evidence of the death of such member, etc., until the full term of his life expectancy at his age of entry according to the Carlyle Table of Expectancy had expired.

The trial court concluded as a matter of law that the contract of insurance between the appellant and James W. Robinson was not subject to the "disappearance by-law" pleaded by appellant, and the correctness of this conclusion is challenged in the appellant's first assignment of error.

[1, 2] As has been observed, James W. Robinson was admitted to membership in appellant's order upon his written application in which he agreed that all the provisions of the constitution and by-laws of the order then in force, or that might thereafter be adopted, should constitute the basis for and form a part of any beneficiary certificate issued to him, and that said certificate was accepted subject to all of the laws, rules, and regulations of the appellant then in force or that might thereafter be enacted, and should become null and void if he did not comply with such laws, rules, and regulations. These provisions of the contract sued on give rise to the first question presented and discussed by counsel, namely, whether or not the disappearance by-law, which was admittedly passed after Robinson became a member of the order, constituted such a material change in said contract as not to be binding on the said Robinson or his beneficiary. The contention of the appellee is that, whatever may be the rule in other jurisdictions, the stipulation that the insured will be bound by future by-laws passed by the appellant cannot, under the settled law of this state, affect the terms of the contract as it existed at the time it was made, and that such is the effect of the by-law in question. In support of this contention, appellee cites Supreme Lodge K. P. v. Mims, 167 S. W. 835, and Ericson v. Sup. Ruling, Frat. Mystic Circle, 105 Tex. 170, 146 S. W. 160. On the other hand, the appellant contends that, while it may be true that retroactive legislation cannot be invoked to divest vested rights of property or to impair the rights and obligations of contracts, yet the disappearance by-law under consideration, which was adopted by the appellant the year after James W. Robinson received his benefit, does not impair any vested

contract right, but merely establishes a rule of evidence, and the contract for benefits or of insurance is subject thereto. In the cases of Mims and Ericson, supra, it was held that the provision in the policy by which the insured agreed to comply with future rules and by-laws adopted by the order had reference only to such regulations as related to the insured's duties and conduct as a member and did not embrace an act that would produce a radical change in his rights; that the by-law invoked had the latter effect and was not binding. Those cases are probably not in point here. We regard it as a well-established general rule that no person has a vested right in rules of evidence, and that such rules may be changed by the state, if its action relates only to evidence, without violating the contract clause of the constitution. This is for the reason, as said by Mr. Cooley in his work on Constitutional Limitations (7th Ed.) 524, that:

"The rules of evidence pertain to the remedies which the state provides for its citizens, and generally in legal contemplation neither enter into and constitute any part of any contract nor can be regarded as being the essence of any right which a party may seek to enforce."

But however well established this general rule may be, and no matter how often it may have been applied in adjudicated cases, still we think it is not applicable and controlling in solving the question we are considering in the instant case. This is true, even if it be conceded that the law invoked by the appellant merely establishes a rule of evidence, because the by-law is unreasonable and contravenes article 5707 of our statute, which provides that:

"Any person absenting himself beyond sea or elsewhere for seven years successively shall be presumed to be dead, in any cause wherein his death may come in question, unless proof be made that he was alive within that time."

It has been held in this state and in other jurisdictions that a by-law of a fraternal order similar to the one involved in this case is inapplicable to an action on the certificate based on the member's death because he has not been heard from for seven years after his disappearance from his home, when such by-law renders ineffectual a statute providing that a person disappearing and unheard of for seven years shall be presumed to be dead. Supreme Ruling of Fraternal Mystic Circle v. Hoskins, 171 S. W. 812; Samberg v. Knights of the Modern Maccabees, 158 Mich. 568, 123 N. W. 25, 133 Am. St. Rep. 396. The fact that seven years had not elapsed from the time of the disappearance of the insured Robinson to the time of the institution of this suit or the cessation of the payment of dues should not, in our opinion, alter the case. The by-law under consideration is clearly opposed to the statute of this state referred to above in relation to the presumption arising from seven years' absence without intelligence concerning the absent person and one the appellant could not lawfully

make. It was therefore invalid, or without binding force, from the date of its enactment and could not be invoked in this case to render ineffective evidence that otherwise might be sufficient to establish the death of the insured.

[3, 4] Furthermore, the by-law could not be invoked by appellant for the purpose stated because it is unreasonable. Its enforcement would not only have the effect to render nugatory a salutary statute, but the further effect of "making it practically impossible to make proofs of death in cases within the occasional experiences of men." *Samberg v. Knights of the Modern Maccabees*, supra. In that case the by-law was held to be unreasonable. The following quoted language from appellee's brief aptly expresses our views upon the subject:

"In the light of existing authority, it may be said that a stipulation, in a contract that certain evidence only shall be admissible in case of litigation subsequently arising under such contract, cannot be allowed to control the action of the court in the admission of, or in the effect to be given to, evidence. Courts will not permit the course of justice, upon trials before them, to be stipulated and contracted in such manner as to defeat the ends to be subserved by such trials. The parties to the contract cannot agree to oust courts of jurisdiction over such contracts." *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308.

Such would be, practically, the effect of the enforcement of the by-law pleaded in this case by the appellant as a part of the contract sued on. In *Wineland v. Knights of Maccabees of the World*, 148 Mich. 608, 112 N. W. 696, it is held, in effect, that a by-law to be valid must be reasonable.

[5-7] The appellant further contends that the appellee failed to prove her case, for the evidence was wholly insufficient to establish the fact of Robinson's death, and that death occurred prior to June 1, 1913, when he was suspended from the order for nonpayment of dues and assessments and his beneficiary certificate was forfeited. We do not concur in appellant's view of the evidence as expressed in this contention. The law or rule of evidence that, when a person has not been heard of for a number of years, the presumption of duration of life ceases at the end of seven years, does not limit "the presumption of death to an absence of the person whose existence in life is in question without tidings from him for the space of seven years"; nor does the modification of the rule as laid down in some cases, to the effect that such absence for a shorter period, if the person is shown to have been in peril, will raise a presumption of death, exclude evidence of other facts and circumstances which tend to establish the probability of his death.

"Evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed

to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard from may be inferred, without regard to the duration of such absence."

This is the holding of the Supreme Court of Iowa in the case of *Tisdale v. Connecticut Mutual Life Ins. Co.*, 26 Iowa, 170, 96 Am. Dec. 130, and meets with the approval of this court. In that case the court asks the question, "must seven years pass, or must it be shown that he (the absent person) was last seen or heard of in peril, before his death can be presumed?" and, answering the question in the negative, said:

"No greater wrong could be done to the character of the man than to account for his absence, even after the lapse of a few short months, upon the ground of a wanton abandonment of his family and friends. He could have lived a good and useful life to but little purpose, if those who knew him could even entertain such a suspicion."

The court then proceeds to remark that evidence of the character we have mentioned raises a presumption of death, for the reason that:

"Absence from any other cause, being without motive and inconsistent with the very nature of the person, is improbable."

There is much authority to the effect that, where one has been absent and unheard of for seven years, the presumption arises that he is then dead, but not that he died at any particular time theretofore, and that whoever finds it important to establish death at any particular period must do so by some kind of evidence. The evidence, however, need not be direct or positive; it may be circumstantial according to many of the adjudicated cases. Notably among such cases are those decided by the appellate courts of Missouri. Those courts have adopted the doctrine of *Tisdale v. Insurance Co.*, supra, and hold with the Supreme Court of Iowa that the court or jury might, in a proper case, infer the death of the absent person had occurred before seven years had expired, even though he was not exposed to some peril which would be apt to shorten his life, and that the conclusion of death at an earlier period could be drawn upon proof of any facts which, according to common experience, made it probable the party, if alive, would have communicated with his friends. *Bradley v. Modern Woodmen of America*, 146 Mo. App. 428, 124 S. W. 69; *Johnson v. Sovereign Camp Woodmen of the World*, 163 Mo. App. 728, 147 S. W. 510; *Springmeyer v. Sovereign Camp W. of W.*, 144 Mo. App. 483, 129 S. W. 272. In those cases it devolved upon the plaintiff to show that the insured died before the policy was forfeited for nonpayment of dues, and, upon evidence of no greater probative force than the evidence adduced upon the trial of the instant case, it was held a recovery might be had.

[8] The case as made for the appellee is fairly reflected in the court's conclusions of fact stated in a former part of this opinion,

and it becomes unnecessary to detail the evidence upon which those conclusions are based. It is sufficient to say that the evidence supports the court's findings of fact, and that the facts found to exist justified the conclusion that James W. Robinson was dead, and that he died at or about the time of his disappearance.

The record disclosing no reversible error, the judgment of the court below will be affirmed.

Affirmed.

ALTGELT v. GUTZEIT et al. (No. 5720.)*

(Court of Civil Appeals of Texas. San Antonio.
April 26, 1916. Rehearing Denied
May 31, 1916.)

1. EVIDENCE — 30—JUDICIAL NOTICE—SPECIAL LAW.

The court cannot take judicial notice of a special law not made a public act by its own provisions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 38; Dec. Dig. —30.]

2. APPEAL AND ERROR — 518(1)—RECORD—LEGISLATIVE ACT.

Where both parties pleaded a special law by giving its title and the date of its approval, as authorized by Rev. St. 1911, art. 1823, and the entire act was before the court as if it had been copied in full in the pleadings of each party, it must be considered a part of the record on appeal, although not copied into the statement of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342, 2343, 2351, 2353, 2354; Dec. Dig. —518(1).]

3. STATUTES — 97(1)—GENERAL OR SPECIAL ACT—CONSTITUTIONAL PROVISIONS—REPEAL.

Const. art. 3, § 56, providing that the Legislature shall not, except as otherwise provided in the Constitution, pass any local or special law regulating the affairs of counties, etc., or authorizing the maintenance of roads, highways, etc., was annulled as to roads, highways, etc., by the amendment to article 8, § 9, authorizing the Legislature to pass local laws for the maintenance of public roads and highways without the local notice required for special or local laws.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 108; Dec. Dig. —97(1).]

4. STATUTES — 67 — SPECIAL OR GENERAL LAW—CONSTITUTIONAL PROVISIONS.

If the authority to legislate by special act upon a certain subject is given by constitutional provision other than article 3, § 56, forbidding special acts regulating certain matters, such authority carries with it the right to enact all provisions which would be legitimately embraced in the bill, if section 56 was not a part of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 69; Dec. Dig. —67.]

5. STATUTES — 97(1)—LOCAL ACTS—ROADS—CONSTITUTIONAL AND STATUTORY PROVISIONS.

The express authority of the Legislature under the amendment to Const. art. 8, § 9, to pass local laws for the maintenance of public roads and highways carries with it the right to regulate the affairs of the county in all such matters as may be appropriately connected with

or subsidiary to the object of creating an efficient road system, notwithstanding it incidentally regulates the affairs of the county.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 108; Dec. Dig. —97(1).]

6. STATUTES — 125(6)—SUBJECT AND TITLE—COUNTY ROAD LAW.

Const. art. 3, § 35, provides that no bill shall contain more than one subject, and article 3, § 56, forbids the Legislature to pass any local or special law regulating the affairs of counties or authorizing the laying out or maintenance of roads, highways, etc. Vernon's Sayles' Ann. Civ. St. 1914, art. 3870, provides that each county commissioner shall receive from the county treasury on order of the commissioners' court \$3 for each day he is engaged in holding a term of the commissioners' court. Article 6901 constitutes the county commissioners of the several counties supervisors of public roads, each commissioner to supervise the roads in his precinct and to receive \$3 a day for the time actually so employed, payable out of the county's road and bridge fund. Articles 2274, 2275, fix the terms and sessions of the commissioners' court. Sp. Acts 38d Leg. c. 77, known as the "Bexar County Road Law," by section 3 abolished the office of ex officio road commissioner, by section 6 prescribed the meetings of the commissioners' court, by section 7 made failure to attend the meetings ground for removal, by section 14 authorized the court to employ clerical assistance, by section 27 declared its provisions to be cumulative of all general and special laws on the subject-matter, and by section 5 required each precinct county commissioner to supervise the roads in his precinct, to perform all the acts required by the court and fixed the salary of \$2,400 per annum in lieu of all other fees and per diem allowance there payable or thereafter payable under general law. Held, that the Legislature intended to fix a salary to cover all the duties prescribed by the law, whether of roads or not and that such provision did not relate to a subject so disconnected from and independent of the subject of providing a system for laying out roads as to be constitutional because embracing two subjects.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 190; Dec. Dig. —125(6).]

7. STATUTES — 108—SUBJECT AND TITLE—CONSTITUTIONAL PROVISIONS — CONSTRUCTION.

Const. art. 3, § 35, providing that no bill shall contain more than one subject, must be construed liberally rather than to embarrass legislation by strict construction unnecessary to the accomplishment of its object, and no provisions will be held unconstitutional when they relate directly or indirectly to a subject having a natural connection, and are not foreign to the subject expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 135; Dec. Dig. —108.]

8. CONSTITUTIONAL LAW — 48 — CONSTRUCTION OF STATUTES—CONSTITUTIONALITY.

Where the court has a serious doubt whether the Legislature exceeded its power by embracing more than one subject in a bill, such doubt must be resolved in favor of the validity of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. —48; Statutes, Cent. Dig. § 56.]

9. CONSTITUTIONAL LAW — 70(3)—VALIDITY OF STATUTE—PROVINCE OF COURT.

It is not the province of the court to declare a law invalid because it is unwise or unjust, or because opposed to public policy or the spirit of the Constitution, but it must violate some express provision of the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 181; Dec. Dig. —70(3).]

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

Action for injunction by George C. Altgelt against Chas. X. Gutzeit and another. Judgment for defendants, and plaintiff appeals. Affirmed.

E. P. Lipscomb and Geo. C. Altgelt, both of San Antonio, for appellant. Boyle & Storey, of San Antonio, for appellees.

MOURSUND, J. George C. Altgelt sued Charles X. Gutzeit, county commissioner for precinct No. 2 of Bexar county, and Peter P. Hoefgen, county treasurer of Bexar county, seeking to restrain the payment to said Gutzeit of a salary of \$200 per month, which it was alleged had been paid him, and, unless enjoined, would continue to be paid him, under the provisions of a special act of the Legislature approved March 24, 1913, known as the "Bexar County Road Law," the title of which act was recited. It was alleged that said act of the Legislature is unconstitutional and void in so far as it attempts to fix the salaries of the county commissioners of Bexar county at \$200 per month, in that it illegally regulates and attempts to regulate the affairs of Bexar county by local or special law different from the general law of the state of Texas. Plaintiff alleged that he was the owner of real and personal property situated in Bexar county subject to taxation by the state and county, and in fact taxed, and that by the payment of said amount to Gutzeit each month plaintiff's burdens as a taxpayer are increased, and that petitioner is without adequate remedy at law. It was stated in the prayer that the restraining order desired should apply only to the salary of \$200 per month, and not to the per diem compensation for county commissioners fixed by the general laws of the state.

Defendants answered by general demurrer, a general denial, and a special answer in which the special law referred to by plaintiff was pleaded by stating the date of its approval and reciting its title, and it is alleged that said act is constitutional, and that it is authorized by article 8, § 9 of the Constitution.

The court refused to grant the temporary injunction. Upon the trial it was admitted that Gutzeit was county commissioner of precinct No. 2 and Hoefgen county treasurer, that Gutzeit has since his incumbency in such office received a salary of \$200 per month, which was paid him by Hoefgen out of the funds of Bexar county, and that provision for the future payment of such salary has been made by the commissioners' court of Bexar county by virtue of the act of the Legislature approved March 24, 1913. It was also admitted that plaintiff was a taxpayer as alleged by him.

[1, 2] The special act of the Legislature known as the "Bexar County Road Law" is

not copied in the statement of facts, but is merely referred to. As it is a special law, not made a public act by its own provisions, it appears that it cannot be taken judicial notice of. *City of Paris v. Tucker*, 101 Tex. 99, 104 S. W. 1046. However, as it was pleaded by both parties, by giving its title and the date of its approval, as is authorized by article 1323, Revised Statutes, it appears that the entire act was before the court as if it had been copied in full in the pleadings of each party. *Railway v. Rushing*, 69 Tex. 306, 6 S. W. 834. Such act must therefore be considered a part of the record in this case, although not copied into the statement of facts.

The caption of the act, which fairly outlines its scope and effect, reads as follows:

"An act providing more efficient road laws for Bexar county, conferring on the commissioners' court of Bexar county control of all roads, bridges, drains, ditches, culverts and all works incident to same; providing for the adoption of rules governing same, their alteration or amendment; providing for the abolishment of the office ex officio road commissioner, and prescribing the salaries of the commissioners; fixing the time of meetings of the commissioners' court, and declaring the same cumulative; permitting the county commissioners in Bexar county to engage in other occupations; providing for the manner of purchasing materials and supplies, and of making contracts where the amount is over fifty dollars (\$50.00) and less than five hundred dollars (\$500.00); providing for the acquiring of land for roads and drainage by condemnation or otherwise; providing for the proper drainage and maintenance of railway rights of way; providing for the referring of petitions for new roads to the county commissioner of the precinct before action is taken; authorizing the employment of all necessary labor, teams, wagons, and clerical help, and providing payment therefor; providing for road or ditch crossings wherever necessary, and the acquiring of land for same; providing for roads sixty (60) feet wide; authorizing the appointment of a county highway engineer, road superintendents and assistant engineers and other assistants, regulating the working of convicts, exempting all persons from road work and abolishing the office of road overseer, defining the word 'road'; providing for the investment of sinking funds; prohibiting the blockading of county roads by trains, etc., and providing a penalty; prohibiting any county officer to be interested in any county contract; fixing ex-officio salary of the county judge; declaring this act cumulative; providing for the construction by the courts, repealing all laws and parts of laws in conflict therewith, and declaring an emergency." Sp. Acts 33d Leg. c. 77.

Section 5 of said act is the one attacked by plaintiff. It reads as follows:

"Each precinct county commissioner shall inspect and supervise from time to time all roads in his precinct, and shall do and perform any and all acts required of him by the commissioners' court, and all other duties required of him by law as county commissioner, and shall receive for his services an annual salary of twenty-four hundred dollars (\$2,400.00) per annum, to be paid out of the general fund of the road and bridge fund, or any other available fund or the special road and bridge fund, in monthly installments, and shall be in lieu of all other fees and per diem of all kinds now payable or that may hereafter be allowed by general law."

[3] It is contended that this section, in so far as it provides for a salary of \$2,400, per annum, is unconstitutional, in that it consti-

tutes an attempt to regulate the affairs of Bexar county by a local or special law in contravention of section 56, art. 3, of the Constitution. That section of the Constitution provides, among other things, that the Legislature shall not, except as otherwise provided in the Constitution, pass any local or special law, authorizing:

"* * * Regulating the affairs of counties, cities, towns, wards or school districts; * * *
"Authorizing the laying out, opening, altering or maintaining of roads, highways, streets or alleys. * * *"

It is well established that the above-quoted provision with regard to the laying out, opening, altering, or maintaining of roads, highways, streets, or alleys has been, according to our decisions, annulled to all intents and purposes by the amendment to section 9, art. 8, which reads as follows:

"And the Legislature may pass local laws for the maintenance of the public roads and highways, without the local notice required for special or local laws."

See *Smith v. Grayson County*, 18 Tex. Civ. App. 153, 44 S. W. 921; *Dallas County v. Plowman*, 99 Tex. 512, 91 S. W. 221.

The question then arises whether the Legislature in exercising the power given it under the above-quoted amendment is restricted by the provisions of section 56, art. 3, other than the one relating to roads.

[4] If the authority to legislate by special act upon a certain subject is given by a provision of the Constitution other than section 56, art. 3, such authority carries with it the right to enact all provisions which could legitimately be embraced in the bill if section 56 was not a part of the Constitution. *Smith v. Grayson County*, supra; *City of Dallas v. Western Electric Co.*, 83 Tex. 243, 18 S. W. 552; *Texas Savings & Real Estate Ins. Ass'n v. Heirs of Pierre*, 10 Tex. Civ. App. 453, 31 S. W. 426; *State v. Hanscom*, 37 S. W. 453; *Railway v. Galveston*, 96 Tex. 520, 74 S. W. 537; *Withers v. Crenshaw*, 155 S. W. 1189; *Cravens v. State*, 57 Tex. Cr. R. 135, 122 S. W. 29, 136 Am. St. Rep. 977.

[5] The authority to enact special road laws carries with it the right to regulate the affairs of the county in all such matters as may appropriately be connected with or subsidiary to the object of creating an efficient road system. The objection therefore that a special road law contains provisions regulating the affairs of a county is of itself entitled to no consideration. We do not mean to say, however, that a provision regulating the affairs of a county in a matter totally disconnected with the object of providing for a road system could be inserted in a special road law. Such a provision might be as foreign to the subject of providing a system for establishing and maintaining public roads as a provision changing a person's name or locating a county seat, each of which things is also prohibited from being done by a special act.

[6-8] All acts of the Legislature must com-

ply with section 85 of article 8 of the Constitution, which provides that no bill shall contain more than one subject. The contention that section 5 of the special act known as the "Bexar County Road Law" is unconstitutional because it undertakes by special act to regulate the affairs of Bexar county raises the question whether that section relates to a subject which cannot be dealt with by a special law. If this be correct, then it follows that, if said section relates to such subject, it is evident that it is not appropriately connected with or subsidiary to the object of creating a road system for Bexar county, and must be declared to be in violation of the Constitution. In other words, if this act embraces two subjects, it violates section 35, art. 3, which has not been pleaded or relied on, but, in addition, it may be declared to violate section 56, art. 3, in that it enacts legislation upon a subject mentioned in said section, and not permitted under any other section of the Constitution, either expressly or as an essential or appropriate incident to any subject expressly permitted by another section. We therefore deem it advisable to go into the matter further than is perhaps necessary under the pleadings and brief of appellant. We will first state and discuss the legislation existing at the time said act was enacted, and then consider the provisions of said act, and construe section 5 thereof. By general law (*Vernon's Sayles' Ann. Civ. St. 1914*), it was provided as follows with respect to the compensation of county commissioners:

Art. 8870. "Each county commissioner, and the county judge when acting as such, shall receive from the county treasury, to be paid on the order of the commissioners' court, the sum of three dollars for each day he is engaged in holding a term of the commissioners' court, but such commissioners shall receive no pay for holding more than one special term of their court per month."

Art. 6901. "The county commissioners of the several counties are hereby constituted supervisors of public roads in their respective counties, and each commissioner shall supervise the public roads within his commissioner's precinct once each year, and shall receive as compensation therefor three dollars per day for the time actually employed in the discharge of his duties, to be paid out of the road and bridge fund of the county: Provided, that no commissioner shall receive pay for more than ten days in each year. * * *"

The general law (*Vernon's Sayles' Ann. Civ. St. 1914*), with respect to meetings was as follows:

Art. 2274. "The regular terms of the commissioners' court shall commence and be held at the courthouse of their respective counties on the second Monday of each month throughout the year and may continue in session one week: Provided, however, that the provision of this act shall not be construed to be mandatory upon the court to hold more than one session of the court each quarter if the business of the court does not demand a session, and any session may adjourn at any time the business of the court is disposed of."

Art. 2275. "Special terms of said courts may be called by the county judge or any three of the county commissioners, and may continue in session until the business is completed."

There was a special road law for Bexar county (Special Laws 1909, c. 8) which provided that each member of the commissioners' court should be ex officio road commissioner of his district, and contained the following statement with respect to compensation:

"Each of said commissioners shall receive as salary for the services required of them by this act \$400.00 per annum, payable quarterly, or as the commissioners' court may determine."

The act now under consideration (Sp. Acts 33d Leg. c. 77) contains, among others, the following provisions:

Sec. 3. "It is hereby specially provided that the office of ex officio road commissioner as now provided by law is hereby abolished in the county of Bexar, and from and after the final passage of this act the several commissioners of Bexar county shall cease to act as ex officio road commissioners, and their bonds as such shall be null and void, except for their official acts prior to the date of the final passage of this act."

Sec. 6. "The commissioners' court of Bexar county shall meet at the courthouse of Bexar county at ten o'clock a. m. each Monday, or on such regular day of the week as the court may fix in its rules, as provided in section 2, and may remain in session until the business before the court is transacted. This provision is cumulative of all other laws governing the convening of the commissioners' court, and no notice of such weekly meetings shall be necessary."

Sec. 7. "It is hereby specially provided that it shall not be unlawful for any county commissioner to engage in any other occupation or business, but should a county commissioner, by virtue of such other business or occupation, fail or neglect to perform his duties as county commissioner he shall be subject to removal from office in the manner provided by law for the removal of county officers. A failure to attend meetings regularly shall be grounds for such removal."

Sec. 14. "Should the commissioners' court deem it advisable, it shall have the right to employ all clerical assistance necessary to attend to the affairs of the commissioners' court, and all clerical work connected with the official duties of the members thereof, and to fix the salaries of such assistants to be paid out of the general fund of the county, or any other available fund."

Sec. 27. "The provisions of this act are and shall be held and construed to be cumulative of all general and special laws of this state, on the subjects treated of in this act, when not in conflict therewith, but in case of such conflict this act shall control as to Bexar county."

The Legislature had made the commissioners ex officio road commissioners of their districts, and awarded compensation for the services required of them by the act of 1909. In 1913 it abolished the office of ex officio road commissioner, and prescribed additional duties to be performed by the county commissioners as such, and in dealing with the subject of compensation the words for "services required of them by this act" were not used, but, instead, section 5, attacked by appellant, was inserted. The other sections of the act of 1913 above copied indicate an intention on the part of the Legislature not to confine itself to such matters as appertain strictly to the duties imposed on the commissioners with respect to roads.

We come then to section 5, and in view of the matters above set forth it seems very clear that the Legislature intended to fix a salary to cover all the duties prescribed by law, whether with respect to roads or not. If it be given a literal construction, it certainly so provides. But it is agreed that said section can be and should be construed to mean that the \$2,400 per annum is to be received for services in connection with roads alone. We do not see how this can be done. In the first place, the very act itself undertakes to provide for holding regular terms of court every week, and thus, if the per diem provided by article 3870 could be collected for all of the time used in holding court, the compensation of the commissioners would be a very considerable amount in excess of \$2,400 per annum; an amount of such consequence that it would naturally occur to the person drawing the bill that it should be expressly mentioned as excluded if it was to be received in addition to the \$2,400. In the next place, the Legislature undertook to provide that a failure to attend meetings regularly should be ground for removal, which indicates that the special act was regarded as fixing an absolute salary to be received regardless of the number of days the commissioners should attend sessions of the court, and therefore it would be advisable to fix a penalty for failure to attend regularly. The abolishing of the office of ex officio road commissioner and the change of verbiage from that used in the former law also indicate the intention to make the salary of \$2,400 cover all compensation to be received. But it may be argued that the Legislature merely fixed the amount to be allowed for services in connection with roads at the difference between the amount which would accrue under article 3870 and the \$2,400 allowed by the special act, and that this, in effect, is the same as if such special act had named a certain amount to be received for road services alone. This is plausible, but it is difficult to ascribe to the Legislature an intent to allow varying sums to the commissioners for road services, and that would be the effect of such a construction. For instance, if one commissioner was absent from the court 50 days more than another, he would receive \$150 less under article 3870, but by the special act would be allowed \$150 more than the other commissioners for services in connection with roads. We cannot ascribe the use of the language contained in section 5 to an inadvertent failure to express the real intent, for the real intent, as gathered from previous legislation and other provisions of the act in question, appears plainly to coincide with the language used in said section, and, as the same Legislature used similar language in other special road laws, and the next Legislature followed with similar acts, we may take it that such Legislatures have construed the Constitution to

permit them to enact provisions in special road laws fixing the entire compensation to be received by county commissioners.

We come, therefore, to the direct question whether the provision fixing the compensation to be received by county commissioners for all services prescribed by general law, as well as those prescribed by an act purporting to establish a system for laying out and maintaining the public roads, relates to a subject so disconnected from and independent of the subject of providing a system for laying out roads as to make the law objectionable on the ground that it embraces two subjects within the meaning of section 35, art. 3, of the Constitution.

"None of the provisions of a statute will be held unconstitutional when they all relate, directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in the title." Lewis' Sutherland on Statutory Construction, § 118.

See *Austin v. Railway Co.*, 45 Tex. 265; *Tadlock v. Eccles*, 20 Tex. 793, 73 Am. Dec. 213; *Johnson v. Martin*, 75 Tex. 40, 12 S. W. 321; *Joliff v. State*, 53 Tex. Cr. R. 61, 109 S. W. 176; *Ex parte Abrams*, 56 Tex. Cr. R. 465, 120 S. W. 883, 18 Ann. Cas. 45; *Howth v. Greer*, 40 Tex. Civ. App. 559, 90 S. W. 211; *Newnom v. Williamson*, 46 Tex. Civ. App. 615, 103 S. W. 656; *Joy v. City of Terrell*, 138 S. W. 215.

It is also well settled that the courts will construe section 35, art. 3, of the Constitution "liberally, rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it was adopted." *Austin v. Railway*, supra. There is so much danger connected with the passage of local and special laws that the legal mind views with concern every provision which is not very clearly germane to the subject, and is apt upon first impression to condemn all doubtful provisions, especially when they carry with them large disbursements of public funds. There being no necessity for making the provision relating to compensation apply to services other than those connected with the subject of roads, it is natural that in this case, upon first impression, it would appear that the necessary connection does not exist. It must, however, be borne in mind that there is a certain connection which makes these subjects overlap each other. The commissioner under the general law draws \$3 per day for his services in attending the meetings of the commissioners' court. At such meetings a considerable portion of his time is occupied, even under the general law with matters relating to public roads. A special law which seeks to inaugurate a more efficient road system necessarily, or at least very probably, will require more time to be devoted to road matters by the commissioners' court. Such special law therefore necessarily or probably affects the amount of compensation received in the aggregate by

the county commissioners for attending court. If this conclusion is correct, then it follows that by a special road law, without saying a word about the compensation to be received for attending court, the amount paid by the county to its commissioners may be increased, and the law would be unobjectionable. If so, it seems the further conclusion would follow that any matter which is affected by the special law when drawn in a manner conceded to be unobjectionable is an appropriate incident to the subject of inaugurating a road system, or at least has such a connection therewith as to permit of a provision being inserted which includes all compensation to be received for attending meetings as well as for superintending and supervising roads. Again, it appears that in a special road law additional duties with respect to roads can be prescribed, not only for the commissioners individually, but also for the commissioners' court. It would seem that the matter of compensation is of no greater importance legally than that of duties and powers, and that such matter of compensation has such a connection with the matter of duties and powers as to appropriately permit of its being dealt with in the same act. In the case of *Smith v. Grayson County*, supra, the county attorney sued to recover certain commissions and costs alleged to be due him by the county under the general laws of the state by reason of the fact that the county had worked the convicts, in whose cases such commissions and costs accrued, upon the roads until their fines and costs had been discharged. The county relied for its defense upon a provision of a special road law, to the effect that the commissioners' court should not pay any costs adjudged against convicts if such convicts worked out their fine and costs upon the public roads. Among other contentions made by the county attorney was the one that this provision was not embraced in or germane to the title of the act, which was:

"An Act to be entitled an act to create a more efficient road system for the counties of Grayson, Dallas, Galveston, Brown, Comanche, Mills, Fannin, Travis, Hunt, Hill, Kaufman and Fayette, in the state of Texas authorizing the employment of a road commissioner, defining his duties, prescribing penalties for his failure to perform his duties, and further defining the powers and duties of the commissioners' courts of the said counties under said act." Acts 22d Leg. c. 54.

The court said:

"If the title to the act fairly gives reasonable notice of its subject-matter, the act will be upheld. The main subject of this act is the creating of a system of public roads and highways, and in furtherance of this purpose the commissioners' court is authorized in its discretion to utilize the labor of county convicts; and the commissioners' court, in its duties of managing the business of the county and controlling the convicts, is prohibited from paying the costs that may be adjudged against the convict. The terms employed in the title of this act are fairly indicative of the subject-matter of the act, and fully meet the requirements of section 35, art. 3 of the Constitution."

It appears that, as the providing for working county convicts upon the public roads is a legitimate incident to a road law, it was proper to go a step further and deal with the matter of costs accruing in the cases against such convicts. In that case county officers were deprived in a special road law of part of the emolument given them by general law, and it was held that this was a matter incidental to the general subject of the act. That case illustrates fairly well the far-reaching effects which may legitimately be accomplished by reason of the fact that the subject is connected with that which expresses the general object to be accomplished.

We have carefully considered this case, and, bearing in mind the rules to be applied in determining whether a law is unconstitutional, as clearly enunciated in the case of *Brown v. City of Galveston*, 97 Tex. 9, 75 S. W. 488, we conclude that it is our duty to hold that the section of the Bexar county road law attacked in this case does not contravene the Constitution. It is difficult to determine in many cases whether there is such a connection between subjects as is required by the Constitution, and we regard this as one of those cases, but, there being a serious doubt in our minds whether the Legislature exceeded its powers, that doubt has been, as it must be, resolved in favor of the validity of the law. It is not the province of the courts, as is said by our Supreme Court in the case of *Glass v. Pool* (Sup.), 166 S. W. 377, to declare a law invalid because it is unwise or unjust, or because opposed to public policy or the spirit of the Constitution. It must violate some express provision of the Constitution.

The judgment is affirmed.

TEXAS POWER & LIGHT CO. v. ROBERTS. (No. 5624.)

(Court of Civil Appeals of Texas. Austin.
May 30, 1916.)

1. DAMAGES \S 147 — PLEADING — SPECIAL DAMAGES.

The petition of plaintiff seeking to recover special damages for defendant's failure to put in a partition to inclose office space rented to plaintiff must allege facts showing that at the time of the making of the contract defendant should have contemplated such damages would result from breach.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 410, 412; Dec. Dig. \S 147.]

2. PLEADING \S 228 — PETITION — BREACH OF CONTRACT — MOTIVE OF DEFENDANT.

Where no punitive damages were sought, and the petition averred that defendant maliciously breached its contract, special exception there-to should have been sustained, as defendant's motive was immaterial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. \S 584-590; Dec. Dig. \S 228.]

3. DAMAGES \S 37 — RECOVERY — DOUBLE RECOVERY.

Defendant demised a portion of an office to plaintiff, agreeing to erect a partition inclosing

it. Plaintiff intended to carry on a millinery business in the demised space, but defendant's failure to build the partition delayed the opening of plaintiff's shop to her damage. *Held*, that she could not recover for loss of profits of her business and at the same time for loss of time which she would have devoted to the business, for that would allow double recovery.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 237-241; Dec. Dig. \S 37.]

4. DAMAGES \S 40(2) — SPECULATIVE DAMAGES — PROFITS.

In such case, as plaintiff's business had not yet been started, her claim for lost profits occasioned by defendant's breach of contract is too remote, and cannot be sustained, but she may, upon showing that defendant knew injury would result to her from its failure to erect the partition pursuant to agreement, recover the net loss on her stock of millinery which she was unable to dispose of because of delay in opening; it appearing that such goods quickly depreciated in value due to change in styles.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 74-78; Dec. Dig. \S 40(2).]

5. EVIDENCE \S 498 — OPINION EVIDENCE — ADMISSIBILITY.

In such case, opinion evidence as to the amount for which plaintiff's millinery could have been sold, and its value after change in styles, is admissible; but plaintiff cannot give opinion evidence as to the probable damage to her business.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 2289; Dec. Dig. \S 498.]

Appeal from Bell County Court; W. S. Shipp, Judge.

Action by Miss Lustre Roberts against the Texas Power & Light Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Spann & Spann, of Temple, for appellant.

KEY, C. J. The following statement of the nature and result of this suit is copied from appellant's brief:

"Miss Lustre Roberts, appellee, instituted this suit in the county court of Bell county, Tex., on the 29th day of August, 1914, against the appellant, alleging that on or about the 12th day of August, 1912, she had rented from the appellant a certain space in the office occupied by the appellant in the Temple State Bank Building, in the city of Temple, Bell county, Tex., from the 1st day of September, 1912, until the 1st day of January, 1913; that appellant agreed to partition said space from the balance of the office occupied by it and have the same completed by September 1, 1912; that she relied upon said rental contract and immediately went to market to purchase her stock of millinery goods to open her business, in said rented premises; that she did purchase her stock of merchandise; and that the same reached Temple on August 31, 1912. Appellee alleged that the appellant failed to comply with its contract to have said partition installed and completed by the 1st day of September, 1912, and did not complete the same until the 10th day of September, 1912; that she was thereby kept out of possession of said rented premises for a period of ten days; that by reason thereof she was unable to have her millinery opening and share in the early fall trade as she had contemplated, and because thereof she had suffered great damage.

"She further alleged that on or about the 15th day of September, 1912, she had customers come from nearby towns, who had come at her writ-

ten request, but that she could not effect sales with them because she was unable to show her merchandise on account of the failure of the appellant to install said partition.

"She further alleged that, had she secured the rented premises on September 1st, she could have had her opening and display as contemplated by her; and that as a result of said breach of contract she had a great deal of stock left on her hands at the end of the season, which she alleges was practically worthless because of the change in fashions and styles.

"She further alleged that it was understood and agreed that the appellant would cause to be installed in said rented space a water hydrant, and furnish her, the appellee, with water free of cost other than the agreed rental of \$25 per month; that she repeatedly requested the installation of said water hydrant, and that the appellant failed to install the same, and that by reason thereof she was forced to go around the corner to a drug store to secure drinking water, and that she was unable to furnish her customers with drinking water, which humiliated her very much. (To these last-mentioned allegations the court sustained appellant's third special exception.) She further alleged that, by reason of the failure of the appellant to install and complete said partition by September 1st, she was caused to lose, and did lose, ten days of time from her employment, which was reasonably worth the sum of \$100, and that, by reason of the delay in opening her establishment, she was unable to sell her goods and merchandise and meet her bills; that she was damaged in the sum of \$500; that, by reason of the failure of appellant to install and complete said partition and to install said hydrant in said rented premises and to furnish her water, her said millinery business was for several months after September 10, 1912, greatly impaired and injured, from which injury her business had not recovered at the time of the trial, to her further damage in the sum of \$400.

"Appellee prayed for damages in the sum of \$1,000, for costs of suit, and for general relief. She did not allege that the appellant had notice of the special damages above mentioned at the time of making the contract.

"The appellant answered by general exception and nine special exceptions to the appellee's petition, all of which were by the court overruled except appellant's third special exception, which was by the court sustained. The action of the trial court in overruling said general and special exceptions has been assigned as error and will be presented under proper assignments. The appellant further answered by admitting that it had entered into the rental contract in the manner as alleged by the appellee, but denied that the time of the building of said partition in said rented premises was of essence and said that it did not contract, agree, or bind itself to install said partition in said rented premises on or before September 1, 1912, but that it was agreed that said partition should be installed and completed as soon after the 1st of September, 1912, as was convenient and possible.

"Appellant especially denied all other allegations contained in the appellee's petition, and that the failure on the part of this appellant to install said partition in any way caused or contributed to any of the appellee's alleged damages as set forth in said petition, and specially pleaded that appellee's alleged damage was not the natural or proximate result of the appellant's alleged breach of contract. The appellant's pleadings are only important to show the joinder of issue, since appellant introduced no evidence.

"The cause was tried by a jury. The appellee, being the only witness introduced, testified in her own behalf to the entering into of said contract, and that she was delayed ten days in obtaining possession of said rented premises by reason of the failure of the appellant to install

said partition; that she afterwards opened in said rented premises a millinery business; that she lost ten days of her time by reason of the failure of the appellant to install said partition, which the court permitted her to estimate to be \$100. On cross-examination she testified that she was not employed by any one; that she expected to receive returns for her labor by conducting a millinery store, trimming hats, offering them for sale, and to be paid for her services out of the profits of her business. The court also permitted her to testify, over the objection of appellant, that in her opinion from September 1, to September 10, 1912, she was damaged to the extent of \$500. The court further permitted her to testify, over the objection of the appellant, that her business was injured after September 10th to the extent of several thousand dollars.

"At the close of the appellee's testimony, the appellee rested her case. Whereupon the appellant moved the court to instruct the jury to render a verdict in favor of appellant, which motion was by the trial court considered and overruled. Whereupon the appellant rested, the cause going to the jury under instructions from the court upon the testimony of the appellee only. The jury rendered a verdict in favor of the appellee for \$500, upon which verdict the court accordingly entered judgment on the 6th day of April, 1915."

Opinion.

Without making specific reference to the assignments of error presented in appellant's brief, we deem it sufficient to say that the questions hereafter considered are properly presented; and, having reached the conclusion that the case should be reversed, we announce our views upon the controlling questions as follows:

[1] The trial court should have sustained some of appellant's exceptions to the plaintiff's petition. The damages sought to be recovered are special damages, and therefore it was necessary for the plaintiff to allege in her petition such facts as would show that at the time the contract was made appellant should have contemplated that such damages would result from its breach thereof. No such facts were alleged, and, for that reason, the court should have sustained the general demurrer to the petition.

[2, 3] The special exception which was addressed to the paragraph of the plaintiff's petition, wherein it was alleged that appellant acted maliciously when it breached the contract, should also have been sustained. No punitive damages were sought to be recovered, and therefore appellant's motive for breaching the contract was immaterial. Nor was the plaintiff entitled to recover \$100, or any other amount, for her alleged loss of employment. The undisputed proof shows that she intended to devote her time to the conduct of her millinery business, and to permit her to recover for both loss of time and injury to the business would allow a double recovery.

[4] We also sustain appellant's contention that, inasmuch as it was not alleged and proved that the plaintiff had an established business, her claim for net profits was too remote and speculative, as held by this court in *Walter Box Co. v. Blackburn*, 157 S. W.

220. The right to recover the loss of alleged profits as damages for breach of a contract is one upon which there is much diversity of opinion among the courts, and we do not desire to be understood as holding that such damages are not recoverable in any case. On the contrary, in *American Construction Co. v. Caswell*, 141 S. W. 1013, this court held that such damages were recoverable where the defendant had wrongfully diverted trade from the plaintiff's place of business. That case, it is true, was an action for tort and not for breach of contract; but, in considering whether or not damages sought to be recovered are too remote, we see no reason for making any distinction on that account. In the *Caswell* Case it was shown that the plaintiff had an established business; the amount of profits for several preceding years was shown, and it was also made to appear that such profits had materially decreased during the time for which plaintiff sought to recover damages; and this court held that such damages were not too remote and speculative. The reason why courts have refused to allow recovery for net profits which the plaintiff alleges he would have made from a business which was not in existence at the time the contract was made and breached seems to be that such alleged net profits are not capable of proof with that degree of certainty required by the law. Whereas, when a business is already established and is making a profit when the contract is breached or the tort committed, such pre-existing profit, together with other facts and circumstances, may indicate with reasonable certainty the amount of profit which would have been made but for the wrongful conduct complained of. However, while the plaintiff in this case may not be entitled to recover for loss of net profits, we are not prepared to hold that she is not entitled to recover substantial damages. If upon another trial her pleading shall be so framed as to admit it, and the testimony shall show that time for the completion of the partition which appellant agreed to put in the building by the 1st day of September, 1912, was of the essence of the contract, and that, on account of the failure to do so, the plaintiff was unable to sell a portion of her stock of millinery which otherwise she would have sold, and that on account of the nature of the millinery business, change in styles, etc., the value of said unsold portion was materially diminished, and to that extent constituted a loss, and that the defendant at the time the contract was breached had notice of such facts as would require it to contemplate that such loss would result directly from its breach of the contract, then the plaintiff would be entitled to recovery for such diminution in the value of that portion of the stock which she would have sold if the contract had been complied with, regardless of whether or not she would have made a net profit upon her entire business if appellant

had complied with the contract. In other words, if appellant's breach of the contract was the direct cause of her failure to sell her stock of millinery or any portion of it, for more than she was afterwards compelled to sell it for, and such result was in contemplation of the parties at the time the contract was made and breached, then she has sustained a pecuniary loss on account of such breach and appellant is liable therefor. *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280.

[5] Over appellant's objection, the court permitted appellee to state to the jury her opinion to the effect that she considered that her loss on account of appellant's breach of the contract resulting from her failure to have her opening and get her business started at the time she expected to was \$500, and that the injury to her business generally was up into the thousands. If upon another trial appellee seeks to recover upon the only theory which our decision leaves open to her, she will prove about what portion of her stock of goods was not sold on account of her failure to begin business at the time she contemplated, how much such goods could have been sold for, and how much they depreciated in value on account of the change of styles, etc., and the difference will constitute the measure of damages; and therefore there will be no necessity for any opinion testimony, unless it be as to the amount of goods so left on hand, and the amount for which they could have been sold and their value after the change in styles, which will be proper testimony. Concurring with Prof. Wigmore, the writer of this opinion believes that a great deal of sophistry has been promulgated and many unsound rulings made in reference to the so-called opinion rule of evidence. In chapter 65, vol. 3, of Prof. Wigmore's admirable treatise on the Law of Evidence, the opinion rule is elaborately considered, the author's view being, in substance, that in all cases the true test should be whether or not the opinion of the witness could probably aid the jury or judge in determining a particular question of fact, and that when a witness, though a nonexpert, is familiar with the surrounding circumstances, he should be permitted to give his opinion, to be considered by the jury for no more than what they may consider it worth in determining the question to which the opinion relates; and in the concluding section of that chapter, among other things, the author says:

"If one were asked to name the rules most peculiar to the Anglo-American evidence-law, he ought perhaps to name the Character rule, the Hearsay rule, and the Opinion rule. Neither is found on the Continent. All three are indigenous judicial developments. All are the product of the jury system. All are founded on a peculiar cautiousness in our law, and all have been developed with an equally peculiar rigidity and stolid disregard of practical consequences. All three are complex and far-reaching in application as well as voluminous in detailed development. But a radically different future may be predicted for them. The Hearsay rule, and the

Character rule will always remain in our law in a more or less relaxed form; while the Opinion rule will in substance disappear. An important difference between them is that the first two are the solid growth of experience; while the last rule, in its American development, is merely the logical technical development of a misunderstood term. The Opinion rule day by day exhibits its unpractical subtlety and its useless refinement of logic. Under this rule we accomplish little by enforcing it and we should do no harm if we dispensed with it. We accomplish little, because from the side on which the witness appears and from the form of the question, his answer, i. e., his opinion, may often be inferred. We should do no harm, because, even when the final opinion or inference is admitted, the inference amounts in force usually to nothing unless it appears to be solidly based on satisfactory data, the existence and quality of which we can always bring out, if desirable, on cross-examination. Add to this that, under the present liberal application of the rule, and the practice as to new trials, a single erroneous ruling upon the single trifling answer of one witness out of a dozen or more in a trial occupying a day may overturn the whole result and cause a double expense of time, money and effort; and we perceive the absurdly unjust effects of the rule. Add, finally, the utter impossibility of a consistent application of the rule, and the consequent uncertainty of the law, and we understand how much more it makes for injustice rather than justice. It has done more than any one rule of procedure to reduce our litigation towards a state of legalized gambling."

For the reasons stated, the judgment of the court below is reversed, and the cause remanded for another trial consistent with this opinion.

Reversed and remanded.

HAGOOD v. HAGOOD.

(Court of Civil Appeals of Texas. April 29, 1910.)

Dissenting Opinion.

For majority opinion, see 186 S. W. 220.

DUNKLIN, J. The only controverted issue involved upon this appeal is the proper construction of the will of R. L. Hagood. The conclusion of the majority is, substantially, that as the language of the will is of itself clear and free from ambiguity, all agreed facts shown in the statement of facts should be excluded from consideration in arriving at the testator's intentions, because such evidence would tend to vary the express terms of the will.

Some of the quotations shown in the opinion of the majority to the effect that a will cannot be reformed to correct a mistake made by the testator in its execution are inapplicable here and tend to confuse rather than to elucidate the issue, since appellants did not present that issue, but elected to stand upon the will as written, interpreted in the light of facts dehors the will shown in the agreed statement of facts.

All the authorities agree upon the general rule announced in the quotations in the opinion of the majority that parol evidence will not be permitted to contradict, add to, or ex-

plain the terms of a will which are free of ambiguities or obscurities. But there is another rule of construction equally as well established, that the terms of a will or contract, which, standing alone, are definite and certain, may be shown by parol evidence to be ambiguous and the ambiguity may be removed by evidence of like character. 3 Jones on Evidence, § 472.

"Ambiguity is defined as duplicity; indistinctness; an uncertainty of meaning or expression used in a written instrument." 1 Words and Phrases, p. 199.

"A 'latent' ambiguity, as defined by Lord Bacon, is 'that which seems certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter, outside of the deed, that breedeth the ambiguity.'" 8 Words and Phrases, p. 31.

Prof. Wigmore, in volume 4, § 2462, of his able and exhaustive work on Evidence, traces the history of the general rule forbidding the introduction of parol evidence to vary the terms of a written instrument. He notes that until the middle of the fifteenth century land could not be alienated by will at all, and that for a long time after that period "through the lack of a liberal and sympathetic search for the testator's meanings, the spirit of rational interpretation was hindered." He notes further that a like strictness of interpretation of all legal documents continued until about the beginning of the eighteenth century, when there set in "a growing spirit of liberality." And in section 2470 he notes the stages of progress of liberalism in the construction of wills, both in England and the United States, from Lord Coke's time down to the present, giving the following quotations of authorities:

"1831, Sir James Wigram, V. C., *Extrinsic Evidence in Aid of the Interpretation of Wills*, Proposition V: 'For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words.'

"In 1833, Parke, J., in *Doe v. Martin*, 4 B. & Ad. 770, 785: 'It may be laid down as a general rule that all facts relating to the subject-matter and object of the devise * * * are admissible to aid in ascertaining what is meant by the words used in the will.'

"In 1842, Sugden, L. C. in *Attorney General v. Drummond*, 1 Dr. & W. 356 (interpreting a deed containing the words 'Christian' and 'Protestant Dissenter'): 'The court is at liberty to inquire into all the surrounding circumstances which may have acted upon the minds of the persons by whom the deed or will (it matters not whether it was one or the other) was executed. * * * The court therefore has not merely a right, but it is the duty to inquire into the surrounding circumstances, before it can approach the construction of the instrument itself.'

"1886, Blackburn, J., in *Allgood v. Blake*, L. R. 8 Exch. 160: "The general rule is that in construing a will the court is entitled to put itself in the position of the testator and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention (i. e. sense) evidenced by the words used, with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words. As said in *Wigram on Extrinsic Evidence*: "The question in expounding a will is, not what the testator meant—as distinguished from what his words express—but simply what is the meaning of his words." But we think that the meaning of words varies according to the circumstances of and concerning which they are used."

And in 3 *Jones on Evidence*, § 477, the author, after referring to the former rule of strict construction of wills, says:

"The rule now is unquestioned that extrinsic evidence in aid of the interpretation of wills is admissible for the purpose of showing the object of the testator's bounty, the property devised, and the quantity of interest intended to be given. Evidence may be received as to every material fact relating to the person who claims under the will, and to the property devised, as to the circumstances of the testator and his family and affairs, so as to lead to a correct decision of the quantity of interest the claimant is entitled to by the will. This is true as to every disputed point respecting which it can be shown that a knowledge of extrinsic facts can aid in the right interpretation of the will."

In 4 *Wigmore on Evidence*, §§ 2471 to 2477, inclusive, the author announces the general rule, which he says has never been questioned, and exceptions thereto, that while extrinsic facts and circumstances are admissible to discover the intent of the testator, his declarations of such intention are rejected because the tendency of such proof would be to overthrow the written instrument, or else establish by parol evidence a transaction which is required to be shown by an instrument in writing. See, also, 1 *Greenleaf on Evidence*, §§ 290, 291; 2 *Underhill on Wills*, § 908.

The most frequent application of the rule allowing evidence of facts dehors the will occurs when the language, employed to designate the property devised or the objects of the testator's bounty, is applicable alike to more than one piece of property or more than one person, and such evidence is introduced to identify the property or person intended.

And in section 289, 1 *Greenleaf on Evidence*, the author states his individual belief to be that in all other cases than those parol evidence to show the testator's intention should be excluded under the general rule; but he cites no decision supporting a doctrine so broad in scope as that.

The authorities abound with statements that the court should place itself in the position of the testator and construe his will in the light of his surrounding circumstances, to the end that his intention may be discovered and carried out, if that purpose can be accomplished without violating some rule of law. 1 *Greenleaf on Evidence*, § 289; 1 *Jar-*

man on Wills, § 422; 2 *Underhill on Wills*, § 909. In *Finley v. King's Lessee*, 3 Pet. (28 U. S.) 377, 7 L. Ed. 712, Chief Justice Marshall said:

"The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail; although in giving effect to it, some words should be rejected, or so strained in their application, as materially to change the literal meaning of the particular sentence."

The statement occurs frequently in the text-books that wills are construed in accordance with the same rules that apply to deeds and contracts. But in *Lambert v. Paine*, 3 Cranch, 97-138, 2 L. Ed. 377, 391, the following was said:

"Wills are expounded more favorably, to carry the intent of the testator into effect, than conveyances at common law, which take effect in the lifetime of the parties; wills being frequently made by people enfeebled by age or indisposition, and without the aid of counsel learned in the law. Therefore, words not so technical for the purpose, have in a great variety of cases, for above 100 years, been construed by the judges, to carry a fee, which would not do so in a deed."

Other cases of like import are cited in *Hancock v. Butler*, 21 Tex. at pages 813, 814 (orig. edition), bot. page 726 (later edition).

The authorities are uniform upon the proposition that when a will is made, the presumption obtains that the testator intended thereby to dispose of all his property, and no presumption will be allowed that he intended to die intestate as to a part of his estate, if the words used in the will may fairly carry the whole. 1 *Underhill on Wills*, § 464; *Hardenbergh v. Ray*, 151 U. S. 112-126, 14 Sup. Ct. 305, 38 L. Ed. 93.

By the express terms of the will in controversy in this suit, R. L. Hagood devised his entire estate. He left the will unchanged at the time of his death, although he survived J. O. Hagood, one of the beneficiaries originally intended, by more than 3 years. One of the provisions of the will limits the action of the county court with respect to his estate to the probate of the will, and the return of an inventory and appraisement of the property belonging to his estate—a provision wholly inconsistent with intestacy of one-half of the estate; and the devise of the entire estate which testator might own at the date of his death to the beneficiaries named, to the exclusion of all other kindred, indicates an intention that such other kindred should be excluded from a participation in said estate, especially as the will was never changed after the death of J. O. Hagood. The facts so enumerated create an ambiguity and uncertainty as to whether or not the testator intended that the will should cast the whole estate upon the survivor of those beneficiaries in the event one should die before the death of the testator. And independent of testator's instructions to his attorneys with respect to how he desired his will to be drawn, and independent even of the

agreement as to the testator's intention in fact, the facts enumerated above, considered in connection with the further facts and circumstances shown in the record, including the joint acquisition by the three brothers of practically all the property owned by them, the fact that R. L. and J. O. Hagood never married, that they lived in the same home with R. B. Hagood and his family for several years prior to the execution of the two wills and up to their respective deaths, and were cared for by R. B. Hagood and his family during their long illness from consumption, with which both died, in connection with an absence of proof of any facts such as financial needs or special affection, tending to show why testator might probably have desired his other kindred to share in the estate in the event of the predecease of one of the beneficiaries, all lead irresistibly to the conclusion, in the opinion of the writer, that in making the will in question the testator intended that, in the event of the death of one of said beneficiaries prior to the death of the testator, the survivor of the two should take the whole estate, if he should survive the testator also. If the will can be so construed as to give effect to that intention without doing violence to the language therein employed, interpreted in accordance with the law controlling in the construction of wills, then that interpretation should be adopted and the will enforced accordingly; otherwise it should be held that the testator died testate as to one half his estate and intestate as to the other half. And that is the next question to be considered.

Authorities, practically without number, might be cited announcing the general rule, that in construing wills the terms used must be interpreted in their plain and ordinary sense. But lexicographers often give different meanings of the same words according as they are employed in common parlance, or in theology, law, etc., and it cannot be doubted that words used in deeds or wills which have a well-fixed meaning in law should be given that construction by courts rather than some other meaning not popularly understood by those not versed in the law. For illustration: In early times a conveyance "to A. and his heirs" and one "to A. for life, remainder over to his heirs," were substantially the same. In either case A. acquired only a life estate in the property, and after his death his heirs took the remainder under the conveyance. In other words, the word "heirs" was a word of purchase according to its plain meaning to the layman. But later, by judicial construction, it was interpreted as a word of limitation indicating the quantity of estate conveyed, which would be a title in fee simple, or fee tail, as the case might be, and that meaning was finally fixed and established by the decision in *Shelley's Case*. See 2 *Reeves on Real Property*, § 892.

If the beneficiaries named had both survived the testator, then under the common

law the will vests in them a joint tenancy, and under the common law, in case of the death of one before the decease of the testator, the will vests the whole estate in the survivor, "because," as said in 1 *Jarman on Wills*, §§ 340, 341, "as joint tenants take per my et tout, or, as it has been expressed, 'each is to take of the whole, but not wholly, and solely,' any one of them existing when the will takes effect will be entitled to the entire property." If one of the intended joint tenants dies before the date the devise becomes effective, then no joint tenancy is created, and it is perfectly clear that the underlying and controlling reason for so construing the will as to cast the whole estate upon such surviving devisee is the purpose to give effect to the intention of the testator that such should be the result. And the rule applying in case of a devise which would create a joint tenancy if both devisees survive the testator, furnishes another instance of giving effect to the testator's intention at the sacrifice of the plain meaning of words in that a devise to two or more is construed to mean a devise to one only, viz., the survivor.

By article 2471 of the statutes of descent and distribution of Texas, it is provided that where two or more persons own an estate jointly and one dies before a severance, his interest in said estate shall not survive to the remaining joint owner or joint owners, but shall descend to the heirs of the decedent in the same manner as if his interest had been severed before his death. That is a statute of inheritance after title has vested in two or more joint tenants, and does not necessarily control in the present suit because J. O. and R. B. Hagood never became joint tenants. But several states have enacted statutes, which further provide that upon the death of an intended joint tenant by will before the death of the testator, the interest which he would have acquired under the will had he survived the testator shall pass to his heirs.

If, by reason of our statute, it can be said that the will itself does not show an intention on the part of the testator that the beneficiary surviving at the death of the testator should take the whole estate, yet that intention clearly appears from extrinsic facts and circumstances noted already. And if the intention of the testator is to be the controlling factor, regardless of the specific terms of the will, in the one instance, why not in the other?

Under the common law, a devise or conveyance to two or more with a provision denoting the share each is to take, would, upon the face of the instrument, constitute the takers tenants in common. And Mr. Jarman in his work on *Wills*, § 341, following his statement of the rule obtaining if the devise is to joint tenants, says:

"While it is equally clear that if the devisees or legatees in any of these cases had been

made tenants in common, the failure of the gift as to one object would not have entitled the other to the whole by the mere effect of survivorship. Where, however, the devise or bequest embraces a fluctuating class of persons, who, by the rules of construction, are to be ascertained at the death of the testator; or at a subsequent period, the decease of any of such persons during the testator's life will occasion no lapse or hiatus in the disposition, even though the devisees or legatees are made tenants in common, since members of the class antecedently dying are not actual objects of gift."

In passing, it is proper to note that to do this, the designation of several beneficiaries by a collective term is construed as meaning one of that class only. It is quite evident that the discussion by the author, of the rules in the two instances referred only to wills showing plainly by their own language the creation of the character of estates devised and without reference to cases in which the intention of the testator, in case of ambiguities in the will, might be shown by extrinsic evidence, a subject discussed in later chapters of the work.

Many authorities are cited in the opinion of the majority defining a class, substantially, as a body of persons which can be designated by the same general term, such as "children," "grandchildren," "nephews," "brothers," or "sisters." In some of the definitions found in the authorities, it is expressly stated that the designation of the beneficiaries by name, or a statement of the share each is to take, will destroy the class. It is also a rule that a class may be created by the inclusion of a part only of those standing in the same relation to the testator. The definitions of "class" referred to are given in numerous cases where the beneficiaries named did constitute a class within the meaning of those definitions. If those decisions could be construed as holding that persons not coming within those definitions cannot constitute a class, then to that extent they would be mere dicta and not necessarily authoritative. Except as announcing general principles, little aid can be procured from adjudged cases with their ever differing facts. In *Smith v. Bell*, 6 Pet. 68, 79, 5 L. Ed. 322, Chief Justice Marshall said:

"The construction put upon words in one will has been supposed to furnish a rule for construing the same words in other wills, and thereby to furnish some settled and fixed rules of construction which ought to be respected. We cannot say that this principle ought to be totally disregarded; but it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution, without violating the rules of law. It has been said truly (*Gulliver v. Poynts*, 3 Wils. 141) 'that cases on wills may guide us to general rules of construction; but, unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills.'"

That statement has been quoted with approval in *Colton v. Colton*, 127 U. S. 300-309, 8 Sup. Ct. 1164, 32 L. Ed. 188, and in

Adams v. Cowen, 177 U. S. 471, 475, 20 Sup. Ct. 668, 44 L. Ed. 851.

If the two beneficiaries named in the will in controversy had been designated as those brothers with whom the testator made his home, without naming them, then they would have constituted a class within the meaning of the definitions of that term usually given, and would have given the one surviving when the will took effect the whole estate. That the brothers named in the will were the ones with whom he made his home is admitted, but instead of identifying them by collective and descriptive terms, and in order to establish their identity beyond cavil, he named them, and, by so doing, according to the usual definitions of a "class," he metamorphosed what would have resulted in a devise of the whole estate to R. B. Hagood into a devise of only one-half of it, and that too contrary to the testator's intention in fact. Viewing such a construction in the light of fundamental principles, the inquiry would not be inappropriate: When this magic in mere names of persons?

If the question, whether or not the will in the present suit was to the testator's two brothers as a class should be determined by precedents, then only those cases should be considered which involved devises or legacies to persons identified in such a manner as not to come within the usual definitions of "class." Applying that test, the decided weight of such precedents sustains the contention of the appellant in the present suit; assuming that the cases which are considered more nearly in point are those specially noted in the opinion of the majority, and without attempting an examination of the numerous decisions otherwise referred to. In the case of *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, 69 N. E. 283, 67 L. R. A. 146, by a residuary clause of the will, the remainder of the estate after satisfying other bequests was given to testator's four children, who were all named, share and share alike; and it was held that the gift was not to a class.

In *re Hittell's Estate*, 141 Cal. 432, 75 Pac. 53, 54, the gift was to two sisters, as tenants in common, who were not related to testator, but with whom he lived for 10 years prior to his death. It was held that the gift was not to a class, and that the death of one of the beneficiaries prior to the death of the testator caused a lapse of one-half of the estate. The further question whether or not the devise was intended to be a devise to a class was discussed and the conclusion reached that the circumstances relied on to show such intention were not sufficient to accomplish that result, thus leaving the inference to be drawn that if such intention was so shown, the decision might have been different.

In *Melton v. Sellars* (Ky.) 181 S. W. 346, by the Court of Appeals of Kentucky, the beneficiaries were identified by terms of gen-

eral description, and it was held that the gift was to a class, tested by the usual definitions of what is necessary to constitute a class.

In *Ritch v. Talbot*, 74 Conn. 137, 50 Atl. 42, the gift was to testator's two brothers, Charles and Christopher Talbot, share and share alike. Charles Talbot, one of the brothers, died prior to the death of the testator. The court said:

"The bequest to the two brothers, Charles and Christopher Talbot, was one to them individually and not to them as a class. By operation of section 541 of the General Statutes, the legacy to Charles Talbot was in legal effect a gift to him, and to his issue in case he should not survive the testator."

Following are cases cited in appellant's brief to support his contention that the gift was to him and J. O. Hagood as a class:

In *Bolles v. Smith*, 39 Conn. 217, the gift was to "Frederic M. Smith, Valentine W. Smith, and Timothy W. Smith, sons of my late brother, Roswell Smith, and to their heirs and assigns forever, equally, the residue of my estate * * *" upon the payment by them of a legacy to testator's wife. The gift was held to be to a class because such appeared to be the intention of the testator as gathered from the whole will in the light of surrounding circumstances. And in the opinion in that case the court said:

"It is true that by the law of Connecticut the survivors, in ordinary cases of joint tenancy, do not take the whole estate. But the argument does not depend upon the *jus accrescendi*. If they are joint tenants, *prima facie* they take as a class. If they take as a class the lapsed legacy goes to the survivors."

And the latter holding is supported by *Lockhart v. Vandyke*, 97 Va. 356, 33 S. E. 613.

In *Warner's Appeal*, 39 Conn. 253, the remainder of the estate left after other devises was divided into four equal parts, one of which was given "to the sons of my two sisters, deceased, Henry S. and Charles K. Warner." It appeared that the mother of each of said nephews had successively been the wife of the father of those nephews. One of those nephews having died prior to the death of the testator, it was held that the gift was to the three as a class, and the two survivors took the entire fourth interest that had been bequeathed to the three, because such appeared to be the intention of the testator, viewing the will as a whole.

In *Jackson v. Roberts*, 80 Mass. 546 (14 Gray), a certain residue of the estate was bequeathed to Elizabeth, Ellen, Edward, Grace, and Mary, five children of an adopted daughter of testatrix, share and share alike, the issue of any of said beneficiaries to take the share of their parents by representation. It was further provided in the will that in event any one of three of the children, Edward, Grace, and Mary, should die without issue, then the share of that one should go to the survivors of Ellen, Edward, Grace, and Mary, thus omitting Elizabeth, the issue

of any one of those four to take by representation the share of their parent. It was held that the devise was to a class, and that the shares of Grace and Ellen, who died without issue and before the death of the testatrix, passed to the survivors. It is noted in the opinion that the fact that testatrix, by codicil to the will, expressly confirmed it after the death of Grace clearly indicates her original intention that the bequest was to the children as a class. It was further said that the mention by name of individuals who compose a class is not conclusive that a class was not intended, and in that connection occurs the following:

"And it is not to be doubted, that when the intention of survivorship is in any other way plainly shown by the will itself, or by the will and such evidence of extrinsic facts as is legally admissible for the purpose of showing it, such intention must prevail."

Numerous English authorities are cited in support of that announcement.

In *Re Ive's Estate*, 182 Mich. 699, 148 N. W. 727, the gift of the property in controversy was "to my sister Hattie Butterfield, and my brothers, Wesley and Dwight Skinner, to each an undivided one-third." The testatrix was survived by the two brothers named, but her sister Hattie Butterfield died prior to her death. In holding that the devise was to the sister and two brothers as a class, the court said:

"The presumption is that a testator intended to dispose of his entire estate, and not to die intestate either as to the whole or any part thereof, and the will should be so construed, unless the presumption is clearly rebutted by the provisions of the will or by the evidence to the contrary. 40 Cyc. 1409; *Toms v. Williams*, 41 Mich. 552-565, 2 N. W. 814; *Des Grand Champ v. Dufo*, supra [169 Mich. 104, 135 N. W. 98]. In the instant case we have not only the presumption to aid us, but we have also the express language of the testatrix, that she intended to give the rest, residue, and remainder of her estate to her sister and brothers. * * * We recognize the general rule contended for by appellee that, where property is given to several persons by name, to be equally divided between them, they take as tenants in common, and not as joint tenants, or as a class. But the authorities hold, we think, that this rule yields to a different construction when it plainly appears from the will that it was the intention of the testator that the survivors should take the whole. We think that this is such a case, and that for the reasons stated the trial court erred in its conclusion in reversing the action of the probate court."

Numerous authorities are cited in the opinion in support of that construction.

In *Re Langdon's Estate*, 129 Cal. 451, 62 Pac. 73, the gift in controversy was "unto my nephews Callaghan Byrne, James W. Byrne, and Fred Byrne, in equal proportions." The bequest was held to be to those nephews as a class, and that Fred Byrne having died prior to the death of testatrix, leaving no descendant, that part of the estate intended for him passed to the other two nephews who survived the testatrix. In that case a section of the Civil Code of California was quoted, which reads:

"In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations."

It was held that there was such uncertainty upon the face of the will, and hence the surrounding circumstances of the testatrix at the time she made the will could be shown by parol evidence aside from her oral declarations.

The familiar common-law rule of evidence for explaining a latent ambiguity in wills and other written instruments was thus by statute made applicable to wills showing patent ambiguities also. According to the old common-law rule, ambiguities apparent upon the face of a written instrument could not be explained by parol evidence of extrinsic facts, and, presumably, this statute was passed for the purpose of changing that rule. Other decisions practically to the same effect as those discussed above are *Page v. Gilbert*, 32 Hun (N. Y.) 301; *Swallow v. Swallow*, 186 Mass. 241, 44 N. E. 132; *Hoppock v. Tucker*, 59 N. Y. 202; *Schaffer v. Kettel*, 96 Mass. (14 Allen) 528; *Stedman v. Priest*, 103 Mass. 293; *Mann v. Hyde*, 71 Mich. 278, 39 N. W. 78; *Roosevelt v. Porter*, 36 Misc. Rep. 441, 73 N. Y. Supp. 800; *Meserve v. Haak*, 191 Mass. 220, 77 N. E. 377; *Smith v. Haynes*, 202 Mass. 531, 89 N. E. 158; *Hazard v. Stevens*, 36 R. I. 90, 88 Atl. 980; *Chase v. Peckham*, 17 R. I. 385, 22 Atl. 285; *Security Trust Co. v. Lovett*, 78 N. J. Eq. 445, 79 Atl. 616; *Lockhart v. Vandyke*, 97 Va. 356, 33 S. E. 13; *McCoy v. Houck*, 180 Ind. 634, 99 N. E. 97.

If, in a deed or will disposing of real estate, the word "heirs" can be construed as a word of limitation and not as a word of purchase, as it plainly indicates, if a devise to two or more as joint tenants can be read as a devise to one only in the event he alone survives the testator, if a devise to several as tenants in common can be read as a devise to one only in the event the devise is to a class and that one only survives the testator, if the intent of the testator is the cardinal rule in the construction of wills, and if, as said in *Jackson v. Roberts*, 14 Gray (80 Mass.) 550, supra, and supported, in effect, by practically all the other authorities last cited, "No rule of law gives an inflexible sense and effect to a bequest made to children of a family, by their several names, nor to a bequest to them 'equally' or 'in equal shares,'" then, under the facts and circumstances shown in the statement of facts in the present suit, excluding the declarations of the testator and the opinion of his attorneys therein appearing, no sound reason is perceived why the will of R. L. Hagood, which, upon its face, purports to be a devise to his two brothers as joint tenants and not as tenants in common, should not be con-

strued as a devise to a class, according to the undoubted intention of the testator; and for the reasons noted, the writer is of the opinion that the judgment of the trial court should be reversed, and judgment here rendered in favor of the appellant for the property in controversy.

SMITH v. FIRST NAT. BANK OF WACO et al. (No. 5646.)

(Court of Civil Appeals of Texas. Austin.
May 17, 1916.)

1. APPEARANCE \Leftrightarrow 4—FILING PLEA—WAIVER OF TIME OF ANSWERING.

Where suit is brought to a term too late for service at that term, defendant waives his right not to answer at that term by filing a plea of privilege before adjournment of the term, under Rev. St. 1911, art. 1882, providing that filing answer shall constitute an appearance of a defendant so as to dispense with necessity for the issuance or service of citation upon him.

[Ed. Note.—For other cases, see *Appearance*, Cent. Dig. §§ 12-14; Dec. Dig. \Leftrightarrow 4.]

2. VENUE \Leftrightarrow 32(2)—RESIDENCE—WAIVER.

Where defendant, through no fault of the clerk or plaintiff or his attorneys, fails to call the court's attention to a plea of privilege at the term at which filed, and it appears there was time for the court to have passed on it if presented, and the case is not continued without prejudice to such plea, he waives his right to have the plea passed on by the court at a subsequent term, under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1910, providing that pleas to the jurisdiction and other dilatory pleas not involving the merits shall be determined at the term at which filed, if the business of the court permits, and rule 24 for the government of district and county courts (142 S. W. xix) that such pleas shall be tried at the first term at which the attention of the court shall be called to them, unless passed by agreement of parties with consent of the court.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 49; Dec. Dig. \Leftrightarrow 32(2).]

3. VENUE \Leftrightarrow 32(2)—RESIDENCE—WAIVER.

In such case an amended plea of privilege cannot be filed at a subsequent term to which the case has been continued.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 49; Dec. Dig. \Leftrightarrow 32(2).]

Appeal from McLennan County Court;
Geo. N. Denton, Judge.

Action by the First National Bank of Waco against A. M. Smith and another. From a judgment for plaintiff, the named defendant appeals. Affirmed.

Hall & Barclay, of Wharton, for appellant.
Howard D. McElroy, of Waco, for appellees.

RICE, J. This suit was brought by the First National Bank of Waco against the Waco Mill & Elevator Company, a private corporation, and appellant, who was a resident citizen of Wharton county, to enforce the payment of a draft for \$315, drawn by the Mill & Elevator Company upon appellant and indorsed by that company to the bank, who advanced the money thereon to it. The bank afterwards, by due course of mail,

forwarded the draft for collection against appellant, who, when presented, refused to pay same. Upon its return the bank undertook to charge the draft against the account of the Mill & Elevator Company (who had funds on deposit in excess of such amount), who declined to permit it to do so.

The suit was brought to the May term of the county court, but too late for service at that term. On the 9th of June appellant filed his plea of privilege to be sued in Wharton, the county of his residence. The May term of the county court adjourned on the 19th of June. This plea of privilege was not called to the attention of the court, nor any order of any character made in reference thereto, though there was sufficient time before adjournment for the court to have passed thereon. The next succeeding term of said court began on the first Monday in July, and prior thereto appellant's counsel wrote the clerk of said court asking when the next term of the county court of McLennan county would convene, and was promptly informed that it would commence on the first Monday in July. On the 10th of July appellant filed his amended plea of privilege in said court. On appearance day the case was set for trial on the 14th of July, at which time no mention was made of appellant's plea of privilege; and when called for trial appellees made motions to strike out both said pleas of privilege, the first on the ground that it was filed during the May term of the court, and not called to the attention of the court during that term, although the court had time and the condition of the docket was such that it could have been heard and determined by the court, if attention had been called thereto, and the second to strike out the amended plea of privilege, for the reason that it had been filed after the case had been continued for the May term of court, both of which motions were by the court sustained, and, the appellant declining to plead to the merits of the case, the court heard evidence and rendered judgment in favor of the First National Bank against the Mill & Elevator Company and appellant for the sum of \$315, with interest at the rate of 6 per cent. per annum from April 7, 1915, together with all costs of court, providing that execution should first issue against appellant, and only against the Mill & Elevator Company in the event the judgment should not be satisfied out of the property of appellant, from which action of the court appellant prosecutes this appeal.

[1-3] Notwithstanding appellant was not required to answer at the May term, he waived his right by the filing of his plea of privilege. See article 1882, Rev. Stat. 1911. Having failed to call the attention of the court to this plea at that term, it appearing that there was sufficient time for the court to have passed upon it if it had been presented, and the case not being continued

without prejudice to such plea, it must be held, under the authority of article 1910, vol. 2, Vernon's Sayles' Revised Civil Statutes, and rule 24 for the government of district and county courts (see 142 S. W. xix), that the action of the court in striking out same was correct, and appellant therefore had waived his right to have the same passed upon at a subsequent term of the court. Under the authority of Harris Millinery Co. v. Melcher, 142 S. W. 100, which is on all fours with the case at bar, we hold that the action of the court in striking out appellant's plea of privilege was not error; and, appellant failing to answer to the merits, judgment was properly rendered against him upon the proof submitted.

If appellant or his attorneys had been misled as to the convening of the court by appellees or their attorneys, or any unfair advantage of any character taken of him to his prejudice with reference to such pleas, it might be reason for holding that the judgment was improperly rendered. It is true that appellant's counsel assert that they were under belief that the May term of court had adjourned before they filed their plea of privilege. There is nothing in the record, however, to show that such impression was based upon the answer of the clerk to their letter; nor was such impression created by any action or conduct upon the part of appellees or their attorneys; hence no ground of complaint on this score can be urged.

Finding no error in the proceedings of the trial court, its judgment is in all things affirmed.

Affirmed.

BRAZOS VALLEY TELEGRAPH & TELEPHONE CO. et al. v. WILSON.*
(No. 5552.)

(Court of Civil Appeals of Texas, Austin. Feb. 14, 1916. Rehearing Denied May 17, 1916.)

ELECTRICITY — 19(12) — MASTER AND SERVANT — 289(19) — INJURIES — ACTION — QUESTION FOR JURY — CONTRIBUTORY NEGLIGENCE.

In an action by lineman of telephone company against that company and an electric light company for injury from a live wire of the latter company, caused by the negligence of both companies, evidence as to his previous experience and warnings, by appearance of wire and shouts of others before picking up the wire to make the street safe, held to make the question of his contributory negligence for the jury.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. — 19(12); Master and Servant, Cent. Dig. § 1110; Dec. Dig. — 289(19).]

Appeal from District Court, McLennan County; Tom L. McCullough, Judge.

Action by Will Wilson against the Brazos Valley Telegraph & Telephone Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

Spell & Sanford, of Waco, for appellant Power & Light Co. Sleeper, Boynton & Kendall, of Waco, for appellant Brazos Valley Telegraph & Telephone Co. Williams & Williams and Marshall Surratt, all of Waco, for appellee.

KEY, C. J. Appellee Wilson brought this suit against the Brazos Valley Telegraph & Telephone Company and the Texas Power & Light Company, and obtained a verdict and judgment for \$7,000 as damages for injuries sustained by him by coming in contact with a wire charged with electricity near the intersection of North Sixth and Columbus streets in the city of Waco, in September, 1913, which wire belonged to the Texas Power & Light Company, and both defendants have appealed. For convenience the appellants will hereafter be designated in this opinion as the Light Company and the Telephone Company.

The Light Company is a private corporation engaged in the business of furnishing electricity for light and power purposes to the public generally in the city of Waco, and maintains a regular system of wires, strung upon poles along the streets and alleys of that city. The Telephone Company is a private corporation engaged in the telephone business in the city of Waco, and maintains a regular system of wires stretched upon poles along the streets and alleys thereof; and the wires of the two companies, at the time in question, crossed each other at or near the street intersection where the accident happened. The plaintiff charged in his petition that each and both defendants were guilty of negligence which caused their wires to come in contact, as a result of which a wire belonging to the Light Company, and charged with about 2,300 volts of electricity, was burned in two, and that one end thereof fell to the ground in a public street. The proof sustains that charge and justifies that portion of the verdict which found that the defendants were guilty of negligence which was the proximate cause of the plaintiff's injuries. In fact, the verdict in that respect is not contested in this court. Both defendants pleaded contributory negligence, and after the evidence closed each requested the court to instruct the jury to return a verdict against the plaintiff, and the refusal to give those instructions is assigned as error, and strenuously urged in printed brief and oral argument, the contention being that the testimony shows, as matter of law, that the plaintiff was guilty of contributory negligence. That question is not free from doubt and difficulty; but, after giving it careful consideration, the conclusion has been reached that the trial court ruled correctly when it declined to instruct a verdict for the defendants, and submitted the question of contributory negligence to the jury. While there was conflict in the testimony in reference to some other matters, the undisputed evidence

shows that on the occasion in question the plaintiff was employed by appellant Telephone Company as a lineman; that on the day of the accident the crew of which he was a member was engaged in working for the telephone company about one block away from where the wire of the Light Company fell in the street, and that some one notified the plaintiff and one of his collaborators named Geo. Reynolds that the wire in question had broken and was down in the street. Thereupon the plaintiff and his companion Reynolds went at once to the place designated, and soon after they arrived there Reynolds ascended a telephone pole and cut a telephone wire for the purpose of preventing a contact between it and one end of the broken light wire, which was suspended in the vicinity of the telephone wire. At about the same time the plaintiff, Wilson, ascended a pole on the opposite side of the street belonging to the Light Company, and from which the other end of the broken wire in question was suspended, for the purpose, as testified to by him, of removing that wire from the street. When he had reached a point somewhere between 6 and 10 feet from the ground, the plaintiff caught the broken wire with his left hand, upon which he had an ordinary glove, and attempted to cut it in two with a pair of uninsulated pliers, which he held in his right hand. The result was that he received a severe shock, which rendered him unconscious, caused him to become entangled in the broken wire, thereby sustaining severe burns upon his left arm and elsewhere. He fell to the ground, was rescued by others from contact with the wire and carried to a sanitarium, where ultimately it became necessary to amputate his left arm in order to save his life.

It would be a difficult matter to state in condensed form the reasons given by the plaintiff for attempting to remove the wire from the street, and we therefore quote as follows from his testimony as set out in the statement of facts:

"I was taking down some cable that morning. Mr. Gray put us to taking down some cable, and when we got the cable taken down, he wasn't anywhere around, and we were standing in under the awning out of the rain, down on Sixth street. I don't know where Mr. Gray was. About 20 minutes before that I seen him go in the house, I don't know whether he came out or not, down on Sixth street. It was about a block from where we were under the awning to Columbus street. We were on the left-hand side of Sixth street going out. While we were there under the awning some one came down the street and told us there was some wire down in the street. I disremember whether the man that told us that was walking or riding. He told Geo. Reynolds and myself. At that time Geo. Reynolds and I were within 5 or 6 feet of each other, standing out of the rain. We then came on up the street. Dave Gray was not there then. We came on up Sixth street towards Columbus street. We came on to the corner of Sixth and Columbus streets.

"I walked up there on the corner and there was a man and lady, I reckon there was a man and a lady in the buggy—vehicle there and the

horse scared—and they told me to clear the wire out of the street; asked me if I would get the wire out of the street; and I looked at the wire and started over to the pole to get it out of the street, but it was an insulated wire, so I climbed up the pole to take it out of the street, and I got hurt. There were other wires on the pole which I climbed up; there were some large wires running north and south on Sixth street. There was a transformer over on Seventh street down Columbus. I don't know where there was any other transformer. I don't know what size wire it was that was in the street, but it was a small wire, though. As to whether I saw the part of the wire that was on the ground, I just noticed the wire laying in the street, and seen it swinging from that pole; it was an insulated wire. I don't recall the shape the insulation was in, I just noticed it was an insulated wire. I did not know that the wire was charged.

"The wire which Mr. Williams now holds in his hand looks to be about the same size as the wire which was in the street, about the same size as a light wire that goes into a house. I understand that a wire that goes into a house carried 110 volts. I know that 110 volts of electricity won't hurt a man very much. The day before I dragged—I was breaking down some wire and it had slacked down onto the drop that was going into the house, and I felt something on it. I knew it was not the telephone, because it was cut loose and was dead, and it bound to have been down on that; I could feel it. Nobody told me how much voltage was on the wire that I dragged this one across. I have heard people say that there was 110 volts to light up a house.

"With reference to whether a big wire carries the most voltage or a small one carries the most voltage, my opinion is that the big wire does. At that time I thought the big wires carried the greatest voltage. I did not know whether the wire was apportioned to the voltage in size. Before I went up the pole I noticed there was a big wire up there, and seen the transformer down Columbus street. I thought if the wires would be charged at all, it was 110 volts, that transformer down there broke loose would be feeding that way. I noticed these other wires, and didn't see anything like electricity on this wire, I thought it would be safe it (if) I would go up the pole. I had my gloves on. I seen the big wires, and thought if there was any heavy electricity I thought it was on those wires. When I said I thought if (it) was feeding, I meant by that I thought that is the way the electricity was coming from. I thought it was coming from Seventh street. I thought the wire I was fixing to take hold of was dead.

"I do not know where Geo. Reynolds was at that time. I didn't look at the part of the wire that was on the ground long, I just glanced at the wire and started on to move it; the horse was scared at it, and I wanted to get it out of the way, so there would not be any runaway, or something. Yes; I thought it was an electric light wire. I was working for the telephone company. The reason I went there and went up on the electric light pole, I thought it was our duty; I thought probably our wires had caused the trouble and caused that wire to be down or something, and I thought it was my duty to take it out of the street so people could pass.

"Geo. Reynolds came up the street part of the way with me. I don't know how far he came. I don't know whether he was around close where I was or not. When we were coming up the street there we were on the left-hand side of the street coming this way, right at the corner of Columbus and Sixth streets. We were close to the corner. No one said anything to me; only this party in the buggy. It was a man that told me to get the wire out of the street. There might have been several people around there, but I don't remember seeing—I wasn't paying

any attention about it after this man called my attention to the wire. I then went on to take the wire out of the street, and went up the pole. I don't know whether I ever taken hold of the wire or whether it jumped onto me, or what happened. I went up the pole between 6 and 10 feet. I don't know whether I was going to drag the wire out of the street, or whether I was going to tie it up around the pole; I was going to try to get it out of the way so this man could get by. I thought the insulation was put on the wire for protection, to keep from hurting any one. I thought the higher the power the wire carried the better insulation it would have. I didn't think if I took hold of a 2,200 volt wire off of the ground that was insulated it would hurt me; I didn't know. I didn't think it would hurt; I thought the insulation was put there for that purpose. Q. I will ask you to state whether or not you would have taken hold of that wire if you had known it was charged with 2,200 volts if it was not insulated so as to protect you? A. No, sir. The reason I went up there to take that wire out of the street was because I thought it might cause trouble. I thought maybe it was a charged wire, or something might get into it. I thought if it had anything on it at all, it would not be but 110 volts; it being a little wire. I thought I could handle it if it was just 110 volts by being on the pole. I had dragged a wire across 110 volts the day before.

"After I got on the pole the last thing I remember was with reference to fastening myself to the pole. I had on climbers. 'Climbers' are spurs to climb poles with. They are fastened around the ankle, around the leg and strapped around, iron around the bottom of your foot. There is one on each foot. I also had a belt and safety. The belt is to carry the tools in. The safety belt goes around the pole and fastens in the belt; it goes around the pole each side and is fastened in the rings to my belt. I have one belt around my waist, then I have another belt I put around the pole and fastened on each end to the belt around my waist. I did that in this instance.

"I do not know whether I reached the wire the first time I attempted to or not. I do not know whether I attempted to reach it more than one time. I probably reached out to see whether I was high enough to reach it, high enough on the pole, something like that. When I stopped I remember putting my safety around the pole, and that is all I remember. I don't think I had any pliers in my hand, because I had just fastened my safety, and that is all I remember. Ordinarily I would have taken my pliers out before I got hold of the wire. I did not feel any electricity until I was done knocked. I do not remember the electric current hitting me. I just remember getting knocked; I couldn't tell whether it was somebody hit me or what it was. I do not know whether I had actually hold of the wire or not. As to what happened to me, I fell to the ground, so they say. I don't know anything about it; that is the last I remember being on the pole for 12 or 13 hours, probably longer. The next time I came to I was at the Provident Sanitarium. I would judge it was between 10 and 11 o'clock that this happened, I don't hardly know. I came to the next morning between 3 and 4 o'clock. The first thing that I knew I remember seeing a couple of boys that I knew.

"I know Bill Lofton. I saw him this morning. I do not know whether they were there at the time I fell. Bill Lofton at that time was working, I think, for the Texas Power & Light Company. I did not see him before I got hurt that morning. I know Guy Robinson. I did not see him before I got hurt. Nobody hollered at me loud enough for me to hear. I never heard anything. I had pretty good ears. * * *

"The electric wires on the top of pole No. 1, the one that I climbed, were a great deal bigger

in appearance than the wire which I was supposed to take hold of.

"I worked as lineman in the town of Marlin for the Southwestern Telephone Company. I worked for that company as lineman in Marlin about a month. I worked as a lineman at Yoakum. I worked for the Bell Telephone Company. I worked as lineman at Yoakum about a month. I strung wires out of Lampasas, just started there. I was working for the Bell Telephone Company then. I haven't worked in any other towns. I just go through there; go through other towns stringing wires. I hadn't done any construction work in these others; only strung wires through them. I strung wires through Moody, McGregor, and into Gatesville, through Bartlett, Holland, Granger, and several other towns. I was employed by the Bell Telephone Company about 3½ years, and had worked a short while for the Brazos Valley in this town, and a short while for the Western Union and the Sap (San Antonio & Aransas Pass Railway) Telegraph Company. Yes, I guess I worked about 3 years for the Bell Telephone Company. I think that Marlin, Yoakum, Moody, Gatesville, and Lampasas all have electric light systems. Marlin and Yoakum and Gatesville have. I guess the others have. They are little towns. I only worked through them in the day time. I wouldn't be for sure whether Moody has electric light system or not; I don't know. Yes; I am sure that Marlin, Yoakum, and Gatesville have. Yes, sir; I suppose there were electric light wires strung along the streets in Marlin, Yoakum, and Gatesville when I was working as a lineman stringing wires in and through those places. Q. Well, I will ask you if it is not a fact that at various points in those towns the telephone wires would cross the light wires or to the contrary, light wires cross the telephone wires. A. Something like house drops. Yes, there were leads down the streets of those towns. I don't know whether there were any primary wires there or not. I didn't know what primary wires were. If there were primary wires there, I suppose they were there to furnish the current or furnish lights throughout the residence part, I suppose that is what they are there for. Yes; I know it is necessary to get the electric current distributed through the town in order to furnish the lights for the electric power. I did not know that in doing that certain wires carry a heavier voltage than other wires. Yes, sir; I thought that wires lead off from the main leads into the house; thought that lead carried the heavier current of electricity. I thought where the main lead was was supposed to carry the heavy lead. I thought when that broke off that only had a small lead on it. In those various towns I did not know one wire from the other; only just house wires. I understood that the larger wires carried the heavier voltage. I did not think that the wires that run into the houses carried as much voltage as the larger wires. Yes; in the towns which I have worked I thought the larger wires carried the most voltage. I thought it was dangerous to come in contact with wires that carried heavier voltage.

"The voltage carried on the telephone wires for the companies which I have worked for was harmless. There was no shock or effect of the electric current felt at all only just in the ringing of the telephone, something like that. That would be just slight. It would not be dangerous. I had had no experience in the handling of electric light wires. I had never worked for a company that furnished electric lights. I knew that wires on which large currents were transmitted were dangerous to handle. Q. You ascertained that fact, or that information came to you, did it not, while you were working in Marlin and Yoakum and Gatesville and other places where there were electric light lines? A. Well, during the time I worked in Yoakum that was a dead town in the daytime—didn't have any current

on only at night—and at Gatesville the same way when I was there. I think Marlin was a live town during the daytime. I knew that when the electricity was turned on, the wires in Yoakum and Gatesville, that they were supposed to light up the town. I also knew that whenever the electricity was turned on from the power house or any of these light systems some of the wires were dangerous. Q. You were instructed or informed, were you not, in working as a lineman that whenever you crossed or came near the light wires of the respective electric light companies, why that you were to exercise caution and care and not come in contact with those wires, were you not? A. Only with the men, the boys we were working with. Q. They all recognized that, didn't they. A. Practically; yea, sir.

"We would avoid coming in contact with electric light wires, and that was because of the recognition of the danger of the electric current that was conveyed over the electric light wires. I had been in Waco for something like 16 days before this accident happened. Yes; I could say that during that time I was aware that electric light leads run up a large number, if not practically all, of the streets in the city of Waco. Yes; I was of the opinion that those carried dangerous currents of electricity. As to whether I knew that the wires here in Waco were charged practically the entire time, day and night, I didn't know about the residence part of town. I didn't know whether they were up in this part of town or not. I didn't know whether they could turn on the electric lights in the residences any time during the day.

"Yes; I have testified that I was under the impression that the wires that run into residences, the electric light wires that run into residences, carried 110 volts. As to what care I would exercise when I was working around those wires, when I would be working around anything like that, I would try to stay in the clear and keep in the clear and not take any chances. I took precautionary measures all the time from coming in contact with any light wires at all because of the recognition of the probable danger that would control.

"I had been working something like 2 or 3 or maybe 4 days on North Sixth street. I had worked up about that churchhouse or school buildings, negro school buildings, worked down this way to Columbus street. The negro church and schoolhouse is on the left-hand side of North Sixth street going up Sixth from Columbus. I don't think I had worked along below pole No. 6 on the west side of Columbus street at all. As to whether I had been informed as to the condition of the lead there as to whether or not the wires had been taken down south of that pole prior to the date of this accident, I don't think there had been any wires taken down. We hadn't taken any down across Columbus street. I do not undertake to tell the jury as a fact that there had not been any of the wires taken down south of that pole prior to the accident by somebody else. I know they were not, they were still there. The telephone wires on the west side of Sixth street south of pole designated as No. 6, which is located near the auditorium, and the cable were still up there when I got hurt. In my direct examination I stated that I had been engaged for a day or two prior to the date of the accident in taking down telephone wires on the west side of Sixth street and north of Columbus.

"We had taken the cable down on Sixth street coming this way. With reference to what point we had started and to what point we had taken them down, we started away up there by those negro churchhouses taking the cables down, and I disremember how far we come with the cable, but I know we were coming all the way with the wires and I think we were coming all the way with the cable. Q. I will ask you what is your recollection as to whether the

cable was ever taken down, whether you also took down the messenger wire from which the cable was suspended or left the messenger wire on the pole. A. Well, I don't think we taken down any messenger wire. At the time of the accident I think the messenger wire was still on the post. As to how far up Sixth street on the west side of Sixth street did the messenger wire extend, I guess it was run all the way through clean up to those churchhouses; we hadn't taken down any messenger wires; we had taken the cable off. They were going to put some new cable there. I am not sure that the messenger wire was intact all the way up the lead to at least up to the negro church. As to my being exact, I don't know. I couldn't say that the messenger wires were still intact from which we had taken down the cables; I know we taken down the cable way this side of the creek. I didn't take the messenger wire down, I don't know whether the rest of them taken it down or not. At times we would be separated, some on one end and some on the other end. Yes; I worked up to Columbus street and stopped. I don't remember whether the messenger wire was still intact on the poles north of the point where we stopped the night before the accident. I guess it was still there. No; I do not undertake to say to the jury that it was not there. I know the messenger wire was not taken down the same time the cable wire was. I was taking down cable that morning that I got hurt. We started to taking down the cable, that morning before I got hurt, across the creek. Yes; the morning of the accident we started to work taking down cable north of Barron's branch. We had taken the cable down this side of the creek there that morning. I know where the little market is. We had taken it down just north of that point. I think we had taken the cable down this side of the market the day before. We started across the creek to take down the cable the morning of the day of the accident. That was beyond the market, north of the market. No; I am not mistaken when I stated that we had taken cable down to a point this side of the market when we stopped the day before; there was some cable left up there, and he put us to taking that down. He said, 'Take that down.' In taking down the cable we were working south, this way. We were coming this way. As to whether the cable was in a continuous line or whether it had been cut, it had been cut; it was a cable left on the messenger. I think the cable had been cut about the third or fourth pole this side of the market there, somewhere along there. I don't know how far that would be on the other side of Columbus street; I don't know how many poles there are there. The cable had been taken down between Columbus street and the market before I got hurt. Q. When you left work the night before this accident, where was the cable suspended north of Columbus street? A. Well, if there was any there it would have gone on down close to the market there somewhere in two or three poles of the market. There was a can top there; I don't know whether there was any cable working out of that can or not. There had not been any cable removed south of the three or four poles the day before; that had been taken down about two or three spans at a time. Q. Then the cable had been taken down, all the cable north of the market had been taken down, to a point just a short distance to the north of the market? A. Except a little bit left up there the night before. Q. Then there was a piece of cable then from about the market down to where it was cut about three or four poles this side of the market that were suspended there that had not been taken down the day before? A. I understand the question all right, but I don't remember whether we taken that cable down before I got hurt or not; I don't remember whether it was taken down or still there.

"At the time I got the information that attracted my attention to Columbus street, the messenger wire was somewhere about the market, somewhere or probably across the street to an anchor pole; I don't remember whether they had taken the messenger down above there or not. I do not know who the man was that came to where Reynolds and I were standing and told us about the wire at Columbus and Sixth streets. As to whether he was walking or in a buggy, I could not say how he was coming; he was out in the street, and we were under the awning out of the rain. He said there was some trouble or wire down, 'You had better go down and see about it.' With reference to whether he was a man employed by the telephone company or by the light company, I could not say; I never paid any attention to him, I just heard the remark, and George said, 'Let's go,' and we started out. I had probably seen the man before. No; I did not recognize him as a man that I had seen before, because I never paid any particular attention. No; he did not come to me as any one in authority there at all. He just casually remarked that there was a wire down up there. As to whether I asked any question of Mr. Gray, he was not there. We were waiting on him then. Q. As a matter of fact, you had not spoken to Mr. Gray prior to the time, according to your testimony, that you started up towards Columbus street? A. No, sir; he put us—he give us a little job down there, and we had finished that, and he was gone. I didn't see him any more. I seen him go in a house. I don't know what he went for. I never noticed whether he came out or not. I saw him go in the house. We were standing down there close, and thought he would be back out and give us some more work to do. Before he came out we was notified about this trouble. When we left the place where we were at work when Mr. Gray left there, on North Sixth street, and came back to Columbus, I thought I was acting under instructions and directions of Mr. Gray, I thought he would be there. No; I did not see Mr. Gray. From the time I got the information and left there until the accident, I never had any conversation with Dave Gray. I never asked Mr. Gray whether I could come on down to Columbus street. I did not see Mr. Gray. Mr. Gray did not give me any directions to go down there.

"I do not know whether the party that told us about that wire being down in the street was acting for the telephone company or not. I did not ask him. I did not ask him if he was acting for the Texas Power & Light Company. The man just said there was some trouble up there, and we had better go up there and attend to it. Mr. George Reynolds was with me at that time.

"In coming back to Columbus street we were on the west side of Sixth street. I crossed the street right on the corner of Sixth and Columbus. The buggy was on Sixth street. I guess it was driving down Sixth street; I don't know whether they intended to turn up Columbus street or go on down Sixth street. As I turned the corner, I was kind looking around to the top of the pole and I heard this man say something about it, and I looked around and seen his horse was scaring, and he asked me if I would move that wire and let him get by. The horse and buggy were south of where Sixth street comes into Columbus street. They were just ready to cross Columbus street, right at it like. He was traveling out north, or going to turn up Columbus street, I don't know which. The man with the horse and buggy was south of where the wire was in the street. I was within 10 or 20 feet of the man and the buggy. As to how far the man with the horse and buggy was south of the wire, the horse was right upon it, and as soon as he seen it he jumped back and cut the wheel around in under the buggy; the horse was scared at it. He

happened right on it, and it scared him. I was just off of the corner of the sidewalk, part of the way in the street; just had come out of the street. I was still on the west side of the street—I was coming up from the north end of Sixth street. When I first noticed the wire it extended very near all the way across the street. With reference to where the end of the wire that was lying in the street from the west side of Sixth street, I never paid any attention to the end of the wire. I just glanced down at it, and seen the horse was scared at it, and I started on to move the wire. I don't know that I ever saw the end of the wire; I don't know that I paid any attention to it at all. I don't know how many feet it was from the pole which the wire was attached to to where it was broken. My idea would be that it was about 50 feet from the top of the post to the end of the wire; it must have been about 50 feet.

It is not a fact that there was a noise emitting from that wire that I heard. I never heard nothing. Yes, sir; my hearing was good. The wire was lying there in the street perfectly still. It was not moving; it was perfectly still. I did not see any sparks emitted from the wire. I did not hear any sound. As to how near to the wire I passed in going to the post, I guess I walked under the wire from where it was on the top of the pole. I walked right across the street to the pole. I was not aware that there was any electricity in the ground as I walked along there. I did not feel any effect at all. Yes, sir; I heard Mr. Robinson's testimony here yesterday. I never felt a thing, and never seen anything that indicated electricity.

"With reference to whether I thought it was a dangerous thing for me to undertake to handle an electric light wire, I did not think it was dangerous to handle that wire, because it was lying perfectly still. I never seen any electricity or nothing coming out from it. I didn't think it would be dangerous to handle that wire, because it was a small wire and insulated. I thought it was the same size wire and carrying the same current I dragged some wire over the day before. I thought if I could get on the pole, I could drag it out of the way or cut it off. I don't know whether my mind was to cut it off or drag it out of the way. I intended to tie it up around the pole or cut it off or drag it out of the street. I tell the jury that I did not think there was any danger in handling that wire. Yes; I thought I could pick that wire up and there would be no danger at all. The reason I did not cut it off in the street was because I thought I could get on the pole, and I wouldn't get away. It was like on the day before; if it had any it would be 110 volts. I did not realize that there was danger in handling 110 volts. I thought if there was anything at all on it, it would not be over 110, because I dragged a wire over same size the day before. I could feel it on there. I thought that probably maybe it was a dangerous wire anything like that I would be on the pole, and I would be safe. I thought when you are on the pole or had on gloves you would be safe in handling the wire. No; I didn't think 110 would hurt me at all. The ground was very muddy. It had been raining for several days; the ground was very wet. The pole was wet. The reason I did not pick it up out of the street, I thought I would take it and drag it back out of the street and tie it up around the pole. Maybe I didn't want to cut it off; something like that. I knew it wasn't our wire. Yes; I thought it was safer to be on the wood pole than on the ground; even if it was 110 I wouldn't get as much on the pole as I would on the ground. Yes; my going on the pole was in response to a suggestion that I would be in less danger in handling that wire on the pole than trying to handle it on the ground.

"I heard Mr. Robertson's testimony when he

said: I had my pliers in one hand and had taken hold of the wire with the other hand, and was reaching out with the pliers and was going to cut the wire. I don't know whether I was in the act of cutting the wire when I sustained the shock and was knocked to the ground. The last thing I remember after getting on the pole was putting my safety around the pole. I don't know whether I ever got my pliers or whether I ever taken hold of the wire, turned it loose and got it again, or what. I do not say as to whether I ever got in the act of cutting, or attempting to cut, that wire; I don't remember. The last thing I remember was fastening myself to the pole. No; it is not a fact that I had in my mind that I would climb up the pole and cut the wire with my pliers. I had in mind that I was going to remove the wire, drag it off, or cut it after I got it dragged out of the street out of the way of this man in the buggy. I might have cut the wire then or wrapped it up around the pole. It is not a fact that there was a noise emitting from the wire which attracted a large number of people there. I never heard it. My hearing was all right at that time. I never heard it at all. I did not see any people attracted there when I went up the pole. I hadn't noticed any one there except those two in the buggy as I was coming up North Sixth street, and when I went up the pole. Just before I reached out to take hold of the wire I did not see anybody else around there.

"I did not ask any one whether it would be safe for me to take hold of that live wire. No one told me to take hold of it. Yes; some one told me to take hold of the wire. The man asked me would I remove the wire so he could get by. That was the man in the buggy. I did not know who the man was. I have never seen him since to know him. I don't know whether he was connected with either one of these companies. I have never heard that he was.

"With reference to whether I stated in my direct examination that I was up pole No. 2 the night before the accident, I was up there that evening. I was up pole No. 7, the telephone pole just north of Columbus street the afternoon of the day before the accident. It must have been between 4 and 5 o'clock that I was up on that pole. I couldn't say whether it was nearer 4 o'clock or nearer 5 o'clock. We quit work about 5 o'clock that evening. Q. How many light wires were there running across Sixth street from pole 1, that is, the pole where this accident happened to pole 2, there of the light company at the corner of the auditorium? A. I couldn't say how many there were. I don't know.

"As to whether there were only two wires, there might have been two, but I don't know it to have been a fact. The wire that I saw, the wire of the size of this wire, ran across North Sixth street on the light wire, was such size that I thought had the same current that went into houses, 110 volts. I did not think there was any danger from 110 voltage in getting hurt. Q. What wires, if any, was Turner referring to that night, if you know, when he spoke about the telephone wires being in trouble? A. He was on the telephone and told Mr. Gray that he had better pull the slack out of those wires, if not it was liable to cause trouble. Q. What things did he refer to? A. That the telephone wires would be apt to get down on the light wires of the Texas Power & Light Company. One of those wires that were down the next day I thought it was 110 volt wire. I didn't think anything about it that evening. I guess that was the wire; I don't know whether that was the particular wire or not. There were wires running right across there. Yes; there were four or six cross-arms on that lead up North Sixth street. The messenger wire was underneath the cross-arm. As to whether it is a fact that the messenger wire ran a short distance under the lowest cross-arm or lowest

overhead wire of the telephone company at that point. I don't know what the distance was. Q. But a short distance below. I will ask you if it is not a fact that the light wire—light wires running across from pole 1 to pole 2—run between the lowest cross-arm carrying the overhead wires and the cable and the messenger wire from which the cable was suspended? A. No, sir; I think the wires run in between the telephone wires, some over it and some under it. I think it is a fact that it run through the telephone wires. The next telephone pole was shortly south of that. I think that the light wires run through about between the bottom arm and the next arm, something like that, about one arm wire under the light wire. As to whether I had ever observed the crossing of the light wires with particular care to ascertain the relative position of the wire, I hadn't worked on this side of Columbus street. I had not had to dodge those wires any, just worked up to them. I noticed the wires being out there.

"The telephone wires are fastened to the insulators on the cross-arms. As to whether I have had any information which I have gained by any personal experience as to how wires carrying current of electricity should be insulated in order to afford protection, only just hearing linemen talk. I have heard them say that the higher power the wire carried the better insulation they had. From my experience I knew nothing about how much insulation was necessary for a wire to have which carried a current sufficient to burn a light in order to protect one against handling. If you should attempt to cut a wire that was insulated, when you cut to the metal it would amount to something. No, sir; I don't think that I was undertaking to cut this wire. I was going to do something. I don't know whether I intended to cut the wire. I don't know what I was going to do. I intended to get it out of the way. After I got it tied, I don't know what I intended to do with it. I was just getting it out of the way so they could pass. * * * Q. During the time that you were engaged in constructing those telephone wires, didn't you frequently construct them in the same territory where electric light wires were? A. Well, yes; there would be wires strung around. In a good many places the telephone wires would cross the electric light wires. I knew those electric wires were dangerous to get against the wire, but I didn't think they were dangerous with the insulation. I thought the insulation was put there to prevent that. I did not know that there was more or less danger even with the insulation on them. I never had enough experience to know that. When I would happen where those electric light wires were, I would avoid coming in contact with them. I tried to stay away from them. The reason I did that was because the wires was nothing to me; I knew they were electric wires. Because they were electric wires I did not want to handle them. I had been told they were dangerous. I would handle them if it had been necessary to handle them; I thought the insulation was to keep the electricity. I knew they were dangerous if it wasn't for the insulation. I did not think they were even dangerous some times with the insulation. I don't know why I avoided coming in contact with them. I can't explain.

"I went to work the morning I was hurt about 8 o'clock, and worked up until about something after 9. I was standing down there, and somebody told me there was some trouble up at the corner of Sixth and Columbus streets, and I walked up there. George Reynolds went up there with me. Yes, he is called 'Little' George. I never knew him by the name of 'Shorty.' We called him 'Little' George all the time. He went by the nick name of 'Little' George. Little George and I walked up to the corner. I won't say the horse and buggy was standing there while we were walking down the street. I guess they had just drove in. Just as I walked

up, I wasn't paying any attention to what was in the street, and I looked around to see what I could see, and I saw the horse, and the man asked me if I would move the wire. The man asked me to come and move the wire. As to whether I saw the wire about the time the man spoke about it, I hadn't been paying any attention. I hadn't seen that until the man spoke to me. The man spoke to me, and asked me to come over and move it. I did it in order to accommodate him and to keep the horse from tearing up the buggy. I did it because he asked me to do it in order to keep the horse from turning the buggy over. I wanted to get the wire out of the street away from other people. I thought about that right then. As to what else was there for me to get it out of the way, I don't know, I didn't see any one else. I didn't notice any one else. I didn't think it was right to leave that wire lying there in the street, and that was my reason for moving it. I did not think it was right to leave that wire there in the street; those were the reasons for my doing that. I don't know they were the only reasons or not, I wanted to get it safe from everything and everybody. Yes; I wanted to take it out of the way of that man and to keep the horse from turning the buggy over. Those were my reasons. I don't know that there were other reasons. I don't know of any other reason. Yes; I thought I was doing the public a service and the telephone too, I was working to their interest. I was working to the interest of the telephone. I thought I was doing the telephone company an important duty. I went up that pole because I thought it was safer to be on the pole; if there happened to be any juice at all on it, it would be safer to be on the post than on the ground. I did not know it was dangerous. The reason I did not take it aside without getting upon the pole was because I did not want to. I wanted to take it out of the street and go up there and tie it upon the pole or something. I wanted to climb the pole. If there should be any electricity, it would be safer for me on the pole. I climbed the pole to move that wire. The reason I laughed was because you asked me the same question, and me telling you the same thing. As to why I did not move the wire out of the street without getting on the pole was because I thought that if there was any electricity on it, it would be safer on the pole. I wanted to get on the pole; in case there was any electricity it might not hurt me. I did not think there was electricity on it. I thought if there was, I would be safer on the pole. I thought if there was any electricity, it would only be 110 volts. With reference to why I did not move it from the ground if I thought that 110 volts would not hurt me, I did not want to get that much. No, sir; I didn't want to get that much even. Q. Did you think whenever you cut into that wire through the insulation with your pliers struck the wire that you would get a shock if there was electricity in that wire, or not? A. That is what I went on the pole for; I thought that would save me. I was on the pole and off of the ground. I didn't think it would hurt me. Yes; I thought if there was electricity on the wire, and when I cut through the insulation with my pliers the electricity would be communicated to me, if I was in connection with the ground. I did not think it would if I was on the pole. I did not know it would do it on that wet pole. I knew the pole was wet. No; I do not remember whether I actually caught hold of the wire. I don't remember whether I had my pliers in my hand or not. Yes; several other things might have happened just about that time that I did not remember. Yes, Little George could have been there in that neighborhood, but I did not see him anywhere. I don't remember seeing him. I don't think I had my pliers in my hand. I don't remember about Little George being right there. If Little George spoke to me just before I took hold of

the wire or got the shock, he did not talk loud enough for me to hear him. I never heard him. I am positive about that. I do not think he spoke to me. I don't think I could have forgotten it. If I had heard him, I would not have forgot. I certainly would have remembered it if he had spoken to me and I had heard him.

"I did not see any indication that there was an electric current in that wire when I got to the intersection of Columbus and Sixth streets and started towards that pole. I saw absolutely nothing. I did not see a spark; I did not see the wire move. I did not see any indication that it was live and had a current on it. Yes; the current was so strong that it knocked me off the pole to the ground. The wire was laying perfectly quiet on the ground. It was resting on the ground. It was muddy and wet there where the wire was lying.

"I did not stay at the corner of Sixth and Columbus long before I started up the pole, just a little while. I came up and looked around where the trouble was. I couldn't say whether I halted there a minute or two or a half of a minute. Yes; I halted there at the corner of Sixth and Columbus and looked around to see what I could see, and listening to see what I could hear. The first that attracted my attention was the horse and buggy, and the horse was shy and turning and cutting up, and the man asked me, 'Will you come and move this wire?'

"I had not mended any other light company's wire since I had been working for the telephone company. I had never had any occasion to. I had not handled any of the electric light company's wires at all since I had been working here for the telephone company. I had not helped to rearrange any of the light wires. The gang I was working with had not misplaced any that I know of, absolutely none, no, sir.

"When I climb a pole I look up. I thought a high-power wire had sufficient insulation on it to * * *. With reference to my working in different towns, and whether I know whether the old or new insulation, sometimes one insulation is good on a wire and sometimes it is bad. I have noticed stringy insulation on the wires; I guess weather-worn and rotten. I do not know whether this wire was that way or not. It would wear the insulation to drag a telephone wire across any other wire, because it would drag and wear the insulation off from the light wire.

"I was afraid to drag the wire across the electric light wire, because I was afraid to wear the insulation out, and when it came in contact with it it would charge the telephone wire."

J. B. Earle, manager of the Telephone Company, and an expert electrician, testified that a current of 110 volts of electricity is used to light ordinary residences, and that they used a No. 10 wire for that purpose. He also testified that at the place where the accident happened the ground slopes three ways, so that water would not stand in great volumes, but might collect and stand in the street, and that if the wire in question made a perfect connection after it fell, it might have remained still and not arced. And he further testified that if the wire in question had been feeding from Seventh and Columbus streets, the end which fell in the street would have been dead, which meant that it would not have been charged with electricity, and therefore the plaintiff would not have been injured.

Dave Gray, a witness for appellants, and an employé of the Telephone Company, testified that it was a custom existing between the two companies that when one interfered

with the wires of the other, it was the duty of the party interfering to correct the trouble, and that when one of his crew caused a trouble, he instructed his men to repair it or remove it, and that he had so instructed the plaintiff, he being the foreman under whom plaintiff worked.

Guy Robertson, an employé of the Light Company, who had been notified of the trouble and was going to see about it, testified that when he was 200 or 300 feet away, and just as plaintiff was in the act of trying to cut the wire, he hallooed at him not to do so.

Dave Gray testified that while he was going to the place, he saw the plaintiff on the pole, and called to him not to touch the wire; and George Reynolds, who was ascending the telephone pole across the street, testified that he hallooed to the plaintiff not to try to cut the wire, and to wait until they got a hand axe. But the plaintiff testified that he heard none of the warnings referred to.

So, it will be seen that upon the question of warning there was a conflict in the testimony, and therefore the trial court had no right to assume that the plaintiff was warned before he attempted to remove the wire. And the same may be said in reference to appellant's contention to the effect that the plaintiff must have known that the wire in question was charged with electricity, and therefore dangerous. Several witnesses testified that the wire was manifesting its vitality by writhing and twisting on the street, by making a popping noise, like a bunch of firecrackers, and by throwing off smoke and flames. If the plaintiff told the truth as a witness, none of the manifestations referred to were made after he reached the scene, or, if made, were not observed by him. It is true that his conduct, as well as his testimony, indicates that he thought the wire might have been charged with electricity; but he further testified that on account of the size of the wire he did not suppose that it carried more than 110 volts, which the testimony shows is not sufficient to cause serious bodily injury. He also testified that he thought that insulation would protect against injury on contact with a live wire, and further testified, in substance, that he thought that by getting off of the wet ground and placing his feet in contact with the wooden pole, he could thereby handle the wire in question without sustaining serious injury. Now, while some of his testimony, when considered in connection with the testimony of other witnesses, may seem to us improbable, it may be that his appearance on the witness stand, and his manner of testifying were such as to impress the jury with the belief that he was telling the truth. At any rate, while if the jury had reached the conclusion that he did not tell the truth in some of the matters referred to, such finding would not be set aside, still his credibility as a witness was a matter to be decided by the jury. And so it is, under well-settled rules of law,

that while this court, if required to decide the question of contributory negligence as an original proposition, might decide it otherwise as a question of fact, it does not follow that it should be held that the plaintiff was guilty of contributory negligence as a matter of law.

While not entirely analogous, there is some similarity between this case and *Temple Electric Light Co. v. Halliburton*, 186 S. W. 584, decided by this court, where the question of contributory negligence as matter of law is considered and discussed with some elaboration by Mr. Justice Rice, who prepared the opinion. It is a well-settled rule, announced by both text-writers and courts that, in all cases, and especially cases involving questions of negligence, the trial court should not direct a verdict unless the proof is so clear and strong as to leave no reasonable room for persons of average integrity and intelligence to draw different conclusions therefrom; and in at least one case our Supreme Court has held that a trial court should not give a peremptory instruction upon a question of negligence "except in cases where the evidence is so clear as to admit of but one answer to a rational mind." *Mills v. Railway*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497. The last-named case may state the rule too strongly, but the authorities are unanimous that, in order to justify a peremptory instruction, the evidence must be so strong as to leave no reasonable ground for divergent views among persons of average intelligence and fairness; but it seems to this writer that, as a logical result of that rule, if strictly adhered to, when a jury has passed upon a question of negligence and decided a particular way, that should be held to settle the proposition—that an appellate court should not hold the negligence involved to be a question of law upon the theory that there is no room for reasonable difference of opinion in reference to that question. A jury is supposed to be composed of men of average intelligence and fairness, and when they consider the testimony relating to a particular issue and decide it a particular way, and the members of an appellate court considering the same testimony reach a different conclusion, the finding of the jury and contrary finding of the appellate court would seem to demonstrate the fact that there was room for difference of opinion among fair-minded men of average intelligence and integrity. However, the courts do not so apply and administer the rule, but deal with it as stated by Judge Thompson in vol. 1, § 188, of his treatise on Negligence, as follows:

"It must be apparent that this rule in the concrete means no more or less than this: That when the fair-minded man on the bench thinks he is better capable of deciding the question than the 12 fair-minded men in the jury box, he will decide it without taking their verdict upon it. There are different ways of stating the doctrine, but they all come back to the conclusion just

stated: The judge will submit the question to the jury where he (the judge) cannot positively say that the plaintiff was guilty of contributory negligence; or where there is any doubt upon the subject (that is to say, doubt in the mind of the trial judge, or in the minds of the judges of the court of appeal); or, stated negatively, the judge is not warranted in withdrawing the question from the jury unless the proof of contributory negligence is so clear and decisive as not to leave room (in his opinion) for impartial and unbiased minds to arrive at any other conclusion."

In considering whether a question of negligence is one of law to be decided by the court, or one of fact to be submitted to the jury, it should be borne in mind that, as a general rule, the test by which to determine whether or not a particular act or omission constitutes negligence is speculative, indefinite, and flexible. In other words, with some exceptions, in determining whether or not the matter complained of constitutes negligence, the law requires the conduct so complained of to be compared with what the jury may believe would have been the conduct of a person of ordinary prudence under the same or similar circumstances. What such a person would have done under like circumstances cannot be determined like a problem in mathematics, but is a matter of speculation and conjecture based upon common knowledge and the observation and experience of those who are required by law to pass upon the question. And the same may be said in determining whether, under a given state of facts, negligence is a question of law or a question of fact. In other words, whether or not the testimony leaves room for difference of opinion among men of ordinary, or average, intelligence and fairness is largely speculative, because there is no scientific rule or absolute method by which to determine precisely how much intelligence and fairness is required to constitute the ordinary or average man. Therefore, in determining whether or not, in a given case, the testimony renders the issue of negligence a question of law to be decided by the court, or a question of fact to be decided by the jury, two indefinite and speculative standards are to be applied; one in relation to the question of negligence, and the other in determining whether or not the testimony leaves room for difference of opinion among persons of ordinary, or average, intelligence and fairness.

Keeping in mind the thoughts above expressed, and the fact that a jury of 12 men have decided that appellee acted as a person of ordinary prudence would have acted on the occasion in question, we are not prepared to say, as a matter of law, that the facts proved by undisputed testimony clearly show that he did not so act.

It may be conceded that this case is near the border line and within the twilight zone between what constitutes a question of law and a question of fact; but, after giving it careful consideration, we have reached the

conclusion that it was not a question of law, but a question of fact, and that the court did not err in refusing to instruct a verdict for the defendants.

On the subject of contributory negligence the court gave fair and reasonably full instructions, which required the jury to decide whether or not the plaintiff was guilty of negligence in attempting to remove the wire from the street in the manner in which he attempted to do so; and we are not prepared to say that the verdict, finding that he was not guilty of such negligence, is not supported by testimony.

There are some other questions presented in appellants' briefs, all of which have been duly considered and are decided against appellants.

No reversible error has been shown, and the judgment is affirmed.

Affirmed.

SHEAR v. BRUYERE. (No. 5532.) *

(Court of Civil Appeals of Texas. Austin.

April 5, 1916. Rehearing Denied
May 17, 1916.)

1. CONTRACTS \S 332(1)—ACTION—SUFFICIENCY OF PETITION—DEFINITENESS.

In action for extra services in superintending building, petition alleging it would have taken 8 or 9 months to perform the work as originally planned and specified, whereas it required 18 to 19 months because of the alterations, *held* sufficiently specific.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1616-1618, 1619 $\frac{1}{2}$, 1620; Dec. Dig. \S 332(1).]

2. CONTRACTS \S 232(3) — EXTRA WORK — BUILDINGS—CONTRACTS TO SUPERINTEND.

In such action plaintiff could recover reasonable compensation for extra services in superintending the building and additional improvements, performed at defendant's assistance, if such extra services were not provided for by his contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1075 $\frac{1}{2}$, 1077, 1087, 1088, 1092; Dec. Dig. \S 232(3).]

3. CONTRACTS \S 346(3)—BUILDING CONTRACT — ACTION—ISSUES, PROOF, AND VARIANCE.

In an action for extra services in superintending building, where plaintiff sues therefor in the alternative upon either express or implied contract, evidence as to reasonable value of such services is admissible.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1719; Dec. Dig. \S 346(3).]

Appeal from District Court, McLennan County; Tom L. McCullough, Judge.

Action by E. H. Bruyere against H. H. Shear. From a judgment for plaintiff, defendant appeals. Affirmed.

J. D. Williamson, of Waco, for appellant. S. E. Stratton and J. N. Gallagher, both of Waco, for appellee.

RIOE, J. About the 1st of July, 1909, appellant, who contemplated the erection of a residence at Fifteenth and Columbus streets in the city of Waco, employed appellee to superintend the construction thereof in ac-

cordance with plans and specifications prepared by M. W. Scott, architect. During the course of the construction much extra work was done in connection with said building, as well as constructing numerous other improvements on said lot, not originally contemplated by the plans and specifications, and this suit is brought by appellee to recover extra compensation for additional personal services in superintending same, alleging that at the time of making the contract appellant represented to him that the residence was to be erected in accordance with such plans and specifications, and that he contemplated that the building would cost from \$20,000 to \$25,000, whereupon he entered into a contract with appellant by which he agreed to perform the service of superintending same for the sum of \$1,500, but alleging that it was expressly understood that, in the event the building should cost more than \$25,000, then appellant agreed that he would pay an additional compensation to him, commensurate with the increased cost of the building. He further alleged that during the construction of such work appellant made many additional alterations and charges therein, all of which appellee was called upon to and did superintend, the details of which were specifically set out, and alleged that he was likewise called upon to superintend the construction of various other improvements on appellant's lot, among others, a barn, garage, servant's house, and numerous other improvements, which were likewise specifically set out in the petition—alleging that the work could and would have been completed within a period of 8 or 9 months, if done in accordance with the Scott plans and specifications, but that it in fact took from 18 to 19 months to complete same, all of which was rendered necessary by reason of such alterations and additions; that the total cost of the residence and improvements amounted to the sum of \$50,000, whereby he was entitled to the additional sum of \$1,500, as per contract; or, in the alternative, for the sum of \$1,500 for the erection of the residence and the reasonable value of his time, labor, skill, and attention to such additional work, which he alleged was of the value of \$1,500. He further alleged that the other improvements outside of the residence were not embraced in the contract, and that if for any reason he should be denied pay for them and the outside work at the rate of 6 per cent., as prayed for, then that he was entitled to receive pay for the reasonable value of his services, which he alleged to be \$700.

As shown by his brief, appellant answered, admitting the employment of appellee as alleged, and that he superintended the erection of the buildings and improvements constructed by him, and likewise admitted that all of such improvements cost about \$50,000,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

and that some changes and alterations were made in the residence during the time of erection and construction, but denied that he had ever represented to appellee that such improvements would only cost \$25,000; that he agreed to pay appellee the sum of \$1,500 for superintending the work, and \$200 as additional compensation for the services for the extra work, which was agreed to by appellee, all of which was paid by him to appellee, who accepted the same in full payment for his services, whereby he did not owe him anything. He further pleaded that a number of the items which appellee alleged were extras were embodied in and called for by the plans and specifications, for which appellee was not entitled to additional compensation, and that the changes and alterations in the residence were not of such a character as to increase the services of appellee or lengthen the time for the erection of the building, and that the work and labor done in such changes were performed by contractors and laborers hired and paid by appellant to perform same, causing the expenditure of no additional time or labor on the part of appellee, for which reason he had no claim or demand upon appellant therefor.

The case was submitted to the jury on a general charge, and a verdict (which finds support in the evidence) was returned in favor of appellee for the sum of \$1,300, upon which judgment was entered, and from which this appeal is prosecuted.

[1] A special exception was addressed to the petition on the ground that it failed to allege the increased cost of such extra work and the extra time necessarily spent on such work or the value thereof. This exception was overruled, which action of the court is assigned as error. In suits of this character we think the petition was sufficiently specific. It would have been impracticable and unnecessary to set out, with more minute detail, the time required and the cost of making each of the many changes, alterations, and additions, as well as appellee's services rendered in connection with such changes. Appellee did allege that it would have taken from 8 to 9 months to perform the work in accordance with the original plans and specifications, whereas it required from 18 to 19 months by reason of the alterations and additional work. We think this was all that was necessary. See *Shook v. Peters*, 59 Tex. 395; *Wilkins v. Ferrell*, 10 Tex. Civ. App. 231, 30 S. W. 450-451; *Stuart v. Broome*, 59 Tex. 468; *Chandler v. Meckling*, 22 Tex. 36 to 42.

[2] The second, third, fourth, and fifth assignments of error might be disregarded by us, because the action of the court in giving the charge complained of, as well as refusing the special charges, was not properly excepted to as required by law. See *Brooke Smith Co. v. Dennis*, 175 S. W. 807, St. Louis S. W. Ry. Co. v. Wadsack, 166 S. W. 42, G., O. &

S. F. Ry. Co. v. Loyd, 175 S. W. 721, and *Floegge v. Meyer*, 172 S. W. 194.

But, waiving this failure on the part of appellant, we think it is only necessary to say that no error was committed by the court in its main charge, as complained of in the second assignment, because there was ample evidence that warranted the court in giving it. This charge permitted the jury to render a verdict for appellee for reasonable compensation for the extra services performed in superintending the building and additional improvements, if they should believe that payment for such extra services was not provided for by the contract, provided same had been performed at the instance of appellant. See *Smith v. Bruyere*, 152 S. W. 813 (and authorities therein cited), where it was held that, notwithstanding plaintiff expressly contracted to superintend the construction of a building in consideration of a lump sum, still, if the owner made changes during the progress of the work, requiring longer time to complete the building than originally contemplated, and the work was done with the owner's knowledge, plaintiff could recover extra compensation for such additional services. We have examined the line of authorities cited by appellant, but deem them inapplicable under the authority of the above case, which we believe announces the correct doctrine.

The third assignment urges that the court erred in failing to give special charge No. 1, as follows:

"I charge you that no evidence was introduced as to the cost of any of the changes or alterations made in said building, and there is no evidence as to its requiring any additional time in the completion of said building by reason of making said changes or alterations. You are therefore instructed to find for defendant."

This charge was properly refused (1) on the ground that it was equivalent to a peremptory instruction in favor of appellant, and was not authorized under the evidence; (2) because there was ample evidence to show that the extra work and improvements required extra time and attention on the part of appellee, and the proof established the reasonable value thereof.

The fourth assignment urges that the court erred in failing to give special charge No. 2, as follows:

"I charge you that if you find from the evidence that the plaintiff under his contract was to devote all of his time to superintending the Shear house and the Smith house during the time of their construction, and you further find that the changes and alterations as made, under the evidence, did not increase the time for completion of the job, or should not, with reasonable diligence have increased the time for the completion thereof, then you will find for defendant."

Appellee insists that this charge was properly refused, because all of the evidence showed that the changes, alterations, additions, and additional buildings and improvements did necessarily increase the time for the completion of the entire job, and also re-

quired skill, attention, and labor on the part of appellee, for which he is entitled to be compensated, regardless of whether additional time was required or not. We agree with this contention, and hold that the charge was properly refused, because the features there-in presented were fully covered by the main charge.

[3] The sixth assignment, in effect, urges that the court erred in permitting the witness Bruyere, over appellant's objection, to testify as to the reasonable compensation or value of the services of a supervisor for the erection and construction of a house, because it is contended that the suit was based solely upon a contract for such services, and therefore it was not permissible to show what the services were reasonably worth. This testimony was properly admitted, because appellee had sued in the alternative on a quantum meruit. Furthermore, the witness Harrison, without objection, was permitted to give like testimony. This being true, error cannot be predicated thereon. See *M., K. & T. Ry. Co. of Texas v. Sullivan*, 157 S. W. 193; *Mott v. Spring Garden Ins. Co.*, 154 S. W. 658; *Lof-tus v. King*, 23 Tex. Civ. App. 36, 56 S. W. 109; *G., H. & S. A. R. R. Co. v. Heard*, 91 S. W. 371.

The seventh, eighth, ninth, tenth, and eleventh assignments of error complain of the verdict of the jury as being contrary to the law and the evidence. These were matters for the consideration of the jury. The court, in a clear and admirable charge, presented both appellant's and appellee's theory of the case, and, there being evidence to support their verdict, we do not feel called upon to set it aside.

The remaining assignments have been considered, and are regarded without merit, for which reason they are all overruled.

Finding no error in the proceedings of the trial court, its judgment is affirmed.

RICE v. SCHERTZ. (No. 5679).*

(Court of Civil Appeals of Texas. San Antonio.
May 17, 1916. Rehearing Denied
June 14, 1916.)

1. LANDLORD AND TENANT §111 — FORFEITURE OF TENANCY—ASSERTION OF ADVERSE TITLE.

A tenant who disavows his landlord's title and asserts title in himself forfeits his rights as a tenant and becomes a mere trespasser.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 836; Dec. Dig. §111.]

2. TRESPASS TO TRY TITLE §41(1)—DEFENSES—SUFFICIENCY.

In trespass to try title, evidence held sufficient to sustain a verdict for plaintiff, where defendant had repudiated the contract of tenancy under which he claimed lawful possession, and thereafter had asserted adverse title.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 62; Dec. Dig. §41(1).]

Appeal from District Court, Caldwell County; Frank S. Roberts, Judge.

Action by William Schertz against Emmett Rice. Judgment for plaintiff, and defendant appeals. Affirmed.

S. R. Graves and Monroe & Richards, all of Lockhart, for appellant. Jeffrey & Field-er, of Lockhart, and S. S. Searcy and C. C. Clamp, both of San Antonio, for appellee.

FLY, C. J. This is an action of trespass to try title to 3,846 acres of land out of the Barnard Klecamp survey in Caldwell county, Tex., instituted by appellee against appellant. Appellee also applied for and obtained a writ of sequestration and took possession of the crops on the land. Appellant disclaimed having possession of any except 160 acres of the land, and claimed possession of that under a rental contract for the year 1913, and "that at the time this suit was brought defendant was asserting—no claim nor title to the said land and premises, as owner of same, except under his rental contract, as aforesaid, and as tenant only." He sought to recover damages for the wrongful and malicious issuance of the writ of sequestration. The cause was tried by jury, and resulted in a verdict and judgment in favor of appellee for the land sued for, and against appellant on his cross-action. The cause was submitted to the jury on three special issues, two of which were as to appellant's repudiation of a compromise of an action of forcible entry and detainer, made by his attorney, said action having been instituted by appellee in May, 1913, and an assertion of title to the land. The jury found that appellant did repudiate his agreement to acknowledge the ownership of appellee and to surrender possession of the land on December 1, 1913, and that he asserted title to 160 acres of the land just prior to August 16, 1913, when this suit was instituted.

The facts clearly show that appellant was on the land in 1912, asserting title and ownership to the same, that appellee, through an action of trespass to try title, recovered the land from appellant, and he was permitted to remain on the land, upon promising to work the land as the tenant of appellee and sign a written contract and acknowledgment of his ownership. A written agreement to this effect was presented to appellant in January, 1913, which he failed and refused to sign and began to set up a claim of ownership to the land. Thereupon, in May, 1913, appellee brought an action of forcible entry and detainer against appellant, but under an agreement with appellant's attorney, appellant was to be permitted to stay on the place until December 1, 1913. Appellant at once repudiated that agreement and asserted title to the land. He said he would not give up the place; "that he had not had a fair deal, and that the lawyers and judge had sold him

out; and that he had gotten a good lawyer now; and that he was going to hold the place." After the forcible entry and detainer suit went against him and the agreement as to his remaining on the land until December, 1913, by paying the rent, had been made he said: "Well, I never told Ellis to sign that and I am not going to abide by it." That was in July, 1913. He was claiming the land at that time. He promised to sign the lease contract in January, 1913, but afterwards refused to do so. He paid no rent for 1912 or 1913. The evidence is conclusive that appellant was asserting title to the land until this suit was instituted in August, 1913, and, when employed after the crops were sequestered to assist in gathering the same, he sold some of the crop and appropriated the money.

[1] The agreement in January, 1913, with appellant was that he might stay on the place and cultivate the land if he would sign a certain lease contract. This he refused to do, and asserted adverse title to the land. At all times during the year (1913) that he was on the land he was a trespasser, and nothing more. The relation of landlord and tenant never at any time existed between appellee and appellant. The creation of that relation depended on the execution of the written contract, which appellant refused to execute, and repudiated any tenancy. He produced the crop after such repudiation, and while asserting title to the land.

Appellant seeks to invoke the contract made by Ellis as attorney for appellant after the suit of forcible entry and detainer had been filed as his authority for being on the place, but he at once repudiated that agreement, denounced his attorney for executing it, and stated that he was not bound by it. At no time was he in lawful possession of the land, for his tenancy and right to possession were to date from his execution of the lease contract, and that was repudiated by him. He did not at any time expect to sign the contract for he never read it to ascertain its contents. He evidently intended from the first to defy appellee and contest his title to the property. He was from the first an aggressive trespasser, boldly asserting his right and title to the property. He was notified that he could not stay on the place when he refused to sign the contract, and knew that he had no right to plant a crop on the place. He did not invoke a tenancy to justify his retaining possession of the place, and he had no right to any crops raised on the place. He terminated any tenancy he may have had by repudiating it and claiming adverse title to his landlord. *Calhoun v. Kirkpatrick*, 155 S. W. 686.

What conduct upon the part of a tenant towards a landlord shall be considered an adverse holding to the landlord depends on the peculiar facts and circumstances; but it is the rule that when a tenant disavows his landlord's title and claims the premises for

himself or some one else, he thereby forfeits his lease and title. *Underhill, Landlord and Tenant*, pages 968, 969, § 579. In the case of *Turner v. Smith*, 11 Tex. 620, it was held:

"Yet, where the tenant disclaims to hold under his lease, he becomes a trespasser, and his possession is adverse, and as open to the action of his landlord as a possession originally acquired by wrong. The relation of landlord and tenant is dissolved, and each party is to stand upon his right."

In the case of *Wilkey Lodge v. City of Paris*, 31 Tex. Civ. App. 632, 78 S. W. 69, it was held:

"The title to the lots in controversy is in appellant, and if, as alleged in the petition, the city has repudiated the lease, abandoned its rights thereunder, denied the title of appellant and asserted title in itself, then its possession has ceased to be rightful, and appellant is entitled to the relief sought."

[2] After the judgment in the first action of trespass to try title, brought by appellee against appellant, the latter was a trespasser upon the land, because he was told he could not remain upon the land unless he signed a written lease contract. That he refused to do, and claimed the land which it had been adjudicated he did not own. As said in *Love v. Perry*, 111 S. W. 203, a similar case to this:

"The judgment was for the land, which included the crops standing thereon that had not been severed from the land."

The cases cited by appellant have no applicability to the facts of this case. The cases supposed by appellant are not like the one made by the facts of this case. Appellant was never in lawful possession, but if he was in such possession in January, 1913, he repudiated the title of his landlord shortly thereafter, and asserted title in himself. He at once became a trespasser, and continued a trespasser while planting and cultivating the crop.

Not only did appellant repudiate his lease for some future date, but for the present and all times, and the language used by the Supreme Court in *Kilgore v. Baptist Association*, 90 Tex. 139, 37 S. W. 593, is peculiarly appropriate, where it is held:

"The intention to abandon the contract at some future date is no breach of it, but, when that intention is declared in positive terms and unconditionally, it has the effect, in so far as the promisor is able to do so, to repudiate the contract itself and to terminate the contractual relations between the parties."

If appellant was lawfully in possession of the land under a contract in the early part of 1913, but repudiated it, he was a trespasser, and the court did not err in refusing to submit the first issue presented by appellant. The issue was improperly drawn because it ignored the repudiation by appellant of his tenancy.

The fourth and fifth assignments of error are without merit, and are overruled, and the sixth assignment is too complicated and multifarious to be considered.

The judgment is affirmed.

JACOB V. HOUSTON ELECTRIC CO.
(No. 593.)

(Court of Civil Appeals of Texas. El Paso.
May 25, 1916. Rehearing Denied
June 15, 1916.)

1. **STREET RAILROADS** \S 112(3)—**ACTIONS FOR INJURIES—BURDEN OF PROOF—NEGLIGENCE.**
In an action for personal injuries caused by defendant's street car striking plaintiff's automobile, where the only act of negligence charged was discovered peril, the burden of proof was on the plaintiff to establish that the employees of the company actually had knowledge of plaintiff's peril and that they did not exercise reasonable care to prevent the injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. \S 227, 228; Dec. Dig. \S 112(3).]

2. **TRIAL** \S 139(1)—**INSTRUCTED VERDICT.**

In an action for personal injuries caused by defendant's street car striking plaintiff's automobile, where there was no evidence tending to prove the only issue to be submitted to the jury, the court did not err in instructing a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 332, 333, 338-341; Dec. Dig. \S 139(1).]

Appeal from Harris County Court; Clark O. Wren, Judge.

Suit by Howard Jacobo against the Houston Electric Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Stanley Thompson, of Houston, for appellant. Baker, Botts, Parker & Garwood and R. C. Patterson, all of Houston, for appellee.

HARPER, C. J. Howard Jacobo brought this suit against the Houston Electric Company for damages on account of injuries to his automobile and his person, occasioned under the following allegations of fact: That on or about July 23, 1914, plaintiff was the owner of a Ford automobile. That he was passing along Main street, in Houston, Tex., in a southerly direction toward Franklin avenue, which intersects Main street. That when he approached near to defendant's street railway track, where it turns on Franklin, he stopped for the purpose of allowing foot passengers to pass across the street in front of him, as it was necessary for him to do in order not to run over or upon and injure them. That while he was so standing still in said position, one of defendant's cars, being then operated by the agents and servants of defendant, came along Main street, going toward Franklin avenue, and they carelessly and negligently ran the street car against plaintiff's automobile, and injured same and himself in person. That the defendant and its officers were guilty of negligence, in that they saw, or could by the exercise of reasonable diligence have seen, and discovered the position, danger, and peril of plaintiff. And he further charged that the servants did discover plaintiff's peril in time to have prevented the collision and injury, etc. Defendant answered by general denial, contributory negligence, etc. Tried with jury. At the close of the testimony, the

court instructed a verdict for defendant, from which this appeal is prosecuted.

[1, 2] The appellant presents his case for review upon one assignment of error, viz., that, there being evidence to show negligence upon the part of the street car company, it was error to instruct a verdict. The only act of negligence charged was discovered peril. The burden of proof was upon plaintiff to establish that the employees of the company actually had knowledge of plaintiff's peril, and that they did not exercise reasonable care to stop the car and prevent the injury before he is entitled to recover (T. & P. Ry. Co. v. Breadow, 90 Tex. 31, 36 S. W. 410); and as to this there is a total lack of proof, but, on the other hand, plaintiff testified:

"I am not sure the motorman saw me. I do not suppose he saw me. I do not know whether he did or not. I saw him very plainly. He was not looking at me. I did not see him looking at me at any time while I was standing there. I could not say that he did see me, or did not see me, either way."

And there is no other evidence that the motorman discovered plaintiff's peril. The motorman testified that he did not know that he had struck plaintiff's car until afterwards. Therefore there is no evidence which tends to prove the issue to be submitted to the jury, and, the trial court did not err in instructing a verdict.

The judgment is therefore affirmed.

GENSBERG v. NEELY. (No. 593.)

(Court of Civil Appeals of Texas. San Antonio.
June 7, 1916. Rehearing Denied
June 27, 1916.)

1. **PLEADING** \S 104(2)—**PLEA OF PRIVILEGE—SUFFICIENCY.**

Defendant's plea of privilege to be sued in the county of his residence, complying in all respects with Rev. St. 1911, art. 1908, was sufficient, though it did not allege that the allegation of plaintiff's petition that the suit was based upon a written contract to be performed in the county of suit was fraudulently made to confer jurisdiction upon the court, as the privilege to be sued in the county of one's residence is dependent solely upon the facts, and not upon whether plaintiff acted in good faith in stating the facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 215; Dec. Dig. \S 104(2).]

2. **VENUE** \S 7—**RESIDENCE OF PARTY—PLEA OF PRIVILEGE.**

Where a written contract was made for the delivery of apples in Hays county, where the seller did not reside, and, after inspecting, the buyer found that the apples were defective, whereupon he called the seller over the telephone, who agreed to make good the damage if the buyer would accept the shipment, which the buyer did, in the buyer's action for breach of the agreement to make good the damage, brought in Hays county, the seller's plea of privilege was properly sustained.

[Ed. Note.—For other cases, see Venue, Cent. Dig. \S 13-16; Dec. Dig. \S 7.]

Appeal from Hays County Court; J. R. Wilhelm, Judge.

Action by L. Gensberg against R. P. Neely. From an order sustaining plaintiff's plea of privilege, plaintiff appeals. Affirmed.

Barber & Johnson, of San Marcos, for appellant. R. E. McKie, of San Marcos, for appellee.

MOURSUND, J. L. Gensberg sued R. P. Neely, alleging that on or about February 18, 1915, plaintiff and defendant entered into a written contract, evidenced by certain telegrams, whereby defendant contracted to sell, and deliver to plaintiff at San Marcos, a car of apples; that defendant shipped a car of apples which arrived at San Marcos on or about February 23, 1915, and drew on plaintiff for \$285.76, accompanying same with an order on the railroad company for the car of apples, which was to be delivered by the bank upon payment of draft; that before paying the draft plaintiff was permitted to inspect the apples, and found they were not in a sound condition; that thereupon plaintiff advised defendant by telephone of the condition of the apples, and defendant requested plaintiff to receive the apples and "to handle and dispose thereof for the account of defendant to the best advantage practicable," and agreed that he would repay plaintiff all loss and expense he might sustain by reason of the apples "not being of the condition and quality which plaintiff had contracted to buy from defendant, and such loss and expense as plaintiff might sustain in the effort to dispose of said apples for the account of the defendant"; that, acting upon such request and relying upon defendant's promise and assurance, plaintiff paid the draft and the freight on the car, received and disposed of the apples for the sum of \$303.10; that his time and services were worth \$50; and that, if the apples had been such as plaintiff was entitled to receive under his contract, they would have been worth \$567.05 at San Marcos. Plaintiff sued for \$313.95, the difference between said sum of \$567.05 and the amount received for the apples, less the \$50, charged for time and services. Defendant filed a plea of privilege to be sued in Tarrant county, the county of his residence. In this plea he expressly denied that he had contracted in writing to perform or pay the claim or obligation sued on in the county of Hays, and alleged that none of the exceptions to exclusive venue in the county of one's residence mentioned and specified in article 1830 or article 2309, Revised Statutes of Texas, exist in this cause. Upon a trial before the court evidence was adduced in support of the plea of privilege, and it was sustained. Plaintiff appealed from the order sustaining such plea.

[1] Appellant contends that the plea was insufficient, because it failed to allege and prove that the allegation in plaintiff's petition to the effect that the suit is based upon a written contract to be performed in Hays

county was fraudulently made for the purpose of conferring jurisdiction upon the county court of Hays county. This contention is without merit. The plea complied in all respects with the requirements specified in article 1903, Revised Statutes of 1911. The privilege to be sued in the county of one's residence is dependent upon the facts, and not upon whether plaintiff acted in good faith in misstating the facts. *Hilliard Bros. v. Wilson*, 76 Tex. 183, 13 S. W. 25; *Railway Co. v. Childs*, 40 S. W. 41; *Coal Co. v. Luna*, 144 S. W. 723; *Weller v. Guajardo*, 174 S. W. 673; *Holmes v. Coalson*, 178 S. W. 635.

The first and second assignments of error are overruled.

[2] Appellant also contends that the uncontroverted evidence shows there was in fact a written contract entered into, as alleged in plaintiff's petition, and that such contract was to be performed in Hays county, and therefore suit was properly brought in Hays county. It is true that the evidence shows that a written contract had been entered into to deliver a car of apples at San Marcos, but the suit was not based upon such contract. Plaintiff's petition shows that he made a verbal contract, by telephone, with defendant, after refusing to accept the car, by which plaintiff was to sell the apples on defendant's account, etc. His testimony is to the effect that he refused to accept the car, and thereupon defendant proposed that plaintiff should accept the car, sell same for the best prices he could get, and defendant would make good plaintiff's loss on the same. Defendant testified the car was not shipped pursuant to the agreement evidenced by the telegrams, which agreement was for certain kinds of apples at the price of \$1.79 per hundred; that the apples offered him, out of which he expected to fill plaintiff's offer, proved to be in bad condition, so he did not accept them; that about six days later plaintiff asked him, over the telephone, about the apples, and he told plaintiff why he did not ship them, and offered plaintiff a mixed car of apples at \$1.80, and plaintiff instructed him to ship the same immediately. This was done, and he sent plaintiff a bill on February 19, 1915, showing the kinds and quantity of apples shipped as well as the price. He testified, further, that on February 23, 1915, he had another conversation with plaintiff over the telephone, in which plaintiff stated the car had arrived, that he had inspected it and found the Ben Davis apples badly damaged, and said he would not accept the car unless defendant would agree to make good the damage on the Ben Davis apples; that defendant agreed to do this, and plaintiff accepted the car. The evidence supports a finding that this car was shipped under a verbal contract, and that it was the intention of the parties to substitute for plaintiff's right to sue for damages for breach of such contract a new obligation on the part of defendant, namely, to pay plaintiff such

SUCH as he might lose by taking the car of apples and selling the same for the best prices obtainable. If the obligation to deliver a car of apples of a certain quality had been evidenced by writing, it is clear that such obligation was canceled by the substitution therefor of the specific obligation to make good all losses on a certain kind of apples or on all the apples, as the case may be; the parties having agreed in their testimony, except as to the extent of the new obligation. The obligation to make good the loss is the one which is the basis of the suit, and it is not in writing, and therefore the court was correct in sustaining the plea of privilege. *Wettermark v. Burton*, 30 Tex. Civ. App. 509, 70 S. W. 1029; *Kramer v. Lilley*, 55 Tex. Civ. App. 339, 118 S. W. 735; *McCamant v. Webb*, 147 S. W. 693.

The judgment is affirmed.

PULLMAN CO. v. MOISE et al.
(No. 7577.)

(Court of Civil Appeals of Texas. Dallas.
June 8, 1916.)

1. CARRIERS — SLEEPING CAR — LOSS OF WEARING APPAREL — QUESTION FOR JURY — NEGLIGENCE.

In an action for the loss of wearing apparel stolen from a sleeping car berth, and for consequent mental anguish and embarrassment, evidence held to make defendant's exercise of reasonable care in guarding the property a question of fact for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1590-1600; Dec. Dig. ¶417.]

2. TRIAL — INSTRUCTIONS — PROVINCE OF JURY — WEIGHT OF EVIDENCE.

In an action for damages for the loss of wearing apparel stolen from a sleeping car berth, and for consequent mental anguish and embarrassment, an instruction, after defining negligence, that if the jury found and believed that defendant was guilty of negligence in failing to properly watch and guard the plaintiff's property against theft, and such negligence was the proximate cause of plaintiff's loss, to find for plaintiff, indicated the court's opinion that the evidence showed a failure to properly guard the property against theft, and was an instruction on the weight of the evidence, contrary to the mandatory provision of the statute, and reversible error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 465; Dec. Dig. ¶194(15).]

3. CARRIERS — SLEEPING CAR COMPANIES — CARE REQUIRED.

Sleeping car companies are required to use only reasonable or ordinary care to guard the property of passengers from theft, and are not held to that high degree of care applicable to common carriers generally.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1584, 1585; Dec. Dig. ¶413(2).]

4. TRIAL — INSTRUCTION — THEORY OF CASE.

In an action against a sleeping car company for the loss of wearing apparel stolen from a berth, and for consequent mental anguish and embarrassment, the defendant was entitled to an instruction as to its exercise of reasonable care to guard the property against theft apply-

ing the law to his theory of the facts as disclosed by the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 477-479; Dec. Dig. ¶203(1).]

5. TRIAL — INSTRUCTIONS — REQUEST.

In such case and on the court's failure to so instruct in its general charge, the defendant had the right to prepare and have given a special charge supplying the omission in the general charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 630; Dec. Dig. ¶256(3).]

6. CARRIERS — SLEEPING CAR COMPANIES — LOSS OF WEARING APPAREL — DAMAGES — HUMILIATION.

A woman passenger, whose clothes were stolen from her sleeping car berth by cutting the screen from an open window, and who in consequence clad in a nightgown and kimona had to walk through the train, including another sleeper, several day coaches, and one or more smoking rooms to reach her trunk in the baggage car, from defendant's failure to exercise reasonable care to guard her clothes from theft, might recover for such humiliation and embarrassment.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1590-1600; Dec. Dig. ¶417.]

7. CARRIERS — SLEEPING CAR COMPANIES — LOSS OF BAGGAGE — MENTAL SUFFERING — FEAR AND APPREHENSION.

In such case, the admission of plaintiff's testimony that she did not know what to do, did not know whether she would be without clothes the next evening when she arrived, and was in an awful predicament, and did not know what to do, was erroneous, as damages are not recoverable for mental anxiety or fear of some contingency, when the anxiety is unfounded and the contingency never comes to pass.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1590-1600; Dec. Dig. ¶417.]

Appeal from Dallas County Court; T. A. Work, Judge.

Action by Mrs. A. S. Moise and husband against the Pullman Company. Judgment for plaintiffs, and defendant appeals. Reversed, and cause remanded.

Etheridge, McCormick & Bromberg and Chas. T. McCormick, all of Dallas, for appellant. Moise & Mullican, of Dallas, for appellees.

TALBOT, J. Mrs. A. S. Moise, joined by her husband, A. S. Moise, brought this suit against the Pullman Company to recover damages alleged to have been sustained on account of the loss of wearing apparel while a passenger in one of defendant's sleeping cars, and on account of mental suffering, inconvenience, and embarrassment in consequence thereof, as a result of the negligence of the defendant. The plaintiff's amended original petition alleges that on the morning of July 8, 1914, some time between 2 and 3 o'clock, while plaintiff was traveling from Dallas, Tex., to Chattanooga, Tenn., and while she was sleeping in a lower berth of one of defendant's sleeping cars, the screen of the window of the berth was cut and articles of clothing of the value of \$65 were abstracted from her berth; that this loss was caused by the negligence of defendant's servants in allowing the window of plaintiff's

berth to remain open and in failing to keep an adequate watch to protect plaintiff's effects from theft; that, as the result of plaintiff's loss of her clothes, she was forced to go through the train to the baggage car in insufficient attire whereby she suffered mental anguish and embarrassment. The prayer is for damages in the sum of \$600.

There was testimony to the effect that the plaintiff, while en route from Dallas, Tex., to Chattanooga, Tenn., embarked at Shreveport, La., upon one of defendant's sleeping cars, and that she occupied lower berth No. 9, which was on the left-hand side of the car going east, and that after plaintiff had retired she was awakened somewhere between 2 and 3 o'clock in the morning by a ripping sound; that after she awoke the train began to move, and she then discovered that her clothes were gone, and that the screen in the open window of her berth had been cut open. She lay awake until it was light and then notified the porter and conductor of her loss. When she retired, plaintiff placed her clothing upon a shelf at the foot of the berth and in a hammock swung alongside the windows of the berth. One of the windows was closed, the other was open except for a screen which completely covered the open part of the window, and the open window was next to the shelf where her clothes were. The plaintiff did not request that the window should remain open. When the plaintiff got up in the morning, in order to reach the baggage car where her trunk and clothes were, the plaintiff, clad in a nightgown and kimona, had to walk through the train, including another sleeper, one or more day coaches, and one or more smoking rooms; there were many people in these coaches who looked at plaintiff as she went to and returned from the baggage car—all of which caused her humiliation and embarrassment. Her kimona had been brought by her for the purpose of being used in going from the berth to the dressing room in her sleeper, and she had used it for that purpose. The clothes that were stolen were subsequently found and were tendered to the plaintiff about six weeks after the loss. She inspected them and found that they were mussed up and were not as fresh looking as they had been when in her possession. One of the articles lost was a coat suit suitable for summer wear, and the season for its use was over when the clothes were tendered to plaintiff, and she declined to accept any of them.

B. F. Gay, the porter, testified, in substance, that he was on watch in the car in which Mrs. Moise was traveling throughout the night in question, and knew nothing of the loss until the morning after the occurrence; that he was in the car continuously throughout the night, except when the train would stop at stations, at which time he was on watch on the ground side of the car near the entrance; that at such times only one entrance to the car was open; that the

weather was hot at that time, and the window to plaintiff's berth was open before she retired, and plaintiff made no request with reference to whether the window should remain open or closed; that in warm weather the practice is to allow the window to remain open unless the passenger requests otherwise; that no other robberies had ever occurred to his knowledge from his car in the country traversed that night. This witness further testified:

"I do not know where this robbery occurred. I know it was before we got to Meridian, Miss. I would open the door on the left-hand side of the car, and if anybody, at any station between Vicksburg and Meridian, had attempted to get up on the left side of the car, I would have seen him. I attended to just one car. York, Ala., is 27 miles from Meridian. We got to York after we left Meridian. I had a passenger to put off at York, and then I was on the right-hand side of the car, and had to put him off on the right side. York, Ala., is a regular stop for the train. We got there at about 2:35 in the morning, something like that. I did not see anybody there. I might have told Mrs. Moise that her clothing were taken at York, Ala., and that there is where they were found. I did not look on the left-hand side of the car at York, as the station was not on that side. On the left-hand side of the train, at York, were just tracks and box cars. I don't know whether they had a night watchman around these box cars there or not, but I didn't see any. I did not look over on that side."

The conductor of the sleeping car testified, in substance, that he was the conductor of the car that plaintiff was in; that the porter was on watch in that car plaintiff was in, and he knew nothing of the robbery until next morning; that "in the sleeper where Mrs. Moise was the porter, Gay, was on watch. I saw him in there when I would pass through the cars. It is my duty to see that the porter is on watch, and, if one happens to fall asleep, I wake him. If Gay had not been on watch on the night in question, I would have known it and would have remembered it."

The case was submitted to a jury on a general charge and resulted in a verdict in favor of the plaintiffs for "\$50 actual damages and \$50 damages for mental anguish."

[1] The first assignment of error complains of the court's refusal to give a special charge requested by appellant directing the jury to return a verdict in its favor. This assignment challenges the sufficiency of the evidence, upon any fair analysis and construction of it, to show liability on the part of the appellant. The contention is that the undisputed evidence shows that an uninterrupted watch was kept by appellant's servants in charge of the sleeping car in question throughout the night upon which the loss complained of was sustained, and that such a showing constitutes a complete defense to appellee's cause of action charging a negligent failure on appellant's part to prevent loss of her property. We have stated what we regard as the most material testimony bearing upon the question here raised, and in view of the fact that the case will be reversed and remained for another trial, because

of what we conceive to be error in the court's charge, it would be improper for us to comment upon the weight of the evidence, and we shall therefore overrule this assignment by simply saying that we have concluded that whether or not reasonable care was exercised by the appellant in guarding the property of Mrs. Moise was a question of fact for the determination of the jury.

[2] The court, after telling the jury that "a failure to use that degree of care that an ordinarily prudent person would use under the same or similar circumstances is negligence," instructed them further as follows:

"Therefore, if you find and believe that defendant was guilty of negligence as above defined in failing to properly watch and guard the property of plaintiff to protect same against theft, and you further find that said negligence, if any, was the proximate cause of the plaintiff's loss, then you will find for the plaintiff in an amount sufficient to compensate plaintiff for her loss, if any."

It is contended that the charge is on the weight of the evidence, in that, it intimates that the defendant did fail to properly watch and guard the property of the plaintiff, Mrs. Moise, to protect same against theft. The contention is well founded. Several similar charges have been held to be subject to the objection here urged, and the cases in which they were given reversed and remanded. *Railway Co. v. Williams*, 17 Tex. Civ. App. 675, 40 S. W. 161; *Railway Company v. Waldie*, 101 S. W. 517; *Railway Co. v. DeBord*, 132 S. W. 845; *Railway Company v. Smith*, 133 S. W. 482. Our statute prohibits the judge in jury trials from commenting upon the weight of the evidence, and this statute is mandatory. The appellant was entitled to have the issue involved in the charge complained of determined by the jury from a consideration of the testimony alone, uninfluenced by any intimation from the court as to the view he entertained with reference to it. The court, in framing the charge, did not intend, of course, to be understood as making such an intimation to the jury; but, as the language and form of the charge is such as to suggest that the court was of the opinion that the evidence showed a failure on the part of the appellant to properly guard the property of the plaintiff against theft, it constitutes reversible error. As was said in *Railway Company v. Lynch*, 136 S. W. 530:

"The vice in the instruction does not lie in the fact that the jury were relieved of the duty to determine such a question, but in the fact that they might have construed the language complained of as indicating the view the court took of the testimony with reference to that phase of the case."

In *Railway Co. v. Waldie*, supra, the plaintiff, an employé, sued to recover damages for personal injuries received, while assisting in loading iron rails from one car to another, under the direction of the company's section foreman Collins, and the charge of the court, so far as here material, was as follows:

"And if you further find defendant and its foreman Collins was guilty of negligence, as

that term has been hereinbefore defined, in attempting to do said work with an insufficient number of men or in failing to provide and furnish appliances or tools reasonably necessary to enable said gang to perform said work with reasonable safety, or in failing (italics ours) to notify plaintiff that said rail would be dropped, and if you further find that such negligence, if any, was the direct and proximate cause of plaintiff's injury; then, if you so find, you will find for the plaintiff and so say by your verdict, and assess his damages as hereinafter directed unless you should find for the defendant under charges hereinafter given you."

The Court of Civil Appeals of the Third District, in holding this charge erroneous, said:

"Error is addressed to this charge, because it invades the province of the jury, and assumes as a fact that there were an insufficient number of men to safely do the work, and failure by the defendant to furnish appliances and tools reasonably necessary for the performance of the work with reasonable safety. Charges similarly framed have been held subject to the objection urged and made grounds for reversal. *Railway Co. v. Williams*, 17 Tex. Civ. App. 675, 40 S. W. 161; *Railway Co. v. Smith*, 63 S. W. 1065. Having a statute which, in jury trials, prohibits the judge from commenting upon the weight of testimony, it has been repeatedly held that any act of the judge which intimates to the jury his opinion as to the weight of testimony submitted to the jury is prohibited by that statute. This may be done in many ways, as shown by repeated decisions."

In *Railway Co. v. Smith*, 133 S. W. 482, cited above, the court charged the jury thus:

"If you believe from the evidence that the defendant in loading the coal on the tender, or in maintaining its track at the place where such injury occurred, or in running the train at too great a speed, or in providing an insufficient number of men to keep the track in the section where such injury occurred, if it did occur, in good condition, failed to exercise ordinary care as that term is defined in this charge, and if you believe that such personal injuries to James Smith, if any, resulted in his death and from the failure of the defendant to exercise care in respect to its railway track and running its train and in loading its tender, as above stated, then and in that event you should find for the plaintiff; but, if you do not so believe, you will find for the defendant."

This charge was attacked as being upon the weight of the evidence, and the Court of Civil Appeals of the Sixth District, speaking through Mr. Justice Levy, said:

"The charge assumes that the train was being run at too great a rate of speed, and that an insufficient number of section men were provided to properly maintain the track at that section. These were sharply controverted issues in the case and material grounds of negligence pleaded and relied on. We feel constrained to hold that it was a charge upon the weight of evidence and in violation of the statute in such respect. Under repeated decisions, it is held to be reversible error, under the terms of the statute, for the court to charge at all on the weight of evidence."

In the case at bar the language of the charge objected to is as follows:

"If you find and believe from the evidence that the defendant was guilty of negligence, as above defined, in failing to properly watch and guard the property of plaintiff to protect same against theft, * * * then you will find for the plaintiff in an amount sufficient to compensate plaintiff for the loss, if any."

The purport of this charge is that, in the opinion of the trial court, the appellant failed to properly watch and guard the property of the appellee, Mrs. Moise, and in view of our statute must be held to be reversible error. This court, in the case of *Railway Co. v. Williams*, 17 Tex. Civ. App. 675, 40 S. W. 161, held that an instruction which from its form of expression was liable to be construed by the jury as assuming the proof of a material fact in controversy was misleading, and reversed and remanded the cause for a new trial. The fact assumed in the court's charge in the instant case was not only material, but the controlling issuable fact in the case.

[3] Appellant further contends that the charge under consideration was erroneous, in that it was, in effect, an instruction that the appellant had the duty of keeping such a watch as would necessarily prevent theft. There is force in this contention, but it is not likely that the court's charge upon another trial will be subject to such criticism. The rule is well settled that sleeping car companies are required to use only reasonable or ordinary care to guard the property of passengers on their cars from theft. That high degree of care applicable to common carriers generally does not apply. In *Lewis v. Car Co.*, 143 Mass. 287, 9 N. E. 615, 58 Am. Rep. 135, which seems to be a leading case upon the subject, the rule is thus stated:

"While it is not liable as a common carrier or as an innholder, yet it is its duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger such as he might reasonably carry with him are stolen, the company is liable for it."

The rule enunciated is well nigh universal, and many of the cases announcing and following it will be found cited in *Pullman Sleeping Car Co. v. Hatch*, 30 Tex. Civ. App. 303, 70 S. W. 771.

[4, 5] There is another rule firmly established by the decisions of this state, which is invoked by appellant, and that is that ordinarily a party to a suit is entitled to an instruction applying the law to his theory of the facts as disclosed by the evidence. If this rule has not been complied with in the court's general charge, then the party who has been thus deprived of such a charge has the right to prepare and have given a special charge supplying the omission in the general charge. *Railway Co. v. McGlamory*, 89 Tex. 639, 35 S. W. 1058; *Railway Co. v. Rogers*, 91 Tex. 52, 40 S. W. 956; *Pullman Co. v. Schober*, 149 S. W. 236. Whether appellant exercised reasonable care to guard the appellee's property against theft was an issue in this case which it "was entitled to have * * * submitted on charges that embodied a reference to the facts or theory upon which it was based." *Railway Co. v. McGlamory* and *Pullman Co. v. Schober*, supra. The issue was submitted only in a very general manner.

[6] In the third paragraph of the court's charge the jury was instructed as follows:

"You are further charged that if you find for the plaintiff in any sum as actual damages, under the charge above, and you further find that by reason of said negligence, if any, as above defined, the plaintiff was really and necessarily caused to suffer humiliation and mental anguish, you will find for the plaintiff in any amount that you believe she has suffered thereby, not to exceed \$535."

The proposition contended for under this assignment is that:

"Damages for mental anguish are not recoverable in an action for negligent loss of property in the absence of pleading and proof of intentional wrong or insulting conduct on the part of the defendant."

Appellant's able counsel have cited no case in which the precise question raised has been decided and admit that they have been unable to find such a case. It is contended, however, that the principle deducible from the decisions cited in support of their proposition is that damages for mental anguish are not a proper element of recovery in cases of breach of contract except for the delay and misdelivery of telegrams, which on their face indicate that mental distress would probably follow from such delay or misdelivery; nor in actions for tort, unless the plaintiff has sustained physical harm or has been intentionally or wantonly subjected to distress or humiliation. The question is not free from difficulty, but we have reached the conclusion that the issue sought and intended to be submitted in the charge was a proper one under the pleadings and proof. The charge, however, did not, we think, submit as specifically and clearly the very issue involved in the allegations of the appellee's petition and the evidence adduced upon that issue as it should have done. Probably the appellee was not entitled to recover for any mental distress suffered simply as a result of the loss of her property, and we do not understand that she sought any such recovery. The allegations of the petition are that, as a consequence of the negligence of the appellant, the appellee was forced to walk through a number of coaches of the train clad only in her nightgown and kimona to the baggage car in the train to secure from her trunk sufficient clothing to wear until she reached her destination, and was thereby exposed, in her scanty attire, to the gaze of the passengers on the train and caused to suffer great mental anguish, embarrassment, and annoyance. These allegations were sustained by undisputed evidence, but the record discloses no pleading nor evidence of "intentional wrong or insulting conduct on the part of the appellant." The question then is: Was the mental anguish suffered by appellee, in the manner and under the circumstances alleged and proved, a proper element of her damage if the appellant failed to exercise reasonable care to guard her wearing apparel from the depredations of thieves? It has been held by our appellate courts that injury to feel-

ings or mental suffering caused by the seizure under legal process of real or personal property, even though such property be exempt from forced sale, is not recoverable as actual damages, though it may, under some circumstances, be taken into consideration in estimating exemplary damages, and as a general rule damages for mental anguish unaccompanied by any actual physical injury are not recoverable; but in exceptional cases such damages, in the absence of any physical injury, or intentional wrong or insulting conduct on the part of appellant, have been allowed in this state. Notably among such cases are those involving delay or misdelivery of telegrams. The exception to the general rule, however, has not been restricted to cases in which there has been a failure to deliver a telegram. *Railway Co. v. Anchonda*, 68 S. W. 743; *Id.*, 38 Tex. Civ. App. 24, 75 S. W. 557; *Railway Co. v. Coopwood*, 98 S. W. 102. In the first case cited the appellee therein purchased of the railway company's agent tickets for herself and two children, the agent looking at the children to see if they were entitled to half fare tickets, but nothing being said as to the relationship existing. When the train upon which the mother and children expected to embark arrived at the station, the two children were placed upon the train; but the train was not stopped long enough to enable the mother to board it, and her children were carried away on the train and thus separated from her. The court held that, if the railway company knew of the relationship of the mother to the children, the husband, who was suing, was entitled to recover for the mental anguish suffered by the wife as a direct result of the negligent separation of her from her children, without proof of any physical injury or intentional wrong or insulting conduct. In the second case, in which a writ of error was denied, the appellee, Mrs. Coopwood, sued the railway company to recover damages for mental anguish suffered by her as the result of the inattention, mistreatment, or neglect by the company's servants of her invalid and helpless daughter, who was traveling with her on one of the railway company's passenger trains, and the principal question in the case was whether such suffering was an element of appellee's damages. This court, after a somewhat lengthy review of the decisions of this state, held that damages by reason of such suffering were recoverable, although it did not appear that Mrs. Coopwood had sustained any physical injury, or had been intentionally or wantonly subjected to distress or humiliation. In the case at bar, if the appellant failed to exercise the degree of care imposed upon it by law to guard Mrs. Moise's wearing apparel from the

theft alleged, and as a result of such failure she lost such apparel, and if as a further proximate result of such loss it became necessary for appellee to pass through the coaches of the train clad only in her nightgown and kimona to the baggage car to secure proper clothing, and suffered humiliation or mental anguish by reason thereof, then, upon the theory that such humiliation or mental anguish was the direct or proximate result of appellant's negligence, the appellant would be liable in damages therefor. That appellee, in the event of the loss of her wearing apparel by theft, would be exposed to the gaze of passengers on the train in her nightclothes and would suffer as a result thereof humiliation, or some form of mental anguish, might reasonably have been expected as the natural and probable consequence thereof can hardly be questioned.

[7] The next assignment of error is that: "The court erred in admitting the following testimony offered by plaintiff, over defendant's objection, to wit, the testimony of plaintiff, as follows: 'I didn't know what to do. I didn't know whether I would be without clothes the next morning when I got to Chattanooga, and I was in an awful predicament, and I didn't know what to do.'"

The proposition advanced under this assignment is that:

"Damages are not recoverable for mental anxiety or fear of some contingency when the contingency never came to pass and the anxiety is unfounded."

This assignment is well taken. In the case of *M., K. & T. Ry. Co. of Texas v. Linton*, 126 S. W. 678, the plaintiff sued for mental anguish incident to delay by defendant in shipping the corpse of her son. The railway company failed to transport the corpse, and plaintiff testified that when the corpse did not arrive promptly she feared that the body would be in such condition that it could not be shipped at all. In fact, the body was later shipped by express, so that plaintiff's fear proved to be ill founded. On appeal to this court, it was held, in an opinion by Mr. Justice Bookhout, that:

"The fears of appellee that it could not be shipped, but would have to be laid away in the state of Washington, and if shipped it would be in such condition she could not look upon it, were purely imaginary. Mental anguish on her part resulting from apprehension or fear that certain things would happen, which in fact did not, cannot be made a basis for the recovery of damages. *Western Union Tel. Co. v. McNairy*, 34 Tex. Civ. App. 389, 78 S. W. 969; *Tel. Co. v. Edmonson*, 91 Tex. 206, 42 S. W. 549; *Tel. Co. v. Reed*, 37 Tex. Civ. App. 445, 84 S. W. 296; *Hart v. Tel. Co.* [53 Tex. Civ. App. 276], 115 S. W. 638. The admission of this evidence was error."

Clearly, under the decisions cited, the testimony here complained of was inadmissible.

The judgment is reversed, and the cause remanded.

ALEXANDER v. CONLEY et al. (No. 7525.)

(Court of Civil Appeals of Texas, Dallas.
June 3, 1916.)

1. MORTGAGES \S 39 — ABSOLUTE DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY.

Whether deed was given as a mortgage held on the evidence to be a jury question.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 112, 113; Dec. Dig. \S 39.]

2. MORTGAGES \S 32(3) — ABSOLUTE DEED AS MORTGAGE—DETERMINATION BY ATTENDANT CIRCUMSTANCES.

A judgment creditor's attorney purchased land on an execution sale which he conveyed to a grantee, who paid the judgment debts with the understanding that such grantee would convey to the judgment debtor when reimbursed for his outlay. Held, the attorney's deed was in effect a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 60, 84; Dec. Dig. \S 32(3).]

3. TRESPASS TO TRY TITLE \S 6(1)—TITLE—MORTGAGEE.

A mortgagee who has never been in possession cannot maintain a suit in trespass to try title.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. \S 5-7, 9, 15, 16; Dec. Dig. \S 6(1).]

4. APPEAL AND ERROR \S 1062(2)—HARMLESS ERROR—SUBMISSION OF ISSUES.

In trespass to try title, the refusal to submit special issues as to appellees' diligence in not discovering a prior deed to appellant is harmless, where the jury found that such deed was a mortgage, thereby preventing appellant from maintaining his form of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4213; Dec. Dig. \S 1062(2).]

5. APPEAL AND ERROR \S 1058(2)—HARMLESS ERROR—ADMISSION OF SIMILAR EVIDENCE BY SAME WITNESS.

Excluding of grantee's testimony that he would not have taken the deed in question as a mortgage is harmless, where he is permitted to repeatedly state that it was an absolute conveyance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4195, 4201; Dec. Dig. \S 1058(2).]

6. EVIDENCE \S 273(2)—DECLARATIONS AS TO TITLE—OWNER OF LAND.

Prior to an execution sale, the record owner told the purchaser that the judgment debtor owned the land, and the debtor confirmed it. Held, the debtor's statement was admissible on the issue of title, where appellant claimed under a prior unrecorded deed of the record owner.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1111, 1112; Dec. Dig. \S 273(2).]

7. TRIAL \S 255(4)—INSTRUCTIONS—REQUESTS—NECESSITY—PURPOSE OF EVIDENCE.

In an action to try title, receiving evidence admissible on the question of appellees' care in not discovering an unrecorded deed to appellant, but inadmissible on the question whether such deed was a mortgage, is not reversible error when no request was made to limit its effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 632; Dec. Dig. \S 255(4).]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Action by W. N. Alexander against B. K. Conley and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Woods & Morrow, of Kaufman, for appellant. S. J. Osborne, Wynne & Wynne, and Huffmaster & Huffmaster, all of Kaufman, for appellees.

RASBURY, J. This is an appeal from a judgment in favor of appellees, who were defendants below, in a suit of trespass to try title to lands in Kaufman county. No issue arises upon the sufficiency of the pleading, and for that reason it will not be detailed.

The land in dispute is 50 acres out of the W. A. Thompson survey in Kaufman county, the parties claiming D. F. Fitzgerald as the common source of title, and the following constitutes appellant's chain of title: On December 28, 1908, J. E. Mathis recovered judgment in justice court of Kaufman county against Fitzgerald for \$43.25. Subsequently, the land in controversy was levied upon by virtue of execution issued out of said judgment and sold, and in turn conveyed by the constable by the usual form of deed to Ed Sewell. Sewell recorded his deed September 14, 1904. On March 31, 1905, Sewell conveyed the land to W. N. Alexander, appellant, reciting a consideration of \$40 paid. Appellant recorded his deed July 5, 1914. The following constitutes appellees' chain of title: On April 29, 1910, John Persche recovered judgment in justice court of Kaufman county against Fitzgerald for \$120.86. Subsequently the land in controversy was levied upon by virtue of execution issued out of said judgment and sold, and in turn conveyed by the constable by the usual form of deed to Persche. The deed was dated July 5, 1910, and was recorded July 30, 1910. By deed dated October 6, 1910, and recorded November 21, 1912, Persche conveyed the land to Ross Huffmaster. Huffmaster conveyed to McCormick October 9, 1910, the deed being recorded October 21, 1912, and being in correction of deed of December 22, 1910. The several conveyances enumerated, the vendees in which were made parties to the suit, contain provisions concerning the consideration therefor and the manner of its payment; but these provisions are not material to the disposition of the appeal, and for that reason are not detailed. Other necessary facts will be stated later.

There was trial by jury, to whom the court submitted certain special issues of fact and upon the answers to which judgment was entered for appellees, defendants below, and from which entry this appeal is prosecuted.

[1] The first assignment of error complains of the action of the court in submitting to the jury the following special issue of fact:

"Does the evidence show that the deed of Ed Sewell to plaintiff, Alexander, was intended by the parties as a mortgage or security for debt or other like purpose?"

In connection with the issue so submitted to the jury, it is necessary to state that ap-

pellées by appropriate pleading alleged that, while the deed from Sewell to appellant was absolute on its face, it was in truth given in security of money advanced by appellant to Sewell in payment of the Mathis judgment with the understanding that same would be reconveyed to Fitzgerald when the debt was repaid, and hence the instrument was but a mortgage. It was that the jury might determine that claim that the special issue was submitted. Appellant contends, first, that such issue should not have been submitted to the jury because the evidence did not raise it. Both Alexander and Sewell testified on the issue. A careful analysis of Sewell's testimony discloses that he was attorney for J. E. Mathis, his father-in-law, and, before suing Fitzgerald, he endeavored to collect from him, and explained that if the debt was not paid he would sue. Fitzgerald told Sewell the land was incumbered, that he could not pay the Mathis debt, and for Sewell to do as he pleased. Sewell did sue and secured judgment, after which execution was levied upon the land, which was bought by Sewell at the constable's sale under the judgment and deed thereto taken in his name; and he intended to bring suit for its possession. However, after the conveyance to Sewell, and before suit for possession was commenced, Fitzgerald conferred with Sewell about the matter, and, in the presence of Alexander, told Sewell he could not pay the judgment debt, but if he would transfer his claim and the land to Alexander he would carry it and permit Fitzgerald to pay it off later. To this Sewell agreed, and Alexander paid Sewell the amount of the judgment, and he conveyed the land to him with the understanding between Sewell, Fitzgerald, and Alexander that the conveyance was in security of the debt paid by Alexander. Fitzgerald did not testify, but it appears from the testimony that Fitzgerald was in possession of the land when it was sold under the Persche judgment. Appellant was never in actual possession of the land, never rendered same for taxation or paid taxes thereon, or attempted to secure possession or control thereof. From 1904 to 1910, the tax was paid in the name of Fitzgerald. The witness R. E. Conner cultivated the land during 1908, 1909, as the tenant of Fitzgerald, accounting to him for the rent, and in 1910, 1911, as the tenant of Conley, appellee.

Appellant, who was a witness, denied that he made the arrangement testified to by Sewell and, on the contrary, asserted that the deed evidenced an outright sale; the consideration being the satisfaction of the Mathis judgment and certain other indebtedness due him by Fitzgerald, secured by lien on the land in favor of a former owner, although it was in evidence, without dispute, that appellant, long after the deed from Sewell to him was executed, renewed and extended the debt, supposed to be satisfied by the conveyance, at the request of Fitzgerald. Ap-

pellant's explanation of that circumstance, however, was that he was willing to reconvey the land to Fitzgerald notwithstanding his deed, if he would repay the debt. There are other facts and circumstances in the record, which would tend to sustain a finding of the jury in favor of either party. What we have said, however, is sufficient, it seems to us, to demonstrate that the finding of the jury is not without support in the evidence, and that the instant case is one of those which, because of its conflicts, demonstrates the wisdom of referring to the jury such matters and because of which the contention of appellant is respectfully overruled.

[2, 3] It is next urged under the same assignment of error that, before a deed absolute on its face may be construed a mortgage, the relation of creditor and debtor must exist between the vendor and the vendee or those to be benefited thereby, and it appearing that that relation did not exist between Sewell and Alexander, or Sewell and Fitzgerald, the instrument is and remains, as matter of law, a deed absolute. It is true that the relation of creditor and debtor never existed between Sewell and Alexander. It may also be conceded that that relation as between Sewell and Fitzgerald ceased to exist when the land was conveyed by the constable on the theory that the conveyance satisfied the judgment of Mathis for whom Sewell was acting. Notwithstanding such conceded facts, we are of opinion that the relation of creditor and debtor was created as between appellant and Fitzgerald by the conveyance of the land to the former for the purpose found by the jury. While the title passed to Sewell, and while such fact may have in law satisfied the debt of Mathis, Sewell nevertheless had the right to reconvey same to Fitzgerald on such conditions as he might impose. Sewell testified, and the jury in effect found, that he agreed to reconvey upon payment of the Mathis debt. This could only be effected by conveying to Alexander, who advanced the money, in trust for Fitzgerald, and the jury further found that the purpose of the conveyance was to secure appellant in payment of the amount so advanced. The legal result of such facts is that the deed, though on its face absolute, was in fact a mortgage. Such being the situation, and appellant never having been in possession of the lands, appellant was not entitled, as urged by appellees in counter propositions, to dispossess appellees by suit of trespass to try title. His remedy was a suit for his debt and foreclosure of his mortgage. *Edrington v. Newland*, 57 Tex. 627; *Wiggins v. Wiggins*, 16 Tex. Civ. App. 335, 40 S. W. 643, and cases cited. It is so well settled that a deed absolute on its face may be shown by parol to be a mortgage or security for money loaned or a debt owing, that we forego the citation of authority in support of that rule.

[4] The refusal to submit to the jury several special issues of fact, relating to the

diligence of appellees in ascertaining in whom the outstanding title, indicated by the deed from Fitzgerald (by constable) to Sewell, reposed, is made the basis of several assignments of error. If it should be conceded that error is shown, though we think that issue was correctly presented by the court, it would nevertheless be immaterial under the finding of the jury that the deed under which appellant claimed the land was not a deed but a mortgage, and as a consequence appellant's remedy was a suit for debt and foreclosure.

[5] On the issue as to whether the deed was in fact a mortgage, counsel asked appellant: "Would you have taken the deed from Sewell to you as a mortgage or trust on this property?" Upon objection the witness was not permitted to answer. Such action is assigned as error. The answer of the witness would have been that the deed was taken by him as an absolute conveyance in satisfaction of his debt and to avoid foreclosure. While the answer which the witness would have made is not in any sense responsive to the question, since it is not a statement of what the witness would have done, but what he did do, at the same time, the witness was permitted repeatedly to say that the deed was an absolute conveyance; the consideration being the satisfaction of the debt he held against Fitzgerald, and as a consequence the ruling, if erroneous, was harmless.

[6, 7] Ross Huffmaster, who secured judgment against Fitzgerald for Persche and who caused the levy of execution on the land in controversy from said judgment and bought it in for Persche, was a witness, and testified that before he bought the land for Persche he examined the record and found the title in

Sewell. He then called upon Sewell and inquired of him whether he owned the land, Sewell informing him that, while he had bought it at constable's sale, Fitzgerald had paid off the judgment and received the land back. Huffmaster then called upon Fitzgerald and inquired of him "as to who owned the land," and to which Fitzgerald replied that "he owned it and that he got the land back." Appellant objected to the admission of the quoted testimony, and assigns as error the action of the court in admitting same. On the issue of title, we think the testimony was admissible, since it was the duty of Huffmaster, acting for Persche and having knowledge of the deed to Sewell, to inquire whether he (Sewell) still claimed the property. Having been informed by Sewell that it had gone back to Fitzgerald, it was his duty to inquire of him if he was still the owner. Being without actual knowledge of the unrecorded deed to Alexander, he had the right to reply upon the statements of Sewell and Fitzgerald. If it can be said that the testimony was inadmissible on the issue of whether the deed was a mortgage, then, being admissible on the issue of title, it was the duty of appellant to request the court to restrict it to its legitimate purpose, and, having failed to do so, it does not constitute reversible error.

We have carefully examined all remaining assignments of error, some of which relate to charges refused and given and some of which relate to the admission or exclusion of testimony; but because, in our opinion, they become immaterial, in view of the conclusion we have reached on other issues, same are overruled.

For the reasons stated, the judgment is affirmed.

STATE ex rel. LASHLY v. WURDEMAN,
Circuit Court Judge. (No. 19277.)
(Supreme Court of Missouri. In Banc. June
2, 1916.)

MANDAMUS \S 61 — SUBJECT OF RELIEF —
COURTS.

Mandamus will not lie to require the judge of the circuit court to strike from the records of that court a "complete special report" of an investigation by the grand jury of the official acts of the relator as prosecuting attorney, alleged to be false and malicious.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 122-126; Dec. Dig. \S 61.]

Woodson, C. J., and Blair and Revelle, JJ., dissenting.

Mandamus by the State of Missouri, on the relation of Arthur V. Lashly, against Gustavus A. Wurde-man, Judge of the Circuit Court of St. Louis County, Mo. Motion for judgment on the pleadings and to make the writ peremptory denied, and writ quashed.

Holland, Rutledge & Lashly, of St. Louis, for relator.

BOND, J. I. Our alternative writ of mandamus was awarded upon the relation of Arthur V. Lashly, prosecuting attorney of St. Louis county, requiring Gustavus A. Wurde-man, judge of the circuit court of that county, to show cause why he should not strike from the files and records of said circuit court a certain document filed therein by the grand jury of that county, termed their "Complete Special Report" of an investigation of the official acts of said prosecuting attorney. In conformity with the requirements of our writ said Gustavus A. Wurde-man, judge of the circuit court of St. Louis county, filed his amended return, showing that a special grand jury was called and impaneled prior to the 20th day of October, 1913, upon the written request of relator, suggesting to respondent that medium of investigating certain transactions of one of the citizens of that county; that in pursuance of such request the respondent, on the 23d day of September, 1914, ordered a grand jury to meet in the courthouse at Clayton, in St. Louis county, on October 12, 1914, and that during the session of said grand jury the relator herein delivered to its foreman a letter dated October 26, 1914, to the effect that everything in his office was thrown open to them to facilitate the work of investigation of its operations; that in pursuance of such offer the report in question was made and filed on October 20, 1914, and as far as material recites a finding by the grand jury that relator, in violation of section 4414, Revised Statutes 1900, accepted and received fees aggregating the sum of \$45 in eight criminal cases which were dismissed on payment of costs (setting out specifically each of said cases); that the fees in five of those cases were paid to relator on June 28, 1918; that the fees in three of those cases were paid on

June 22, 1914. The report then recited that the grand jury had been advised in such investigations by a special prosecuting attorney and Lee W. Ewing, Assistant Attorney General of the State of Missouri, to the effect that violations of said section 4414 of the Revised Statutes, if not prosecuted within one year from their happening, would be barred by the statute of limitations. The report then used these words:

"However, we, as your grand jury, do not believe that said fees were received by A. V. Lashly with criminal intent."

The grand jury further reported a finding that certain assistants of the prosecuting attorney procured, or attempted to procure, the affidavit of a certain witness who had been subpoenaed to testify before it, setting forth his knowledge as to the facts of the dismissal of one of the cases concerning which the grand jury was making an investigation. The report characterized this as unethical conduct on the part of said assistants, especially as it concerned official transactions on behalf of the prosecuting attorney which were then under investigation. But as neither of these assistants have taken any action to expunge so much of the report as relates to them, it need not be further stated. The concluding portion of the report of the grand jury is, to wit:

"Your grand jurors have had evidence taken before them which conclusively proves that the prosecuting attorney of St. Louis county, Mo., Arthur V. Lashly, has been negligent and derelict in his duties as defined and prescribed by the Constitution of the state of Missouri, in section 13 of article 9, of making quarterly reports or returns to the county clerk of all fees received by him and of the salaries by him actually paid to his assistants, stating same in detail, and verified by his affidavit."

Then follow the signatures of all of the members of that body, with an expression of their thanks to the special prosecuting attorney and also to the Assistant Attorney General for their assistance to the grand jury in its labors as shown in said report. Respondent further states that relator filed a motion that said report be stricken from the files and records of said circuit court, for the reasons, in substance: First, that the court should not have permitted it to be filed. Second, that the making and filing of such a report was in excess of the jurisdiction of said grand jury. Third, that:

"The said report is grossly scandalous, scurrilous, and defamatory, and was designed and is calculated to and has injured and damaged said Arthur V. Lashly in his good name and reputation in said St. Louis county, and is a continuing injury and damage to his good name and reputation as long as said report remains a part of the records of said court."

Respondent states that relator was represented by counsel in the argument of said motion, but that before it was submitted, he caused two members of the grand jury to testify concerning certain averments in said motion, and that after hearing the testimony

of said witnesses, and on the next day, he entered an order overruling the same, and in so doing filed a memorandum of the reasons for making that order, to wit:

"Section 11, art. 14, Constitution of Missouri provides that it shall be the duty of the grand jury in each county at least once a year to investigate the official acts of all officers having charge of public funds and report the result of their investigation in writing to the court.

"Section 7266, R. S. 1909, provides that the grand jury shall make careful inquiry into the failure or refusal of county and municipal officers to do their duty as provided by law. I believe that the grand jury acted within the scope of their authority in filing the report in question, and therefore the motion to expunge is overruled.

"[Signed] Gustavus A. Wurdeman, Judge."

The return then denies that the report of the grand jury was defamatory or had injured the relator, and denies that relator was not in charge of any public funds, but avers that his fees were limited to the sum of \$10,000 per year under section 13, art. 9, of the Constitution of the state, and, further, limited to \$5,000 per year under sections 10734, 10736, inclusive, of the Revised Statutes of 1909, and that relator had collected fees in large amount, and had failed to make return thereof as required by law. Respondent further stated that he had no personal interest in the proceeding except to see that justice was had, and that no judgment for costs was rendered against him, and concluded his return, to wit:

"Respondent further states that in overruling relator's several motions, respondent only performed what he considered his conscientious duty under his oath of office and under the laws of this state. That in passing upon said several motions respondent performed a judicial act, after mature deliberation and investigation, and respondent prays the judgment of this court whether, after having so acted and after having interpreted the law according to his best judgment, the extraordinary writ of mandamus will lie herein to coerce a particular judgment or to correct any error in his judgment, if error was committed."

Upon the filing of the aforesaid return, relator moved for judgment on the pleadings. In considering this motion we must take the well-pleaded statements of the amended return to be true. The question, therefore, is whether our writ of mandamus should be made peremptory under the facts shown in the amended return.

II. While the writ of mandamus has lost something of its ancient prerogative character and become largely a method of civil redress, and may be prosecuted in the trial courts under a special code relative thereto (R. S. 1909, § 2546 et seq.), yet, whether it is sued for in this court or in a trial court, the right to its obtention is conditioned on the inadequacy of any other mode of redress by appeal, writ of error, or otherwise. The authorities on this subject are unvarying, and have been crystallized to that effect, as to the procedure in this court, by rule 82, adopted on April 10, 1906. It is important, therefore, to determine whether the redress sought by relator in this case could have been obtained other-

wise than by his application to this court.

In addition to the right to appeal from certain interlocutory orders specified therein, the statute affords any party to a civil cause the right of appeal "from any final judgment in the case or from any special order after final judgment in the cause." R. S. 1909, § 2038. A final judgment is one in which the court's jurisdiction has been exhausted as to the matter decided. In the instant case the relator, after the filing of the report of the grand jury, presented a written motion to expunge said report from the records of the court. Upon the determination of that motion, the jurisdiction of the circuit court was exhausted by a final judgment adverse to the mover, from which, after taking the proper steps, he could have appealed to the St. Louis Court of Appeals, or if the motion presented a question falling within our exclusive appellate jurisdiction, to this court, where the judgment of the trial court could have been reviewed and corrected, if found to be erroneous, and the cause could have been remanded with directions for the entry of a judgment as prayed by the movant.

It is apparent, therefore, that relator was possessed of a complete remedy by pursuing the ordinary course prescribed by law for the correction of the error of courts of first instance. The trial court was possessed of full jurisdiction to expunge from its records the report of the grand jury if its contents were outside the scope of the duties of that body under the Constitution, statutes, and decisions empowering the grand jury to act, and defining and pointing out the nature and extent of its duties. In other words, it was the duty of the trial court to apply the standards of the law to the contents of the report of the grand jury, and if, in so doing, it erred in legal judgment or decision, the right of appeal from its judgment or to a writ of error for the correction of the same flowed from the plain terms of the applicatory statutes. Hence there was no occasion to apply for a mandamus in this court, for want of adequate redress by appeal or writ of error.

III. Another obstacle to the grant of the peremptory writ is that it never lies, even in the absence of adequate redress by appeal or writ of error, if the relator might have obtained full and complete relief by another suit. In the matter in hand the entire theory upon which the motion to expunge is predicated is that the report of the grand jury is defamatory to the relator and prejudicial to his reputation as public officer. Unless that theory is true, there exist no grounds whatever for expunging the report of the grand jury; but if it is true, then the relator might have obtained full and complete redress by an action for libel against the members of the grand jury, and this is exactly what was adjudged in the case of *Caruth v. Richeson*, 98 Mo. 186, 9 S. W. 633. The only impediment to a complete recovery in that case resulted from the insufficiency of

the evidence in pairs to disclose that the plaintiff was one of the persons referred to in a report of a grand jury, referring to statements of a corrupt combination of persons not specifically named. The verdict of the jury for the defendant in that case was on the sole ground that there was no proof that the plaintiff was meant in the public utterance by the defendants. In the case at bar the relator would have been relieved from the necessity of adducing testimony on that point, for the report in express terms mentioned his name. If an action for libel had been brought, relator might have obtained even greater redress than he is now seeking by writ of mandamus, for a favorable judgment in that action would not only have stamped the report of the grand jury as false and malicious, but might have awarded him substantial damages. We are not inclined, therefore, by awarding a peremptory writ in this court, to make it, in effect, a partial substitute for the redress which might have been had in a suit for libel.

IV. We are not able to concur in the view of the relator that in disposing of his motion the learned trial judge was only exercising a ministerial function, and was not exercising a judicial faculty or discretion reposed in him by law. The very nature of his ruling on relator's motion to expunge implies that it resulted from the exercise of discrimination and judgment on his part, and hence was a discretionary act depending on a judicial determination, according to legal standards, of the propriety or impropriety of the report of the grand jury. That body is a component part of the court, existed at common law, and is recognized in the Constitution, where some of its duties are specified. Its creation and duties are provided for by statutes. The grand jury is a great inquisitorial body, originally designed to vindicate the law and to protect the body of the people from the encroachments of arbitrary power. It is a necessary adjunct of all courts charged with the enforcement of the criminal law. In speaking of the scope of the powers of a grand jury, although convened and impaneled for a special purpose, this court said:

"When once duly impaneled they may inquire and presentment make of any offense committed within the jurisdiction of the court, not barred by the statute of limitations." *State v. Overstreet*, 128 Mo. loc. cit. 473, 31 S. W. 36.

As bearing on this point, we also note the following statutory provision:

"And the grand jury shall make careful inquiry into the failure or refusal of county and municipal officers to do their duty as provided by law." R. S. 1909, § 7266.

The oath prescribed for them imposes the obligation to—

"diligently inquire and true presentment make, according to your charge, of all offenses against the laws of the state, committed and triable in this county, of which you have or can obtain legal evidence." R. S. 1909, § 5069.

The broad powers of inquisition thus imposed upon this body are further emphasized

by specific statutes, requiring the circuit judge to charge them particularly as to certain investigations. R. S. 1909, §§ 3163, 3378, 4085, 4422, 4786, 7209, 4736, and divers others.

Moreover, the Constitution makes it the positive duty of the grand jury to submit, once a year to the proper court, a "report in writing" of its investigations of the official acts of all officers having charge of public funds. Constitution, art. 14, § 11. Under this provision of the organic law, it is the imperative duty of the grand jury, in addition to the performance of their statutory duties of making presentments and finding indictments, to make a report in writing as to the matters designated in the Constitution. Hence it is not correct to say that the duties of the grand jury in this state are confined simply to the finding of indictments and the making of presentments through their foreman. The statute does impose these duties (R. S. 1909, § 509), but the Constitution also imposes the additional duty of making a written report as therein specified. The Constitution and the statute (Const. art. 9, § 13; R. S. 1909, §§ 10784, 10785, 10786) provide and limit all fees which can be retained by the relator, and impose the duty of making quarterly returns, showing the amounts so received, under the penalties prescribed in the statute. It necessarily follows that any excess over the fees thus limited was money belonging to the public and in the custody of such officer until turned over. In view of the foregoing constitutional and statutory provisions, the conclusion is inescapable that the report of the grand jury in the present proceeding presented matters requiring the exercise of the judicial faculty on the part of the circuit judge in determining whether it should be expunged or permitted to remain among the files and records of the court. But it is elementary that any decision which he might make in the exercise of his judicial discretion is one which cannot be directed by writ of mandamus from any court. The judge may be compelled to exercise his jurisdiction and make a decision or render a judgment, but the kind of decision or the nature of his judgment, resting on his judicial discretion, cannot be controlled by this writ. *State ex rel. v. Grimm*, 220 Mo. loc. cit. 490, 119 S. W. 626. We are therefore wholly unable to concur in the view of the relator that in acting upon his motion to expunge said report from the files of the court, the learned judge was only performing a ministerial duty.

IV. Relator has cited a number of cases in other jurisdictions, all of which, with one exception, pertain to motions filed in the court of first instance to expunge from its records certain defamatory statements contained in the reports of a grand jury. The power to make such an order is clearly within the jurisdiction of such courts, and it was

clearly within the jurisdiction of the respondent in this case to have adjudged and determined that the report complained of was not in performance of any of the duties imposed upon the grand jury by the law of this state, and therefore to have stricken it from his docket. And it may even be conceded for the argument that he fell into legal error in failing to do so; but the erroneous exercise of jurisdiction, although within the correction of an appeal or writ of error, is not within the scope of a writ of mandamus. In the other case cited by the relator (Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N. W. 141), the Supreme Court of that state issued a mandamus, compelling the circuit judge to strike from the files of his court a certain report reflecting upon a prosecuting attorney. It is to be observed, however, that the case in question wholly ignored, in its process of reasoning, any consideration of the fundamental prerequisites of the issuance of a writ of mandamus by a superior court, which are, in substance, that the relator must be remediless by appeal or writ of error, and otherwise without adequate relief. That decision is unsupported, either in principle or precedent, and we are not inclined to adopt its views.

The result is that the motion for judgment on the pleadings is overruled and our writ quashed.

WALKER, J., concurs. FARIS, J., concurs in paragraph 3 and result. GRAVES, J., concurs in result in separate opinion. WOODSON, C. J., and BLAIR and REVELLE, JJ., dissent.

GRAVES, J. I am impressed with the view that, when the judge of the circuit court was called upon to act upon the motion filed in the circuit court of the relator herein, his action was judicial in character, and therefore when he has acted, mandamus will not lie. Mandamus will never lie to compel judicial action, unless there has been a refusal to proceed and act. But in this case the circuit judge did not refuse to act, but has acted. That the act was a judicial one I think is evident from the very character of the questions involved for decision. Whether an appeal will lie or not we need not discuss, because if the action is judicial in character, as we hold, then there can be no mandamus after the court has acted. For these reasons I concur in the result of Brother BOND'S opinion.

SHERWOOD v. ST. LOUIS S. W. RY. CO.
(No. 1867.)

(Springfield Court of Appeals. Missouri. June 24, 1916.)

1. TRIAL \S 253(3)—INSTRUCTIONS—IGNORING ISSUES—INJURIES TO PROPERTY.

In an action for injuries to land, alleged to have been caused by insufficient opening for wa-

ter course in railway embankment, an instruction permitting recovery is erroneous if it disregards the issues whether the flood was not so great and so unprecedented that no negligence arose in failing to anticipate that a certain opening would be insufficient, and whether it was not so great that the injury would have occurred regardless of the size of the opening; the flood being in fact the greatest recorded in that vicinity.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 616; Dec. Dig. \S 253(3).]

2. WATERS AND WATER COURSES \S 171(1)—EMBANKMENTS—INJURIES TO PROPERTY.

A railroad was not negligent in constructing an embankment with a 90-foot opening for a water course, unless it had reasonable cause to believe that a larger opening would be required to dispose of water likely to accumulate.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. \S 216, 217, 221, 222; Dec. Dig. \S 171(1).]

3. TRIAL \S 253(1)—INSTRUCTIONS—NEGATIVE DEFENSES.

The rule that matters of pure defense need not be negated in plaintiff's instruction is applicable only when the situation presents harmless error, and not where the instruction ignores the most potent factor in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 613, 614; Dec. Dig. \S 253(1).]

4. NEGLIGENCE \S 121(1) — LIABILITY — VIS MAJOR.

The rule that one is liable when his negligence combines with act of God or vis major is applicable only when negligence is shown.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 217, 220, 224, 227; Dec. Dig. \S 121(1).]

5. WATERS AND WATER COURSES \S 171(1)—OVERFLOW—LIABILITY—DAMAGES.

Damages from overflow during an extraordinary flood, alleged to have been caused by a railway's negligence in leaving insufficient opening in embankment, cannot be allowed, unless the injury would not have occurred unless the opening was too small.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. \S 216, 217, 221, 222; Dec. Dig. \S 171(1).]

6. WATERS AND WATER COURSES \S 178(1)—OVERFLOW—LIABILITY—DAMAGES.

Damages for overflow on land, alleged to have been caused by railway's negligence in leaving insufficient opening in embankment, are not the entire damage but only that caused by the insufficient opening.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. \S 251-254; Dec. Dig. \S 178(1); Damages, Cent. Dig. \S 13, 276½, 282.]

Appeal from Circuit Court, New Madrid County; Sterling H. McCarty, Judge.

Action by Weston Sherwood against the St. Louis Southwestern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Edward A. Hald, of St. Louis, and Wam-mack & Welborn, of Bloomfield, for appellant. Robert L. Ward, of Caruthersville, and Riley & Riley, of New Madrid, for respondent.

STURGIS, J. The damages sued for, and for which plaintiff was awarded \$3,000, were occasioned to plaintiff's land by the

overflow from backwater of the Mississippi river during the great flood of April, 1913. The plaintiff claims that the defendant's negligence in not leaving a sufficient opening through its roadbed, to permit the passage of the water through same, combined with the high water to cause same to overflow the defendant's embankment and wash away the soil and cut channels through his farm. The defendant claims that it was not negligent in this respect, in that the opening left by it through the embankment was amply sufficient to afford an outlet for all the waters that would ordinarily accumulate or could reasonably be expected would do so, and that the damage in question was the result of an unusual and extraordinary flood and overflow of the river, such that it was not bound to anticipate and provide against the same. Defendant also claims that the flood and overflow of water was of such vast extent and overwhelming character that the damage would have occurred regardless of its embankment or any sized opening therein.

The land in question is located some four miles from the river, northwest of the town of New Madrid, and in and along what is known as the De Cyperi, which is described as an overflow channel or depression leading from the Mississippi river to the Little River Swamp to the northwest. This channel or depression leaves the Mississippi river about a mile below New Madrid and extends northwest, and is crossed at about a right angle by defendant's roadbed at plaintiff's farm of 163 acres, of which 56 acres are on the southeast side of the defendant's railroad and 107 acres on the northwest side. This De Cyperi channel is really a cultivated valley between slightly higher ridges and of somewhat indefinite and varying width. The crest of the ridges on the north and south are about opposite each other and nearest together at and near plaintiff's farm, or, as some witnesses put it, this De Cyperi channel or valley passes through the ridge at this place. The defendant's railroad crosses the De Cyperi from one ridge to the other on an embankment, the valley here being about a quarter of a mile wide. The height of this railroad embankment varies from 2 or 3 feet to 7 or 8 feet where the valley is lowest. Some of the witnesses speak of an inner channel or depression in this valley about 300 feet wide and 3 or 4 feet lower than its banks. The defendant had left a 30-foot opening or trestle at the lowest part of this basin-like valley.

A map of the flooded area shows that when this injury occurred there was a vast flooded area to the east of plaintiff's farm, where defendant's road crosses the De Cyperi valley, extending inland from the river from 10 to 20 miles or more, covering most of Mississippi and the eastern portion of New Madrid counties, beginning above Cairo and extending with the bend of the river to below New

Madrid. Within this area the levees along the river had broken and been washed away at several places to the extent of 4 or 5 miles, allowing the flood waters of the river to cover the land to the ridges converging at this point. The flood waters converged like a funnel and passed through the De Cyperi under and across defendant's roadbed, and again expanded into a vast inland sea in the Little River valley to the west. The dry land formed two tongues converging, one from the north and the other from the south, with plaintiff's farm in the De Cyperi valley or depression between. In ordinary conditions this De Cyperi channel is not a water course, even for surface water, and it is only when the Mississippi river reaches a high-flood stage that the water backs up therein and reaches such a high stage that it begins to run westward and away from the river into the Little River Swamps through the De Cyperi basin over plaintiff's farm. Since the settlement of the country, this has occurred only a few times. At the time of this injury, the Mississippi river rose to the highest stage of which there is any record. In the previous year, however, it rose to a stage only about 8½ inches lower. These two floods and the flooded areas were, of course, very similar. In 1912, some 400 or 500 feet of defendant's railroad was washed away. It was restored, leaving, as stated, about 90 feet of open trestle. In 1913, during the flood now in question, about 1,000 feet of defendant's track was washed away. No great damage was done to plaintiff's farm in 1912, and the great damage of 1913 is accounted for, not only by the 8-inch higher rise of the river, but because in 1912 the defendant's embankment was washed away early in the flood, while in 1913 it had been ballasted with stone and withstood the flood for several days, forcing the water to flow and fall over the embankment. The evidence also indicates that the breaks in the levees further north in the vicinity of Cairo caused a strong current to come from the northeast as well as from the river to the south below New Madrid, and the combined currents and greater volume of water converging here poured like a millrace through the De Cyperi channel, making a much stronger and swifter current than in 1912. A civil engineer, who was present at the time and made a study of the flood conditions, said that the water attained a speed of 8 miles an hour in this channel, and that a volume of water equal to more than 1/20 of the flow of the Mississippi river passed through this De Cyperi valley.

The evidence on which plaintiff most strongly relies, as proving that defendant's embankment was one of the efficient causes of his land being so badly washed, is that as the water gradually rose in the De Cyperi the driftwood and debris lodged against the trestlework and, this opening being choked

and too small, the water dammed up till it was overflowing the embankment, beginning 100 feet or more from the end of the trestle, where the embankment was slightly lower. Several witnesses testified that, before the embankment gave way and while the water was pouring over it, the water on the south-east side of the embankment, nearest the river, was 2 to 4 feet higher than on the northwest side. The Frisco railroad about parallels the defendant's road at this place and crosses the De Cyperi channel about a half mile further northwest. Its track and roadbed were also washed out. The water rose to the depth of 4 to 5 feet in the town of New Madrid and several smaller towns were flooded, including Lillbourn west of the ridge running north from below New Madrid and through which ridge the De Cyperi is a sort of pass. When the flood subsided, the soil was found to be washed from a large part of plaintiff's farm and a large lake or slough, 200 to 400 feet wide, extended across same on both sides of defendant's roadbed.

The defendant built its road in 1883 and then left only a narrow opening not over 20 to 30 feet wide. In that year the backwater from the river went through the De Cyperi and washed it out to a limited extent, and a wider opening was then made. The volume of water which then passed through the De Cyperi was very much smaller than that of the floods of 1912 and 1913. Some of the witnesses said the water again went through to a small extent in 1897. Mention is also made of a flood in 1865 or 1866, but its extent is not clearly shown. In the flood of 1883 the river rose to a height of 52 feet on the Cairo gauge. The backwater will begin to run through the De Cyperi channel when the river is at 47 to 48 feet, but this is only the water which backs up through the channel from its mouth below New Madrid. When the river reaches the height of 52 feet, as it did in 1883, the flood water from higher up the river above Cairo will begin to flow over the ridge of high ground extending north of New Madrid and east of the De Cyperi depression. This it did to a small extent in 1883. In 1912 the river rose to 54 feet at Cairo and in 1913 to 54.7. At the time of this flood, at least 2½ feet of water was going over the entire ridge of high ground north of New Madrid and east of the De Cyperi depression. This depression was some 12 to 14 feet lower, and hence the volume of water and the swift current.

The case was submitted to the jury for plaintiff on an instruction that if the jury find—

"that said De Cyperi on plaintiff's land was a natural and well-defined drain running through plaintiff's land from a southeasterly to a north-westerly direction; that the defendant in constructing its roadbed across said De Cyperi on plaintiff's land constructed an embankment and dump several feet higher and above the level

of plaintiff's said land, and negligently failed to construct and maintain a suitable opening across and through its right of way and roadbed so as to afford a sufficient outlet to permit the water to pass through the said De Cyperi from the east and south side of defendant's right of way and roadbed where said railroad crosses the De Cyperi on plaintiff's land; and, if you further find that the opening in defendant's roadbed and right of way, where the same crosses the De Cyperi on plaintiff's land was not suitable, sufficient, and large enough to permit the waters on plaintiff's land to pass, but the flow of the water was obstructed in its passage through the De Cyperi at the place aforesaid, at the time testified to herein, and by reason thereof water accumulated in a large body or great quantities on plaintiff's land south and east of defendant's roadbed and by reason thereof such water was held in a body until it rose to the top of defendant's roadbed and ran over it and greatly increased its velocity and thereby precipitated large bodies of water over and across plaintiff's land and washed away the soil and made large channels thereon and thereby damaging and injuring plaintiff's said lands, then you will find the issues for the plaintiff."

[1] This instruction is clearly wrong in that it loses sight of the only issues in the case, to wit: (a) Whether the flood in question was of such extraordinary and unprecedented magnitude that defendant, in building and maintaining its roadbed, was guilty of negligence in not anticipating that a 90-foot opening in its embankment would be too small to let through the water accumulating there; and (b) whether or not the flood and volume of water forced through this channel was not so large, swift, and overwhelming as to have caused the damage regardless of the size of the opening. By this instruction, the jury were authorized to find for plaintiff on the mere finding that the opening left by defendant in its roadbed did not in this flood, "afford a sufficient outlet to permit the water to pass through"—a fact about which there was really no question. The defendant practically conceded, and the physical facts clearly show, that the opening was not "large enough to permit the waters on plaintiff's land to pass," and only claimed that no such volume of water had ever tried to pass before and that it had no reasonable cause to anticipate and provide against such an extraordinary flood; that the volume of water was so great and swift that the damage would have resulted regardless of the size of the opening. The instruction is almost, in its effect, a peremptory one to find for plaintiff.

[2] We do not understand plaintiff to controvert the proposition that defendant is not required to anticipate and provide against the effects of an extraordinary and unprecedented flood. Unless the defendant had reasonable cause to believe that a larger opening through its roadbed would be required to let through the water that was likely to accumulate there, then there is no negligence in the case. *Eliet v. Railroad*, 76 Mo. 518, 534; *Coleman v. Railroad*, 36 Mo. App. 476, 493; *Evans v. Railroad*, 222 Mo. 435, 454, 121 S. W. 36; *Powers v. Railroad*, 158 Mo. 87,

101, 57 S. W. 1090; Haney v. Kansas City, 94 Mo. 334, 7 S. W. 417.

[3] The plaintiff practically concedes this error in his instruction but invokes the rule that matters of pure defense need not be negated in plaintiff's instruction, where same are clearly presented in those given for defendant. This rule is not to be applied indiscriminately, but only when it falls under the doctrine of harmless error. It should not be applied here for the reason that the main issue in the case was as to whether this flood was so extraordinary that a reasonably prudent person would have anticipated and guarded against it. Plaintiff's proof of his damage connected same with the highest rise and flood known in the history of the Mississippi river. There is much to be said in favor of denying defendant's liability absolutely under the facts stated, and the case should not have gone to the jury on an instruction purporting to cover the whole case and ignoring the most potent factor in the case, to wit: The extraordinary and unexpected flood causing this damage. In both the Ellet and Coleman Cases, *supra*, the court condemned the instructions containing this same error, though proper instructions on the same point were given for defendant.

[4] The plaintiff seeks to justify his recovery in this case on, and cites cases announcing, the rule that where the negligence of the defendant combines with the act of God or vis major the defendant is liable. The defect in that proposition as applied to this case is that no negligence of defendant is alleged or attempted to be shown except the making of a too narrow opening in the roadbed at this point. There is no negligence in the case and hence none combined with the vis major, unless the defendant had reason to believe that a wider opening was necessary to take care of the water likely to accumulate there. By this instruction the jury was not required to so find, and hence there is no negligence found to exist in the case.

[5] Since the evidence connects the damage with an unusual and extraordinary flood, the jury should not have been allowed to find for plaintiff without finding that the injury would not have occurred except for this opening through the roadbed being too narrow.

[6] In this connection, plaintiff's third instruction on the measure of damages is also erroneous in telling the jury that if it found for plaintiff to allow damages for the diminished value of plaintiff's land "caused to be less by reason of the injury testified about." The damages which plaintiff could recover were not necessarily all that were occasioned by the flood as the instruction says, but only such, if any, as would not have occurred except by the opening in the embankment being too small. The damages here were to the land on both sides of the

railroad, and it is difficult to see how the washing of the land on the upper or south-east side of the railroad could have resulted from this cause. Where it is so speculative to say that any of the damages claimed would not have occurred had the opening been wider than 90 feet, the jury should have clearly understood that they should exclude such damages as would have occurred regardless of the width of the opening. Fowler v. Burris, 186 Mo. App. 347, 171 S. W. 620; Gulath v. St. Louis, 179 Mo. 38, 55, 77 S. W. 744; Turner v. Haar, 114 Mo. 335, 347, 21 S. W. 737; Newcomb v. Railroad, 169 Mo. 409, 427, 69 S. W. 348. These considerations demand a reversal of the present judgment.

On a full consideration of this case with my Associates, we have concluded and concur in holding that the flood in question was so overwhelming in character and destructive in its results that there is no substantial evidence showing that the injury to plaintiff's farm resulted as an efficient cause from the narrowness of the opening through defendant's embankment—that it would not have occurred regardless of the size of the opening—or that defendant had any reasonable cause to anticipate and guard against, if it could have done so, such an extraordinary and unusual flood.

The case will therefore be reversed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

PITTSBURG & MIDWAY COAL CO. v.
LANING HARRIS COAL CO.
(No. 12005.)

(Kansas City Court of Appeals. Missouri.
June 12, 1916. Rehearing Denied
July 3, 1916.)

1. TROVER AND CONVERSION §11—TITLE—THEFT.

No title to personalty can come through a thief, and whoever intermeddles with the owner's rights by selling stolen property is guilty of a conversion, regardless of his innocence; therefore a coal dealer, who received coal stolen from a mine by a servant of the mine owner, is guilty of a conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 95-98; Dec. Dig. § 11.]

2. TROVER AND CONVERSION §22—RECEIVING STOLEN PROPERTY—DEFENSE.

Plaintiff mining company allowed its shipping clerk to sell coal on its behalf. The clerk, representing to defendant that cars of coal belonging to plaintiff belonged to third persons and were delivered to him for sale, consigned them to defendant who sold the same, returning the proceeds to the clerk. This practice went on for a considerable time. Held that, as the shipping clerk had no right to sell plaintiff's coal on his own behalf and was not clothed with any indicia of ownership, defendant cannot escape liability for its conversion on the ground that plaintiff should earlier have discovered the thefts.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 152-162, 167-169; Dec. Dig. § 22.]

3. ESTOPPEL. ~~§58~~—EQUITABLE ESTOPPEL—WHAT CONSTITUTES.

In such case, the fact that plaintiff requested defendant not to mention the thefts when they were discovered, and it was sought to induce the clerk's relatives to make a settlement, does not estop plaintiff from later asserting its rights; defendant, by silence and failure to immediately pursue the shipping clerk, not having suffered any loss.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 144, 145; Dec. Dig. ~~§58~~.]

Appeal from Circuit Court, Jackson County; T. J. Seehorn, Judge.

Action by the Pittsburg & Midway Coal Company against the Laning Harris Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Lathrop, Morrow, Fox & Moore, of Kansas City, for appellant. Scarritt, Scarritt, Jones & Miller, of Kansas City, and John J. Campbell, of Pittsburg, Kan., for respondent.

ELLISON, P. J. This is an action for conversion in which the judgment was for the plaintiff in the trial court.

Plaintiff is a corporation engaged in mining and shipping coal to market from Pittsburg, Kan. Defendant is a corporation engaged in the coal business, including the sale of coal on commission and remittance of proceeds to those engaging its services. It had business connection with plaintiff, and had served plaintiff in the manner indicated for several years. Defendant's shipping and billing clerk was one Hiatt. He likewise sometimes bought and sold coal for plaintiff, but he had no authority to sell it on consignment; and he had no authority to collect money for sales, nor to indorse checks, nor to sell plaintiff's coal in his own name. Hiatt was, or at least became, dishonest and began to steal or embezzle coal from plaintiff. This appears first in the following letter dated April 15, 1911, to defendants:

"I am billing you to-day a car of lump coal on consignment. This coal comes from a small shaft, but is good, clean, lump coal and a party asked me to dispose of it, so the only way I knew of was to send it to you. I trust you will handle it so as to save any demurrage, and at best price possible. This car is 7943 N. Y. C. & St. L. 40 ton capacity. Will send you bill as soon as get weights, as party is a little hard up, and if you can stretch a point and send me check it will be appreciated. Thanking you in advance, I am, yours truly, C. O. Hiatt."

This was kept up, from time to time, for about three years, until the carloads of coal amounted to \$4,014.80. All of Hiatt's letters were individual communications, and all of plaintiff's remittances were to him individually. Hiatt quit plaintiff's employment shortly before his misdeeds were discovered. He admitted his guilt and absconded. Plaintiff's president came to Kansas City and exhibited to defendant's general manager a statement of the cars of coal taken from it by Hiatt and sold for him by defendant.

The latter refused to admit liability or to pay.

The evidence showed that, when plaintiff's president discovered the loss, he endeavored to get Hiatt to make it good by the assistance of his relatives, but failed. The evidence further shows that, when plaintiff's president interviewed defendant's manager and received his emphatic refusal to recognize liability, they separated, and that night plaintiff's president called him at his house over the telephone in regard to the matter. They differ as to what was said. Accepting defendant's version as correct, it was a request to defendant's manager to say nothing about the matter discussed between them.

[1] An interesting opinion by Judge Bliss in *Koch v. Branch*, 44 Mo. 542, 100 Am. Dec. 324, demonstrates that no title to personalty can come through a thief. And whoever intermeddles with the owner's right by selling the property is guilty of conversion, however innocent he may be. In that case, the instance of an auctioneer is given as an illustration, the statement being that although such agent sells in the usual way with such agents, without knowledge of the theft, or the claim of the true owner, and although he pays over the sale price to the person for whom he made the sale, he is guilty of a conversion. That case has been followed by the Supreme and appellate courts of the state to the present time. Therefore, however good defendant's intentions and however innocent it was of Hiatt's pilfering, its legal obligation will not be disturbed. *Sage v. Shepard & Morse Lbr. Co.*, 4 App. Div. 290, 39 N. Y. Supp. 449 (affirmed *Id.*, 158 N. Y. 672, 52 N. E. 1126); *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 56 N. W. 663, 48 Am. St. Rep. 400; *Porges v. Mortgage & Trust Co.*, 203 N. Y. 181, 96 N. E. 424; *Rogers v. Dutton*, 182 Mass. 187, 65 N. E. 58.

[2] Defendant's defense is that the loss was occasioned "by the default of plaintiff's own trusted employé, whom plaintiff had clothed with authority to pass title to the property by causing it to be billed out in accordance with his directions, and also to purchase and dispose of coal *in behalf of the company.*" (Italics ours.) If the facts would justify that statement of defense, no doubt it would be good. But if the trusted agent, not acting for his principal, disposes of the latter's property as his own to a purchaser who pays or remits the sale price to such agent in his own name, it forces a conclusion the reverse of that just stated. And so the learned trial judge submitted the case by an instruction for plaintiff, and we accept the verdict as establishing that fact.

Defendant states that the conceded facts show that either Hiatt's position with plaintiff was such that his knowledge of the transactions "must be imputed to the company, or the company, by reason of placing Hiatt in

a position such that he could and did impose upon and mislead defendant into these dealings, extending over a series of years, without detection, and in failing to check his shipments against the record of mine production, was guilty of such negligence that it cannot recover." The cases of *Fairgate Realty Co. v. Drosda*, 181 S. W. 898, not yet officially reported, *National Safe Dep. Co. v. Hibbs*, 229 U. S. 891, 88 Sup. Ct. 818, 57 L. Ed. 1241, are cited in support of this statement.

The first of these is a decision of our Supreme Court and bears no resemblance to this in its facts, or in the law applicable thereto. There, a promissory note and deed of trust were executed in the name of a corporation by two parties, one purporting to be president, and the other secretary, of the corporation, when others held that place. These persons falsely wrote in the records of the corporation that they had been elected to those offices by the directors, and were authorized to borrow money. The note was sold to an innocent purchaser to whom these false entries were shown. The corporation brought suit to cancel the deed of trust. Two of the complaining directors received part of the money realized on the note, and the others admitted that they never looked at the record where these falsehoods were recorded, and one of them admitted that he was "ashamed of it." Others knew of the execution of the note, and all knew of the application of a part of the money to improvements for the corporation. In such state of facts, the Supreme Court denied relief. The case, manifestly, is not one of the class to which the one before us belongs.

The second case is founded on a principle invoked by defendant, viz., that "where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." This case, also, is wholly unlike the one under consideration. Kelly, a borrower from a bank, gave as collateral certain certificates of corporation stock issued in his name, which recited that it was transferable by him, and each contained an assignment on the back by Kelly with power of attorney to transfer, signed in blank by him. A bookkeeper and assistant note teller's duties, among other things, consisted in delivering to borrowers, who had paid their obligations, the collaterals pledged to secure them; but he did not have authority to sell or dispose of such collateral. He asked the proper officer for the Kelly certificates of stock and, supposing it was for delivery to Kelly, because he had paid his loan, they were delivered to him. But Kelly had not paid, and this employé took two of the certificates to a stockbroker for sale on his own account. Being already assigned by Kelly, as above stated, they were taken by the broker and sold, the employé receiving the price obtained.

The broker naturally supposed the stock belonged to the employé. The Supreme Court of the United States refused to apply the principle that, when the owner of property has lost it by the criminal act of another, he cannot be deprived of his property by an attempted transfer of title to a third person, no matter how innocent the purchaser may be. The court refused to apply that principle because the bank had intrusted its employé with a peculiar article of property, in its nature negotiable, with every indicia of ownership and right to sell for himself.

The present case does not present any feature like that. This plaintiff in no way clothed Hiatt with an appearance of ownership of the coal. He could sell for plaintiff as its agent, but he had no more right to appropriate the coal and sell it as his own and receive the price for himself, than a stableman would have to ride off his employer's horse and sell it as his own.

[3] But defendant insists, as a separate proposition, from other considerations, that plaintiff, by the conduct of its president in requesting that the matter of Hiatt's embezzlement be not mentioned, led it to believe that no claim would be made against it, and thereby to fail to take measures against Hiatt looking to its own reimbursement. We may leave out of view that defendant's president absolutely and finally denied any liability and absolutely refused to pay plaintiff's demand, and yet reject this defense, for the reason that there was no evidence that defendant suffered any loss by reason of not immediately pursuing Hiatt. The Supreme Court of the United States decided in *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 115, 6 Sup. Ct. 657, 29 L. Ed. 811, that such right would be regarded as a valuable one, regardless of affirmative evidence of damage, and defendant cites it as bearing out its position. That case was based on the peculiar condition of a bank in its relation to its depositors. But conceding its application, it has not been regarded as the law in this and other states. *Wind v. Bank*, 39 Mo. App. 72, 85; *McKeen v. Bank*, 74 Mo. App. 290; *Kenneth Inv. Co. v. Bank*, 96 Mo. App. 125, 70 S. W. 173.

After full consideration, we conclude the judgment on the law and the facts was for the right party and it is affirmed. All concur.

LYKE v. AMERICAN NAT. ASSUR. CO.*
(No. 1732.)

(Springfield Court of Appeals. Missouri.
June 24, 1916.)

1. INSURANCE — 137(3) — PREMIUMS — PAYMENT.

Where a life policy provided that it should not go into effect until payment of the first premium, the fact that the agent delivered it and personally paid the amount of the premium, less his commission, pursuant to his agree-

ment with the insurer, did not operate as the payment of the first premium, making the policy effective.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 235-242; Dec. Dig. ¶137(3).]

2. EVIDENCE ¶420(3) — PAROL EVIDENCE — LIFE INSURANCE—PREMIUMS—PAYMENT.

Where a life policy making payment of the first premium a condition of its going into effect contained no recital of such payment, the fact that the premium was not paid may be established by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1815, 1821, 1936; Dec. Dig. ¶420(3).]

3. INSURANCE ¶136(5) — LIFE POLICY — TIME OF GOING INTO EFFECT.

Where insured receives a life policy different from the one applied for, he must reject it within a reasonable time after delivery, and retention of the policy without objection beyond such reasonable time is proof of acceptance. Therefore, where insured received a life policy in August, and did not at that time return a receipt attached to the policy which directed that the receipt should be signed and returned when the policy was delivered, insured cannot in December, by writing across the face of the policy "Accepted" and his name, put the policy into effect as of that date, thus delaying time for payment of subsequent premiums; this being particularly true as the receipt was signed and dated as of the time of delivery of the policy, but was not detached, the first premium, not having been paid by insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 222-224, 229, 230; Dec. Dig. ¶136(5).]

Appeal from Circuit Court, Jasper County; D. E. Blair, Judge.

Action by Anna C. Lyke against the American National Assurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Oscar B. Elam, of Aurora, for appellant. Jones, Hocker, Sullivan & Angert, of St. Louis, John L. McNatt, of Aurora, and George F. Hald, of St. Louis, for respondent.

STURGIS, J. The trial court sustained a demurrer to plaintiff's evidence in this suit on a policy of life insurance issued by defendant. The salient facts lie within a small compass. The policy is dated August 11, 1913, and was then issued on the application of the insured, Winfred B. Lyke, in favor of plaintiff as beneficiary. Both the application and the policy provide that the policy shall not take effect until the first premium of \$109.53 has been actually paid and the policy delivered to the applicant during life and good health. No premium was actually paid by the insured. The policy also provides that the insurance is granted in consideration of the application and of the payment in advance of the premium mentioned for the first policy year ending August 11, 1914; that the contract will be continued upon the payment of an annual renewal premium of like amount on or before August 11, 1914, and of the payment thereafter of a

like sum on or before the 11th day of August in each year during the continuance of the policy or until the prior death of the insured; that after delivery of the policy to the insured it takes effect as of its date, August 11, 1913.

The insured died December 16, 1914, more than four months after the second premium became due, counting from the date of the policy. This premium was not paid. The policy also provides that, if any premium or installment thereof is not paid when due, the policy shall ipso facto be null and void, and all premiums forfeited to the company, except as otherwise provided.

[1] The plaintiff seeks to avoid the force and effect of the failure of the insured to pay the first premium, the effect of which is that the policy never became a live contract, by showing that the defendant company had an agency contract with the agent through whom the policy was applied for by which it lost nothing by the insured's failure to pay the premium to the agent. The substance of that contract, so far as material here, is that the defendant received all applications and issued all policies within the agency territory through this agent, who collected all first premiums and retained, as his commission, a large part thereof; that when applications were received through his agency and accepted by the company the policies were then forwarded to this agent, who delivered same and collected the first premium; that this agent was charged with the net amount of premiums due the defendant on all policies sent to him for delivery, and he must settle for same with the defendant company within 60 days from the delivery of the policy to him unless returned to the company, except that when notes were taken for the premiums he must then settle for same within 90 days. It will be readily seen that this contract was an arrangement and agreement solely between the company and its agent to facilitate and safeguard the transaction of business between them, by which the company looked to the agent, and held him responsible, for all premiums on policies delivered to him by the company for applicants and not returned to the company within the stipulated time. The agent took the risk of collecting from the applicant and, if he chose to indulge an applicant it was his personal risk. Under this arrangement a payment of any such premium by the applicant to the agent would be a payment to the company whose agent he was, but a payment by the agent to the company was not a payment for the applicant whose agent he was not.

In the present case we will grant that the evidence is sufficient to show that defendant's agent, by reason of having indulged the insured beyond the period allowed, did in fact pay over to defendant its portion of the

first premium on this policy, and thereafter tried to induce the insured to repay the same; yet we do not think this fact made a valid contract of insurance in favor of the insured. This exact point was decided in *Whiting v. Insurance Co.*, 129 Mass. 240, 37 Am. Rep. 317, though in that case the third party paying the premium did so for the insured's benefit. Here the agent did not pay his company this net premium for the benefit of the insured, or with the intention of keeping the policy alive for his benefit, but solely because it became a debt of his own. The agent was not even making a contract for the benefit of the insured. He was merely accounting for funds which, so far as the company was concerned, were regarded as being in his hands. As stated in the above-cited case, there was no insurance contract, because there was no meeting of the minds of the company and the insured. The settlement between the agent and the company was *res inter alios acta*.

[2] Nor does this case come within the rule of *Dobyns v. Bay State Beneficiary Ass'n*, 141 Mo. 95, 45 S. W. 1107, and *Gibson v. Insurance Co.*, 181 Mo. App. 302, 168 S. W. 818, that, where the policy expressly recites the advance payment of the initial premium, such fact cannot be controverted by parol evidence. Here there is no recital in the policy that the first premium had been paid. The whole contract, consisting of the application and policy, shows that it was contemplated that the first premium should not be paid till its delivery and acceptance by the insured, and it is competent to show that this was never done. 5 *Elliott on Contracts*, § 4358. Since the payment of the first premium was a condition precedent to the policy becoming a binding contract, the policy never went into force. *Giddings v. Insurance Co.*, 102 U. S. loc. cit. 111, 26 L. Ed. 92; *Brown v. Insurance Co.*, 59 N. H. 298, 47 Am. Rep. 205; *Whiting v. Insurance Co.*, 129 Mass. 240, 37 Am. Rep. 317.

[3] We also think that, even if the policy came into life by the payment or waiver of payment of the first premium, it was thereafter forfeited by failure to pay the second premium within 30 days of the due date thereof, as the policy provides. The plaintiff seeks to avoid this by claiming that the policy did not go into force and effect till its delivery and acceptance by the insured, and that the insured did not accept the policy until December 31, 1913; that the first year's premium kept the policy in force one year from the last-named date, or to December 31, 1914, and the insured died within that time. The plaintiff relies on *Halsey v. Insurance Co.*, 258 Mo. 659, 167 S. W. 951, as sustaining this theory. The facts do not justify this conclusion. The policy bears date August 11, 1913, and was registered by the state insurance department on August 13, 1913. A form of receipt which evidently accompanied the policy and contained the

direction that upon the delivery of the policy this receipt should be signed by the insured and mailed immediately to the company bore date of August 20, 1913, over the insured's signature, and was found along with the policy among the insured's effects after his decease. It is evident, therefore, that the policy was delivered to the insured at or about this last date.

No formal act of acceptance of this policy was called for or required; as the form of receipt, had it been returned to the company as requested, was merely for its information that the policy had been delivered. The policy issued and tendered to the insured was in exact accord with that applied for, and there was no need of any acceptance further than the payment of the first premium and retention of the policy. The insured's consciousness that he had not paid this first premium and that the policy was therefore worthless accounts for his not returning the formal receipt acknowledging the delivery of the policy. Even if the insured had paid the first premium or given an obligation therefor and the policy delivered was different than that applied for, the insured would be required to reject same within a reasonable time after delivery to him, and the retention of the policy without objection beyond such reasonable time is proof of acceptance. *Insurance Co. v. Nelberger*, 74 Mo. 167; *Robertson v. Tapley*, 48 Mo. App. 239, 242; *Gray v. Blackwood*, 112 Ark. 332, 165 S. W. 958.

It is true that across the face of this form of acknowledgment of the delivery of the policy, which was found among the deceased's effects, appear the words, "Accepted 12—31—1913, W. D. Lyke," and there is some evidence that this notation is in the handwriting of the insured. But, if so, it was purely an *ex parte* act of the insured, unknown and unassented to by the defendant. To hold that the insured could thus arbitrarily and indefinitely postpone the taking effect of the policy and prolong at his pleasure the due date of the next premium, and, in effect, obtain insurance for a year and four months on payment of one premium (which as we have seen was not paid), is repugnant to our conception of both law and justice.

This policy itself declares that after delivery to the insured it takes effect as of its date, August 11, 1913, which is contracted to mark the beginning and end of each policy year. But it is not necessary to hold that the terms of this policy so differ from the one before the court in *Halsey v. Insurance Co.*, 258 Mo. 659, 167 S. W. 951, that the acceptance of this policy related back to the date of the policy. It is sufficient to hold, as we do, that the acceptance of this policy, if there was any acceptance, was within a reasonable time after its delivery to the insured, and that the second premium was due one year after such date; that it was not

paid within such period and the policy lapsed.

This cause might well have been disposed of on a bare statement of the facts showing that no premium was ever paid on this policy, either in cash or otherwise, and that plaintiff is seeking to reap where she has not sown—to get something for nothing. We will also say, as an additional and sufficient reason for affirming the judgment, that appellant has grievously sinned against our rule requiring the appellant to abstract the record.

The judgment is therefore affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

SWANSON et al. v. BRADSHAW.
(No. 1805.)

(Springfield Court of Appeals. Missouri.
June 24, 1918.)

1. NUISANCE §75—DECREE—CONSTRUCTION.

A decree perpetually enjoining the maintenance of a nuisance must be understood, interpreted, and limited with reference to the subject-matter of the litigation and the object to be attained.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176-184; Dec. Dig. §75.]

2. APPEAL AND ERROR §170(2)—OBJECTION BELOW—CONSTITUTIONAL QUESTION.

In a suit in equity to enjoin the further maintenance of a nuisance consisting in the use of land for the disposition of garbage, dead animals, etc., the constitutional question as to whether an injunction would deprive defendant of the use of his property without compensation or due process of law should have been raised at or before the trial, and could not be first raised in the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1037, 1038; Dec. Dig. §170(2).]

3. NUISANCE §62—OFFENSIVE ODORS.

Where the air is corrupted by noisome smells so as to substantially interfere with the ordinary comforts of human existence, or to materially diminish the value of another's property, such smells constitute a nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 153-157; Dec. Dig. §62.

For other definitions, see Words and Phrases, First and Second Series, Nuisance.]

4. NUISANCE §75 — OFFENSIVE ODORS — SUFFICIENCY OF EVIDENCE.

Evidence in a suit in equity to enjoin the maintenance of a nuisance consisting in defendant's use of a tract of land for disposing of the garbage and dead animals collected from a city, which were so buried or disposed of as to create offensive odors, to render water dangerous for domestic use, to interfere with health and enjoyment of the community, and to decrease value of property, held to sustain a perpetual injunction.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176-184; Dec. Dig. §75.]

5. NUISANCE §67—ENJOYMENT OF PROPERTY—INTERFERENCE.

In such case, the fact that defendant was using an approved method and was disposing of the garbage in a careful manner would not justify his interference with the reasonable and comfortable enjoyment of property in the

vicinity, or the causing of material injury thereto.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 140; Dec. Dig. §67.]

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Suit in equity to enjoin the maintenance of a nuisance by A. C. Swanson and others against W. J. Bradshaw. Perpetual injunction granted, and defendant appeals. Affirmed.

Patterson & Patterson and George Pepperdine, all of Springfield, for appellant. Perry T. Allen and W. D. Tatlow, both of Springfield, for respondents.

STURGIS, J. This is a suit in equity to enjoin the further maintenance of a nuisance. The nuisance consists in the use by defendant of a tract of land, about four or five miles southwest of the city of Springfield, for disposing of the garbage and dead animals collected from said city. The defendant entered into and was operating under a contract with the city by which he agreed to remove from the city all dead animals and garbage and to dispose of the same in a sanitary manner so as not to create a public or private nuisance. The plaintiff alleges, and defendant denies, that the manner in which the dead animals and garbage from said city have been and are being disposed of by defendant on the tract of land mentioned has created, and will continue to create, a grievous nuisance, in that same creates noisome and offensive smells and odors and pollutes the atmosphere; that the burying of such large numbers of dead animals on defendant's premises renders dangerous and unsafe for domestic use all water in that neighborhood; that the maintenance of this nuisance has materially decreased the value of land in that vicinity, inclusive of that owned by the plaintiffs, and is a menace to the health, happiness, and enjoyment of that community. The issues were found for plaintiff and a perpetual injunction granted.

[1, 2] As the case is presented here, it involves a question of fact only, save that defendant has suggested that, on account of a constitutional question being involved, the appeal should have been granted to the Supreme Court. As to this last suggestion, we find that no constitutional question was ever suggested till in the motion for new trial. The constitutional question asserted to be involved is that to enjoin the use by defendant of his land, for disposing of garbage and dead animals, deprives him of his property and the use thereof without compensation or due process of law. The decree, however, is not so general or far-reaching as this contention might imply. Like all judgments and decrees it must be understood, interpreted, and limited with reference to the subject-matter of the litigation and the object to be

attained. The court has only decreed with reference to the disposition being made by defendant of the dead animals and garbage collected from the city of Springfield. The constitutional question, if any is involved, could and should have been raised at or before the trial and it is well settled that such question, to be a live one in the case, must enter at the first open door. Being raised too late, it was properly ignored. *Nail v. Railroad*, 97 Mo. 68, 10 S. W. 610; *Paul v. Western Union*, 164 Mo. App. 288, 145 S. W. 99; *Austin v. Shoe Co.*, 176 Mo. App. 546, 558, 158 S. W. 709; *Zachra v. Manufacturing Co.*, 179 Mo. App. 683, 695, 162 S. W. 1077.

[3] It is urged here that the finding and judgment is against the weight of the evidence. We do not understand defendant to contend that the court should not grant the injunction as a proper remedy, provided the facts show that the use which defendant is making of his property is such as materially interferes with the usual and proper enjoyment of that of his neighbors. The law is well stated in *Joyce on Nuisances*, § 157, as follows:

"Where the air is corrupted by noisome smells so as to substantially interfere with the ordinary comforts of human existence, or to materially diminish the value of another's property, such smells constitute a nuisance."

[4] The evidence is quite voluminous, and many witnesses, both interested and disinterested, gave evidence sustaining plaintiff's contention. This is an equity case, and we have reviewed this evidence with a view of rendering such judgment as the trial court, in our opinion, ought to have given on the merits. We find that we do not need to defer to any superior opportunities of the trial judge in weighing the evidence, as we find that the clear weight of the evidence is with the trial court's finding. The evidence shows that large numbers of dead animals, horses, cows, dogs, cats, chickens, etc., were hauled to this point and disposed of by burying same in comparatively shallow trenches, and by feeding to hogs; that the offal and garbage was fed to hogs in open pens and distributed over the ground as manure. Not only does the surface water carry away such impurities onto other lands, but this land being of a limestone formation is such that the impurities are likely to find their way into the numerous underground streams finding an outlet in springs and wells. According to numerous witnesses, the stench and odor from this source pollutes the atmosphere for a mile or more around, rendering the habitations at times almost unbearable. Those traveling the adjacent road and cultivating the adjoining fields testify as to the sickening odors. Not only does this stench reach several dwelling houses, but also a church of that neighborhood. The varying winds shift the odors from one direction to another with little partiality.

[5] It is true that the garbage of the city must be taken care of and that defendant is engaged in a lawful and useful business. The evidence shows, however, that by some increased expense this garbage can be disposed of in a far more safe and sanitary way. The health officers of the city, both by report to the city and by oral evidence, pronounce the present method as improper and unsanitary. Even if defendant was using an approved method and was disposing of the garbage in a careful manner, this fact would not justify his interference with the reasonable and comfortable enjoyment by another of his property or his causing material injury thereto. *Joyce on Nuisances*, § 167.

The judgment is for the right party and is therefore affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

BIXEMAN v. REICHEL et al. (No. 11973.)
(Kansas City Court of Appeals. Missouri.
June 12, 1916. Rehearing Denied
July 8, 1916.)

1. FORCIBLE ENTRY AND DETAINER § 9(1)—
RIGHT OF ACTION—POSSESSION.

One cannot maintain an action of forcible entry and detainer who at the time of his dispossession was not in the exclusive possession of the land, though there is an exception to the rule when one tenant in common has been dispossessed by his cotenant.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 37; Dec. Dig. § 9(1).]

2. FORCIBLE ENTRY AND DETAINER § 6(2)—
OBJECT OF REMEDY.

The object of the forcible entry and detainer and unlawful detainer statutes is to preserve the peace by preventing one not in the actual possession of land from resorting to physical force, threats, or intimidation to gain possession, and the issue in such cases is not one of title or right to possession, but whether the plaintiff was in actual possession, and whether he was dispossessed by the defendant.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 31; Dec. Dig. § 6(2).]

3. LANDLORD AND TENANT § 9—RELATION—
POSSESSION OF PURCHASER.

Possession of land by a purchaser under a contract for a conveyance, taken either under the contract or by oral permission of the vendor, could not invest the purchaser with the relationship of a tenant to his vendor, nor make his holding anything more than that of a licensee.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 23-29; Dec. Dig. § 9.]

4. FORCIBLE ENTRY AND DETAINER § 9(2)—
RIGHT OF ACTION—POSSESSION.

A purchaser in possession under a contract for a conveyance or by oral permission of the vendor, and merely as a licensee, to till the farm and make repairs preparatory to taking possession after sale, was not in such exclusive possession, at the time of his dispossession by the vendor, as to enable him to resort to an action of forcible entry and detainer.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 38; Dec. Dig. § 9(2).]

Appeal from Circuit Court, Chariton County; Fred Lamb, Judge.

Suit by John Bixeman against Frank S. Reichel and another. Judgment for plaintiff, and defendants appeal. Reversed.

Roy McKittrick and J. A. Collet, both of Sallsbury, for appellants. John V. Goodson, of New Cambria, and Roy W. Rucker, of Keytesville, for respondent.

JOHNSON, J. Plaintiff sued defendants in a justice court to recover possession of a farm of 100 acres in Chariton county. The cause was removed to the circuit court on certiorari, and plaintiff filed an amended complaint, in which he alleged that defendants, who are father and son—

"willfully and unlawfully forcibly entered and detained, and unlawfully detained on the date aforesaid and continuing dates, and now detain, possession of the aforesaid lands, after demand made in writing for the delivery of the possession thereof."

A trial to a jury resulted in a verdict and judgment for plaintiff, and defendants appealed.

An error in the description of the land in the original complaint is the basis for a vigorous attack against the jurisdiction of the justice and of the circuit court to hear and determine the cause; but, in the view we entertain of the merits, the judgment should be reversed, and it is not necessary to discuss the subject of jurisdiction. Defendants offered no evidence, but stood in the circuit court, and are standing here on their demurrer to the evidence of plaintiff, which discloses the following facts: The parties are farmers, and plaintiff, in addition to farming, pursues the avocation of a rural auctioneer. Defendant Frank S. Reichel was the owner of the farm in question, and his son Joe lived on and was in actual possession thereof. On March 30, 1915, the parties met at a bank in New Cambria, and entered into a contract in writing for the sale of the farm by Reichel, Sr., to plaintiff for \$4,000, to be paid as follows: "Fifteen hundred dollars cash in hand paid, the receipt whereof is hereby acknowledged," and "twenty-five hundred on March 30, 1922." Further, the contract provided that "time shall be an essential," that plaintiff should "have possession of said land until default be made in any of the covenants or agreements herein contained to be done or performed by him," and that in case of the failure of plaintiff "to make either of the payments or perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of the parties of the first part, be forfeited and determined and the party of the second part shall forfeit all payments made by him on this contract," etc. Plaintiff testified that defendants accepted a span of mules from plaintiff in payment of \$250 on the first payment of \$1,500, and that he offered at the bank at the time the contract

was signed to give his check for the remaining \$1,250, but the banker who assisted in closing the deal discovered that a deed of trust which defendant Frank said had been paid had not been released of record, and the parties agreed to leave the contract which was signed in duplicate with the banker, and when the title was cleared plaintiff should pay the \$1,250 to the banker and receive his copy. At the same time Joe employed plaintiff to serve as auctioneer of a public sale of the personal property he had on the farm, and the sale was advertised for April 7th, and was made on that day at the farm. In the meantime, i. e., between March 30th and April 7th, Joe continued living on the farm without any change in the character of his occupancy, except that plaintiff was suffered to enter upon and sow 12 or 14 acres in oats and do other work on the place. Plaintiff testified he did this pursuant to an oral agreement made at the meeting on March 30th. As he states the agreement, it was:

"I was to have full possession, put the team in the barn, or, if I rather eat there, just use his stove and take possession. Q. Well, was Joe to remain on the place until the day of the sale; you consented to his remaining there? A. Yes, sir."

April 7th, at the close of the sale, defendants notified plaintiff to stay off the farm, and plaintiff, after making formal demand for possession, brought this suit.

[1] We have stated only the facts in evidence which compel the application of the rule that no one can maintain an action of forcible entry and detainer who at the time of his dispossession was not in the exclusive possession of the land. *Nelson v. Nelson*, 80 Mo. App. 184. There are exceptions to this rule as, e. g., where one tenant in common has been dispossessed by his cotenant (*McHose v. Ins. Co.*, 4 Mo. App. 514), but plaintiff cannot come within the exception, since his possession during the week between March 30th and April 7th neither was exclusive nor in common with one whose right to the common possession of the whole farm was equal to, but no greater than, his own.

[2] The prime object of the forcible entry and detainer and unlawful detainer statutes is to preserve the peace by preventing one not in the actual possession of land from resorting to physical force, threats, or intimidation to gain possession, and the question at issue in such cases is not one of title or right to possession, but was the plaintiff in actual possession, and was he dispossessed by defendant? *Redman v. Perkins*, 122 Mo. App. loc. cit. 168, 98 S. W. 1097, and authorities cited.

[3] Regarding plaintiff as a vendee under a contract for conveyance possession of the land taken by him, whether under the contract or by oral permission of his vendors, could not have invested him with the relationship of a tenant of his vendors, nor

made his holding anything more than that of a licensee. 1 Warvelle on Vendors, § 187; Young v. Ingle, 14 Mo. 426.

[4] And if, as such licensee, he was not in exclusive possession at the time of his dispossession, he is in no position to resort to the action of forcible entry and detainer or unlawful detainer. The question at issue is not concerned with the character of possession defendants may have agreed to give plaintiff, either in the contract or orally, but with the character of the possession plaintiff actually had at the time of the alleged dispossession. His testimony shows beyond question that defendants remained in full possession, and that the only license or privilege he was exercising when served with notice to quit was the privilege of entering the farm to till it and make repairs upon it preparatory to taking full possession after the public sale. If defendants breached the contract of sale and plaintiff has a cause of action, he has misconceived his remedy.

The judgment is reversed. All concur.

MENDENHALL v. SHERMAN. (No. 12079.)

(Kansas City Court of Appeals. Missouri.

June 12, 1916. Rehearing Denied

July 3, 1916.)

1. ATTORNEY AND CLIENT §81—ATTORNEY'S AUTHORITY — CONTRACTS FOR PRINTING BRIEFS.

An attorney has authority, as agent for his client, to bind the client for the price of printing briefs.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 141, 142, 144-146; Dec. Dig. §81.]

2. ATTORNEY AND CLIENT §81 — LIABILITY OF ATTORNEY—PRINTING BRIEFS.

Where an attorney gives an order for briefs to be printed in a case, prima facie the client, and not the attorney, is liable for such expense.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 141, 142, 144-146; Dec. Dig. §81.]

3. CUSTOMS AND USAGES §18—PLEADING—NECESSITY.

Proof is inadmissible as to a custom not pleaded.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 40; Dec. Dig. §18.]

Appeal from Circuit Court, Jackson County; C. I. Spellman, Special Judge.

Action by E. L. Mendenhall against Adrian F. Sherman. From a judgment for plaintiff, defendant appeals. Reversed.

Thad B. Landon and J. S. Cannon, both of Kansas City, for appellant. Garnett & Garnett, of Kansas City, for respondent.

ELLISON, P. J. This action is on an account for printing abstracts and briefs to be used in this court in a case pending here. The trial was had without the aid of a jury, and judgment rendered for the plaintiff.

Neither the work nor the amount of the account is disputed. The whole question for

decision is whether defendant, who gave the order, is liable as a principal, or whether, being an agent, he is not liable. The only testimony was that of plaintiff's solicitor for work of the kind. From his testimony it directly appears: That he solicited work for the plaintiff and had experience in that line. That he saw from the records in this court that the case of Moody, Respondent, v. Baxter and Walter, Appellants, had been filed and docketed for hearing in this court, and that defendant was attorney for the appellants. That he sought out defendant and solicited and obtained the printing. Nothing was said about who it was to be charged to, though in fact he charged it to defendant, but it did not appear that defendant knew this, that the printing was done and the abstract and briefs delivered to defendant. He demanded payment of defendant, who finally referred him to his client, Walter, who did not pay. It does not appear why he did not. The following letter from defendant to plaintiff was introduced by plaintiff:

"Relative to your bill for printing of abstract in the case of Moody v. Baxter, I am inclosing same, with the information that I have taken the matter up with Mr. Walters, who, you will find, is in the Grand Avenue Temple building. He has asked that you call and endeavor to straighten the matter up."

Defendant insists that the foregoing evidence, not only fails to make a case against him, but that it affirmatively shows he was not liable, and so he asked the court to declare. The question turns on the law of liability of an agent for work done for his principal, and we think it is clearly against the judgment rendered.

[1, 2] It is well settled that an attorney has authority, as agent for his client, to bind the latter for the price of printing briefs. Williamson Paper Co. v. Bosbyshell, 14 Mo. App. 534; Tyrrel v. Milliken, 135 Mo. App. 293, 115 S. W. 512; 2 Mechem on Agency, § 2169; 4 Cyc. 932. And, in prosecuting his engagement—

"he acts primarily for his client, and his authorized engagements, where he is known to be acting as such, should be held binding upon the client rather than upon himself, in the absence of evidence that he intended to bind himself." 2 Mechem on Agency, § 2216.

"The rule is well established that when a person contracts as the agent of another, and the fact of his agency is known to the person with whom he contracts, the principal alone, and not the agent, is responsible. This rule applies to the relationship of attorney and client, and, except to a certain class of officers who are not within the general rule, attorneys cannot be held personally responsible for services of this kind rendered in a suit, unless there is a special obligation to that effect." Bonynge v. Field, 81 N. Y. 159, 160.

In Sanders v. Riddick, 127 Tenn. 701, 706, 156 S. W. 464, 465, it is said that:

"The expenses of a lawsuit are the expenses of the client, and that, where the service of a third person is needful to the better conduct of the cause, such as a stenographer or a printer, that

service, when called into requisition, is prima facie at the expense of the client."

In the dissenting opinion in *Thompson Payne & Co. v. Irwin Allen & Co.*, 42 Mo. App. 423, and in the opinion of the entire court in same case (76 Mo. App. 418), it will be seen that we have held that, where a person deals with one whom he knows to be an agent, he presumptively binds the principal and not the agent. And so it is held in *Huston v. Tyler*, 140 Mo. 252, 268, 86 S. W. 654, 41 S. W. 795, quoting from *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050, that:

"When the principal is disclosed and the agent is known to be acting as such, the latter cannot be made personally liable."

Of course an agent may contract as a principal, and if that be shown by the evidence, he will be held as such; and he may do this even where the principal is known. So we held in *Cameron Sun v. McAnaw*, 72 Mo. App. 196. That case, like this, was instituted against a lawyer for printing his client's briefs; but the vital distinction is that in that case the lawyer "expressly undertook and promised to pay for the printing of the briefs, if plaintiff would print them." In this case no such contract was shown, and the case is left to be controlled by the ordinary relation which an agent bears to one with whom he contracts in his known principal's business.

[3] Plaintiff sought aid from what he asserted to be a custom for lawyers to bind themselves personally to printers for briefs. The court properly rejected evidence on this subject, since a custom was not pleaded. Gould on Pleading, 60; 2 Chitty on Pleading, 644.

The judgment is reversed. All concur.

STATE v. HENDRICKS et al.

(Kansas City Court of Appeals. Missouri.
May 22, 1916. Rehearing Denied
July 3, 1916.)

INDICTMENT AND INFORMATION ~~§ 331~~ 124(4)— JOINT OFFENSE—ILLEGAL PRACTICE OF MEDICINE.

Under Rev. St. 1909, § 8315, making it an offense to practice medicine without a license, and in view of section 8313, under which the license to practice medicine must be procured by individuals, the joint participation in an act of treatment creates no joint offense, but may constitute one or two offenses according to whether one or both of the parties is without a license, and the failure to procure a license is necessarily an individual, and not a joint, matter, so that a conviction of two jointly indicted for practicing medicine without a license fixing the punishment at \$50 for both defendants, with judgment for that amount against each, would be reversed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 331; Dec. Dig. ~~§ 331~~ 124(4).]

Appeal from Circuit Court, Cole County;
B. G. Thurmond, Special Judge.

"To be officially published."

Charles Hendricks and Stella Hendricks

were prosecuted jointly, and convicted of practicing medicine without a license from the state board of health in violation of statute, and they appeal. Reversed, and defendants discharged.

A. T. Dumm, of Jefferson City, and Morris & Hartwell, of La Crosse, Wis., for appellants. D. W. Peters, of Jefferson City, for the State.

TRIMBLE, J. The defendants were jointly indicted for practicing medicine without a license from the state board of health in violation of section 8315, R. S. Mo. 1909. They were prosecuted jointly, and, after a trial, the jury returned a verdict which said:

"We, the jury, find the defendants guilty as charged in the indictment and assess the punishment at fifty dollars."

When the verdict was read, and before it was received, or the jury polled, or dismissed, the court inquired whether it was intended by the verdict to fix the punishment at \$50 each or \$50 for both defendants. To this the foreman replied that it was intended to fix the punishment at \$50 for both defendants. Thereupon judgment was rendered against each defendant for \$50. Defendants have appealed.

Numerous attacks have been made upon the indictment, only one of which we find it necessary to notice. That one is that the defendants are charged with the commission of a joint offense when, in the very nature of things, the offense cannot be joint. The law does not provide for the issuance of a license to practice medicine jointly to two persons. The license to practice medicine must be procured by individuals. Section 8313, R. S. Mo. 1909. Each person must have his own individual license. Neither of the defendants could procure a license for the other, nor could the two obtain a license for a joint undertaking to practice medicine. Hence the case is not like those where a license for a business is necessary and such license can be procured for a joint enterprise. In such case two or more, jointly carrying on that business without such a license, can be jointly indicted. But here the case is different. If two persons engage in the task of medically treating a sick person without a license, the two have not committed a joint offense, but each has committed a separate offense. If one of them has a license, he is not guilty; if both are without a license, then both are guilty, but each is guilty of his own offense, and not both guilty of one joint offense. The gravamen of the offense is in not having a license, and the failure to have a license is a purely personal matter. Failure to procure a license cannot be a joint, but is necessarily an individual, matter. In the case of *United States v. Kazinski*, 26 Fed. Cas. p. 682, No. 15,508, it was held that two or more per-

sons, charged with committing an offense in its nature several, cannot be joined in the same indictment. The treating of the sick is not an act in itself criminal. It is only so with regard to the particular personal default of the one charged in failing to obtain a license authorizing him to perform that service. In the case of *State v. Gay*, 10 Mo. 440, the Supreme Court, in deciding what may and what may not be charged against several jointly, says:

"If it [the offense] wholly arise from any such joint act, which in itself is criminal *without any regard to any particular personal default of the defendant*, * * * indictment may either charge the defendants jointly and severally or may charge them jointly only, without charging them severally." (Italics ours.)

The same is held in *Commonwealth v. Miller*, 2 Para. Eq. Cas. (Pa.) 480, namely, that where the offense does not wholly arise from the joint act of all the defendants, but from such act, joined with some personal and particular defect or omission of each defendant, without which it would be no offense, the indictment must charge them severally and not jointly. So in the case at bar, the treating of the sick is not in itself an offense. It becomes so only through the personal default of the defendant who does not secure an individual license from the state board. If one of them has a license, he is not rendered guilty by reason of the other not being licensed; and if each is without license, then each is guilty of his own individual offense. In *Reg v. Atkinson*, 81 Eng. Rep. 333, it was held that two cannot be jointly indicted for exercising a trade without having served an apprenticeship, for the failure to serve the apprenticeship is what occasions the crime, and that must of necessity be several. See, also, *State v. Roulstone*, 3 Sneed (Tenn.) 108; *State v. Wilson*, 115 Tenn. 731, 91 S. W. 125; *Cox v. State*, 76 Ala. 66; *Young v. Rex*, 2 East P. C. 833; *Rex v. Phillips*, 2 Strange, 921; *United States v. Davis* (D. C.) 33 Fed. 621. To convict of a joint offense the act proved must be joint. Wharton on Crim. Pl. & Pr. § 115. That is, each must be guilty of that which the other does. They both must be guilty of one and the same offense. But suppose A., who is without a license, goes in company with B., who has one, and they both treat a patient. B. cannot be convicted because he joined with A. in the treatment, for B. has a license and is therefore not amenable for what he has himself done; nor is he to be convicted for what A. has done, since A.'s failure to obtain a license is not a matter for which B. can be held liable. B. can say to the prosecutor:

"I have a license to do what I have done. If A. has not secured one, that is a matter between him and the state. I have committed no offense."

So that what they have done is not a joint offense; since neither is liable for the other's fault, but is liable only in case he

has himself failed to qualify for such duties. This shows that, while there may be a joint participation in an act of treatment, there is no joint offense created, but the same treatment may constitute one or two offenses according to whether one or both of them is without a license.

The judgment is reversed, and the defendants discharged.

SCHOENHARD v. DUNHAM et al.

(No. 12044.)

(Kansas City Court of Appeals, Missouri.
June 12, 1916. Rehearing Denied July 3,
1916.)

STREET RAILROADS — 114(19) — COLLISION WITH MOTORCYCLE — ACTION — EVIDENCE — LAST CLEAR CHANCE.

In an action for death of motorcycle rider struck by street car, evidence that the motorcycle approached street car tracks at a speed of more than 50 feet per second in a street so narrow that deceased could not be seen by motorman more than a second before the collision held not to sustain verdict for plaintiff.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 248; Dec. Dig. — 114(19).]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Action by Hattie Schoenhard against Robert Dunham and others. From a judgment for plaintiff, defendants appeal. Reversed.

John H. Lucas, Roscoe P. Conkling, and Charles A. Stratton, all of Kansas City, for appellants, W. S. Gabriel, Sparrow & Page, and Harry B. Bandel, all of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action was instituted to recover damages for the death of her husband alleged to have been caused by defendant's negligence. She obtained judgment in the trial court.

Defendant is a street railway company operating a double-track railway north and south on Brooklyn avenue, in Kansas City, Mo., beginning at Thirty-Ninth street and coming north into the business section of the city. These tracks cross Thirty-Eighth street, which runs east and west. From Thirty-Ninth street to within a short distance from the south line of Thirty-Eighth street it is down grade, and from thence on to within a few feet of the north line of that street it is level, and thence on for a considerable distance north, there is a sharp up grade.

Deceased lived in that neighborhood, and at about 8 o'clock of the night of the 19th of November, 1913, was going home from a small grocery store which he owned in a distant part of the city, and was late for supper. He was riding a motorcycle at high speed going east along Thirty-Eighth street. At this time one of defendant's electric cars had left Thirty-Ninth street and approached Thirty-Eighth at a speed estimated by different wit-

nesses at from 15 to 35 miles an hour. A collision occurred which killed deceased. Plaintiff says that the car struck the motorcycle; while defendant insists that the motorcycle plunged into the side of the car, at the front end. There was evidence tending to support either theory. The petition was framed for recovery under the idea that defendant was guilty of negligence, and deceased was not, and also on the humanitarian rule. The trial court, however, refused two instructions offered on the latter theory, and, plaintiff not offering any on the other theory, the case was submitted by her on an instruction on the measure of damages alone. Plaintiff puts her case to this court under the humanitarian rule.

The state of the evidence leaves it impossible to determine the facts in many parts of the case. No one saw the accident except the motorman, conductor, and one of two passengers on the car, and two women walking south on Brooklyn, one of the latter turning her head from fright as she saw the impending collision. Whether we say deceased struck the car or the car struck him, it is certain that he and the motor were carried or dragged a considerable distance, stated to be from 50 to 150 feet up grade to a point where the car stopped. As stated, there was strong evidence that he ran into the front end or corner of the car, the fore wheel of his motorcycle wedging between the fender and the car, and in that way, with his legs astride the cycle and his body and head leaning or lying forward over the handle bars, he was carried forward to where the car stopped. Disinterested and, from all we can see, truthful witnesses testified they found him in that position. Two or more other witnesses stated that the motorcycle was lying on the side, and he prone on top, with one leg in some way entangled with the car fender. There was some evidence tending to show that the front of the fender was bent or broken. So we say that it cannot be known whether deceased struck the car or the car struck him. And, as we can dispose of the case as it is presented in other respects, it is not necessary to say which of these conditions is the true one. Both Brooklyn and Thirty-Eighth streets are narrow, so narrow that a car going north on Brooklyn and a motorcycle going east on Thirty-Eighth at rapid speed, when near the respective street lines are practically upon one another. The length of the street car (stated to be 54 feet) makes it mathematically certain that the motorcycle would be struck by the car or the car struck by it.

The case should not be considered from the standpoint of an object on the track, or a man slowly approaching a track, oblivious to danger; for here the object to be struck was approaching at such speed that to see it on the side in an intersecting street is to strike it, or be struck by it. Practically, the

moment of sight and the moment of collision are the same. It is the duty of a motorman to keep a lookout ahead of his car, and he should not be expected to look up and down side streets any further than the breadth of his vision in looking ahead. In this instance the motorman saw the deceased when he was within 10 feet of the south curb line of Thirty-Eighth street, and deceased was within 50 feet of the west line of Brooklyn. Now, to take the most favorable view of the evidence, or inferences to be drawn therefrom, in plaintiff's favor, that it will bear, and allowing that it will support the view that the motorman did not attempt to stop his car until about the moment before the collision, it must be remembered that it took that moment for the collision to occur; for the motorcycle was being driven at a speed of more than 50 feet per second.

But there is another view of the evidence, and, though invoked by plaintiff, it leaves her still clearly without evidence upon which to base a case. It is said that deceased could have been seen, and was seen, by the motorman far enough west up Thirty-Eighth street for him to have avoided a collision by stopping the car. It was long after dark, and an arc electric light hung over the center of the intersecting streets, and until deceased got within the full rays of that light the motorman, allowing that he saw the motorcycle, of course, would not suppose that deceased intended to run into the car, nor could the motorman, in reason, suppose that he would attempt to run across the track in front of the car. At the high speed of the motorcycle, the point of time when the motorman saw that the deceased was not going to stop, or was going to attempt to run in front of the car, or was himself not going to turn into Brooklyn and run parallel with the tracks, was almost the instant of the collision. Much emphasis must be laid upon the indefensible character of the negligence of which deceased was guilty in coming towards street railway tracks upon which was a large fully lighted car, at such speed he could not stop, nor turn to one side. We are utterly at a loss to know how a motorman, as a reasonable man, was to know that deceased was oblivious to danger before he knew that he was not going to stop or turn into Brooklyn; and, when deceased was close enough to show that he was not going to do either, the collision immediately followed. Recurring again to the thought of the difference in the situation of one walking on or slowly approaching a track and one approaching it on a motorcycle at high speed, we think the evidence leaves no doubt whatever that the time between which the motorman could see that deceased was oblivious to peril and the collision was inappreciable—was but a second—not long enough for the motorman to take hold of his power, much less to stop the car. There are cases in the Supreme Court which are deci-

sive of this. *McGee v. Railroad*, 214 Mo. 530, 541, 114 S. W. 33; *Degonia v. Railroad*, 224 Mo. 564, 593, 123 S. W. 807; *Burge v. Railroad*, 244 Mo. 76, 101, 148 S. W. 925; *Rollison v. Railroad*, 252 Mo. 525, 538-543, 160 S. W. 994.

In the first of these the court said (214 Mo. 543, 114 S. W. 33) that:

"Courts being eminently practical tribunals in getting at practical and just results in the affairs of men, will it do to chop logic and predicate actionable negligence on subtle reasoning involving metaphysical features and covering an interval of half a second or one or two seconds of time? We think not. Therefore to get to the jury plaintiffs must get their case out of the fog of conjecture and plant it on a basis of fact. This they failed to do on the issue now in hand. Hence the humanitarian doctrine is out of the case."

In the second case (224 Mo. 596, 123 S. W. 807) the court made this statement:

"Now, grant that defendant's servants saw him start toward the track; they had a right to presume that an experienced section man would not go upon the track without looking for the train, and, even if they later saw him on the track, they had a right to presume that he would step aside, as section men often do, and let the train pass. But, further, if the train was running 12 miles per hour, as the evidence shows, it would cover 352 yards per minute, or about 6 yards per second, so that there were but ten seconds in which to act. Yet defendant is held liable for not saving a life, with only ten seconds—ten ticks of the watch—in which to act."

In the third case (244 Mo. 102, 148 S. W. 925) the court referred to the matter of time stated in the *Degonia Case*, and said:

"In the case at bar; if the train was going as fast as some of plaintiff's witnesses put it, there was less than ten seconds in which to act, and, even if going as slow as defendant's witness put it, there was but little more. We do not believe that the facts of this case authorize its submission to the jury even upon the humanitarian rule."

In the last case the court stated (252 Mo. 541, 160 S. W. 994) that:

"If it be said we are dealing in refinements, the answer is: So must appellant's learned counsel deal in refinements to fasten liability on defendant, and maybe refinement against refinement (like estoppel against estoppel) 'settleth the matter at large.' To predicate negligence on two seconds of time is in and of itself a monumental refinement. We cannot adjudicate negligence on such pulse beats and hair-splitting, such airy nothings of surmise."

We applied the same course of reasoning through Judge Trimble in *Lewis v. Street Railway Co.*, 181 Mo. App. 421, 168 S. W. 833, and the Springfield Court of Appeals did likewise in an opinion by Judge Sturgis. *Underwood v. Railroad*, 182 Mo. App. 252, 273, 168 S. W. 803. Those cases are not instances of a motorcycle colliding with a street car, but, if the rule or the reasoning stated in them is applied to this case, the judgment is found to be wholly without support.

The evidence in behalf of plaintiff, when considered with conceded and physical facts as applied to essentials necessary to make

liability, is all against her. The several witnesses in her behalf who were in their houses and were attracted by hearing the collision are of little help to her case in the things necessary for her to make out. The persons who saw the collision leave the case without support. Miss Moody was walking south on Brooklyn and saw the car coming. She saw deceased in Thirty-Eighth street going "very fast." She said:

"I saw there was danger of a collision. He seemed to swerve towards the north, trying to avoid the car, and then collided at a point about on a line with the north curb of Thirty-Eighth street. It seemed to me that the man jammed in between the fender and the car." That is, the "man ran in behind the fender and the body of the car. At that moment the car began to slacken and sparks of fire fly out."

Her woman companions also saw deceased "dash across the street into the car."

The conductor was introduced by plaintiff. He stated deceased came out of Thirty-Eighth street towards them at 35 miles an hour. His testimony demonstrates that a collision was inevitable by reason of the suddenness of deceased's appearance and the high speed at which he was going. And so does that of the passenger inside the car. He, however, was defendant's witness. The other passenger was not sitting so as to see the collision.

The judgment should be reversed. All concur.

SLACK v. ST. LOUIS, I. M. & S. RY. CO.* (No. 1631.)

(Springfield Court of Appeals. Missouri. June 17, 1916.)

1. RAILROADS \S 482(1)—ACTION FOR INJURIES FROM FIRE—EVIDENCE—SUFFICIENCY.

In action for loss by fire from locomotive sparks, evidence that locomotive passed shortly before fire, throwing out sparks, that wind was from locomotive, and that fire started on side towards locomotive held to sustain verdict for plaintiff.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1730; Dec. Dig. \S 482(1).]

2. RAILROADS \S 482(2)—LOSS FROM FIRE—EVIDENCE—CIRCUMSTANTIAL.

In actions for loss by fire from locomotive sparks, plaintiff may prove the origin of the fire by circumstantial evidence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1731, 1732; Dec. Dig. \S 482(2).]

3. EVIDENCE \S 596(1)—DEGREE OF PROOF—NEGLIGENCE.

In such actions, plaintiff need not prove his case beyond a reasonable doubt, but only by fair preponderance of evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 2446; Dec. Dig. \S 596(1).]

4. RAILROADS \S 453—FIRES—CARE REQUIRED.

A railroad company is liable for fires set by sparks escaping from its locomotive, irrespective of defects in locomotives or negligence in operation.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1657-1660, 1667; Dec. Dig. \S 453.]

5. RAILROADS \S 482(2)—ACTIONS FOR FINES—PRESUMPTIONS.

In action for fire from locomotive sparks, the mere fact that a locomotive passed near the property of plaintiff shortly before the fire, or that it was emitting sparks at the time, does not authorize a verdict for plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1731, 1732; Dec. Dig. \S 482(2).]

6. RAILROADS \S 480(1)—ACTIONS FOR FINES—BURDEN OF PROOF.

In such action plaintiff has the burden of showing that his property was set on fire by sparks from defendant's locomotive.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1709, 1716; Dec. Dig. \S 480(1).]

7. DAMAGES \S 69—INTEREST—TORTS.

Interest is not allowable on a claim ex delicto prior to rendition of judgment.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 137-140; Dec. Dig. \S 69.]

Appeal from Circuit Court, Mississippi County; Frank Kelly, Judge.

Action by W. R. Slack against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed on condition.

J. F. Green, of St. Louis, and N. A. Mozley, of Bloomfield, for appellant. H. C. O'Bryan and Haw & Brown, all of Charleston, for respondent.

STURGIS, J. [1] The defendant has appealed from a judgment against it for \$952.47 in a jury trial for alleged damages, in that plaintiff's property, a handle factory and its contents, was destroyed by fire escaping from one of defendant's engines. This handle factory was situated about 2,000 feet northwest of defendant's depot in Charleston, Mo. The train in question, after stopping at the depot, went northwest, passing this factory adjoining its right of way on the southwest, the track running southeast and northwest. The main building of the factory stood nearly at right angles with the railroad track, its northeast end abutting close to the edge of the right of way. Its northeast corner, where plaintiff's evidence shows the fire originated, was 52 feet from defendant's track. Another smaller building, called the old storage building, stood about flush with the right of way, a short distance southeast of the northeast end of the main building, and this was burned also. The engine and boiler room was attached to the main building near to its southwest end, and was about 100 feet from the track. The theory of plaintiff is that the fire originated from a spark thrown from the engine and igniting the main building near the northeast corner next to the right of way. The defendant's evidence indicates that the fire started either in the interior of the main building or in the engine and boiler room. There was shown to have been considerable machinery in the northeast part of the main building next to the railroad, and some oil, shavings, etc. On account of this machinery one of plaintiff's

witnesses designated this part of the main building as the engine room, but we think it is evident that the witness, in designating where the fire started, meant the part of the main building near the railroad, rather than the engine and boiler room much further distant.

The defendant's principal contention is that there is no evidence warranting the jury's finding that the fire originated from sparks from defendant's passing engine. We have given this contention careful consideration, and do not agree with defendant's contention. In fact, we think that plaintiff made a rather strong case, fully warranting the jury's finding. Stating the evidence favorably to plaintiff, it shows that there was a good, strong breeze blowing from the northeast; that is, from the railroad toward this factory. The train in question left the depot shortly before noon, being behind time. The track was nearly level between it and the factory, but the engine was working full steam in order to attain the maximum speed, and this it did not attain until after it passed the factory. Several witnesses said that the train started out at an unusual rate of speed, and that it was emitting large volumes of black smoke and live sparks and cinders. This continued till the train passed the factory. One witness was pasturing some mules just a short distance southeast of this factory and near the track. He testified that as the engine passed him it was throwing live sparks and cinders, one of which lighted on and burned a hole in his wool hat, and others fell on and among the mules, making them rear and plunge. Another witness was standing at the right of way fence a short distance beyond the factory, and the passing engine threw live sparks on and around him. It is true that the engine was shown to have had a wire screen through which the smoke and cinders must pass, but this was exhibited to the jury, had a one-fourth inch mesh, and does not conclusively show that sparks and cinders, large enough and containing enough vitality to cause this fire, could not be forced through it by the strong exhaust of the engine.

About 3 o'clock of the afternoon preceding the destruction of the building, the machinery of the factory was closed down, the fire drawn from the engine and put out, and there was no other fire at or about the factory after that time. Nor was there any there during that night, nor until the night watchman left, at 7:30 on Sunday morning, the day the factory burned. From about 8 o'clock on, the day of the fire, until the passenger train went by, numerous people were near and around the factory, saw in and around it, but saw no one in it, nor any fire in or about it until after the passenger train passed. One witness passed by the factory only a few minutes before this train passed, and says that while he did not enter the

building, he took notice of it, and did not see any signs of smoke or fire. Most of the evidence is to the effect that the fire was first discovered from 15 to 25 minutes after the train passed. Numerous witnesses testified that the fire, though considerably advanced when seen by them, clearly showed that its origin was in the part of the building next to the railroad. The witnesses who saw it first say that it was burning on the outside rather than from within. One Cox, about the first one to the fire, passed the factory about noon, and shortly after this train went by, and saw the fire, which he described as then being at the corner of the building next the railroad and near the old storage building; that the fire was going up the wall of the main building near the corner. He went around the building and saw heavy black smoke coming out of the southwest end of the building, but no fire was there, and he saw no other person around there. The witness, Hull, who was pasturing the mules southeast of the building, and whose hat was burned by the cinders, says that he went to the building as soon as the fire was discovered, and says that it was then burning on the roof; that it was falling in at the part next to the railroad. There was some evidence on behalf of defendant that the fire started before the engine passed the factory, but this issue was squarely put to the jury by defendant's instruction numbered 14, and its finding is conclusive.

[2, 3] There was really but one issue in this case, and that was whether the fire which destroyed this factory was caused by sparks from a passing engine. The evidence, as is generally the case, was circumstantial. It is seldom that any one actually sees the spark leave the engine and light at the place where the fire starts. The evidence in such cases generally consists in showing that an engine passed so recently before the fire as to indicate, and not preclude such origin; that the distance from the passing engine to the starting point of the fire is within the range of live sparks thrown from this or other engines; that the wind and weather conditions are such as to make the starting of the fire from this cause probable; that the passing engine was in fact throwing live sparks and cinders, or that its laboring up-grade, or speeding up, make such fact fairly inferable; that there was no other cause of the fire as probable as this one—in short, that the origin of the fire from this source was both possible and the probable one. That plaintiff may prove that the escape of fire from the defendant's engine was the origin of the fire destroying his property by circumstantial evidence of the character above indicated is too well established to admit of discussion. Nor is it necessary that the evidence, though circumstantial, shall be such as to leave no reasonable doubt of the origin of the fire, as was once indi-

cated in *Pack v. Railway*, 81 Mo. App. 128, 136. In 1 Greenleaf on Evidence, § 18a, the rule as to circumstantial evidence is stated thus:

"In civil cases, where the mischief of an erroneous conclusion is not deemed remediless, it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth."

Such is the doctrine in *Big River Lead Co. v. Railroad*, 123 Mo. App. 894, 400, 101 S. W. 696; *Campbell v. Railroad*, 121 Mo. 340, 349, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; *Matthews v. Railroad*, 142 Mo. 645, 44 S. W. 802; *Price v. Railroad*, 185 Mo. App. 432, 485, 170 S. W. 925. There is nothing to the contrary in *Fritz v. Railroad*, 243 Mo. 62, 148 S. W. 74, or *Foster v. Railroad*, 143 Mo. App. 547, 128 S. W. 30.

[4] On behalf of plaintiff the instructions required the jury to find that plaintiff's property was destroyed by fire communicated to it from the defendant's locomotive, and that if plaintiff had so proved, then it was not material whether the engine was defective, or that there was negligence in its operation; also that the fact that the property was destroyed by fire from defendant's engine need not be proved by direct evidence, but that same could be inferred from the surrounding facts and circumstances, and that if the jury believed from the facts and circumstances in proof that plaintiff's property was so destroyed, to find for plaintiff.

[5, 6] For defendant, the jury was instructed not to guess or surmise that plaintiff's property was destroyed by fire from defendant's engine, nor to find such fact merely because an engine passed near the property shortly before the fire; that to warrant a verdict for plaintiff the jury must find from all the facts and circumstances that live coals from defendant's engine were blown to and set fire to plaintiff's property; that the mere fact that the engine was emitting sparks as it passed near the property, and that shortly thereafter the property was discovered to be on fire, would not alone authorize a verdict for plaintiff; that defendant was not required to show that the fire originated from some other cause than from the engine, but that the burden was on plaintiff to show that his property was in fact set on fire by live sparks thrown from defendant's engine; that if the jury were not able to determine under the evidence with reasonable certainty the true cause of the fire, then to find for defendant. These instructions, we think, fairly submitted the issues to the jury, and its finding, being supported by substantial evidence, must be sustained.

[7] We find, however, that the jury was instructed to allow 6 per cent. interest on the value of the property from the date of the fire. This is erroneous. In *Gerst v. St. Louis*, 185 Mo. 191, 211, 84 S. W. 84, 105

Am. St. Rep. 590, it is held that interest is not recoverable on damages in actions ex delicto, where no pecuniary benefit could accrue to defendant by reason of the injury. In *Reading v. Railroad*, 188 Mo. App. 41, 173 S. W. 451, it is said that:

"Interest is not allowable on a claim arising ex delicto, prior to the rendition of judgment."

The exact point now raised was decided in defendant's favor in *Flannery v. Railroad*, 44 Mo. App. 396. The error, however, may be corrected by a remittitur, and plaintiff has offered to do so. We do not know whether the jury did in fact allow interest on the damages, but the most that could be allowed under the instructions would be interest for two years at 6 per cent. If the jury did allow such interest, the amount of damages could not be less than \$850. If plaintiff will remit \$102.47 within ten days from this date, a judgment will be entered here, as of the date of the original judgment, for \$850. Otherwise the cause will be reversed and remanded.

ROBERTSON, P. J., and FARRINGTON, J., concur.

GLOVER v. GLOVER. (No. 11797.)

(Kansas City Court of Appeals. Missouri. May 22, 1916. Rehearing Denied July 8, 1916.)

1. DIVORCE \S 124—EVIDENCE—SUFFICIENCY. Evidence held to sustain a divorce decree granted a wife for the husband's habitual drunkenness and the indignities to which he subjected her.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 392-398, 450, 455, 456; Dec. Dig. \S 124.]

2. DIVORCE \S 187—APPEAL—DETERMINATION OF CAUSE—EFFECT OF MARRIAGE.

The fact that a wife, after securing a divorce decree, remarries pending appeal, does not affect the Court of Appeal's determination of the appeal.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 575; Dec. Dig. \S 187.]

3. DIVORCE \S 240(5)—PERMANENT ALIMONY—EXCESSIVENESS.

One thousand five hundred dollars permanent alimony awarded to a wife is not excessive, where she brought \$500 into the marriage compact, and defendant was worth \$6,000 or \$7,000.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 678, 680; Dec. Dig. \S 240(5).]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"To be officially published."

Divorce action by Nellie E. Glover against Charles Glover. Decree for plaintiff, and defendant appeals. Affirmed.

Scott J. Miller, of Chillicothe, for appellant. A. G. Knight, of Trenton, and J. M. Davis & Son, of Chillicothe, for respondent.

TRIMBLE, J. A wife sued for divorce, charging indignities and habitual drunkenness for the space of more than a year. The

suit was brought in Grundy county. Defendant, who lived in Livingston county, appeared and filed application for a change of venue and the change was awarded to Livingston county. Thereupon, in the Livingston circuit court, defendant filed a motion to dismiss on the ground that the plaintiff was not a resident of Grundy county at the time she filed her suit therein, and therefore the Grundy court had no jurisdiction to entertain the suit and no authority to award a change of venue to Livingston county. The motion to dismiss was overruled. Defendant then filed an answer, which contained a plea to the jurisdiction on the ground aforesaid, and also a general denial of the allegations of plaintiff's petition.

After a trial the court found in favor of plaintiff, decreeing her a divorce and awarding her the care and custody of the infant son, Harold, and giving plaintiff a judgment for \$1,500 alimony in gross. Defendant has appealed.

Plaintiff and defendant were married in Grundy county, Mo., January 12, 1903. Thereafter at three different times plaintiff, on account of defendant's drunkenness and abuse, left him and brought suit for divorce, but each time upon the faith of defendant's promises to do better she dismissed her suit and went back and endeavored to live with him. In a short time, however, matters got as bad as ever. The final separation took place in December, 1914.

[1] There is no need to recount the evidence of the husband's drunkenness and the abuse and indignities heaped upon his wife. Suffice it to say that the evidence amply justified the trial court in granting the divorce. It was shown that the plaintiff was industrious and did much work on the farm, but that her husband was away much of the time; that he drank a great deal; that he whipped his wife, and called her vile names; and that frequently she took refuge with the neighbors with the marks of her husband's violence upon her. Upon the whole record the decree was entirely proper.

As to the point that the Grundy circuit court has no jurisdiction, the evidence shows that when plaintiff left her husband the last time she had no money and went to work wherever she could find employment; that since the last separation she has been making her home with her father in Grundy county, and at the time of the trial, April, 1915, was employed in nursing him. There was no evidence showing her residence to be elsewhere than in Grundy county, so that the point is without merit.

[2] The case was appealed April 26, 1915, and appeared on the docket of this court at the December call of the October term, 1915, being set for December 7, 1915. No abstract and briefs were filed or served, and a motion was filed on that day to dismiss the ap-

peal for failure to file and serve same. This motion was not acted upon, but the case was continued to the March term, 1916, being set for March 13, 1916. On March 7, 1916, defendant filed with his abstract and brief a motion *ex necessitate rei* to reverse or reverse and remand the judgment. The basis of said motion is the claim upon the part of the defendant that after the motion for new trial was overruled and an appeal had been allowed to this court the plaintiff married one John McHargue in the city of Chicago. The proof in support of plaintiff's alleged marriage was not made a part of the record, but is attempted to be supplied by a purported copy of a marriage license issued to John McHargue and Nellie Glover, together with a certificate of a county judge of Cook county, Ill., that he married said named persons in Chicago; also two affidavits of persons residing in Oregon, one of them as to the marriage of plaintiff, and the other as to certain named persons living out there, but whether they include the plaintiff herein does not appear. The purported marriage certificate filed with defendant's motion and submitted along with the entire case was not certified in accordance with the act of Congress.

But after the case had been argued and submitted, and after the insufficiency of the marriage certificate's certification had been pointed out and objection thereto made by respondent, appellant procured a copy, duly certified according to the act of Congress, and sent it by mail to this court. It has not yet been formally filed by the clerk. Unquestionably, if this were an ordinary suit instead of a divorce case, the correction of the defect would be too late. We need not decide the question whether the rule should be any different in a divorce case, but content ourselves with saying that, without regard to the question of the certification of the marriage certificate, we are of the opinion that we are not compelled to take cognizance of the matters dehors the record which appellant seeks to bring to our notice. It is not necessary for us to do so in order to pass upon the validity of the decree of divorce. The alleged act of the plaintiff in remarrying after the decree was rendered in the circuit court does not relate back to the judgment and destroy its validity. Nor does such alleged remarriage interfere in any way with our right to proceed in the hearing of defendant's appeal. There is therefore nothing *ex necessitate rei*, or from the necessity of the thing, compelling us to pay attention to or take cognizance of matters dehors the record. For this reason the case is not like that of *Scruby v. Norman*, 91 Mo. App. 517, nor of *Dakota County v. Glidden*, 113 U. S. 222, 5 Sup. Ct. 428, 28 L. Ed. 981. In the first of said cases a plaintiff sued upon a note. After a judgment for defendant he ap-

pealed. It was then discovered that he had been adjudged a bankrupt, and the note sued on was a part of the assets of the estate which passed to the trustee in bankruptcy so that the plaintiff had no cause of action in him or capacity to enforce any claim in his favor. In other words, the motion presented matters directly affecting the appellate court's right to consider his appeal, and so the motion *ex necessitate rei* was sustained. In the second case cited, after the appeal, the parties made a valid and binding compromise which left nothing to be decided by the court, hence the motion was sustained. But that is not the situation here. We still have before us the question of the validity of the judgment rendered by the trial court upon the cause of action existing in plaintiff at the time of the decree, and can affirm or reverse that decree according to whether it is correct or erroneous. If it is affirmed, the affirmance relates back to the date of the judgment.

[3] The alimony in gross awarded is not excessive. The evidence shows that plaintiff brought \$500 into the marriage compact, and since has worked and helped earn the money the husband has now. The evidence shows that he does not owe as much as he claims he does. In addition to personal property and land in Missouri, he owns an interest in his father's estate, and also has property in Texas. Allowing a liberal estimate for all he owes, defendant is at least worth \$3,000 or \$7,000 net, and possibly more. So that the amount of alimony allowed is reasonable. There is a statement in defendant's brief to the effect that the boy is now with the father. Of course, if this be true, the small allowance per month for the boy's support can be modified or changed upon application to the circuit court and showing the change in that regard since the decree.

The judgment is affirmed. All concur.

KOYL et al. v. LAY et al. (No. 11991.)

(Kansas City Court of Appeals, Missouri.

May 22, 1916. Rehearing Denied

May 3, 1916.)

1. LIMITATION OF ACTIONS § 102(11)—
GUARDIAN AND WARD—TRUSTS.

Notwithstanding a trust resulting to wards from their guardian using their money in payment for his farm, yet, on a settlement in the probate court, an ascertained and definite indebtedness being found in favor of each of them against him, recognized by them, the statute of limitations begins to run as to each separately, when the settlement is made and the guardian discharged, and this, even if a trust, enforceable against the land, exists after the final settlement; it not being the continuing trust of guardianship, but a resulting trust by operation of law, and being a matured claim, when the amount is finally and fully ascertained as each ward becomes of age.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 505; Dec. Dig. § 102(11); Trusts, Cent. Dig. § 570.]

2. TRUSTS \Leftrightarrow 102(2)—CONTRACTUAL RELATION.

No trust arises, but merely a contractual relation, where on final settlement by a guardian the wards acknowledge receipt of balance, without receiving anything, and the guardian promises to pay them in the future.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 153; Dec. Dig. \Leftrightarrow 102(2).]

3. LIMITATION OF ACTIONS \Leftrightarrow 163(1)—PARTIAL PAYMENT.

Partial payment on a claim barred by limitation renews its life as to the balance.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 642; Dec. Dig. \Leftrightarrow 163(1).]

Appeal from Circuit Court, Benton County; C. A. Calvird, Judge.

Suit by Catherine Koyl and another against Henry P. Lay, administrator, and another. From the judgment, plaintiffs appeal. Reversed and remanded, with directions.

W. S. Jackson, of Warsaw, and Mark A. McGruder, of Sedalia, for appellants. Henry P. Lay, of Warsaw, and Charles E. Yeater, of Sedalia, for respondents.

ELLISON, P. J. This is a bill in equity, which may be said in a general way to have for its purpose an accounting by the estate of a guardian to the plaintiffs as wards of the deceased guardian. The trial court dismissed the bill.

John A. Meier was a soldier in the Civil War, and died in 1863, during that war, leaving a widow and three infant daughters. Two of the daughters are the plaintiffs in this action, and the third, Christina Armstrong, refusing to be a plaintiff, was made a party defendant. Heinrich Meier was a brother of John, and married his widow in 1865, and they had five children, who are defendants herein. Heinrich died in 1913, and defendant Lay is his administrator. His wife had died shortly before. These plaintiffs and their sister Mrs. Armstrong, as infant children of their deceased soldier father, became entitled to a pension from the United States government. Heinrich Meier being their stepfather by his marriage to their mother, was appointed their guardian and curator, and as such, in 1868, received the first payment of an accumulated pension, amounting to \$675. He continued to receive the quarterly installments of their pension until it ceased as they became of age. In a few weeks after Meier received the first payment of the pension he bought a farm of 120 acres, for \$720, upon which he moved, and there he lived, with his wife, and raised his stepchildren and his own. In 1911, after having lived on this farm for near 45 years, he sold it for \$9,220.

Meier, as guardian for his stepchildren (these plaintiffs and Mrs. Armstrong), did not make a settlement with the probate court of Benton county for 3 years from his first receipt of the pension money, when in April, 1871, he filed his first settlement, which

showed a balance due the children of \$1,012.10. There is not a clear distinction between the years of other settlements, but it may fairly be said that he made annual settlements to the year 1877, when he made a final settlement of Mrs. Armstrong's interest, who had become 18 years of age, showing a balance due her of \$486.92. In 1880 he made a joint final settlement of the interests of the two plaintiffs, who also had become 18 years of age, showing a balance due each of \$996.92. Each of the wards acknowledged and receipted payment of the separate balances found to be due them, and Meier was discharged as guardian.

It is the theory of plaintiffs that the guardian was a poor man, living on a rented farm, when he received their first pension money of \$675; that he bought the farm on which they were raised, paying \$720 for it by paying out of their money the cash payment of \$420, and giving his note for \$300, with a deed of trust on the place to secure it; that he afterwards gave two other deeds of trust on the land, paying all of them off with their money; that the three children lived with their mother and stepfather guardian until they were each married, when they went to homes of their own; that from the time they were old enough they did all kinds of farm labor, including plowing and harvesting; and that at times they worked as domestics in the city of Sedalia, turning in their wages to their parents. In the settlements we have spoken of above the guardian, while charging himself liberally with interest, makes no mention of any loans to other persons, and we can draw no other inference than that he kept and used the pension money as his own, thinking of course, that rendering an account with interest would be all that was necessary. The settlements show moderate charges for all items with which he has credited himself, some seemingly nominal. For the first three years, the children being small, there is an aggregate charge of \$39.25 for clothing, and \$8.60 for German schooling, and \$75 for "caring for children." There is a charge for schooling and clothing in each of his settlements that seem reasonable enough; and in his second settlement there is a lump charge for \$300 for board for seven years, which is but little more than \$14 per year each. Again, in succeeding settlements, the board charged is \$2 per month each. But we do not altogether agree with counsel that the guardian is entitled to praise for his liberality to the children as evidenced by his moderate charges and his liberal allowance of interest on the money in his hands. The impression which the record leaves of that household is that idleness was not one of the faults of these children. They lived plainly and worked hard, and at no place in any of the settlements are they credited with labor. Now it would reasonably seem that in the number of years they lived

at home, three-fourths of the time when they were of self-sustaining age their labor should have, at least, equaled their board and clothes.

We think the evidence sufficiently clear that Meier used the pension money of his wards in part payment for the land and improvements. He seems to have had nothing save a team, some cows, and other personalty of small value. He paid \$420 in cash on the purchase, when he had \$875 of their money, but he built a small house and also put up a barn, which, with other necessary improvements, must have exhausted the remainder of that sum. Doubtless the fruit of his own industry contributed materially to the purchase. He was receiving their pension money quarterly, and while the settlements do not show that these sums were in uniform amounts, they all exceeded \$150 per annum. Furthermore, there was affirmative testimony to the effect that he at various times admitted that the children's money went into the farm. Besides this, there is the conceded fact that after he sold the farm, he paid to plaintiff Anna (who married Palmer) out of the proceeds the sum of \$800. The evidence in plaintiff's behalf was that this was a part payment of what was owing to her on the final settlement. Defendants account for it in a very unsatisfactory way. They insist that Anna asked him for it to help her and her husband pay some debts, and that he, being feeble in mind and body, allowed himself to be persuaded. We feel satisfied from the evidence that he considered himself indebted to her on account of the guardianship, and made a part payment of the balance found in his hands on the final settlement.

Defendant Christina Armstrong and plaintiff Anna were offered as witnesses (over defendants' objection) in support of the petition, plaintiffs admitting that, since the guardian was dead, neither could be a witness in her own favor, the testimony of each could be received in favor of the other. They were heard by the court subject to objection at the close of the case. We have had a learned discussion of the question. We have considered their testimony, and since we find that it does not affect or control the conclusion we have come to, it will be unnecessary to say whether they should have been permitted to testify; for, conceding their testimony to be legal evidence, it does not alter the legal situation of the parties.

The respective counsel have likewise furnished us interesting arguments on the question of trustee relationship and of the doctrine of implied, resulting, and express trusts. There is no material difference between them as to the law of such relationship. Counsel for plaintiffs have made it plain that money of a ward invested by the guardian in lands the title to which he takes in his own name, and afterwards sells, may be followed into the sale money received, at the suit of the former ward. Defendants' counsel concede

that it can. The point of difference between them relates to the question of laches and the statute of limitations with its arbitrary and specific periods within which actions must be brought.

[1] Preliminary to stating our conclusions on that subject, we may make our views clearer by observing that we think that, while a trust resulted to plaintiffs for the amount of their money which the guardian used in part payment for the farm, and while the land might have been subjected to a lien in their favor, yet when that money was regularly accounted for in the guardian's settlements and final balances stated in the final settlement, approved by the probate court and accepted by the wards after becoming of age, such balances became a separate indebtedness from the guardian to each of his former wards for which he and the sureties on his bond would be liable. We need not say that in case of insolvency, an action in equity might not also be maintained, enforcing a lien against the land for the balances. For if that be true, the fact remains that on a settlement in the probate court an ascertained and definite indebtedness was found in favor of each of the wards against the guardian, which was recognized by them, and we have no doubt the statute of limitations began to run as to each separately, when the settlement was made and the guardian discharged. *State ex rel. v. Hoshaw*, 88 Mo. 193; *State, to Use, v. Will*, 46 Mo. 286; *Johnson v. Smith*, 27 Mo. 591.

But, if we concede that a trust existed after the final settlement, which, as we have intimated, might be enforced against the land, it was not the continuing trust of guardianship; it was a resulting trust by force of the law, and it was a matured claim for the purpose of applying the statute of limitations, when the amount was finally and fully ascertained as each of the wards became of age. *Burdett v. May*, 100 Mo. 13, 18, 12 S. W. 1056; *Reed v. Painter*, 145 Mo. 341, 356, 46 S. W. 1089; *Hudson v. Cahoon*, 198 Mo. 562, 91 S. W. 72; *Johnson v. Railway Co.*, 243 Mo. 278, 296, 297, 147 S. W. 1077; *Graham v. Wilson*, 168 Mo. App. 193, 153 S. W. 88.

While plaintiffs, in the opening paragraph of the brief, assert that the trust in this case arose by operation of law, yet throughout the argument there is every indication of an endeavor to treat the case as if it were an express trust against which limitations do not run. 2 *Perry on Trusts*, § 863. Of course this must be under the view that the trust is not claimed against the land, for an express trust as to land is void if not in writing. Section 2868, R. S. 1909. If it cannot be claimed against the land, it should fail against the sale money realized on the land, for it is only through the land that the sale money may be followed.

[2] Plaintiffs are therefore driven to a position of seeking to create a trust in money by reason of the guardian making a contract

with each of them whereby he promised that he would pay each of them a certain sum in the future. But that amounts to a mere promise, which ought not to be connected with an express continuing trust. In *Soar v. Ashwell*, 2 Q. B. Div. (1893) 390, 393, it is said that:

"If the only relation which it is proved the defendant or person charged bears to the matter is a contractual relation, he is not, in the view of equity, a trustee at all, but only a contractor; and equity leaves the contractual relation to be determined by the common or statute law."

In referring to a violation of such promise, the court in that case continued with these remarks, which, we think, are especially applicable to this case, both as to the question of trust and of the statute of limitations, viz.:

"If the breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of a court of equity, the defendant a trustee for the plaintiff, the court of equity treats the defendant as a trustee, become so by construction, and the trust is called a constructive trust; and against the breach which by construction creates the trust the court of equity allows statutes of limitation to be vouched."

Much comment is made by plaintiffs concerning what was said by the guardian and plaintiff's mother to them on the day they started into town to make final settlement, to the effect that if they insisted on their money being paid to them, it would take their home from them. So far as concerns the application of the statute of limitations, this strongly favors the defendants. It could only mean an acknowledgment that balances would be found due them by the court, and if plaintiffs insisted on payment, it would make it necessary to part with the home. Conceding that plaintiffs were induced by this appeal to them to acknowledge receipt of the balances, without receiving anything, it only shows that they knew of the money due them, and each volunteered that she would not demand payment. But, from a legal standpoint, we think they could not make a verbal promise which would reach beyond the period of limitations.

[3] We therefore conclude that whether the evidence puts an end to the trust at the time of the final settlement, or whether that trust continued, in either event the statute of limitations bars the action, except as to the separate sum found due to plaintiff Anna Palmer, to whom the payment of \$600 was made, reducing the original amount of \$996.92 due her on the settlement to \$196.92, that payment having the effect of renewing the life of the claim as to that balance.

While there is neither sentiment nor equity in a statute fixing an arbitrary period beyond which a right cannot be asserted, yet it assumes the phase of benevolence in this case. These parties have been of age and final settlements have been made by their

guardian for more than 85 years. At any time during this period they could have taken written acknowledgment of indebtedness for what they say is due them, or they could have brought suits for such sums. The testimony of two of them shows them to be intelligent married women with families, yet they have stood by until every one, but themselves, who would be supposed to know of the matters involved have died. The probate judge, and clerk may have known much. They were not witnesses, and are said to be dead. The farm was sold without objection from them and without an effort to secure the proceeds for more than 3 years. The mother died, and finally the stepfather and guardian. That about closed out the witnesses who were in position to know, and who may have had much to say if an opportunity had been presented in their lifetime.

We have been saved much labor in the case by the able, clear, and thorough manner in which counsel for each party have presented it.

The judgment will be reversed and the cause remanded, with directions to enter judgment for defendants, except as to plaintiff Anna Palmer. A judgment will be entered in her favor for \$196.92, with 6 per cent. interest from the 4th day of November, 1911, the date of demand and the payment made on her claim. All concur.

JOHNSON v. MISSOURI PAC. RY. CO. et al. (No. 12037.)

(Kansas City Court of Appeals. Missouri.
June 12, 1916. Rehearing Denied
July 3, 1916.)

1. CARRIERS \Leftrightarrow 218(10)—LIVE STOCK—SPECIAL CONTRACT—NOTICE OF CLAIM.

A consignee's written receipt for the delivery of live stock is not the written notice of claim for damages required under the bill of lading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 947; Dec. Dig. \Leftrightarrow 218 (10).]

2. CARRIERS \Leftrightarrow 218(8)—LIVE STOCK—SPECIAL CONTRACT—VALIDITY—NOTICE OF CLAIM.

A bill of lading provision, requiring written notice of claim for damages to the carrier within a certain time after live stock is delivered and before mingled with other stock, is valid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 938; Dec. Dig. \Leftrightarrow 218 (3).]

3. CARRIERS \Leftrightarrow 218(5)—LIVE STOCK—SPECIAL CONTRACT—NOTICE OF CLAIM.

The provision needs no special consideration to support it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696; Dec. Dig. \Leftrightarrow 218(5).]

4. COMMERCE \Leftrightarrow 8—EXCLUSIVE REGULATION—CARRIAGE OF LIVE STOCK.

The effect of failure to give such notice as to an interstate shipment is determined exclusively by the federal statutes and decisions.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. \Leftrightarrow 8.]

5. CARRIERS ⇨218(10)—LIVE STOCK—SPECIAL CONTRACT—EFFECT OF BREACH.

The failure to give the notice bars the shipper's right of action.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 947; Dec. Dig. ⇨218(10).]

6. CARRIERS ⇨218(10)—LIVE STOCK—SPECIAL CONTRACT—NOTICE OF CLAIM.

Bad order notations on the freight bill do not take the place of such notice.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 947; Dec. Dig. ⇨218(10).]

7. CARRIERS ⇨218(10)—LIVE STOCK—SPECIAL CONTRACT—NOTICE OF CLAIM.

An oral notice of claim for damages to a station agent is insufficient.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 947; Dec. Dig. ⇨218(10).]

8. CARRIERS ⇨218(10)—LIVE STOCK—SPECIAL CONTRACT—NOTICE OF CLAIM.

The knowledge of the station agent at destination that the stock was injured does not render the written notice unnecessary.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 947; Dec. Dig. ⇨218(10).]

9. CARRIERS ⇨207(1)—SPECIAL CONTRACT.

A shipper of live stock is precluded from contending that his shipment was not made under the bill of lading, in view of his signature thereto and the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. 1913, § 8592]), requiring a written contract of shipment.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. ⇨207(1).]

10. CARRIERS ⇨218(11)—LIVE STOCK—SPECIAL CONTRACT—NOTICE OF CLAIM—WAIVER.

The failure to give notice of claim for damages cannot be waived by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 948; Dec. Dig. ⇨218(11).]

11. EXCEPTIONS, BILL OF ⇨32(3)—SPECIAL JUDGE—SIGNATURE.

Appellee cannot complain because the bill of exceptions was signed both by the trial judge and a special judge, who was acting during the trial court's illness, at the time of signature.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 39; Dec. Dig. ⇨32(3).]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

"Not to be officially published."

Action by J. A. Johnson against the Missouri Pacific Railway Company, and others. Judgment for plaintiff, and defendants appeal. Reversed.

White, Hackney & Lyons, of Kansas City, for appellants. Horace Kimbrell and Martin J. O'Donnell, both of Kansas City, for respondent.

TRIMBLE, J. This is a suit, under the Carmack Amendment to the Hepburn Act, against the defendants, being, respectively, the initial and delivering carriers of a shipment of horses from Kansas City, Mo., to Augusta, Ark. The suit was for damages arising by reason of injuries inflicted upon the horses during transit.

[1-5] The shipping contract, signed by carrier and shipper, provided for a written notice of claim for damages to be given the carrier within a certain time after delivery of the stock at destination and before removal and mingling of same with other stock. The answer set up this clause of the contract and pleaded its noncompliance as a bar to the action. No written claim for damages was ever presented in accordance with said provision of the contract. The written delivery receipt of the stock signed by the plaintiff consignee, identified in the record as Exhibit B., can in no way be construed as, or tortured into, a claim for damages. The provision is valid and binding upon the shipper. *Missouri, etc., R. Co. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690. It is an agreement that may be incorporated in a general form of bill of lading, and does not have to have a special consideration to support it. *Johnson v. Chicago, etc., R. Co.*, 177 Mo. App. 194, 184 S. W. 182. The shipment, being one in interstate commerce, is governed exclusively by federal law and federal decisions. Consequently it is useless to attempt to avoid the result of failure to give notice by invoking the benefit of any state rule prevailing on the subject prior to the entry by Congress into the field of legislation on the subject of the liability of interstate carriers. Such federal legislation is exclusive and supersedes all state laws, rules, and regulations in force prior thereto. *Hamilton v. Chicago, etc., R. Co.*, 177 Mo. App. 145, 164 S. W. 248. And a failure to comply with the requirement as to notice bars the shipper's action. *McElvain v. St. Louis, etc., R. Co.*, 176 Mo. App. 379, 158 S. W. 464; *Smith v. St. Louis, etc., R. Co.*, 186 Mo. App. 401, 171 S. W. 635.

[6-8] Notations on the freight bill that the freight is in bad order do not constitute such notice, nor take the place thereof. *St. Louis, etc., R. Co. v. Overton* (Tex. Civ. App.) 178 S. W. 814. The talk made by the consignee to the station agent did not constitute even oral notice that a claim would be presented; but, even if he had informed said agent orally that a claim would be presented, it would not have been a compliance with the provision requiring written notice. *Kidwell v. Oregon Short Line R. Co.*, 208 Fed. 1, 125 C. C. A. 313. So, also, knowledge on the part of the station agent at destination that the stock was injured does not render unnecessary the presentation of a written notice that claim for damages will be made.

"It is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it, even with respect to its own operations." *Georgia, etc., R. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. —, decided by U. S. Supreme Court May 8, 1916.

[9] The shipper will not be heard to say the shipment was not upon the written con-

tract of shipment, in view of the fact that he signed the contract and the Carmack Amendment requires the carrier to put the contract of shipment in writing.

[10] Nor can the failure to give notice be waived. *Phillips v. Grand Trunk Railway*, 236 U. S. 662, loc. cit. 667, 35 Sup. Ct. 444, 59 L. Ed. 774; *Banaka v. Missouri Pacific Ry. Co.*, 186 S. W. 7, decided by this court March 6, 1916; *Georgia, etc., R. Co. v. Bligh Milling Co.*, supra.

[11] The motion to dismiss the appeal because of supposed errors in the record proper and in the signing of the bill of exceptions is without merit. The record shows that the verdict was returned and judgment rendered on April 20, 1915. This was a part of the March term of that year. The motion for new trial was filed in open court on the next day, April 30, 1915. The motion for new trial lay undisposed of until the September term, 1915, when on September 2, 1915, the motion was overruled, and on the 10th of that month an appeal was duly allowed. It seems that the trial was had before Hon. Frank G. Johnson, but when the bill of exceptions was filed and ordered made a part of the record at the November term, 1915 (in accordance with the time allowed for filing bill of exceptions, though under the law as it now stands same may be filed at any time before appellant is required to serve copies of its abstract and brief), A. W. Brewster was acting as special judge in Judge Johnson's place, who was off the bench at the time on account of illness. He signed the bill as special judge, but appellant, out of caution, got Judge Johnson to sign it also. We fail to see how any complaint can exist because both of them signed it.

It follows from what has been said hereinabove that the judgment must be reversed. It is so ordered. All concur.

KING v. MISSOURI DAIRY CO. et al. (No. 12072.)

(Kansas City Court of Appeals. Missouri.
June 12, 1916. Rehearing Denied
July 3, 1916.)

1. APPEAL AND ERROR \S 854(6)—NEW TRIAL—REVIEW.

Though no reasons are given by a trial court for sustaining a motion for a new trial, appellee may show that the order was right under any of the grounds stated in the motion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3423, 3424; Dec. Dig. \S 854(6).]

2. TRIAL \S 251(8)—INSTRUCTIONS—CONFORMITY TO PLEADING AND ISSUES.

In an action for damages for personal injury resulting from the concurring negligence of a dairy company and an express company, wherein the petition alleged that while plaintiff was standing near the express company's agent the dairy company's servant carelessly and negligently threw or pitched an empty milk can toward plaintiff, and that the express com-

pany's agent negligently failed to catch or stop it, by reason of which it struck and injured plaintiff, an instruction premising that the express company's agent instructed or directed the dairy company's servant to pitch a can, stating a hypothesis necessary to the plaintiff's case not found in the petition, in the absence of any offer to amend, was erroneous.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 593; Dec. Dig. \S 251(8).]

3. PLEADING \S 8(17)—FACT OR CONCLUSION—NEGLIGENCE.

In such petition, an allegation that the dairy company's agent carelessly and negligently pitched a can to the express company's agent, and that the latter was negligent, merely pleaded a conclusion as to the negligence of the express company's agent, and hence did not show that the can was thrown, and that it might have been caught if the agent had made an effort to do so.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. \S 12, 13; Dec. Dig. \S 8(17); *Negligence*, Cent. Dig. \S 182.]

4. APPEAL AND ERROR \S 193(9)—PRESENTATION OF OBJECTIONS—PLEADING—CAUSE OF ACTION.

The point that the plaintiff's petition states no cause of action may be first invoked in the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 1232-1236; Dec. Dig. \S 193(9); *Pleading*, Cent. Dig. \S 1355, 1362.]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Action by Charles H. King against the Missouri Dairy Company and another. Judgment for defendant Dairy Company, and for plaintiff against defendant Express Company. From an order granting the Express Company's motion for a new trial, plaintiff appeals. Affirmed.

Glenn R. Donaldson and Theoph. L. Carns, both of Kansas City, for appellant. Lathrop, Morrow, Fox & Moore and George J. Mersereau, all of Kansas City, for respondents.

ELLISON, P. J. Plaintiff's action was instituted to recover damages for personal injury alleged to have been received through the concurring negligence of both defendants. The verdict was in his favor against the defendant Express Company, and was also in favor of the defendant Dairy Company. Afterwards the court, on motion of the Express Company, set the verdict aside and granted a new trial. No reasons were stated by the court for its action. Plaintiff thereupon appealed from that order.

[1] The rule is that, though no reasons are given by a trial court for sustaining a motion for new trial, the party filing the motion may show the order was right under any of the grounds stated in the motion: *Crawford v. Stockyards*, 215 Mo. 402, 114 S. W. 1057; *Stoner v. Royer*, 200 Mo. 444, 450, 98 S. W. 601; *Pierce v. Lee*, 197 Mo. 480, 95 S. W. 426; *State ex rel. v. Thomas*, 245 Mo. 65, 73, 149 S. W. 318.

[2] It seems that the Dairy Company was returning empty milk cans through the Ex-

press Company, and that an employé of the Dairy Company was delivering them to the Express Company by throwing them off his wagon, one at a time, to the agent of the latter company, and that he would catch each one and set it down; that presently plaintiff approached the Express Company's agent and asked him to sign a receipt. The unloading of the cans ceased while this was being done, and when the receipt was signed, and while plaintiff was yet standing about two feet from the Express Company's agent, the work was resumed by the Dairy Company man on the wagon pitching another can. The charge in the petition is that while plaintiff was so standing the Dairy Company man "carelessly and negligently threw or pitched an empty milk can toward this plaintiff, and that the agent of defendant Express Company then and there carelessly and negligently failed to catch or stop said milk can when thrown to him, by reason of which negligence on the part of said agents of both defendants" the can struck and injured the plaintiff.

The first instruction for plaintiff brought an issue into the case not found in the petition, viz., that the Express Company's agent "instructed or directed" the Dairy Company's man to pitch a can. It is clear that the object in inserting this new proposition in the instruction was to forestall the idea or suggestion that, if the Dairy Company's man pitched the can without the order or sanction of the Express Company's agent, he could not very well be blamed for not catching it, and the entire fault lay with the Dairy Company's man. In the circumstances developed by the evidence, the instruction stated a hypothesis necessary to plaintiff's case which is not found in the petition. There being no offer to amend the petition, it was error to give this instruction.

In *Black v. Street Railway*, 217 Mo. 672, 117 S. W. 1142, Judge Graves delivered a separate concurring opinion, which we do not understand was disapproved by the other members of the court, in which he said:

"I think instruction numbered 1 for the plaintiff is broader than the allegations of the petition, and in that is erroneous. However broad a scope the evidence in a case may take, and however proper an instruction would be (considered from the standpoint of the evidence introduced) as to having sufficient evidence to support it, yet if such instruction goes beyond the purview of the pleadings, it is nevertheless erroneous. In other words, a correct and proper instruction must be (1) an instruction based upon and authorized by the evidence; and (2) an instruction in no wise going beyond the purview of the pleadings. If in the trial of a cause the court permits the evidence to assume a broader scope than indicated by the petition, such does not authorize an instruction broader in terms than is the petition. 'A court does not possess the power to change by instruction the issues which the pleadings permit.'"

Afterwards, in *Haft v. Railroad*, 222 Mo. 298, 308, 121 S. W. 120, in an opinion con-

curring in by the whole court, he used this language:

"It has long been the rule of this court that the instructions should not only be within the scope of the evidence, but within the scope of the petition as well. For a collation of the authorities see separate concurring opinion in *Black v. Railroad*, 217 Mo. 685 [117 S. W. 1142]."

And this view is affirmed in *Scrivner v. Railroad*, 260 Mo. 421, 432, 169 S. W. 83.

[3] Furthermore, we think the petition, in attempting to state a case, merely pleads a conclusion that the agent of the Express Company was negligent. In order to properly state a cause of action, it should be amended so as to show that the can was thrown, and that it could have been caught by the agent, if he had endeavored, or made a proper effort, to do so. As the petition stands it contains an allegation that the dairyman carelessly and negligently pitched the can to the expressman. If that means the manner in which he pitched it, it might afford good cause for failure to catch it. If it means the time when it was pitched, other considerations would arise. It is therefore necessary that plaintiff should state his case in such way that it may be known upon what it rests.

[4] Plaintiff objects to defendant's raising the point, at this stage, that no cause of action was stated. Such point can be made at any time. It may be invoked by a defendant for the first time in the appellate court. *Hoffman v. McCracken*, 168 Mo. 337, 343, 67 S. W. 878. There is perhaps no point of practice oftener stated in the reports than this.

The judgment is affirmed. All concur.

CARRADINE v. FORD et al. (No. 14427.)
(St. Louis Court of Appeals, Missouri, June 6, 1916. On Motion for Rehearing and to Transfer to Supreme Court, July 11, 1916.)

1. MUNICIPAL CORPORATIONS \Leftrightarrow 706(7)—INJURIES TO PERSONS ON STREETS—ACTIONS—JURY QUESTION.

In an action for injuries received in a collision with defendant's electric coupe, the question of plaintiff's contributory negligence held under the evidence for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. \Leftrightarrow 706(7).]

2. MUNICIPAL CORPORATIONS \Leftrightarrow 705(2) — STREETS—DUTY OF CARE.

A pedestrian has the same right on a street as a driver of a vehicle, and is no more bound to watch for the approach of motor cars than motorists are bound to watch for him.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1515; Dec. Dig. \Leftrightarrow 705(2).]

3. MUNICIPAL CORPORATIONS \Leftrightarrow 705(10) — CONTRIBUTORY NEGLIGENCE—RECOVERY.

For an injured party's recovery to be defeated on the ground of contributory negligence, his negligence must have been such as to enter into and form the direct and efficient cause of the injury. Therefore slight negligence by a

pedestrian run down by an electric coupe will not bar recovery, where her negligence did not enter into the efficient cause of the accident and the driver of the coupe was guilty of negligence and of failure to follow Laws 1911, p. 330, § 9, requiring motorists to use the highest degree of care to prevent injuries to persons traveling over, upon, or across a public street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515, 1517; Dec. Dig. ¶ 705(10).]

4. MUNICIPAL CORPORATIONS ¶ 705(10)—INJURIES TO PERSONS ON STREETS—DEGREE OF CARE.

A pedestrian about to cross a street is not, where he sees a motor car approaching, bound to continue his observation until he reaches a place of safety.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515, 1517; Dec. Dig. ¶ 705(10).]

5. MUNICIPAL CORPORATIONS ¶ 705(10) — STREETS—INJURIES TO PERSONS UPON.

Where a pedestrian about to cross a street sees a motor car approaching, but the car is at such a distance that under ordinary circumstances he could safely cross ahead of it, he is not guilty of negligence in starting across the street in front of the car.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515, 1517; Dec. Dig. ¶ 705(10).]

6. APPEAL AND ERROR ¶ 231(3)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—SCOPE OF OBJECTIONS.

An objection that an ordinance was not admissible under the petition is so general that it presents nothing for review, and complaint cannot be made on the ground that the ordinance was not specifically pleaded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1299; Dec. Dig. ¶ 231(3); Pleading, Cent. Dig. § 1439; Trial, Cent. Dig. §§ 194-196, 198-200, 689, 690, 694, 696.]

7. TRIAL ¶ 84(1)—OBJECTION TO EVIDENCE—QUESTIONS RAISED.

An objection, in an action by one run down by a motor car, to the introduction in evidence of an ordinance regulating the speed of such vehicles, does not raise the question that the ordinance is invalid as being in conflict with the general statute relating to motor vehicles.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-213, 220, 221; Dec. Dig. ¶ 84(1).]

8. MUNICIPAL CORPORATIONS ¶ 705(4) — STREETS—INJURIES TO PERSONS UPON—NEGLECT.

Where a municipal ordinance fixed the speed at which motor vehicles might be operated, the operation of a motor vehicle at a speed in excess of that authorized by the ordinance is negligence per se.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515, 1517; Dec. Dig. ¶ 705(4).]

On Motion for Rehearing and to Transfer to Supreme Court.

9. APPEAL AND ERROR ¶ 1078(1)—BRIEFS—RAISING OF CONTENTIONS IN REPLY BRIEF.

Assignments of error not raised in the appellants' original brief, but presented by their reply brief, need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256; Dec. Dig. ¶ 1078(1).]

10. MUNICIPAL CORPORATIONS ¶ 706(1)—INJURIES TO PERSONS ON STREETS—PETITION—SUFFICIENCY.

Where the petition of plaintiff, who was run down by a motor car, alleged defendants' viola-

tions not only of municipal ordinances regulating motor vehicles, but of statutes applicable to such vehicle, the petition is not objectionable as being insufficient to state a cause of action on the ground that the ordinances were invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ¶ 706(1).]

11. CONSTITUTIONAL LAW ¶ 43(1)—TIME OF RAISING QUESTION.

A constitutional question should be raised as soon as it may be under the circumstances of the given case, or it will be waived.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. ¶ 43(1).]

12. COURTS ¶ 231(22)—CERTIFICATE TO SUPREME COURT—CONSTITUTIONAL QUESTION.

The petition of plaintiff, who was run down by a motor car, averred that defendants violated not only the municipal ordinances but the state statutes. At trial defendants made general objections to the introduction of the ordinances in question, but the principal defense was that plaintiff was guilty of contributory negligence. Neither in objections to instructions nor in the motion for new trial did the defendants raise the proposition that the ordinances were invalid because conflicting with the general motor laws. Held that, the question not being raised at the earliest possible time, it was waived, and the case will not be certified to the Supreme Court on the ground a constitutional question was involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 658; Dec. Dig. ¶ 231(22); Appeal and Error, Cent. Dig. § 1773.]

13. APPEAL AND ERROR ¶ 170(2)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Under Rev. St. 1909, § 2061, declaring that no exceptions shall be taken in any appeal or writ of error to any proceeding in the lower court except such as have been expressly decided by such court, the question of the validity of municipal ordinances regulating the speed of motor vehicles cannot be raised on appeal where not raised below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1037, 1038; Dec. Dig. ¶ 170(2).]

14. APPEAL AND ERROR ¶ 193(9)—QUESTIONS PRESENTED FOR REVIEW — SUFFICIENCY OF PETITION.

The sufficiency of a petition to state a cause of action may for the first time be raised on appeal, a petition stating a cause of action being necessary to give the court jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1232-1236; Dec. Dig. ¶ 193(9); Pleading, Cent. Dig. §§ 1355-1374.]

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

Action by Josephine Carradine against John W. Ford, Jr., and another. From a judgment for plaintiff, defendants appeal. Affirmed, and motions for rehearing and to transfer to the Supreme Court overruled.

Henry W. Blodgett, of St. Louis (Fauntleroy, Cullen & Hay, of St. Louis, on rehearing), for appellants. Percy Werner, of St. Louis, for respondent.

REYNOLDS, P. J. This is an action to recover damages for injuries said to have been sustained by plaintiff, while as a pedestrian, she was crossing at the intersection of Washington and Pendleton avenues,

public streets in the city of St. Louis, by being struck by an electric automobile, which ran into and knocked her down, seriously injuring her. The accident occurred on October 27th, 1912. (In certain paragraphs of the petition the accident is laid as having occurred October 11th, 1912. This, however, is evidently a clerical error, as the uncontroverted evidence is that it occurred on October 27th of that year, so in referring to the date we will treat it as of October 27th instead of October 11th.) It is alleged that the electric automobile was at the time owned by the Priesmeyer-Stevens Automobile Company but at the time of the accident was in the charge and control of defendant John W. Ford, Jr., under some arrangement between him and the automobile company pending the purchase of another car from that company by Mr. Ford. As the cause was dismissed as to the Priesmeyer-Stevens Automobile Company on demurrer, and plaintiff having failed to plead further as to that defendant, judgment was entered in its favor. No error is assigned to this so it is unnecessary to notice the connection of that company with the case. At the time of the accident the automobile, it is charged, was being run by Mrs. Flora L. Ford, the wife of the defendant John W. Ford, Jr.

It is averred that:

At the date of the accident there was in force in the city of St. Louis, "an ordinance which, among other provisions, provided that drivers of motor vehicles shall, when approaching a crossing on the public street, sound their signal in such a way as to give warning to other vehicles and to pedestrians of their approach. There was also on said date an ordinance in force in said city which provided that no automobile, motor vehicle, locomobile, or horseless vehicle, propelled by the use of electricity, gasoline or steam, * * * shall be moved or propelled along, over, or upon any public street, avenue, boulevard or other public place at a greater rate of speed than is reasonable, having regard to the traffic and use of such street, avenue, boulevard or public place, or so as to endanger the life or limb of any person, and shall not in any event, while upon any such street, * * * be moved or propelled at a greater rate of speed than eight miles an hour in the business portions of said city, and not greater than ten miles an hour in other portions of said city."

It is alleged that the point at which the accident occurred, that is to say, the intersection of Washington and Pendleton avenues, was not in the business portion of the city and that Pendleton avenue is a north and south and Washington avenue an east and west street. It is further averred that under the laws of this state and at the time set forth in the petition, it was the duty of persons owning, operating or controlling an automobile upon any public street, avenue or other place much used for travel, to use the highest degree of care that a very careful person would use under like and similar circumstances to prevent injury to persons on such street, and on approaching a pedestrian on the traveled parts of a highway, and

upon approaching an intersecting highway, to slow down and give a timely signal. Averring that at the time of the accident plaintiff was a pedestrian crossing Washington avenue southwardly upon the east crossing of Pendleton avenue at Washington avenue, where, as it is averred, by the exercise of ordinary care, she could have been seen by Mrs. Ford in ample time to have avoided all injury to her, it is charged that Mrs. Ford, in violation of the duty imposed by law and ordinances upon persons owning, operating or controlling an automobile running along, over and upon a public street or avenue, as above set out, negligently and without using the care required by law to prevent injury to plaintiff, ran the automobile at a high and dangerous rate of speed and at a rate in excess of ten miles an hour and without sounding any warning and without slowing down as she approached the crossing, into and upon plaintiff, and with great force and violence striking her, knocking her down and seriously and permanently injuring her. Stating the extent and duration of her injuries and loss of her earnings in her professional work as a musician, damages are laid at \$30,000, for which she demands judgment.

The answer, after a general denial, pleads contributory negligence on the part of defendant.

A reply in general denial of the affirmative defense was filed.

By stipulation between counsel and before a trial, the petition was amended by inserting in it an averment to the effect that on the date of the accident there was also an ordinance of the city in force which provided that a vehicle, except when passing a vehicle ahead, shall keep as near to the right-hand curb as possible. By like stipulation there was also inserted in the petition the words, "and without keeping as near as possible to the right-hand curb of said avenue," coupling this with the charge that Mrs. Ford, in violation of the city ordinance and the law, was driving at a rate in excess of ten miles an hour and without sounding any warning, and without slowing down as she approached the crossing.

At the trial before the court and a jury, a verdict was returned in favor of plaintiff and against the defendants John W. Ford and his wife, for \$3,500, judgment following. Interposing a motion for new trial, as well as one in arrest, and these being overruled, the defendants have duly appealed to our court.

Three errors are here assigned. The first is, that the trial court erred in overruling appellant's demurrers at the close of plaintiff's case and at the close of all the evidence offered, because respondent was guilty of gross negligence which directly contributed to her injuries.

[1] On a careful reading of all the testi-

mony offered in behalf of plaintiff, and that is the testimony to be considered in passing on this demurrer, we are unable to hold, as a matter of law, that plaintiff was guilty of contributory negligence. Her own testimony is that she was a young woman, at the time of the accident about twenty-two years old, living on Morgan street, in St. Louis, and attending both as pupil and teacher a school of music situated in the Musical Arts Building located on the corner of Boyle avenue and Olive street, in that city. She started from her home for that place, it being a little over three blocks south of her starting point, about eleven o'clock on the morning of October 27th, 1912, that being a bright, clear day. She walked east to Pendleton avenue, which was the first street east of her home, crossed to the east side of that street at Delmar, the next street south of Morgan, and walked along the east sidewalk of Pendleton avenue, after crossing Delmar, until she reached the intersection of Pendleton with Washington, the Musical Arts Building being on Olive street and about a quarter of a block east of the intersection of Pendleton and Olive. When she reached Washington avenue and before she stepped off the curb, she looked west and saw an automobile coming from the west along Washington not very far west of Pendleton. She stepped off of the east sidewalk or curb of Pendleton and into Washington and waited for this machine, which was propelled by gasoline power, to pass. When it had passed she started to walk straight across Washington, crossing Washington in a straight line from the east pavement on Pendleton. She testified that when she reached the curb of Pendleton and Washington, and was about to step into the street—Washington avenue—she looked west along Washington and "had an impression" that when she looked west up Washington avenue she saw a second automobile behind this gasoline machine but some great distance back of it. As she testified:

"It was so far down the street that I didn't pay any attention to it, much; but I just remember that there was another machine in the distance."

She could not swear positively that that was the machine that hit her, for she was knocked senseless. She testified that she had heard no noise from any approaching machine or signal of any kind, either the sounding of a gong or ringing of a bell; that she was accustomed to automobiles and to their signals; that Washington avenue, as she knew, was a travelled highway and used a great deal by automobiles. She again testified, when asked if she knew what struck her, that she had seen this electric automobile an instant before it struck her; turned her head just before that and got the impression that the machine was close to her, but the striking was so sudden that it was a mere impression as to the machine which struck

her, but she saw that there were several women in it. She repeated that she did not remember the fact of being struck, for she was knocked unconscious and the next thing she remembered was when she came to herself in the hospital. She testified that after the first automobile, the one driven by gasoline, had passed, while she could not be definite, she thought she had taken only a few steps from the sidewalk into the street. The automobile that passed her was toward the center of the street, a little south of the center and going east, and she took several steps off the curb before she reached that automobile when she stopped to let it pass. She was struck, as near as she could tell, by the following automobile directly in the route which the first automobile had passed over; that is to say, the following automobile was traveling about in the tracks of the forward one.

On cross-examination, plaintiff testified that after the gasoline car had passed, she started immediately to cross the street back of that car; that she did not look either way before she did this; did not look for the following machine; that after the gasoline machine had passed her, she walked right on without looking, and started on across; had taken a few steps in the street when the following machine struck her. Asked if there was anything to prevent her seeing the following machine if she had looked, she said she supposed not; that if she had stopped where she was at the time the forward machine passed, she supposed the following one would have passed without hitting her; as she had not seen this following machine she could not tell how fast it was coming but that when she did see it, and before she left the curb to cross over behind the forward machine, the electric automobile was so far west and down the street that she never thought of it; did not notice its speed; it seemed to her to be too far away to be able to cover the distance between where it was when she saw it and where she was attempting to cross the street; when she turned her head just before the electric struck her, it seemed to be coming fast but she did not know its speed. Asked by the court if she had seen this following machine, the one that struck her, the first time she looked, she answered that she had a dim recollection of a second machine following the gasoline car further down the street; she could not say exactly how far down but so far that the speed did not make any impression at all on her; it had passed Newstead avenue coming east, Newstead avenue being the street immediately west of Pendleton avenue, and was in the block between Newstead and Pendleton avenues, on Washington avenue, following the other machine, and when she saw it it was about a block away from the gasoline car.

Asked by the court how far behind the first machine it was when she saw it, plain-

tiff answered that she could not say exactly, except that it was so great a distance that it never occurred to her that it would catch up before she could cross. Asked by the court if she had any idea as to the number of feet, she said she had not.

Counsel for defendants, continuing the cross-examination, asked her, when she looked up the street and saw that following machine, if that was just when she stepped down off the curb or just after she got down in the gutter. She answered that before she stepped off the curb she had looked to see what, if anything, was coming, and that she did this while still on the sidewalk. She looked up the street, that is to the west, and saw this following machine and then stepped down over the gutter and into the street without looking west again. Asked if she had not walked as far as the middle of the street from the curb, she answered that she did not think she had walked that far; she first went just far enough into the street so that the first would pass her and leave a space between her and it, then, that car having passed, she stepped along behind it in the street. After she had stood on the sidewalk and looked west up Washington avenue and saw this following machine at a distance, she repeated, she did not look again.

Asked by the court if she had stood in the middle of the street after she got there, she answered she had stood in the street just for the first car she was waiting for to pass her. Asked if she had stood there for a second or two, she said, "No," that to the best of her recollection she could have hurried across the street in front of the first car; that car was on the other side of Pendleton. She further testified that she did not pay any attention to the following car; stepped down off of the curb as a warning to the people in the gasoline car that she was wanting to cross and when that car went by, she attempted to go on.

Asked by counsel for defendants if she had a roll of music in her hand at the time and if she had not been looking at that when she was struck, she said, "No." Asked if she was not doing that, and because of that had failed to see the second automobile, she answered that she had not paid any attention to the fact of the second machine; it was so far that she never considered the fact of its being able to cover the distance; "that you naturally estimate, when you go into the street, what was coming," and she saw only one machine that seemed to make any difference with her crossing. Asked if on this occasion she had crossed the street without looking up, she answered there was nothing coming from the east and there was just this one machine, the gasoline car, that seemed to be close to her; she waited for it to pass and the other one, the following one, did not seem to be close enough to be counted in. While she could not say positively that the

machine she had seen at a distance was the one that struck her, she did remember seeing the machine that struck her just before it struck her. The machine was then on her and she had no chance to get away.

Other witnesses testified that they saw Miss Carradine, the plaintiff, attempting to cross the street; that she had reached about the center of it and stopped to let one automobile pass. The electric automobile was coming east and after the gasoline machine had passed, plaintiff started to cross and was struck by this electric coupe, which was coming east on Washington avenue on the south side of the street at a rapid gait.

A motorcycle policeman testified that the electric automobile was driven by Mrs. Ford; that there were three ladies, a child and a baby in it; that at the time it struck plaintiff, it was running at about 20 miles an hour; that after striking her it ran down the street; possibly a hundred and fifty feet, and then into the curb. Another witness testified to the same effect as to the speed of this oncoming electric motor car and said that he saw the accident; that the electric machine was about two lengths behind the gasoline machine; that plaintiff was at the regular crossing; that he supposed the left front spring of the electric machine struck plaintiff, as he found scraps of clothing, etc., on it; that the machine knocked plaintiff about ten feet and then ran over her and carried her about 20 feet further. These witnesses testified that the electric automobile was south of the center line of the street about half the width of the machine, and when plaintiff attempted to pass over behind the first machine, this second machine was about two lengths behind. It made no sound and gave no warning; that it ran about 200 feet east after striking Miss Carradine, and when it stopped at the curb it was about 200 feet behind the gasoline car.

This is practically the testimony for plaintiff and while there were a number of witnesses examined on behalf of defendants, it cannot be said that its general effect was shaken or contradicted in any material respect. Mrs. Ford, however, testifying, said she was not going over eight miles an hour; that she saw plaintiff standing in the center of the street; that she looked up and saw the electric and walked right into it; that when she saw plaintiff standing in the street her car was about a hundred feet west of Pendleton and that plaintiff was about a hundred feet east of that street, crossing diagonally. On this state of facts the question of contributory negligence was for the jury. We cannot say, as a matter of law, that plaintiff was guilty of contributory negligence.

[2] It is argued by learned counsel for appellants, in support of his proposition that the court erred in refusing to take the case from the jury because of the contributory

negligence of plaintiff, that it is the duty of a pedestrian on a public highway to watch for the approach of automobiles and that failure to do so is negligence. That is the first and, apparently, controlling ground upon which he relies for a reversal of the judgment in this case; in fact we are advised by the memorandum of the learned trial judge, which appellants' counsel has seen fit to embody in his abstract of the record and bring before us, that in support of the motion for new trial defendants relied solely upon the contention that plaintiff's own evidence shows her to have been guilty of such contributory negligence as to preclude her as a matter of law from recovering. The trial court, in this memorandum, says that in support of this proposition learned counsel had cited numerous cases from Missouri, declaring that the duty to look is a continuing one and that the duty does not cease until after the range of danger has been passed, and had asked the trial court to apply these authorities to the facts in this case. The learned trial judge, however, very correctly remarked that counsel had overlooked the fact that all of the cases cited and relied upon by him are cases involving either the crossing of a railroad track or the crossing of a street car track and were so decided for the reason that a street car track or a railroad track is held to be in and of itself a signal of danger. In his brief before us, however, the learned counsel for appellants, apparently abandoning this line of Missouri cases, has cited a number of cases from other jurisdictions in support of his proposition as to the duty of a pedestrian to watch for the approach of automobiles and that the failure to do so is negligence. Whatever may be the rule in other jurisdictions, the rule is otherwise in our state. So it was held in *Bongner v. Zeigenhein*, 165 Mo. App. 328, 147 S. W. 182. That was a decision of our court, the opinion written by Judge Norton.

In *Hodges v. Chambers*, 171 Mo. App. 563, loc. cit. 570, 154 S. W. 429, Judge Allen there speaking for our court, after holding that the great number of cases dealing with the duty of one in crossing or walking upon railroad tracks or street car tracks, while correctly applied in cases of that kind, because such tracks are in themselves a warning of danger, holds that such cases have no application in the case of a pedestrian travelling along the street, for the reason that the pedestrian going along the public streets of the city or town has as much right upon a driveway as anyone else and has a right to presume that one driving an automobile would exercise that degree of care enjoined upon him by law. This principle is so sound and so in line with modern conditions, that it ought not to be questioned anywhere.

The rule contended for by learned counsel for appellants as to the superior right of vehicles in the public highways over the right of

pedestrians, undoubtedly had its origin in conditions prevailing in feudal times and in monarchical countries, when the "common people" trudged along these highways on foot and the King and his nobles and courtiers rode over them, the "common people," being pedestrians, having no rights on them which the King and nobles were to or did respect. That is not so in our day and, especially, in our Republic. With us, all have an equal right to the use of public ways and each must so use them as to have due regard to the rights as well as the safety of others. People driving machines propelled by power, whether animal or mechanical, must have due regard to the safety of pedestrians. In brief, and as said by our court in the two cases referred to, the right of the pedestrian to proceed along the streets and highways of the city and of the country, is just as high as that of the person in a vehicle drawn by horse power or propelled by steam, gasoline or electricity.

[3] As concerning the contributory negligence of the respondent, our Supreme Court, in the recent case of *Howard v. Scarritt Estate Co.*, not yet officially reported but see 184 S. W. 1144, has said:

"It is not the law that the least negligence of him who is hurt will excuse an otherwise guilty tort-feasor for his negligent act. (Citing cases.) It is plain (and it has so been ruled) that to hold otherwise would be to hold that there exists in this state the doctrine of comparative negligence, a doctrine which has been, when sought to be invoked, always expressly repudiated. (Citing cases.) The rule as to the quantum of contributory negligence which is sufficient to prevent recovery is that it must be such as to enter into and form the direct, producing, and efficient cause of the casualty, and absent which the casualty would not have happened."

In line with what is said by our Supreme Court in the *Howard Case*, supra, and as applicable to the facts in the case at bar, our Supreme Court, in *Strauchon v. Metropolitan St. Ry. Co.*, 232 Mo. 587, 135 S. W. 14, has held that the conduct of the plaintiff there, as shown by the evidence, can only be characterized as poor judgment but does not degenerate into negligence. That is a case where a pedestrian attempting to cross a street-railway track, looks and sees from a straight line, or an acute angle, a car approaching two hundred feet away, and supposing that at the usual speed of cars on the track at that point he will have ample time to cross, thereafter gives no further heed to the approach of the car. In such case, it was there held that the pedestrian is not chargeable with contributory negligence in assuming that he could have crossed in safety.

Applying the above rule here, there is evidence tending to show that Mrs. Ford, the driver of this electric machine, was coming at an excessive speed—twenty miles an hour—along one of the most frequented thoroughfares in the city of St. Louis, in the center of the most populous residence district of the

city; that she was driving her machine without a sound of warning. The evidence is that these electric machines move along almost noiselessly over a street such as this, a wooden block pavement covered with creosote and sand, and coming along at this rate of speed, which under the circumstances and the place was reckless, it ran upon this unfortunate young woman and inflicted serious and possibly permanent injuries. So that although plaintiff may have been somewhat negligent in failing to be more careful before attempting to cross, that fact, as held in the Howard Case, *supra*, will not excuse defendants for the negligent act of so driving the electric machine. As held in the Strauchon Case, *supra*, respondent here, seeing the electric car at a distance west, nearly a block, had a right to assume that at the usual speed, that car would not reach her until she had time to cross in safety.

Furthermore, by her own evidence, Mrs. Ford was not, when she saw plaintiff standing in the center of the street and about to cross, using "the highest degree of care that a very careful person would use, under like or similar circumstances, to prevent injury or death to persons, on, or traveling over, upon or across" a public street. Act of March 9, 1911 (Laws 1911, p. 330, § 9).

[4] The second point made by learned counsel for appellant under his assignment as to contributory negligence is that if a pedestrian sees an automobile approaching near him on the street which he proposes crossing, he must continue to observe its movements and that failure to do so is negligence on his part. We do not think that under the facts here present and under the authorities we have above cited, that point is well taken.

[5] Counsel's third point under that assignment is, that stepping in front of an automobile is negligence on the part of a pedestrian. It is true, if respondent did that, knowing of the presence of the automobile, she could not recover. But in the case at bar it distinctly appears that plaintiff here had every reason to suppose that this electric machine was not within striking distance. When she saw it, it was almost a block away and plaintiff had no reason to believe that she was in any danger from it. She was very much in the situation of the plaintiff in the Strauchon Case, *supra*.

[6] The second assignment of error is that the trial court erred in giving respondent's first instruction, which advised the jury that if they believed that appellants' automobile was not as near the right-hand curb as possible, their verdict should be for respondent and against appellant because the ordinance so providing was not pleaded specifically or in substance in the petition. As we have seen, by stipulation of counsel, the petition was amended before the trial, so as to specifically insert in it the clause when referring to the provisions of the ordinance and the

disregard of it, in that appellants had driven the electric machine along and over a public street without slowing down as she approached the crossing, "and without keeping as near as possible to the right-hand curb of said avenue," so that this is distinctly pleaded. When we come to the discussion by the learned counsel for appellant of this point, that is, to error on the part of the trial court in allowing respondent to read in evidence ordinance 1327 of the city of St. Louis, for the reason that the ordinance is not pleaded specifically or in substance, the section of the ordinance referred to (section 1327, Revised Code of 1912 of the City) was read in evidence, and the only objection made to its introduction was of this kind. "Mr. Blodgett: I object to the introduction of the ordinance under this petition." This was overruled, defendants excepting. That objection means nothing.

[7] The final assignment is that the trial court erred in giving respondent's first instruction, which advised the jury that if they believed that appellants' automobile was exceeding a speed of ten miles an hour, their verdict should be for respondent and against appellants, because the ten-mile ordinance is in conflict with the statute and is therefore void.

[8] This is a challenge of the validity of the ten-mile ordinance of the city as being in conflict with the statute and as inconsistent with the Act of the General Assembly of this state relating to motor vehicles, approved March 9th, 1911 (Session Acts 1911, p. 322). When these sections 1338 and 2585 were offered in evidence, counsel for appellants said: "I make the same objection to that," evidently referring to the one we have previously set out, which, as we have seen, was a mere general objection to the introduction of the ordinance under the petition, without assigning any specific ground of objection. The validity of the ordinance was in no manner challenged by such an objection. It is therefore apparent that that question, that is to say, as to the validity of these ordinances of the city governing the movement of automobiles through the streets of the city, as tested by the act of the General Assembly approved March 9th, 1911, is not before us. All we have before us are the ordinances of the city pleaded, as we think, sufficiently, and introduced without any specific objection or with any objection that we can take note of. One of those ordinances provides that the speed limit in the resident parts of the city, or in the parts other than the business portions of the city, shall not exceed ten miles an hour. The learned counsel for appellants has himself said in his brief in this case, that "any speed in excess of the speed limit prescribed by valid ordinance is negligence per se under the universal doctrine in this state," citing many cases in support of this proposition. As the ordinance prescribing the speed limit was, as we

hold, properly pleaded and in evidence without proper objection, and that ordinance prescribing that the speed should not exceed ten miles an hour in the district mentioned, there is no room for controversy over the fact that this was a negligent act on the part of appellants. Appreciating the learning, skill and industry of counsel in briefing and arguing this point, we are compelled to say that that question is not here before us in this case and we must decline to enter into a discussion, much less into a decision, of it.

Finding no reversible error to the prejudice of appellants in this case, the judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

On Motion for Rehearing and to Transfer to Supreme Court.

REYNOLDS, P. J. Learned counsel for appellant, with other associate counsel, have filed two motions, one for rehearing, the other asking us to transfer the cause to the Supreme Court. While in the motion for rehearing it is claimed that our judgment is in conflict with controlling decisions of the Supreme Court and of our own court and of the other appellate courts of the state on the merits of the case, we do not think, on consideration of the authorities cited by learned counsel in support of this that they sustain that contention.

As a further ground it is claimed that the right of recovery is based on an ordinance of the city of St. Louis regulating motor vehicles, and that if the cause of action is based on an ordinance, or if an instruction is given based on an ordinance, or if evidence is admitted by the trial court on the theory of a valid ordinance, the question of the validity of the ordinance is in the case from start to finish and may be raised in any court at any time, because, if there is no valid ordinance on which to base the judgment, the judgment must fall, it being claimed that the appellants had not waived the question of the validity of the city ordinance regulating motor vehicles.

The motion to transfer to the Supreme Court is practically grounded on this claim, it being contended that this case involves a construction of section 23, article 9, section 25, article 9, of the Constitution of Missouri, section 26, article 3, of the Charter of the City of St. Louis, and section 9582, of the Revised Statutes of Missouri, and it is claimed that these questions have been duly presented and arise on consideration of the validity of the ordinance upon which the plaintiff based her claim, and that upon such a state of facts this is a case involving the construction of the Constitution of this state, within the meaning of our Constitution and statutes.

[9, 10] In the assignments of error originally filed in this case no attack whatever is made upon the petition as being insufficient, this point being made for the first

time in the motion for rehearing. We might conclude to disregard this point, following well settled rules of practice, as evidenced by numerous decisions in the state, but will say that we do not think the petition is objectionable on that ground. It is true that it charges violation of the city ordinance but it also pleads the state law regulating automobiles, in effect, and charges that in violation of the duty imposed "by law as well as by ordinance," defendant had "negligently, and without using the care required by law to prevent injury to plaintiff, ran said automobile at a high and dangerous rate of speed, and at a rate in excess of 10 miles an hour, and without sounding any warning, and without slowing down as she approached the said crossing, into and upon plaintiff, thereby with great force and violence striking plaintiff, knocking her down and seriously and permanently injuring her." This invokes both the ordinances and the statute. As far as the petition is concerned, therefore, it does state a cause of action, either under the city ordinance or under the state law. While this is so, it is true that by the main instruction given, plaintiff the case went to the jury on the ground of a violation of the city ordinance.

As noted in the main opinion the city ordinances regulating the speed and movement of automobiles through the streets of the city of St. Louis, when offered to be introduced in evidence, were objected to in the most general way, no reason whatever being assigned for the objection. We there noted the objection to the ordinance, when first offered, made by counsel for appellant, was: "I object to the introduction of the ordinance under this petition." When other ordinances or sections of the ordinance were offered in evidence, all the objection counsel for defendants made was: "I make the same objection to that." We held that these objections did not challenge the validity of the ordinances.

[11, 12] It is now urged that the validity and constitutionality of the city ordinances regulating automobiles and their speed through the city, is open by reason of the instruction having been based on those ordinances and the giving of that instruction objected to, and that that instruction was again challenged in the motion for new trial. As to this, it may be said that the objection to the instruction was a general one, without specifying in any manner whatever that it was objectionable because based on an unconstitutional or void city ordinance. When we examine the motion for the new trial we find it contains fourteen assignments of error: First, that the verdict is against the evidence. Second, against the weight of the evidence. Third, against the law as declared in the instruction given by the court. Fourth, against the law and the evidence. Fifth, because the court erred in refusing to give instructions asked by defendant. Sixth, be-

cause the court erred in giving instructions asked by plaintiff. Seventh, because the court erred in its statement of the measure of damages if a verdict was found for plaintiff. Eighth, because the court gave instructions for the plaintiff in conflict with instructions the court gave for defendants. Ninth, because the court refused to sustain the defendants' demurrer at the close of plaintiff's case. Tenth, because the court refused to sustain the demurrer of the defendant John W. Ford at the close of plaintiff's case. Eleventh, because the court refused to sustain the demurrer of the defendants at the close of all the evidence. Twelfth, because the court refused to sustain the demurrer of defendant John W. Ford at the close of all the evidence. Thirteenth, because the court erred in sustaining objections of plaintiff to competent and relevant evidence offered by defendants. Fourteenth, because the court erred in overruling objections by the defendants to irrelevant, incompetent and immaterial evidence offered by the plaintiff. Not one of these grounds for a new trial presents or raises in any manner whatever the point here attempted to be raised as to the invalidity or unconstitutionality of the ordinance, which question is now attempted to be injected into the case for the first time by the motion for rehearing and to transfer to the Supreme Court.

The answer in this case, beyond a general denial, was a plea of contributory negligence.

Our Supreme Court in *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 118 S. W. 1108, commencing at page 689, and considering whether it had jurisdiction of a case appealed to that court, said that the Supreme Court, if it had jurisdiction, had it because "a constitutional question was raised and is involved in the fourteenth clause in the motion." The fourteenth clause referred to charges that section 6438, Revised Statutes 1899, was unconstitutional because it was special legislation as denounced in sections 53-54, article 4, of our Constitution; because it deprived defendant of its rights as a citizen of the United States under section 1 of the fourteenth amendment of the Federal Constitution; and because said statute and verdict deprived it of its property without due process of law guaranteed by said fourteenth amendment. Quoting this fourteenth assignment, or ground in the motion for new trial, our Supreme Court said:

"A constitutional question might possibly obtrude itself at the trial regardless of the pleadings through some unanticipated ruling on the introduction of testimony when such question was squarely and with due precision made on objection and exception saved. If raised in that way in an appropriate case, and if the trial court had a chance to correct its error under an appropriate ground in the motion for a new trial, the point would be saved on appeal. So a constitutional question might be preserved on appeal in rare cases by a clause in the motion for a new trial when it did not appear elsewhere in the record. An example of that kind of a case would be where the court had given some

instruction directly or by necessary implication for the first time involving the Constitution—for instance, permitting nine jurors out of twelve to render a verdict. *Logan v. Field*, 192 Mo. loc. cit. 68, 90 S. W. 127. In such case, or cases of a kindred nature, the first door open for a constitutional question to enter would be in the motion for a new trial. Appellant could raise it no sooner and nowhere else. But it must be taken as settled law that in so grave a matter as a constitutional question it should be lodged in the case at the earliest moment that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived. *Barber Asphalt Paving Co. v. Ridge*, 169 Mo. loc. cit. 387 et seq., 68 S. W. 1043. If plaintiff grounds his right of action on a statute which defendant contends is unconstitutional it should be put in the answer and kept alive. If the defendant grounds an affirmative defense on a statute that plaintiff contends has a like vice, it would seem he should plead its unconstitutionality in the reply (though that has been questioned. *Kirkwood v. Maramec Highlands Co.*, 160 Mo. 111, 60 S. W. 1072). If proper to put it in instructions, it should be lodged there and the ruling of the court invoked. Unless one or the other of those courses is pursued, life enough is kept in no such question to give this court jurisdiction on appeal except in one instance, viz.: Where on the whole case some provision of the Constitution was either directly or by inexorable implication involved in the rendition of the judgment and decided against appellant."

The conclusion of the court was that as the appellant had neglected to inject its constitutional question in its answer and in its instructions, it neglected its opportunity and should be held to a waiver. That case was followed and approved by our Supreme Court in *Woolley and Fish v. Mears and Woodruff*, Ex'rs, 226 Mo. 41, 125 S. W. 1112, where at page 52, Judge Woodson says that in the case then before the court which had originated before a justice of the peace and where no pleadings were required, but where the trial court based its declaration of law upon an Act of the Legislature and at the time appellant objected to the court giving the instruction and to the judgment of the court because said Act was unconstitutional, that that was a timely saving of exception and presented the question of the constitutionality of the Act to the Supreme Court, citing *Lohmeyer v. St. Louis Cordage Co.*, supra, as stating the uniform rulings of the court as to the matter of timely objection.

In the case at bar the answer, we have seen, was a general denial, accompanied by a plea of contributory negligence. If the defendant, appellant here, had desired to test the validity or constitutionality of the city ordinance regulating the speed of automobiles in the city, that was the time to raise it because the plaintiff had distinctly pleaded these ordinances in her petition. *Lohmeyer v. St. Louis Cordage Co.*, supra. He did not do that.

When the ordinances were offered in evidence counsel for appellant could then have objected to them as void under the statute and Constitution, specifying the provisions relied upon, assuming, but not holding, that he had not lost his right to do so by failure

to attack the petition by answer. But he did not do so. So that by his action upon this point that counsel failed to warn plaintiff or the trial court of the pitfall which he now seeks to dig.

The main instruction given at the instance of plaintiff clearly put these ordinances before the jury as a ground for recovery. Defendant, appellant here, in no manner whatever, except by the general exception to the instruction as a whole, in any manner challenged the correctness of this instruction permitting the jury to find for plaintiff on a violation of the ordinance.

As we have seen, the motion for new trial in no manner whatever challenged the validity of the ordinance or raised any constitutional question.

Appellant has seen fit to bring up with the record a memorandum opinion filed by the learned trial judge in overruling the motion for new trial. In that memorandum the learned trial judge says:

"Defendants, in support of their motion for a new trial, relying solely upon the contention that plaintiff's own evidence shows her to have been guilty of such contributory negligence as to preclude her as a matter of law from recovering, cite and quote from, in support of their position, numerous Missouri cases declaring that the duty to look is a continuing one, and that the duty does not cease until after the range of danger has been passed; and ask the court to apply those authorities to the facts in this case."

The trial judge then proceeds to discuss this proposition exclusively and determines it adversely to the contention of appellants, defendants below.

Thus it will be seen that in no manner whatever was the attention of the trial court called to the point, a point made for the first time in our court when this case was here argued and again insisted on in the motion for a rehearing and to transfer to the Supreme Court.

In a very recent case, that of *Taber v. Missouri Pacific Ry. Co.*, not yet officially reported, but see 186 S. W. 688, it is stated that in the oral argument before the Supreme Court, the appellant for the first time contended that the facts in the case clearly show that the decedent was engaged in handling cars engaged in interstate commerce at the time of his death, and that for that reason the judgment should be reversed upon the appeal. It is further stated that in the reply brief this same point was urged. Mr. Commissioner Brown, who wrote the opinion adopted by the majority of the court in banc, says of this:

"The first question, therefore, is whether this point is now before us. The petition clearly states a cause of action founded upon the provisions of section 5425 of the Revised Statutes of Missouri of 1908, and asks the penalty therein imposed."

Quoting the federal statute (section 1, c. 149, Act April 22, 1908, p. 65, 35 Stat. at L., section 8657, Compiled Statutes 1913), Commissioner Brown continues:

"No reason has been suggested why this petition does not state all the facts necessary to a recovery by these children under the Missouri statute cited. That it does not state a cause of action in favor of the personal representative of the deceased under the federal statute is clear, for there is no statement of the vital fact that the injury was inflicted while the defendant was engaging in commerce between the states and territories, and while the deceased was employed by it in such commerce. * * * It follows, from the statement in the petition of all the facts necessary to constitute a perfect cause of action under the state statute, that if it is sought to defeat it, by showing the additional facts that the injury was inflicted while the defendant was engaging in interstate commerce, and while the deceased was employed by it in such commerce, those facts should have been pleaded in the answer. This was the first step provided by the Missouri Code for presenting such matters for the determination of the court."

Commissioner Brown notes that at the trial it was in evidence that one of the objects of the work in which deceased was engaged was in the making up of a train to go west from Kansas City, and that certain cars bore initials, the meaning of which were not explained, but of which counsel asked the court to take judicial notice. The learned Commissioner then says:

"If this testimony tended to prove that the appellant and deceased were engaged in interstate commerce at the time of the injury, there was still an opportunity under the Missouri Code for the defendant to conform his answer to such evidence and to have the question submitted to the jury. Instead of doing this, he asked, and the court granted, its submission upon the theory, inconsistent with the terms of the federal statute, that contributory negligence on the part of the deceased constituted a complete defense to the action. To raise the question upon appeal the statute expressly required (R. S. 1908, § 2081) that it should appear in the record that it was submitted to the determination of the trial court, and was expressly decided against the appellant. There is nothing in the record indicating this. On the contrary, the appellant, after having availed himself of the defense of contributory negligence under the state statute and lost, is now seeking to recede, because, for the purpose of gaining this advantage, to which it was not entitled, it had concealed its real defense. * * * Having digged this pit, it is appropriate that the appellant should have been the one to fall into it. The question of the application of the Employers' Liability Act (Act April 22d, 1908, chap. 149, 35 Stat. 65) not having been decided by the trial court, no exception with respect to it can be taken here."

The section of our statute referred to by Mr. Commissioner Brown (section 2081), provides:

"No exceptions shall be taken in an appeal or writ of error to any proceedings in the circuit court, except such as shall have been expressly decided by such court."

It appears in the case at bar, not only by the record proper but by the statement of the learned trial judge, which counsel for appellants has seen fit to bring before us as part of the record in the case, that no such proposition and point as now attempted to be raised for the first time in this court, was ever presented, considered or passed upon in the trial court. The opinion heretofore ren-

dered is modified to some extent in its verbiage; in all other respects it will stand.

[13] By the same line of reasoning and on the decisions cited, we hold that no constitutional question has been saved, and we conclude that no question as to the validity of the city speed ordinance had been raised, because no such point was made in the trial court nor presented there for consideration. Section 2081, Revised Statutes 1909, is just as applicable here as on any like situation. That is to say, no such exception was presented to and passed on by the trial court. We are forbidden by that section to notice an exception not made in the trial court. While the argument of learned counsel for appellants is specious, it is not sound. We cannot consider the validity of the speed ordinances on this appeal for the conclusive reason that their validity was not attacked in the trial court in this case.

[14] It is well settled in our state that the question of whether a petition totally fails to state a cause of action, or whether the case is one within the jurisdiction of the court, is open for consideration on appeal, even if no attack has been made on it below, for the jurisdiction of the court depends on that. The latter was the situation in *State ex rel. McEntee v. Bright*, 224 Mo. 514, loc. cit. 527, 123 S. W. 1067, 135 Am. St. Rep. 552, 20 Ann. Cas. 955. But that does not reach this case. Here the petition counts not only on the ordinance but on the statute. Even assuming that the ordinance is void, the petition is still good as counting on the statute.

Finding no constitutional question and no question as to the validity of the ordinance under the statute and constitution saved in such manner as to warrant a transfer of the case to the Supreme Court, we have no power to transfer this case to the Supreme Court.

The motion for rehearing and the motion to transfer to the Supreme Court are overruled. All concur.

BUTTERFIELD v. BUTTERFIELD.

(No. 12076.)

(Kansas City Court of Appeals. Missouri. June 12, 1916. Rehearing Denied July 8, 1916.)

1. HUSBAND AND WIFE §203(2)—ACTION BY WIFE AGAINST HUSBAND FOR TORT.

The Married Woman's Act (Rev. St. 1909, §§ 8295-8310) has not changed the common-law rule that neither husband nor wife is liable to the other in a civil action for a personal tort.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 748, 749, 751, 753, 970; Dec. Dig. §203(2).]

2. APPEAL AND ERROR §301—RESERVATION OF OBJECTIONS—MOTION FOR NEW TRIAL—RULING ON PLEADINGS.

Where a motion to strike out, if granted, would dispose of the case, it amounts to a demurrer, and the court's action thereon is saved without being embodied in motion for new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. §301.]

3. MARRIAGE §50(1)—EVIDENCE—DEFAULT JUDGMENT.

A default divorce judgment is, in a later action between the parties, evidence that prior to divorce, they were married.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 79, 83, 88, 89; Dec. Dig. §50(1).]

Appeal from Circuit Court, Jackson County; Clyde Wilcox, Special Judge.

Action by Flora Belle Butterfield against Robert James Butterfield. From judgment for plaintiff, defendant appeals. Reversed.

L. E. Bates, of Excelsior Springs, and J. C. Grover, of Kansas City, for appellant. Prince & Harris and J. H. Hunter, all of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action is to recover damages resulting from an assault and battery alleged to have been committed upon her by defendant. She recovered judgment in the trial court.

[1] It appears by the record that at the time of the assault and battery plaintiff was defendant's wife. Under the common law, the husband or wife was not liable in a civil action to the other for a personal tort. And our statutes, including the Married Woman's Act, has not changed the rule. In a recent opinion written by Judge Walker, the Supreme Court has fully discussed this question, and we refer thereto in support of our judgment herein. *Rogers v. Rogers*, 265 Mo. 200, 177 S. W. 382.

[2] Plaintiff, after obtaining this judgment without a shadow of legal right, has sought to interpose various technical objections to being deprived of it. It appears that that part of the answer setting up the marriage was erroneously stricken out on plaintiff's motion, which left nothing but a general denial. Plaintiff insists that, since the defendant did not save that point in his motion for new trial, he waived it. This was such character of motion as amounted, to all intents and purposes, to a demurrer, and the court's action is saved without being embodied in a motion for new trial. *State ex rel. v. Ellison* (Sup.) 182 S. W. 998; *Shohoney v. Railroad*, 231 Mo. 131, 148, 132 S. W. 1059, Ann. Cas. 1912A, 1143.

But, aside from that, the proof was made during the trial and a peremptory instruction was asked by defendant and refused, and an exception to the ruling was duly preserved.

[3] The evidence, that the parties were husband and wife at the time of the assault, consisted of a record of the circuit court of Clay county of a divorce proceeding, instituted by defendant against plaintiff in that county, wherein the petition alleged a marriage at a date prior to the assault, and the petition was adjudged to be confessed, and a decree was rendered. This was evidence tending to show they were husband and wife, and there was no evidence to the contrary.

The judgment should be reversed. All concur.

LOUISVILLE & N. R. CO. v. GREENBRIER
DISTILLERY CO. et al.

(Court of Appeals of Kentucky. June 14, 1916.)

1. APPEAL AND ERROR 41(1) — DECISIONS
REVIEWABLE — AMOUNT IN CONTROVERSY —
STATUTE.

Under Ky. St. § 950, subssecs. 1-3, when the amount in controversy, exclusive of interest and cost, is over \$200 and less than \$500, the Supreme Court may grant an appeal from a judgment for the recovery of money if, from an examination of the record, it appears that the ends of justice require it, or when the construction of a statute or a section of the Constitution is put in issue, but the circuit court is without authority to grant an appeal from its judgment to the Supreme Court when the judgment is for the recovery of money only, and the amount in controversy is less than \$500, and an appeal so taken will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 127, 128, 130, 134, 172; Dec. Dig. 41(1).]

2. CARRIERS 18(1)—SUPERVISION BY PUBLIC OFFICERS—ACTION.

Under Ky. St. § 829, providing that, if an award by the Railroad Commission in a proceeding to fix rates of transportation is not satisfied within ten days, the chairman shall file a copy in the circuit court, and summons shall be issued as in other cases, does not require any petition to be filed as the basis of the action.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. 18(1).]

3. PARTIES 95(1) — PLEADING 369(1) —
PROCESS 153 — MISJOINDER — ELECTION
— QUASHING SERVICE.

A misjoinder of actions and of parties plaintiff is not a ground for quashing the service of a summons, but such an error in the proceedings must be corrected by a motion to require an election of which cause of action will be prosecuted and which party will prosecute it.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 160; Dec. Dig. 95(1); Pleading, Cent. Dig. §§ 1199, 1200; Dec. Dig. 369(1); Replevin, Cent. Dig. § 206; Process, Cent. Dig. §§ 218, 220; Dec. Dig. 153.]

4. STATUTES 98(1)—LOCAL ACTS—PRACTICE
OF COURTS.

Ky. St. § 829, providing that the Railroad Commission shall hear complaints against carriers for the correction of extortionate rates, and, if its award is not satisfied within ten days, file a copy of the evidence and the award in a circuit court, whereupon summons shall issue as in other cases, and a trial be had as in an ordinary action, and that judgment and proceedings shall be the same as in ordinary cases, is not violative of Const. § 59, subsec. 1, prohibiting local or especial acts to regulate the jurisdiction or practice of the circuits of courts of justice, in that an award of the commission may be proceeded upon and judgment rendered without complainant filing a petition, since the provisions of the statute apply to all circuit courts in the state alike in which the designated cause of action may arise.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 110; Dec. Dig. 98(1).]

5. CONSTITUTIONAL LAW 52—LEGISLATIVE
POWERS.

Ky. St. § 829, does not invest the Railroad Commission with judicial powers in making an award in contravention of Const. § 27, providing that the power of government shall be divided

into legislative, executive, and judicial departments, or section 28, providing that a person belonging to one department of the government shall not exercise the powers of either of the others, and section 109, providing that the judicial power be in one Supreme Court and the courts established by the Constitution, and section 135, providing that no court except those provided by the Constitution shall be established; the Railroad Commission being a permanent governmental agency established by Const. § 209, since the power to make the award is not an exercise of a judicial power, but the proper exercise of a legislative power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 50; Dec. Dig. 52.]

6. CONSTITUTIONAL LAW 52—LEGISLATIVE
POWERS.

Under Const. § 28, prohibiting persons who are of one of the three departments of the government from exercising any powers belonging to either of the others, except as directed or permitted by the Constitution to exercise duties belonging to one of the other departments, and Const. § 209, authorizing the Railroad Commission to perform the duties which it was empowered to perform at the time of the adoption of the Constitution, until otherwise provided by law, the commission had the power at adoption of the Constitution to determine claims for reparation and to order restitution by a carrier to a shipper on the amount collected in excess of the rate thereafter fixed as just and reasonable.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 50; Dec. Dig. 52.]

7. CARRIERS 12(1)—REGULATION—CHARGES.

Fixing of rates to be charged by a railroad carrier in its intrastate commerce is within the power of the legislative department of the government within the constitutional limitations.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7, 15-20; Dec. Dig. 12(1).]

8. CARRIERS 18(1) — REGULATION —
CHARGES.

Although, in the absence of action by the Legislature in establishing rates which a carrier is entitled to charge, the reasonableness of rates may be a judicial question between carrier and shipper, when the Legislature exercises its power, the act by which the establishment is effected becomes a law, and, unless the legislation is violative of the constitutional limitation that the rates established for carriers of intrastate commerce shall not be confiscatory, the reasonableness of the rates is not a judicial question.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. 18(1).]

9. CARRIERS 12(1)—REGULATION—CHARGES.

The Railroad Commission, in establishing a rate order, exercised a legislative power delegated to it by the Legislature, and its act, if done in accordance with law, is a valid and enforceable piece of legislation, and hence a rate charged in excess of that fixed by the commission is unlawful and extortionate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7, 15-20; Dec. Dig. 12(1).]

10. CARRIERS 18(3)—REGULATION—CHARGES—REVIEW.

An act of the Railroad Commission can only be assailed as confiscatory in an action for that purpose, in a court having jurisdiction, which can finally determine its validity, and cannot be assailed in a proceeding to enforce an award of the Railroad Commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. 18(3).]

11. CARRIERS \Leftrightarrow 18(3)—PROCEEDINGS TO ENFORCE REGULATIONS—PLEADING.

Under Ky. St. \S 829, averments of want of evidence before the Railroad Commission to support its findings or of evidence that the shipper suffered damages in the amount of the award did not constitute a defense to recovery of judgment upon the award, since the amount paid was a proper inquiry in the trial court, and, if put in excess, the carrier would have been entitled to a jury trial.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. $\S\S$ 13, 16-18, 20, 24; Dec. Dig. \Leftrightarrow 18(3).]

12. CARRIERS \Leftrightarrow 2—CONSTITUTIONAL LAW \Leftrightarrow 298(2) — REGULATION — CHARGES — REVIEW — DUE PROCESS OF LAW.

Ky. St. \S 829, in limiting the evidence which can be heard in the circuit court to that heard before the Railroad Commission, is not violative of the Fourteenth Amendment of the federal Constitution in denying due process of law, since due process is always had when the party has had sufficient notice and an opportunity to make his defense.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. $\S\S$ 4, 5; Dec. Dig. \Leftrightarrow 2; Constitutional Law, Cent. Dig. \S 847; Dec. Dig. \Leftrightarrow 298(2).]

13. CARRIERS \Leftrightarrow 18(1)—REGULATION—CHARGES—REVIEW.

Ky. St. \S 829, is not violative of Const. \S 2, providing that absolute and arbitrary power does not exist in a republic, since it does not vest in the Railroad Commission any absolute or arbitrary power over the property of carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. $\S\S$ 13, 16-18, 20, 24; Dec. Dig. \Leftrightarrow 18(1).]

14. EMINENT DOMAIN \Leftrightarrow 2(8) — REGULATION OF CHARGES.

Ky. St. \S 829, is not violative of Const. \S 13, providing that no man's property shall be taken for public use without consent of his representative and just compensation, since the commission has no power, by making an award or otherwise, to take the property or apply it to public use without the consent of the carrier or without just compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. \S 3; Dec. Dig. \Leftrightarrow 2(8).]

15. CONSTITUTIONAL LAW \Leftrightarrow 328—COURTS TO BE OPEN.

Ky. St. \S 829, is not violative of Const. \S 14, providing that all courts shall be opened to every person, and that he shall have a remedy by due course of law for any injury done him.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. $\S\S$ 950-963; Dec. Dig. \Leftrightarrow 328.]

16. CONSTITUTIONAL LAW \Leftrightarrow 82 — REPUBLICAN FORM OF GOVERNMENT.

Ky. St. \S 829, is not violative of Const. U. S. art. 4, \S 4, guaranteeing a republican form of government.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 149; Dec. Dig. \Leftrightarrow 82.]

17. CARRIERS \Leftrightarrow 12(1)—REGULATION—CHARGES.

Under Ky. St. \S 829, the Railroad Commission does not declare illegal legal rights imposed before, since an extortionate charge by a carrier is illegal at the time it was exacted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. $\S\S$ 7, 15-20; Dec. Dig. \Leftrightarrow 12(1).]

18. CARRIERS \Leftrightarrow 18(2)—REGULATION—CHARGES—DISCRIMINATION.

Ky. St. \S 829, is not violative of Const. \S 218, prohibiting discrimination by carriers in

transportation charges, and providing that a carrier shall not charge more for short than for long hauls, in that the enforcement of an award compels such discrimination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. $\S\S$ 22, 24; Dec. Dig. \Leftrightarrow 18(2).]

19. CARRIERS \Leftrightarrow 18(3)—REGULATION—ACTION TO ENFORCE.

Under Ky. St. \S 829, a carrier has no right to require the shipper to file records of proceedings before the Railroad Commission other than the copy of the award and evidence required by the statute.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. $\S\S$ 13, 16-18, 20, 24; Dec. Dig. \Leftrightarrow 18(3).]

20. PLEADING \Leftrightarrow 8(5)—CONCLUSIONS.

Under Ky. St. \S 829, in proceeding to enforce an award by the Railroad Commission, as the copy of the award filed by the Railroad Commission in the circuit court amounts to an allegation that the carrier has received from the shipper the amount of the award from extortionate charges, which the shipper has paid, a denial in the carrier's answer that the carrier did not owe the amount of the award was a conclusion of the pleader and insufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. $\S\S$ 15, 16; Dec. Dig. \Leftrightarrow 8(5).]

21. PLEADING \Leftrightarrow 121(3)—ANSWER—INFORMATION AND BELIEF.

The averment of the answer that the carrier did not have knowledge or information sufficient from which to found a belief as to whether the amounts had been paid to or received by it was not sufficient, since a party cannot put in issue by such a plea matters necessarily within its own knowledge.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 247; Dec. Dig. \Leftrightarrow 121(3).]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Separate proceedings by the Greenbrier Distillery Company and others against the Louisville & Nashville Railroad Company before the Railroad Commission of Kentucky. From a judgment of the circuit court affirming an award made by the Railroad Commission against the defendant, it appeals. Judgment for the named plaintiff affirmed, and appeals from judgments for other plaintiffs dismissed.

C. H. Moorman and W. A. Colston, both of Louisville, for appellant. J. V. Norman and John S. Kelley, Jr., both of Louisville, for appellees.

HURT, J. This appeal is from a judgment of the Jefferson circuit court upon an award made by the Railroad Commission of Kentucky against the Louisville & Nashville Railroad Company in favor of the following parties, for the following sums, respectively, and with interest on the sums from August 10, 1910, viz.: Greenbrier Distillery Company, the sum of \$532.62; Early Times Distilling Company, the sum of \$408.51; Mueller, Wathan & Kobert, the sum of \$400.77; S. Grabfelder & Co., the sum of \$325.78; Willow Springs Distillery Company, the sum of \$321.62; Wright & Taylor, the sum of \$257.50; Taylor & Williams, the sum of \$237.19; Emi-

nence Distillery Company, the sum of \$248.37; Old Grand Dad Distillery Company, the sum of \$231.38; T. W. Samuel's Distillery, the sum of \$123.42; the Warwick Distillery Company, the sum of \$127.74; Burks Springs Distillery Company, the sum of \$145.25; W. B. Samuels & Co., the sum of \$58.81; M. C. Beam & Co., the sum of \$57.42; Head & Parker, the sum of \$44.80; Blair, Osborne & Ballard Distillery Company, the sum of \$42.96; and Tom Moore Distillery, the sum of \$44.51.

[1] Each of the foregoing was a separate and independent judgment in favor of the party for whose benefit it was rendered, and no one else had any interest therein or any control over the judgment. Each of the foregoing judgments was a personal judgment, and, except the first named, was for a less amount than the sum of \$500. The eight judgments last named were each for a sum less than \$200. Section 950, subsec. 1-3, Ky. St., fix the amounts which must be in controversy before this court is authorized to entertain an appeal from the judgment of an inferior court. This court is not authorized in any instance to entertain or hear an appeal from a judgment for the recovery of money only when the amount in controversy is less than the sum of \$200, exclusive of interest and costs. An appeal cannot be taken to this court, as a matter of right, from a judgment for the recovery of money, if the amount, exclusive of interest and costs, in controversy, is less than the sum of \$500, but, when the amount in controversy, exclusive of interests and costs, is as much as \$200 and is less than \$500, this court may grant an appeal from a judgment for the recovery of money if upon an examination of the record it appears—

"that the ends of justice require that the judgment appealed from should be reversed; or when the construction or validity of a statute or the construction of a section of the Constitution is necessarily and directly put in issue, and a correct decision of the case cannot be had without passing on the validity of the statute or construing the section of the Constitution or statute involved."

When in such case an appeal is sought, it can only be obtained in this court and in the manner provided by subsection 3 of section 950, supra, and the rule of this court relating to that subject. The party desiring an appeal must file the record in the clerk's office of this court and enter his motion to be granted an appeal. The circuit court is without authority to grant an appeal from its judgment to this court when the judgment is for the recovery of money only, and the amount in controversy is less than the sum of \$500. The appellant has not sought any appeal in this court from the judgments in the circuit court against it, and hence this court can only dismiss the appeals from each of the judgments, except the one from the judgment in favor of the Greenbrier Distillery Company, which appeal the circuit court

had authority to grant, as the amount in controversy between it and appellant exceeds the sum of \$500. *Oman-Bowling Green Stone Co. v. L. & N. R. R. Co.*, 169 Ky. 832, 185 S. W. 118; *Childers v. Ratliff*, 164 Ky. 123, 175 S. W. 25; *Gough v. I. C. R. R. Co.*, 166 Ky. 568, 179 S. W. 449.

It appears that the Greenbrier Distillery Company, which we will hereinafter call the appellee, as well as the other parties, the appeals from the judgments in whose favor have been as above stated dismissed, made separate complaints, but at the same time, to the Railroad Commission, that the appellant had theretofore, and since the 25th day of March, 1910, been charging, collecting, and receiving from them more than a just and reasonable compensation for the transportation to them over its lines of railroad within the state of Kentucky of certain commodities which were used by them as materials in the manufacturing of liquors at their respective places of operation, and sought awards in their favor against appellant in reparation of the damages sustained by them on account of such extortionate charges so made for the transportation of the commodities. The proceeding was based upon the provisions of sections 816, 819, and 829, Ky. St.

Section 816, supra, is as follows:

"If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this state, it shall be guilty of extortion."

Section 819, supra, among other things, provides that, when a railroad company shall be guilty of extortion, it shall be liable in damages to the party aggrieved for the damages sustained.

Section 829, supra, is as follows:

"The commission shall hear and determine complaints under sections 816, 817, and 818. Such complaints shall be made in writing, and they shall give the company complained of not less than ten days' notice of the time and place of the hearing of the same. They shall hear and reduce to writing all evidence adduced by the parties, and render such award as may be proper. If the award of the commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award and the evidence heard, in the office of the clerk of the circuit court of the county, which, under the Code of Practice, would have jurisdiction of said controversy, and the clerk of said court shall enter the same on the docket for trial; and summons shall be issued, as in other cases, against the party against whom the award shall have been rendered, requiring said party to appear in the court, within the time allowed in ordinary cases, and show cause why said award shall not be satisfied. If such party fails to appear, judgment shall be rendered by default, and the same proceedings had thereon as in other ordinary cases. If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the commission by the exercise of reasonable dili-

gence; the judgment and proceedings thereon shall be the same as in other ordinary cases."

Notice was given to appellant, as required by sections 829 and 820a, of the time and place of the hearing of the complaints, and the nature of the complaints and the matters to be investigated. The complainants and appellant appeared, with counsel. Such arguments, statements, and evidence was heard as either party desired to offer, and the evidence heard was reduced to writing. The complaints were, without objection, all heard together. It appeared from the statements received as evidence and the sworn testimony that for many years previous to the 25th day of March, 1910, the appellant had charged and received a rate for the transportation of the commodities used in manufacturing liquors, from Louisville, Newport, and Covington to the 16 different places at which the complainants conducted their manufacturing establishments, and for the transportations of the commodities to the complainants, less than the rate charged other persons for the transportation of like commodities to the same places, but on March 25, 1910, the special rate charged complainants was withdrawn, and the same rates thereafter charged other persons for the transportation of like commodities to the same places was imposed upon the commodities transported to the complainants.

The Railroad Commission arrived at the conclusion that the rates charged and received by appellant for the transportation of such commodities to and from Louisville, Newport, and Covington to the places of the establishment of complainants were extortionate, and thereupon, as authorized by section 820a, supra, made an order by which it fixed the rates of transportation for the commodities in question to and from the places of the plants of complainants and Louisville, Newport, and Covington at the same as the special rate which had formerly been charged the complainants for the transportation of the commodities from the three points named to the places of their plants, but made the rates apply to all persons who might receive or ship such commodities at such places alike. Under the provisions of section 829, supra, the commission made an award against appellant and in favor of appellee and each of the other complainants of the amounts which each of them had been charged and had paid, respectively, for the transportation of said commodities received by them from Louisville, Newport, and Covington in excess of the rates fixed by the commission since March 25, 1910, when the increased rates, as to complainants, had been put into effect. Each award was a distinct one in favor of the party for whom it was made, and was representative of his distinct interest, although all of the awards were set out in the same writing, which was subscribed by the commissioners. The awards were made upon the 10th day of

August, 1910, and, the appellant having declined to pay or satisfy the awards, on the 12th day of October, 1914, certified copies of the awards and the rates order and the evidence heard before the commission were filed in the office of the clerk of the Jefferson circuit court, and a summons was issued and served upon appellant, as by law is required in such cases. The summons set out separately the awards in favor of each of the complainants.

[2] The appellant moved to quash the return upon the summons upon two grounds: (1) Because the summons was not issued upon a petition, which stated the names of the parties and set out the cause of action; (2) because the awards sued on were several, and not joint, and could not jointly be proceeded upon. The motion was overruled, to which the appellant excepted. In this ruling the court does not seem to have been in error. Section 829, supra, which controls the proceedings in such an action, does not require any petition to be filed as the basis of the action. It provides expressly that the summons issue upon the writing setting out the award, and provides that such writing shall be a sufficient basis for the action. *I. O. R. R. Co. v. Paducah Brewery Co.*, 157 Ky. 357, 163 S. W. 239.

[3] A misjoinder of actions and of parties plaintiff is not a ground for quashing the service of a summons. Such an error in the proceedings must be corrected by a motion to require an election of which cause of action will be prosecuted and which party will prosecute same. *Yeates v. Walker*, 1 Duv. 84; *Dean v. English*, 18 B. Mon. 132; *Wilson v. Thompson*, 1 Metc. 123; *Pelly v. Bowyer*, 7 Bush, 518; *St. Joseph Society v. Wolpert*, 80 Ky. 86; *Graziano v. Ernst*, 169 Ky. 751, 185 S. W. 99.

The appellant demurred to the proceedings against it, and specially set out nine different reasons for the demurrer. The demurrer was overruled by the court, and properly so, but we will refrain from discussing the reasons for same, as the grounds of the demurrer are all embraced in the answer afterward filed by appellant, and to which a general demurrer was sustained, and the reasons for our opinion will be stated in determining the soundness of the judgment of the court below in sustaining the demurrer to the answer.

The answer contained nine separate paragraphs, and to which, as stated heretofore, a general demurrer was sustained, and, the appellant declining to plead further, the judgment appealed from was rendered. The grounds of defense will be considered as far as they attempted to present a defense to the cause of action of the Greenbrier Distillery Company, the judgment upon which being the only one from which appellant has an appeal.

[4] (a) In the first paragraph of the answer it is alleged that section 829, supra,

under the provisions of which it is attempted to enforce the award, is violative of section 59, subsec. 1, of the Constitution of Kentucky, in that an award of the Railroad Commission may be proceeded upon and a judgment rendered thereon without the complainant filing a petition and setting forth his cause of action, as is ordinarily required to be done. Section 829, *supra*, provides for the filing of a copy of the award and the evidence heard before the commission in the clerk's office of the circuit court, which has jurisdiction of the action, according to the provisions of the Civil Code, the issue and service of a summons, and a trial of the cause as any ordinary action, but that no evidence shall be introduced except that heard before the commission, or such as the court shall be satisfied from sworn testimony could not have been produced before the commission by the exercise of ordinary diligence. This is not a local or special act which regulates the jurisdiction or the practice or the circuits of the courts of justice, or the rights, powers, duties, or compensation of the officers of the courts, which the General Assembly has not power to enact by reason of the inhibition of section 59, subsec. 1, of the Constitution. The provisions of section 829 apply to all the circuit courts in the state alike in which the designated causes of action may arise, and prescribes the procedure for all courts having jurisdiction of the subject-matter.

[5] (aa) It is insisted that section 829, *supra*, invests the Railroad Commission with judicial powers, and in making an award it exercises judicial powers, and for that reason the making of an award by it and the statute which authorizes it to do so are void, as being in contravention of sections 27, 28, 109, and 135 of the Constitution. Section 27, *supra*, provides that the powers of the government shall be divided into three distinct departments and confined to a separate body of magistrates—the legislative to one; the executive to another; and the judicial to another. Section 28 provides that a person being of one of these departments shall not exercise any powers belonging to either of the others, except in the instances expressly directed and permitted by the Constitution. Section 109 provides that the judicial power shall be vested in the Senate, when sitting as a court of impeachment, and in one Supreme Court and the courts established by the Constitution. Section 135 provides that no court except those provided for in the Constitution shall be established. The Railroad Commission, as an instrumentality of the government, was created in this state previous to the adoption of the present Constitution by an act of the General Assembly. It was a creation of the legislative department of the government, and so remained until the adoption of the present Constitution, when by section 209 of that instrument

it was made one of the permanent governmental agencies, and was invested with such powers and duties as might be bestowed upon it by law, and, until otherwise provided by law, it was granted such powers and jurisdiction, and was authorized to perform the same duties as it was authorized by law to exercise and to perform at the time of the adoption of the Constitution. Among other powers and jurisdiction it then possessed was to render awards in favor of persons against the railroad companies for extortion. Act April 6, 1882, as amended by Act March 7, 1890 (Laws 1890, p. 25); *I. C. R. R. Co. v. Paducah Brewery Co.*, *supra*. The power to make an award, however, as it is provided that the Railroad Commission shall make awards on account of extortion, is not a judicial power, and in making an award it does not exercise judicial functions. It is true that the statute provides that upon a complaint of extortion it is made the duty of the commission to give the party of whom complaint is made notice for ten days, and to hear such arguments, statements, and evidence as may be offered, and, if it finds that the rates complained of are extortionate, to fix a just and reasonable rate, and the carriers must not then charge more than the rate so established. This, however, is the exercise of a legislative power, and the duty of making investigation of the causes of complaint as a basis upon which to rest the needed legislation is no more the exercise of a judicial power than a legislative body exercises when it makes an investigation to determine the necessary and proper legislation to right any sore which is upon the body politic. In establishing rates the commission is an arm of the legislative branch of the government. The Legislature has delegated to it so much of its authority as is necessary to be exercised in establishing rates for the common carriers. The railroads may charge and receive rates for the transportation of passengers and commerce subject to the laws of the land, and the Legislature and its agency, the Railroad Commission, may require the railroads to charge and receive such rates as they may prescribe, provided the rates prescribed are not so unreasonably low as to be confiscatory. When the commission makes a reparation award it does not judicially determine anything. It gathers and preserves the evidence necessary upon which to base judicial action. It collates the facts and sums up the results from the basis from which it acts, and this is presented to a court for review, with ample opportunity for each party to have his day in court before the matter is determined, and the questions between the parties are determined alone by the court. The act of the commission in making a reparation award has no enforceable effect until it is determined by the court that its report of the results of its investigation is correct.

[6] Further, while section 28 of the Constitution prohibits persons who are of one of the three great departments of the government from exercising any powers belonging to either of the others, it excepted the instances in which persons of one department are expressly directed or permitted by the Constitution to exercise duties belonging to one of the other departments. Section 209 expressly authorizes the Railroad Commission to perform the duties which it was empowered to perform by existing laws at the time of the adoption of the Constitution until it should otherwise be provided by law. One of the duties imposed upon it, and which it had authority and jurisdiction to perform under the laws which existed at the adoption of the present Constitution, was to hear and determine claims for reparation and to order restitution by a carrier to a shipper of the amount charged and collected from the shipper by the carrier in excess of the rate thereafter fixed by the commission as just and reasonable. This was an express holding by this court in *I. C. R. R. Co. v. Paducah Brewery Co.*, 157 Ky. 363, 163 S. W. 239. It is, however, insisted that the Railroad Commission did not have such power at the time of the adoption of the present Constitution; that the statutes which then existed and which authorized such power were void, as being in contravention of the Constitution of 1850. A perusal of its provisions, however, fails to make manifest the soundness of this contention. Article 1, § 2, of the Constitution of 1850 provided that persons being of one of the departments of the government should not exercise any powers properly belonging to either of the others, except in the instances expressly directed or permitted by the Constitution. Section 1 of article 4 of the Constitution of 1850 provided that the judicial power of the state should be vested in a Supreme Court, the courts established by the Constitution, and such other courts as the General Assembly might from time to time erect and establish.

(b) The appellant, by various allegations in the various paragraphs of its answer, offered as a defense to a judgment the contentions that the rates which were charged appellee from March 25, 1910, until August 10, 1910, the date of the rate order and award, were not unreasonable or extortionate; that the rates prescribed by the commission on August 10, 1910, were unreasonably low and confiscatory, and that upon such rates as a basis the rates theretofore charged were deemed as extortionate, and that the award embraced the excess of the rates charged over the rates prescribed by the commission during the time the higher rates were in force; that the commission did not have before it any substantial evidence that the excess of the rates charged between March 25 and August 10, 1910, over the rates fixed by the commission, was ever paid by appellee because of the difference be-

tween the rates charged and those prescribed by the commission, and for such reasons the action of the commission was arbitrary.

[7, 8] To determine whether such averments or any of them in the answer presented a defense to the recovery of a judgment upon the award, it will be necessary to consider the nature of the power and acts of the commission in making the order whereby the rates were established for the future and the making of the award. As heretofore stated, the fixing of rates to be charged by a railroad carrier in its intrastate commerce is within the power of the legislative department of the government, within the constitutional limitations. The right of the railroad to fix its own intrastate rates is subject to the laws of the state, if enacted in accordance with the provisions of the Constitution. In the absence of any action by the Legislature by which rates have been prescribed, it can very well be seen how the question of the reasonableness of the rates could be a judicial one in a controversy between the carrier and shipper, and to the rates which the carrier was entitled to charge and receive. When, however, the Legislature exercises its power to establish rates, the act by which the establishment is effected becomes a law, which the courts have no other choice than to enforce, unless the Legislature has exceeded its constitutional authority. The constitutional limitation placed upon the legislative authority as to the establishment of rates for carriers in intrastate commerce is that the rates prescribed must not be such as to be confiscatory, and the courts have the inherent power, in a proper proceeding, to determine whether the rates prescribed by the Legislature are confiscatory, and, if so, to restrain the enforcement of the law. Other than this, the reasonableness or unreasonableness of rates prescribed by the legislative authority, or whether arbitrarily prescribed, is not a judicial question.

[9] It is manifest that in a proceeding to enforce an award which is based upon a rate prescribed by the legislative authority the question of the reasonableness or unreasonableness of the rate prescribed as just and reasonable, or whether or not it was arbitrarily established, could not be a proper subject of judicial inquiry. It is readily apparent that it would be utterly impracticable to permit the constitutionality of the law to be put to the test on every occasion when an award based upon that law should be attempted to be enforced. Its constitutionality would depend upon whether or not the rates prescribed by it were confiscatory, and it is not to be reckoned that in the enactment of section 829, Ky. St., the Legislature intended that in every case for the enforcement of an award a jury should be called upon to determine whether the rate prescribing law was or was not constitutional. Doubtless, upon one day a jury would

hold the law to be valid and on the next day another jury would hold it to be unconstitutional and void. The Railroad Commission, in establishing a rate order, exercises a legislative power which is delegated to it by the Legislature, and its act, if done in accordance with law, is a valid and enforceable act of legislation. *McChord v. L. & N. R. Co.*, 183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289; *Interstate Commerce Commission v. C. & T. P. Ry. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243. Hence a rate charged in excess of that fixed by the commission was unlawful and extortionate. Hence the reasonableness or unreasonableness or confiscatory character of the rate order, or the arbitrary conduct of the commission in establishing it, was not, in the proceeding in the court below, a subject of inquiry. *L. & N. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229.

[10] It is not intended by the foregoing to say that the carrier is without remedy against a confiscatory rate prescribed by the Legislature or a confiscatory or arbitrary rate order established by the Railroad Commission, as the courts have the power to relieve against such injustice, but the act of legislation must be assailed by an action for that purpose, as by a suit in equity, in a court having jurisdiction, which can for once and for all determine its validity. *St. Louis & S. F. R. Co. v. Gill*, 158 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970; *L. & N. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229.

[11] Neither did the averments of want of evidence before the commission to support its finding of the amounts paid by appellee to appellant for freight transportation between March 25 and August 10, 1910, in excess of the rates prescribed by the commission, nor the want of evidence before the commission to establish that appellee suffered damages in the amount of the award, and for that reason the action of the commission was arbitrary and unlawful, constitute a defense to the recovery of a judgment upon the award, because it is clear that the damage suffered was the amount paid for freights in excess of what was a just and reasonable rate as established by the commission, and the amount so paid was a proper inquiry before the court below, if put in issue. The appellant does not complain that it did not have notice of the appellant's complaint and claim, or that it failed to have a hearing before the commission, or did not have opportunity to offer all the evidence it desired pertaining to the claim of appellee, or that the commission failed to preserve the evidence, or failed to comply with any of the requirements of section 829, *supra*, with reference to the claim, but only insists that the commission was not justified in making the award upon the evidence offered. Section 829, *supra*, provides for a

trial upon the issue as to whether or not the appellee had paid and appellant had received the sum awarded, and appellant could have had a trial before a jury upon this subject if it had put it in issue.

(c) Section 820a, Ky. St., does not authorize the commission to fix a rate for the transportation of freights until it has given the carrier ten days' notice of the complaint, and of the time and place at which it will hear and consider same, and the nature of the complaint or matter to be investigated, and shall hear such statements, arguments, and evidence which the parties offer, and which the commission deems relevant, and, if it decides that the carrier has been guilty of extortion, it then fixes a just and reasonable rate and gives the carrier notice of it. If the rate fixed is so low as to be confiscatory, the carrier may, in the way above indicated, have a review of the proceedings by a court, and, if the action was based upon insufficient evidence as was thus arbitrarily done, it has its remedy.

[12] Section 829, Ky. St., provides that upon complaint made in writing of extortion against a carrier the carrier shall have not less than ten days' notice of the time and place of the hearing. The commission shall hear and reduce to writing all evidence offered by the parties. If the award shall not be satisfied within ten days, a copy of the award and evidence heard shall be filed in the circuit court. A summons shall be issued and served upon the carrier, and it shall be required to appear and defend, if it desires, within the time allowed as in ordinary actions. If a trial is demanded, the trial shall be heard as in other ordinary actions. No evidence shall be heard except what was heard before the commission, or such as the court may be satisfied from sworn testimony could not have been produced before the commission by ordinary diligence. It is insisted by appellant that, because the statute limits the evidence which can be heard in the circuit court to that heard before the commission, or such as could not be had before the commission by ordinary diligence, this renders the statute void, in that it denies to it the due process of law and the equal protection of the laws, as guaranteed by the Fourteenth Amendment to the federal Constitution. That this contention is without merit is manifest. It is impossible to discover in this proceeding any failure of the equal protection of the laws, and "due process" is always had when the party has had sufficient notice and an opportunity to make his defense. The requirement complained of merely relates to the procedure in the court. A similar statute has been held to be not in violation of the Fourteenth Amendment of the Constitution of the United States by the United States Supreme Court in the case of *State of Washington v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 585, 56 L. Ed. 863, and the

statute complained of was held valid by this court in *L. & N. R. Co. v. Paducah Brewery Co.*, supra.

[13-15] (d) It is contended that section 829, supra, and the act of the commission in making the award to appellee are both violative of sections 2, 13, and 14, of the Constitution of Kentucky. The provisions of the statute, however, do not vest in the commission any absolute or arbitrary power over the property of carriers, as is denounced by section 2, supra, nor has the commission power by making an award, or otherwise any authority, to take property or to apply it to public use without the consent of the carrier, nor without just compensation being made to it, as prohibited by section 13, supra, nor are the courts closed, nor any remedy denied by due course of law to appellant, as guaranteed by section 14, supra.

[16, 17] (e) It is also contended that the commission is without authority to make an award based upon past transactions, based upon a rate prescribed by the commission, and to do so it exercises legislative, judicial, and executive powers of an arbitrary nature, and in violation of section 4, art. 4, of the federal Constitution, and that section 829, supra, is violative of said provision. It is impossible to discern in what manner the act or an award under its authority could affect the republican form of government guaranteed by the constitutional provision mentioned, or wherein the commission exercises the functions alleged in making an award, which must be thereafter reviewed by a judicial tribunal before it becomes effective, or in what manner its action is of an arbitrary nature. It is contended that, the rates exacted previous to the establishment of the rate order being legal, they cannot thereafter be declared illegal so as to entitle the shipper to recover them to the extent they are determined to be extortionate. An extortionate charge by a carrier for transportation is illegal at the time it is exacted. It does not become illegal after the commission has found it to be extortionate and fixed a lower rate only. To require the commission to collect and preserve the evidence of its illegality, the amount wrongfully exacted, and to make an award for it is only the procedure provided to enable its recovery. To charge an unreasonable and extortionate rate for the transportation of commodities by carriers was unlawful at the common law. There can be no recovery of anything wrongfully exacted, except it arise upon a past transaction.

[18] (f) It is also claimed that the enforcement of the award and the rate order upon which it is based violates section 218 of the Constitution, in that it compels a discrimination, which is denounced by that constitutional provision. The rates from and to the places embraced by the order and from and to the persons who reside and do business at such places are all within the control of

appellant, and it is not required to make any discrimination. *L. & N. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229.

[19] (g) Appellant insists that, although it did not satisfy the court, by sworn testimony, that it had any evidence which it did not offer before the commission, which it could not with ordinary diligence have produced before the commission, it was entitled to a trial upon the evidence which was heard by the commission, and which was on file; that it demanded such a trial, and was refused; that it also moved the court to require appellee to file the records of all the proceedings before the commission in court, along with the copy of the award and evidence; and that the court overruled its motion, to its prejudice. What records of the proceedings were before the commission does not appear; neither does it appear what effect their filing would have upon the proceedings in the case at bar. Suffice it to say, however, that the statute only requires a copy of the award and the evidence to be filed in the circuit court, and it is to be presumed that, if any other of the records of the proceedings would have been useful upon the hearing in the circuit court, appellant would have caused them to be filed there, as it had an equal opportunity and right with appellee to have done so, and no right to require the appellee to file them.

[20] (h) It is elementary that in an ordinary action a party is not entitled to a trial of his case upon the evidence, unless the pleadings make an issue, which makes it necessary for the party holding the affirmative to support with evidence. In a case of the character of the one at bar it must be considered that the findings in the copy of the award amount to an allegation that the carrier has received from the shipper the amount of the award from extortionate charges which the shipper has paid. To make an issue it would be necessary for the carrier to deny that the shipper had paid the sums in excess of the rates fixed by the commission, and which go to make up the award, or that it had received same, or, if the award had been satisfied by the carrier, to so affirmatively allege. The denial of the answer that appellant did not owe appellee the amount of the award or any part of it was only a conclusion of the pleader, and did not put anything in issue.

[21] The averment in the answer that it did not have knowledge or information sufficient upon which to found a belief as to whether or not the amounts had been paid by appellee or received by it was not sufficient under the well-known rule that a party cannot put in issue by such a plea matters necessarily within his own knowledge. Hence the pleadings charged appellant with having received from appellee the amounts of the award in extortionate rates for trans-

portation of freights, and there was no denial of it. *Barret, etc., v. Godshaw*, 12 Bush, 598; *Wing v. Dugan*, 8 Bush, 583; *Gridler, etc., v. Farmers' & Drovers' Bank*, 12 Bush, 338; *Mt. Sterling v. First National Bank*, 147 Ky. 376, 144 S. W. 370; *Augustus v. Holt*, 15 S. W. 1064, 13 Ky. Law Rep. 8; *McClure v. Biggstaff*, 37 S. W. 294, 38 S. W. 431, 18 Ky. Law Rep. 601; *Lucas v. Lucas*, 37 S. W. 588, 18 Ky. Law Rep. 661. Hence the court did not err in sustaining the demurrer to the answer.

The judgment in favor of the Greenbrier Distillery Company is affirmed. The appeals from the judgments in favor of Early Times Distilling Company, Mueller, Wathan & Kobert, S. Grabfelder & Co., Willow Springs Distillery Company, Wright & Taylor, Taylor & Williams, Eminence Distillery Company, Old Grand Dad Distillery Company, T. W. Samuel's Distillery, the Warwick Distillery Company, Burks Springs Distillery Company, W. B. Samuels & Co., M. C. Bean & Co., Head & Parker, Blair, Osborne & Ballard Distillery Company, and Tom Moore Distillery, respectively, are dismissed.

BOWKER v. BRY-BLOCK MERCANTILE CO. et al.

(Supreme Court of Tennessee. April 27, 1916.)

LIBEL AND SLANDER \Leftrightarrow 123(3)—**WORDS IMPUTING LARCENY.**

In slander action it was error to direct a verdict for defendant on the ground he had not imputed larceny to plaintiff, where he roughly said to plaintiff, a customer in his store, in the presence of others, that a hat was stolen from the store, that the hat on her head looked very much like it and was the hat, that he had been trying to locate the hat for some time by detectives, and they had located it on her head, and she replied that she had never been accused of stealing before, and no denial of the meaning of his words as defined by this reply was made by him.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 358; Dec. Dig. \Leftrightarrow 123(3).]

Certiorari to Court of Civil Appeals.

Action for slander by Mrs. W. F. Bowker against the Bry-Block Mercantile Company and another. To a judgment of the Court of Civil Appeals reversing a judgment for defendants, defendants bring certiorari. Certiorari denied.

Hunter & Wilson, and Banks, Boals & Harrelson, of Memphis, for plaintiff. Hirsh & Goodman, of Memphis, for defendants.

GHOLSON, Special Judge. This is a suit for slander brought by the plaintiff, Mrs. W. F. Bowker, against the Bry-Block Mercantile Company, a corporation, and I. D. Block, who was its vice president, in the circuit court of Shelby county. At the conclusion of the testimony of the plaintiff a motion for a directed verdict was sustained by the circuit judge, from which an appeal was prayed and

granted to the Court of Civil Appeals. That court reversed and remanded the case, and it is now here upon petition for certiorari on the part of the defendants below.

The testimony shows that the plaintiff, Mrs. Bowker, who lives in Memphis, and who had been personally acquainted with the defendant I. D. Block for several years (two of her children having worked in the store of the defendant company), on Saturday afternoon, June 27, 1914, went into the store of said company and was seated upon a stool and being waited upon at the counter of the pattern department; that the defendant corporation conducted a large department store, with several hundred employees; that the defendant I. D. Block approached Mrs. Bowker and roughly touched her on the shoulder and said he wanted to see her a moment. He took her two or three steps over in the main aisle of the store, and in the presence and hearing of two men said to her:

"A hat was stolen from this store some time ago, and the hat you have on your head looks very much like the hat, and is the hat. These men are my detectives. I have had them trying to locate the hat for some time, and they have located it on your head, and that is the hat."

Mrs. Bowker then said to Mr. Block that she had never been accused of stealing before. Thereupon Mr. Block told her to go on and finish her shopping, and Mrs. Bowker stated that she had some change coming to her from the saleslady at the pattern counter which she would get and never do any more shopping in his store. Mr. Block then asked her where she got the hat she had on. She replied that she had purchased it at that store and paid \$9.98 therefor. He asked from whom she purchased it, and if she could identify the clerk, to which she replied that she had purchased it several months before from a lady clerk, but she could not identify her, as she did not know her.

When this conversation took place a large number of people were in the store, some of whom were within two or three feet of Mr. Block, Mrs. Bowker, and the two detectives, and within hearing distance of what was said.

Immediately after this conversation Mrs. Bowker went back to the pattern counter, got her change, and one of the detectives in whose presence I. D. Block had made the statement set out above came and asked for her name and address, said he assumed that she wanted to wear the hat home, as the next day was Sunday, and that he would be down Monday morning for it, to which she replied: "All right, and I will show you the best time you ever had." The detective did go to her house on Monday and Tuesday for the hat, but she was not at home, and on Wednesday he went again to her house, saw her, and demanded the hat, which she declined to give him, and referred him to her lawyer.

The declaration of the plaintiff below contained three counts and set out the words spoken by I. D. Block to her, quoted above. It also contained an innuendo that the defendants by the words quoted in the testimony of Mrs. Bowker imputed to her the crime of larceny. The defendants pleaded not guilty.

It was conceded by the parties that, if the meaning of the words used by I. D. Block imputed to the plaintiff the crime of larceny, they would be slanderous per se, and that it would have been error to peremptorily instruct for the defendants. Plaintiff contends that the words meant to impute said crime, or at least that this was a question for the jury. The defendants contend that the words did not impute to her the crime of larceny; furthermore, that the words are not ambiguous, either on their face or by reason of extraneous facts, and hence that the meaning of the words should not have been submitted to the jury.

"Larceny" (as defined in this state in the cases of *Fields v. State*, 6 Cold. 526, and *Hughes v. State*, 8 Humph. 76) "is the felonious taking and carrying away the personal goods of another. * * * Possession of the fruits of crime recently after its commission is prima facie evidence of guilty possession, and if unexplained, either by direct evidence or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive."

"Words are now to be construed by courts * * * in the plain and popular sense in which the rest of the world naturally understood them. In all cases of ambiguity it is purely a question for the jury to decide what meaning the words would convey to persons of ordinary intelligence." *Bank v. Bowdre*, 92 Tenn. 740, 23 S. W. 131, and authorities there cited.

Where the language published is unambiguous, it is the exclusive province of the court to determine its construction, and to determine whether or not upon its face it is actionable per se. *Bank v. Bowdre*, supra.

"The question always is: How did the persons to whom the words were originally spoken or published understand them?—the legal presumption being that they were persons of ordinary intelligence. We must assume too, that they give to ordinary words their ordinary meaning; to local or technical phrases their local or technical meaning. That being done, what did the whole passage convey to the unbiased mind?" *Newell's Slander & Libel* (3d Ed.) § 367.

In the opinion of Judge Lansden in the well-considered case of *Cheatham v. Patterson*, 125 Tenn. 437, 145 S. W. 159, Ann. Cas. 1913C, 314, there is quoted with approval the following language of Chief Justice De Gray in *Onslow v. Horne*, 3 Wils. 177:

"The rule is that the words must contain an express imputation of some crime liable to punishment, some capital offense, or other infamous crime or misdemeanor, and the charge upon the person spoken of must be precise."

Now, applying the rules under the authorities above referred to, what was the meaning of the language used by Block to Mrs. Bowker?

The statement was made by Block that a hat had been stolen from the store of defendant company; that the hat which she (Mrs. Bowker) had on looked like the stolen hat, and was the hat; that the detectives whom he had employed for some time had been trying to locate the hat, and had located it on her head.

Can there be any doubt but that Block in precise and exact terms charged that the crime of larceny of the hat had been committed, and that the property found in the possession and upon the person of Mrs. Bowker was the same that had been stolen from said store? Did he not in this charge make out a prima facie case of larceny by Mrs. Bowker in having in her possession stolen property? Did not those who heard this charge understand the language used by him in speaking to her to mean that he charged her with the larceny of the hat?

The detectives employed by Block are shown by the evidence to have heard the conversation. Customers in the store and employes in all probability heard it. In the light of the testimony quoted, there is no doubt as to how Mrs. Bowker understood it, because her reply was that she had never been accused of stealing before. No denial of his meaning as defined by her was made by Block. There can be no doubt as to how one of the detectives in whose presence the conversation took place understood this meaning, because he took her name and address and said that he would be at her house on the following Monday to get the hat; and, as stated before, he did go to her residence for the hat on Monday, Tuesday, and Wednesday.

We think the Court of Civil Appeals was clearly right in reversing and remanding the case, and the petition for certiorari is denied.

PRATER v. REICHMAN, Sheriff.

(Supreme Court of Tennessee. June 24, 1916.)
EXEMPTIONS § 44 — STATUTES — CONSTRUCTION.

Under Shannon's Code, § 3794, exempting in the hands of every male citizen, and every female head of a family, two horses or mules, together with wagons, harness, and saddles, etc., an automobile is not exempt; it being property entirely dissimilar to that exempted and used by a different class of citizens from those intended to be protected by the exemption statute. [Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 51-55; Dec. Dig. § 44.]

Certiorari to Court of Civil Appeals.

Replevin by W. T. Prater against J. A. Reichman, Sheriff. A judgment for defendant was affirmed by the Court of Civil Appeals, and the plaintiff applies for writ of certiorari. Denied.

B. F. Booth, of Memphis, for plaintiff in error. Chas. M. Bryan, of Memphis, for defendant in error.

BUCHANAN, J. Dr. Prater was a practicing physician residing in Memphis, a married man, and the head of a family. He owned a two-seated runabout automobile, valued at not less than \$100, which he used in calling upon his patients in and out of the city. He also frequently hauled groceries and other small articles in the automobile. He owned no horse or buggy, or other vehicle.

The sheriff, having in hand an execution at law against him, levied the same on the automobile, and Prater brought an action of replevin, claiming the property to be exempt under Shannon's Code, section 3794. The circuit court, and the Court of Civil Appeals, held against the claim of exemption, and Prater now invokes our judgment of the question by his petition for certiorari.

By the legislation above referred to, it is declared that there "shall be exempt from execution, seizure, or attachment, in the hands of every male citizen of the age of 18 years and upward, and every female who is the head of a family" (here follow certain articles and provisions which we need not mention), "two horses, or two mules, one horse and mule, or one horse or mule, and one yoke of oxen; one ox-cart, yoke, ring, staple, and log chain; one, two, or one one horse wagon (not to exceed \$75 in value), and harness; one man's saddle; one woman's saddle; two riding bridles."

The public policy underlying our exemption statutes for heads of families is that a creditor should be restrained from having satisfaction of his debt out of certain kinds of property which are necessary to the maintenance of the families of improvident or unfortunate debtors; authorities: *Cox v. Balcantine*, 60 Tenn. (1 Baxt.) 363; *Wolfenbarger v. Standifer*, 35 Tenn. (3 Sneed) 659; *Hawkins v. Pearce*, 30 Tenn. (11 Humph.) 44; *Webb v. Brandon*, 51 Tenn. (4 Heisk.) 285; *Simons v. Lovell*, 54 Tenn. (7 Heisk.) 510.

The schedule of exempt articles under section 3794, Sh. Code, many of which are not mentioned above, embraces such as were, at the time of the legislation, in common use among the class of debtors for whose protection the statute was enacted. The animals and vehicles named in the schedule are such as were usually owned by such debtors and used by them in the work necessary to be done to support their families, and to accomplish such limited transportation of themselves and their families as might be necessary. An automobile, on the other hand, is an invention not in use when the exemption statute was passed, and so of course is not mentioned therein, and was not within the intent of the Legislature. The automobile is the product of a civilization advanced much beyond the date of our exemption legislation; and it is, as a means of transportation, a different class of vehicle altogether from those named in the statute. It was invented to meet the needs of a different class of citizenship from that intended to be protected by the exemption statutes. It is a vehicle whose owner is usually well able to pay his debts, and, whether willing or not so to do, should be thereto compelled.

Petitioner relies on *Lames v. Armstrong*, 162 Iowa, 327, 144 N. W. 1, 49 L. R. A. (N. S.) 691. In that case an insurance agent was held to be a laborer and an automobile a vehicle, within the purview of the statute there under consideration. But our statute is so different in its phraseology that we find the Iowa case of no value as authority.

An automobile is property so entirely dissimilar in kind from any of the articles named in our exemption statutes that it cannot be held to be embraced therein, unless we should depart from legitimate construction and engage in judicial legislation.

There was no error in the judgment of the Court of Civil Appeals, and the writ of certiorari is accordingly denied.

CHUNN v. LONDON & LANCASHIRE FIRE INS. CO. (No. 29.)

(Supreme Court of Arkansas. May 29, 1916.)

1. INSURANCE — 658 — ACTIONS — EVIDENCE — ADMISSIBILITY — LOSS.

In an action upon fire insurance policy, defense being incendiarism, exclusion of answer to plaintiff's question to manager of electric light plant, if it was not a fact that frequently the wiring of a house ignites and burns it, was not error, where there was no showing that the wiring of the house could have caused the fire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1689, 1690, 1694; Dec. Dig. 658.]

2. EVIDENCE — 474(19) — OPINION — SPECIAL KNOWLEDGE — VALUE.

In such action, admission of testimony by a witness for defendant that a lounge destroyed was without value was not error, where he has observed the lounge a few days before the fire while considering buying some of plaintiff's furniture.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2218; Dec. Dig. 474(19).]

3. EVIDENCE — 525 — OPINION — SUBJECTS OF EXPERT TESTIMONY — VALUE — PERSONAL PROPERTY.

In such action, the value of a lounge destroyed did not require expert evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2233; Dec. Dig. 525.]

4. TRIAL — 63(2) — RECEPTION OF EVIDENCE — ADMISSION IN REBUTTAL OF EVIDENCE PROPER IN CHIEF.

A large discretion rests with the trial judge in permitting the introduction of evidence in rebuttal which is not strictly of a rebuttal nature.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 152; Dec. Dig. 63(2).]

5. INSURANCE — 669(10) — ACTIONS — INSTRUCTIONS.

In an action upon fire insurance policy, defense being incendiarism, refusal of plaintiff's instruction, that she had the right to remove goods from her house without notice to the company so long as the hazard was not increased thereby, is not error, since the jury could well regard the removal as highly important as bearing upon the origin of the fire, although it did not increase the physical hazard.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1778; Dec. Dig. 669(10).]

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Action by Mrs. Annie L. Chunn against the London & Lancashire Fire Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

R. S. Coffman, Rachels & Yarnell, and John E. Miller, all of Searcy, for appellant. Brundidge & Neelly, of Searcy, for appellee.

SMITH, J. This is the second appeal of this case, and a statement of the material facts will be found in the opinion on the former appeal. *Chunn v. London & Lancashire Fire Ins. Co.*, 115 Ark. 555, 172 S. W. 837.

[1] A Mr. Candor, who was the manager of the electric light plant in the city of Searcy, where appellant's house was located, was asked the question: "I will ask you if it is

not a fact that frequently the wiring of a house ignites and burns it?" But an objection was sustained to the question. The insurance company claimed the fire was of incendiary origin, and this question was intended to furnish a possible explanation of the origin of the fire. However, it appeared that immediately preceding this question the witness was asked, "Do you know how that building was wired and whether or not it was properly wired?" and he answered, "I do not know." No other attempt was made to show that anything about the wiring of this house could have been responsible for the fire. The answer of the witness, therefore, could only have furnished a speculative or possible cause for the fire, and we think no error was committed in excluding the answer.

[2, 3] A witness named Smith was permitted, over appellant's objection, to testify that a lounge which was destroyed in the fire was without value. It was the contention of the insurance company that appellant had removed from the building most of the furniture of any value, and appellant had proved the loss of this lounge. It is urged that the witness did not show himself qualified to testify as to the value of the lounge. This witness, however, had gone to the house a few days before the fire for the purpose of looking at the furniture with a view of buying some of it, and while there had observed the lounge, and answered that it had no value. The witness evidently had some personal knowledge of values, and we think no error was committed in permitting him to testify that this simple article of furniture had no value, as this was not an article about which expert evidence was necessary.

[4] A witness, W. L. Barnett, was asked the question, "I will put the question to you, did you or not, a few days prior to the time of the fire, go to this building and put new locks on the back doors and do certain other repair work on the building?" Appellee objected to this question on the ground that it was not rebuttal testimony, it being asked after appellant had taken up her cause in rebuttal. Appellant's theory was that this proof would tend to show that she was making improvements on her place just prior to the time of the fire, and that she was not contemplating a fire. But it appears that this was the third trial of this case, and the issues in it were well defined and sharply drawn, and appellant had substantially developed her case. Of necessity, a large discretion must abide with the trial judge in permitting the introduction of evidence in rebuttal which is not strictly of a rebuttal nature, and we cannot say that any error was committed here in this respect.

It is also insisted that the court erred in permitting Mrs. Phillips to detail a conversation had with appellant the day after the

fire. In response to the question, "What else did she say?" this witness answered: "She said when she got the money she was going to travel on it, and that she was going to see that no other woman enjoyed it." It was appellee's theory that this answer explained appellant's motive, and it was therefore competent for that purpose. It further appears that without objection appellant was asked practically the same question in her cross-examination and gave substantially the same answer.

[5] Appellant asked an instruction numbered 5, which reads as follows:

"The jury is further instructed that the plaintiff had the right to remove goods from her house, without notice to the defendant company, so long as the hazard was not increased thereby; the policies, of course, covering only the building and such goods as remained in the building. The jury, however, will not render a verdict of any kind concerning the goods, as that part of it has been adjudicated at a former trial."

This instruction was not proper under the circumstances, as its effect was to tell the jury that appellant had the right to remove the goods from the house if the hazard was not thereby increased, when that circumstance might have been regarded by the jury as highly important as bearing upon the origin of the fire, although it did not increase the hazard from natural causes. Moreover, the instruction relates to the policies, one of which was on the house, and the other on the furniture, and the liability of the insurance company was, of course, affected by the amount of property left in the building.

Other instructions appear to raise questions which were passed upon in the former opinion.

Upon the whole case, it appears that the instructions fairly submitted the case to the jury.

Finding no prejudicial error, the judgment is affirmed.

NIX v. STATE. (No. 43.)

(Supreme Court of Arkansas. June 5, 1916.)

1. CRIMINAL LAW § 603(4)—TRIAL—CONTINUANCE—STATUTE.

It is a requirement of Kirby's Dig. § 6178, that motion for continuance for absence of a witness allege that affiant believes the evidence to be true.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1350; Dec. Dig. § 603(4).]

2. CRIMINAL LAW § 603(11)—TRIAL—CONTINUANCE—DILIGENCE—DISCRETION OF COURT.

In a prosecution for larceny, where indictment was returned a year before trial, and one continuance had been had, and the motion for second continuance for the absence of witnesses did not show when subpoenas had been issued, or that they had been served, though the motion alleged that the witnesses were residents of the county, while it alleged that another witness had in obedience to a subpoena attended former trial, and that he was absent from the state, but would return within 30 days to remain permanently, which 30 days would

be beyond the term of court, there being no showing why deposition had not been taken, the trial court did not abuse its discretion in overruling the motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1359, 1360; Dec. Dig. § 603(11).]

3. LARCENY § 5—PROPERTY SUBJECT—UNBRANDED RANGE ANIMAL—STATUTE.

Despite Kirby's Dig. § 1898, providing that, if unbranded cattle, hogs, or sheep running at large in the range or woods shall be taken or converted to the use of a person other than the owner, such person shall not be deemed guilty of larceny, where an animal running on the range is domestic in its nature, like a milch cow, and is permitted to go from the home of the owner only for a short distance and for a short period of time, as a day or two, to roam or graze upon the common, the range, or in the woods, and by reason of its habits or training returns each day or practically so to the owner's home, such animal is the subject of larceny, though over 12 months old, unmarked, and unbranded.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 11-17; Dec. Dig. § 5.]

4. CRIMINAL LAW § 718—TRIAL—ARGUMENT OF PROSECUTING ATTORNEY.

In a prosecution for larceny of a cow, argument of the prosecuting attorney that he had prosecuted another defendant just as he had defendant, and such other was convicted and took an appeal, which was reversed and sent back, and the prosecuting attorney prosecuted him again just as he had defendant, and he was convicted a second time, and that the prosecuting attorney had the same evidence against the other defendant as against defendant, was improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1668; Dec. Dig. § 718.]

5. CRIMINAL LAW § 720—TRIAL—HARMLESS ERROR—IMPROPER ARGUMENT—WITHDRAWAL.

In a prosecution for larceny, the withdrawal by prosecuting attorney immediately upon objection of his improper argument commenting on another defendant's having been twice convicted on the evidence against defendant cured the error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1692; Dec. Dig. § 720.]

6. LARCENY § 55—GUILT—SUFFICIENCY OF EVIDENCE.

In a prosecution for larceny of an unmarked and unbranded heifer, evidence held sufficient to support verdict of guilty.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.]

Appeal from Circuit Court, Lafayette County; Geo. R. Haynie, Judge.

Seymour Nix was convicted of larceny, and he appeals. Judgment affirmed.

Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was indicted in conjunction with one Sid Davis for the larceny of an unmarked and unbranded heifer, which was over a year old at the time it was alleged to have been stolen. Although the evidence showed the animal was running at large on the range, its owner testified that he "saw it every day generally," and in re-

sponse to the question, "Did it go out and come back every day," answered, "Yes sir."

[1] When the case was called for trial, appellant filed in open court a verified motion for continuance, which was overruled by the court, and exceptions saved. No showing was made except that contained in the motion. It alleged that subpoenas had issued for Odie Ash, Neil Marlow, and Will Plunder, and contained the statement that they would testify to certain facts there recited, and it was alleged that this evidence was material. The materiality of the evidence, however, does not appear from a mere perusal of the motion; nor does it allege that the affiant believes the evidence to be true as is required by section 6173 of Kirby's Digest.

[2] It appears from the recitals of the motion that Ash had, in obedience to a subpoena, attended a former trial of the case, but it also recited that Ash was then absent from the state, but would return within 30 days to remain permanently. The 30 days would be beyond the term of court. No request was made to read this statement as a deposition, nor was any showing made why a deposition had not been taken. The motion did not show when subpoenas had been issued for the other two witnesses, nor did it show that they had been served, although the motion alleged the two witnesses were residents of that county. The indictment had been returned a year prior to the trial, and one continuance of the cause had been had. We think no such showing of diligence is here made as would warrant us in finding that the trial court had abused its discretion in overruling the motion.

[3] The court read to the jury section 1896 of Kirby's Digest and, after reading this section as an instruction said:

"The purpose and intention of the statute which the court has just read is to declare that those animals which are not the subject of larceny are the ones, which being uncontrolled or unrestrained, roam at will on the range or in the woods for long periods; that is to say, for weeks or months, so that it would not or could not be known who was the owner thereof. But where the animal is domestic in its nature, like a milch cow, or any other cow, and it is permitted to go from the home of the owner only for a short distance, and for a short period of time, as for a day or two or the like, in order to roam or feed upon the common, or on the range or in the woods, and by reason of its habits and training returns each day, or practically so, to the home of its owner, then such animal does not run at large within the meaning of the statute. Therefore, such animal would be the subject of larceny, and it would be larceny to steal such animal although over twelve months old and unmarked and unbranded."

Complaint is made of this language. But we think there is no error in what was there said. The court evidently had in mind the language of Mr. Justice Frauenthal in the case of Jeffries v. State, 102 Ark. 373, 144 S. W. 514. The exposition of this section

made by the court finds full support in the language of that opinion.

[4] In his argument before the jury the prosecuting attorney said:

"I have prosecuted Sid Davis just as I have Seymour Nix, and he was convicted and took an appeal to the Supreme Court. It was reversed and sent back, and I prosecuted him again just as I have this defendant, and he was convicted a second time, and I had the same evidence against Sid Davis as I have against this defendant."

Exception was duly saved to this argument, which was manifestly improper, but, upon objection being made, it was immediately withdrawn.

[5] The rule in such cases was stated in the opinion in the case referred to by the prosecuting attorney. Davis v. State, 178 S. W. 918. Under the rule there stated, we think the prompt withdrawal of the improper argument cured the error.

[6] While we have not been favored with a brief by appellant, we find that the Attorney General has abstracted all matters embraced in the motion for a new trial, and the only remaining error assigned is that the evidence was not sufficient to support the verdict.

In answer to this contention it may be said that the evidence on the part of the state was to the effect that appellant went to the home of Sid Davis to get him to aid in killing the animal, which he had already tied for slaughter; that appellant himself killed the helper and skinned it on the ground, and, while engaged in peddling the meat, denied that he had done so, but stated that he had "swung it up" before butchering it, and that it was an animal which had belonged to his father. There was proof of other contradictory statements made by appellant in regard to his possession of the meat; and upon a consideration of this evidence we are of opinion that it is legally sufficient to support the verdict of the jury.

The judgment of the court below is therefore affirmed.

COFFIN et al. v. PLANTERS' COTTON CO. et al. (No. 59.)

(Supreme Court of Arkansas. June 12, 1916.)

1. MORTGAGES \S 298(2)—PAYMENT—TO TRUSTEE UNDER TRUST DEED—RIGHT OF HOLDER OF NOTE.

A junior mortgagee is not protected by mere payment to the trustee of deed of trust securing a prior mortgage and cancellation of such trust deed by the trustee, as against a holder of one of the prior mortgage notes.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 837-839, 864; Dec. Dig. \S 298(2).]

2. PRINCIPAL AND AGENT \S 166(1) — RATIFICATION—KNOWLEDGE.

Before a principal can be held to have ratified any unauthorized act of an alleged agent, he must have knowledge of all the material facts

upon which the agency is predicated; and ignorance of such facts renders the alleged ratification ineffectual and invalid.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 627-628; Dec. Dig. ☞ 166(1).]

3. PRINCIPAL AND AGENT ☞ 170(3), 171(1) — RATIFICATION—IMPLIED RATIFICATION.

When a principal, with full knowledge of the facts of an unauthorized contract by an alleged agent, remains silent when he should speak, or accepts some benefit which he obtains by virtue of his reputed agent's acts, he cannot thereafter be heard to deny the agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 641, 642, 644, 645, 653, 654; Dec. Dig. ☞ 170(3), 171(1).]

4. MORTGAGES ☞ 309(2) — PAYMENT — DISCHARGE BY TRUSTEE — IMPLIED RATIFICATION.

Where a mortgagee, with full means of knowing the facts and legal effect of an unauthorized discharge by trustee of the trust deed securing her debt, accepted as security a subordinate lien, she was held to have ratified the discharge and estopped to assert, in a suit to foreclose, priority of her note over a junior incumbrancer who had paid the trustee part of the mortgage debt to secure such discharge, although she did not know the exact form of that discharge.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 864, 900, 902, 903; Dec. Dig. ☞ 309(2).]

Appeal from Mississippi Chancery Court; Chas. T. Coleman, Special Chancellor.

Suit by Mary M. Coffin and others against the Planters' Cotton Company and others. From a decree for respondents, complainants appeal. Affirmed.

Hughes & Hughes, of Memphis, Tenn., for appellants. Caruthers Ewing, of Memphis, Tenn., for appellees.

SMITH, J. A condensation of the allegations of the complaint is contained in appellant's brief, from which we copy the following statement:

"The complaint alleges, in substance, that G. L. Waddell is the owner of a plantation in Mississippi county, Ark., known as the Shawnee Village. At the times mentioned he owed a balance of purchase money of about \$20,000 on the land. Defendant Planters' Cotton Company, in March, 1911, loaned him approximately \$30,000 on the land, taking three \$10,000 notes due several months later. The plaintiff, two days thereafter, bought one of said notes from the Planters' Company, before maturity, in good faith, without notice of any defense, and paid therefore \$10,000 in cash. This indebtedness was renewed in 1912, and three new notes taken by the Planters' Company, one of which was thereupon indorsed to plaintiff, who also took a separate note for the interest then due her.

"On February 22, 1913, the defendant Commonwealth Farm Loan Company (herein called the loan company) took a mortgage on the same land to secure a loan of \$35,000. Of this sum \$20,000 was applied to liquidate the purchase-money lien, which was in front of all the mortgages. The remainder, about \$15,000, was paid to Planters' Cotton Company, and that company placed of record on the same day a power of attorney to the clerk to satisfy the record of both the mortgages to it, which was done.

"The plaintiff was ignorant of all the proceedings. No part of the note held by her has been paid, nor has she in any way authorized the release of record of the mortgage securing her note. The Planters' Cotton Company is now in the hands of a receiver, and Waddell, the maker of the notes, is insolvent.

"There were various other allegations on subordinate features of the controversy, but these were the main facts.

"The prayer is, in effect, for judgment on the note, for sale of the property, and that plaintiff be decreed to have priority in the proceeds except as to the \$20,000 paid toward the purchase money."

Certain junior lienors are also parties defendant, but as the decree in the cause finds, and as they themselves concede, that their liens are inferior to the ones here involved, we make no statement of the issues as to them.

The loan company and the cotton company do not deny the execution of the different deeds of trust and other instruments referred to in the complaint, but they do deny that the deed of trust originally given had been satisfied of record without appellant's consent, but aver that she had authorized this action, and that she had fully ratified the action of the Planters' Cotton Company in satisfying the deeds of trust, and that the loan company is an innocent purchaser.

The two principal questions in the case are: First, that of the priority of the mortgages; and, second, whether the plaintiff Mrs. Coffin ratified the action of the Planters' Cotton Company in satisfying the deed of trust securing the note on which this action is based. The principal question of fact which is important to consider in determining these questions is that of the nature and extent of the authority of one C. T. French as appellant's agent. Appellant's husband had been a member of the firm of Dillard & Coffin Company, and during the last years of his life French was employed by that firm and was held in the highest regard by its members. After the death of Mr. Coffin, French severed his connection with that firm and became connected with the Planters' Cotton Company in the capacity of general manager. He continued, however, to be the agent and confidential adviser of Mrs. Coffin, and her confidence in him appears to have been unreserved.

We agree with appellant in her claim of priority. This view conforms to the opinions in the recent cases of *Driver v. Lacer*, 186 S. W. 824; *Calhoun v. Ainsworth*, 118 Ark. 316, 176 S. W. 316, L. R. A. 1915E, 395; *Calhoun v. Sharkey*, 180 S. W. 216; *Koen v. Miller*, 105 Ark. 152, 150 S. W. 411.

[1] The note in question was negotiable and had been properly indorsed and was owned by appellant at the time the deed of trust securing it was canceled. It was therefore the duty of the loan company to know who the owner of the note was, and it could not claim protection through the mere

cancellation of the deed of trust by the cotton company, if that company was not the holder of the note at the time that action was taken. It is earnestly insisted that French was the agent of Mrs. Coffin in causing the deed of trust to be canceled. But a majority of the court do not accept that view of the evidence. All of us, however, do agree with the learned special chancellor in his finding that Mrs. Coffin ratified the action of French in canceling the lien of this deed of trust.

[2] We have been favored with very excellent briefs in this case which evince much learning and research on the part of opposing counsel; but the legal principles involved are not difficult and have been settled by the decisions of this court. It is well settled that, before one can be held to have ratified any unauthorized act of one who assumes to be his agent, the principal must have knowledge of all the material facts upon which said agency is predicated, and ignorance of such facts renders the alleged ratification ineffectual and invalid. *Schenck v. Griffith*, 74 Ark. 557, 86 S. W. 850; *Lyon v. Tams & Co.* 11 Ark. 189; *Martin v. Hickman*, 64 Ark. 217, 41 S. W. 852; *Niemeyer Lbr. Co. v. Moore*, 55 Ark. 240, 17 S. W. 1028.

[3] But it is equally as well settled that when one has this knowledge and remains silent when he should speak, or accepts some benefit which he obtains by virtue of his reputed agent's acts, he cannot thereafter be heard to deny the agency. In other words, he will be held to have ratified the unauthorized acts. *Ladenberg, Thalman & Co. v. Beal-Doyle Dry Goods Co.*, 83 Ark. 440, 104 S. W. 145; *Atlanta National Bldg. & Loan Ass'n v. Bollinger*, 63 Ark. 212, 37 S. W. 1049; *Dierks Lbr. Co. v. Coffman*, 96 Ark. 505, 132 S. W. 654; *Lyon v. Tams & Co.*, 11 Ark. 189; *Billingsley v. Benefield*, 87 Ark. 128, 112 S. W. 188; *Pike v. Douglass*, 28 Ark. 59; *Creson v. Ward*, 66 Ark. 209, 49 S. W. 827; *Kelly v. Carter*, 55 Ark. 112, 17 S. W. 706.

Appellant quotes and relies upon the rule as stated in 2 C. J. 496, where it is said:

"There is no ratification if, at the time it becomes known that the agent exceeded his authority, the principal has put it beyond his power to return or restore the benefits received, or if without his fault conditions are such that he cannot be placed in statu quo, or repudiate the entire transaction without loss."

[4] This statement of the law is, of course, correct and is in accord with the prior decisions of this court. It becomes necessary, therefore, to determine whether Mrs. Coffin remained silent when she should have spoken, or whether she accepted benefits flowing out of the unauthorized acts of French or whether the action taken by her was such only as was necessary to obtain the best security possible for her debt after the lien securing it had been canceled. The evidence shows that French's conduct of Mrs. Coffin's affairs had previously been

highly satisfactory and profitable to Mrs. Coffin, and that her confidence in his integrity and judgment was unlimited; that she was also the owner of \$10,000 of the preferred stock of the cotton company, and neither she nor any one else questioned the solvency of that company at the time of her purchase of the note. The following indorsement appears on the back of the note in suit, which French testified was made by him at the time of the cancellation of this deed of trust:

"This note renewed by notes attached, due December 15/13, also 4 rent notes, \$4,800.00 each, attached, as additional security."

There was also executed a deed of trust covering the lands in question in Mrs. Coffin's favor which the parties refer to as the third deed of trust. This instrument was given to Waddell to be placed of record, but was not recorded until some months later. The four notes mentioned were given to G. L. Waddell by his tenant pursuant to a contract for their execution, but upon a showing made that the notes had been executed for an excessive amount they were surrendered with the understanding that new notes for the correct amount of rent should be substituted. At the time of the acceptance of these rent notes the cotton company was a going concern and would probably have paid Mrs. Coffin her money had she refused to accept them, or had the payment been refused and the loan company apprised of that fact that company could have taken proper steps to be subrogated to the rights of Waddell's vendor with respect to the money paid this vendor, in discharge of their vendor's lien, which lien was prior both in time and right to either the Planters' Cotton Company or Mrs. Coffin; this vendor's lien having been discharged on February 2, 1913.

It is also shown that upon default being made in the payment of the interest due the loan company, in order to prevent a foreclosure of the deed of trust given that company, Mrs. Coffin surrendered one of the rent notes, the proceeds of which, when collected, were applied to the payment of the interest due the loan company.

This was done in January, 1914, but Mrs. Coffin's attorney testified that at that time he thought the only security held by her consisted of the rent note, a note that had been transferred to her in lieu of her original note indorsed by the cotton company and the deed of trust on the Shawnee Village plantation securing this substituted note, which was inferior to the loan company's deed of trust. It is said, however, that notwithstanding these new securities were taken, no ratification was accomplished because Mrs. Coffin did not know the manner in which the cancellation of the deed of trust by the cotton company had been accomplished, and that she did not know that she had the note in her possession, nor did she know that it had not been surrendered. That she assumed, as she

had the right to do, that the note had been surrendered, or had been exhibited by the cotton company to the loan company as being in its possession, and therefore its property. In other words, that the satisfaction of the deed of trust had been accomplished in such a manner as to bind her effectively and to leave her no choice, but to take such securities as were then available.

We cannot, however, accept this view. Mrs. Coffin had knowledge that French had undertaken to satisfy this deed of trust at a time when, had she repudiated that action, the loan company might have protected itself as above stated. Nor do we agree that her lack of knowledge as to the possession of the note protects her. If she did not possess this knowledge—and it appears that she did not—she yet possessed the means of acquiring all this information. The original note was found in her deposit vault, and although she did not actually know it was there she must be charged with this knowledge. We think, when she became aware of the cancellation of the deed of trust by French, she should immediately have informed herself as to the circumstances connected with that transaction, and that although she did not do so she must be charged with the knowledge which the slightest inquiry would have disclosed.

We agree with the learned special chancellor in the following finding which he made:

"Mrs. Coffin believed that the satisfaction was in behalf of all the owners of the notes, including herself. She was mistaken as to the form, but not as to the substance, for the substance included the representations of two essential facts: First, that the party in whose name the satisfaction was entered was the owner of the entire debt; and, second, that the debt itself had been fully paid. If these representations had been true, the loan company would have acquired a first lien by its mortgage. If the satisfaction had been in the form supposed by Mrs. Coffin, its legal effect would not have been different from that arising from these representations, if true. It therefore appears that while there may have been a want of knowledge as to the exact form of the satisfaction, all the parties, including Mrs. Coffin, had the same idea of its scope and effect, and all believed that it was a complete satisfaction. If the satisfaction had actually been in form as Mrs. Coffin believed it to be in effect, her ratification of it would have given priority to the mortgage in favor of the loan company."

But, as we have said, Mrs. Coffin did not acquaint herself with the facts in regard to the manner of the satisfaction of this deed of trust, although the means of information were open to her, but without repudiating the unauthorized act of her agent she accepted, and still retains, other securities delivered to her by French.

We conclude, with the chancellor, therefore, that appellant must be held to have ratified the action of the cotton company in cancelling the deed of trust, and the decree will therefore be affirmed.

BRANDON v. PARKER. (No. 62.)

(Supreme Court of Arkansas. June 12, 1916.)

1. TAXATION \S 805(1)—TAX DEEDS—ACTIONS—DISABILITY.

Kirby's Dig. \S 5075, excepting infants from section 5061, providing that the possession of a tax sale grantee must be attacked within two years after plaintiff was seized or in possession, does not avail an infant plaintiff claiming under the possession of her father, who died three years before section 5075 was enacted.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1593, 1597; Dec. Dig. \S 805(1).]

2. TAXATION \S 805(1)—ACTION TO TRY TITLE—LIMITATION—ACTION AGAINST CLAIMANT UNDER TAX TITLE.

Kirby's Dig. \S 5061, protects a defendant who has been in possession over two years under a donation tax deed, although plaintiff's predecessors had previously been in possession over two years under a similar deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1593, 1597; Dec. Dig. \S 805(1).]

Hart and Kirby, JJ., dissenting.

Appeal from Circuit Court, Crittenden County; J. F. Gautney, Judge.

Action by Constance Brandon against A. C. Parker. Judgment for defendant, and plaintiff appeals. Affirmed.

J. R. Coates and B. J. Semmes, both of Memphis, Tenn., for appellant. A. B. Shafer, of Memphis, Tenn., for appellee.

SMITH, J. This case was submitted and heard on the following agreed statement of facts:

"(1) That the plaintiff, Miss Constance Brandon, and Bettie Brown, are the sole heirs at law of N. B. Brandon, deceased, and that plaintiff, Miss Constance Brandon, was 19 years of age when this suit was filed.

"(2) That N. B. Brandon died intestate on the 1st day of February, 1896.

"(3) That the northwest quarter of section 14 in township 8 north, range 7 east, in Crittenden county, Ark., was duly patented by the United States government and became subject to taxation in the year 1886, and was forfeited to the state for the nonpayment of taxes of the year 1872, and was again forfeited to the state for the nonpayment of taxes of the year 1885, which said forfeiture was void for irregularities.

"(4) That on the 28th day of July, 1893, the commissioner of state lands executed a donation deed to said property to said N. B. Brandon, and that said N. B. Brandon went immediately into possession of same under said donation deed and stayed in the open, actual, and continuous possession of same, clearing five acres of land, and remaining in the continuous, adverse possession of same until the 1st day of February, 1896, the day of his death.

"(5) That on the 9th day of January, 1893, the commissioner of state lands executed to Robert Hill a donation deed covering said land, and that said Robert Hill immediately after said donation deed was executed died intestate, leaving as his sole heir his daughter, Lillie Hill, who subsequently married Will Stokes; that Lillie Hill did not take actual possession of said land until the 1st day of March, 1897, on which date she entered same and built a house, cleared up land, and fenced same, claiming under the donation deed to said Robert Hill, which was executed on January 9, 1893, as aforesaid; that said Lillie Hill has cleared and put in cultivation nearly all of the said land; that she

and those claiming under her have paid state and county taxes on said land continuously since the said 1st day of March, 1897; and that she and those claiming under her have been in the continuous, open, notorious and adverse possession since that date.

"(6) That on the 15th day of January, 1910, said Lillie Hill (now Stokes) executed conveyance to Guy A. Blann, conveying said land for the sum of \$2,350, which deed recited that said Lillie Stokes was the sole heir at law of Robert Hill, deceased.

"(7) That Guy Blann and wife on the 10th day of June, 1913, executed warranty deed to defendant, A. C. Parker; that defendant, A. C. Parker, and those under whom he claims, have been in the open, notorious, actual, and continuous possession of the said land since the 1st day of March, 1897, having cleared and put in cultivation nearly all of said land and have paid taxes continuously thereon since said date, claiming to own all of said land under the donation deed executed in 1883 to Robert Hill, as aforesaid.

"(8) That Bettie Brown, daughter of N. B. Brandon, above mentioned, was 27 years old at the date this suit was instituted, and that Constance Brandon, plaintiff in this cause, was 19 years old at the date this suit was instituted."

[1] Notwithstanding the fact that it appears that appellant was only 19 years old at the time of the institution of this suit, section 5075 of Kirby's Digest is of no avail to her, because her ancestor died in February, 1896, which was 3 years prior to the enactment of this section, and the death of her father terminated the possession under his donation deed. Section 5061 of Kirby's Digest was therefore in effect without the exception in favor of infants which section 5075 enacted. *Sims v. Cumby*, 53 Ark. 418, 14 S. W. 623; *Sparks v. Farris*, 71 Ark. 117, 71 S. W. 255, 945. This section (5061) reads as follows:

"Sec. 5061. No action for the recovery of any lands, or for the possession thereof against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof at a sale by the collector, or commissioner of state lands, for the nonpayment of taxes, or who may have purchased the same from the state by virtue of any act providing for the sale of lands forfeited to the state for the nonpayment of taxes, or who may hold such lands under a donation deed from the state, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the lands in question within two years next before the commencement of such suit or action."

It is here contemplated that the tax sales upon which these deeds would be based might be void. Indeed, only that fact could make the statute necessary. If these sales were valid there would be no necessity for this statute of limitations. These deeds, though based on void sales, constituted color of title, and by this section it was enacted that actual possession under this color of title barred the owner from maintaining a suit for its recovery, unless the suit was brought within the time there limited.

[2] It is said, however, that the prior possession of appellant's ancestor under a donation deed ripened into title under this section, and that when that possession had so

ripened into title the prior donation deed of appellee's ancestor became canceled, and subsequent possession under it would not entitle the donee there named to claim the benefit of the provisions of section 5061 of Kirby's Digest.

The decision of the case therefore turns upon the effect to be given to appellant's ancestor's possession upon the donation deed under which appellee's ancestor entered into the possession. It is conceded, of course, that appellant's ancestor acquired the title by virtue of his possession under his donation deed. But did this possession cancel the prior outstanding donation deed of appellee's ancestor? A similar question was involved in the case of *Moore v. Morris*, 118 Ark. 516, 177 S. W. 6. There the facts were that the owner of the paper title lost his title by the adverse possession of an occupying claimant, but this claimant, after acquiring title by possession, abandoned the land, and it became wild and unoccupied lands. The original owner continued to pay the taxes on the land, and paid for more than seven years after it had again become wild land. It was there urged that the original owner's paper title had been canceled, and he was not entitled to the benefit of the provisions of section 5057 of Kirby's Digest, which provides that unimproved and unclosed land shall be deemed and held to be in the possession of the person who pays the taxes thereon if he have color of title thereto for at least seven years in succession.

We think the controlling point here, as it was in the case of *Moore v. Morris*, supra, is that the color of title as such was not canceled. The owner in the case cited lost his title, but his deed, not having been canceled by any order or judgment of court, remained as color of title and entitled him to the benefit of the provisions of section 5057 of Kirby's Digest, upon complying with its terms. This section inures to the benefit of any holder of color of title who pays taxes for seven years. Section 5061 of Kirby's Digest inures to the benefit of the holders of the particular color of title there named who occupy the land thereunder for the period of two years. When appellee's ancestor entered upon the land on March 1, 1897, under his donation deed his attitude was that merely of one who had only color of title, and his situation would not have been improved had the sale upon which his deed was based been perfectly good. He had lost his title by the previous adverse occupancy; yet his deed was color of title, and he entered under it and remained in possession of the land for more than two years, and he thereby became entitled to claim the benefits of section 5061 of Kirby's Digest.

The judgment of the court below will therefore be affirmed.

JAMESON v. DAVIS et al. (No. 52.)

(Supreme Court of Arkansas. June 12, 1916.)

1. DOWER §69—STATUTORY ESTATE—ALLOTMENT—POWER OF PROBATE COURT.

Under Kirby's Dig., § 2709, providing that, if a husband dies leaving a widow and no children, the widow shall be endowed in fee simple with one-half of the real estate of which her husband died seized where it is a new acquisition, the probate court has jurisdiction to allot dower to a widow by setting apart to her one-half of all the lands of her husband described in the petition of his executors for the appointment of commissioners to allot dower.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 239-246; Dec. Dig. §69.]

2. DOWER §68—ALLOTMENT—POWER OF EXECUTORS—STATUTE.

Under Kirby's Dig. § 2717, providing that it shall be the duty of the heir at law to assign dower, the executors of a deceased husband who left no children had no power as such to allot dower in decedent's lands to the widow.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 236-238; Dec. Dig. §68.]

3. DOWER §69—ALLOTMENT—NECESSARY PARTIES—STATUTE.

Under Kirby's Dig. §§ 2720, 2721, providing that parties having an interest in the lands must be made parties to the proceedings for the allotment of dower, devisees of a deceased husband as to lands embraced in the executors' petition for the allotment of dower to a widow were necessary parties to the proceedings.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 239-246; Dec. Dig. §69.]

Appeal from Circuit Court, Columbia County; C. W. Smith, Judge.

Petition by J. L. Davis and another, as executors of T. N. Jameson, deceased, for the appointment of commissioners to allot dower to Mrs. Isadore Jameson, widow. From a judgment for the executors, the widow appeals. Judgment reversed, and cause remanded, with directions to dismiss the petition.

The appellees, as executors of T. N. Jameson, deceased, commenced this action by filing their petition in the Columbia probate court, asking that court to appoint commissioners to allow dower out of the estate to Mrs. Isadore Jameson, the appellant. They described the land in their petition and set up that the appellant was entitled to be endowed as the widow of T. N. Jameson with one-half of the property in fee simple; her husband, T. N. Jameson, having died seized thereof. The appellant responded to the petition, alleging that her interests had already been determined by the judgment of a proper court to be an undivided one-half interest in fee in the land set out in the petition. She alleged that therefore the probate court had no jurisdiction of the subject-matter to allot her dower. She further set up that there were no proper parties to the petition, and that the court was without jurisdiction of the necessary parties. The court rendered judgment for the allotment of dower and appointed commissioners to lay off the same. The appellant appealed to the circuit

court. The circuit court found that T. N. Jameson died leaving his widow, the appellant, with no children; that at the time of his death he was not indebted to any one, and he was the owner, seized and possessed of the lands described in the petition; that the land was not an ancestral estate; and that Mrs. Jameson was entitled to be endowed in fee simple of one-half thereof. The court then entered a judgment:

"That Mrs. Isadore Jameson be endowed in fee simple of one-half of the following real estate of which her husband died seized and possessed lying in the county of Columbia and state of Arkansas, to wit:" Then follows an exact description of the land as set forth in the petition.

The court ordered that its judgment be certified "to the probate court of Columbia county, Ark., to the end that said court may proceed to allot dower of the said Mrs. Isadore Jameson according to the terms of this decree." From that judgment this appeal has been duly prosecuted.

Stevens & Stevens, of Magnolia, for appellant. C. W. McKay, of Magnolia, for appellees.

WOOD, J. (after stating the facts as above). The appellant contends that she was entitled to an undivided one-half interest in fee simple in the lands in controversy, not as dower, but by inheritance from her husband, and that, inasmuch as the title in fee simple to the one-half interest was vested in her by inheritance at her husband's death, the probate court had no jurisdiction to allot this interest to her as dower.

[1] Section 2709 of Kirby's Digest provides that, if a husband die leaving a widow and no children, his widow shall be endowed in fee simple of one-half of the real estate of which her husband died seized where said estate is a new acquisition, etc.

In *Barton v. Wilson*, 116 Ark. 400, 405, 172 S. W. 1032, 1033, we held that the widow, under the above statute, "takes absolutely an undivided interest in fee simple, and it is such an interest as immediately vests and without assignment becomes subject to transmission by conveyance or inheritance." We also held in that case that:

"It is a mistake to assume that the widow takes as heir, for the statute expressly declares that the widow 'shall be endowed in fee simple of one-half of the real estate of which such husband died seized.'"

And, quoting from the Supreme Court of Maine, we said:

"The statute does not change the status of the widow with reference to her deceased husband's estate. It enlarges her interest by giving her an estate in fee instead of an estate for life. She still takes, not as heir, but as widow."

Golder v. Golder, 95 Me. 259, 49 Atl. 1050.

In *McGuire v. Cook*, 98 Ark. 118-120, 135 S. W. 840, 841 (Ann. Cas. 1912D, 776), we said:

"The interest which the widow possesses in the lands of her deceased husband is known as

dower. * * * By this enactment we do not think the Legislature intended to create in the widow an estate in her * * * husband's lands different in any essential from the estate of dower known at the common law, except as therein expressly provided."

While the statute enlarges the quantity and extends the duration of the estate, it in no manner changes the character of the estate nor the method by which it is set apart or allotted to the widow. Probate courts in this state are vested with jurisdiction in matters of dower. *Carter v. Younger*, 112 Ark. 483-487, 166 S. W. 547. It follows that the probate court has jurisdiction to allot dower to appellant by setting apart to her one-half of all the lands described in the petition, and the circuit court did not err in so holding.

[2] But appellant is correct in her contention that the appellees as executors had no power to allot dower in the lands to appellant. "It shall be the duty of the heir at law of any estate of which the widow is entitled to dower to lay off and assign such dower as soon as practicable after the death of the husband of such widow. Section 2717, Kirby's Digest; Hill's Adm'rs v. Mitchell, 5 Ark. 608. And those who have an interest in the lands must be made parties to the proceedings for the allotment of dower. Kirby's Digest, §§ 2720 and 2721.

[3] The devisees of Jameson had an interest in the lands embraced in the petition, and they were necessary parties to any proceedings for the allotment of dower.

The court erred therefore in directing the probate court to proceed to the allotment of dower. The appellant was not asking such allotment, and the appellees could not have it allotted.

The judgment is therefore reversed, and the cause is remanded, with directions to dismiss the petition.

BOARD OF COM'RS OF CREEK COUNTY, OKL., v. SPEER & DOW. (No. 82.)

(Supreme Court of Arkansas. June 5, 1916.)

1. COUNTIES ~~182~~—SALE OF BONDS—CON- SIDERATION—SUFFICIENCY.

Where, having sold bonds at a premium to be accepted and paid for in installments, the county defaulted in delivery of the first installment, a contract, whereby the purchasers received all of the bonds at one delivery in consideration of a reduction of the premium, is valid, being supported by a consideration.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 285; Dec. Dig. ~~182~~.]

2. COUNTIES ~~182~~—BONDS—BOARD OF COM- MISSIONERS—POWERS OF.

The board of commissioners of an Oklahoma county may enter into a second contract for the sale of bonds, the county having defaulted in the original contract, for it is the general agent of the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 285; Dec. Dig. ~~182~~.]

3. COUNTIES ~~182~~—BONDS—BOARD OF COM- MISSIONERS—POWERS OF.

As the board of commissioners of an Oklahoma county have plenary power with regard to the sale of county bonds, it may allow the purchaser compensation for his services and expenses in preparing and improving the bonds.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 285; Dec. Dig. ~~182~~.]

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Action by the Board of County Commissioners of the County of Creek, Oklahoma, against Speer & Dow. From a judgment for defendant, plaintiffs appeal. Affirmed.

W. Morris Harrison and Geo. L. Burke, both of Sapulpa, Okl., for appellants. Read & McDonough, of Ft. Smith, for appellee.

MCCULLOCH, C. J. This is an action instituted by the board of county commissioners of the county of Creek, state of Oklahoma, against appellees, Speer & Dow, to recover the sum of \$5,300 alleged to be due as a balance on the price of bonds of that county sold by the commissioners to appellees. The cause was tried before the circuit judge sitting as a jury, and there was a judgment in favor of appellees, from which an appeal has been prosecuted.

Creek county, Okl., acting through the county board of commissioners, and upon a vote of the people, issued bonds in the sum of \$200,000 for the construction of bridges in the county, and a contract, evidenced by correspondence between the parties and an order spread on the county record, was entered into between the county and Speer & Dow, whereby the latter agreed to become the purchasers of the bonds at a premium of \$6,050, which, with interest on the bonds from date up to the time of delivery, aggregated the total sum of \$207,800. The bonds were to be delivered in monthly installments, beginning June 1, 1910. When the date for the first delivery arrived, the bonds were not ready, and on June 7th there was an additional agreement modifying the original contract with respect to the time of delivery. On June 21st another agreement was entered into, as evidenced by the order spread on the county record, allowing Speer & Dow the sum of \$1,250 as services and expenses in connection with the preparation and approval of the bonds; said sum to be allowed only in reduction of the amount due on the purchase price of the bonds. At that time Speer & Dow made an advance payment of \$2,000 on the price of the bonds. The contract at that time still contemplated a delivery of the bonds in installments, but on July 26, 1910, before any of the bonds were delivered, there was a still further modification of the contract to the effect that in consideration of immediate acceptance of the bonds, without requiring delayed deliveries according to the original contract, the price would be reduced

to the sum of \$208,250 and credited with the \$1,250 allowed for services as aforesaid, thus reducing the additional amount to be paid at the time of delivery to the sum of \$200,000. The modification of the contract was entered at large upon the county records, and pursuant thereto the bonds were delivered and paid for.

[1] The present suit is to recover the amount of the price of the bonds as originally agreed upon, after deducting the \$202,000 actually paid by Speer & Dow. The contention is that the board had no authority to allow Speer & Dow the sum of \$1,250, or any sum, for their services, and that the board was also without power to make the additional contract and reduce the amount to be paid for the bonds. It appears from the testimony that, after the failure to begin delivery of the bonds at the time specified in the original contract, the parties began negotiations for a modification so as to meet the changed conditions, and the sale was consummated pursuant to the last modification, which enabled the county to realize the stipulated price without delaying the delivery of the bonds as specified in the original contract. Ordinarily, it is within the power of contracting parties, as long as the contract remains unexecuted, to make any changes that they may agree upon. The modification, of course, amounts to a new contract. In this instance it appears that the contract was modified in the same way in which the original contract was made; that is to say, by correspondence between the parties and by an entry of the terms of the agreement upon the records of the county. The change in the mutual undertakings of the respective parties concerning the price to be paid, and the acceptance of the bonds without further delay, constituted a sufficient consideration for the modification of the original contract.

[2] Counsel for appellant contend that the board of commissioners had no authority to enter into an additional agreement, but they bring to our attention no statute or decision from the state of Oklahoma to show that the board was lacking in that authority. On the contrary, it appears that the Supreme Court of Oklahoma has held that the board of commissioners is the general agent of the county and may enter into compromises, even to the extent of compromising a judgment in favor of the county. *Sequoyah County v. Helms*, 40 Okl. 565, 139 Pac. 958; *Ironside v. State ex rel.* (Okla.) 148 Pac. 97.

[3] It is also contended that the board was without authority to enter into a contract for the allowance of compensation to appellees for their expenses and services in preparation and approval of the bonds, but it is seen from the terms of the contract that this was a part of the contract for the sale of the bonds; and, since the authority of the board of commissioners to fix the

price of the bonds was ample, the agreement to make this allowance in the way of reduction of the price of the bonds was within the scope of the authority. The effect of the contract was an agreement to accept the stipulated net amount as the price of the bonds and to consider the services rendered by appellees in fixing the price of the bonds. The decision of the case rests upon the law of the state of Oklahoma with respect to the power of the board, and we find nothing which restricts that power to the extent contended for by counsel.

We are of the opinion, therefore, that the circuit court reached the correct conclusion, and the judgment is affirmed.

SHULTS v. MUNN et al. (No. 56.)

(Supreme Court of Arkansas. June 12, 1916.)

1. FERRIES §10 — ESTABLISHMENT — FRANCHISE.

A franchise for the operation of a ferry is a creature of the sovereign power and cannot be exercised without the consent of the state.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 9, 10; Dec. Dig. §10.]

2. FERRIES §34—LICENSES—PENALTIES.

Under Kirby's Dig. §§ 3555, 3558, prohibiting the operation of a ferry on a public navigable stream without procuring a license therefor, and section 3570, providing that a license tax shall not be exacted from ferries at which public roads do not cross, held, that the keeper of a ferry, which on one side of the stream was 50 feet distant from the public road, which was reached by a private road maintained by the ferry keeper, was liable for the penalties prescribed by section 3582 for operating an unlicensed ferry.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. § 94; Dec. Dig. §34.]

3. FERRIES §34—PENALTIES FOR UNLICENSED FERRY—EVIDENCE.

In proceedings to recover penalties for operating an unlicensed ferry contrary to Kirby's Dig. §§ 3555, 3558, 3570, evidence that the ferry is reached by a public road in the county across the river from the county in which the action is brought is competent.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. § 94; Dec. Dig. §34.]

Appeal from Circuit Court, Miller County; Geo. R. Haynie, Judge.

Action by J. B. Shults against M. J. Munn and others to recover penalties for operating an unlicensed ferry. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Appellant, who was regularly licensed by the Miller county court to keep a public ferry across Red river, a navigable stream, from a point on the western bank, opposite the town of Fulton in Hempstead county, brought this suit against M. J. Munn and others to collect penalties denounced by the law (3582, Kirby's Digest) for operating a ferry across navigable streams, without procuring a license therefor.

The answer denied the allegations of the

complaint and alleged that defendant had paid the license required by Miller county during the time of the operation of the ferry.

It appears from the testimony that M. J. Munn kept a ferry during said years at a point on the bank of Red river, a navigable stream, the boundary between Miller and Hempstead counties, called Buzzard's Bluff, in Miller county, about 8 miles south of Fulton, and carried persons and property across the river there for hire during said years. A public road has existed in Miller county, now in road district No. 13, from a point near the Finn place to Fulton, since 1877. This road a witness, D. R. Coleman, testified "crossed Buzzard's Bluff at the old house and went down to the river bank and went up the river." The road was located along the river at Buzzard's Bluff, as close to the bank of the river as it could be made, and frequently the road had caved into the river and a new one was established further back. This bluff is caused by a point of hill land from 30 to 50 feet higher than the bottom land north and south of it, coming into the river and from the point of the bluff bank, from which appellees' ferry was operated, it is 50 feet distant from the high-water mark of the river, to said public road running virtually north and south and parallel to the river.

He made and maintained a road sloping from the public road down to his ferry landing. Appellant offered to show that a public road had been established in Hempstead county in January, 1913, to appellant's ferry landing on the Hempstead county side of Red river, opposite Buzzard's Bluff, but the testimony was excluded. It was also shown that no license had been issued by the county court of Miller county for the operation of Munn's ferry.

The court held that it was necessary to prove that the public road of Miller county crossed at the unlicensed ferry, in order to establish liability to the payment of the penalties by the operator thereof, and directed the jury to return a verdict in defendant's favor, and from the judgment thereon, this appeal is prosecuted.

Will Steel, of Texarkana, for appellant.
Henry Moore, Jr., of Texarkana, for appellees.

KIRBY, J. (after stating the facts as above). [1] A franchise for the operation of a ferry is a creature of the sovereign power and cannot be exercised without the consent of the state. Sections 3555, 3558, Kirby's Digest; Murray v. Menefee, 20 Ark. 561; Darnell v. State, 48 Ark. 321, 3 S. W. 365; Finley v. Shemwell, 94 Ark. 190, 126 S. W. 717.

Said section 3558, Kirby's Digest, provides:

"No person shall keep any ferry over or across any public navigable stream or lake, so as to charge any compensation for crossing the same, without first procuring a license from the coun-

ty court of the county in which such ferry is situated."

Section 3570 provides:

"It shall be the duty of the county courts to levy a tax on all ferry privileges in their respective counties, whether application be made by any person for the same or not: Provided, however, no ferry at which the public county road does not cross shall be subject to the tax herein provided."

The penalties of section 3582, Kirby's Digest, are denounced against any person who shall keep a ferry over any navigable stream and charge for transportation of persons and property, "without complying with the provisions of law in relation to obtaining license."

Appellee contends and the trial court held that since the public road in Miller county did not cross the navigable river at his ferry or run thereto, that he was not bound by the provisions of the law to obtain license to operate a ferry nor liable to the penalties prescribed for the operation of same without license.

[2] The law declares all ferries upon or over public navigable streams shall be deemed public ferries, and that no person shall keep any ferry over or across any such stream or lake and charge compensation for the use thereof without procuring a license. Sections 3555, 3558. But it is also provided in said section 3570 that:

"No ferry at which the public county road does not cross shall be subject to the tax" for ferry privileges.

This provision is not necessarily in conflict with nor repugnant to the others. The ferries across navigable rivers are declared to be public, and license is granted to persons on sites along said streams for the establishment and operation thereof when the public convenience will be promoted thereby, and it was doubtless intended to be determined by the Legislature in the making of said proviso that the public convenience would not be promoted by the establishment of a ferry across navigable streams, except at points where public roads crossed, and, this being true, it does not follow that appellee was not violating the law in the operation of the ferry complained about. If the public road passed his ferry at a convenient place to cross the stream to a public road on the other side thereof and the traveling public on these roads on each side the river were accustomed to resort to his ferry for crossing thereof, it was as much a ferry at which the public county road crossed as though the road had run directly to the ferry and stopped there. The ferry is established for the convenience of the public traveling upon the public roads, and if a public road existed and was in use by the public on the Hempstead county side coming down to appellee's ferry there, which transported persons and property from that side to the Miller county side of the river and in effect to the public road running by the ferry, it was

a ferry at which the public county road crossed, since the persons, vehicles, and stock traveling same crossed at the ferry to which the public roads extended on each side the river, within the meaning of the act.

[3] The court erred in refusing to permit the introduction of the testimony showing the establishment of a public road on the Hempstead county side of the river to appellee's ferry, and in directing the verdict, and for said errors the judgment is reversed, and the cause remanded for a new trial.

FORTNER v. PHILLIPS et al. (No. 51.)
(Supreme Court of Arkansas. June 12, 1916.)

1. WILLS \S 682(2)—TESTAMENTARY TRUST—CONSTRUCTION.

Under a direction in a will that the executor pay over to the testatrix's husband \$50 per month for life, construed in the light of an agreed statement that the property was to provide for the husband's support and was no more than necessary, the surviving husband took no property right, but was merely the beneficiary of a trust for his support.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 1607-1611; Dec. Dig. \S 682(2).]

2. TRUSTS \S 151(1)—ATTACHMENT—PROPERTY SUBJECT—TRUST FOR SUPPORT.

Where a surviving husband was devised a certain amount per month payable by a trustee for his support, and which amount was necessary therefor, his interest was not subject to levy and attachment at the suit of his creditors.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. \S 195; Dec. Dig. \S 151(1).]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by J. F. Fortner against James Phillips and others. Decree for defendants dismissing the complaint for want of equity, and plaintiff appeals. Affirmed.

Sarah Phillips made a will in which she named her son William James Phillips as executor and trustee. The will contains, among others, the following provision:

"I further direct and instruct that my said executor shall pay over to my beloved husband, James Phillips, the sum of fifty dollars each and every month so long as he shall live."

Appellant recovered a judgment against James Phillips, the beneficiary, and brought this suit in the chancery court, alleging that Phillips, unless restrained, would attempt to sell and transfer his income under the will for the purpose of preventing appellant from levying on the same to satisfy the judgment, and prayed that he be restrained from so doing. The appellee James Phillips answered and set up as one of his defenses that the amount of the monthly income provided for him under the will was no more than was necessary for his support, and that same was not subject to execution. The cause was heard upon an agreed statement of facts, in which the parties agreed that the sum of \$50 per month was necessary for the support of the beneficiary, James Phillips, and that he had

no other income than this; that no payments had been made to him under the will. The court dismissed the complaint for want of equity, and this appeal has been duly prosecuted.

Carmichael, Brooks, Powers & Rector, of Little Rock, for appellant. Ben D. Brickhouse, of Little Rock, for appellee.

WOOD, J. (after stating the facts as above). [1] The language of the clause of the will quoted supra does not vest any estate in the appellee James Phillips. No property right is conferred upon him by this clause in the estate of his deceased wife. The clause merely directs that the executor and trustee, William James Phillips, shall pay to appellee the above sum. The entire estate, real and personal, is devised and bequeathed to William James Phillips and other devisees and legatees named in the will, but no estate whatever is vested or created in appellee James Phillips. No estate in his property is even vested in William James Phillips.

It will be observed that the testatrix does not bequeath to her husband, James Phillips, the sum of \$50 out of her estate and direct her executor and trustee to pay the same; nor does the will in express terms devise and bequeath any real estate or personal property to the executor and trustee in trust charged with the payment of the sum of \$50 per month to appellee James Phillips out of such estate or funds. The language of the clause is peculiar, in that it does not express the purpose that the testatrix had in mind in directing the monthly payments of \$50 to her husband so long as he shall live. It is shown, however, by the agreed statement of facts, that the purpose of the testatrix was to provide \$50 per month for the support of her husband, and that this sum was necessary; that he had no other income; and that it would take the entire sum for his support.

The language of the will must be construed in the light of this agreed statement. The fact that the testatrix designates her son William James Phillips as executor and trustee and directs him to pay the sum of \$50 per month to her beloved husband, James Phillips, as long as he lives, showed her intention to create a trust in favor of her husband out of the property devised and bequeathed to her son. In other words, the property going to him under the will was burdened with the trust of paying to the extent of \$50 per month for the specific purpose of the support of the appellee James Phillips.

[2] Says Mr. Perry:

"But a trust may be so created that no interest vests in the cestui que trust; consequently, such interest cannot be alienated, as where property is given to trustees to be applied in their discretion to the use of a third person, no inter-

est goes to the third person until the trustees have exercised this discretion. So if property is given to trustees to be applied by them to the support of the cestui que trust and his family, or to be paid over to the cestui que trust for the support of himself and the education and maintenance of his children. In short, if a trust is created for a specific purpose, and is so limited that it is not repugnant to the rule against perpetuities and is in other respects legal, neither the trustees, nor the cestui que trust, nor his creditors or assigns, can divest the property from the appointed purposes." 1 Perry on Trusts, § 386a, pp. 632, 633, and cases cited.

In *Robertson v. Schard*, 142 Iowa, 500, 119 N. W. 529-531, 134 Am. St. Rep. 430, it is said:

"The wife is under no obligation to give or devise to an insolvent husband her own estate when she knows that it will be immediately absorbed by his creditors, and if she can construct a trust from which he may derive some benefit, without vesting him with an estate or interest which is subject to levy, or other legal process, at the suit of such creditors, and thereby makes sure that he will not become an object of public charity, there is no good reason in law or morals why she should not be allowed to do so"—citing cases.

The above is the doctrine applicable to the undisputed facts of this record. Since it would require all of the monthly stipend to support appellee James Phillips, the money in contemplation of the will has been expended before it is paid over to him, and there are no accumulations in his hands which creditors can reach. See *Leigh v. Harrison*, 69 Miss. 923, 11 South. 604, 18 L. R. A. 49.

Nothing that is said in *Booe v. Vinson*, 104 Ark. 439, 149 S. W. 524, is contrary to the doctrine here announced. In that case the clause of the will was, "All my estate, real, personal and mixed, I give and bequeath to my aunt," etc. Thus the will vested the title to the estate in the beneficiary. But in that case we quoted from *Wenzel v. Powder*, 100 Md. 39, 59 Atl. 195, 108 Am. St. Rep. 880, the American rule, as follows:

"But in this country the Supreme Court of the United States, the courts of last resort in some of the states, and this court, have, after full consideration, determined that the power of alienation is not a necessary incident to an equitable estate for life, and that the owner of the property may so dispose of it as to secure its enjoyment by the beneficiary, without making it alienable by him or liable for his debts."

The agreed statement of facts shows that such was the intention of the testatrix by the clause of the will under review.

The decree is correct, and it is affirmed.

ST. LOUIS & S. F. R. CO. v. KEATHLEY.
(No. 47.)

(Supreme Court of Arkansas. June 12, 1916.)

1. MASTER AND SERVANT §278(4) — APPLIANCES FOR WORK—EVIDENCE—CUSTOM.

In a railroad fireman's action for injury when his shovel struck the edge of a hole in the metal sheet constituting the floor of the tender

and used to allow the coupling pin of the draw bar to pass through so that he was thrown down and his wrist broken, where the issue was whether the defendant was negligent in making a hole for the coupling pin too large, evidence that it was about the customary size of that on other railroads was admissible as evidence of what a reasonably prudent employer would ordinarily do, but not conclusive evidence thereof.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 960; Dec. Dig. §278(4).]

2. APPEAL AND ERROR §1056(4)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of such evidence was reversible error, where the evidence as to defendant's negligence in leaving a hole of that size in the floor of the tender was conflicting; and it was not enough to say that the jury might have based the verdict entirely upon evidence that the edges of the hole were battered, or that the court permitted defendant's witnesses to testify concerning the use of tenders with such holes or devices on its own road and the size of the holes in such tenders.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4190; Dec. Dig. §1056(4).]

Appeal from Circuit Court, Lawrence County; Dene H. Coleman, Judge.

Action by L. Keathley against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

W. F. Evans, of St. Louis, Mo., W. J. Orr, of Springfield, Mo., and H. L. Ponder, of Walnut Ridge, for appellant. W. P. Smith and G. M. Gibson, both of Walnut Ridge, for appellee.

MCCULLOCH, O. J. The plaintiff, L. Keathley, worked for the defendant railroad company as fireman, and while in the discharge of his duties received injuries for which he seeks, in this action, to recover compensation. He was fireman on an engine hauling a through freight train from St. Louis to Chaffee, Mo., and the injury occurred on July 21, 1912, at or near St. Genevieve, Mo. Plaintiff was engaged in shoveling coal from the tender into the fire box of the engine, when the shovel he was handling struck the edge of a hole in the metal sheet which constituted the floor of the tender, and he was thrown down, and his wrist was broken in the fall.

The charge of negligence is not very specifically set out in the complaint, it being alleged only in general terms that the shovel which plaintiff used was obstructed "in a large hole about seven inches in diameter in the shoveling sheet," that it was "necessary to use considerable force in operating the shovel, and it was customary and proper for the shovel to slide along the surface of the shoveling sheet without obstruction," and that the defendant "knew of the defective condition of the shoveling sheet, or could have known thereof by the proper inspection, but that the same was covered with coal at the time this plaintiff was injured, and on

that account he had no knowledge of such defective condition of said shoveling sheet."

[1] In the trial of the case the plaintiff undertook to specify the acts of negligence by showing that the hole was too large, and that it was unnecessary to have any hole at all in the floor of the tender. He testified also that on account of the hole being too large the edges of it had become battered, and that this was what obstructed the free passage of the shovel. Plaintiff himself testified that the proper method of constructing a floor of a tender was to cover the hole with a false metal sheet, or that in the event of there being a hole left there it ought not to be over four inches square; whereas the hole in this tender was, according to his testimony, about seven inches in size. Plaintiff referred to the metal flooring as the "shoveling sheet," and explained that it was necessary to have a smooth surface so that the shovel could be shoved along the floor until it reached the fire box of the engine.

It appears from the testimony that the reason there is a hole left in the floor is to allow the coupling pin of the drawbar to pass through. The testimony adduced by the defendant tends to show that this is a common device on engines, and it is the customary method of constructing them. The evidence was that there has to be an opening for the coupling pin to drop through, and that the pin must be left accessible so that it may be drawn out when the engine and tender are disconnected; also that it is necessary to draw the pin out occasionally in making inspections. The testimony adduced by defendant shows that this hole was about the customary size, and that the engines with this device were commonly in use, not only on defendant's railroad, but other railroad systems of the country. At least defendant offered the testimony to that effect, but the court excluded it so far as it related to custom on other lines of railroad. That is one of the errors assigned, and we are of the opinion that it is well taken.

In the case of *Oak Leaf Mill Co. v. Littleton*, 105 Ark. 392, 151 S. W. 262, after reviewing the authorities on the subject, we adopted the following rule:

"What was the custom of others under like conditions and circumstances is evidence of what a reasonably prudent man would ordinarily do, but it is not conclusive evidence of that fact."

That statement of the law as the correct rule of evidence was deduced from Prof. Wigmore's discussion of the subject which was quoted at length in the opinion just referred to. The decision of the court was directly in conflict with that rule, and calls, we think, for a reversal of the judgment in the present case. There was a sharp conflict in the testi-

mony of the witnesses, and it made a very close question for the decision of the jury as to whether or not the defendant was guilty of negligence in allowing the metal floor of the tender to become thus obstructed, or whether it in fact constituted an obstruction.

[2] There was, it is true, testimony that the edges of the hole had become battered or frazzled, and this testimony alone might have authorized the jury in reaching the conclusion that there was negligence on the part of the company, but the plaintiff's testimony was that the alleged battered condition of the edges of the hole resulted from the hole being too large, and the substance of his testimony was to make the size of the hole the primary charge of negligence. So, if the jury had been permitted to consider evidence which might have convinced them that there was no negligence in making the hole too large, the jury could have found that there was no negligence on the part of the company even though the edges of the hole had become to some extent battered and rough. It does not answer the contention, therefore, to say that the jury might have based their verdict entirely upon the evidence showing that the edges of the hole were battered, or that they found that that alone constituted negligence of the company.

The court permitted defendant's witnesses to testify concerning the use of tenders with this device on its own road, and the size of the holes in such tenders, but that did not obviate the prejudice which resulted from refusing to allow proof showing what the custom was on other roads. Without the excluded testimony, the jury may have found that it was negligence to leave a hole of that size in the floor of the tender, but, if they had been permitted to consider the fact that that was the custom on many of the great railroad systems of the country, they might have concluded that it did not constitute negligence to leave a hole of that size. In other words, the jury might have adopted the general standard as the correct measure of what a reasonably prudent man would do under those circumstances.

We do not deem it necessary to discuss the case any further. The evidence was sufficient to sustain the verdict, and there was no prejudicial error in the instructions of the court nor in its rulings on the introduction of evidence other than in the respect already mentioned. One of the instructions (No. 3) is technically incorrect in stating the degree of care which the employer should observe, but there was no specific objection to the defect. We merely call attention to it now so that it will not be repeated in the next trial.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

HAGLIN v. HAGLIN. (No. 23.)

(Supreme Court of Arkansas. May 29, 1916.)

1. GIFTS \Leftrightarrow 49(6)—EVIDENCE—SUFFICIENCY.

In an action to foreclose a mortgage lien and recover a balance on the secured note, where defendant by cross-complaint attempted to set off one-half the value of a bond given by the mother of the parties to plaintiff to be used as collateral security but in which defendant claims she gave him a half interest, the mother testifying that she only intended to give plaintiff the use of the bond but had never demanded the bond or interest, although plaintiff signed a receipt for it, evidence held sufficient to justify a finding that the mother gave the bond to the plaintiff.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95, 99, 100; Dec. Dig. \Leftrightarrow 49(6).]

2. LIMITATION OF ACTIONS \Leftrightarrow 45—ACTS CONSTITUTING CONVERSION — DETENTION OF PROPERTY—STATUTE OF LIMITATIONS.

In an action to foreclose a mortgage lien, where defendant in the cross-complaint attempted to set off half interest in a bond alleged to have been given by the mother of the parties to plaintiff as a loan, to be used as collateral security only, plaintiff's action in collecting interest and the principal of the bond and appropriating it to his own use more than three years before the filing of the cross-complaint amounting to a conversion, defendant's claim is barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 233-239; Dec. Dig. \Leftrightarrow 45.]

Appeal from Sebastian Chancery Court; W. A. Falconer, Chancellor.

Suit by Alva R. Haglin against Edward Haglin, in which defendant filed a cross-complaint, and at request of plaintiff in his answer to cross-complaint the mother of the parties, Mrs. M. L. Haglin, was made a party to the action. Decree for plaintiff, and defendant appeals. Affirmed.

Geo. W. Dodd, of Ft. Smith, for appellant.
Geo. F. Youmans, of Ft. Smith, for appellee.

HART, J. On the 5th day of April, 1910, Edward Haglin executed a note in favor of Alva R. Haglin for \$4,000 and gave him a mortgage on two lots in the city of Ft. Smith, Ark., to secure it. On the 7th day of May, 1915, Alva R. Haglin instituted this action in the chancery court against Edward Haglin to recover judgment for \$2,000, the balance alleged to be due on the note, and to foreclose the mortgage on the lots.

[1] Edward Haglin filed an answer and cross-complaint. He admitted the execution of the note and mortgage described in the complaint, but denied that the balance due on the note was \$2,000 and the accrued interest. He further alleged that he and the plaintiff were brothers, and that during the year 1905 their mother lent to the plaintiff a certain bond of the par value of \$1,000, issued by the Ft. Smith Light & Traction Company, bearing interest at the rate of 5 per cent. per annum, to be used by the plaintiff as collateral security for an indebtedness owed by him to a third party. The defendant Ed-

ward Haglin further alleged that in January, 1915, his mother gave to him a one-half interest in said bond, and he asked that this amount be set off against the amount which he owed the plaintiff on the note sued on. The plaintiff filed an answer to the cross-complaint of the defendant and averred the truth to be that his mother had given him the \$1,000 bond referred to. He asked that his mother be made a party to the suit, which was done. She stated in her answer practically the same matters as were set up in the answer and cross-complaint of the defendant Edward Haglin. The plaintiff also pleaded the statute of limitations. The chancellor found in favor of the plaintiff, Alva R. Haglin, and the defendant Edward Haglin has appealed.

The plaintiff, Alva R. Haglin, testified that in 1903 he was somewhat financially embarrassed, and that inasmuch as his mother had given his brother, Will, a \$1,000 bond issued by the Ft. Smith Light & Traction Company, he thought that she would give him a bond of like denomination; that at his request she gave him the bond, and he used it as collateral security for an indebtedness owed by him to a third party; that he collected the interest on the bond annually; that it was redeemed by the Ft. Smith Light & Traction Company on June 27, 1911; that his mother never said anything to him in regard to returning the bond or paying to her any part of the proceeds of it; that she gave him the bond; and that his mother has never at any time since attempted to exercise any control over the bond or the proceeds of it.

Mrs. Haglin testified that she let her son have the bond to be used by him as collateral security, but never intended to give it to him outright. She stated that when she gave him the bond she took a receipt as follows:

"Received from Mrs. M. L. Haglin, one Light & Traction Company bond bearing 5 per cent. interest less coupons to date."

She was asked, "Did you intend to make him a present of this bond, or just let him have it to use?" and answered:

"I let him have it just to use, but did not explain it to him at the time, that I ever wanted him to pay it back, but called for something to show that he got it."

Again, she admitted that she never demanded the bond at all and never asked him for the interest. She said that at one time she did suggest to him that he let her have some of the money. He did not give her any, and that was the last she said about it; that her son said to her, "Mamma do you think I owe you anything?" that she could not answer this and dropped the matter; that this conversation occurred something over three years before the suit was brought. Under this state of the record, the chancellor was warranted in finding that Mrs. Haglin gave the bond to

her son. He testified in positive terms that she gave it to him; that he collected the interest on it, and also the principal when the bond matured. Mrs. Haglin does say that she did not intend to give the bond absolutely to her son, but she, also, says that she did not communicate this intention to her son. He asked her to give him the bond, and she did so. She further states that she afterwards asked him for some money, and he asked her if he owed her anything, and she dropped the matter. She allowed him to take the bond, collect the interest and principal of it, and use it as his own. She did not, at the time she let him have the bond, tell him that she was only lending it to him. So we think a preponderance of the evidence shows a gift from the mother to the son. There is nothing in the language of the receipt tending to contradict this. She might want to keep the receipt to show that she had made an advancement to her son.

[2] If the transaction is considered as a loan, the claim is barred by the statute of limitations. The bond was delivered to the plaintiff either in 1903, as testified to by him, or in 1905, as testified to by his mother. After the bond came in his possession, plaintiff collected the interest on it, and in June, 1911, collected the principal and placed the same to his own credit. This amounted to a conversion of the bond to his own use, and, having occurred more than three years before the filing of the cross-complaint by the defendants, they are barred of recovery by the statute of limitations.

The decree will be affirmed.

NELMS v. ORNE. (No. 34.)

(Supreme Court of Arkansas. June 5, 1916.)

INFANTS \S 112—JUDGMENT—COLLATERAL ATTACK—PROCESS.

Under Acts 1895, p. 88, amending Acts 1893, p. 24, providing for condemnation of land for levee taxes, and declaring that nonresident owners are served by the publication of a warning order describing the lands and advising that they will be sold for taxes, the proceeding is one in rem, and despite Kirby's Dig. \S 6049, prescribing the rules for service of process on infants, an infant cannot collaterally attack a judgment condemning the land for taxes on the ground that she was not served as required by such section; the prescribed warning order having been published.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. \S 320; Dec. Dig. \S 112.]

Appeal from Crittenden Chancery Court; Chas. D. Frierson, Chancellor.

Suit by Ruth Earle Nelms against Julia Orne. From a decree for defendant, plaintiff appeals. Affirmed.

This suit involves the title to a certain tract of land in Crittenden county, Ark. In January, 1891, J. F. Earle, who owned the land, died, and the title to the land descended to his only children, Ben R. and

Ruth. They were nonresidents of Crittenden county. In 1903 Ben conveyed his undivided interest to his sister, Ruth Earle (now Nelms).

A suit was brought July 1, 1895, by the board of directors of the St. Francis levee district against the Arkansas Land & Timber Company and others under the levee act of 1893, as amended by the act of 1895, to enforce the payment of the levee taxes for the years 1893 and 1894. The land was proceeded against as the property of Julia Miller (now Orne), who was served with summons. There was also a warning order duly issued, in which the land was described as the property of Julia Miller.

Ben Earle reached his majority December 11, 1891, and Ruth Earle reached her majority May 31, 1901. She was married in April, 1904, to one Nelms. Ben and Ruth Earle, in the tax suit above mentioned, were constructively summoned. Ruth Earle at that time was a minor 14 years of age. C. L. Lewis was her guardian, and he was made a party in his individual capacity to the tax suit and personally served with process. He was not, however, served as guardian or as guardian of Ruth Earle, a minor.

A decree was rendered in the suit to enforce the levee taxes condemning the land to be sold, and sale was made to the St. Francis levee district on July 21, 1896, and the deed to the district was duly executed and confirmed. On October 19, 1899, the levee district executed its deed to Julia Miller (now Orne). She was in possession of the land in July, 1898, and since that time has been in the actual, adverse, exclusive, hostile, open, and notorious possession of the land.

On November 24, 1902, Ruth Earle (now Nelms) brought suit in the Crittenden chancery court against W. M. Brown and others. Julia Orne was made a party, and in that suit Ruth Earle (now Nelms) sought to recover the lands now in controversy. On motion of Julia Miller the case was severed as to her, and that branch of the case ordered to the law court on September 29, 1905. The case did not appear on the docket in the law court during the years 1905, 1906, 1907, and 1908. At the November term, 1909, an entry appears on the docket of the law court as follows: "No. 1049. Ruth Earle Nelms v. Julia Orne." On December 30, 1909, the complaint now before the court was filed. No summons was issued, but the appellee filed her answer. The case was by consent transferred to chancery court on April 21, 1910.

The court, on this agreed statement of facts, entered a decree dismissing appellant's complaint for want of equity, from which this appeal has been duly prosecuted.

Allen Hughes and B. J. Semmes, both of Memphis, Tenn., for appellant. W. W. Hughes, of Memphis, Tenn., for appellee.

WOOD, J. (after stating the facts as above). It appears from the agreed statement of facts that the appellee was in possession of the land in suit and claiming title thereto under a decree of the chancery court of Crittenden county condemning the land to be sold for delinquent levee taxes. The suit by the appellant was a collateral attack on that decree. She contends that inasmuch as she was a minor under 14 years of age and a nonresident, and that inasmuch as her guardian, who was a resident, was not made a party to the suit as her guardian and served as such, that the court by the order of publication acquired no jurisdiction to condemn her lands, and that the sale was therefore void. She admits that she has no title to the part conveyed to her by her brother.

The suit to condemn the land for levee taxes was brought under the act of 1895 (Acts 1895, p. 88), amending the act of 1893 (Acts 1893, p. 24). This court in several cases has construed that act, holding that the proceedings were in the nature of proceedings in rem, and that where a decree is rendered upon a complaint properly describing the lands and where the nonresident landowners are constructively served, by warning order as prescribed by the statute, in which the lands are properly described, the court has jurisdiction to enter a decree condemning the lands to be sold for the delinquent levee taxes.

In *Crittenden Lumber Co. v. McDougal*, 101 Ark. 390, 142 S. W. 836, we said:

"By such notice, all nonresident persons having an interest in the land are warned of the pendency of the suit and are concluded thereby, whether they are made parties to the suit or not. It is therefore not necessary to name the true owner, in event he is a nonresident, either in the complaint or in the notice, and the decree entered upon such notice is not open to collateral attack by reason of the failure to name the true owner either in the notice or to make him a party to the suit. Notice is sufficiently given to every one who is a nonresident and has any interest in the land by the description of the land which is proceeded against, and which is set out in such notice."

And further on in the same case, speaking of the service by publication, we say:

If the land "is duly described in such published notice or warning order, it is sufficient to give the court jurisdiction over all nonresident persons who have any claim whatsoever in said land, although it is noted as belonging to one who actually has no interest therein, in event such land is actually owned by a nonresident."

See, also, *Ballard v. Hunter*, 74 Ark. 174, 85 S. W. 252; *Pattison v. Smith*, 94 Ark. 588, 127 S. W. 963.

But appellant contends that these cases have no application for the reason that the complaining nonresident landowners in those cases were adults, and that inasmuch as appellant was a minor under the age of 14 years, she had to be served under the provisions of section 6049 of Kirby's Digest, which provides:

"Where the defendant is an infant under the age of fourteen years, the service must be upon him, and upon his father or guardian, or, if neither of these can be found, then upon his mother, or upon any other person having the care or control of the infant, or with whom he lives. Where the infant is over fourteen years of age, service on him shall be sufficient."

But the acts under which the land in controversy was condemned are all comprehensive, and, as construed by the court, the notice there prescribed was to be the only method of service upon nonresident landowners. The statute makes no exception as to infants, and the courts can make none. As it is in the nature of a proceeding in rem, no reason is perceived why personal service should be had upon the infant or his natural or statutory guardian. Section 6049, *supra*, has no application here, and this case is ruled by the above cases.

While the agreed statement shows that appellant had a guardian who was a resident of Crittenden county, it does not show that the lands were occupied by him. He was made a party to the suit as an individual presumably for the reason that he was also an owner of some of the lands sought to be condemned.

The decree of the chancery court being correct on the merits, we pretermitt a discussion of the question as to whether there had been an abandonment of the suit by the appellant.

The decree is therefore affirmed.

DAVIES v. JOHNSON. (No. 63.)

(Supreme Court of Arkansas. May 22, 1916.)

1. HUSBAND AND WIFE \S 14(7)—TENANCY BY THE ENTIRETIES—STATUTE.

Kirby's Dig. \S 739, providing that every interest in realty, granted or devised to two or more persons other than executors or trustees, shall be in tenancy in common unless expressly declared to be a joint tenancy, has no application to the case of a grant or devise to husband and wife, who hold by the entirety.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 79; Dec. Dig. \S 14(7).]

2. PARTITION \S 2—ESTATES SUBJECT—TENANCY BY THE ENTIRETIES—PARTITION AFTER DIVORCE.

An estate held by husband and wife by entireties does not become subject to partition, after conveyance by the wife of her interest to a third party, and divorce of the original tenant.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. \S 2; Dec. Dig. \S 2.]

* Appeal from Garland Chancery Court; J. P. Henderson, Chancellor.

Suit for partition by R. G. Davies against C. I. Johnson. From a decree refusing to grant partition, plaintiff appeals. Decree affirmed.

Davies & Davies, of Hot Springs, for appellant. Martin, Wootton & Martin, of Hot Springs, for appellee.

McCULLOCH, C. J. The question involved in this appeal is this: "Does an estate held by entireties become subject to partition, after conveyance by the wife of her interest to a third party, and divorce of the original tenant?" The divorce was granted April 24, 1915.

[1] Appellant contends, first, that the right of survivorship was destroyed by the enactment of what is now section 739 of Kirby's Digest. This section reads as follows:

"Every interest in real estate, granted or devised to two or more persons, other than executors and trustees as such, shall be in tenancy in common, unless expressly declared in such grant or devise to be a joint tenancy."

In answer to this, it may be said that the same contention was made in the case of *Robinson v. Eagle*, 29 Ark. 202, where the court said:

"The act referred to in Gould's Digest (section 9, c. 37, Gould's Digest, 265, which is section 739 of Kirby's Digest), was intended to remedy what was regarded as an evil growing out of an estate of joint tenancy, whereby a survivor, though a stranger, on the death of his cotenant, would take the whole estate by survivorship, and other reasons. But it certainly was not intended to apply to the case of husband and wife, who are regarded by the law, Divine and human, as one person, and hold the estate as an entirety and not as joint tenants."

Appellant also cites us to the cases collated in the notes to *Stelz v. Schreck*, 13 L. R. A. 325, and *McKinnon, Currie & Co. v. Caulk*, 55 L. R. A. (N. S.) 396. These cases hold that divorce destroys the right of survivorship in an estate by the entirety, and it appears that the weight of authority, numerically speaking, supports that view. The Supreme Courts of Michigan and Pennsylvania support the opposite view. *Alles v. Lyon*, 216 Pa. 604, 66 Atl. 81, 10 L. R. A. (N. S.) 463, 116 Am. St. Rep. 791, 9 Ann. Cas. 137; *In re Appeal of Nellie B. Lewis*, 85 Mich. 340, 48 N. W. 580, 24 Am. St. Rep. 94. The reasoning of the courts which take the former view is that, the right of survivorship having attached at the creation of the estate, it cannot be divested by a decree of divorce subsequently granted. The Pennsylvania court stated, in the case just cited, that the estate by the entirety "arises, not out of unity of person alone, but out of unity of person at the time of the grant." The court then quotes from Coke's *Littleton* the statement that "if an estate be made to a man and a woman and their heirs, before marriage, and afterwards they marry, the husband and wife have moieties between them," and then reasons in support of its view as follows:

"If subsequent unity of person cannot change a tenancy in common to one by entireties, e converso, a subsequent severance of the unity of person ought not to change a tenancy by entireties to one in common."

The courts adopting the other view take the position that the very question presented is whether this right of survivorship did attach as an inseparable incident of owner-

ship, or was dependent upon the unity of person between the husband and wife, and consequently destroyed when that unity ceased to exist. The majority of the court are of the opinion that the question has been decided in this state, and that the decision has become a rule of property.

In *Branch v. Polk*, 61 Ark. 388, 33 S. W. 424, 30 L. R. A. 324, 54 Am. St. Rep. 266, the rule was laid down that under a deed to husband and wife "the entire estate is vested in each of the tenants by the entireties, for they hold, not by moieties, but by entireties." That, in fact, conforms precisely to the common-law definition of an estate, by the entirety. If the entire estate is vested at the time of the conveyance in each of the tenants, how could it be divested merely by the granting of a divorce in the absence of a statute authorizing it to be done? Suppose one of the parties executes a deed to a third party during the coverture, purporting to convey the whole estate, the deed would convey all of the vested interest of the grantor, including the rights resulting from survivorship; and it would be an anomalous situation to hold that such a vested interest could be divested by divorce of the parties.

The necessary effect of the decision in the case of *Roulston v. Hall*, 66 Ark. 305, 50 S. W. 690, 74 Am. St. Rep. 97, was that the character of an estate by the entirety is not changed by divorce of the parties. The facts of that case were that Ben and Addie Hall, his wife, purchased property in their joint names, creating an estate by the entirety. Afterwards Addie Hall sued Ben Hall, and obtained a decree in her favor for divorce, as well as for one-half of the property absolutely in fee simple and one-third of the other half belonging to Ben Hall for her lifetime. After this decree was rendered, Ben Hall conveyed one-half of the property to Roulston, who instituted an action of ejectment against Addie Hall for one-half of the property. In disposing of the case, the court used the following language in holding the wife was not entitled to the one-third interest presumably given her as dower interest in her husband's one-half interest:

"We suppose the court below gave the appellee the decree for one-third interest for her natural life in the appellant's half of said property, because it was adjudged to her in the suit of *Addie Hall v. Benjamin Hall* in the Garland chancery court. And we suppose that the learned chancellor in that case awarded it to her under section 2517 of *Sandels & Hill's Digest*, where it is provided that 'in every final judgment for divorce from the bonds of matrimony granted to the wife against the husband [the wife] shall be entitled to one-third part of the husband's personal property absolutely, and one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been so relinquished by her in legal form.' But the husband, Ben Hall, had not an estate of inheritance in these lots. Where land is conveyed to husband and wife, they do not take by moieties, but both are seized of the entirety—the whole in contradistinction to

a moiety or part only. *Robinson v. Eagle*, 29 Ark. 202; 2 Kent's Comm. 132; 4 Kent's Comm. 414. * * * Neither tenant by entirety can convey his or her interest so as to affect the right of survivorship in the other. The alienation by the husband of a moiety will not defeat the wife's title to that moiety if she survive him; but, if he survive, the conveyance becomes as effective to pass the whole estate as it would had he been sole seized at the time of the conveyance. The husband may do what he pleases with the rents and profits during coverture, but he cannot dispose of any part of the inheritance, without his wife's consent."

[2] It being the view of the majority that the language quoted is decisive of the question submitted, it must necessarily follow that the decree of the chancellor in refusing to grant partition must be affirmed.

HART and SMITH, JJ., are of opinion that the case of *Roulston v. Hall*, supra, is not decisive of this question, and that, upon both reason and authority, it should be held that a divorce granted a tenant by the entirety destroys the right of survivorship.

SEELBINDER v. WITHERSPOON. (No. 31.)

(Supreme Court of Arkansas. May 29, 1916.)

VENUE \S 32(2) — COUNTY OF DEFENDANT'S RESIDENCE—WAIVER.

Under Kirby's Dig. \S 6074, providing that judgment cannot be had against a nonresident of the county in which action is brought on service of summons outside of such county, unless some other defendant is joined who resided in such county at the commencement of the action, or was summoned therein and unless judgment is recovered against him, except where nonresident defendant makes no objection before the entry of judgment, a defendant served in a county other than the forum, upon the dismissal as to a codefendant properly served in the county where the action was brought, may object to trial in such county notwithstanding the filing by him of an answer and counterclaim.

[Ed. Note.—For other cases, see Venue, Cent. Dig. \S 49; Dec. Dig. \S 32(2).]

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Action by John Witherspoon against A. Seelbinder and another. Judgment for plaintiff, and defendant named appeals. Reversed and remanded.

E. L. Matlock, of Van Buren, for appellant. Kimpel & Dally, of Ft. Smith, for appellee.

SMITH, J. This is a suit for damages which was brought originally before a justice of the peace of Sebastian county against appellant and his son, Hugo. The suit grew out of an automobile collision in the city of Ft. Smith on May 13, 1915. Before the trial in the justice's court appellant filed the following motion:

"Comes the defendant A. Seelbinder and states to the court that he was served with the summons in this action in Crawford county, Ark., where he resided at the time this suit was com-

menced, and at the time the summons was served, and where he now resides.

"Wherefore he objects to being put upon trial in this cause in Sebastian county, Ark., and objects to the proceedings of this court in this cause against him, because he is a resident of Crawford county, and the summons in this suit was served upon him in said county, and prays an order and judgment of the court dismissing the action."

The other defendant, Hugo Seelbinder, was personally served with summons in the township where the suit was brought. This motion was overruled, whereupon appellant filed an answer denying liability, and alleging that the collision was the result of negligence on the part of plaintiff (appellee), and judgment was asked for the damages done appellant's automobile. On the trial in the justice court there was a judgment against appellant and his son Hugo, and an appeal was prosecuted to the circuit court. When the case was called for trial in the circuit court all parties appeared and announced ready for trial, whereupon, before any evidence was offered, appellee asked and obtained permission to take a nonsuit as to Hugo Seelbinder, and the cause was dismissed as to him. Whereupon appellant renewed his objection to the cause proceeding against him and read his motion to the court, and, over his objection and exception, the trial proceeded, and resulted in a verdict against him for damages. Before judgment was rendered on the verdict appellant again objected to a judgment being entered against him for the reasons set forth in his motion and because there was no finding or judgment against his codefendant, which motion was overruled, and the judgment was rendered from which this appeal is prosecuted.

Appellee now insists that the proof did not substantiate the fact that appellant was a resident of Crawford county. But the motion was not overruled because the fact was not established, but because it was not a defense. The evidence at the trial developed the fact that appellant was a resident of Crawford county, and the motion was renewed before judgment was pronounced, when it was again overruled, manifestly for the same reason which prompted the court to overrule it in the first instance. Appellee insists that the question of the sufficiency of the service is foreclosed by the fact that appellant filed a counterclaim, and also by the fact that he prosecuted an appeal from the adverse judgments of both the justice and the circuit court.

If it be conceded that appellant's claim for damages to his own automobile constituted a proper subject for a counterclaim, we think that neither the fact that it was filed nor the fact that an appeal was taken from the judgment of the justice of the peace precluded appellant from filing his motion to quash the service when the state of the record permitted that motion to be filed. Nor does the ap-

peal to this court have the effect of entering his appearance here.

The authority for this suit against appellant as a resident of Crawford county, where he was served with process, in the courts of Sebastian county, is found in section 6074 of Kirby's Digest, which section reads as follows:

"Sec. 6074. Where any action embraced in section 6072 is against several defendants, the plaintiff shall not be entitled to judgment against any of them on the service of a summons in any other county than that in which the action is brought, where no one of the defendants is summoned in that county or resided therein at the commencement of the action, or where, if any of them resided, or were summoned in that county, the action is discontinued or dismissed as to them, or judgment therein is rendered in their favor, unless the defendant summoned in another county, having appeared in the action, failed to object before the judgment to its proceeding against him."

This section has been several times construed by this court. In the case of Wernimont v. State, 101 Ark. 219, 142 S. W. 198, Ann. Cas. 1913D, 1156, Justice Frauenthal, speaking for the court, said:

"It is the policy and spirit of our law, enacted into statute by our Legislature, that every defendant shall be sued in the township or county of his residence. To this general principle there are statutory exceptions, chiefly in cases where there is a joint liability against two or more defendants residing in different counties. In such cases it is provided that suits may be brought in the county of the residence of any of the defendants, and service of summons can then be had upon the other defendants in any county, thereby giving jurisdiction over their persons to the court wherein the suit is thus instituted. Kirby's Digest, §§ 6072 and 4558. But, before this jurisdiction can be acquired by virtue of these statutes over the person of such defendants nonresident of the county wherein the suit is instituted, it is essential that the defendant resident of the county where the suit is brought shall be a bona fide defendant. By our statute, it is further provided that, before judgment can be had against such nonresident defendants, a judgment must be obtained against the resident defendant. Kirby's Digest, § 6074."

In the case of Wood v. Stewart, 81 Ark. 41, 98 S. W. 711, the service was had on defendant Bell in Miller county and on his codefendant, Stewart, in Crawford county, where the suit was brought. It was later alleged by Stewart, in an attack which he made on the judgment, that he had been joined in the suit only for the purpose of procuring service on Bell in Crawford county, and not for the purpose of enforcing the judgment against him. The court of course, refused him the right to make this showing, and in discussing the service of process there had said:

"In the action against Bell and Stewart in the circuit court Bell did appear and object to the proceeding against him, but the judgment against his codefendant, who resided in the county, barred him absolutely from objecting to the exercise of the court's jurisdiction. He

was bound to submit to that jurisdiction unless the action had been discontinued or dismissed as to Stewart or judgment rendered in his (Stewart's) favor."

In the case of Stiewel v. Borman, 63 Ark. 30, 37 S. W. 404, Abe, Joe, Ed, and Harry Stiewel were sued in the Johnson circuit court for damages for personal injuries. The three defendants last named answered and denied any ownership or interest in the mine where the injury occurred for which the damages were asked. The remaining defendant did not answer, but filed a motion to quash the summons as to himself on the ground that he was illegally served with process in Pulaski county; the suit having been brought in Johnson county. A verdict was returned in favor of Joe and Harry Stiewel and against Abe and Ed Stiewel. Upon appeal to this court the judgment was reversed as to Ed Stiewel, whereupon, in a discussion of the sufficiency of the service of process as to Abe Stiewel, the court said:

"As to the sufficiency of the service of the summons upon Abe Stiewel in Pulaski county for a basis of judgment against him, section 5698 of Sandels & Hill's Digest (section 6074 of Kirby's Digest) is decisive. That section is as follows: [After quoting the section the opinion continues:] According to this statute, appellee is not entitled to judgment in this action against Abe Stiewel, although he may be entitled to recover against him, unless judgment is recovered against one of the defendants who resided in the county in which the action was brought at its commencement, or was summoned in such county, or he fails to object before judgment to its proceeding against him."

Appellee strongly insists that appellant made the justice court his own forum when he filed his counterclaim, and that he cannot therefore now question the process by which he was brought into court. But, as has been shown, he never came voluntarily into court, and he filed his answer and cross-complaint only after his motion had been overruled, and this motion was renewed and pressed at every opportunity. Section 6074 gives the defendant who is sued upon a transitory cause of action in a county other than that in which he resides, or was served with process, the right to object to the service at any time before judgment is rendered against him, except upon the conditions there stated, and the statute makes no exception against the defendant thus served who has filed an answer and counterclaim, and we cannot read the exception into the statute. When the nonsuit was taken as to Hugo Seelbinder appellant's right to object to the service arose, and he could not object before that time, but the objection was made in apt time, and should have been sustained, and for the error of the court in not sustaining his motion the judgment will be reversed, and the cause dismissed.

GRAYLING LUMBER CO. v. HEMINGWAY. (No. 54.)

(Supreme Court of Arkansas. June 12, 1916.)

1. LOGS AND LOGGING — §8(5) — HAULING LOGS — CONTRACTS — BREACH — EVIDENCE — SUFFICIENCY.

Where plaintiff had a contract to haul timber various distances at various prices, he could not, on alleged breach, and on evidence that, hauling a certain number of feet of timber for a certain distance, he would have made a certain profit, recover such sum, since he might not have made a profit hauling other distances, and might have been required to haul for various distances.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 16, 17; Dec. Dig. § 8(5).]

2. LOGS AND LOGGING — §8(5) — HAULING LOGS — CONTRACTS — BREACH — DAMAGES — BURDEN OF PROOF.

One alleging breach of contract to haul logs has the burden of proving his damages by way of lost profits.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 16, 17; Dec. Dig. § 8(5).]

3. LOGS AND LOGGING — §8(5) — HAULING LOGS — CONTRACTS — BREACH — CONDONATION.

The mere fact that defendant, who had hired plaintiff to haul logs, complained that the work was unsatisfactory, did not amount to waiver of the breach of contract, and would not support instruction permitting verdict for plaintiff if his breach was condoned.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 16, 17; Dec. Dig. § 8(5).]

4. CONTRACTS — §57 — VALIDITY — MUTUALITY OF CONSIDERATION.

Where defendant hired plaintiff to haul logs at certain rates, as plaintiff alleged for an entire year, the contract was not enforceable where plaintiff was in no way bound to perform; there being no mutuality of consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 345, 352, 353; Dec. Dig. § 57.]

Appeal from Circuit Court, Desha County; Jas. C. Knox, Special Judge.

Action by C. C. Hemingway, Jr., against the Grayling Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

J. Bernhardt, of Arkansas City, and Sam Frauenthal, of Little Rock, for appellant. F. M. Rogers, of Arkansas City, for appellee.

HART, J. C. C. Hemingway, Jr., sued the Grayling Lumber Company to recover damages for a breach of an alleged contract by which he was employed to haul and deliver logs for said company.

The plaintiff alleges that Hemingway entered into a verbal contract with the Grayling Lumber Company in February, 1915, to haul and deliver logs to the company for the balance of the year 1915; that the company agreed to pay him for the hauling as follows: For all logs delivered, where hauled a distance not exceeding one-quarter of a mile, \$2 per 1,000 feet; for all logs delivered where hauled a distance exceeding one-quarter

of a mile, but not exceeding one-half of a mile, \$2.50 per 1,000 feet; all logs delivered which were hauled over one-half of a mile, but not exceeding three-quarters of a mile, \$3 per 1,000 feet; all logs hauled over three-quarters of a mile, and not exceeding one mile, \$3.50 per 1,000 feet. The plaintiff further alleged that he entered upon the performance of the contract and hauled logs thereunder until May 13, 1915, at which time the lumber company without cause refused to permit him to further perform the contract. The material facts are as follows:

C. C. Hemingway, Jr., testified:

"B. J. Terry was the local manager of the lumber company. I had a logging outfit which consisted of 40 mules and 8 wagons and tents. Five mules constituted a team for a log wagon. I had done some logging for the company in 1914. My father acted as my agent in making that contract. In February, 1915, Mr. Terry came to me and asked me to go to work logging for the mill. I told him I would not put my team in the mud, water, and ice unless he guaranteed me work for the balance of the year 1915. He told me to go ahead, and asked me how long it would take me to get ready. I told him that it would take me three or four days to get my outfit together and move it. I moved out on the job and hauled logs until in April, when I went to Mr. Terry and asked him again about the job. I needed new equipments, such as tents and harness, and I had heard rumors to the effect that the logging would be shut down. Terry told me to get the additional equipment and proceed with the work. I did so, and about the 13th day of May I again heard rumors that the mill would stop the work of logging and went to see Mr. Terry about it. On that day Terry notified me to stop work. I endeavored to get other work after that, but was unable to do so. I turned back some of the mules which I had not paid for. I had not been able to make any money up to the time I was discharged. This was on account of the weather conditions, which made the hauling very heavy. The roads were getting better in May, so that thereafter I could have made a profit on the hauling. After the time I was discharged I could have hauled with each team an average of 8,000 feet a day. The price I would receive would be \$2.50 per 1,000 feet for hauling from a turn-round to one-half mile. I could have worked 22 days a month. I would have made \$20 per day each team, and \$412.75 of that would have been profit. My profits with eight teams counting 22 days as a month would amount to \$2,250 per month."

The testimony of the plaintiff was corroborated by other witnesses.

For the defendant B. J. Terry testified:

"I did not employ the plaintiff in 1914. I did employ his father for that year to haul logs for the lumber company. I never made any contract with plaintiff on behalf of the company. I told the plaintiff's father that he could go to work logging the mill in 1915 with the understanding that it would have to be mutually satisfactory. I knew that his son was working with him. I never agreed to keep them in work for any particular length of time. During the whole time they worked in 1915 their work was unsatisfactory. I repeatedly told them that their work was not satisfactory, and urged them to do better. The woods foreman and his assistant corroborated the testimony of Terry as to the manner in which plaintiff did his work. They said that frequently he would leave logs and go to another place and commence hauling; that they would constantly have to watch him

and make him go back and clean up the logs. It was also shown on the part of the defendant that Terry had told the plaintiff and his father that the price for hauling would be decreased when the weather conditions got better.

The jury returned a verdict for the plaintiff in the sum of \$3,000, and the defendant lumber company has appealed.

[1, 2] It is insisted by counsel for the defendant that the evidence is not legally sufficient to sustain the verdict. They point to the fact that plaintiff bases his right to recover on his testimony to the effect that each team could haul on an average of 8,000 feet per day, and that he would receive \$2.50 for hauling from a turn-round of a one-half mile. There is no testimony in the record to support a finding that plaintiff could have made the haul as testified to by him. There were several distances which his complaint alleges that he was to haul logs and the prices varied with the distance. There is a total lack of evidence to show that any of the hauling which he would have done in the future would have been for a distance exceeding one-quarter, but not exceeding one-half, of a mile. He might have been assigned to the task of hauling for a greater distance, and, for aught that appears from the record, he might not have made any profit in hauling the increased distance. The burden was on him to show what his profits would have been. In other words, in order to recover damages for an alleged breach of the contract, it was incumbent upon the plaintiff to show that he would have been assigned the task of hauling more than a quarter of a mile, and not exceeding a half of a mile, before he can recover for hauling that distance. Proof that he could have made a profit in hauling that distance does not tend to prove that the defendant company would have assigned him work at that distance for the balance of the year.

[3] Counsel for the defendant also insists that the court erred in giving in its modified form instruction No. 3, as follows:

"(3) If the jury find from the evidence that there was a contract between the parties, and that the plaintiff breached it, then the defendant will not be liable in this action, unless you further find from a preponderance of the evidence that such breach was condoned."

The modification consisted in these words "unless you further find from a preponderance of the evidence that such breach was condoned." We think the addition of these words to the instruction rendered it misleading and prejudicial to the rights of the defendant. The testimony on the part of the defendant shows that the work of the plain-

tiff and his father was not performed in a satisfactory manner during the year 1915. The local manager of the defendant testified that he had occasion frequently to complain at the plaintiff and to urge that he and his father do their work in a more efficient manner. The mere fact that a master reprimands his servant for not performing his work in an efficient manner does not waive his right to discharge his servant for inefficiency. So here the mere fact that the defendant complained to the plaintiff that he was not performing his contract according to its terms did not amount to a waiver of such breach of the contract.

[4] Again, it is contended by counsel for the plaintiff that the court erred in refusing to give instruction No. 5. The instruction reads as follows:

"(5) The court instructs the jury that, in order that a contract be entirely binding and legal, the observance of its terms and conditions must be binding upon all the parties thereto. So, if the jury believe from the preponderance of the testimony in this case that the terms of the contract sued on left it entirely optional with the plaintiff whether or not he would perform his promise, if you find there was a promise, then this contract would not be binding on the defendant, and you should find for the defendant."

We think the court erred in refusing to give this instruction. It is a general principle in the law of contracts that an agreement entered into between parties to a contract in order to be binding must be mutual; and this is especially so when the consideration consists of mutual promises. In such cases, if it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality. *Eldorado Ice & Planing Mill Co. v. Kinard*, 96 Ark. 184, 131 S. W. 460; *St. L. I. M. & S. Ry. Co. v. Clark*, 90 Ark. 504, 119 S. W. 825. The jury might have found from the evidence that the plaintiff was under no legal obligation to haul logs for the defendant any longer than he chose, and on this account the agreement was void for want of mutuality. Even if the jury should find that the defendant had agreed to employ the plaintiff to haul logs for the balance of the year 1915, the defendant had a right to have its contention on this phase of the case submitted to the jury in concrete form, and this was not done in any instruction given by the court.

For the errors indicated in the opinion, the judgment will be reversed, and the cause remanded for a new trial.

BUTLER COUNTY R. CO. v. EXUM.
(No. 86.)

(Supreme Court of Arkansas. June 5, 1916.)

1. APPEAL AND ERROR \S 959(1)—PLEADING \S 236(1)—DISCRETION OF TRIAL COURT—AMENDMENT OF PLEADINGS.

Large discretion is vested in trial courts in the matter of permitting amendments to pleadings, and their allowance of amendments before the trial, during the trial and even after the evidence has all been taken to conform to the proof, will be sustained, unless there is a manifest abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825, 3826; Dec. Dig. \S 959(1); Pleading, Cent. Dig. § 601; Dec. Dig. \S 236(1).]

2. PLEADING \S 236(6)—TRIAL COURT'S DISCRETION—AMENDMENT.

In a passenger's action for damages from cursing and abuse by drunken passengers and the tearing up of her basket of clothes, seeking to recover actual damages for mental anguish and punitive damages, trial court's allowance of a trial amendment to the complaint alleging that plaintiff was made violently sick by tobacco smoke wrongfully permitted on the train, to supply the necessary allegation to support damages for mental anguish, was not an abuse of its discretion, as it was not inconsistent with the claim for damages set up in the complaint and should not have surprised the defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. \S 236(6).]

3. APPEAL AND ERROR \S 236(2) — TRIAL AMENDMENT—OBJECTION.

Even if defendant in such case was surprised by the amendment, it was its duty to have asked the court to suspend the trial or continue the case before it could complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1385; Dec. Dig. \S 236(2).]

4. CARRIERS \S 318(1)—PASSENGERS—ACTION FOR DAMAGES—SUFFICIENCY OF EVIDENCE.

In a passenger's action for damages for the cursing and abuse received from drunken passengers, the damage to a basket of clothes, and sickness from smoke in the car, evidence held to sustain a verdict for plaintiff for \$100.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307, 1308; Dec. Dig. \S 318(1).]

5. CARRIERS \S 284(1)—REMOVAL OF PASSENGERS—STATUTE.

Under Acts 1909, p. 99, making conductors peace officers with power to arrest drunken persons on their trains, it was the duty of a conductor, when a woman passenger called his attention to the intoxicated condition of other passengers, to have arrested them and handed them over to some peace officer at the first opportunity.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1125, 1127; Dec. Dig. \S 284(1).]

6. CARRIERS \S 319(3)—ACTION FOR DAMAGES—EXCESSIVE VERDICT.

A verdict in the sum of \$100 in a woman passenger's action for damages from the cursing and abuse of drunken passengers, the sickness from the smoke in the car, and damages to a basket of clothes, was not excessive.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1344, 1345; Dec. Dig. \S 319(3).]

Appeal from Circuit Court, Clay County; J. F. Gantney, Judge.

Action by Nancy Exum against the Butler County Railroad Company. Judgment for

plaintiff for \$100, and both parties appeal. Affirmed.

The appellee sued appellant, alleging that it was operating a railroad from Poplar Bluff, Mo., to Piggott, Ark.; that appellee purchased a ticket at Poplar Bluff for Pollard, on appellant's line; that she and her four children were passengers on the train; that appellant unlawfully permitted drunken persons to get on the train, and that they abused appellee, cursing her, tearing up her basket and scattering its contents over the car, calling her vile names and using vulgar language in her presence; that her basket of clothing was damaged in the sum of \$10, and that she suffered mental anguish in the sum of \$1,000. She prayed for actual damages in the sum of \$10, damages for mental anguish in the sum of \$1,000, and for punitive damages in the sum of \$1,000, making a total of \$2,010.

The appellant answered denying the material allegations of the complaint and setting up that whatever damage was done to appellee's basket was settled for by the parties who did such damage, and that appellee accepted the amount paid her by them as a full settlement. After the answer was filed and the evidence was being adduced appellee was permitted, over the objection of appellant, to amend her complaint by alleging "that she was made violently sick by reason of tobacco smoke wrongfully permitted on the train."

There was testimony on the part of appellee tending to sustain the allegations of her complaint. She testified that men got on the train who were drunk, and in the presence of a large crowd of passengers on the train they were cursing, and their conduct made her nervous. She says that men were smoking in the car. She called the attention of the auditor and the conductor to that and they requested the men to quit smoking, as there were ladies in the car. The car was absolutely full of smoke. She could hardly get her breath, and "It made her sick with a headache," and she was "going to vomit." The men riding on the train tore up her basket. She told the conductor of it and the man said, "You are a damned liar." The conductor looked at him, but never said a word. One of the drunken men, when his attention was called to the fact that there were ladies in the car, said: "God damn the ladies; let's drink. He cursed us and black-guarded us and drank." She saw three quarts of whisky. She "didn't hear the trainmen say a word to protect us." The clothes had clay mud all over them where the men had walked on them. They tore up the basket in which she had the clothes and threw it out of the window. She stated on cross-examination that the men asked her what the basket was worth, and her sister told them a dollar, and they gave a dollar to her

boy, to which she made no objection. The boy might have put the dollar in her pocket-book; if so, she got it.

The appellee's testimony was substantially corroborated by the testimony of her sister, who was at the same time a passenger on the train. The testimony on behalf of the appellant was to the effect that there was no one drunk on the car on the occasion mentioned by the appellee. Passengers who were on the same car with appellee testified that they were in position to see and hear what was said and done. One of these witnesses stated that the lady's basket was setting between two seats, a part of it extending out in the aisle. A man by the name of Farmer came along and picked up the basket to set it on another seat. When he took hold of the basket the handle came off and some of the clothes fell on the floor. Appellee said if they would pay her a dollar it would be settled and they paid it.

The conductor and the auditor, in their testimony, denied that there was any disturbance on the train or any abusive or insulting language. They did not permit drunken men to get on the car because it was a violation of the law for them to do so. There were some men on the car who were smoking, and the auditor asked them to quit, and they did so. The conductor testified that there was not any profane or abusive language used; stated that the general conduct of the passengers on the train was good; that the appellee made no complaint about smoking or objectionable words in the car.

There was a judgment in favor of the appellee in the sum of \$100, and both parties have appealed.

Spence & Dudley, or Piggott, for appellant.
C. T. Bloodworth, of Corning, for appellee.

WOOD, J. (after stating the facts as above.)

[1] Large discretion is vested in trial courts under our statute and decisions in the matter of permitting amendments to pleadings. The ruling of a trial court in allowing amendments before the trial has commenced, and after it has begun and before it is ended, and even after the evidence has all been taken to conform to the proof, will be sustained, unless there is a manifest abuse of discretion. *American Bonding Co. v. Morris*, 104

Ark. 276, 148 S. W. 519; *Oakleaf Mill Co. v. Cooper*, 108 Ark. 82, 146 S. W. 130; *Rucker v. Martin*, 94 Ark. 365, 126 S. W. 1062; *McFadden v. Stark*, 58 Ark. 7, 22 S. W. 884.

[2, 3] Appellant could not have been surprised by the amendment. It was not inconsistent with the claim for damages set up in the complaint. The effect of the amendment was not to change the cause of action, but only to supply the necessary allegation to support appellee's prayer for damages for mental anguish. But even if appellant had been surprised, it was its duty to have asked the court to suspend the trial or continue the case before it could complain. See *St. L., I. M. & S. Ry. Co. v. Power*, 67 Ark. 142, 53 S. W. 572. The appellant was not prejudiced by the court's ruling.

[4] The only other ground urged for a reversal is that there was no evidence to sustain the verdict. The evidence was amply sufficient to sustain the verdict.

[5] It appears from the testimony on behalf of the appellee that persons on the train and in the same coach with her were permitted to engage in a scene of drunken debauchery and ribaldry. They absolutely filled the car where appellee was riding with smoke, which gave her a headache and made her sick at the stomach. It was the duty of the conductor, when his attention was called to the intoxicated condition of these persons to have arrested them and handed them over to some peace officer at the first opportunity. Act 44, p. 99, Acts 1900.

The purpose of the above act, in making conductors peace officers and giving them power to arrest drunken persons on their trains, was to protect passengers from just such insults and indignities as is discovered by the testimony on behalf of appellee in this record. The jury accepted the testimony of appellee, therefore assuming that the testimony of appellee was true.

[6] A verdict in the sum of \$100 is but a moderate compensation for the outrageous treatment and the mental and physical suffering which she endured at the hands of drunken rowdies as the direct result of the negligence of appellant's conductor in failing to do his duty under the circumstances.

The judgment is therefore correct, and it is affirmed.

SPARKS v. STATE. (No. 4104.)

(Court of Criminal Appeals of Texas. June 7, 1918.)

1. HOMICIDE \Leftrightarrow 167(1)—EVIDENCE—ADMISSIBILITY.

In a prosecution for assault with intent to murder, prosecutrix having been shot through a window while in bed at night, where a witness testified that the accused was talking with her about the assaulted person, his statement, "I spends my money on the —, and if she don't treat me right I will kill her," was sufficiently identified as referring to the assaulted party and admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 332, 333; Dec. Dig. \Leftrightarrow 167(1).]

2. HOMICIDE \Leftrightarrow 234(6)—EVIDENCE—IDENTIFICATION OF ACCUSED.

In a prosecution for assault with intent to murder, prosecutrix having been shot through a window while in bed at night, and having testified that the accused had been sleeping with her, knew the location of the bed, and that she recognized his voice, it was not necessary to support conviction that she could and did see and recognize accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 487; Dec. Dig. \Leftrightarrow 234(6).]

3. HOMICIDE \Leftrightarrow 230—EVIDENCE—ASSAULT TO MURDER — ABILITY OF ACCUSED TO SEE PROSECUTRIX.

In a prosecution for assault with intent to murder, prosecutrix having been shot through a window while in bed at night, it was not necessary to a conviction that defendant could see prosecutrix on the bed, where the record shows that he had been sleeping in the bed with her, knew its location, that it was next to the window, and that he fired directly through this window.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 478; Dec. Dig. \Leftrightarrow 230.]

4. CRIMINAL LAW \Leftrightarrow 940 — NEW TRIAL — GROUNDS—NEWLY DISCOVERED EVIDENCE.

In a prosecution for assault with intent to murder, where prosecutrix was shot through a window while in bed, refusal of a new trial on the ground that witnesses would swear that since the trial they have gone to the house in the nighttime, one lying on the bed and the other standing just outside the window, and that a person lying on the bed could not recognize a person on the outside of the window in the nighttime when no moon was shining, was not error, since there is no contention that one could not hear another speak, or could not see the bulk of some one standing outside, and the testimony of prosecutrix was that she recognized defendant by his voice, and saw him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327; Dec. Dig. \Leftrightarrow 940.]

Appeal from District Court, Taylor County; W. P. Mahaffey, Special Judge.

Dee Sparks was convicted of assault to murder, and he appeals. Affirmed.

Harry Tom King, of Abilene, for appellant.
C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of assault to murder, and his punishment assessed at two years' confinement in the state penitentiary.

[1] In the first bill of exceptions it is con-

tended that the court erred in permitting the witness Hattie Chandler to testify as herein-after related. She testified that she and Ethel Wyatt were at an entertainment given at the residence of Tom Smith; that while there appellant also came to the entertainment, and while there had a conversation with her, and she testified:

"He was talking to me about Ethel Wyatt. He asked me who she was with, and I told him she was by herself, and he asked me had she said anything about him, and I told him 'No,' and he said, 'Well,' he says, 'I spends my money on the son of a bitch, and if she don't treat me right I will kill her.'"

Appellant contends that, if appellant did use this language, he did not individuate Ethel Wyatt. We think, taking the conversation as a whole, no other inference could be drawn; for the witness says he was talking to her about Ethel Wyatt at the time he used the language he did. Taking also the testimony of the prosecuting witness, Ethel Wyatt, as to the remarks he made to her that evening, it is clear that, if appellant made the remark, he had reference to Ethel Wyatt, and no other person. The prosecuting witness testified to going from the party to her home at Judge Tillet's, she staying in the servants' house; that shortly thereafter she went to bed. She then testifies:

"The first thing I noticed about any one being around there was when Dee Sparks called me by my name three times. I know it was Dee because I saw him. I recognized him also by his voice. He called me and says, 'Ethel'; and he waited a little while, and he called me again, and he called me again, and he says, 'Well, then, you ain't going to talk is you?' I didn't say anything to him, and he says, 'Well, you — — —, you will say something.' I said he called me three times by my name, Ethel. And he said, 'Well, then you ain't going to talk is you?' and I didn't say anything to him, and he says, 'Well you — — —, you will say something.' He was standing right up to the window when he made that statement. The window was closed. That is all he said. I were laying on the bed when he said that, where I could look out the window. I called Mr. Tillet, and it was a good while before I got him awake, but after the last statement that he made he shot me."

[2-3] The shooting was placed at about 3 o'clock in the morning, and appellant requested the court to instruct the jury "that unless they believed beyond a reasonable doubt that Ethel Wyatt could and did see and recognize appellant to acquit him." Under the evidence in this case, wherein the prosecuting witness testified that appellant had been sleeping with her, and knew the location of the bed as being next to the window, and that she recognized his voice, it would not entitle appellant to an acquittal if she did not see appellant. It may be that she could only see the bulk of a person, but she testifies positively to him calling her three times, and to other remarks, and that she knew his voice. Appellant also requested the court to instruct the jury that before they would be authorized to convict they "must believe

beyond a reasonable doubt that appellant could see the prosecutrix on the bed." This is not the law, and the court did not err in refusing to give the charge. It would be immaterial whether he could see her or not, when the record shows that he had been sleeping in the bed with prosecutrix, knew its location, and it was next to the window, and he fired directly through this window; the ball striking the prosecutrix in the stomach.

The only other ground alleged is that the court erred in refusing to grant a new trial on account of alleged newly discovered testimony. The witnesses swear that since the trial they have gone to this house in the nighttime, one lying on the bed, and the other standing just outside the window, and that a person lying on the bed could not recognize the person on the outside of the window in the nighttime when no moon was shining. If the prosecuting witness had tied her identification of appellant to a personal sight of him, there might be some merit in this application, but the woman, as shown by her testimony hereinbefore copied, said she recognized his voice, and repeats the language he used on that occasion.

[4] There is no contention made that one could not hear another speak when occupying the relative positions, and it seems to be conceded that one could be heard, and it is also conceded that one lying in the position described could see the bulk of the person on the outside, and it is the most natural thing for a person to say who recognized the voice speaking to her at the same time seeing the bulk of this person that she both saw and heard the man, and knew who it was; for she recognized him by his voice.

The judgment is affirmed.

BLACK v. STATE. (No. 4114.)

(Court of Criminal Appeals of Texas. June 7, 1916.)

1. LARCENY \S 40(9) — VARIANCE — OWNER-SHIP.

In a prosecution for stealing a lap robe which was alleged to have been in the possession of a husband, and shown by the evidence to be the separate property of his wife, there was not a variance between the proof and allegation, since the separate property of the wife is under the control and management of the husband.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 120, 121, 123, 124; Dec. Dig. \S 40(9).]

2. CRIMINAL LAW \S 369(5)—EVIDENCE—OTHER OFFENSES.

In a prosecution for theft of a lap robe, a question asked a witness if he did not steal whisky from the alleged owner of the lap robe was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822, 823; Dec. Dig. \S 369(5).]

3. CRIMINAL LAW \S 706—CONDUCT OF COUNSEL.

In a prosecution for theft of a lap robe, a question asked defendant if he had heard a witness for the state testify that he stood beside defendant's car, and if it was not a fact that the witness had testified to a lie, was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. \S 706.]

4. CRIMINAL LAW \S 720½—MISCONDUCT OF PROSECUTING ATTORNEY.

In a prosecution for theft of a lap robe, statements of the prosecuting attorney to the jury that he had taken the stand to testify himself because he had seen the defendant make out the owner of the lap robe to be a liar when he knew defendant to be as guilty as a dog, was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1677; Dec. Dig. \S 720½.]

5. CRIMINAL LAW \S 723(3)—TRIAL—MISCONDUCT OF PROSECUTING ATTORNEY—REVERSIBLE ERROR.

In a prosecution for theft of a lap robe, statements of the prosecuting attorney to the jury that, if they wished to foster crime and cover up offenses brought to light by his department, to find defendant not guilty, and, if so, to write their grounds in the verdict, and never complain to him that crime was prevalent, and that the citizenship would not convict criminals, were reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1676; Dec. Dig. \S 723(3).]

6. LARCENY \S 13—STATUTE—CONSTRUCTION—"THEFT."

Where defendant obtained lawful possession of a lap robe from the owner or party having the right to give consent, but subsequently appropriated it, he would not be guilty of theft under the general statute, which requires an intention to appropriate at the time of taking.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 32, 33; Dec. Dig. \S 13.]

For other definitions, see Words and Phrases, First and Second Series, Theft.]

7. LARCENY \S 71(2) — INSTRUCTIONS — STATUTE.

In a prosecution for theft, when the facts raise the issues, the jury should be instructed as to the difference between the general statute requiring an intention to appropriate at the time of taking to constitute theft and the statute making a fraudulent conversion of property legally obtained a violation of law.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 192; Dec. Dig. \S 71(2).]

Appeal from Montague County Court; Homer B. Latham, Judge.

J. S. Black was convicted of stealing, and he appeals. Reversed and remanded.

John Speer, of Bowie, for appellant. O. O. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of stealing a lap robe from C. E. Quillen, his punishment being assessed at a fine of \$25 and 30 days imprisonment in the county jail.

[1] The evidence shows the lap robe was the separate property of Mrs. C. E. Quillen. It was in a house on the place where the Quillens resided as their home, and was taken from that house. The contention is made that, inasmuch as it was the separate property of the wife, therefore the pleadings

should have charged it was in her possession and not in her husband's; therefore there was a variance between the proof and the allegation. Possibly it may have been sufficient to charge it in the possession of the wife, but it certainly could be charged in possession of the husband. He was living on the place and was head of the family. Separate property of the wife, as a rule, is under the control and management of the husband. There may be exceptions to that statement, but that is the general rule, especially as applicable to possession. We do not think there is anything in that proposition.

[2, 3] There are three bills of exception reserved to the action of the county attorney. One of these shows that he asked the witness Shelton while testifying if he did not steal four quarts of whisky from C. E. Quillen while he was working on his place. Prompt objection was interposed, but the witness answered before the court ruled that he had not stolen any whisky from him. The objection was sustained by the court, and the jury instructed to disregard it. Another bill recites that the county attorney asked defendant while testifying for himself, if he had heard the state's witness Charlie Hart testify in this case in which he said he stood beside defendant's car at a given time, and asked defendant if it was not a fact that the said Charlie Hart had testified to a lie in this case. The defendant very promptly answered that he did not care what the county attorney termed it, his testimony was not true; defendant objecting to the question and answer for various and sundry reasons. Among other things he stated that this was done by the county attorney knowing that this would not be permitted to stand before the jury and for the sole purpose of getting such inflammatory testimony into the case, and for the further purpose of getting his individual view before the jury in a manner not prescribed by law; for he had heard said witness Charlie Hart testify as above stated. The court qualified this as he did the previous bill, by stating that the jury was charged not to consider either the question or answer. It is a difficult matter sometimes to say just how far improper questions and answers withdrawn may affect the jury, but without passing here upon these matters, as they will not occur upon another trial, we hope that the prosecution will confine their course of conduct to legitimate matters, and not undertake to put into the case things that ought not to be for the purpose of influencing the jury or such as are calculated to do so against the defendant when the matter is illegal. Much has been written along this line, and the writer is of the opinion that in such instances the error, if material, ought to be reversible.

[4] Another bill of exceptions recites that the county attorney in his closing argument had discussed various and sundry phases of

the testimony and mentioned the fact that he himself had taken the stand and testified in behalf of the state to impeach the truth and veracity of the defendant in the community in which he resided, and said with a great deal of vehemence and positiveness that the reason he had taken the stand and testified he had sat there during the trial and watched the defendant make out Mrs. Quillen a liar when he knew the defendant was as guilty as a dog. Appellant urged various and sundry objections to this, that it was outside the record, not borne out by the testimony, that the county attorney himself had been upon the witness stand and testified, and did not offer to testify as to the merits of the case, and that his statement that he himself knew the defendant to be guilty as a dog was highly improper, not supported by the testimony, was highly inflammatory, that it was insulting, and could not be resented by defendant except to infringe the rules of the court, and showed disrespect to the court, and calculated to and did cause said jurors to believe the statement of the county attorney rather than the testimony of the witnesses, and because of said facts some of said jurors were desirous of giving defendant very heavy penalty as jail sentence and were only prevented by other jurors who were less excited and inflamed over said statement, but who were forced to agree to a conviction to appease the wrath of those who had been influenced by said statements of said county attorney. The court signs this bill with the explanation that the argument was withdrawn from the jury by an oral charge at the time.

[5] Another bill recites that the county attorney, in making his closing argument, dramatically appealed to the prejudices and bias of the jurors for a conviction, and said, in substance, if not in precise words, that if they wanted to foster crime in Montague county, and cover up offenses brought to light by the county attorney's department, they could return a verdict of not guilty in this case, but that in the event they did so to please write in their verdict when they returned it, upon what grounds they did it, and why they so returned a verdict of not guilty, and that in the event they did so to never complain to him again that crime was prevalent in the county, and that the citizenship would not convict criminals, to which improper argument various and sundry objections were urged. There are other matters stated in the same bill. We are of opinion the last two bills of exception are fatal to this conviction. There have been so many cases written, so many reversals occurred on similar matters and questions, we deem it unnecessary here to refer to those cases. This was such error that we cannot afford to give it the sanction of this court.

[6, 7] The theory of the state was that appellant, who was working as a painter on the property of the Quillens, committed the theft

of the lap robe and took it away for the purpose of appropriating it. Appellant's contention was supported by the testimony of himself and another witness that he was working for the Quillens as stated at Nocona in Montague county, and, being without a coat, it having turned cold, he borrowed a coat and the lap robe from Mrs. Quillen to use in returning to his home in Bowie, in the same county. This was the issue in the case. It is not the purpose here to go into detail. The court charged the jury if he borrowed the lap robe from Mrs. Quillen, or if there was a reasonable doubt of it, they should acquit. There were some exceptions to the court's charge, and requested instructions which were refused which perhaps more nearly presented the question. Of course, if appellant borrowed the lap robe, there could have been no theft at the time he obtained possession of it. There is some testimony showing that he kept the lap robe for some time after obtaining it. He explains this by stating that the weather was cold and he did not return to Nocona to work, and gave it to another party with money to pay for its return through proper channels to Mrs. Quillen at Nocona, but this party did not do so, and he did not know this until the day he went to Nocona in his car and took the lap robe with him. There seems to have been a match game of tennis or baseball between the Nocona team and that from the town of Bowie; the excitement being rather acute. Mrs. Quillen on that day obtained the robe from him. He told her at the time she claimed it that it was hers, and that it did not belong to him. These matters are briefly stated. We are of opinion that upon another trial, in order to present these matters more accurately and definitely under the close questions made, the jury should be instructed that, if he obtained possession of the lap robe from Mrs. Quillen and took it under the idea that he had a right to use it for the time, his failure to return it would not constitute theft. In other words, if he obtained possession lawfully with consent of the owner or party having a right to give consent, but subsequently appropriated it, it would not be theft under the general statute. Theft under the general statute consists of the intention to appropriate at the time of the taking. Any lawful possession would not be theft under that statute. We have another statute which was passed to avoid the weakness of the general statute by making the subsequent fraudulent conversion of property when legally obtained a violation of the law. These statutes make a distinction which should be observed whenever the facts raise these different issues, and the jury should be properly so instructed.

The judgment is reversed, and the cause remanded.

POWELL v. STATE. (No. 4106.)

(Court of Criminal Appeals of Texas. May 31, 1916. Rehearing Denied June 21, 1916.)

1. CRIMINAL LAW §1038(1) — APPEAL — OBJECTIONS TO CHARGE.

Objections to the court's charge not made at the time of the trial are too late.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. §1038(1).]

2. CRIMINAL LAW §923(1) — NEW TRIAL — CONDUCT OF JUROR.

Where the jurors were questioned together on their voir dire examination and were asked whether any of them had ever had daughters who ran away and married, that a juror did not hear the question and that if he had he would have answered that one of his daughters had done so, and have caused his peremptory challenge by the defendant, was no ground for a new trial where the juror further testified that he had become reconciled to her marriage and that it did not influence his verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2225; Dec. Dig. §923(1).]

3. CRIMINAL LAW §932 — NEW TRIAL — CONDUCT OF JUROR.

Where the jury had decided that defendant was guilty, and while it was discussing whether to suspend his sentence, remarks of a juror, in conversation with others, not made as an argument against suspension of the sentence of which he was in favor, and which remarks had no effect whatever upon the sentence, were no ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2238; Dec. Dig. §932.]

4. CRIMINAL LAW §925(1) — CONDUCT OF JURY — NEW TRIAL.

The fact that a juror in a criminal case agreed to the verdict as rendered, because he did not want to have a "hung" jury, did not entitle the defendant to a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2238, 2246; Dec. Dig. §925(1).]

Appeal from District Court, Titus County; J. A. Ward, Judge.

R. S. Powell was convicted of subornation of perjury, and he appeals. Affirmed.

G. H. Crum and T. O. Hutchings, both of Mt. Pleasant, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of subornation of false swearing, and his punishment assessed at the lowest. The great preponderance of the testimony was amply sufficient to sustain his conviction. His testimony alone was almost sufficient to do so.

[1] No objections whatever were made to the court's charge at the time of the trial. In appellant's motion for a new trial, he criticises it in two or three particulars. None of the complaints present any fundamental error. His objections come too late under the express provisions of the recent laws of that subject and the uniform decisions of this court thereunder since then.

In his amended and supplemental motion for a new trial, he attacked the verdict in

these particulars: (b) That the juror McKee failed to answer a question on his voir dire examination, which if he had answered would have caused appellant to have peremptorily challenged him; (c) that the juror Stringfellow discussed in the jury room, while the jury was considering its verdict, that he once had a girl to run away and marry without his consent; (d) that the juror Jenkins was unable to read and write, and he failed to disclose that fact when asked the question by the court in qualifying the jurors; (e) that Morgan agreed to a verdict as rendered because he did not want to have a "hung" jury. As a part of the motion, he attached some affidavits merely as a pleading. These were not introduced in evidence when the court heard the testimony on his grounds of attack. The agreed statement of facts shows that none of them were offered in evidence.

The court heard the testimony, in acting on said motions, of every juror who sat upon the case. From the whole of it, as well as practically each juror, the court was fully authorized to find that none of appellant's contentions were sustained, and that he was correct in overruling the motions. Their testimony disclosed, without any controversy, that soon after the jury retired, and practically without any discussion, they took a vote and unanimously voted appellant guilty. None seemed to hesitate to so vote, and each of them testified that they considered nothing whatever in arriving at their verdict except the evidence introduced and the charge of the court.

[2] It appears that in questioning the jurors on their voir dire examination they were all questioned together, not singly. It seems among other questions appellant's attorney asked the jury whether or not any of them ever had any trouble in their family, or any family of their near relatives, as to the running away and marriage of minor children, especially girls. The juror McKee swore he never heard the question; that, if he had, he would unhesitatingly have answered it to the effect that at one time one of his daughters did run away and get married. His testimony further shows that he had long since become reconciled to that marriage, and that it would have in no way influenced him in finding a verdict in this case, and did not do so. This would in no way have disqualified this juror from sitting in this case; in other words, it would not have been a cause for challenge. Appellant's attorney is not shown to have pressed the inquiry to this juror any further, but seems to have assumed that, because he did not answer that he had had such trouble, he had not had. As shown by the testimony heard on the motion, no error is shown in the court's denying a new trial on that ground.

[3] Appellant properly plead for a suspended sentence. The court submitted the ques-

tion to the jury. The verdict expressly stated they did not recommend a suspended sentence. As soon as all of the jurors unanimously agree and found that appellant was guilty, they then took up the question of the number of years they would assess as his punishment and whether or not they would suspend his sentence. Eight jurors were opposed affirmatively to suspending his sentence at all and wanted to fix his punishment at two years. Four at first desired to suspend his sentence. These four wavered at first, some of the jurors expressing a willingness to assess the punishment at five years if they could agree on a suspended sentence. The others refused to do this. It seems that one or more of the four at different times agreed with the other eight not to suspend the sentence. While they were "hung up" on whether or not they would suspend the sentence, Mr. Stringfellow swore that, when sitting back with one or two of the jurors, they were talking, and he merely said to them that he had a daughter that ran away with a fellow without obtaining his consent, but she was of age, and it was all right, and he thought well of it. He and all who heard it swore that the remark was not made as an argument against suspension of his sentence, and that it had no effect whatever upon them, but that they found their verdict solely on the evidence introduced and the charge of the court. Mr. Stringfellow himself was at first in favor of suspending the sentence, and it seems that some of the others who heard him perhaps were also. The other jurors swore they heard no such remark from Stringfellow, or any other juror. Finally, the jurors agreed unanimously on the lowest punishment and not to suspend the sentence, and their verdict so stated. We think none of this shows any injury to appellant and would not entitle him to a new trial. It occurs to us that, if anything, it may have been beneficial to him. At any rate, it presents no ground for reversal.

No proof whatever was offered to show that Jenkins could neither read nor writ. His testimony would clearly indicate that he could, though he made no direct answer to that effect and was asked no question on the subject.

[4] The fact that Morgan agreed to the verdict as rendered because he did not want to have a "hung" jury would in no way entitle appellant to a new trial. A great many verdicts—in fact, most of them—in cases coming to this court, indicate clearly compromise verdicts; that is a yielding of first contentions and abandoning them finally, thereby succeeding in the assessment of a lower penalty or some other advantage to an accused.

The trial judge saw the whole conduct of the trial, heard all the testimony thereon, and then heard the testimony of every juror on said motions for a new trial. He, of course,

was better qualified to determine the issues of fact raised by the motions than this court can possibly be. His finding denying a new trial on the grounds set up was amply justified by the whole testimony of the jurors, and this court is in no position to substitute its judgment for his under the circumstances.

The judgment is affirmed.

JOHNSON v. STATE. (No. 4116.)

(Court of Criminal Appeals of Texas. June 14, 1916.)

CRIMINAL LAW §942(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE — IMPEACHING TESTIMONY.

Affidavits, showing that one of the main witnesses for the state had a bad reputation for truth and veracity, did not support motion for new trial on the ground of newly discovered testimony; since testimony which is only impeaching does not afford ground for new trial for newly discovered testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2331; Dec. Dig. §942(1).]

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

John Johnson was convicted of murder, and he appeals. Judgment affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. The jury convicted appellant of murder, allotting the death penalty.

It is unnecessary, we believe, to give a statement of the facts. While appellant makes a serious contention that the evidence is not sufficient, we do not agree with that contention. The facts and details are numerous, covering over 150 pages of the transcript, and show a brutal murder by somebody. The evidence shows two parties did the act for the purpose of taking money and other things. The deceased, Jones, evidently engaged them in vigorous battle. Larkin was convicted and hung for the same murder. The confession of defendant placed his case beyond the pale of circumstantial evidence. His confession is direct, in which he gave some details of the fight and killing.

[1, 2] In his amended motion for a new trial, defendant alleges newly discovered testimony, setting out the affidavits of two witnesses. These affidavits show that one of the main witnesses who testified for the state had a bad reputation for truth and veracity. These parties lived in Waxahachie, in Ellis county, a number of years, as did the witness who testified. This could hardly be used as newly discovered testimony, even if it affords sufficient grounds for reversal otherwise. If the witness had the general reputation for want of veracity in the neighborhood where all these witnesses lived, it ought to be assumed, or presumed, that other witnesses would have known this fact. Testi-

mony, which only is impeaching, does not afford a ground for a new trial. There must be something more than the mere question of impeachment to authorize the granting of a new trial for newly discovered testimony. The state filed a contest and placed affidavits in the record which show confessions of the defendant, which could be produced upon another trial. Two witnesses, Aiken and Watson, filed affidavits which would show upon another trial of the defendant his confession, which was made to each one of those affiants. Motion was made by the attorneys for appellant to strike these from the record, which was overruled by the court. It should not be necessary to here decide whether the court erred or not in refusing to eliminate those affidavits. The showing made by the appellant of the ground of newly discovered evidence does not come within any rule of newly discovered testimony; and the affidavits filed by the state certainly could not be of any benefit to appellant on another trial, because they contain statements by the appellant which, if sworn to, would show his unquestioned guilt. So, from any standpoint, it could not be contended that the testimony, either for the state or for appellant, could have produced a different result, inasmuch as the impeaching testimony is not a ground for a new trial and the affidavits of the confession could not benefit the appellant. The punishment would hardly be reduced from the death penalty to some term of imprisonment in the penitentiary on additional confessions. Additional confessions could not be accorded as testimony favorable to appellant.

For the reasons given this judgment will be affirmed.

PEARSON v. STATE. (No. 4108.)

(Court of Criminal Appeals of Texas. June 7, 1916. Rehearing Denied June 23, 1916.)

1. CRIMINAL LAW §875(4) — VERDICT — MOTION IN ARREST.

Where no objection was made to the verdict when rendered or to rendition of judgment on the verdict, but was first raised on a motion in arrest of judgment, the misspelling of the word "years" in the verdict, otherwise perfect, could not vitiate it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2090; Dec. Dig. §875(4).]

2. CRIMINAL LAW §338(1)—EVIDENCE—ADMISSIBILITY.

In a prosecution for robbery of whisky, testimony of a witness that on several occasions one of the parties robbed had passed through the county with a wagonload of whisky, and that he was unlawfully introducing it into Oklahoma, was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 755, 756, 787, 788, 801; Dec. Dig. §338(1).]

3. CRIMINAL LAW §419, 420(10)—EVIDENCE—ADMISSIBILITY—HEARSAY.

In a prosecution for robbery of whisky, testimony of a witness that she had heard defendant say that there was more whisky in a box

from which she had seen him take two quarts of alcohol, and of a conversation which she had heard defendant have with a veterinary doctor, were inadmissible as hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 980-983; Dec. Dig. ¶419, 420(10).]

4. CRIMINAL LAW ¶603(11) — APPLICATION FOR CONTINUANCE—DILIGENCE.

Where in her affidavit an absent witness whose testimony is assigned as a ground for continuance, does not swear that she was ever subpoenaed, and it does not appear that she was not able to appear on the day following the application for continuance, no diligence was shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1359, 1360; Dec. Dig. ¶603(11).]

5. CRIMINAL LAW ¶595(2)—CONTINUANCE.

In a prosecution for robbery of whisky, where the only admissible testimony of an absent witness was that defendant the day before the robbery had taken two bottles of alcohol out of a box in her presence, the refusal of the court to grant a continuance was not error, since the fact was immaterial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1323; Dec. Dig. ¶595(2).]

6. CRIMINAL LAW ¶1169(1)—HARMLESS ERROR—EVIDENCE—VALUE OF PROPERTY TAKEN.

In an indictment for robbery, it is not necessary to allege the value of the property taken, and it not affecting the penalty, error in the admission of testimony as to the value was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8137; Dec. Dig. ¶1169(1).]

7. CRIMINAL LAW ¶1122(6)—APPEAL—INSTRUCTIONS.

Where it does not appear that requested instructions were presented to the judge at the time required by the statute, they will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2945; Dec. Dig. ¶1122(6).]

8. ROBBERY ¶26—INSTRUCTIONS.

In a prosecution for robbery in taking whisky by force under pretense that accused was a deputy sheriff, refusal of requested peremptory instructions, for acquittal, that the testimony was insufficient to establish the offense alleged, but, if any, swindling, and to acquit, was not error.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 37; Dec. Dig. ¶26.]

9. CRIMINAL LAW ¶814(17)—APPEAL AND ERROR — REVIEW — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.

In a prosecution for robbery, as the robbery occurred in ordering persons robbed away from the wagon at point of a pistol, and taking charge of the wagon containing the whisky, shown by positive testimony, and not in coming back later, refusal to charge on circumstantial evidence was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883, 1979; Dec. Dig. ¶814(17).]

10. CRIMINAL LAW ¶730(16)—TRIAL—ARGUMENTS OF COUNSEL.

Where the court instructed the jury to disregard improper arguments of the county attorney, and in his qualification shows that the argument was provoked by argument of appellant's attorneys, there was no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. ¶730(16).]

Appeal from District Court, Montague County; C. F. Spencer, Judge.

Mat Pearson was convicted of robbery with firearms and he appeals. Affirmed.

W. F. Weeks, of Wichita Falls, W. W. Cook, of Montague, and W. W. Alcorn, of Bowie, for appellant. C. O. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of robbery with firearms, and his punishment assessed at five years in the penitentiary, the lowest authorized by law.

The indictment is in strict accordance with the statute, and in the exact form laid down in 2 Branch's Ann. P. C. § 2380, page 1300, and is good against all of appellant's objections thereto. See the authorities cited by Mr. Branch, page 1301.

[1] The verdict of the jury was:

"We, the jury, find the defendant, Mat Pearson, guilty as charged in the indictment and assess his penalty at five *years* confinement in the penitentiary."

As seen, the verdict is in every way perfect, except the spelling of the word *years*, the *r* being left out. No objection to the verdict at the time it was rendered was made, nor to the rendition of the judgment, at the time, assessing his punishment at five *years* in the penitentiary in accordance with the verdict. It was first thereafter raised when he filed a motion in arrest of judgment on that account. The charge of the court may, and should, be looked to in aid of the verdict. 1 Branch's Ann. P. C. 332, for cases. The charge told the jury in the first paragraph that the punishment might be death or confinement in the penitentiary for any term of *years* not less than five. Again, in submitting the case to them for a finding, he told them that if they found him guilty, to assess his punishment at death or confinement in the penitentiary for any term not less than five *years*. From the charge and the verdict, no one could possibly reach any other reasonable conclusion than that the jury intended and actually assessed his punishment at five *years* in the penitentiary. That they misspelled the word *years* as *yeas* under no circumstances could vitiate the verdict.

The testimony clearly showed this state of fact: About 8 o'clock on the night of October 13, 1915, appellant tried to hire Mr. Manly who ran a service automobile, to drive him out that night two or three miles in the country. Manly asked him what he was going to do out there. Appellant replied that it was none of his business; that he would pay him for it. Manly then told him he would not go without knowing what he was going to do out there. After some further parleying, appellant told him that there was going to be some bootleggers through the country who were going to camp out there for the night, and he wanted to go out there

and get the whisky; that he was going to get it. He said "We'll hold them up and get it." That he was going to play sheriff and tell them that he came after the whisky. He also told Manly then how much whisky there would be—a wagonload, 19 or 20 cases. Manly refused his services. Appellant then procured Mr. Antrim to haul him out there in his (Antrim's) automobile, agreeing with Antrim where he could be picked up after he started. Antrim picked him up at the place agreed upon, and also another man, whom Antrim did not know, and who was not identified. Antrim hauled appellant and this man out just past where Charles Hare and George Collins were camped, about two miles out of Nocona, with a wagonload of whisky. After passing them, he stopped, turned around, and went back opposite the wagon, where Hare and Collins had gone to bed. Appellant and his companion got out of the automobile, went to the wagon where these persons had gone to bed, and appellant drew and presented his pistol to them, ordered them up and out of the wagon and into the automobile, with which they complied. He asked them what they had in the wagon, and Hare told him 19 cases of whisky. Appellant falsely told them that he was the sheriff of the county, and intended to take them to Montague, the county seat, that night. Hare, the owner of the liquor, and Collins, too, tried to get him to let them hitch up their team to the wagon and take it back into the town of Nocona with them. This was on their direct route to Montague. He refused to permit this, but told him he would himself get a man to put in charge of it, and immediately did, going a short distance and getting another man, not identified, who evidently was one of his pals, and put him in charge of the wagon and team and liquor. Appellant then, with his companion, after forcing Hare and Collins into the automobile, as stated, got in and ordered Mr. Antrim to drive them to a certain point, which was a mile or more beyond Nocona, towards Montague, passing through Nocona in a circuitous route to prevent being seen, and there had Antrim to stop his automobile, claiming that it had broken down. He then ordered Hare and Collins out of the automobile. He then told them that probably the county attorney would not prosecute them even if he took them to Montague, and that he had concluded if they would go on—beat it and say nothing about the matter—he would turn them loose. They promised, and he turned them loose. On his way back, at their instance, he had them hauled back a part of the way to Nocona. After Hare and Collins got to Nocona, they proceeded on foot to get their loaded wagon and team that night. Before reaching the point where they had been robbed, they met appellant coming back in the automobile from the direction where they had camped, and saw

then either the whole or at least a part of said cases of liquor in the automobile, and appellant then told them that he had left them a little package. After thus meeting appellant, and before reaching where they had camped, they met their wagon and team and the man whom appellant had placed in charge of it, but all of the liquor had been taken. Antrim hauled appellant and his companion and the liquor they had placed in the automobile back to appellant's barn, where they that night secreted said cases of liquor. Some time the next evening the officers searched appellant's barn, but at that time found none of the cases of liquor therein. We have not given all the evidence in detail. We regard it as unnecessary. Appellant did not testify. He had his wife and others to attempt to establish an alibi for him by testifying that he was at home the night of this robbery.

[2-5] Appellant has a bill of exceptions to the court's overruling his application for a continuance. It is very brief, merely stating that the court overruled his application, "which application has been filed in this cause." The bill does not contain the application, or any part of it. We find it in the record. It was based on the absence of said Collins, by whom he expected to prove that he (Collins) could not and would not identify appellant as the party who perpetrated said robbery. The state later produced Collins, who testified to the reverse of what appellant said he would prove by him, and he swore positively in various ways to the identity of appellant as the robber. Another absent witness was Mrs. Johnson, whom he said he had had subpoenaed, as the attached subpoena would show. No subpoena is attached to the motion showing any such thing. He also claimed that she was sick, as shown by the certificate of a doctor attached. No such certificate is attached. He alleged that she would testify that the day previous to the night of the robbery appellant brought home some whisky and set it down on the porch, where she was washing for him at his house, that a part of this was alcohol which he had secured to doctor his horse's leg with, and that she had heard a telephone conversation by appellant with a veterinary doctor, asking whether the alcohol would blister the horse's leg. Another absent witness, Crow, he says, he believes would testify that on several occasions said Hare passed through Montague county with a wagonload of whisky, and that he was unlawfully introducing it into Oklahoma. This evidence by Crow would have been wholly inadmissible. The other absent witness he claimed was Ellis, who was later produced and testified. The court, in overruling his application for a continuance, says he tendered appellant attachments for said witnesses; that it was about 3 o'clock in the evening at the time he overruled this motion, and it was not prob-

able that the taking of testimony would begin until the next day, Saturday, nor probable that the case would be concluded before the following Monday, and that the court thought the said witnesses, who were within 9 or 10 miles from Montague, could be had before the testimony closed, and that he did not then consider testimony of the claimed witnesses material. Appellant did not avail himself of any writ of attachment offered by the court, and does not claim to have had any issued or attempted to be served. To his motion for a new trial, filed some time after the trial was concluded, he attached the affidavit of Mrs. Johnson. She does not swear therein at all that she had ever been subpoenaed as a witness in the cause, nor does she swear that she was sick at the time of the trial, or give any reason why she was not subpoenaed or was not present. She does swear that on the 12th or 13th of October, appellant "brought a box and set it down to the tub where I was washing," and took out two quarts of alcohol, and he said one bottle was to wash his mare's leg with, and asked her if it would take the hair off of it. She asked who prescribed it, and he told her the veterinary doctor, and she told him to phone the doctor, which he did. That she heard appellant say there was more whisky in the box, but she did not remember just how many he said there was. It will be seen that she did not know what was in the box other than she says he took out two quarts of alcohol. What he said to her would be hearsay, and also the telephone conversation between him and the veterinary doctor would be hearsay; but outside of this, he proved by disinterested witnesses that the day before the robbery he did receive by express some liquor, and by the veterinary doctor that he had advised him to use alcohol on the sore leg of his horse, and had a conversation with him over the phone about whether or not alcohol would take the hair off the horse's leg. From the whole testimony, it is clear that the alcohol and two quarts of whisky which were found in appellant's stall the evening after the night of the robbery was the liquor that he had received through the express company the day before, and was no part of the whisky he took from Hare. In the first place, under the showing he made, he was wholly lacking in diligence in procuring Mrs. Johnson's attendance. Even if it could be conceded that she was sick on Friday evening when he filed his application for a continuance, it is not shown, nor attempted to be shown, that she was too unwell to have attended the next day or the Monday following; and the mere fact, which seems to be all that her testimony would have been admissible for, that appellant the day before the robbery set a box down in her presence, of which she did not know the contents, and that he took two bottles of alcohol out of it to doctor his horse with, un-

der the circumstances of this case is of such minor importance the court was not required to grant a continuance or new trial on that account, nor would this court be justified in reversing the case.

[6] In an indictment for robbery, it is unnecessary to allege the value of the property taken. The value does not affect the penalty. Where such an allegation is made, it should be treated as surplusage. *Winston v. State*, 9 Tex. App. 143; *Williams v. State*, 10 Tex. App. 15; *Kelley v. State*, 34 Tex. Cr. R. 413; 31 S. W. 174; *Williams v. State*, 34 Tex. Cr. R. 531, 31 S. W. 405; and many other cases. So the court committed no reversible error when it permitted Collins to testify that the value of the liquor was \$195 in Wichita county, he claiming that the value in Montague, and not Wichita, should have been proven.

[7-8] Appellant requested several special charges, among them a peremptory instruction of acquittal; another, that the testimony was insufficient to establish the offense alleged, but, if any, swindling, and to acquit; another, that the offense alleged could only be committed by fraudulently taking property away from a person, and not by taking the person away from his property, and to not consider the testimony of Collins, because it does not show, or tend to show, the offense alleged, but only that of swindling, if anything, and he requested some others unnecessary to mention. None of these charges should have been given. None of them are shown to have been presented to the judge at the time required by the statute, nor is any reason shown why they should have been given. It is merely stated that appellant requested the charge, copying it, and the court refused to give it. Clearly, under the statute, and the many decisions of this court, these matters are not presented in a way that we are required to review them, but if we could, none of them should have been given. See *Ross v. State*, 170 S. W. 305, and many other cases since then following that decision. Also *Ryan v. State*, 64 Tex. Cr. R. 637, 142 S. W. 878, *Byrd v. State*, 69 Tex. Cr. R. 35, 151 S. W. 1068, and many other cases since then following them. Clearly, under the law, no charge on circumstantial evidence was called for. Under the testimony, the robbery occurred at the time appellant threw his pistol down on Hare and Collins, commanded them to get out of the wagon and into the automobile, and he himself took charge of the whisky and placed one of his pals in custody thereof. The robbery did not occur when appellant later came back and took part or all of the whisky and put it in the automobile; but, even if it did, this was shown by positive testimony. Under no circumstances did the testimony call for a charge on circumstantial evidence.

[10] The only other question raised is several complaints and bills to different short utterances in the argument of the county at-

torney. There were several of these. We think it unnecessary to detail them. In most instances, we think the county attorney was not out of the record, and had the right to argue as he did. In other instances, the court gave appellant's instructions to the jury, where proper, to disregard the argument, and still in addition the court by his qualification shows that the argument was provoked by and called for in answer to the argument of appellant's own attorneys. Such matters are frequently before us, as they have been always. In several recent cases, we have discussed such matters and the rules applicable thereto, going back to many of the early decisions where the rules were laid down. We think it unnecessary to again discuss this question, but instead will refer to some of these decisions. *Marshall v. State*, 182 S. W. 1108; *Little v. State*, 178 S. W. 326; *Kinney Miller v. State*, 185 S. W. 29; and Judge Davidson's concurring opinion, 45; *Mooney v. State*, 176 S. W. 56. It is unnecessary to collate the great number of cases along the same line.

The judgment is affirmed.

HUTSPETH v. STATE. (No. 4119.)

(Court of Criminal Appeals of Texas. June 14, 1916.)

1. LARCENY §50 — EVIDENCE — ADMISSIBILITY.

In prosecution for larceny the state may show accused's financial condition immediately before and immediately after the alleged theft.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 142; Dec. Dig. §50.]

2. LARCENY §3(2)—PROSECUTIONS—OFFENSE.

Where a finder of lost property at the time of the finding intended to appropriate it and deprive the owner he is guilty of larceny; but, if he subsequently converts the property, not having intended to do so at the time of the finding, he is not guilty, though the fact that the property did not contain any means of identification is no defense.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 4; Dec. Dig. §3(2).]

For other definitions, see *Words and Phrases*, First and Second Series, *Larceny*.]

3. CRIMINAL LAW §829(1)—TRIAL—INSTRUCTIONS.

The refusal of a requested charge covered by one given is not error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. §829(1).]

Appeal from District Court, Nolan County; W. R. Spencer, Judge.

Joe Hutspeth was convicted of theft, and he appeals. Affirmed.

John J. Ford, of Sweetwater, for appellant.
O. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of theft, and his punishment assessed at two years' confinement in the state penitentiary.

The facts would show that while Miss Ed-

na Kelsey was shopping in the city of Sweetwater, while going from the Sweetwater dry goods store to Cox's jewelry store, she lost her pocketbook containing four \$20 bills, a \$10 bill, and some silver. She described the pocketbook, and Dave O'Connell says as he was passing along the street he saw a pocketbook of this description, and, thinking it was placed there to fool some one, he kicked it on down the street; that after passing he saw appellant go and pick up the pocketbook, and shove it quickly in his pocket. Bessie Dykes says she saw appellant that afternoon, and he showed her a \$10 bill and some silver first, and gave her \$12.50, but she returned it to him. That appellant also showed her some more money, and said it was \$80, claiming that he had won it at a crap game. Afterwards he told her it had been paid to him by Mose Newman, and he had saved it and kept it at the Palace Drug Store. Mr. Newman testified that he had paid appellant no money since January before (this occurring in April), and appellant had been trying to borrow money from him. The proprietor of the Palace Drug Store testified appellant had never kept any money at his drug store. Bob May testified to appellant, two days after Miss Kelsey lost her pocketbook, paying him \$27.50 for a suit of clothes, and John R. Cox testified to appellant buying a watch and paying him \$22.50 for the watch.

[1] Appellant objected to Bob May, John R. Cox, and Bessie Dykes being permitted to testify about appellant having this money in his possession, as it was not identified as the money lost by Miss Kelsey. It is the rule in a case of this kind that the state may prove the financial condition of the person on trial just before and just after the theft, if such proof would shed any light on the transaction. *Armstrong v. State*, 34 Tex. Cr. R. 248, 30 S. W. 235, and cases cited in Branch's Ann. Penal Code, page 1304. Appellant requested peremptory instructions. The court did not err in refusing same, the evidence, in our opinion, being ample to sustain the conviction.

[2] Appellant requested two special charges, in which he asked the court to charge the jury "if the purse or contents did not contain any means of identification of the owner" to acquit appellant. We know of no authority announcing any such rule of law, and appellant cites none. The law governing a case of this kind was presented as favorably as he could expect in the third special charge given at appellant's request:

"In order to constitute the finding of lost property theft, the intent to deprive the owner of his property, and to appropriate it to the taker's own use and benefit, must have existed in the mind of the finder at the time he found such property and took possession of it; and, if the fraudulent intent to deprive the owner of his property and to appropriate the same to the use and benefit of the finder did not exist at the time of the finding, no subsequent appropri-

tion of such property by the finder would constitute theft. Now, if you believe from the evidence, that the lost money in question was found by the defendant, Joe Hutspeth, you are charged that you cannot convict him of the theft of such money unless you believe beyond a reasonable doubt that, at the time of the taking, if in fact you find there was a taking, that defendant took such money with the fraudulent intent to deprive the owner of the use and benefit of the same, and to appropriate it to his own use and benefit; and, in case you have a reasonable doubt as to the intention of defendant to so do, you should acquit him."

[3] The only other special charge requested was one in regard to circumstantial evidence. The court in his main charge gave a charge on circumstantial evidence; therefore it was unnecessary to give the charge requested on this issue. This charge, as given, is not upon the weight to be given the testimony, as contended by appellant. The charge as given is a full and fair presentation of the law as applicable to the evidence adduced. *Reed v. State*, 8 Tex. App. 40, 84 Am. Rep. 732; *Robinson v. State*, 11 Tex. App. 407, 40 Am. Rep. 790; *Stepp v. State*, 31 Tex. Cr. R. 351, 20 S. W. 753; *Wharton's Crim. Law*, vol. 2, pp. 1363-1373; *Branch's Ann. Penal Code*, pp. 1351-1352.

The judgment is affirmed.

DEBTH v. STATE. (No. 4121.)

(Court of Criminal Appeals of Texas. June 14, 1916.)

1. CRIMINAL LAW §1048—APPEAL AND ERROR—SCOPE OF REVIEW—PRESERVATION OF EXCEPTIONS.

On appeal matters not excepted to, but set up for the first time in motion for new trial, cannot be noticed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2656, 2657, 2670; Dec. Dig. §1048.]

2. CRIMINAL LAW §1056(1)—APPEAL—PRESERVATION OF EXCEPTIONS.

Unless contrary to the law and the facts, a charge, though erroneous, will not be treated as fundamental error, unless exception is taken on the trial and before the charge is read to the jury, either in felony or misdemeanor cases.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2668, 2670; Dec. Dig. §1056(1).]

3. CRIMINAL LAW §1137(3)—APPEAL—INVITED ERROR.

Defendant cannot complain of a charge given at his request, even though erroneous.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3007, 3009; Dec. Dig. §1137(3).]

4. CRIMINAL LAW §1053—TRIAL—SWEARING WITNESSES—RECORD.

Evidence cannot be held insufficient merely because the statement of facts fails to show on its face that witnesses were sworn, if no exception was taken at the trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2661, 2665; Dec. Dig. §1053.]

5. CRIMINAL LAW §1036(1)—APPEAL—REVERSAL.

Where defendant and his attorney agreed to use of affidavit of absent witness and made no

objection to its introduction at the trial, its admission is not ground for reversal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1631-1640, 2639; Dec. Dig. §1036(1).]

Appeal from Bexar County Court; Nelson Lytle, Judge.

William Debth was convicted of keeping and aiding in keeping a disorderly house, and he appeals. Affirmed.

Chambers & Watson, of San Antonio, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted under the second count of the information charging him with directly keeping and being concerned in keeping and aiding and assisting in keeping a disorderly house, etc., where men and women met by mutual appointment and by appointment made by another for the purpose of sexual intercourse.

The evidence shows that defendant had married a woman named Belle Cook, whom he had known some time prior to their marriage, and that he was living with her at the alleged disorderly house, and was in charge of the house as shown by the witnesses. Appellant testified in his own behalf, and stated that he had never rented a room either to Virginia Carothers or McMullen; that he was unaware that men and women met at his house for immoral purposes, but he knew that men and women frequently came there without baggage, and some time would stay all night, and some time only an hour or two and go away; that he was a machinist himself, but since his marriage to Belle Cook had not worked at his trade; that he was managing her property, which consisted of a house back of the Menger Hotel, the alleged disorderly house, and 15 acres of land; that he had no income on which to live except what he received from this property, and that his wife lived off the income from the same property; that he had known her two or three years before their marriage, and had lived with her since, making seven or eight years in all; that he had been at her place a number of times before he married her, but did not know what business she was in, and did not know whether she kept a disorderly house or not. Appellant introduced also Ella Jones, a white woman, who was housekeeper for Belle Cook, wife of the defendant. This woman testified that she did no scrubbing nor washed dishes, but did the housework, and that men and women often came there together, and sometimes would stay all night, sometimes only a short while, and that they never brought any baggage, and were not required to register, and that no register was kept for such purpose; that there was only one regular roomer in the house; that she knew Virginia Carothers, who had formerly lived in a house of prostitution, where witness also

stayed for a while; that Virginia Carothers was a sporting woman, and that said house was like the one occupied by the defendant; that Belle Cook and her husband, the defendant, were at their house on many occasions when rooms were rented, and she had seen them on some occasions talking to the parties renting the room; and that defendant and his wife lived there at the time alleged in the information, and had the care, custody, and control of said place, and were there the night of the raid by the officers. Two of the detectives testified, as well as two policemen, that they were with the police department of the city of San Antonio at the time of the alleged offense, and were familiar with the house back of the Menger Hotel where appellant lived, and knew the general reputation of the house, and that it was a disorderly house, and had been used as such for years, and was being used as such at the time they made the raid; that they had raided this house two or three times and found unmarried men and women in rooms together; that some of the women were well-known prostitutes; and that when they entered the house at the time alleged in the information they inquired for the landlord and keeper of the house, and defendant came forward and stated he was such, and if they had any business to take it up with him; that this was his place and he lived there. They further testified that a prostitute by the name of Virginia Carothers was taken out of a room with a traveling salesman by the name of McMullen, to whom she was not married, and that they were undressed, and that this was about 1 o'clock in the morning, and that another unmarried couple were found in another room of the same house at the same time, and that appellant was there at this time.

There is also evidence that an attorney named Cresson represented defendant on the trial before the jury, and on the former term of the court defendant asked for a continuance, which was granted, and that there was an agreement had with defendant in open court that, inasmuch as the state was then and there ready for trial, and had all of its witnesses present and that one, Virginia Carothers, a witness for the state, was likely not to be found again, and likely not to be present at the trial of this cause at a later date, defendant and his attorney then and there agreed with the court and the county attorney that the said Virginia Carothers should be then and there in open court sworn by the court and examined by the state and defendant, which was done, and defendant cross-examined her and elicited from said witness all testimony material to this cause, and agreed that said testimony then and there in open court obtained from said witness should be used at the trial of this cause at a later date, and that, in order to preserve said testimony exactly as it was given in open court, it should be reduced to

writing in narrative form, and sworn to by the witness, and that thereupon same was reduced to writing at once in the office of the county attorney, the attorney for defendant being present and agreeing to the statement as written, which statement was then and there exhibited to the defendant, which the defendant agreed was as given in the court, that the defendant and his attorney then and there agreed that it was as he wished it, and further agreed that said statement was to be read in evidence as the testimony of Virginia Carothers without reservation by both parties as all that Virginia Carothers knew or could testify to in this case, and that said statement be taken and admitted in evidence as of the same weight and merit as if the said witness was present at the trial and testified under oath as a witness the said statements that are included in said affidavit. She testified, without repeating it in detail, that she was at that time living in San Antonio, and was not married to McMullen, and never had been, and was not married to him at the time he and she were in a room at Belle Cook's house about midnight of the 13th day of December, 1915; that this was the third time she and appellant had been at Belle Cook's house and stayed there together for the night. Witness says she was rooming at the Menger Hotel at the time she went to Belle Cook's house, and when they got there Mr. McMullen made arrangements with Belle Cook and her husband, defendant, for the room they were to occupy on these different occasions, and on the first occasion in going there witness heard Belle Cook ask McMullen where he got such a pretty wife. She testified further she was a sporting woman, and was at this house the night the police made the arrest and the raid, and was in the room with McMullen, and they were undressed. She also said Belle Cook knew and had seen her there prior to this time; that both Belle Cook and her husband, appellant, were there at the time they were arrested, and when McMullen engaged the room. Without going further into detail, this is a sufficient statement of the facts. It might be stated further that Mr. Cresson, who represented appellant on the trial, is not the attorney representing him here, but other attorneys were employed.

[1-3] There was no exception taken to any action of the court during the trial. The court gave every charge asked by the state and the defendant. In the motion for new trial some matters are set up which, in our judgment, cannot be noticed because no exception was taken to any of the matters, except specified as grounds of the motion for new trial. The court at the request of the county attorney gave a general definition of what it takes to constitute a disorderly house, etc. The county attorney asked another charge applying the law to the facts of the case, and also a charge was asked by the de-

fendant. This charge asked by defendant is attacked by him in the motion for new trial and here because it is not the law, and that it is of such a nature it ought to reverse the judgment. In order to have the case reversed exception must be taken at the time of the trial and before the charge is read to the jury, if it be a felony, and the same rule has been held to apply to misdemeanors as under the statute before it was amended with reference to the time of taking exceptions to the charge.

In *Basquez v. State*, 56 Tex. Cr. R. 329, 119 S. W. 861, this matter came under review again, and, so far as the writer has been able to ascertain, has been followed by the decisions of the court since. Under that view of the law, even if the charge was erroneous, it would not be treated as fundamental error unless contrary to the law and the facts. The special charge given at the request of appellant is as follows:

"Unless you believe beyond a reasonable doubt that defendant, William Debth, was keeping the premises, or did aid, abet, assist in, or was concerned in keeping said premises where a woman and a man were found together, and unless you further believe also that the defendant, William Debth, rented a room to a man and a woman, or did aid, abet, assist in, or was concerned in renting said room, and at the time knew them not to be married, you will find the defendant not guilty."

This charge seems to be favorable to the defendant, and it is attacked largely because it fails to require the jury to find that the premises were rented to this man and woman for sexual intercourse by mutual agreement. In addition, the court gave the presumption of innocence and the reasonable doubt, etc. In the absence of an exception taken, these charges cannot be reviewed, especially the charge requested by appellant, if for no other reason under the doctrine of what is termed in the books invited error.

[4] Again, it is urged the evidence is not sufficient because it does not show the witnesses to have been sworn, and this only to be gathered from the statement of facts. Of course, the evidence of Virginia Carothers was sworn to at the time under the circumstances above stated. The statement of facts is silent as to whether the other witnesses were or were not sworn, and the ground of attack does not show whether they were or were not sworn. It seems to be based upon the fact that the statement of facts does not show on its face that they were sworn. We are of opinion this proposition is not well taken. In *Goldsmith v. State*, 32 Tex. Cr. R. 112, 22 S. W. 405, the proposition is laid down that, where a witness who was not sworn was permitted without objection to testify on the trial, it is too late on the motion for new trial to raise the question. The same proposition was laid down as far back as *Bell v. State*, 2 Tex. App. 217, 28 Am. Rep. 429. These cases have been followed, and some of the authorities will be

found collated in 5 *Rose's Notes*, on page 917 of that work. Reading from the syllabus as found in *Goldsmith v. State*, supra, this is quoted:

"It is too late on motion for new trial to urge that witness was not sworn before testifying, where no objection was made at the trial."

This was approved in *United States v. Armour & Co.* (D. C.) 142 Fed. 825; *Dodd v. State*, 44 Tex. Cr. R. 482, 72 S. W. 1015; *Coleman v. State*, 43 Tex. Cr. R. 17, 63 S. W. 322.

[5] It is again urged that the affidavit made by Virginia Carothers and used on the trial was not admissible, for various reasons, among others, it is contended defendant was not confronted with the witnesses, etc. However this may be, there was no bill of exceptions reserved to the affidavit. It was agreed to by the defendant and his attorney in open court, with the concurrence of the court, for reasons already quoted and stated above, and no objection was urged to it on the trial. It comes for the first time on motion for new trial. The writer has not agreed with the majority of the court on the question of the reproduction of testimony under the constitutional provisions requiring the accused to be confronted with the witnesses against him, but this question does not come within that rule as he understands it. A defendant may object to the reproduction of testimony or its production in any form if it has not been legally done. The rule is well settled also that in order to obtain advantage the testimony must be objected to at the time, with the exception of where the wife is used in behalf of the state. There being no exception, and the matter having been fully agreed to by the defendant and his attorney, Mr. Cresson, we find no error in this matter requiring a review of the question or a reversal for that reason.

As the record is presented, we are of opinion that there is no reversible error shown, or that the errors as shown are not of such nature and presented in such manner that they can be reviewed to the end of reversing the judgment.

The judgment therefore will be affirmed.

DERRY v. HARTY et al. (No. 5644.)

(Court of Civil Appeals of Texas. Austin.
April 19, 1916.)

1. APPEAL AND ERROR — 994(3), 995 — REVIEW — FINDINGS.

On trial by court without a jury, the court is the sole judge of the credibility of witnesses and weight of the testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3904–3905½, 3907; Dec. Dig. — 994(3), 995.]

2. HOMESTEAD — 181(3) — ABANDONMENT — EVIDENCE — WEIGHT.

In an action by a widow to recover title and possession of a lot as a homestead, evidence of

removal and declarations held to support a finding of abandonment.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 353; Dec. Dig. ¶181(3).]

3. HOMESTEAD ¶164—ABANDONMENT—ACQUIRING ANOTHER HOMESTEAD.

A homestead may be abandoned notwithstanding another has not been acquired.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 327, 328; Dec. Dig. ¶164.]

4. HOMESTEAD ¶163—ABANDONMENT—REMOVAL—INTENT TO RETURN.

Removal coupled with intent never to return constitutes abandonment of a homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 320-326; Dec. Dig. ¶163.]

5. HOMESTEAD ¶181½—ABANDONMENT—INTENT—QUESTION FOR JURY.

In an action raising issue of homestead abandonment, the intent to abandon is a question of fact for the jury or court trying the case.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 401; Dec. Dig. ¶181½.]

Appeal from District Court, Williamson County; C. A. Wilcox, Judge.

Action by Belle Derry against Charles L. Harty and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Wilcox & Graves and J. B. Robinson, all of Georgetown, for appellant.

RICE, J. Appellant, who is the head of a family, during the year 1908 purchased a house and lot in Georgetown, in which, with her children, she lived as a home until July, 1911, when she left it, going to points in Bell and Williamson counties, where, it seems, she picked cotton during that season with one Gus Derry, and later cooked for Mr. Roundtree. In the latter part of said year she and Derry were arrested and employed appellee Harty, an attorney, to represent them, by reason of which she became indebted to him for attorney's fees. In April, 1912, she married Derry and moved to Dallas, where she continued to live until July, 1914, when she returned to Georgetown; her husband having died in the meantime. Prior to the death of her husband, Harty obtained judgment against them for the amount due him as attorney's fees, and thereafter, on the 7th of January, 1913, levied an execution upon the lot in question, and sold the same thereunder, at which sale he became the purchaser, subsequently conveying it to W. R. McElroy, one of the appellees herein; and this suit was brought by appellant against Harty and McElroy to recover title and possession of the lot on the ground that the same was her homestead and not subject to forced sale at the time of the levy, as well as for damages for the alleged conversion of certain personal property left by her in the house. Harty and McElroy answered, denying that the property was her homestead, or that she was the head of a family, or that they had ever converted the personal property, and alleged that if the lot had ever been her homestead she had

abandoned it prior to and at the time of the levy, and that the same was subject to execution. The case was tried before the court without a jury, who found as a matter of fact that appellant had abandoned the property as her homestead prior to and at the time of the levy of the execution, and that she was not entitled to recover, and judgment was entered accordingly, from which this appeal is prosecuted; and the principal contention is that the court erred in finding as a fact that appellant had abandoned the property in question as her homestead.

[1-5] There being no jury, the findings of the court must be treated as we would the verdict of the jury; and, if there is any evidence to support it, the judgment must be sustained. See *Wells v. Yarbrough*, 84 Tex. 680, 19 S. W. 865. The court in such cases is the sole judge of the credibility of the witnesses and the weight of the testimony. See *Miller v. Himebaugh*, 153 S. W. 338. Appellant left her home in 1911, and did not return to it until 1914. She married in April, 1912, and moved with her husband to Dallas, where she lived until his death, which occurred in December, 1913, and continued to remain in Dallas until the following summer. At the time she left her home, and on numerous occasions during her absence, it was shown that she had frequently declared her intention never to return to Georgetown; that she expected to remain with her husband wherever he might go. When arrested she made a deed to this property to Mr. Roundtree to secure bond, declaring at the time that it was not her homestead, and that she never expected to live in it again. It was also shown that she had written to one of her sons during the time that she was absent, stating that she never expected to return home, and intended to give the place to her children. There was evidence, however, showing that when she left her home she left her household and kitchen furniture there in charge of the children, who remained in the house until the forcible entry and detainer suit was brought against them, when they surrendered possession to appellee Harty. She also specifically denied having stated that she never intended to return. The evidence in her behalf was sufficient, if the court had found in her favor, to have sustained its judgment. The judge, however, evidently disregarded the testimony of appellant and her witnesses. This was his province. *Jones v. Jones*, 146 S. W. 265-270, and cases there cited. It is true that during her absence she never acquired another homestead, but this was not necessary, since the homestead may be abandoned, notwithstanding another has not been acquired. See *Woolfolk v. Rickets*, 41 Tex. 362; *Oline v. Upton*, 56 Tex. 319; *McMillan v. Warner*, 38 Tex. 414; *Shepherd v. Cassidy*, 20 Tex.

29, 70 Am. Dec. 372; *Jordan v. Godman*, 19 Tex. 275. Removal, coupled with an intention never to return, constitutes an abandonment of the homestead. See *Cox v. Shropshire*, 25 Tex. 123; *Shepherd v. Cassidy*, supra; *Cline v. Upton*, supra. The question of intent to abandon is one of fact solely for the consideration of the court or jury trying the case. *McMillan v. Warner*, supra; *Edmonson v. Blessing*, 42 Tex. 601.

While the evidence, as we have seen, would have sustained a finding in favor of appellant, still, there is ample evidence, in our opinion, to support the judgment of the court, for which reason the same is in all things affirmed.

Affirmed.

CROSS et al. v. WILKINSON et al.*
(No. 5570.)

(Court of Civil Appeals of Texas. Austin. Feb. 16, 1916. On Motion for Rehearing, April, 1916. Rehearing Denied June 7, 1916.)

1. BOUNDARIES \S 40(1) — **OFFICIAL SURVEYS** — **LAND INCLUDED.**

In trespass to try title, evidence of the location of boundary lines of county school lands held to raise a question for the jury.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. \S 196-208; Dec. Dig. \S 40(1).]

2. PUBLIC LANDS \S 175(5) — **OFFICIAL SURVEYS** — **STATUTORY PROVISIONS** — **"SURVEY."**

Rev. St. 1896, art. 4269 (Acts 18th Leg. c. 40) validating surveys theretofore made of county school lands, declaring vested in the several counties "the titles to the lands included in the lines of said surveys and returned to the general land office," does not mean that in ascertaining the boundaries of county school lands such construction will be given to the field notes so returned to the land office as to give to the county the benefit of those calls most favorable to the county, and the word "survey," in the expression "the land included in the lines of the survey," does not mean the diagram or map required by Rev. St. 1911, art. 5336, to be returned with and as a part of the field notes, but is there used as synonymous with "field notes," although the survey, accurately speaking, is the land included in such field notes.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. \S 565, 566; Dec. Dig. \S 175(5).]

For other definitions, see *Words and Phrases*, First and Second Series, Survey.]

3. PUBLIC LANDS \S 175(6) — **OFFICIAL SURVEYS** — **STATUTORY PROVISIONS.**

Such act by its express terms is applicable only to surveys which had been patented at the time it was passed.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. \S 568, 569; Dec. Dig. \S 175(6).]

On Motion for Rehearing.

4. PUBLIC LANDS \S 178(1) — **CONVEYANCE BY COUNTY** — **WARRANTY** — **LIABILITY.**

Where a county sells land to which it has good title by patent from the state, and conveys by the same description as in the patent, it is not liable to the purchaser on account of differences or difficulties in ascertaining the boundaries of the tract conveyed, since when the boundaries are ascertained the purchaser's title is good.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. \S 579; Dec. Dig. \S 178(1).]

Error from District Court, Travis County; Geo. Calhoun, Judge.

Action by Ed Wilkinson and others against Jesse F. Cross and others. From a judgment for plaintiffs against the named defendant and certain others, they bring error. Reversed as to them, and affirmed as to defendant La Salle County, as to which plaintiffs were denied relief.

A. H. Kirby, of Ft. Worth, E. H. Yelser, of Austin, and Theodore Mack, of Ft. Worth, for plaintiffs in error. Morrow & Morrow, of Hillsboro, for defendants in error.

JENKINS, J. We copy and adopt the following from plaintiffs in error's preliminary statement as to nature and result of this suit, omitting references to pages of the transcript:

"Defendants in error Ed. Wilkinson, Ed. Woodall, W. O. Robertson, and Pat E. Hooks, as plaintiffs, instituted suit in the form of trespass to try title against Jesse F. Cross, Cora B. Cross, H. Allison, H. O. Conway, Ben O. Smith, W. H. Grove, J. C. C. Martin, H. L. Stewart, J. C. Hartzog, H. T. Shumake, G. W. Walcott, O. B. Holt, T. B. Duncan, and La Salle county, as defendants, for the title and possession of a tract of land described as a part of La Salle county school land leagues Nos. 322, 323, 324, and 325, in Martin county, Tex.

"H. T. Shumate answered by general denial and not guilty, and by cross-action for a tract of land lying west and south of the La Salle county leagues. La Salle county filed plea of privilege, plea in bar, and its answer consisting of exceptions, general denial, and not guilty, and specially that the lands were conveyed by it in bulk and for a lump consideration, and gave only a special warranty.

"Jesse F. Cross and Cora B. Cross answered by general denial and not guilty. Ben O. Smith, W. H. Grove, and T. B. Duncan disclaimed as to all of the land except surveys Nos. 1, 2, and 3, block 10, known as the Jesse F. Cross surveys, describing same by field notes, and also by general denial and plea of not guilty. Defendants J. C. C. Martin, H. L. Stewart, A. F. Blue, and J. B. Smith filed plea of privilege and special demurrer. The plea of privilege was overruled, and the demurrer sustained. These defendants answered by adopting the pleadings of the plaintiff in so far as they sought to establish the boundary lines of the four leagues of the La Salle county school land, and in all other respects denied the allegations of plaintiffs' petition.

"The case was tried before a jury, and on a peremptory instruction given by the court the jury returned a verdict for plaintiffs, and judgment was entered in accordance with such instruction.

"Defendants W. H. Grove, Ben O. Smith, T. B. Duncan, and Jesse F. Cross filed their motion for new trial, which was overruled by the court. W. H. Grove, Ben O. Smith, Jesse F. Cross, Cora B. Cross, and T. B. Duncan filed their petition for writ of error and writ of error bond, and brought the case before this court for review.

"This is really a boundary suit involving the location of the lines and corners of the four leagues of La Salle county school lands, the plaintiffs in the lower court claiming that said boundaries included the lands claimed by plaintiffs in error, which lands were surveyed by the state and platted as existing between the La Salle county school land leagues and the Texas

& Pacific surveys, and sold to plaintiff in error Jesse F. Cross as public school land.

"Plaintiffs in error insist that a vacancy existed between the system of school land leagues of which the La Salle county leagues formed a part and the Texas & Pacific system of surveys made at a different time by a different surveyor, and that, the lands claimed by them having been surveyed on such vacancy, the surveys were valid, and were not included in the boundaries of the La Salle county school land leagues. There is no question raised in the record as to the title of plaintiffs to the four leagues of La Salle county school land, and none as to the title of plaintiffs in error to the Jesse F. Cross surveys, if said surveys, in fact, exist."

[1] The evidence as to the location of the boundary lines of the La Salle county school land did not justify a peremptory instruction in favor of the plaintiffs in the court below, defendants in error herein. On the contrary, in our opinion, the evidence greatly preponderated in favor of plaintiffs in error as to the location of the lines and corners of the La Salle county school lands, as originally surveyed. To say the least of it, the evidence was sufficient to raise the issue of boundary for the jury to decide. As this case is to be reversed, we do not deem it proper to further comment on the evidence as to boundary.

[2] The other grounds relied upon, and which evidently formed the basis of the court's action in this matter, was that such charge was required by article 4269, R. S. 1895 (Acts Leg. 1883, p. 28) which reads as follows:

"Art. 4269.—The surveys of all county school lands heretofore made, either actually on the ground or by protraction, and returned to the general land office, according to law, and upon which patents have issued, are hereby declared valid surveys, and the titles to the lands included within the lines of said surveys, as returned to the general land office, are hereby vested in the counties for which the same were made; and in all such surveys the calls for distance shall have precedence and control calls for rivers or natural objects when the calls for distance will give the quantity of land intended to be included in the survey and the calls for natural objects or rivers will not; provided, this law shall not divest any vested right."

It is contended that this act of the Legislature is applicable in the instant case by reason of the fact that the field notes of the La Salle county school land leagues 322 and 325 call for the lines of sections 1 and 6, Texas & Pacific Railroad surveys, which were located prior to said county school land surveys, and also by reason of the fact that the sketch of said county school lands returned to the land office with said field notes showed that the western lines of leagues 322 and 325 coincided with the eastern lines of the railway company surveys. The field notes referred to are as follows:

322: "Beginning at a point the S. E. corner of 320; thence S. 13° E. 5,000 vrs. to corner on west line of section 2, township 2 north, and block 37 of the Texas & Pacific Railway surveys 500 vrs. S. 13° E. from N. W. corner of said section; thence S. 77° W. 5,000 vrs. to mound for corner; thence N. 13° W. 5,000 vrs.

to S. W. corner of No. 20; thence N. 77° E. 5,000 vrs. to place of beginning."

325: "Beginning at a point the S. E. corner of 322; thence S. 13° E. 5,000 vrs. to a point on the west line of section 6, township 2 N., Blk. 38, T. & P. sur. 200 vrs. N. 13° W. from the S. W. corner of said sec. 6; thence S. 77° W. 5,000 vrs. to S. E. corner of No. 324 (school land); thence N. 13° W. 5,000 vrs. to mound 3 feet high, N. E. corner of 324; thence N. 77° E. 5,000 vrs. to the beginning."

The sketch of this block of county school land surveys, consisting of 81 leagues, showed that the western lines of leagues 322 and 325 connected with the eastern lines of the Texas & Pacific surveys Nos. 2 and 6, to the extent indicated by their calls, and also with the line of section 3 lying between sections Nos. 2 and 6.

If we should follow the decision of the Supreme Court in *Steward v. Coleman County*, 95 Tex. 445, 67 S. W. 1016, as was done by this court in *Lewright v. Travis County*, 54 Tex. Civ. App. 540, 118 S. W. 725, we would affirm the judgment of the trial court. As was said in the latter case:

"In its final analysis this decision (*Steward v. Coleman County*) means that, in ascertaining the boundaries of county school lands, such construction will be given to the field notes so returned to the land office as to give to the county the benefit of those calls that are most favorable to" the county.

We do not think that the article of the statute referred to admits of such construction. Nothing but a firm conviction of the correctness of our views herein would induce us to decline to follow an opinion of the Supreme Court of this state, and especially one written by the learned judge who wrote the opinion in *Steward v. Coleman County*, whom we regard as one of the ablest jurists who ever sat upon the supreme bench of this or any other state. The writer of this opinion, who speaks for this court, is not conscious of being influenced herein by the fact that he was of counsel for *Steward* in the *Coleman County Case*. That case was settled long ago, and *Steward* is in his grave. The act in question was not referred to in the *Coleman County Case*, supra, in the trial court, nor in the briefs or arguments of counsel in the Court of Civil Appeals, as the record, which we have to-day examined, shows, nor in the Supreme Court, except in a supplemental argument filed on behalf of the county, of which the writer knows, by reason of having been of counsel in that case, counsel for *Steward* had no notice of. By reason of the fact that the case was compromised, *Steward* did not file a motion for rehearing in the Supreme Court. For these reasons we do not think that the Supreme Court gave their usual mature consideration to the interpretation of article 4269 above set out. In fact, for reasons herein-after stated, we think that all that was said in that case in reference to this article was dicta.

In the concluding portion of the opinion in

Steward v. Coleman County, supra, the court says:

"It will not do to say that the language 'lands included within the lines as returned to the general land office' means merely such lands as are found on a trial of the question of boundary, to be so included; for that construction would make this provision wholly useless."

On the contrary, the act might be very useful to a county or counties. In ordinary trials of questions of boundary calls for natural objects take precedence over calls for distance and quantity. But this statute reverses the rule, and declares that:

"The calls for distance shall have precedence and control calls for rivers or natural objects when the calls for distance will give the quantity of land intended to be included in the survey and calls for natural objects or rivers will not."

Thus, if a county school land survey called to begin at a known corner, and to run thence a given course and distance for another corner on the bank of a river or creek, and such natural object would be reached short of the distance called for, thereby reducing the intended area of the survey, this act, if the land beyond the river or creek was vacant, so that vested rights would not be interfered with, extended such lines the distance called for in the field notes, and appropriated such additional land to the county. If the Legislature did not have one or more such surveys as this in mind, then, indeed, all that portion of the statute referring to calls for natural objects or to course and distance was indeed useless. If a number of such surveys had been made and returned to the land office, great loss might have occurred to the counties but for the passage of this act, and that is just what the emergency clause of the act declares. There is no hint in the act that the Legislature intended to favor counties by giving them more land than the field notes of their surveys called for, but only that under the conditions mentioned they should not lose any part of the quantity of the land to which they were entitled under the laws of this state.

But this act might have been beneficial to counties in another respect. It declared that all surveys for county school lands theretofore made and returned to the general land office according to law were "valid surveys," from which it might be inferred that the Legislature was informed that some surveys had been made and the field notes returned to the land office as required by law, which were not valid surveys. That such was the main purpose of said act appears from its enacting clause, which reads:

"An act to validate certain surveys heretofore informally or defectively made, in locating the county school lands of this state."

Surveys which have been legally made and returned to the land office, but which by reason of their calls for natural objects did not include within their lines the quantity of land intended, did not need validat-

ing. They were already valid surveys, whether made upon the ground or by protraction, and included all of the land within their lines, as the location of such lines might be fixed by the rules governing the location of boundaries.

The act referred to declares the counties to be the owner of "the lands included within the lines of said surveys, as returned to the general land office." Section 1. The field notes of a survey are in all cases the field notes returned to the land office. The owner of a valid certificate is the owner, in all cases, of the land included within the lines of his survey, though it is frequently a mooted question as to what lands are so included.

In *Steward v. Coleman County*, supra, the court lays stress upon the words "the lands included within the lines of said surveys, as returned to the general land office." The word survey is here used as synonymous with "field notes." It was the "field notes" which the law required to be returned to the land office. The survey, accurately speaking, is the land included in such field notes, not necessarily as shown by the calls therein for course and distance, nor for lines of prior surveys, nor for natural or artificial objects, but whichever of one or more such calls most correctly showed, under the facts and circumstances of a given case, what land was embraced within the survey. In every instance the surveyor was required by the statute to return with, and as a part of his field notes a "diagram" or map of his survey (Rev. St. 1911, art. 5336); but this diagram or map, while it might aid in construing the field notes, was at most, only a part of such field notes or survey, and could in no proper sense be said to be "the survey" returned to the land office. And this the Legislature is presumed to have known, and, if it was intended that the map or diagram returned by the surveyor should control all other portions of the field notes, it is but fair to the Legislature to presume that it would have said so. But, instead of so doing, the word "map" or "diagram" is not used in said act. Such maps or diagrams have always been held to be admissible in evidence on the issue of boundary, but they have never been given controlling effect in locating the lines of surveys. In every instance where a survey calls to begin upon one survey and run to another survey, if the surveyor did his duty, he returned with his field notes a diagram showing that his survey covered all of the vacancy between such prior surveys; but, notwithstanding such map, and the calls for the lines and corners of the prior surveys, it has been held in many cases that the survey, as shown by the field notes returned to the land office, did not embrace all of such vacancy. All this the Legislature is presumed to have known, and, in the absence of anything appearing to the contrary, is presumed to have used the

words "the land included in the lines of said surveys as returned to the general land office" in the ordinary sense of those words.

That portion of the act declaring that the counties are the owners of the lands included within their surveys, taken by itself, was useless, and added nothing to the rights of the counties. They were, by virtue of the Constitution and the laws regulating the location of vacant lands, already the owners of "the lands included within the lines" of their surveys, if the same were valid surveys. But, when taken in connection with the previous portion of the act which validated such surveys, and with the subsequent portion of the act, which extended the lines of the surveys the distance required to give the quantity intended, it was very useful to the counties having surveys to which it was applicable.

We have said in a previous portion of this opinion that we regard all that was said in the Coleman County Case with reference to the act there referred to as dicta. Our reason for this statement is this: The act, by its terms, applies only to two classes of county school land surveys; one where the survey made and returned to the land office within the time and manner required by law was invalid; the other where, by reason of calls for natural objects, the lines of the surveys were shorter than the distance called for in the field notes, and for that reason the survey did not embrace the quantity of land intended. In the Coleman county survey there was no question as to the validity of the survey, and there was no call for a river or other natural object. The call to which it was sought to extend the line was a call for an open and unmarked prairie line, which might or might not control the call for distance without reference to said act. It was not sought by the county to give "precedence and control" to "the call for distance," but to ignore such call in favor of a call, not for a natural object, but which, at most, was a call for an artificial object. It was not sought to give such control to the call for the lines of older surveys in order to give the county "the quantity of land included in the survey," but in order to give it about 1,500 acres more than such quantity, all of which appears from the opinion in that case.

The constitutionality of the act referred to, in so far as it relates to the construction of field notes, may be questionable, as not being disclosed by the caption of the act, but, as this issue has not been presented in this case, we will not pass upon it.

[3] We sustain appellants' assignments of error for another reason. Article 4269, R. S. 1895, is, by its terms, applicable only to surveys which had been patented at the time such act was passed. It was approved March 21, 1883, and took effect from and

after its passage. The La Salle county surveys were patented November 1, 1883.

For the reasons stated, the judgment of the trial court herein is reversed, and the cause is remanded.

Reversed and remanded.

On Motion for Rehearing.

[4] This is a boundary suit, and La Salle county was made a party on its warranty. There is no question as to the title of La Salle county to the land described in its patents. That is the land, and no other, which was sold by La Salle county. No survey was made, and no particular land was pointed out to the purchasers. Whether it shall be determined that the La Salle county school lands are located to the west and south, as contended by appellees, or to the north and east, as contended by appellants, is immaterial so far as La Salle county is concerned, as in either event its grantees will get the land described in their deeds; such description being the same as in the patents. As in no event could any judgment be rendered against La Salle county on its warranty, the motion of said county for a rehearing is granted, and the judgment of the trial court in its favor is affirmed.

Motion granted.

WESTERN UNION TELEGRAPH CO. v. GRIFFIS. (No. 583.)

(Court of Civil Appeals of Texas. El Paso. June 1, 1916.)

TELEGRAPHS AND TELEPHONES \S 67(2)—DAMAGES FOR MENTAL SUFFERING — DELAY IN DELIVERY.

A telegraph message, worded, "Your father died this afternoon at four o'clock" being insufficient to charge the telegraph company with notice that the addressee of the message would request a postponement of the funeral until he could arrive, the damages suffered by addressee by delay in delivery of the message preventing him from attending his father's funeral were too remote.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. \S 65; Dec. Dig. \S 67(2).]

Appeal from District Court, Taylor County; Thos. L. Blanton, Judge.

Action by R. W. Griffis against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

J. M. Wagstaff, of Abilene, and N. L. Lindsley, of Dallas, for appellant. W. P. Mahaffey, of Abilene, for appellee.

HIGGINS, J. Appellee sued appellant to recover damages alleged to have been sustained by reason of alleged negligent delay in the delivery of a telegram sent to appellee by T. O. Griffis, advising of the death of appellee's father. Verdict was returned and judgment rendered in favor of plaintiff in sum of \$250.

as damages occasioned by his failure to attend the funeral of the deceased. The defendant prosecutes this appeal therefrom, assigning as error the refusal of a requested peremptory instruction in its favor.

Thomas Griffis, father of appellee, died at his residence near Lynnville, Tenn., on Sunday, July 4, 1915, at 4 p. m. After his death, T. O. Griffis phoned to appellant at Pulaski for transmission and delivery to appellee at Abilene, Tex., this message:

"Lynnville, Tennessee, 4:25 p. m., July 4th, '15. R. W. Griffis, Route 6, Abilene, Texas. Your father died this afternoon at four o'clock. T. O. Griffis."

The message was promptly transmitted to Abilene, and reached there about 6 p. m. of the same day. It was delivered to appellee on Tuesday, July 6, 1915. For the purpose of this opinion, it will be assumed that the jury was warranted in finding that the delay in the delivery of the message to this date was negligent upon the part of defendant, though this finding is vigorously contested, and it is contended that the undisputed evidence shows no negligence upon appellant's part in failing to make earlier delivery. Under the view which we have of the case, it is unnecessary to pass upon this question, and we express no opinion upon that phase of the case. Thomas Griffis was buried at 4 p. m., Monday, July 5, 1915, near Lynnville. R. W. Griffis, the sender of the message, testified that he was one of the persons in charge of the funeral arrangements and burial of the deceased, and, had appellee telegraphed him that he was coming to Lynnville to attend his father's funeral, he would have asked that the funeral be delayed until his arrival.

Appellee testified that, had the message been delivered to him promptly after it reached Abilene, he would have wired back and told them to hold his father's body and postpone the funeral until he got there; that he would have started to Lynnville the same night at 11 o'clock; he would go from Abilene to Pulaski; thence to Lynnville, which was the nearest railroad station to the place where his father died and the nearest to the place of interment; that he would have reached there Tuesday night, July 6th, or Wednesday morning, July 7th; that he was expecting a message of this kind and was prepared to go at any time.

J. D. Griffis, a brother of appellee, testified he was one of those in charge of the funeral arrangements and burial of deceased; that the message sent appellee was sent at his (witness) request, and, had they received a message from R. W. Griffis asking that the funeral be delayed, they would have kept the body until his arrival.

Appellant advances the proposition that the plaintiff's claim for damages is too remote, and in this contention he is supported by *Telegraph Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; *Telegraph Co. v.*

Motley, 87 Tex. 38, 27 S. W. 52, and *Telegraph Co. v. White*, 149 S. W. 790. This case falls within the principle announced in the cited cases, and upon the authority thereof it must be held that a peremptory instruction should have been given in appellant's favor. Appellee relies upon *Telegraph Company v. Swearingen*, 97 Tex. 293, 78 S. W. 491, 104 Am. St. Rep. 876; *Telegraph Co. v. Norris*, 25 Tex. Civ. App. 43, 60 S. W. 982; *Telegraph Co. v. Lyman*, 3 Tex. Civ. App. 460, 22 S. W. 656; and *Telegraph Co. v. Ford*, 40 Tex. Civ. App. 474, 90 S. W. 677. But in each of these cases the message bade the addressee to come, and in such case the telegraph company was properly charged with notice that the injunction would probably be obeyed and that all necessary arrangements would be made, so that interment would not take place until the addressee arrived. A telegraph company handling such a message must reasonably have foreseen that the addressee would wire back and have the funeral postponed if such was necessary in order to prevent the same occurring before the arrival of the addressee. This, we think, is the main distinguishing feature between the line of cases first cited and those relied upon by appellee. In the case at bar the message, in our judgment, is insufficient to charge the defendant with notice that appellee would request a postponement of the funeral, and the damages for which recovery is sought are too remote. This is the rule, as we deduce it from the *Linn* and *Motley* Cases.

The message considered in *Johnston v. Telegraph Company*, 167 S. W. 272, was of a precisely similar nature to this one. In principle, the cases cannot be distinguished. In that case, the trial court sustained a general demurrer to the petition. Upon appeal, the Court of Civil Appeals reviewed the cases noted above and held that the principle announced in *Linn*, *Motley*, and *White* Cases did not apply, but the case was ruled by the *Swearingen* and *Norris* Cases, and remanded the cause. Thereupon, the Supreme Court granted a writ of error and in doing so, we are informed, made this notation:

"We think the terms of the message do not give notice that the plaintiff would request a postponement of the funeral."

In view of the action of the Supreme Court in the *Johnston* Case, it is evident that court is inclined to the view that the *Linn* and *Motley* Cases were applicable; and, if they are applicable in that, they are in this case also.

For the reason indicated, it must be held that the damages sought to be recovered herein are too remote, and the peremptory instruction should have been given.

Accordingly, the judgment of the court below is reversed and here rendered in appellant's favor.

Reversed and rendered.

**FARMERS' & GINNERS' COTTON OIL CO.
v. CLEBURNE OIL MILL CO.**
(No. 5685.)

(Court of Civil Appeals of Texas. San Antonio.
June 7, 1916. Rehearing Denied
June 27, 1916.)

1. SALES — 22(3)—CONTRACTS—ACCEPTANCE.

An oil company could not be bound by a broker's contract or memorandum of sale of oil to the plaintiff, unless it accepted the terms of the contract; and, if it did not accept the terms and notified the plaintiff through the broker, it owed no duty whatever to the plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 41; Dec. Dig. 22(3); Contracts, Cent. Dig. §§ 71, 75.]

2. SALES — 53(2) — ACTION FOR BREACH OF CONTRACT—QUESTION FOR JURY.

In an action for the breach of a contract for the sale of oil to the plaintiff, evidence held to make the defendant's acceptance of the contract a question for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 148; Dec. Dig. 53(2).]

Appeal from Travis County Court; Wm. Von Rosenberg, Jr., Judge.

Action by the Cleburne Oil Mill Company against the Farmers' & Ginnners' Cotton Oil Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded.

Lightfoot, Brady & Robertson, of Austin, for appellant. Hart & Woodward, of Austin, for appellee.

SWEARINGEN, J. Appellee alleged: That on September 16, 1913, it purchased of and from appellant, through Early-Foster Company, of Waco, Tex., as broker, 5 tanks of prime, crude, cotton-seed oil at 42 cents per gallon delivered f. o. b. cars at Wolfe City, Tex.; said contract being evidenced by a written confirmation in triplicate, executed by said broker on said date. That such execution by the said broker of said contract was accepted and ratified by appellee and appellant as the act and deed of each of said parties. Appellee alleged a breach of the contract by appellant and sued for \$480 damages. Appellant denied that it contracted with appellee to deliver the five tanks of cotton-seed oil f. o. b. cars at Wolfe City, Tex. Answered that the memorandum made by the broker was forwarded to appellant for acceptance, but immediately upon receipt of the memorandum, appellant refused to accept the contract as written in the memorandum of sale by the broker and immediately notified the broker that it would not accept the contract. And appellant further averred that the broker promptly notified the appellee that appellant refused to accept the contract as written in the memorandum of sale. Several other issues were pleaded by both parties, which, under our view of the case, need not be stated. Upon motion by appellee, the court gave a peremptory instruction to return a verdict in favor of appellee for

\$480, upon which verdict the court rendered judgment against appellant.

All six of appellant's assignments very properly complain that the trial court erred by giving to the jury the peremptory instruction to return a verdict in favor of appellee.

[1] It is elementary that appellant could not be bound to appellee by the contract unless appellant accepted the terms of the contract. If appellant did not accept the terms of the memorandum of sale, and notified appellee thereof through the broker immediately, he owed no contract duty whatever to appellee, whether usage or custom, or broker's memorandum, or rules of the Cotton Crushers' Association. Appellant neither owed the duty to appellee to sell it oil, nor to notify it when or where to send empty tank cars to receive appellant's oil.

[2] The question, whether appellant accepted the contract or not, was the issue made by the pleadings, and there was certainly a conflict in the testimony upon that fundamental issue. The broker in Waco wrote out the memorandum of sale, which, among other things, stated that the oil was to be f. o. b. Wolfe City. A triplicate of this memorandum was sent to appellant at Austin, Tex. for confirmation, and a triplicate copy to appellee for confirmation or acceptance. There is no conflict in the evidence as to these recited facts. However, whether or not appellant accepted the memorandum of sale is sharply contested. That appellant did not accept the memorandum of sale is positively testified to by the manager of appellant, whose duty it was to make sale contracts for appellant, and who testified that immediately upon receipt of the memorandum of sale he phoned the broker that appellant would not accept the sale; that it would not sell f. o. b. Wolfe City. In this testimony the manager was corroborated by the testimony of the broker himself, who testified that appellant's manager immediately notified him that appellant would not accept the sale contract to deliver oil f. o. b. Wolfe City, and the broker further testified that he notified appellee promptly that appellant refused to accept the sale contract. On the other hand, the manager for appellee testified that he never heard or knew that appellant refused to accept the sales contract, and relied upon the triplicate memorandum of sale dated September 16, 1913, which he had received.

This illustrates the conflict in the testimony upon the issue of acceptance by appellant of the sale contract, but is by no means all the circumstances shown by the testimony. To determine this issue was absolutely essential to a determination of the case. It was the exclusive province of the jury to determine the issue from the conflicting testimony. It seems from the evidence that appellant thought it had a contract for delivery f. o. b. cars at Austin, whereas ap

pellee thought it had a contract requiring delivery f. o. b. Wolfe City, and both traveled their respective divergent routes in their dealings after September 16, 1913, and naturally separated further and further. If this be true, there never was any agreement between the parties.

The assignments are correctly taken and are sustained.

The judgment of the trial court is reversed, and the cause remanded.

HARTFORD LIFE INS. CO. et al. v. BENSON. (No. 5592).*

(Court of Civil Appeals of Texas. Austin. March 22, 1916. Rehearing Denied June 7, 1916.)

INSURANCE — 179½ — POLICY LOAN AGREEMENT — VALIDITY.

In a paid-up life policy loan note, an agreement by insured and beneficiary that on nonpayment of the note the amount of paid-up insurance guaranteed in the policy should be reduced in the same proportion as the indebtedness bore to the cash surrender value is reasonable and valid and in harmony with the policy indicated by Rev. St. 1911, art. 4741, requiring policies to stipulate that "the failure to repay any such advance or to pay interest shall not void the policy until the total indebtedness thereon to the company shall equal or exceed the loan value," although not providing for a sale of the policy pledged for nonpayment of the note, since there can be no general market for life insurance policies outside of relatives and creditors.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. — 179½.]

Error from District Court, Tom Green County; J. W. Timmins, Judge.

Action by Mrs. Ora Benson against the Hartford Life Insurance Company and another. Judgment for plaintiff, and defendants bring error. Reversed and rendered in part, and in part reformed and affirmed.

Plaintiffs in error's brief contains the following correct statement of the nature and result of this suit, and the facts relied on for a reversal:

"This suit was brought by Mrs. Ora Benson to recover from the Hartford Life Insurance Company and the Missouri State Life Insurance Company on a policy for \$2,000 issued by the first-mentioned company on the life of her husband. The plaintiff sought judgment for the face of the policy, less the amount of a loan. It was alleged that Missouri State Life Insurance Company had reinsured the business of the other company, and had assumed all of its obligations; hence judgment was asked against it also.

"The defendants denied liability for any greater sum than \$50, for which sum they admitted liability, and pleaded a tender thereof prior to the institution of suit. About 8½ years before the death of the insured the company made a loan on said policy of \$788. The plaintiff and the insured made written application for such loan, and the same was evidenced by a loan note executed by the plaintiff and the insured. At the time of securing said loan all premiums due under the policy had been paid, and it had become a paid-up policy for its face amount, payable on the death of the insured, though several of the last premiums had been paid with the

proceeds of loans under said policy. A provision of the loan note stipulated that, should any installment of interest thereon remain unpaid for 30 days, the amount of paid-up insurance guaranteed in the policy should be reduced in the same proportion as the indebtedness bore to the cash surrender value thereof, and that the company should not thereafter be liable on the policy, except for the amount of paid-up insurance so reduced. The interest installment due July 6, 1911, not having been paid upon that date, nor within 30 days thereafter, the defendant company satisfied the note in pursuance of the terms of the loan agreement, allowing, however, a greater cash surrender value than was required under the policy, indorsed said policy as a paid-up policy for \$50 in pursuance of the agreement, and duly notified the insured of its action. The insured made no complaint, and died on December 30, 1912, 14 months thereafter.

"The plaintiff contended that the rights of the parties were to be determined just as if the stipulation in the loan agreement did not exist, and as if the company had not taken the action indicated. The case was tried before the court without a jury, on an agreed statement of facts, and resulted in a judgment in favor of the plaintiff for the face of the policy, less the amount of the note and interest thereon, and together with statutory attorney's fees and penalties. The court filed findings of fact and conclusions of law. The defendants duly filed a motion for new trial, and, the same having been overruled, they sued out this writ of error for the revision and correction of the judgment.

"The policy in suit was a 10-payment life policy; that is to say, a policy requiring the payment of premiums for 10 years and payable on the death of the insured. The policy was issued July 6, 1900, and became paid up by the payment of the tenth premium in July, 1909. Thereafter, under date of July 30, 1909, the insured and plaintiff applied to defendant Hartford Life Insurance Company for a loan of \$788 on the policy, the same being the entire loan value promised in the policy, the application for the loan in part reading as follows: 'I do hereby apply for a loan of \$788 to be made upon said policy, subject to the conditions of the loan note executed by me this day, and do hereby agree that said loan shall be and continue a lien upon said policy and on the money that may become due thereon until said loan and interest thereon shall be fully paid.' Upon the same date the plaintiff and the insured, in exchange for the amount of the loan, executed and delivered to the company their loan note or agreement as follows:

"\$788.00. Policy No. 258,186.
"On demand, for value received, I promise to pay to the Hartford Life Insurance Company, of Hartford, Conn., seven hundred eighty-eight dollars, with interest at the rate of 5 per cent. per annum, payable annually in advance (interest up to July 6, 1910, to be deducted from the amount received hereon), and I hereby acknowledge the amount of this note, with any interest that may accrue thereon, to be an indebtedness to said Hartford Life Insurance Company on account of policy No. 258,186, issued by said company on the life of Thomas H. Benson, which policy, with all right, title, and interest therein, and all benefit and advantage to be derived therefrom, is hereby assigned to and deposited with said company as security. I further agree that, if this note remains unpaid 30 days after payment is demanded, or if any interest payment on said note shall remain unpaid 30 days after it becomes due, or if any premium shall become due and remain unpaid for 30 days, the amount of paid-up insurance guaranteed in said policy shall be reduced in the same proportion as the said indebtedness bears to the cash surrender hereof

(which cash surrender value shall equal the loan value of the preceding policy year), and the company shall not thereafter be liable on said policy except for the amount of paid-up insurance so reduced, notwithstanding any of the provisions of said policy, and said indebtedness shall then be considered canceled.

"All payments, whether of principle or interest, shall be made by the borrower at the home office of the company in Hartford, Conn., or to an agent whose authority for receiving the same shall be the possession of the note or a receipt signed by an executive officer of said company.

"Dated at Crowell, Tex., this 30th day of July, 1909.

"Insured, Thomas H. Benson.

"Beneficiary, Ora Benson."

"Witness, Ben Henderson.

"Witness, J. R. Beverly."

"As already stated, the loan was for the entire loan value promised in the policy, and the cash surrender value under the foregoing agreement therefore exactly equaled the loan at all the dates in question.

"The installment of interest due July 6, 1910, on said loan was duly paid by the insured, but the interest installment due July 6, 1911, to wit, \$39.40 was not then or thereafter paid by the insured, or by any one for him. A receipt for such interest installment was sent by the company to the First State Bank of Crowell, Tex., for collection, and was presented by said bank to the insured, but he did not pay the same, notwithstanding he received and accepted a check from the company for \$4.38 for a dividend declared by it on the policy for the preceding year. Upon the return to the company of the dishonored interest receipt, the company proceeded to act in accordance with the provisions of the loan note, and stamped the policy 'Paid-up insurance for \$50,' and advised the insured by registered letter, which he duly received, that it had so indorsed the policy, and that said amount of paid-up insurance constituted the sole liability of the company on the policy. The insured made no complaint, and died a little more than 14 months afterwards, on December 30, 1912. Some 10 months after his death proofs of death were furnished to the company, and claim made on it for the amount of the policy. The company thereupon forwarded its check for \$50 to the plaintiff, which she refused to accept, and the company shortly thereafter, and before the present suit was filed, tendered to her in legal tender money of the United States said sum of \$50, which tender was rejected. The company has retained ever since the identical legal tender money used on such occasion, holding the same subject to the order of the plaintiff, and in its pleadings has repeated its offer and tender of the same to the plaintiff. Thereafter on April 24, 1914, the present suit was begun.

"The company's indorsement of said policy for \$50 of paid-up insurance was due to its allowance of \$808 as a cash surrender value of said policy, being \$20 more than the amount promised in the policy, and \$20 more than the amount of the loan. The company allowed this additional sum, because it was enabled by its experience to do so, and because customarily, as in this case, it allowed its policy holders the maximum values which their policies had, according to its experience. But for the allowance of this additional sum the entire value of the policy would have been consumed in the satisfaction of the loan.

"The policy of insurance contains a schedule of loan values, available to the insured from year to year, such value being \$788 at the end of the ninth policy year, to wit, on July 6, 1909, and being also \$788 at the end of the tenth policy year, to wit, July 6, 1910. Under the policy the insured also had the privilege of surrendering the policy at the end of the tenth year, to wit, July 6, 1910, for the cash value

thereof, which was stated to be the same amount as the loan value at the end of the tenth year, to wit, \$788.

"As has been indicated in the general statement under this assignment of error, the policy at the time of default had a value in the experience of the company of \$808, being \$20 more than that promised in the policy, and accordingly the company, in indorsing the policy for paid-up insurance under the terms of the loan note, allowed the greater sum, as was its custom. At said time the value of the policy according to the American Experience Table of Mortality, and interest at $4\frac{1}{2}$ per cent., was \$793.70, being less than the value allowed by the company.

"Article 3050 of the Revised Statutes of 1895, in force when the policy was issued, relating to the duties of the commissioner of insurance, provides as follows: 'He shall, as soon as practicable in each year, calculate or cause to be calculated, in his office, by an officer or employé of his department, the net value on the 31st day of December of the previous year, of all the policies in force on that day in each life or health company doing business in the state. Calculations of the net value of each policy shall be based upon the American Experience Table of Mortality and four and one-half per cent. interest per annum. And the net value of a policy at any time shall be taken to be the net single premium which will at that time effect the insurance, less the value at that time of the future net premiums called for by the table of mortality and rate of interest designated above.'

"While the foregoing statute was repealed by the Insurance Code of 1909 (page 192) and substitute provisions enacted therefor, the Texas standard for the valuation of life insurance policies issued at the time in question remains the same. R. S. 1911, articles 4758, 4751, 4493, 4498."

Locke & Locke, of Dallas, for plaintiffs in error. Hill, Lee & Hill, of San Angelo, and O. F. Wencker and E. S. Hamilton, both of Dallas, for defendant in error.

KEY, C. J. (after stating the facts as above). The controlling question involved in the appeal is the validity of the agreement between the insurance company, on the one side, and the insured and beneficiary named in the policy, on the other side, embodied in the loan note, by which it was stipulated that, if the note should remain unpaid 30 days after maturity and demand, or if any interest payment remained unpaid 30 days after maturity, etc., the amount of paid-up insurance guaranteed in the policy should be reduced in the same proportion as the indebtedness bore to the cash surrender value, and stipulating that the company should not thereafter be liable on the policy, except for the amount of paid-up insurance so reduced, etc. Counsel for plaintiffs in error make the contention that the contract referred to does not violate any written law or any rule of public policy of this state; that it provides a reasonable, fair, and just method of settlement in the event of a breach of the contract embodied in the loan note, and therefore it is binding upon Mrs. Benson, the defendant in error, who signed the contract.

Counsel for defendant in error present two counter propositions in support of the judgment of the trial court, which are: (1) That the insurance company had no right to can-

cel the policy because of a note which provided that upon a failure of the insured to pay interest on the note the policy could be canceled by the company so as to deprive the beneficiary of the proceeds of the policy, less the debt and interest due thereon; and (2) that the acts of the company in declaring the policy canceled and issuing a small amount of paid-up insurance without any proceeding to foreclose their pledge was not sufficient to deprive the beneficiary of paid-up insurance as originally provided in the policy, less what might be due under the pledge.

While it seems to have been held otherwise by the Supreme Court of Kentucky, and perhaps a few other courts, we think the weight of authority, based upon sounder reason, supports the contention urged in behalf of the insurance company, as is shown by some of the following authorities cited in the brief of their counsel: *Sherman v. Mut. Life Ins. Co.*, 53 Wash. 523, 102 Pac. 419; *Hayes v. N. Y. Life Ins. Co.*, 68 Misc. Rep. 558, 124 N. Y. Supp. 792; affirmed *Id.*, 150 App. Div. 927, 135 N. Y. Supp. 1116; *Palmer v. Mut. Life Ins. Co.*, 114 Minn. 1, 130 N. W. 250, Ann. Cas. 1912B, 957; *Wilson v. Royal Union Life Ins. Co.*, 137 Iowa, 184, 114 N. W. 1051; *Palmer v. Mut. Life Ins. Co.*, 38 Misc. Rep. 318, 77 N. Y. Supp. 869; *Eagle v. N. Y. Life Ins. Co.*, 48 Ind. App. 284, 91 N. E. 814; *Frese v. Mut. Life Ins. Co.*, 11 Cal. App. 387, 105 Pac. 265; *Rye v. N. Y. Life Ins. Co.*, 88 Neb. 707, 130 N. W. 434; *Cilek v. N. Y. Life Ins. Co.*, 95 Neb. 274, 145 N. W. 693; *Salig v. U. S. Life Ins. Co.*, 236 Pa. 460, 84 Atl. 826.

It is a well-settled rule of law relating to pledges that the agreement may authorize the pledgee to sell the property, either at public or private sale, and with or without notice to the pledgor, and the pledgee may himself become the purchaser at the sale, the proceeds to be applied to the liquidation of the debt, and the balance held in trust for the pledgor. Of course, the sale must be fairly made and for a fair price, but the power to sell exists, and by the sale the pledgor is deprived of all interest in the property. It is true that the contract in this case did not provide for the sale of the policy, which was pledged for the security of the debt, but it does not follow that it was unreasonable or unjust or illegal for that reason, as will be shown hereafter. The contract here involved not only does not violate any constitutional or statutory law, nor contravene any rule of public policy, but is in harmony with the policy impliedly sanctioned by article 4741 of Revised Statutes 1911, which article, in part, reads as follows:

"It shall further be stipulated in the policy that failure to repay any such advance, or to pay interest, shall not void the policy until the total indebtedness thereon to the company shall equal or exceed the loan value."

To say the least of it, that provision of the statute impliedly recognizes the right of insurance companies to make and enforce con-

tracts similar to the one involved in this case, and therefore it is clear that such contracts do not violate any rule of public policy; and the fact that the Legislature enacted that statute is some indication that the lawmaking department of the government did not regard contracts impliedly sanctioned therein as invalid or unreasonable.

Recurring to the question of the reasonableness of such contracts as the one here involved, attention is called to the fact that in this state there can be no general market for life insurance policies, such as exists for stocks, bonds, and other obligations to pay money. This results from the fact that no one except relatives and creditors can become a beneficiary in a life insurance policy. This rule applies to an assignee, as was held in *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107; and therefore, if such a policy were offered for sale, a vast majority of the public would be prohibited from purchasing, and those eligible to purchase would be so few that practically no market for such property would exist. And for that reason, if the contract or the law should require the property to be disposed of by sale, as is generally the case as to other pledges, the result in most instances would be that the insurance company would be the only bidder, and could buy in the policy upon terms much more injurious to the insured and beneficiary than has resulted in this case.

Of the authorities hereinbefore cited in *Palmer v. Mut. Life Ins. Co.*, 114 Minn. 1, 130 N. W. 250, *Sherman v. Mut. Life Ins. Co.*, 53 Wash. 523, 102 Pac. 419, *Eagle v. N. Y. Life Ins. Co.*, 48 Ind. App. 284, 91 N. E. 814, and *Palmer v. Mut. Life Ins. Co.*, 38 Misc. Rep. 318, 77 N. Y. Supp. 869, contracts similar to the one now under consideration were involved and held to be valid, and we copy the following excerpts from two of those cases:

In *Palmer v. Mutual Life Insurance Co.*, 114 Minn. 1, 130 N. W. 250, the Supreme Court of Minnesota said:

"The rule requiring the sale of the property cannot well be made applicable to a life insurance policy, pledged to the company issuing it as security for the payment of a loan; for, whether fully paid or not, it has no marketable sale value, and an attempt to thus dispose of it would be futile. So that some method of enforcement, other than a sale, or unconditional relinquishment of ownership by the pledgor, must be resorted to. A careful consideration of the subject leads to the conclusion that the remedy by cancellation at the cash surrender value of the policy is not inconsistent with sound public policy or violative of the substantial rights of the pledgor. On the contrary, it is a reasonable and practicable method of bringing the contract to a final termination."

In *Sherman v. Mut. Life Ins. Co.*, 53 Wash. 523, 102 Pac. 419, the Supreme Court of Washington dealt with the question as follows:

"We think the applicable principles of law are well settled. It is true, as the appellant

urges, that the general rule is that a contract, whereby the pledged property becomes forfeited to the pledgee for the nonpayment of a debt at its maturity is void on the ground of public policy. Denis, *Contracts of Pledge*, § 302. The reason for the rule is that in most instances the disparity between the amount of the loan and the value of the security is so great as to make such a contract unconscionable. It is a rule proceeding from equitable principles, and, like other equitable rules, where the reason ceases, the principle fails of application. It is competent for the parties to the contract to stipulate that the pledgee may buy the securities at private sale at the market price, in case of default in payment of the debt, or that he may sell at public or private sale with or without notice, and that he may become the purchaser. [Citations omitted.] In such case the pledgee is treated as the trustee of the pledgor, and is held to the rule of good faith. Not only did the parties stipulate in the assignment that the cash surrender value of the policy was \$781, but at the time of the trial they further stipulated that such was its value at the time the loan was made, according to the books of the respondent. Indeed, it may be said that there is nothing in the record which rises to the dignity of evidence tending to show that at such time, or upon the date of its cancellation, it had any greater value. As we have seen, the rule that forbids the parties to stipulate for the forfeiture proceeds from equitable principles, to the end that the creditor may not make an unconscionable contract with one in necessitous circumstances. We have seen that an agreement which permits the creditor to take the security at the time of default at its market value has the sanction of law. In effect, that is what the respondent did. The policy had no market value in excess of the surrender value. We must determine the rights of the parties from the ultimate result of what was done, rather than the form employed to accomplish the result. Measured by this rule, the acts of the respondent have the sanction of law."

In our opinion, the two cases last mentioned are in line with both reason and the weight of authority, and therefore we hold that the present case should have been decided in accordance with plaintiff in errors' contention.

For the reasons stated, the judgment of the trial court is in part reversed and rendered for plaintiffs in error, and is reformed so as to permit the plaintiff in the court below, Mrs. Ora Benson, to recover of the defendants in the court below, the Hartford Life Insurance Company and the Missouri State Life Insurance Company, the sum of \$50, and no more; and, inasmuch as the insurance companies conceded their liability for \$50, and tendered that sum before the suit was brought, all the costs of both courts will be taxed against Mrs. Benson.

Reversed and rendered in part, and in part reformed and affirmed.

TEXAS & P. RY. CO. v. R. W. WILLIAMSON & CO. (No. 7557.) *

(Court of Civil Appeals of Texas. Dallas. May 20, 1916. Rehearing Denied June 24, 1916.)

1. LIMITATION OF ACTIONS §24(2)—WRITTEN CONTRACTS—BILL OF LADING.

Rev. St. 1911, art. 5688, subd. 1, providing that actions for debt or contracts in writing shall

be commenced within four years, applies to an action to recover for breach of a bill of lading.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 113; Dec. Dig. §24(2).]

2. LIMITATION OF ACTIONS §46(11)—ACCRUAL OF RIGHT OF ACTION—CONTRACTS—BILL OF LADING.

Where cotton was shipped on a through bill of lading from Texas via New Orleans to Liverpool, England, and a portion of it destroyed by fire while in defendant's possession, the consignor not being under duty to keep track of the shipment while in transit, the statute of limitations did not begin to run till plaintiffs, not being negligent, actually learned of the non-delivery.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 250; Dec. Dig. §46(11).]

3. CARRIERS §132 — DESTRUCTION OF SHIPMENT—EVIDENCE—BURDEN OF PROOF.

In an action for the value of 30 bales of cotton destroyed by fire, upon establishment of the plaintiffs' prima facie case that the cotton was destroyed while in the defendant's possession under a bill of lading, the burden was on defendant to show freedom from negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 578-582, 605; Dec. Dig. §132.]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by R. W. Williamson & Co. against the Texas & Pacific Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

George Thompson and Flippen, Gresham & Freeman, all of Dallas, for appellant. D. A. Eldridge, of Dallas, for appellees.

RAINEY, C. J. On December 17, 1908, appellees sued appellant to recover for the value of 30 bales of cotton shipped over appellant's road, which cotton was destroyed by fire while in possession of appellant, and was never delivered. Defendant answered by demurrer that plaintiff's cause of action was barred by the statutes of two and four years' limitation, and specially the denial of liability in that the cotton was destroyed by fire not attributable to its negligence. A trial was had without a jury and resulted in a judgment for appellees.

The case was tried on an agreed statement of facts and those necessary for the determination of the issues in controversy are found in appellant's brief as follows:

"At Detroit, Tex., on October 27, 1904, W. A. Arthur & Co., delivered to the Texas & Pacific Railway Company 104 bales of cotton to be by it transported to New Orleans, La., and at that port to make delivery thereof to Leyland Steamship Line, the shipment to be thence transported by the Leyland Steamship Line to Liverpool, England, and there delivered to shipper's order, notify Steel, Bradley & Co. Upon the receipt of said 104 bales of cotton defendant issued the bill of lading hereto attached and marked 'Exhibit A' for identification.

"Said 104 bales of cotton were in due course transported to Clarksville, Tex., and there delivered to a compress company; and after compression the same were by the compress company reloaded into cars and delivered to defendant. While said shipment of cotton was in possession of defendant in transit from Clark-

vile to New Orleans, 30 bales of said cotton, in Texas & Pacific box car No. 4868, marked 'E. N. R. Y. 8,' which are herein sued for, were on the 5th day of November, 1904, destroyed by fire, the origin of which is to defendant unknown. Said box car No. 4868 was 634 feet from the engine attached to train.

"The remainder of said shipment—that is, 74 bales of cotton—were by defendant in due course transported to New Orleans, and there, on the 14th day of November, 1904, delivered to the Leyland Steamship Line, which steamship line on the 16th day of November, 1904, issued to plaintiffs, the then owners by indorsement of defendant's said bill of lading, its (said steamship line) bill of lading for said 74 bales of cotton, the original of which last-mentioned bill of lading is lost, but an exact copy thereof, with the identical corrections and interlineations, is hereto attached and marked 'Exhibit B' for identification. Said 74 bales of cotton were transported by the Leyland Steamship Line by its steamship Belgian to Liverpool, England, and by it there delivered to the consignee on the 7th day of December, 1904, at which time both of said bills of lading were surrendered, and the following notation was made on defendant's bill of lading, viz.: 'Order signed for 74 bales of cotton ex Belgian S. S. 7-1201904 for Frederick Leyland & Co. (1900) Limited. [Signed] A. E. Dunne.'

"The shipment of cotton was covered by two bills of lading which are attached to the agreed statement of facts. The first, Exhibit A, was issued by appellant at Detroit, Tex., and the other, Exhibit B, was issued by the Leyland Steamship Line at New Orleans. The inland bill of lading issued by appellant recites that 104 bales of cotton were received at Detroit, Tex., October 27, 1904, 'to be carried to the port of New Orleans, La.; thence by Harrison or Leyland Steamship Line to the port of Liverpool, England.' This bill of lading contains, among others, the following two conditions: 'This contract is executed and accomplished and the liability of the Texas & Pacific Railway Company as common carrier under said contract is terminated on the delivery of said cotton to Leyland Steamship Company, its master, agent, or servants, or to any steamship of said company, or when said cotton shall have been unloaded on the wharf or steamship pier, or upon the platform or in the warehouse of the Texas & Pacific Railway Company, at said port of New Orleans, La., and said steamship company duly and reasonably notified thereof. Upon the delivery of said cotton to said ocean carrier at the aforesaid port said cotton shall be subject to all the terms and conditions expressed in the bills of lading and masters' receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported, and upon delivery of said cotton at the usual place of delivery by the steamship or steamship lines carrying the same at the port of destination the responsibility of said ocean carrier shall cease.' The ocean bill of lading issued by the Leyland Steamship Line to appellee at New Orleans on November 16, 1904, recites that 74 bales of cotton were 'received from Texas & Pacific Railway Company for shipment by the steamship Belgian bound for Liverpool.'

It was also agreed that none of the parties actually knew of the 30 bales of cotton being destroyed by fire until January, 1905, except the railway company.

Complaint is made that appellees' cause of action was barred by the four-year statute of limitation, and appellant submits the proposition that:

"The bill of lading declared upon in the petition only obligated appellant to transport the cotton to the port of New Orleans, and there to deliver the same to the Leyland Steamship Com-

pany, when its undertaking in respect to the shipment was performed and fully accomplished, and its liability terminated. If appellant breached its contract of shipment and incurred a liability by reason thereof, such breach occurred, and liability resulted, and appellees' cause of action accrued, when appellant failed to deliver the 30 bales of cotton to the Leyland Steamship Line at New Orleans, and subdivision 1 of article 5688 of the statutes, prescribing a four-year period of limitation, is a bar to this action."

[1] It is settled that in an action to recover for the breach of a bill of lading the statute of four years applies, and not that of two years. *Dempster v. Railway Company*, 105 Tex. 628, 154 S. W. 975; *Williamson v. Railway Company*, 106 Tex. 294, 166 S. W. 692.

Do the facts in this case show that appellees' action was barred by the four-year statute of limitation? We think not. Our conclusion is based in part upon the action of the Supreme Court in *Williamson v. Railway Company*, supra, which was a former appeal of this case, and wherein the pleading and facts were the same as herein presented, but the trial court and this court held that the statute of two years applied, and the Supreme Court reversed and remanded the cause, holding that the four-year statute instead of the two-year applied. In rendering the opinion in that case Mr. Chief Justice Phillips said:

"It was found by the honorable Court of Civil Appeals that the plaintiffs had notice of there being a shortage of 30 bales in the shipment at the time of the delivery of the cotton to the steamship line at New Orleans, that the consignee of the cotton had notice to the same effect when the bills of lading were surrendered at Liverpool, but that plaintiffs in error had no actual knowledge of the destruction by fire of the 30 bales in question while in transit to New Orleans until a later time. The suit was filed more than two years after the destruction of the 30 bales, and after the plaintiffs in error acquired actual knowledge of that fact, but within four years from the date they acquired such knowledge, and that accordingly the cotton could not and would not be delivered in compliance with the obligation of the bill of lading. The trial court sustained the plea of limitation interposed by the defendant in error upon the view that the two-year statute of limitation applied to the action."

From this language of the Supreme Court we take it that the 30 bales were not delivered in compliance with the obligations of the bill of lading, and that the cotton was destroyed, which was not actually known to the appellees until January, 1905, therefore the statute of limitation did not begin to run until that time, and it reversed the judgment, that the trial court might try the cause on the theory that the four-year statute of limitation applied, not feeling certain but that on another trial different facts might be developed.

[2] The bill of lading issued by appellant was a through bill of lading from Detroit, Tex., via New Orleans, to Liverpool, England. The consignor was not expected to keep track of said cotton while in transportation, but could expect the cotton to be transported safely to the point of destination through

connecting carriers named to transport same. A reasonable time is given for delivery, and the statute will not begin to run until a reasonable time has been given to learn of the nondelivery. *Railway Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 118. The evidence fails to show negligence of appellees in failing to ascertain the nondelivery of the cotton before January, 1905, and until then the statute of limitation did not begin to run.

[3] The cotton was destroyed by fire while in the possession of the appellant, but its origin was unknown to appellant. The appellees by showing the destruction of the cotton while in appellant's possession established a prima facie case of liability on appellant's part, and to disprove this it devolved upon appellant to show want of negligence in not causing the fire. This it did not do, and therefore it is liable for its value. *Railway Co. v. Richmond & Tiffany*, 94 Tex. 576, 63 S. E. 619.

The judgment is affirmed.

NEW JERSEY FIRE INS. CO. v. BAIRD et al. (No. 7550).*

(Court of Civil Appeals of Texas. Dallas. May 13, 1916. Rehearing Denied June 24, 1916.)

1. CONTINUANCE ⇐30—RIGHT TO—DENIAL OF APPLICATION.

In an action on a fire policy where the insurer sought to defeat liability on the ground of other insurance, and its attorneys made inquiry as to how the defense would be met, and plaintiff's counsel stated that it would be traversed, the denial of a continuance requested, when, at trial, plaintiff filed an amended pleading setting up that the additional insurance was obtained with the knowledge and consent of the insurer, was not an abuse of discretion, where it did not appear that, had the continuance been granted, the insurer could have obtained evidence to rebut such defense.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 99-112; Dec. Dig. ⇐30.]

2. INSURANCE ⇐376(3)—FIRE POLICIES—AUTHORITY OF AGENT.

A local agent of a fire company, authorized to solicit insurance, deliver policies, and collect premiums, may waive conditions and forfeitures in the policy regardless of the authority conferred by the insurer, unless the insured knows of such limitations on his authority.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 952, 955; Dec. Dig. ⇐376(3).]

3. INSURANCE ⇐383—FIRE INSURANCE—CONDITIONS—WAIVER.

A local insurance agent authorized to waive conditions and forfeitures contained in a fire policy may waive them by parol.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1018; Dec. Dig. ⇐383.]

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Action by Emma O. Baird and others against the New Jersey Fire Insurance Company, in which W. T. Henry and another were made parties. From a judgment for plaintiffs, and W. T. Henry and another, defendant appeals. Affirmed.

Senter & Synnott, of Dallas, for appellant. Short & Field and Leake & Henry, all of Dallas, for appellees.

RASBURY, J. Appellees sued appellant upon a policy of insurance issued by the latter to W. R. Lynch, insuring him against all direct loss or damage by fire to his two-story frame residence at 901 West Ninth street, Dallas, Tex., in an amount not exceeding \$3,000. Appellees alleged that they were the owners of the insured premises as well as the beneficiaries in the policy of insurance. They also alleged that while the policy was in force the insured premises were totally destroyed by fire, subsequent to which they observed and performed all things required of them by the policy to be performed, and that appellant had investigated the loss and satisfied itself that it was bound upon the policy, and offered to pay appellees \$2,700 thereon, which they refused. They made W. T. Henry, Esq., and S. J. McFarland, Esq., to whom the insurance was first payable as trustees for the Security National Bank, as security for an indebtedness of \$2,500, parties to the suit, and prayed judgment for the full amount of the policy, according to its terms and the rights of the beneficiaries therein named.

For the purpose of this appeal appellant answered that the policy, save in reference to the amount of the bank debt for which it was liable in any event under its attached mortgage clause, was void and unenforceable for the reason that appellees had, without the consent of appellant, obtained additional insurance upon the insured premises. Appellant offered in its answer to pay the amount of the bank's claim, upon being subrogated to the bank's security under the provision in its policy conferring that right. By subsequent appropriate pleading, appellees alleged that appellant was cognizant of the additional insurance and consented thereto, which appellant in turn denied. The defendant trustees by appropriate pleading sought judgment against appellant for the amount of the debt due the bank. A jury was demanded and impaneled. Upon conclusion of the testimony the jury, in compliance with peremptory instruction from the court, returned verdict for the bank for \$2,723.23, its accumulated debt, and for appellees for \$419.22, the balance of the policy. Judgment was in accordance with the directed verdict and from which this appeal is prosecuted, save that no attack is made upon the verdict and judgment for the bank.

On November 25, 1912, W. R. Lynch was owner of the residence at 901 West Ninth street, Dallas, Tex., and the land upon which same was situated. On that date, appellant insured Lynch against loss on the building by fire to the extent of \$3,000, with the loss payable to R. H. Clem, trustee, as his interest might appear. January 13, 1913, the

appellant by indorsement upon its policy made any loss thereunder payable to Messrs. Henry and McFarland, who were trustees for the Security National Bank, owner of a mortgage debt thereon. On and prior to February 10, 1913, Martha C. Beaupre acquired the property from Lynch. Before purchasing the property, however, Mrs. Beaupre called on Lynch, who represented himself to be the agent of appellant, and asked him if she could obtain additional insurance on the premises. With her was C. H. Verschoyle, the agent of the company, who proposed to write the additional insurance. After advising Lynch what she desired he, assuming to act for the appellant, told Mrs. Beaupre in effect that he consented to the additional insurance. After this conversation Mrs. Beaupre acquired the premises, the other policy of insurance was issued, and Lynch assigned the existing policy to Mrs. Beaupre, to which assignment appellant consented in writing. Afterward Mrs. Beaupre sold and conveyed the premises to C. F. Roderick, assigning the appellant's policy to him and to which appellant in writing consented. Roderick in turn sold and conveyed the premises to J. J. McClurg, assigning appellant's policy, and to which appellant also in writing consented. McClurg sold and conveyed the premises to appellee, Mrs. Emma C. Baird; she also assigning appellant's policy and to which appellant in writing consented. The other policy of insurance was in similar manner assigned to the successive purchasers of the land and premises. Subsequent to all of the foregoing, the insured premises were totally destroyed by fire. After the fire, agents of appellant attempted to adjust the loss with appellees, during which negotiations liability on the policy was not denied because of the additional insurance, although one of the agents knew of the additional insurance when he attempted an adjustment. Among other provisions of the policy was one declaring that the entire policy should be void, in the event the insured should procure other insurance on the premises without securing the consent of the insurer indorsed upon or added to the policy. There was no such indorsement upon the policy. The agency of Lynch was disputed by appellant, and we will state the facts on that issue at another place. Otherwise the foregoing is, in our language the substance of the essential facts adduced at trial.

[1] The first assignment of error complains of the action of the court in overruling appellant's application to continue the case. In the application it was shown, in substance, that the case was assigned for trial April 21, 1915, and that prior thereto appellant had filed answer denying liability on the policy on the grounds we have stated, and that from time to time thereafter inquiry was made of counsel for appellees in what manner they would meet such defense, and were told in effect that appellees would

"merely traverse" appellant's answer. Appellant, because of counsel's statement, believed its plea would only be denied and the consequent issue accordingly cast; but when the case was called for trial appellees, by amended pleading, for the first time charged that the additional insurance was obtained with the knowledge and consent of appellant. It was further shown in the application that as result of the facts therein stated appellant was surprised and was not ready to go to trial. The foregoing fairly states the substance of the application; and, based thereon, we conclude the court did not err in overruling same. There was no claim made that there was evidence obtainable and necessary to meet the unexpected change in appellee's pleading on the issue tendered. Or that appellant did not know what the facts were in reference to the consent to other insurance, and desired further time in which to ascertain them. In such cases, whether the application should be granted is matter largely in the discretion of the trial court, and, in the absence of any showing that real injury resulted in refusing the application, that discretion will not be disturbed. *I. & G. N. R. R. Co. v. Howell*, 101 Tex. 603, 111 S. W. 142.

[2, 3] Following the assignment just discussed are a number of others challenging from various angles the action of the court in directing verdict for appellee. The first of the series of assignments, however, in our opinion comprehends and controls the others. Said assignment, in effect, asserts that Lynch was not an agent authorized in law to waive the provision of the policy precluding additional insurance on the premises unless appellant's consent thereto was attached or indorsed upon the policy. The issue thus raised makes it necessary for us to review the evidence in order to determine Lynch's relation to the company and his consequent right to waive the provision in the policy. The only evidence on that issue is that of Lynch. No officer, agent, or representative of appellant testified concerning Lynch's relation to the company, or denied or affirmed his right to waive the provision of the policy under discussion. Lynch's testimony on the precise question of agency, carefully analyzed, discloses the following facts: He was a builder, real estate and fire insurance agent and notary public. He was once the owner of the insured premises and sold them to Mrs. Beaupre. While she owned the premises Lynch was agent for appellant and had a "commission" as such, and during his agency issued policies for appellant. While he was such agent and while Mrs. Beaupre owned the property, he agreed as such agent that the additional insurance might be procured upon the premises. On cross-examination the witness stated that he did not pass upon risks, or issue the policies. The policies were, upon his report of applications therefor, written in the office of John R. Hancock

& Co. What he did was to solicit the insurance, deliver the policies, collect the premiums, and keep a set of books, wherein he charged John R. Hancock & Co. with his commission on each policy secured, and credited them in like manner with all paid.

Of the foregoing facts there is no contradiction. Lynch was a commissioned agent with authority, according to his statement, to solicit insurance, issue policies, and collect premiums. However, he did, on cross-examination, admit that the policies were written in and issued from the office of John R. Hancock & Co., who, we assume, were general agents, and that they passed on the risk. This admission is at most a limitation of his authority and does not at all disprove agency. Further, while the appellant, who commissioned Lynch as agent, was not compelled to deny or admit the agency, yet its failure to do so inferentially, at least, supports his claim that he was its agent. Then, under the uncontradicted facts of agency, with the admitted limitation, was he authorized to consent to the additional insurance? An accepted authority says that there "is a 'veritable maze' of conflict in regard to the authority of agents to waive forfeitures and conditions in insurance policies." 3 Cooley's Ins. Briefs, 2475. After pointing out that officers, general agents, and other agents with named powers may waive forfeitures and conditions, he adds that local agents likewise possess similar authority. We mention local agents for the reason that we conclude that Lynch was under the powers conferred upon him in contemplation of law a local agent. The authority just cited holds that while the term local agent is meaningless, so far as relates to such agent's authority, yet such agent is, in law, one who represents his company in a particular place or locality. Id. 2481. Lynch was such an agent, since it appears without dispute that he was commissioned by appellant, his authority being that which we have detailed. Admitting that as between Lynch and the appellant he was without authority to waive the provision of the policy he did waive, yet, according to Mr. Cooley, "if he is (the local agent), he has general authority to act for the company and can waive conditions and forfeitures, unless his authority is specifically limited, to the knowledge of the insured." Id. 2481-2, and cases cited. It does not appear from the evidence in this case that appellee had knowledge of the fact that Lynch was without authority to waive any provision of the policy. Hence the rule stated controls the disposition of this appeal, since, if Lynch being a local agent could, in the absence of knowledge on part of appellee to the contrary, waive the forfeiture clause, the case will necessarily have to be affirmed; since it is further well settled in this state at least that when the right to waive exists it may be done verbally, notwithstanding the

provision of the policy that it shall be in writing. *Crescent Ins. Co. v. Griffin*, 59 Tex. 510; *New Orleans Ins. Co. v. Griffin*, 66 Tex. 232, 18 S. W. 505; *Wagner & Chabot v. Westchester Fire Ins. Co.*, 92 Tex. 549, 50 S. W. 569.

The judgment is affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. LANDA & STOREY et al. (No. 5684).*

(Court of Civil Appeals of Texas. San Antonio. June 14, 1916. Rehearing Denied June 30, 1916.)

1. APPEAL AND ERROR ⇨758(3)—ASSIGNMENTS—NUMBERS—COURT RULES.

Giving numbers to assignments of error in the brief not corresponding to the numbers of the same assignments in the motion for new trial is expressly permitted by Court of Civil Appeals rule 29 (142 S. W. xiii).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 758; Dec. Dig. ⇨758(3).]

2. PLEADING ⇨228—EXCEPTIONS—CONTRACT VIOLATING LAWS.

An exception to the petition as seeking to enforce a contract illegal as violative of the United States laws relating to rates on interstate commerce need not name the particular laws.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 584-590; Dec. Dig. ⇨228.]

3. PLEADING ⇨85(1)—OBJECTIONS—TIME TO MAKE.

Objection that the suit is based on an illegal contract when the petition discloses it, may be made at any stage, as it goes to the substance of the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172, 173; Dec. Dig. ⇨85(1).]

4. CARRIERS ⇨13(2)—REBATES—COMPROMISE OF CLAIM.

An agreement of a carrier to pay a certain amount in compromise of an unliquidated claim for damages for alleged negligence, in consideration of the claimant making all his subsequent interstate shipments over the carrier's line, violates the law against rebating.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 22, 24; Dec. Dig. ⇨13(2).]

5. CARRIERS ⇨13(1)—AGREEMENT FOR REBATE—ESTOPPEL—ILLEGAL CONTRACTS.

A carrier will not be required on the ground of estoppel to perform its part of a contract, illegal as giving a rebate, because of the shipper having performed his part.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 21, 24; Dec. Dig. ⇨13(1).]

Error from District Court, Hays County; Frank S. Roberts, Judge.

Action by Landa & Storey against the St. Louis, Iron Mountain & Southern Railway Company and others. There was judgment against the named defendant, and it brings error. Reversed and dismissed.

See, also, 149 S. W. 292.

Guinn & McNeill, of San Antonio, for plaintiff in error. O. T. Brown and E. M. Cape, both of San Marcos, for defendants in error.

MOURSUND, J. Landa & Storey sued the St. Louis, Iron Mountain & Southern

Railway Company, a foreign corporation, the Texas & Pacific Railway Company, the International & Great Northern Railway Company, and James A. Baker and Cecil A. Lyons, receivers of said last-named company, alleging that on or about August 14, 1909, plaintiffs instituted a suit in the district court of Hays county against the said St. Louis, Iron Mountain & Southern Railway Company, the Texas & Pacific Railway Company, the International & Great Northern Railroad Company, and T. J. Freeman, receiver of said last-named company, wherein plaintiffs sought to recover a sum as damages alleged to have been occasioned by the negligence of the defendants therein "in the course of the shipment of a lot of beef cattle shipped by the plaintiffs from New Braunfels Tex., to the National Stockyards at East St. Louis, Ill.," said cause being numbered No. 2147 on the docket of said court; that plaintiffs were exclusively engaged in shipping beef cattle from points in Western Texas to the National Stockyards at East St. Louis, Ill., and at the time had the privilege of shipping the same over various routes to the entire exclusion of the route afforded by the defendants in said suit, which route is for convenience styled the Iron Mountain route, and plaintiffs were shipping the same over such other routes, all of which was well known to said defendants, and said defendants, desiring to share in the traffic thus promoted by plaintiffs, were willing to come to a "settlement of said suit by a compromise agreement to that end, and with a view to that purpose" said Receiver Freeman, said Texas & Pacific Railway Company, and said St. Louis, Iron Mountain & Southern Railway Company on the one hand, acting through their authorized agents, and plaintiffs, on the other hand, on or about May 7, 1911, for a valuable consideration, agreed upon a compromise of said suit; that said agreement, in substance, was (1) that the defendants should and would pay plaintiffs in cash \$700 of the \$720 damages claimed in that suit and the accrued costs of suit; (2) that plaintiffs should and would accept the payment of same as full settlement and discharge of the damages claimed in said suit; and (3) that from said date forward plaintiffs should and would route all the cattle shipped by them during the remainder of the cattle shipping season of that year so that the same would be carried over said Iron Mountain route; that said agreement was directly afterwards made known to said defendants in that suit and ratified by them before plaintiffs routed their subsequent shipments in conformity with that agreement; that the time within which plaintiffs were to be paid was not specified, but it was understood and agreed that payment was to be made within a reasonable time, and that 60 days was a reasonable time; that plaintiffs relied upon said agreement and complied therewith by routing all of their shipments of cattle dur-

ing said shipping season so that they were received and carried by defendants from various points in West Texas to the National Stockyards at East St. Louis, Ill., there being about 60 cars, on all of which plaintiffs paid the entire freight, amounting in the aggregate to about \$7,000 or \$8,000, which was received by said defendants; that said defendants received said freight, although they intended all the while to refuse payment of the sums agreed to be paid by them to plaintiffs according to the terms of said agreement, which sums were alleged to be \$700 and \$42; that defendants have failed and refused to pay the sums due plaintiffs under said agreement, and are justly indebted to plaintiffs in said sums, with interest from July 7, 1911.

Plaintiffs alleged that the International & Great Northern Railway Company purchased the assets of and became liable for the debts of the International & Great Northern Railroad Company.

The St. Louis, Iron Mountain & Southern Railway Company filed a plea in abatement; a general demurrer; special exceptions; denials of the material allegations of the petition; a plea to the effect that, if any compromise agreement was made, it was abrogated by plaintiffs by their election to proceed with said cause No. 2147 and the prosecution thereof to final judgment; a plea to the effect that, if such a compromise agreement was made, and the consideration was as alleged by plaintiffs, then that such agreement was illegal and void, in that it is contrary to and forbidden by the laws of Texas, and of the United States, in that it granted a privilege and advantage to plaintiffs not open to other shippers of the same character of freight transported in the same manner and over the same lines, and was equivalent to a reduction in plaintiffs' favor of the freight rates authorized and published by the Interstate Commerce Commission for that kind and character of freight over the lines of defendants, and was an undue and unlawful discrimination in plaintiffs' favor. Said defendant also denied that it was indebted to plaintiffs as alleged in said cause No. 2147, and denied that it was negligent with reference to the shipment described in said suit.

Plaintiffs, by supplemental petition, denied the allegations above stated. Plaintiffs dismissed as to all defendants except the St. Louis, Iron Mountain & Southern Railway Company, and upon a trial before the court judgment was rendered against said company for \$720, with interest thereon from July 7, 1911. Said railway company, by writ of error, seeks revision of the judgment against it.

The evidence shows that an agreement was made by D. C. Smith, live stock agent of plaintiff in error, with defendants in error, substantially as alleged in the petition. The amount to be paid was \$720.70, the full

amount claimed in cause No. 2147, exclusive of interest. The evidence was conflicting as to whether the agreement provided for the payment of costs incurred in cause No. 2147 and the payment of interest on the sum of \$720.70 from May 15, 1908. The court found against plaintiffs on these items, and allowed \$720, with interest thereon beginning 60 days after May 7, 1911, the date of the compromise agreement.

Landa & Storey had ceased shipping over the Iron Mountain route during the pendency of cause No. 2147, and the compromise agreement was made for the purpose of getting them to ship all of their cattle over said route during the remainder of the cattle shipping season of 1911 at the usual and regular freight rates, and it was contemplated by both parties that the regular freight would be collected on each shipment when it should be made. Plaintiffs complied with the agreement to ship exclusively over the Iron Mountain route, shipping 74 cars in all during the remainder of the year 1911, on which they paid the usual freight, amounting in the aggregate to \$7,978.71. Defendants failed to pay the sums agreed to be paid by them, whereupon plaintiffs proceeded with the trial of cause No. 2147, obtained a judgment against the St. Louis, Iron Mountain & Southern Railway Company for the full amount of the claim, with interest thereon, but not against the other defendants, and said judgment, in so far as it affected said St. Louis, Iron Mountain & Southern Railway Company, was reversed by the Court of Civil Appeals of the Third District, and the cause remanded, whereupon, prior to the trial of this case, said cause No. 2147 was dismissed.

Plaintiff in error, by its third assignment of error, complains of the overruling of an exception to the petition, wherein it was contended that the petition stated no cause of action, for the reason that the contract sought to be enforced therein was illegal, in that it violated the laws of the United States relating to rates upon interstate commerce. While this exception was styled a special exception, it goes to the foundation of the cause of action asserted.

By the fourth assignment plaintiff in error contends that the evidence shows the compromise agreement to have been an illegal one, because in violation of the laws of the United States relating to interstate commerce.

[1-3] These assignments will be considered together. Defendants in error object to the consideration thereof on the ground that the numbers given said assignments in the brief do not correspond with the numbers of the same assignments in the motion for new trial, but such change of numbers is expressly permitted by rule 29 for the Courts of Civil Appeals (142 S. W. xiii). They also object on the ground that the so-called "special exception" failed to name the particular laws which were relied upon. This was unneces-

sary. In fact, when the petition discloses that the suit is based upon an illegal contract, the objection may be made at any stage of the proceedings, for it goes to the substance of the petition, and the error, if any exists, is fundamental. *T. P. Coal Company v. Lawson*, 89 Tex. 403, 32 S. W. 871, 34 S. W. 919; *Fuqua v. Brewing Company*, 90 Tex. 301, 38 S. W. 29, 35 L. R. A. 241; *Redland Fruit Company v. Sargent*, 51 Tex. Civ. App. 622, 113 S. W. 330; *Norris v. Logan*, 100 Tex. 228, 97 S. W. 820.

[4] The contract as alleged and proved is one by which plaintiff in error, for the purpose of obtaining the shipment over its road, and the roads of the other companies, of all cattle to be shipped by Landa & Storey during the cattle shipping season of 1911, at the usual and regular freight rates, bound itself to pay to Landa & Storey a certain sum of money in settlement of an unliquidated claim for damages alleged to have been sustained by Landa & Storey by reason of negligence on the part of plaintiff in error and the other railroad companies in the transportation of cattle. This claim had been sued upon and the suit contested by the defendants therein. The compromise agreement was one involving shipments of cattle to National Stockyards, and therefore related to interstate commerce, and such interstate shipments were in fact made, and are relied upon to show compliance by Landa & Storey with the terms of the compromise agreement. It follows that, if the agreement provides for a rebate or for discrimination, such rebate or discrimination will be with regard to interstate commerce. We will therefore consider this case in the light of the federal statutes and decisions, and not our statute and decisions.

An agreement to pay money or deliver property in consideration of receiving all the tonnage of a certain shipper at the regular rate is illegal; for its effect is to give a rebate and to discriminate against the shipper who will not bind himself to ship exclusively over such road. In the case of *Vandalla R. v. United States*, 226 Fed. 713, 141 C. C. A. 469, the court, in speaking of the Elkins Law, said:

"Every device that seeks to cover up either a rebate or a discrimination in interstate transportation is denounced by the statute, provided only, as to a rebate, that thereby the property is actually transported at less than the tariff rate. That the full tariff rate is collected at the time of transportation does not negative the possibility of a rebate in respect thereto. The rebate may be in a lump cash sum in advance (*United States v. Union Stockyards*, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226), or by later or earlier indirect payments (*G. R. & I. Ry. Co. v. United States*, 212 Fed. 577, 129 C. C. A. 113). * * * If, then, a direct cash payment for exclusive tonnage is a rebate in respect to property transported under such a contract, any device whereby a similar payment is made comes within the prohibition of the statute. A loan at less than the market rate of interest, like a lease at less than market rental (*C., C. & St. L. Ry. Co. v. Hirsch*, 204 Fed.

849, 853, 123 C. C. A. 145) is, in effect, a gift of the difference between the contract and the market rate, and is in every respect equivalent to a direct payment of that amount of money."

In the instant case, instead of promising to pay money for exclusive shipments, appellant promised to pay an unliquidated claim for damages, which claim it was at that time contesting in the courts. It is obvious from the pleadings and the evidence that the agreement to pay such claim was not made on account of any recognition of the justice of the claim, but solely as a means to procure the large number of shipments to be made by Landa & Storey. It does not appear from the pleadings or evidence that plaintiffs were entitled to the amount sued for in cause No. 1247, nor that they were not entitled thereto. In the case of *Union Pacific R. Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. Ed. 896, the court had under consideration a statute of Colorado, described by the court as of the same nature as the Interstate Commerce Act, and, like that, designed to prevent unjust discrimination and rebates. It was claimed that certain rebates were justified because given in consideration of the release of certain unliquidated claims for damages alleged to have been suffered on account of negligent acts of the company's grantors; said claims being asserted to be a lien against the property. The court held that the rebate could not be allowed, and in discussing the matter said:

"To hold a defense thus pleaded to be valid would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages, which it would be difficult, if not impossible, to disprove. For instance, under the defense made by this company, there is nothing to prevent a customer of the road, who has received a personal injury, from making a claim against the road for any amount he chooses, and in consideration thereof, and of shipping all his goods by that road, receiving a rebate for all goods he may ship over the road for an indefinite time in the future. It is almost needless to say that such a contract could not be supported."

This statement was not necessary to the decision of the case, but it is by such eminent authority, and shows so clearly the evils which would follow if contracts such as the one sued on herein be permitted that we think it should be accepted as conclusive in this case. When one shipper is favored by agreeing to pay his unliquidated claim for damages, he is getting something which other shippers do not receive, and which is regarded and treated by both parties as valuable, and whatever the concession is worth amounts to a rebate just as the delivery of money or property would amount to a rebate. Appellees contend that, as the evidence showed that plaintiffs paid all the freight at regular rates, "it will surely be presumed that the regular rates mentioned as paid were the same provided by law." We agree with

them, and also construe their pleadings as alleging the agreement on their part to pay the freight provided by law on each shipment, but the fact remains that, in order to secure such agreement, the company promised them a concession deemed valuable by both parties; promised to pay a claim which it had denied and contested, and which was then being litigated in the courts. In support of our conclusion that the contract declared on and proved is illegal we cite also the following cases: *Duplan Silk Co. v. American & Foreign Ins. Co.*, 205 Fed. 724, 124 C. C. A. 18; *Cleveland, C., C. & St. L. Ry. Co. v. Hirsch*, 204 Fed. 849, 123 C. C. A. 145; *United States v. Union Stockyards*, 226 U. S. 306, 308, 33 Sup. Ct. 83, 57 L. Ed. 226; *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *New Haven R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515.

[5] Defendants in error contend that, as they performed their part of the contract, plaintiff in error should be required to comply with its agreement and made to pay the sums it agreed to pay. The principle of estoppel is sought to be invoked. There is no merit in this contention. To so hold would be to enforce an illegal contract; to require the discrimination prohibited by law to be actually made; to make a common carrier violate the law by paying a rebate. See *Cleveland, C., C. & St. L. Ry. Co. v. Hirsch*, supra; *Southern Cotton Oil Co. v. Central of Georgia Ry. Co.*, 228 Fed. 335, 142 C. C. A. 627.

We conclude that plaintiffs' petition discloses that the suit is based upon an illegal contract, and that the evidence even more clearly than the petition shows that the contract was illegal.

The judgment of the trial court must therefore be reversed, and, there being no reason for remanding the cause, the same will be dismissed.

CRAWFORD v. SPRUILL et ux. (No. 5660).
(Court of Civil Appeals of Texas. San Antonio.
May 31, 1916. Rehearing Denied June 22,
1916.)

1. MORTGAGES §513 — FORECLOSURE SALE — PROPERTY TO BE SOLD.

Defendants, owning a tract of 418 acres, executed a deed of trust on the entire tract to secure the payment of a note, and thereafter executed to the plaintiff a deed of trust on the entire tract to secure a note, and thereafter conveyed 199 acres of the 413-acre tract, partly for vendor's lien notes and the purchaser's assumption of the first deed of trust, and thereafter sold to the plaintiff the purchaser's lien notes, with the usual indorsements, and conveyed their equitable title to the plaintiff, warranting that the notes were the only lien on the land, except the first mortgage note, whereupon the

plaintiff released his deed of trust covering the entire tract. The house was situated on the part sold, but thereafter the owner built a house and intended to claim 200 acres from the remainder of the tract as a homestead. On default on the first note and in the plaintiff's suit to restrain the sale, the holder of such note on the court's order transferred it to the plaintiff. *Held*, in plaintiff's suit for judgment on the first mortgage note, that he was entitled, as against the defendants, to have the 199 acres sold first and the proceeds applied to the payment of the purchaser's notes, prior to the first mortgage note; the defendants being estopped to claim as against plaintiff that the 199 acres should be applied to the first mortgage note.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1516; Dec. Dig. ¶513.]

2. DEEDS ¶90—CONSTRUCTION.

A construction least favorable to the grantor will be adopted when the intention is doubtful.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234-237, 247, 248; Dec. Dig. ¶90.]

3. HOMESTEAD ¶213—PLEADING—SUFFICIENCY.

In a suit to restrain a sale under a deed of trust, and for judgment on a first mortgage note, foreclosure of the deed of trust, and of vendor's liens assigned to the plaintiff, where the issue was which part of a tract should be first sold, an answer that it had been the intention of defendants from the time of their execution of the first mortgage on the entire tract to sell off a part of the tract sufficient to pay such indebtedness and out of the remainder to create a homestead, and that they claimed 200 acres of the 213 acres remaining after a sale of 199 acres, subject to a first mortgage, was insufficient, as against a general demurrer, to show a homestead in 200 acres of the remaining 213 acres.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 394-396; Dec. Dig. ¶213.]

Appeal from District Court, Frio County; J. F. Mullally, Judge.

Suit by W. L. Crawford against A. J. Spruill and wife to restrain a sale of land under a deed of trust, in which the holder of the deed was required to transfer the rights to the plaintiff, with amended original petition for judgment as assignee of a mortgage note, foreclosure of a deed of trust, and of vendor's liens. Judgment for plaintiff on both causes of action and for the foreclosure of both liens, but ordering a sale and an application of the proceeds as prayed by defendants, and plaintiff appeals. Reversed and rendered.

Scott & Dodson, of San Antonio, and S. T. Dowe, of Pearsall, for appellant. S. T. Phelps, of Pearsall, and John L. Dannelley, of Laredo, for appellees.

MOURSUND, J. On June 26, 1912, A. J. Spruill and wife owned a tract of land of 413 acres in Frio county, Tex., and on that date executed, in favor of Wm. Boon and I. H. Clemons, a deed of trust on the entire tract to secure them in the payment of a \$2,300 note. On January 9, 1913, Spruill and wife executed to W. L. Crawford a deed of trust on said 413 acres of land to secure him in the payment of a note for \$1,365. On

May 7, 1913, Spruill and wife conveyed to H. Hurst 199.3 acres out of the 413-acre tract. The consideration was recited in said deed, as follows:

"One thousand dollars cash in hand paid, the receipt of which is hereby acknowledged, and one vendor's lien note for the sum of \$500 this day given, by said H. Hurst, due January 1, 1914, bearing 8% interest. Said note made payable to A. J. Spruill or order. And the assumption of one outstanding deed of trust against said land promising to pay same for the sum of \$2,300 due June 26, 1915, bearing interest at the rate of 10% interest. Also three vendor's lien notes this day given by the said H. Hurst to A. J. Spruill against said land for the sum of \$2,088, divided into three equal payments as follows: Note 1, due May 7, 1917, for \$696; note No. 2, due May 7, 1918, for \$696; note No. 3, due May 7, 1919, for \$696, all notes bearing interest at the rate of 8% (eight per cent.) interest payable annually as it accrues, both notes and interest payable at Dilley, Texas."

A vendor's lien was expressly reserved to secure the payment of "the above-described notes."

On July 1, 1913, Spruill and wife sold to W. L. Crawford the four vendor's lien notes executed by Hurst, and conveyed to said Crawford, by a written and properly executed conveyance, the equitable title of Spruill and wife, existing by reason of the lien expressly retained in the deed of trust to Hurst, warranting "that said notes are the first and only lien on said land except the \$2,300 in said deed assumed." In consideration of this transfer, Crawford released the deed of trust held by him covering the entire 413 acres, making up the difference in amount by payment of money or its equivalent.

At the time Spruill acquired title to the 413-acre tract of land it had a house and other improvements on it, and about 65 acres in cultivation. The house was situated upon, and the cultivated land was a part of, the 199.3-acre tract sold to Hurst, and said tract was all under fence. The remainder of the 413-acre tract was not under fence, but was inclosed in a larger pasture and was used by Spruill and wife for pasturing their stock, and otherwise in connection with their home. No part of said 413 acres was set apart or designated for homestead purposes, but it was all used for said purposes continuously up to May 7, 1913, when Spruill and wife executed the deed to Hurst for the 199.3-acre tract. At the time Spruill and wife executed the deed, "they were using, and intended to claim and use, for homestead purposes, 200 acres out of the remainder of the 413-acre tract, and shortly after making the deed to Hurst—three weeks or a month afterwards—the defendant Spruill fenced the remainder of the tract amounting to about 213 acres, and about December 1, 1914, constructed a small house on said tract and used it for pasturing stock and otherwise for homestead purposes and lived there a part of that time, and continuously and uninterruptedly from

the execution of the deed from Hurst intended and have intended to claim and use this property for homestead purposes." Spruill and wife have no other property than the 213 acres which they own or can claim as a homestead, and they have designated 200 acres of the 213 as their homestead.

Default was made in the payment of interest on the \$2,300 Boon-Clemons note, and Boon, who had acquired the interest of Clemons, declared the note due, and requested the trustee, John L. Pranglin, to sell the land to satisfy the debt, instructing the trustee to first sell the 199.3 acres and apply the proceeds to the satisfaction of his debt; and, if such proceeds failed to satisfy his debt, then to sell the remaining 213 acres and apply the proceeds thereof to the satisfaction of the balance unpaid. The trustee advertised the land for sale in accordance with these instructions. Crawford instituted this suit to restrain the sale by the trustee of the land in the manner advertised, upon the ground that such sale would prejudice the sale of the four vendor's lien notes held by him which were secured by a lien on the 199.3 acres, and prayed that Boon be required to transfer to him the \$2,300 mortgage note and his rights under the deed of trust. On January 2, 1915, Hon. J. F. Mullally, judge of the Forty-Ninth judicial district, granted Crawford the relief prayed for to the extent of requiring Boon to accept from Crawford the amount of his debt and to transfer the note and rights under the deed of trust to Crawford, without recourse on him, Boon, with which order of the court Boon complied.

Crawford, thereafter, in the same suit filed his first amended original petition in which he sought to recover judgment on the \$2,300 Boon-Clemons note, foreclosure of the deed of trust lien on the 413 acres, and also judgment on the four vendor's lien notes, and foreclosure of his vendor's lien on the 199.3 acres. He prayed that the 213.7-acre tract be first sold and the proceeds applied, first, to the payment of one-half of the costs of suit, second, to costs of sale, third, to the satisfaction of the Boon-Clemons note and lien, and the surplus, if any, to be paid to Spruill; that if such proceeds should prove insufficient to satisfy the three items named, then that the 199.3 acres be sold to satisfy the balance of the Boon-Clemons note, and the surplus, if any, from such sale be applied to the satisfaction of the debt evidenced by the vendor's lien notes. He prayed, in the alternative, that if the court should hold that said 199.3 acres ought to be sold first, then that the proceeds of such sale be applied, first, to one-half of the costs of the suit, second, the costs of sale, third, to pay and satisfy all the debts evidenced by vendor's lien notes and, fourth, to the payment pro tanto on the indebtedness represented by the Boon-Clemons note, and that plaintiff then have foreclosure and sale of said 213.7-acre tract for the payment of lien against the same rep-

resented by said Boon-Clemons note and deed of trust. He further prayed, in the alternative, that in either event he should have a foreclosure of both of his liens and that however said property might be sold that the proceeds thereof be applied, first, to the satisfaction of plaintiff's lien on the 199.3-acre tract of land, and, second, to the satisfaction of his first lien on said 213.7-acre tract, and prayed for general relief.

Spruill and wife admitted the execution of the Boon-Clemons note and the deed of trust given to secure the same; that appellant was the holder of the note and lien; that the note was due and unpaid, and that they were liable thereon. They also admitted all the facts relied upon by Crawford for recovery on the four vendor's lien notes and foreclosure of his lien, and Spruill admitted his liability as an indorser on the four notes. They then plead the facts hereinbefore set out, with the exception that the pleadings, with reference to homestead, do not show the facts as fully as the evidence hereinbefore detailed, and it will be necessary to state what was pleaded with reference to this matter, because objection thereto is presented by the first assignment of error. The allegation is as follows:

"That it has been the intention of these defendants, husband and wife, from the time of the execution of the mortgage in favor of Wm. Boon and I. H. Clemons, to sell off a portion of said 413-acre tract, sufficient to pay off said indebtedness, and out of the remainder of said land create and have a homestead, which they are entitled under the law, and the same to be exempt from execution; and they here and now claim and set up as their homestead 200 acres of said 213 acres remaining after the sale to Hurst, subject only to its secondary liability for the \$2,300 indebtedness now held by the plaintiff, W. L. Crawford, as the assignee of the defendant, Wm. Boon."

They prayed that the 199.3 acres be first sold and the proceeds applied, first, to the satisfaction of the Boon-Clemons note and lien, second, to the satisfaction of the four Hurst vendor's lien notes, and if such proceeds should prove insufficient to satisfy the Boon-Clemons note, that the 213.7 acres be sold to satisfy the balance unpaid and the surplus, if any, be paid to Spruill and wife.

The court rendered judgment for Crawford on both of his causes of action and for foreclosure of both liens, but ordered the land sold and the funds applied as prayed for by Spruill and wife.

[1, 2] By appropriate assignments, the appellant attacks the sufficiency of the pleadings and the evidence to sustain that part of the judgment whereby it was decreed that the proceeds of the sale of the 199.3-acre tract be applied first to the satisfaction of the judgment on the Boon debt.

We think it is clear that the rights of the parties are not affected in any way by the fact that Boon as holder of the \$2,300 debt had undertaken to sell the 199.3 acres first, and had caused the trustee to advertise that

the sale would be so made. The sale was not consummated, and no rights can be predicated upon the attempt to make the same.

As between Hurst and the Spruills, the latter had the right to have the 199.3 acres sold for the payment of the Boon debt and also the Hurst notes. If the proceeds proved insufficient to pay both debts, the Spruills would lose part of the debt evidenced by the Hurst notes; for the Boon debt was their debt as well as Hurst's debt. But they sold the Hurst notes to Crawford for \$2,618.50, and such notes were indorsed to Crawford.

In addition, Spruill and wife conveyed to Crawford the notes and the superior title held by them in the 199.3 acres of land by virtue of the conveyance to Hurst, warranting that "said notes are the first and only lien on said land (except the \$2,300 in said deed assumed)." Appellee contends that this instrument vested in Crawford only the right to subject the balance of the proceeds of the 199.3 acres to the payment of the notes purchased by him, after satisfying the Boon debt out of such proceeds. This contention appears to us to be founded on the theory that the Spruills should be construed to have, in the conveyance to Crawford, expressly contracted that Crawford should rely upon Spruills' indorsement of the notes, and a lien on the 199.3 acres second to the lien for the Boon debt. This is a construction most favorable to the grantors, but the rule is that the construction most unfavorable to the grantor will be adopted when the intention is doubtful. As between Hurst and the Spruills, the Boon and Hurst debts were placed by the contract evidenced by the vendor's lien deed upon terms of equality as both debts represented the consideration for the land. The Spruills, as long as they owned the Hurst debt, could subordinate the same to the payment of the Boon debt; but, when they sold the Hurst debt and received the proceeds, their right to subordinate such debt to the Boon debt ceased, unless it was expressly reserved by contract. The contract cannot be construed to contain any such reservation. A personal warranty was made that the Hurst debt constituted the only lien on the land, except the lien to secure the Boon debt. This warranty cannot be construed into a reservation of the right to demand that the Boon debt be first paid out of the proceeds of the 199.3 acres of land. Therefore, if the Hurst notes had been indorsed without recourse, it appears clear that the Boon debt and the Hurst debt, as between the Spruills and Crawford, would have been entitled to share ratably in the proceeds of the 199.3 acres. *Martin v. Gray*, 159 S. W. 118, and cases therein cited. But, in this case, the Hurst notes were indorsed by usual indorsement.

In addition, Spruill and wife conveyed to Crawford the superior title to the 199.3 acres retained in the deed to Hurst, authorizing

him to release the same upon payment of the Hurst notes. It is contended by appellant that the retention of the vendor's lien to secure the above-described notes, when considered in connection with the wording of the consideration clause, evidenced an express lien only to secure the Hurst notes, and that the Boon debt was secured only by an implied lien. Be this as it may, there is nothing in the transfer of the superior title which evidences an intention to limit the effect of the contract of guaranty evidenced by Spruill's indorsement; on the contrary, the transfer shows an intention to expressly waive the vendor's lien retained in the Hurst deed in so far as it had theretofore existed as security for the Boon debt. Thus, the waiver by Spruill of any existing lien in his favor, implied from the transfer by usual indorsement of the Hurst notes, is reinforced by the actual waiver evidenced by the transfer of the superior title.

We conclude, therefore, that Crawford was entitled, as against the Spruills, to have the 199.3 acres sold first and the proceeds applied to the payment of the Hurst notes prior to the Boon debt, unless the fact that the Spruills, before conveying to Crawford the Hurst notes, acquired a homestead on the remaining 213 acres requires the application of a different rule.

[3] We do not think the answer is sufficient, as against even a general demurrer, in so far as it attempts to set up the acquisition of homestead rights in 200 acres out of the 213-acre tract. No facts are pleaded which show that prior to the transfer of the Hurst notes any homestead right attached to said land. But had the pleading been sufficient, we think the decision would have been the same. After making the conveyance to Hurst, the Spruills made their home on the 213-acre tract. They had received \$1,000 in cash from Hurst, his notes heretofore described, and his contract of assumption of the Boon debt, and had retained the superior title to the 199.3 acres of land. They sold, for a consideration of \$2,618.50, the notes and with them conveyed to Crawford the superior title to the 199.3 acres. As a part of this consideration of \$2,618.50 Crawford released his deed of trust lien, which, while it might have been invalid as to the 199.3 acres, on the ground that it was homestead at the time the deed of trust was executed, or may have been invalid as to 200 acres to be designated, which, however, would have had to include the house and improvements on the 199.3 acres, was valid as to all land not homestead, and undoubtedly a valid lien upon a large portion of the 200 acres now claimed as a homestead. By this contract they secured \$2,618.50, and agreed, according to the legal effect of the indorsement of the notes and transfer of the superior title, that the proceeds of the 199.3 acres should, if Hurst failed to pay his notes, be

used first to reimburse the person who paid the \$2,618.50, or his assigns. They sold and conveyed the notes and superior title by an instrument executed with the formalities necessary in the case of a sale of the homestead itself. We think that the Spruills are in the same position, so far as Crawford is concerned, as if, instead of selling to Hurst, for a consideration largely to be paid, they had sold to Crawford the 199.3 acres for a cash consideration. In such a case, Crawford could have demanded that the 213 acres be first sold for the satisfaction of the Boon debt. *Henkel v. Bohnke*, 7 Tex. Civ. App. 16, 26 S. W. 645. The Spruills would have been estopped to assert as against Crawford an equity to have his land sold before the homestead. And in this case we think they are estopped to claim as against Crawford that the 199.3 acres should be applied first to the Boon debt.

The judgment of the trial court will be reversed and judgment here rendered in all respects the same as was rendered by the trial court, with the exception that the 199.3 acres will be ordered sold first, and the proceeds applied, first, to the payment of one-half of the costs herein incurred; second, to the payment of the debt evidenced by the Hurst notes; and, third, to the payment of the Boon debt and the other half of the costs, and the remainder, if any, is to be paid to defendant H. Hurst. If the proceeds of such sale be insufficient to pay the Boon debt and the other half of the costs, then the 213-acre tract, or so much thereof as may be necessary, shall be sold and the proceeds applied to the satisfaction of the remainder due on the Boon debt and one half of the costs. Any excess from the sale of the 213-acre tract shall be delivered to Spruill and wife.

Reversed and rendered.

A. HARRIS & CO., Inc., v. CAMPBELL.* (No. 7563.)

(Court of Civil Appeals of Texas. Dallas. May 27, 1916. Rehearing Denied June 24, 1916.)

1. LANDLORD AND TENANT § 79(2)—PROVISION FOR SUBLETTING—BREACH—PARTIES.

Where a partnership leased premises under a lease stipulating that the lessee might sublet the premises upon the lessor's written consent, and the partnership subsequently incorporated under the same name, without notice of the change to the lessor or his consent to the assignment of the lease by the partnership to the corporation, there was no such privity to the lease contract as entitled the corporation to sue for damages from the lessor's refusal to allow a subletting.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 249, 250; Dec. Dig. § 79(2).]

2. LANDLORD AND TENANT § 76(4)—PROVISION FOR SUBLETTING—BREACH—SUFFICIENCY OF EVIDENCE.

In a lessee's action for damages from the lessor's refusal to consent to a subletting for an

unexpired term, evidence held to sustain a finding that the lessor did not wrongfully, arbitrarily, and without cause refuse to consent to the occupancy of the premises by the subtenant, either as assignee of the lease or as subtenant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 229; Dec. Dig. § 76(4).]

3. WITNESSES § 410 — EXAMINATION — IMPEACHMENT.

In a lessee's action for damages from the lessor's wrongful refusal to consent to a subletting, where the cross-examination of the defendant showed an attempt to discredit his testimony, testimony, corroborating the defendant's statement that if the lessee would turn over the premises he would release him, was admissible.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1284; Dec. Dig. § 410.]

4. WITNESSES § 361(1) — IMPEACHMENT — REPUTATION.

In such action, where the lessee attempted to impeach the lessor's credibility and standing as a man of integrity, testimony that a witness had known the lessor for 35 years, that he had always promptly paid his debts and had a good reputation for truth and fair dealing, was admissible.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1167, 1171-1175; Dec. Dig. § 361(1).]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by A. Harris & Co., Incorporated, against A. W. Campbell. Judgment for defendant, and plaintiff appeals. Affirmed.

Cockrell, Gray & McBride and Henry P. Edwards, all of Dallas, for appellant. John L. Terrell, of Dallas, for appellee.

RAINEY, C. J. A. Harris & Co., Incorporated, brought this suit against A. W. Campbell to recover \$4,900 for the period from November 17, 1913, to July 1, 1914, alleging that A. Harris & Co., a copartnership, and the predecessor of A. Harris & Co., Incorporated, had a five-year lease contract as lessee with said Campbell as lessor of a certain building in Dallas, Tex., which lease contained a stipulation that the "lessees shall have the right to sublet said premises, provided lessor has no objections to sublessees, which must be evidenced by the written consent of the said lessor"; that said lessee on November 17, 1913, vacated said premises and sought to sublet same to one D. T. Dewell and others, but Campbell refused arbitrarily and without cause to allow subletting; that appellants could have gotten \$700 per month for the unexpired term, the period mentioned.

Appellee answered by general demurrer and denial and specially that A. Harris & Co., the partnership, was succeeded in business by A. Harris & Co., a corporation, to which the lease was transferred, which transfer was not known to appellee, nor did he know of such corporation until after the expiration of said lease contract. That as soon as appellee knew of the lessees' intention to vacate the premises he offered to take the premises off the lessees' hands and release

them from said contract for the remainder of the term, but said offer was declined and refused. That there was no privity of contract or estate between plaintiff and defendant that would entitle plaintiff to recover, and that appellant closed the doors but kept it occupied until ten days after the lease had expired, and not until then did appellant offer to surrender possession of said premises to appellee.

The case was submitted to the court without a jury and judgment rendered in favor of appellee, from which this appeal is taken.

[1] We are met at the threshold of this case with a counterproposition of appellee which attacks the right of appellant to maintain its suit, said proposition being as follows:

"In this case, even though the original lessee in the lease contract, a partnership, has the right of action such as is here brought, the assignee of such lessee, a corporation, has no such right of action growing out of the lease contract to which it is not a party."

The facts are that appellee leased to A. Harris & Co., a copartnership, the premises in question for the term of five years. After entering into said contract said A. Harris & Co., a copartnership, entered into an incorporation which succeeded the partnership and continued to occupy the said premises, and conducted a similar business as the copartnership did. Neither said corporation nor the copartnership ever notified Campbell of such change. Nor did he ever know of such incorporation until the expiration of said lease; nor did Campbell ever give his consent or agree to the assignment of said lease by the copartnership to the corporation, therefore there was no such privity to the lease contract as entitled the corporation to sue for the damages sought to be recovered by it. *Boone v. Bank*, 17 Tex. Civ. App. 365, 43 S. W. 594; *Mayer v. Templeton*, 53 S. W. 68; *Menger v. Ward*, 87 Tex. 622, 30 S. W. 853; *Morrow & Allen v. Camp*, 101 S. W. 819; *Brown v. Pope*, 27 Tex. Civ. App. 225, 65 S. W. 42; *Rose v. Riddle*, 3 Willson, Civ. Cas. Ct. App. 299; *Rees v. Andrews*, 169 Mo. 177, 69 S. W. 4; 24 Cyc. 969.

[2] Appellant urges that under the contract of lease it had the right to sublet the premises, provided the lessor had no objection to the sublessee. That it procured an unobjectionable tenant and offered him to Campbell, but Campbell arbitrarily, and without just cause or reason, refused and declined to accept such subtenant, whereby appellant was damaged in the amount claimed.

The contract of lease between the lessor and A. Harris & Co., a copartnership, reads:

"The lessees shall have the right to sublet said premises, provided lessor have (has) no objection to sublessees, which must be evidenced by the written consent of the said lessor."

When Kramer, the president of the corporation, approached Campbell and asked his consent for the subletting to one party, the lease lacked about six months of expiring.

Campbell refused to sublet for a short term to any one. Campbell testified:

"In relation to the conversation with reference to one called Dewell, one of the firm came up to me * * * and told me they had a man they wanted to put in there with a stock of goods, and I asked him the character of goods that he wanted to put in, and he said about the same as they had been carrying, and I asked him if he would make a permanent tenant, and the answer was, 'No, I don't think so.' He said, 'He is coming from Oklahoma,' or would ship his goods down here from Oklahoma, and left the impression on me he was coming down here merely to put on a quick sale, or to occupy the building temporarily. I told him, so far as I am concerned, I will not give my written consent. We discussed it at more length, but that is the essence of it. They did not tell me the name of the man; his financial ability or responsibility wasn't discussed; they didn't offer to tell me. * * * He said they were shipping or bringing a stock of goods from Oklahoma here to Dallas to put on a sale. What is meant by putting on a sale, if I understand it, is to bring a stock of goods and put it on sale and sell as quick as you can dispose of it. * * * They did not tell me they had some written contract with Dewell. * * * I don't know that I ever heard his (Dewell's) name until after this suit was brought."

Under all the testimony introduced, the trial court found that appellee did not "wrongfully, arbitrarily, or without cause refuse to consent to, or allow or permit, D. T. Dewell or any other person to occupy the leased premises, either as assignee of the lease or as subtenant of plaintiff." The evidence fully warranted this finding and we hold in accordance therewith. *Fisher v. Oil Co.*, 178 S. W. 905.

[3] Appellant assigns as error the admission of the testimony of Harry Kahn "that he had had a conversation with the defendant, Campbell, in about April, 1913, in which the defendant Campbell had stated to him that he had asked Kramer, plaintiff's president, to turn over to him (Campbell) the leased building, and that he would release the plaintiff from the lease, and that the said Kramer had refused such offer," and submits this proposition:

"Where there is a sharp conflict between plaintiff's witness (Kramer) and defendant (Campbell) on a given point, it is error for the court to permit the defendant to support his testimony by introducing his self-serving statement as made to a third person."

Appellant reserved a bill of exceptions, which was approved by the court with the following qualification:

"The defendant, while testifying in his own behalf, was cross-examined by plaintiff's counsel and, on such cross-examination, had been asked and had answered questions as follows, to wit:

"Q. You so told his honor; that happened back in 1913? A. Yes, sir; in 1913. Q. Who else have you ever told that fact? To whom have you ever mentioned that you made any such proposition? A. As to that I could not tell you. Q. That happened about two years ago or more, this last April, didn't it? A. Yes, sir; April, 1913. Q. Can you name any person in that period of time to whom you have repeated or stated the fact that you made that proposition to Mr. Kramer? A. I believe I can. Q. Give his name? A. Harry Kahn. Q. Who is it? A. Harry Kahn. Q. When did you make

that statement to him? A. I could not tell you, because he was very much interested, understand, in getting me a certain tenant. Q. About when did you make that statement to Mr. Harry Kahn? A. I think shortly after I made the proposition to take the building. Q. Shortly after you made the proposition to take the building, you told Harry Kahn that you made it? A. Yes, sir. Q. Do you recall any other person to whom you repeated that fact? A. Not at this time."

These questions show an attempt on the part of appellant to discredit the testimony of Campbell; and we think the testimony of Kahn, corroborating the statement of Campbell, was legitimate under the circumstances.

[4] We also think the testimony of W. J. Kain was legitimate, which testimony was to the effect "that he had known the defendant Campbell for 35 years, and knew that he had always promptly paid his debts during that time, and that the character or reputation of the defendant for honesty and fair dealing and truth and veracity was good." The proposition by appellant is that it is "error for the court to permit such testimony as reflected in the assignment, to the good standing as indicated in the assignment of the defendant, who resides at the seat of the trial, and whose testimony has not been directly impeached."

The trial court approved the bill of exception with the following explanation:

"The defendant, while testifying in his own behalf, was cross-examined by plaintiff's counsel and on such cross-examination had been asked and had answered questions as follows, to wit:"

Without here quoting the questions and answers, we will state that we think the questions asked by the appellant were an attempt to impeach the credibility and standing of Campbell as a man for honesty, etc., which rendered the testimony of Kain admissible, and there was no error in its admission.

The court filed its conclusions of fact, to which there are several assignments presented; but we have fully considered the evidence adduced, and we find the court's conclusions correct and here adopt them as the conclusions of this court.

About the time appellant was considering the subletting of the premises, Campbell proposed to take the building off of its hands and release it from the payment of rents for the unexpired term, as he had a man to whom he could rent it. Kramer inquired the name of the party. Campbell refused to tell and Kramer declined to surrender the lease for fear the party might engage in a competing business with A. Harris & Co., the corporation, and kept the premises occupied with fixtures, etc., until about ten days after the expiration of the lease contract.

Finding no error in the record and believing that justice has been reached, the judgment of the lower court is affirmed.

TERRELL, Comptroller of Public Accounts,
v. MIDDLETON. (No. 5689.)*

(Court of Civil Appeals of Texas. San Antonio.
June 14, 1916. Rehearing Denied
June 29, 1916.)

1. STATES \S 168 $\frac{1}{2}$ —INJUNCTION—ACTION—
RIGHT OF ACTION.

A citizen and taxpayer may institute and maintain an action to restrain state officers from performing illegal and unauthorized and unconstitutional acts, since, when a state officer acts without legal authority, he is not acting for or in the interest of the state, and suit against him is not a suit against the state.

[Ed. Note.—For other cases, see States, Dec. Dig. \S 168 $\frac{1}{2}$.]

2. STATES \S 168 $\frac{1}{2}$ —INJUNCTION—GROUNDS—
PUBLIC OFFICES—ACTS WHICH MAY BE
RESTRAINED—STATUTE.

Rev. St. 1911, art. 5732, providing that no court shall have the power, authority, or jurisdiction to issue the writ of mandamus or injunction or any other mandatory or compulsory writ of process against any of the officers of the executive department of the government to compel the performance of any act, or duty which they are by law authorized to perform, does not deprive the district court of power to restrain the performance of an illegal or unconstitutional act by a state officer, since there is a distinction between compelling an officer to perform a legal duty and restraining him from carrying into effect an illegal act.

[Ed. Note.—For other cases, see States, Dec. Dig. \S 168 $\frac{1}{2}$.]

3. STATES \S 168 $\frac{1}{2}$ —TAXPAYERS' ACTION—
JURISDICTION—DISTRICT COURT—STATUTE.

In view of Rev. St. 1911, art. 1526, as revised by Acts 33d Leg. c. 55, authorizing the Supreme Court to issue warrants of quo warrantum or mandamus against any district judges or state officers except the Governor, the District Court, which is one of general jurisdiction, retains jurisdiction to issue an injunction against a state comptroller to restrain him from issuing warrants on the state treasurer covering expenditures made by the Governor.

[Ed. Note.—For other cases, see States, Dec. Dig. \S 168 $\frac{1}{2}$.]

4. CONSTITUTIONAL LAW \S 70(1)—ENCROACH-
MENT ON LEGISLATURE—RIGHT TO DETER-
MINE CONSTITUTIONALITY OF STATUTE.

It is settled beyond recall that the courts, state and federal, have the power to pass upon the constitutionality of statutes and the authority to ultimately destroy or enforce laws passed by the legislative branch of the government.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 129, 132, 137; Dec. Dig. \S 70(1).]

5. CONSTITUTIONAL LAW \S 67—DISTRIBUTION OF POWERS—LEGISLATURE.

When discretion is confined to any one branch of the government, a decision upon that particular point cannot be questioned or revised.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 123; Dec. Dig. \S 67.]

6. STATES \S 60—COMPENSATION OF GOVERNOR—STATUTES—CONSTRUCTION—CONSTITUTIONAL PROVISIONS.

An act passed February 11, 1915 (Acts 34th Leg. c. 9), making an appropriation covering deficiencies for fuel, water, lights, etc., for the Governor's mansion, but including items for food, automobile repair, punch, water, hire, and coal, for the Governor's private use, is violative of Const. art. 4, \S 5, providing that the Governor shall receive as compensation for his services an annual salary of \$4,000 "and no

more" and shall have the use and occupation of the Governor's mansion, fixtures, and furniture; and Const. art. 16, § 6, providing that no appropriation for private individual purposes shall be made.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 43, 61, 63; Dec. Dig. ¶60.]

7. CONSTITUTIONAL LAW ¶26—CONSTRUCTION OF CONSTITUTION.

A state Constitution should be liberally construed in contradistinction to a strict construction of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. ¶26.]

8. STATES ¶120—DEBTS—STATUTES—CONSTRUCTION—CONSTITUTIONAL PROVISIONS.

Under Const. art. 3, § 49, providing that no debt shall be created by or on behalf of the state except to support casual deficiencies of revenue, and Rev. St. 1911, art. 4342, authorizing appropriations to cover deficiencies, a bill making an appropriation for water, fuel, lights, etc., for the Governor's mansion, and covering items for food, liquors, engraved cards, and invitations for the Governor's private use, is invalid.

[Ed. Note.—For other cases, see States, Cent. Dig. § 119; Dec. Dig. ¶120.]

9. CONSTITUTIONAL LAW ¶50—POWERS OF LEGISLATURE.

A Legislature has plenary powers subject only to constitutional limitations.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 48, 49; Dec. Dig. ¶50.]

10. STATES ¶119—LIMITATION ON CREDIT OF STATE—CONSTITUTIONAL PROVISIONS.

A bill appropriating money to pay bills contracted by the Governor for water, fuel, lights, etc., for the Governor's mansion, containing items for food, liquors, groceries, and automobile repairs for the Governor's private use, is violative of Const. art. 3, § 50, providing that the Legislature shall have no power to authorize the giving or lending of the credit of the state for the payment of the liabilities of an individual.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118; Dec. Dig. ¶119.]

11. CONSTITUTIONAL LAW ¶43(1)—ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution and appointed judicial tribunals to enforce it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. ¶43(1).]

Appeal from District Court, Travis County; Geo. Calhoun, Judge.

Suit for injunction by W. C. Middleton against H. B. Terrell, Comptroller of Public Accounts of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

Pat M. Neff, of Waco, for appellant. John W. Hornsby, of Austin, for appellee.

FLY, C. J. This is a suit by appellee against the comptroller of public accounts of Texas to restrain him from issuing warrants on the state treasurer, covering certain expenditures made and incurred by O. B. Colquitt, while occupying the office of Governor of the state of Texas. The items of expenditure and bills of expense incurred by said

Governor began in June, 1914, and were for gas, ice, telephones, "merchandise," automobile repair to machine (the private property of the Governor), food for horses privately owned by him, chickens, vegetables, butter, eggs, gasoline, "groceries," bread, cakes, meat, "horse shoeing," "invitation cards and envelopes" for private use, "chicken salad," Saratoga flakes, punch, waiter hire, and coal. It was alleged that the amounts due for such articles could not be made the basis of claims against the state of Texas, and were in direct contravention of section 5, art. 4, of the state Constitution, which provides for the compensation of the Governor, and that the Legislature had no power or authority under that article to make, but is prohibited thereby from making, an appropriation for such purposes, as well as by section 51, art. 3, of the Constitution, which provides that:

"The Legislature shall have no power to make any grant, or authorize the making of any grant of public money to any individual, association of individuals, municipal or other corporation whatsoever."

Appellant filed general and special exceptions to the petition, and alleged that the articles itemized and set out were purchased by O. B. Colquitt, as Governor, and not for his private purposes; that an appropriation was made by the Legislature on February 11, 1915, to cover deficiencies for "fuel, light, water, groceries and incidentals for the Governor's mansion and grounds"; and that the comptroller was authorized to issue his official warrants for the debts enumerated in the petition. It was further pleaded that all the debts were created by virtue of article 4342, Revised Statutes, which provides for the creation of deficiencies and pay therefor. The most of the answer consisted of legal deductions and conclusions, few facts being pleaded.

A temporary injunction was issued, and the cause was afterward tried by the court without a jury, and the temporary injunction was perpetuated as to the account of the Driskill Hotel for \$76.50 for punch, as to account of Driskill Hotel for 15 gallons of chicken salad \$90, 5 gallons of olives \$7.50, 2 cases of Saratoga flakes \$2, almonds \$7.50, and case for same \$2, 12 gallons coffee \$6, sugar \$1.50, 14 pounds of mints \$8.40, lettuce \$5, waiters \$12.50, and cooks and helpers \$13, amounting in the aggregate, after deducting \$3 for olives returned, to \$152.40; as to account of Tobin Book Store for 500 engraved and embossed invitations \$32.50, and 500 embossed cards and envelopes \$21, amounting to \$53.50; as to account of W. A. Achilles & Co. for \$98.50 for groceries; as to account of Maerki's Bakery for \$14.20 for groceries; as to account of Excelsior Meat Market for \$12; as to account of Bryant Bros. for \$2.50; as to account of W. J. Forster for \$62.45. The temporary injunction was dissolved as to other items, consisting of charges for wa-

ter, lights, telephone service, and perhaps other things.

[1] The first assignment of error assails the action of the trial judge in overruling an exception questioning the authority of a taxpaying citizen to institute and maintain a suit to restrain the comptroller from issuing warrants; the reasoning being that the plaintiff has no interest in the subject-matter of this suit, and that the "pleadings affirmatively show that he has no interest in the suit other than as a citizen and as a taxpayer in general with other citizens and other taxpayers." The allegations affirmatively showed that appellee as a citizen of Texas and a taxpayer had the right, power, and authority to institute and maintain a suit to restrain state officers from performing illegal, unauthorized, and unconstitutional acts. When a state officer acts without legal authority, he is not acting for or in the interest of the state, and a suit against him is not a suit against the state. In deciding who are parties to the suit the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind as a real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation. *Osborn v. U. S. Bank*, 9 Wheat. 738, 6 L. Ed. 204. To the same effect are *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171, and *Conley v. Daughters of Republic*, 151 S. W. 877. In the latter case a writ was granted and the judgment reversed, but in the remarkable opinion by the Supreme Court nothing was said against the holding that the suit was not one against the state.

Appellee was seeking to prevent the diversion of taxes collected by the state, a portion, no matter how small, of which had been paid by appellee. Citizens are allowed to prevent, by injunction, the collection of illegal taxes, and the reasons for allowing them this power are no stronger than to allow restraint of an officer who seeks to expend the taxes when collected for an illegal or unconstitutional purpose. The diversion of the taxes after collection from legal purposes would be equally as injurious to the taxpayer as the collection of illegal taxes. In either event, the burdens of the taxpayer are increased. As said by the Supreme Court of the United States in *Crampton v. Zabriskie*, 101 U. S. 809, 25 L. Ed. 1070, and quoted and approved by the Supreme Court of Texas in *City of Austin v. McCall*, 95 Tex. 565, 68 S. W. 791:

"Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question. * * * Certainly in the absence of legislation

restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers."

[2, 3] The district court is one of general jurisdiction, and, unless original jurisdiction of any case is specially given by law to some other court, it can exercise jurisdiction over it. Therefore, unless the exclusive authority to try any case similar to the one at bar is given to some court other than the district court, it has the right, power, and authority to hear and determine it.

In 1881, an act was passed by the Seventeenth Legislature providing:

"No court of this state * * * shall have power, authority or jurisdiction to issue the writ of mandamus or injunction or any other mandatory or compulsory writ or process against any of the officers of the executive departments of the government of this state to order or compel the performance of any act or duty which, by the laws of this state, they, or either of them, are authorized to perform, whether such act or duty be judicial, ministerial or discretionary." *Gammell's Laws of Texas*, p. 7.

By the terms of that law no court could compel, by any writ, the performance of any act or duty of any state officer; but it is not even hinted that the district court would not have the power and authority to restrain the performance of an illegal and unconstitutional act by a state officer. There is a marked difference in compelling the performance of a duty and the prevention of the violation of a law to the prejudice of a taxpayer. The act of 1881 is embodied in the Revised Statutes of 1911, as article 5732.

In 1892, after an amendment to the Constitution in 1891, an act was passed authorizing the Supreme Court, in term time or vacation, to issue writs of quo warranto or mandamus against any district judge or officer of the state government, except the Governor of the state. The law in question, which is article 1526, Revised Statutes 1911, was amended in 1913, page 107 Laws of Regular Session, by inserting "or Court of Civil Appeals, or judge of a Court of Civil Appeals." In this law the power to issue injunctions against a state officer is not given, the only power being to issue writs of quo warranto or mandamus. It follows that in the absence of special power, authority, and jurisdiction being lodged in the Supreme Court, or some other court, to enjoin a state officer from a violation of the Constitution, the law has vested that authority in the district court, the only court of general jurisdiction in the state. The Supreme Court can only enforce the performance of a legal duty, but has no authority to enjoin the execution of an act except in protecting its jurisdiction. If the Supreme Court has no jurisdiction to act in a case like this, then to whom can the taxpayer look for redress except to the district court to whom all jurisdiction is given, except that specially confided to other courts? There is

nothing to the contrary in the cases of *Bledsoe v. Railway*, 40 Tex. 564, *Messner v. Giddings*, 65 Tex. 301, and *McKenzie v. Baker*, 88 Tex. 677, 32 S. W. 1038, cited by appellant. Appellant does not seem to recognize the distinction between compelling an officer to perform a legal duty and restraining him from carrying into effect an illegal act. This is undoubtedly the construction placed upon the law by the Supreme Court. *Teat v. McGaughey*, 85 Tex. 478, 22 S. W. 302. The Supreme Court has never attempted, as an act of original jurisdiction, to restrain the infraction of a law or the Constitution upon the part of any one. Our view of the matter is fully sustained in a clear and exhaustive opinion of the Court of Civil Appeals of the Third District, delivered through Judge Key. *Kaufman County v. McGaughey*, 3 Tex. Civ. App. 655, 21 S. W. 281. In that case the Commissioner of the General Land Office took the same position assumed by the controller in this, and the court said:

"In this suit it is not sought to compel either of the defendants to do any act or perform any duty which they are authorized to perform; but, on the contrary, the gist of the plaintiff's case lies in the averment that the acts complained of have been, or will be, committed without and in excess of lawful authority. Manifestly, if, prior to the passage of the statute in question, the district courts were clothed with power to restrain the officers designated therein from the commission of acts without and beyond lawful authority, this statute was not intended to abridge or affect such power. The defendants, by excepting to the court's jurisdiction, deny its power to determine whether or not the acts are within the scope of lawful authority; and this denial rests solely upon the fact that the petition shows one of the defendants to be the head of one of the executive departments of the state. This contention involves the proposition that if such officers choose to exceed their powers, however much the excess or great the injury, the courts cannot interpose to prevent them."

That court held, as we do, that the district court had jurisdiction.

In the case of *Sterrett v. Gibson*, 168 S. W. 16, this court, in passing upon the statute which clothes the Supreme Court with authority to issue writs of quo warranto or mandamus to heads of departments, held:

"The exclusive jurisdiction of the Supreme Court is confined to cases in which it is sought to compel an officer of the executive department to do or perform an act or acts enjoined upon him by the laws of the state, and the statute does not apply to cases in which the rights of persons or property are invaded by such officer. In such cases, swift, decisive action is demanded, and redress would be practically denied for trespasses and torts committed by members of the executive department. What act or duty is appellee seeking to order or compel the commissioner to perform that is authorized by the laws of Texas? He is not seeking to compel him to perform any act or duty, but to restrain him from performing an act or duty enjoined upon him by the laws of the state, which appellee claims are invalid."

A writ of error was denied in that case by the Supreme Court.

The first assignment of error has no merit and is overruled.

[4, 5] The second assignment of error assumes that nothing can be held unconstitutional by a court that had met with the sanction of a legislative body. To accede to such a proposition would be to hold that the Supreme Court of the United States for over a century has been usurping power and playing the part of a tyrant in passing upon the constitutionality of laws passed by the Congress of the Union. Whatever doubts may have existed at one time as to the authority of courts to decide upon the constitutionality of statutes, that matter has been definitely settled in favor of the affirmative, and while it may be a subject of regret that the court of last resort has seemed desirous at times of usurping the full powers of the government, and laying itself open to the charge of shaping the policies and principles of our government, the fact has been settled beyond recall that courts, federal and state, have the authority to ultimately destroy or enforce laws passed by the legislative branch of the government. The matter is too well settled now for this court to desire to enter into a discussion of it. The assignment of error raising this point is not followed by proposition or authorities that have any pertinency or relevancy to the matters sought to be raised by the assignment, and it, as well as the third assignment, which is like unto it, is overruled. If an act of the Legislature is unconstitutional, the sanction of that body, although reinforced by the approval of the Governor, cannot infuse into it vitality and validity. To so hold would be to hold that no act of the Legislature which has met with executive approval could ever be attacked. In other words, it would clothe Legislatures with infallibility. No such doctrine has ever been promulgated by any Texas court. No one disputes the proposition laid down in *March v. State*, 44 Tex. 64, and cognate cases; the only proposition being that, when a discretion is confided to any one branch of the government, a decision upon that particular point cannot be questioned or revised. No court would hold that, if a Legislature voted to give the Governor \$10,000 a year as salary, such act could not be inquired into because it had met with legislative and executive sanction, and yet that is, in its ultimate analysis, the contention of appellant. If an act of the Legislature is not sanctioned by the Constitution, no legislative approval can make it valid, or render it immune from attack in the courts of the country.

[6, 7] The fourth, fifth, sixth, and seventh assignments of error are grouped, and they embody the proposition that the Constitution of Texas permits and authorizes the appropriation of moneys of the state to purchase the groceries, the gasoline, the stationery to be used for social functions, and other articles of comfort, necessity, and luxury desired by the Governor. This brings us to the consideration of the only vital point in this

case, the others considered by us being mere technical matters as to parties and as to the powers of district and appellate courts. To properly understand the points of contention in this case, it will be interesting and instructive to call to mind the circumstances under which the present Constitution was adopted.

It is within the memory of older citizens, and known to all intelligent citizens through the medium of history, that after the close of the fratricidal strife between the North and South, in 1865, when the starved and beaten armies of the South returned to their desolated homes to struggle for a livelihood for their impoverished families, a horde of adventurers, aided by citizens who had opposed secession, filled with hatred for our people and seeking for spoils, with the backing of the strong arm of the military, and aided by the disfranchisement of the whites and the enfranchisement of the negroes, seized the reins of government and engaged in exploiting the state and directing its affairs for the financial as well as political benefit of the flotsam and jetsam cast by the chances of war upon a helpless people. The citizens were burdened with oppressive taxes, which were used in the interest of office holders raised to power by an irresponsible, ignorant, and vicious electorate, and the rights of those bearing the burdens laid on them by the political party that had seized the reins of government were ignored and trampled upon. In 1873, when the burdens had reached their limit, when an armed constabulary of former slaves surrounded the polls and sought to intimidate the whites, the freemen of Texas went to the polls and recorded their condemnation of the state administration and elevated Richard Coke to the governorship. The first efforts of the enfranchised citizens of Texas were to obliterate the Constitution foisted upon them largely by renegades, carpetbaggers, and scalawags, and to re-establish a free government. A constitutional convention was called and met in the city of Austin, on September 8, 1875, which framed the present Constitution. The farmers of Texas constituted a large proportion of that convention, and, writhing under the exactions and extortions of the state government forced upon them, the pendulum swung from the extreme of riotous and irresponsible expenditure of public money to the extreme of close economy, if not penuriousness. All kinds of expenses were cut down, and every constitutional bar to extravagance that could be anticipated was inserted in an instrument which when completed had more the appearance of a code of laws than an enunciation of organic principles upon which to build the laws. The desire for economy caused the convention to provide salaries which were small and insignificant even in that day of cheap living, and which in modern times have become niggardly and utterly insufficient. So

anxious were the members of that convention to hold down salaries and enforce strict economy, that they provided that the Governor of this imperial domain, containing more than 265,000 square miles, larger in extent than any government of Europe except Russia, should receive a beggarly salary of \$4,000 per annum. They provided in article 4, § 5:

"He shall, at stated times, receive as compensation for his services an annual salary of \$4,000.00."

And then, as if to anticipate a spirit of liberality or extravagance in the future, they command that he shall receive that sum "and no more," and then graciously added "and shall have the use and occupation of the Governor's mansion, fixtures and furniture."

A reference to the journal of the convention shows that John H. Reagan sought to have the words, "and no more," stricken from the provision as to the salary of the Governor; but it was voted down. The committee appointed to draft the Constitution reported in favor of a salary of \$5,000 for the Governor, but by a vote of 44 to 32 it was reduced to \$4,000. It was then attempted to append after the words, "and no more," the words, "until otherwise provided by law," which attempt was promptly voted down. In section 5 as reported, the word, "also," preceded, "the use and occupation of the Governor's mansion"; but it was stricken out. These acts of the convention tend to show that it was the determination and desire of the constitutional convention that the Governor should receive as compensation the sum of \$4,000 and no more. It is to be regretted that the debates of that convention were not preserved, as they would illuminate the different portions of the Constitution and give an insight into the intent and desires of those composing the convention. One thing is apparent, however, not only from the plain and unequivocal words of section 5, but from the meager report of the proceedings of the convention, that it was the object and desire to confine the pay and emoluments of the Governor to \$4,000 "and no more." Many of the delegates were desirous of cutting the Governor's salary from \$4,000 to \$3,000, and it was actually reduced from \$5,000 as proposed by the committee to \$4,000. We find that a delegate sought to ingraft on section 5 the sentence, "He shall receive no fees or perquisites, or extra compensation for the performance of any duties connected with his office"; but it was rejected. In the absence of the debate on the question, it cannot be definitely determined whether it was desired that he should receive perquisites or extra compensation, or whether it was thought that the words used were sufficiently comprehensive to cover the desired amendment. From the economical, if not parsimonious, trend of the convention, we are inclined to think that the last interpretation is more reasonable. The spirit of economy seems to have permeated and dominated the convention, not only as

to salaries, but as to advertising the resources of the state and as to all the affairs of the state government. The journal shows such recitations as "the present constitutional convention having reduced their salaries three-eighths of the original amount, of that which was paid members of the Legislature, and have promised their constituents and the people generally to practice rigid retrenchment." "Retrenchment" was the watchword of the hour, and everything was sacrificed to gain that end.

Considering the circumstances under which the convention met, the evils sought to be remedied, and the ends to be accomplished, as well as the personnel of the members, it cannot reasonably be held that it ever entered the mind of any member that the Governor, under the guise of maintaining the Governor's mansion, would be voted groceries to maintain his household, would be voted food and care of the Governor's horses, gasoline and repairs for his automobile, would be voted embossed cards and printed invitations to his social functions, and liquors, meat, vegetables, and fruits for his table. The "Grangers" who composed that convention would have arisen in their wrath and smitten the unfortunate delegate with their votes who would have dared to introduce a resolution permitting such rich perquisites and emoluments to the Governor. If he was to receive such a substantial addition to his salary, the words, "and no more," appended to the amount of the salary, are meaningless; for there can be no substantial difference in voting extra dollars to the Governor and paying the bills he has contracted for necessities and luxuries purchased by him for himself and his family.

Clearly, the items for which the comptroller sought and desired to issue state warrants, and from which action he was restrained, were for private and individual purposes, and not for the public good, and the appropriation made for that purpose by the Legislature was directly in the face of article 16, § 6, of the Constitution, which commands that "no appropriation for private or individual purposes shall be made." The articles named were clearly not for the Governor in his official capacity, but for his individual satisfaction and gratification. No governmental or official object would be obtained by feeding and shoeing his horses, by repairing and furnishing gasoline for his automobile, or by furnishing groceries or other luxuries for him to consume.

[8] The appropriation by the Legislature to pay for the articles used by the Governor was made under the guise of covering a deficiency, and appellant actually contends that article 3, § 49, of the Constitution, and article 4342, Rev. Stats., authorize the Legislature to make provision for the payment of debts contracted by the Governor for provisions and other things purchased by him between

Legislatures. We understand that the rule is that a state Constitution should be liberally construed, in contradistinction to a strict construction of the federal Constitution; but it is liberality of construction running riot, when items purchased for the table, automobile, horses, and library of the Governor can be ranked as "casual deficiencies of revenue," or "to repel invasion, suppress insurrection, defend the state in time of war or pay existing debts." None of these contingencies had arisen, and, in regard to the last named, the state had contracted no debt, and it was not in existence. There were no casual deficiencies of revenue to pay for luxuries and necessities for the household of the Governor, because no attempt had been made to raise revenue for that purpose. No provision could be made for it, for the amount of it would depend on the taste and appetite of the individual who occupied the Governor's office. The Legislature was chary in its description of the items of the appropriation upon which the comptroller desires to draw his warrants. The language is:

"That the following sums be and they are hereby appropriated to cover deficiencies for the named purposes for the fiscal year ending August 31, 1915: For Governor's mansion, water, fuel, lights, etc., \$1,500.00."

The "etc." was very comprehensive, and covered any conceivable articles of food or drink, gasoline, horse feed, stationery, and other articles. By a liberal construction of the Constitution, which was made by the trial judge, but about which an opinion of this court has not been sought, and consequently will not be given, water, fuel, and lights were allowed; but reason would stagger and common sense collapse with a holding that the articles bought for the use of the Governor's family and himself were "for Governor's mansion."

Whenever the line defined by the Constitution is once passed, there is no limit to the things for which appropriations will be asked and given. This is clearly shown by the growth of appropriations from Legislature to Legislature since the adoption of the Constitution. The first Legislature thereafter appropriated "\$110 a year for gas for the Governor's mansion"; the second one included "\$400 a year for a gardener" and "\$200 a year for wood, lights, etc.," and a contingent fund of "\$200 for each year for the mansion"; and so on down until by leaps and bounds the sum of \$1,500 was appropriated, not to cover certain expenses, but to cover a deficiency created by the Governor for necessities and luxuries for himself and family. In addition to the appropriation for a deficiency, the appropriation of "\$110 a year for gas" has grown to \$5,000 per annum for Governor's mansion, for labor and employees at mansion, and for "fuel, lights, water, ice and incidentals." Gen. Laws, Regular Session, 34th Legislature, p. 13. As the encroachments on the Constitution progressed,

each successive step is made a precedent and used as an argument to justify a disregard of the Constitution. The appropriation for the deficiency, out of which the items herein specified are sought to be paid, is in addition to an appropriation made in 1913 for \$2,000 for each year of that administration.

The appropriation does not specify what it is intended to cover beyond "water, fuel, lights, etc.," and yet it is seriously argued that no citizen has the right to go back of that "etc.," and inquire into what is included under that omnibus provision. Did the Legislature know that it was appropriating money to pay for groceries and the other articles used by the Governor? If so, why did it halt at the articles named? Did it seek to conceal the subject of the appropriation? If an appropriation for "etc." is ever legal and valid, certainly the taxpayer, in spite of the sanctity with which appellant seeks to clothe the Legislature, should have the right to inquire into the matters for which the mysterious appropriation is made, and prevent the payment of any items prohibited by the Constitution. It is not a question of the manner of exercise of a power conferred by the Constitution, but the exercise of a power absolutely inhibited by the Constitution. It follows that the numerous authorities cited by appellant condemning the inquiry into the motives of a Legislature in the exercise of a valid power have no pertinency or applicability to an act done in violation of the Constitution.

[9] While not commending the expenditure by the Pennsylvania Legislature, as shown in *Russ v. Commonwealth*, 210 Pa. 544, 60 Atl. 169, 1 L. R. A. (N. S.) 409, 105 Am. St. Rep. 825, of money for the ceremonies attending the dedication of a monument, we can see the difference between that expenditure and one for the purpose of increasing the compensation of the Governor in violation of the Constitution. If there was any doubt, as expressed by the Pennsylvania court, as to the powers of their Legislature to make the appropriation of \$6,100.64, about half of which was for liquors, there is no doubt in this case. It is not doubted that the Legislature has plenary powers, subject only to constitutional limitations, as expressed in the Iowa case of *McSurely v. McGrew*, 140 Iowa, 163, 118 N. W. 415, 182 Am. St. Rep. 248, and we are applying that rule to the act of the Texas Legislature in making its deficiency appropriation. We are willing to concede to our Legislature perfect freedom of action within the constitutional limits of its powers, but we are not called upon to respect and uphold an act not only unsupported by the Constitution, but in contravention of it.

[10] If, as contended through the medium of the eighth assignment of error, the purchase of groceries and other necessities and luxuries for the support and maintenance of

the Governor's household is not an increase in his compensation, we fail to see how a direct payment of money to him would be an increase. The proposition seems to be that, if the money was placed in the hands of the Governor and he had expended it for the articles mentioned, that would be in violation of the Constitution, but if he is allowed, by an appropriation to pay for his purchases, it would not be an increase of compensation. That is a species of sophistry that cannot meet with judicial sanction. The one is as much an increase as the other, and no number of "etc." can cover it up. A lending of the credit of the state to a Governor for his private expenses, to increase his compensation is not only a violation of the constitutional provision as to his compensation, but is in violation of article 3, § 50, of the Constitution. The salary of \$4,000 was given as the entire compensation of the Governor, and it is clearly provided that his compensation shall be no more than \$4,000 annually.

Great stress is put upon the fact that Legislature after Legislature has interpreted the Constitution to give license to supply almost any article of food and drink and other comforts to the Governor, and an infraction of the Constitution is sought to be made sacred and impregnable by the numerous past infractions. As said in *Story on Constitutions*, § 407:

"Contemporary construction can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries."

The fact that the Legislature that met immediately after the adoption of the Constitution very modestly allowed gas for the Governor's mansion to the amount of \$110 annually cannot be invoked to fortify an appropriation to victual and maintain the governor.

"Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution." *Cooley, Const. Lim. (7th Ed.) p. 106.*

As said by the Court of Appeals of New York in *People v. Allen*, 42 N. Y. 378:

"No length of usage can enlarge legislative power, and a wise constitutional provision should not be broken down by frequent violations."

A wrong cannot be sanctioned by age and acquiescence, and transformed into a virtue. Indifference and lack of vigilance have lost some of the dearest rights to the people, but they can always be regained by energy and persistence.

[11] Courts hesitate to declare the acts of a co-ordinate branch of the government unconstitutional and void, and, in some instances where rights of property have sprung into existence by reason of the unconstitutional legislation, decline to interfere with the legislation, but a law passed in violation of the Constitution around which no rights of property have grown up should unhesitatingly be declared null and void.

"In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the Legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution, and because the will of the people which is therein declared is paramount to that of their representatives expressed in any law." Cooley, Const. Lim. p. 228.

The will of a sovereign people as expressed through their organic law is supreme, and necessity, legislative construction, and legislative act cannot weaken, impair, or destroy it.

There is no doubt that the Governor of Texas is inadequately compensated for his services, and that his niggardly salary is a reproach upon a great people; but the people have evidenced no desire to recede from the provision of the Constitution that he shall receive as compensation \$4,000 annually "and no more." Only a short time since a constitutional amendment was presented to the people which sought to increase the Governor's salary, but they promptly and vigorously voted it down. Their will, expressed in the Constitution and reiterated at the polls, cannot be circumvented and set aside by legislative action. There is no more sanctity in an appropriation bill than in any other act, and an unconstitutional appropriation cannot be covered up and hidden from judicial inquiry by a legislative "etc." If the Governor is miserably remunerated for his services, it is the province of the people, and not of the Legislature by evasion or disregard of the Constitution, to remedy it.

In conclusion, we quote the present Chief Justice of the Supreme Court in the case of *Waples v. Marrast*, 184 S. W. 180:

"Taxes are burdens imposed for the support of the government. They are laid as a means of providing public revenues for public purposes. The sovereign power of the state may be exercised in their levy and collection only upon the condition that they shall be devoted to such purposes; and no lawful tax can be laid for a different purpose. Whenever they are imposed for private purposes, as was said in *Brodhead v. Milwaukee*, 19 Wis. 670, 88 Am. Dec. 711, it ceases to be taxation and becomes plunder."

However commendable may be the desire of our Legislatures to add to the beggarly salary allowed the Governor of Texas, their liberality and sense of right and justice must give way to the mandate of the Constitution which commands that he receive \$4,000 annually "and no more."

The judgment is affirmed.

WELLER et ux. v. MISSOURI, K. & T. RY. CO. et al. (No. 5690.)

(Court of Civil Appeals of Texas. San Antonio. June 14, 1916.)

1. APPEAL AND ERROR \S 742(1) — ASSIGNMENTS OF ERROR—SUFFICIENCY.

In an action against a railroad company for damages for placing white passengers in a coach also occupied by negroes, assignments of error that the verdict and judgment were contrary to the testimony, in that it showed that the white passengers purchased tickets entitling them to transportation in a coach set apart for white persons, cannot be extended by propositions to raise the point that they suffered mental anguish by reason of the proximity of negroes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3000; Dec. Dig. \S 742(1).]

2. RAILROADS \S 253—CARRIAGE OF PASSENGERS—ACTIONS—DAMAGES.

A passenger cannot recover even nominal damages against a carrier for an infraction of the separate coach law without showing that he was injured.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 732, 733; Dec. Dig. \S 253.]

3. APPEAL AND ERROR \S 215(1)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—INSTRUCTIONS—OBJECTIONS.

White passengers suing because forced to ride in a coach partly occupied by negroes, not having objected below to instructions which made recovery contingent upon the suffering of actual damages, cannot assert on appeal that they should have been allowed nominal damages in any event.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1309, 1310; Dec. Dig. \S 215(1); Trial, Cent. Dig. \S 683.]

4. APPEAL AND ERROR \S 1050(3)—HARMLESS ERROR — CARRIAGE OF PASSENGERS — EVIDENCE—ADMISSIBILITY.

Where white passengers were suing because compelled to ride in a coach partly occupied by negroes, evidence that the two races were commingled because the negro coach was disabled, that they were separated by large signs, one portion of the coach being set off for the negroes, and that many of the white passengers were soon placed in Pullman and chair cars, has such a bearing on the question as to whether white passengers suffered shame and humiliation that, if erroneously admitted, the error does not necessitate a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4155; Dec. Dig. \S 1050(3).]

Appeal from District Court, Travis County; George Calhoun, Judge.

Action by C. B. Weller and wife, against the Missouri, Kansas & Texas Railway Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

N. A. Rector, of Austin, for appellants; Fiset, McClendon & Shelley, of Austin, for appellees.

MOURSUND, J. We adopt appellants' statement of the nature of the suit, as follows:

"This suit was instituted by C. B. Weller and his wife, Lucile Weller, against the Missouri, Kansas & Texas Railway Company of Texas for the sum of \$1,500 each, and in the total sum of \$3,000. Plaintiffs alleged that

the 23d day of December, 1913, in the city of Austin, Travis county, Tex., they purchased from the defendant railway company two first-class passenger tickets which entitled them to be transported from Austin to San Antonio, Tex., in a first-class coach in which only white people were allowed to ride (the plaintiffs being white people); that the defendant railway company breached its contract, in that it compelled plaintiffs to enter a coach partly filled with negroes and to ride in said coach from Austin to and beyond San Marcos, in Hays county, Tex., a distance over 30 miles; that they were humiliated and mortified on account thereof, and sued for damages suffered because of mental distress and anguish for such outrages. They pleaded, also, the statute which requires a railway company to furnish separate coaches for the transportation of white passengers and negro passengers, and alleged the violation of said statute by the defendant. The defendant answered by general demurrers and special exceptions, which were overruled, and further answered admitting paragraph 1 of plaintiffs' petition and otherwise substantially denying the remaining portions of said petition. In subdivisions (a) and (b) in said answer defendant pleaded extraordinary and unprecedented floods in Texas along its route which washed its tracks and bridges out in different places, which rendered its road unsafe and generally interfered with the operation of its trains, and also specially pleaded that it had not equipped the train upon which plaintiffs took passage with a separate coach for negroes, because it alleged that the only coach available for that purpose was in San Antonio. These subdivisions were pleaded, as the defendant claimed, first to show compliance or a substantial compliance with the requirements of the statute, and, second, as an excuse for not so complying, and, third, in mitigation of damages."

The trial resulted in a verdict and judgment in favor of defendant.

Appellants by their first assignment contend that the verdict and judgment are contrary to the testimony, in that the undisputed testimony showed that plaintiffs, who are white people, purchased tickets from defendant company which entitled them to transportation from Austin to San Antonio in a coach or car set apart for the use exclusively of white people, and that they were required by the defendant's officers and agents to enter a car in one of its trains at Austin bound for San Antonio and to ride from Austin to and through San Marcos in such car, and that a number of negroes were at the same time permitted to ride in said car.

The second assignment is similar to the first in all respects, except that it is asserted the verdict and judgment are contrary to the great preponderance of the testimony.

[1-3] These assignments do not embrace any contention that the undisputed testimony or the great preponderance of the testimony showed that plaintiffs suffered mental anguish, distress of mind, or humiliation, and they cannot be extended by propositions so as to raise such question. They simply assert that on proof of certain facts therein set out plaintiffs were entitled to recover. We therefore regard such assignments as raising the same question presented by the third and eighth assignments, namely, whether upon proof of such facts alone plaintiffs

are entitled to recover nominal damages. This court has held, in the case of *Norwood v. Railway Company*, 12 Tex. Civ. App. 560, 34 S. W. 180, that an individual, though a passenger, cannot recover any damages for the infraction of the separate coach law unless he suffers special damages on account of such infraction. This rule was reiterated in the case of *Henderson v. Railway Co.*, 38 S. W. 1136, and we are still of the opinion that it is correct. We conclude, further, that as plaintiffs did not object to the charge of the court nor the special charge given at defendant's request, in both of which plaintiffs' right to recover was made to depend upon the finding of actual damages, they cannot now be heard to insist that the jury should have allowed nominal damages.

Assignments 1, 2, 3, and 8 are overruled.

[4] Appellants contend that the court erred in admitting evidence showing that floods had occurred which had caused trains to be run on slow time and behind their regular schedule, and in this connection to show that it had no separate coach at Waco to place in the train on which plaintiffs took passage at Austin, and further to show that, as an excuse for not having a separate coach for negroes, such negro coach had been left in San Antonio on a former trip and was reported in bad order. They also contend that testimony should not have been admitted to the effect that defendant's officers and agents had posted placards on the back of the seats in the coach in which plaintiffs rode, designating the front portion thereof "For Negroes," and the rear portion thereof "For Whites"; also, testimony to the effect that an unusually large number of passengers sought passage on the train on which plaintiffs took passage. All of this evidence was objected to as irrelevant and immaterial. The court in his charge did not submit any defense based upon any of this testimony; in fact, refused a special charge in which defendant sought to present a defense based upon the theory that, if it was impossible to furnish other equipment owing to floods and heavy travel, it should not be held liable. The question to be determined is, therefore, whether any part of this testimony was inadmissible, and, if so, whether the error in admitting it is of sufficient importance to require a reversal of the judgment.

As it is a matter of common knowledge that white citizens of the South are daily thrown in contact with members of the negro race in almost every walk of life, and negroes are permitted by law to ride on street cars with whites, with only a sign to indicate the place where they are to sit, it seems clear that whether or not proximity to negroes in a coach or train causes mental anguish or humiliation depends to some extent upon the circumstances under which such proximity is brought about and maintained, and we therefore think it was un-

doubtedly permissible to prove that signs had been put up which showed that the negroes were not permitted to take seats in that part of the coach reserved for whites. Defendant's conductor testified that he used the coach in which plaintiffs took seats as a coach for negroes, from Waco to Austin, and had placed large cardboard signs in both compartments showing that it was for negroes, which signs had been torn down when he entered this car at the bridge as the train was leaving Austin, at which time he ascertained that plaintiffs and other white people had taken seats therein, and that he then put up signs on the seats between the whites and negroes. It is shown that owing to flood conditions no cars were available to add to this train at Waco or Austin or intermediate points, and that many persons were turned back at Austin and not permitted to enter the train; that a Pullman car was added at Austin, and was filled up by the conductor, at the expense of the company, with passengers standing up in the coach used for whites; that at San Marcos a chair car was picked up, and passengers were transferred from the Pullman to the chair car, leaving women passengers in the Pullman, and, shortly after leaving San Marcos, plaintiffs and Mrs. Connally and children, who were with plaintiffs, were moved into the Pullman. It was also proven that the coach ordinarily used for colored people was at San Antonio and reported to be in bad order.

Appellee contends that the unusual flood conditions, the want of proper equipment caused thereby, and the unusually large crowd that was on the train, were circumstances to be taken into consideration in determining whether or not plaintiffs were humiliated or mortified, and, if so, in measuring the equivalent thereof in money. The proof that a large number of people sought passage on the train was necessarily adduced in showing the crowded condition of the train, and could not have harmed plaintiffs; in fact, was developed by plaintiffs' own testimony. Of course, any circumstance tending in the slightest to show conditions calculated to prevent humiliation, or reduce the extent thereof, is admissible, and the difficulties under which defendant was laboring were calculated to make the passengers who were not turned back at the steps of the cars view with more or less resignation the occupancy of the car by both races. Some of the testimony would necessarily be adduced in explanation of the act of the conductor in using and designating the coach as one for negroes, in making the run from Waco to Austin, and if it be conceded that it was unnecessary to go into detail concerning the extent of the flood, and to prove that no other car was available, we think, after consideration of all the testimony, that, if error was committed in admitting the evidence

objected to, such error does not require a reversal of the judgment. In this connection, it is to be noted that all of these matters were fully pleaded by defendant and no exception thereto was urged by plaintiffs.

The judgment is affirmed.

CONNALLY et al. v. MISSOURI, K. & T. RY. CO. OF TEXAS. (No. 5691.)

(Court of Civil Appeals of Texas. San Antonio. June 14, 1916.)

Appeal from District Court, Travis County; George Calhoun, Judge.

Action by C. W. Connally and another against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for defendant, plaintiffs appeal. Affirmed.

MOURSUND, J. This is a companion case to No. 5690, styled C. B. Weller et al. v. Missouri, Kansas & Texas Railway Company, 187 S. W. 374, this day decided by this court. The cases were tried upon the same evidence, before the same jury, and a verdict was returned in favor of defendant company. The cause is submitted on the same briefs, and for the reasons set forth in the opinion rendered in said cause No. 5690, the judgment is affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. HARRELL GIN CO. (No. 5687.)

(Court of Civil Appeals of Texas. San Antonio. June 7, 1916.)

CARRIERS ~~6~~44 — ACTION FOR PENALTIES — FAILURE TO FURNISH CARS — PLEADING.

A complaint in action for penalties prescribed by Rev. St. 1911, art. 6680 (Vernon's Sayles' Ann. Civ. St. 1914, art. 6680), for alleged failure to furnish a car, alleging application for car to be placed on a spur track of another railroad, not designating as the place where the car was desired some station or switch of defendant, is demurrable, under Vernon's Sayles' Ann. Civ. St. 1914, art. 6679, requiring that application for cars shall state the place at which they are desired, and designate a place at some station or switch on the railroad.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120-122, 230; Dec. Dig. ~~6~~44.]

Appeal from Caldwell County Court; J. T. Ellis, Judge.

Action by the Harrell Gin Company against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

A. B. Storey, of San Antonio, and Jeffrey, Jeffrey & Fielder, of Lockhart, for appellant. O. Ellis, Jr., S. R. Graves, N. H. Clark, and Fred L. Blundell, all of Lockhart, for appellee.

MOURSUND, J. This is a suit by appellee against appellant to recover penalties in the sum of \$200 for alleged failure to furnish a tank car for the shipment of fuel oil for eight days after the expiration of three days from the time when demand in writing for such car was filed with the railway company.

Upon appeal to the county court, taken by plaintiff, judgment was rendered in its favor for \$175.

Plaintiff alleged that it owned a gin plant located on a spur of the San Antonio & Aransas Pass Railway Company at Lockhart, where it stored its oil; that there is a transfer track which connects the main line of defendant railway with the main track, switches, and spurs of the said San Antonio & Aransas Pass Railway; that an arrangement existed between the two railway companies whereby defendant railway, on demand, placed or had placed at points on the tracks, switches, and spurs of the San Antonio & Aransas Pass Railway Company cars for the receiving of freight for transportation over appellant's lines; that a custom existed between said railway companies whereby defendant company would place cars on the transfer track between the two main lines of said companies, and the San Antonio & Aransas Pass Railway Company would at once transfer said car to any switch or spur on its line in Lockhart, Tex., where the defendant desired to load freight for shipment over its line, and the agent of defendant would see to the loading and billing out of such freight in the same way as if it had been received on defendant's switches; that it was the duty of the San Antonio & Aransas Pass Railway Company to receive the cars placed on the transfer track, and the duty of defendant to place cars on said transfer track and notify the agent of the San Antonio & Aransas Pass Railway Company of the placing of such car and the switch or spur on which it desired the car placed for loading; that it was not the duty of the San Antonio & Aransas Pass Railway Company to furnish cars in Lockhart, Tex., to be loaded with freight to be transported by defendant to points on its line, nor was it the custom for the San Antonio & Aransas Pass Railway Company to do so, and this was understood by the shipping public in Lockhart and vicinity; that plaintiff desired to ship fuel oil from its gin plant to New Braunfels, and on July 18, 1914, delivered to the agent of defendant at Lockhart a written application or demand for one car suitable for hauling fuel oil, such car to be furnished at Lockhart on the spur of the San Antonio & Aransas Pass Railway Company's lines within three days from that date. Plaintiff then alleged the payment of one-fourth of the freight, its receipt and acceptance by the agent, together with the application, and the agreement by the agent to furnish the car as requested. Plaintiff also alleged that the place at which the car was to be furnished was within the corporate limits in the city of Lockhart, and that appellant had a station and an agent in said city; that defendant failed and refused to deliver the car either to plaintiff or on the transfer track within the time required by law, and did not furnish same until

July 30, 1914, wherefore it became bound to pay plaintiff the sum of \$25 per day for eight days. Plaintiff also alleged fully its readiness and ability to load the car within 48 hours had it been furnished as requested. Defendant alleged that the transfer track was owned jointly by the two railway companies, and plaintiff in a supplemental petition admitted the correctness of such allegation.

Appellant contends that the penalty provided for in article 6680, Vernon's Sayles' Statutes, cannot be collected unless the place designated in the demand be at some station or switch on the line of the company to which the application is made, and that plaintiff's petition is subject to general demurrer on the ground that it fails to allege that the application designated such a place. Article 6679, Vernon's Sayles' Statutes, reads as follows:

"Said application for cars shall state the number of cars desired, the place at which they are desired, and the time they are desired: Provided, that the place designated shall be at some station or switch on the railroad."

This statute, when strictly construed, undoubtedly means that the place designated must be at some station or switch on the railroad of the company to which application is made. In speaking of this statute our Supreme Court, in the case of *H. E. & W. T. Ry. Co. v. Campbell*, 91 Tex. 557, 45 S. W. 2, 43 L. R. A. 225, said:

"The statute imposes a heavy penalty, and it is an elementary rule that such statutes must be strictly construed. This does not imply that the courts are authorized to refuse to give effect to the intention of the Legislature, but it proceeds upon the theory that it is not reasonable to presume it is their intention to impose a punishment, except in so far as that purpose is clearly manifested by the language employed in the statute. It results as a corollary from this rule that the penalty will not be awarded in a case which does not come strictly within the terms of the statute. Such is the established canon of construction in this court."

Our courts have held that in proceedings to enforce statutory penalties the facts constituting the offense must be averred with the same certainty that would be required in a bill of indictment; that the facts must be alleged, and mere inference will not aid them. *State v. Williams*, 8 Tex. 265; *Dorrance v. Railway*, 53 Tex. Civ. App. 460, 126 S. W. 694.

Applying the foregoing rules to plaintiff's petition, we find that it does not allege that plaintiff designated as the place at which the car was desired one at some station or switch on the railroad of appellant company, but, on the contrary, that the petition affirmatively shows that the place designated is situated on the spur track of the San Antonio & Aransas Pass Railway Company. Plaintiff appeared to have some doubt whether it could require appellant to place its car on the track of the San Antonio & Aransas Pass Railway Company under the statute above copied; for it alleged that defendant

failed to deliver the car either to plaintiff or on the transfer track. The transfer track was partly owned by appellant, and it was customary for appellant to place its cars thereon and rely upon the San Antonio & Aransas Pass Railway Company to remove the cars to such place on its track as was desired by the shipper, but no statutory request was made of appellant to place the car on the transfer track, and it is not within the power of the courts to hold that this highly penal statute was intended to cover cases not coming within the terms thereof when strictly construed.

The first assignment is sustained, and the judgment of the trial court is reversed. As it is apparent that no case for the recovery of the penalty prescribed by article 6680, R. S. 1911, can be alleged, and the suit is for such penalty alone, it would be useless to remand the cause. Judgment will therefore be rendered by this court dismissing the case.

COMMISSIONERS' COURT OF TRINITY COUNTY et al. v. MILES et al. (No. 7262.)

(Court of Civil Appeals of Texas. Galveston.
May 5, 1916. Rehearing Denied
June 1, 1916.)

1. COUNTIES ~~6196~~(7)—FISCAL MANAGEMENT—INDEBTEDNESS IN EXCESS OF CONSTITUTIONAL LIMIT—INJUNCTION.

Evidence held sufficient to sustain issuance of injunction at suit of taxpayers to enjoin issuance of county warrants on the ground that tax levy was insufficient to pay interest and provide sinking fund for payment of such warrants on maturity, and on the further ground that there was not such competition in sale of warrants or letting of the contract for which the warrants were needed as is required by law.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. ~~6196~~(7).]

2. COUNTIES ~~6196~~(7) — TAXPAYERS' ACTION—PLEADINGS—SUFFICIENCY.

Where in injunction suit the answer contains special denials to most allegations of the petition in addition to a general denial, the allegation that plaintiffs are property taxpayers of the county, not met by special denial, is sufficiently proved by affidavit attached to the petition.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. ~~6196~~(7).]

3. APPEAL AND ERROR ~~638~~—HARMLESS ERROR—STATEMENT OF FACT—SUFFICIENCY.

Under R. S. 1911, art. 2069, providing that, where parties cannot agree upon a statement of facts, the judge shall certify a correct statement from statements furnished by the parties and from his own knowledge, held, that a statement of facts in an injunction suit based in part upon the recollection of a bystander is not reversible error, where the record contains a stipulation that the statement so prepared is correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2785, 2786; Dec. Dig. ~~638~~.]

Appeal from District Court, Trinity County; S. W. Dean, Judge.

Injunction by W. S. Miles and others against the Commissioners' Court of Trinity

County and others. From an order granting a temporary injunction, certain defendants appeal. Affirmed.

PLEASANTS, C. J. This appeal is from an order of the district court of Trinity county granting a temporary injunction in a suit for injunction, brought by appellees against the appellants, the county judge and members of the commissioners' court of said county, and the Midland Bridge Company, a firm composed of Freygong and Trocon, to restrain the defendants from carrying out a contract made by said court with said bridge company for the erection of bridges and roads in said county.

No pleading could be more inartistic than plaintiffs' petition. It is confusing and complex, but we cannot say that giving its allegations every reasonable intendment it fails to show any grounds for the relief sought.

The contract provides for the issuance by Trinity county of warrants in the sum of \$100,000 to be drawn on the road and bridge fund of the county. These warrants were to be dated January 1, 1916, and to bear interest at the rate of 6 per cent. per annum, payable semiannually, said warrants to be payable in 15 annual installments. The bridge company agreed to furnish the material and labor for the construction of such bridges and roads as should be designated by the commissioners' court, at prices named in the contract, the total amount so furnished not to exceed 85 per cent. of the amount of said warrants, the remaining 15 per cent. of said amount to go to the bridge company for engineering and superintendence of said work, the warrants to be delivered to the bridge company in payment of said labor and material as the work progressed.

[1] The petition, which is properly verified, alleges that plaintiffs are resident property taxpayers of Trinity county. The issuance of the \$100,000 in warrants is sought to be enjoined because the tax levy of 15 cents on the \$100 is not sufficient to pay the interest and provide a sinking fund for the payment of said warrants as they mature. The petition further charges that the contract is illegal because there was not such competition as the law requires in the sale of the warrants of the county and in the letting of the contract for furnishing the material and labor for the construction of bridges and roads to cost \$100,000. It is further alleged that of the 15 per cent. allowed the bridge company for engineering and superintendence of the work 5 per cent. was, in fact, allowed to cover discount on the warrants.

The trial court found that there was evidence to sustain all of these allegations, and that pending a full and final hearing of the cause a temporary injunction should issue restraining defendants from proceeding to

carry out said contract. From this order the members of the commissioners' court have appealed. The bridge company has not appealed. We think there is evidence in the record sufficient to sustain the allegations of the petition, and the trial court did not err in so holding.

[2] The hearing was upon the sworn pleadings of the parties and upon documentary and oral testimony. The defendants' answer contains a general denial, and also special denials of most of the allegations of the petition. There is no special denial of the allegation of the petition that plaintiffs are property taxpayers of Trinity county. In the absence of such denial, the affidavit attached to the petition was sufficient evidence of the truth of the allegation.

[3] The appellants urge that the judgment should be reversed because the statement of facts prepared by the trial judge, after the parties had failed to agree upon a statement, is not certified as required by the statute, and, the appellants having been, because of this insufficient certificate, deprived, without fault of theirs, of a statement of facts which this court can consider, the judgment should be reversed.

The certificate of the judge to the statement of facts is as follows:

"The State of Texas, County of Trinity.

"I, S. W. Dean, judge of the district court of Trinity county, Tex., do hereby certify that, the parties plaintiff and defendant having failed to agree upon a statement of facts in this cause, and having each submitted to me their respective statements, I have from such statements, and from my own knowledge, and from the evidence of N. H. Phillips, an attorney of record for plaintiff, and Hayne Nelms, a party present during the trial of said cause, made out the foregoing correct statement of the facts and all the facts proven upon the trial of said cause, and hereby direct the clerk to file the same as a part of the record therein.

"To certify which witness my hand this 17th day of February, A. D. 1916.

"S. W. Dean,
"Judge Twelfth Judicial District."

This certificate is not in accordance with the requirements of the statute, and ordinarily an appellant would not be required to submit his case in an appellate court upon a statement of facts prepared by the trial judge from testimony heard after the trial as to what was the evidence upon the trial, but such statement must be made from the statements furnished him by the parties and from his own recollection of the evidence. Article 2069, Revised Statutes 1911; Toland v. Turner, 152 S. W. 852.

The statement of facts in this case has appended to it a certificate of the stenographer who took down the testimony that it is a true and correct transcript of his notes of all the testimony heard upon the trial, and has also an agreement signed by the attorneys for the appellants that the statement is "a true and correct statement of the facts and all the facts adduced in evidence upon

the trial." If all the rules applicable to the preparation of a transcript of the evidence upon appeal from a final hearing of a cause are applicable in appeal from a hearing on an application for temporary injunction, which may well be doubted, we do not think the appellants can be heard to complain in the face of their agreement above set out.

We think the pleadings and evidence justified the trial court in granting the temporary injunction, and the order granting said injunction is affirmed.

Affirmed.

UHR v. LANCASTER. (No. 5761.)

(Court of Civil Appeals of Texas. San Antonio.
June 7, 1916.)

1. MUNICIPAL CORPORATIONS \S 180(3)—ORDINANCES—CONSTRUCTION.

An ordinance providing that the police force of the city of San Antonio shall consist of a chief marshal, assistant marshals, and patrolmen, although not establishing a police force, created the office of marshal, because specially named.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 452, 453, 455, 466; Dec. Dig. \S 180(3).]

2. MUNICIPAL CORPORATIONS \S 183(2)—MUNICIPAL OFFICERS—TERM OF OFFICE.

Under San Antonio City Charter, amendment of 1915, \S 16, par. 2, providing that appointive officers shall hold office until the appointment and qualification of their successors, when plaintiff admits that defendant had been appointed in 1913 in accordance with an ordinance creating the position of marshal, and does not allege that a successor has been appointed and qualified, a writ of injunction restraining defendant from exercising the duties of the position of marshal will not be allowed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 476; Dec. Dig. \S 183(2).]

3. MUNICIPAL CORPORATIONS \S 183(1)—CITY CHARTER—"EMPLOYÉ."

Under the City Charter of San Antonio as amended in 1915, enumerating the elective and appointive officers of the city and providing that officers and employes hold office for two years, the city marshal not being enumerated, although an officer contemplated by Const. art. 16, \S 17, providing that all officers of the state shall continue to perform their duties until their successors are duly qualified, is an employé, and not an appointive officer appointed by the mayor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 473; Dec. Dig. \S 183(1).]

For other definitions, see Words and Phrases, First and Second Series, Employé.]

Appeal from District Court, Bexar County; W. F. Ezell, Judge.

Suit for injunction by Robert F. Uhr against F. H. Lancaster. Judgment for defendant, and plaintiff appeals. Affirmed.

Jos. Ryan, Frank H. Wash, Scott & Dodson, and Robt. P. Coon, all of San Antonio, for appellant. Geo. R. Gillette, Robt. G. Harris, and R. J. McMillan, all of San Antonio, for appellee.

FLY, C. J. Appellant sought by this suit to restrain appellee from interfering with appellant or persons serving in the police department of the city of San Antonio in the discharge of their duties; from interfering with appellant in the possession and control of the said police department and the property belonging to said department; from maintaining an office in the building occupied by the police department; from removing or attempting to remove any officer, agent, or employé of said department; from controlling and attempting to control the office room, desk, or mail of appellant, as commissioner of the police and fire department of San Antonio, or any officer or employé thereof, and from interfering with appellant in the enforcement of all fire and police regulations, and from interfering with appellant in the supervision of the police department of said city and the city pound. A temporary writ was refused, upon a hearing, and, from the order of refusal, this appeal has been prosecuted.

[1] It appeared from the facts that appellee was appointed city marshal of San Antonio by its mayor, Clinton G. Brown, in July, 1913, and his appointment was confirmed by the council in the same month and year, and, at the same time, appellee took the oath of office and gave the required bond. He has not been reappointed, nor has he taken the oath nor given a bond since that time. He has been drawing the salary attached to the office of marshal ever since. On May 1, 1916, Robert Uhr, commissioner of the police and fire department, placed on the bulletin board in the police station a notice to all officers and employés of the department that he had appointed J. R. Baldwin city marshal and chief of police, and directing them to report to said Baldwin. That order was not respected by appellee, who issued a counter order to the officers of the police department, who obeyed his order. Appellee did not interfere in any manner with appellant's supervision of the police department, and he expressed a willingness to obey the lawful instructions of appellant. It was agreed that appellee had taken and obeyed orders given by the mayor and had performed all other matters and things in any way appertaining to, or connected with, the office of city marshal.

The following ordinance was passed by the city council and approved by the mayor on March 2, 1903:

"The police force of the city of San Antonio shall consist of one chief marshal and two assistant marshals, one police matron, and such mounted and unmounted patrolmen as the mayor and city council may deem necessary."

On August 7, 1899, the following ordinance was passed:

"The police force of the city of San Antonio will consist of the following grades: Chief marshal (ex officio chief of police), assistant marshal or marshals, and patrolmen."

Those ordinances were never repealed or modified until the adoption of the ordinance of May 4, 1916, which was an ordinance to establish a police force and regulate the same in and for the city of San Antonio.

In 1903, a charter was granted the city of San Antonio, which, with amendments adopted in 1907 (Laws 1907, p. 526), and 1911 (Gammel's Laws 1911, p. 878), remained the charter of the city until the adoption of the present amended charter, known as the "Commission Charter." In the charter of 1903 it was provided:

"The present elective officers of the city of San Antonio shall continue to perform the duties of their offices, unless removed as herein provided, until the general election under this charter, and all ordinances of the city of San Antonio now in force not contrary to the provisions of this act and the laws of this state shall continue in force until repealed."

At the time that act went into effect there was in effect an ordinance, passed by the city council on March 2, 1903, as follows:

"The police force of the city of San Antonio shall consist of one chief marshal and two assistant marshals, one police matron, and such mounted and unmounted patrolmen as the mayor and city council may deem necessary."

That ordinance was not in conflict with the provisions of the charter which afterwards took effect on July 1, 1903. Neither was the provision contrary to any state law, and consequently it was just as effective after the charter of 1903 went into effect as it was before. The amendments of 1907 and 1911 in no wise changed or affected the ordinance in question. In the amendment adopted in 1915, it is provided in section 134:

"All rules, regulations and ordinances of the city, which shall be in force when these amendments take effect, and not in conflict herewith, shall remain in full force and effect until otherwise amended, altered, or repealed."

The ordinance creating the position of marshal was not in any manner disturbed by the adoption of the amendment of 1915, under the enabling act of April 7, 1913, Gammel's General Laws, p. 307. Under the charter of 1903, section 65, the city council was given the power and authority to establish a police force, and the recognition of the ordinance of 1903 by the council, and a failure to repeal it, maintained it in its full force and effect, and it was continued under the amendments of 1915. Under the amendments of 1915, the commission was given the same powers therefore held by the city council, and is given the power "to enact, ordain, alter, modify, or repeal any and all ordinances not repugnant to this charter, and the Constitution and laws of this state." While that provision is rather uncertain, because if literally construed it would prevent the alteration, modification, or repeal of any ordinance, if it was repugnant to the charter or the Constitution and laws of the state, still no attempt has been made to repeal the ordinance of 1903, which created the position of city marshal.

In the case of City of San Antonio v. Coul-

dress, 169 S. W. 917, decided by this court, it was held that the position of patrolman had never been established, because the number of patrolmen or policemen had not been specified, but left it in the hands of the mayor to expand or contract the police force. In other words, there was no provision by ordinance for a police force. The authorities in that case go no further than the Coultrass Case, and in none of them has it been held that where an ordinance has provided for a marshal, although it may not have provided for a police force, the provision as to the marshal was not binding and in accord with charter provisions. The ordinance created the office of marshal, because specially named, and not left to any contingency. Moon v. Mayor, 214 Ill. 40, 73 N. E. 408. It follows that, when appellee was appointed in 1913, the de jure office of city marshal was in existence, because it had been duly established by ordinance under the provisions of sections 51 and 65 of the charter of 1903. Very inadequate steps may have been taken to establish a police force, but the head of it at least was created.

[2] If there had been any question as to the right of appellee to the office of city marshal, it has been dissipated by the admission of appellant—

"that on or about the — day of July, 1913, defendant Lancaster was appointed by the then mayor, and confirmed by the then council of said city, as city marshal and chief of police of said city; and under section 17 of the charter then governing said city, * * * the said Lancaster was appointed and had the right to act as such until the general city election, which plaintiff avers was held on the second Tuesday in May, A. D. 1915, and until his successor, if any, should be appointed and qualified."

It is not claimed that any successor of appellee has been appointed and qualified, nor could he be until such successor was proposed and nominated by the commissioner of fire and police and had been confirmed by a majority vote of the commission. Section 16, par. 2, Amendment of 1915. In view of the admissions in the petition, no writ of injunction could have been properly issued, and a discussion of the law could have been omitted, as it could serve no purpose unless to demonstrate that appellant followed the law in his admissions.

[3] Still, in spite of the admissions, it is contended that, under the terms of the latter part of section 134 of the amendment of 1915, the city marshal went out of office when the mayor and commissioners were elected and qualified. The charter amendment of 1915 names the appointive officers in section 16, paragraph 1, and the city marshal is not included among them; and he must be ranked, so far as the charter provisions are concerned, as an employé of the police department, who is to be proposed and nominated for his position by the commissioner of the department of fire and police, and conse-

quently would not be included under the description, "all officers of the city of San Antonio." If he is so included, however, and as fixing his tenure of office he would be, then his term would be for two years; and as admitted by appellant until his successor is duly appointed and qualified. Callaghan v. Tobin, 40 Tex. Civ. App. 448, 90 S. W. 331; Paris v. Cabiness, 44 Tex. Civ. App. 592, 98 S. W. 927. So far as the term of office is concerned, the Constitution designates every employé of the police and fire department as an officer; but under the amendment of 1915 to the city charter he is ranked as an employé, and not as an officer to be named by the mayor. He was, whether employé or officer, entitled to hold the office of marshal for two years and until his successor was duly appointed and qualified. Section 17 of the amendment of 1915 provides that all appointive officers and employés, except day-laborers, unless otherwise specified in the order making the appointment, shall hold office for two years. The Constitution (article 16, § 17) provides:

"All officers within this state shall continue to perform the duties of their offices until their successors shall be duly qualified."

The city marshal is an officer contemplated in that constitutional provision. Appellant adds to the charter provision, in section 17, the words, "and no longer," but they are not there, and, if they were, they would not override the Constitution.

The judgment is affirmed.

BROWN, Mayor, v. UHR. (No. 5762.) *

(Court of Civil Appeals of Texas. San Antonio, June 14, 1916. Rehearing Denied June 21, 1916.)

1. MUNICIPAL CORPORATIONS — 183(1)—CITY CHARTER—"EMPLOYÉ."

Under the City Charter of San Antonio, as amended in 1915, enumerating the appointive and elective officers of the city and providing that officers and employés shall hold office for two years, the city marshal, not being enumerated as an officer, is an "employé" as the word is used in the charter, and not an appointive officer appointed by the mayor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 473; Dec. Dig. — 183(1).]

For other definitions, see Words and Phrases, First and Second Series, Employé.]

2. MUNICIPAL CORPORATIONS — 131 — CITY CHARTER—CONSTRUCTION.

In San Antonio City Charter, § 16, pars. 1, 2, touching appointive officers, the words "unless otherwise provided" refer to other provisions made in the charter, and not to ordinances that may be passed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 305, 378; Dec. Dig. — 131.]

3. MUNICIPAL CORPORATIONS — 126 — CONSTRUCTION—CITY CHARTER—"OFFICES OR EMPLOYMENT."

Under San Antonio City Charter, § 16, par. 3, providing for the creation by the commission of "offices and employments," reference is not

had to elective and appointive offices already enumerated and limited in the charter, but the words "offices or employment" are necessarily synonymous.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 298-300; Dec. Dig. ¶¶ 126.

For other definitions, see Words and Phrases, First and Second Series, Employment; Office.]

4. MUNICIPAL CORPORATIONS ¶168 — CONSTRUCTION—CITY CHARTER.

Under the City Charter of San Antonio, the provisions giving the mayor "all powers and duties not distributed or assigned to another department," being a general provision, will not affect a special provision, section 16, enumerating and defining the nominating powers of the mayor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 376; Dec. Dig. ¶ 168.]

5. APPEAL AND ERROR ¶839(1)—REVIEW—MATTERS NOT IN RECORD.

The appellate court will not go outside of the pleadings to inquire into matters not properly before the court, and which cannot affect the questions involved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3279; Dec. Dig. ¶ 839(1).]

Appeal from District Court, Bexar County; W. F. Ezell, Judge.

Action for injunction by Robert F. Uhr against Clinton G. Brown, Mayor. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. R. Gillette, Robt. G. Harris, and R. J. McMillan, all of San Antonio, for appellant. Joseph Ryan, Frank H. Wash, and Scott & Dodson, all of San Antonio, for appellee.

FLY, C. J. This is an application upon the part of appellee to obtain a writ of injunction to restrain appellant, as mayor of the city of San Antonio, from proposing, nominating, or appointing any employé in the police and fire department. A temporary writ of injunction was granted, and from the order granting such writ this appeal has been perfected.

For many years prior to 1901, American cities had the reputation, doubtless well earned, of being the worst governed of any found in the civilized countries of the world. The ward system prevailed; that is, the city was divided into wards, and the citizens of each ward elected their representative, or alderman, in the city council, which was composed of the mayor and the aldermen of the respective wards. The mayor, under that form of municipal government, was often the only officer elected by the whole electorate of the city, and the struggle for spoils among the aldermen was the order of the day, and trading and trafficking was indulged in so that each alderman might get his share and could have something to point to in his ward, as the evidence of his fitness for the position, at the next election. The term of office of each alderman was a continued series of strife, combination, and trading with his fel-

low members; the interests and welfare of the people at large being almost entirely forgotten and neglected. The alderman had his eye to the main chance for himself and, instead of serving the interests of the public, favors for the certain ward were to be obtained which might or might not be of benefit to the inhabitants thereof, but would have the designed and desired effect in insuring to the political welfare and benefit of the alderman. The meetings of the council were fields of conflict for spoils and, as so aptly said by a newspaper writer, "divisive strife" attended the consideration of municipal affairs. Under the aldermanic form of government, the mayor was the center of the system, the great dispenser of patronage and favors, and in the charter of San Antonio, up to June 1, 1915, he was clothed with the authority, not only to name all appointive officers, agents, employés, and servants, but, if an elective officer died, refused to accept, resigned, or was removed, the vacancy was filled by the mayor, subject, as to all of them, to confirmation by the council. Not only did the mayor have the nomination, which, with the usual subservient council, meant final appointment of the officers named, but he was given the autocratic power of discharge of any appointive officer, employé, agent or servant of the city. He was the absolute ruler of the destinies of the city, and, fortified as he was by the control over the men employed by the city, he held a position well-nigh impregnable against the ill-directed and unorganized efforts of dissatisfied voters.

But matters at last reached a limit, and a demand so strong, so well organized, so potent in numbers and influence was made that an amendment to the charter was adopted, which vitally and radically changed the form of government. That change was made possible by the act of the Legislature of April 7, 1913, known as the "Enabling act," and in February, 1914, the amendment was adopted by the people and was approved by the Legislature in 1915. This amendment became a part of the charter of 1908 and as amended is now the charter of the city of San Antonio. In that amendment was proposed what is known as "commission government," and was adopted, the central and main ideas of the amendment being to constitute a government consisting of five commissioners, and it was provided that the executive and administrative duties, powers, and authorities should be distributed among five departments, as follows:

"(A) The department of public affairs in general; (B) the department of taxation; (C) the department of sanitation, parks, and public property; (D) the department of streets and public improvements; and (E) the department of fire and police."

The duties of each commissioner were carefully set forth in the amendment, the mayor being placed at the head of the "De-

partment of Public Affairs in General." He is given general supervision and oversight over all departments, offices, officers, and employes of the city. He is made chairman of the board of health, and is given authority to sign all contracts and obligations on the part of the city, to have charge of and cause to be prepared and published all statements and reports, to preside at all meetings of the commissioners, and appoint committees. In addition, he is given all powers and duties not assigned to some other department. The duties and powers of each commissioner are specially enumerated, those of the police and fire commissioner being the enforcement of all fire and police regulations, the supervision of the police and fire department, and the city pound, the lighting of the city, and to perform such other duties as may be provided by the commission. In paragraph 8 of section 7 of the charter, the mayor and each commissioner is given all powers necessary or incident to a proper discharge of the duties imposed upon each of them.

The commission form of government was the child of necessity, born in storm-riven Galveston in 1901, when, undaunted by one of the greatest disasters of history, the energetic and unconquerable people of that city determined to build for the future and entrench themselves behind bulwarks that the tempest and waters could not overcome, and recognized the truth that the rehabilitation of the Island City could never be obtained through their aldermanic government. The citizens of that city knew the shortcomings and inefficiency of that form of government, and, so knowing, out of their genius and intelligence, spurred on by the exigencies of their misfortune, formulated and put into effect the first real commission government created and supported by the people of any community. The scheme was put into form, the city government was divided into departments, the head of each department with his duties defined, and on April 18, 1901, the charter was granted by the Legislature. The people had become so distrustful of men elected by voters of the city that it was provided in the charter that of the five commissioners three should be appointed by the governor. In that charter, the commissioner who presided over the commission was denominated the president. The power of appointment and removal of all employes was given to the commission. The charter was attacked as unconstitutional by reason of the provision as to appointment of three commissioners by the Governor, but was sustained by the Supreme Court. *Brown v. City of Galveston*, 97 Tex. 1, 75 S. W. 488. In that charter, each of the commissioners was given his department by the commission, the departments being those of "police and fire," of "streets and public improvements," of "waterworks and sewerage," and of "finance and revenue." The only appointing power given

the president of the board of commissioners was that of special policemen in time of outbreaks or riots. To strip the mayor of his patronage and power was one of the chief aims of this initial commission government.

The government of Galveston was an unbounded success, and, untrammelled by politics and patronage, the city rose as by the hand of magic from her desolated homes and industries, and accomplished in her seawall one of the wonders of the world. Prosperity attended her efforts, until, in a few short years, she had obtained the position of the chief seaport of the South and one of the principal gateways of the oceans of the earth. Soon other cities followed the example set by Galveston, and in all parts of the American Union commission governments were adopted over the protests of politicians and spoliemen, and in each of them to a greater or less degree is the constant purpose evinced to restrict the powers of the mayor, to destroy one-man government and to place the affairs of each department of municipal government in the hands of a responsible agent, to whom the people can look directly for the proper administration of the affairs of his department.

In the Galveston charter, the commissioner of the fire and police department was given the authority to prepare and present to the board of commissioners the persons he desired in his department, and was given the power of suspension of any one in his department except the chiefs of police and fire.

[1] The commission amendment to the charter of San Antonio of 1903, in its general features, followed the charter of Galveston, and it followed the general purpose of every commission charter in circumscribing the power and authority of the mayor, and placing the powers of government in the different commissioners elected by the people of the city. This is clearly evidenced by paragraph 1 of section 16 of the present charter, wherein it is provided:

"The mayor shall nominate the appointive officers, and such nomination shall be subject to confirmation by a majority of the remaining commissioners, and the mayor shall not vote, except in the case of a tie, upon such confirmation."

In order that there should be no doubt as to who are appointive within the scope of the paragraph, it is provided therein, immediately succeeding the foregoing:

"The appointive officers of the city shall be as follows: City attorney and his assistants; city physician and his assistants; city auditor and his assistants; purchasing agent; and city clerk and his assistants."

The language is plain and simple, and by every reasonable inference denies the right to the mayor to name any officer except those enumerated. There could have been no reason for that enumeration, except to remove every reasonable doubt as to whom the mayor could nominate. There could be no ground for assuming that the language defining who

are appointive officers was inserted in the paragraph, defining the powers of the mayor, merely to create those offices. But, even if the provision did create those appointive offices, it did not alter the restriction placed upon the mayor of having no power to nominate, except as to those appointive officers named. In section 7, paragraph 1, the officers who are required to be elected consist of the mayor and four other commissioners, and it is clear that they are the only elective officers for which provision is made; and then in paragraph 1, section 16, herein quoted, the only appointive officers provided for in the charter are specifically named. Every other person connected with the administration under the charter provisions must be placed in the designation of employes. The charter could legally and validly call those employed by the municipal corporation officers, employes, agents, or servants, and still that would not strip them of any honors or emoluments or lessen their term of office under the constitution. The charter is explicit as to who are appointive officers, and they could no more be added to or decreased than could the elective officers named therein. The elective officers and appointive officers are absolutely named and fixed by the charter, and all others connected with the city government must be employes, agents, or servants.

[2] Having absolutely confined the nominations of the mayor to the appointive officers, and having specifically classified and named them, the succeeding paragraph in section 16 makes provision for the appointment of the other persons connected with or employed by the city government. The paragraph is as follows:

"Each member of the commission shall have the right to propose and nominate all employes in the department under his special charge, unless otherwise provided, but all such nominations shall be subject to the confirmation of the commissioners by a majority vote thereof."

To hold that this provision did not give the commissioner of the police and fire department the right, power, and authority to nominate the men, for whose proper administration of the affairs of the department he is responsible to the people who elected him, would render the provisions of the charter farcical and absurd. It would be a comedy to solemnly clothe a commissioner with the power to appoint a messenger boy, a charwoman, or a janitor, and put the appointment of all men on whom he must depend for the efficiency of his department in the hands of some one else. It cannot be conjectured that such a state of affairs was ever contemplated. It is clear to the mind of this court that the word, "employes," as used in paragraph 2 of section 16 of the charter of San Antonio, meant every one connected with the police and fire department from the chiefs down to the humblest employe. The language of paragraphs 1 and 2 of section 16, construed

together, lead inevitably to that conclusion. The words, "unless otherwise provided," refer to other provisions made in the charter, and not to ordinances that may be passed. Had the reference been to provisions by ordinance the charter would undoubtedly have so stated. The exception was made to cover the city physician and his assistants and the auditor and his assistants, which it was provided should be nominated by the mayor. Naturally, without that provision, the city physician and his assistants would have been appointed by the commissioner of the sanitary department, and the auditor and his assistants by the commissioner of taxation; but the charter makers deemed it best to place the nominating power in the hands of the mayor as to those officers. In section 17, the charter itself places the employes, except day-laborers, on the same footing as officers, by providing that the appointments of officers or employes shall be for a period of two years, thereby recognizing the constitutional provision that all officers shall hold office for the term of two years. In the same section officers and employes are placed on the same footing as to removal or discharge, and in the provision as to salaries, taken with other parts of the charter, recognition is had of the fact that every one connected with the city administration, not designated therein as an elective or appointive officer, is an employe.

[3] The section of the charter as to the elective officers of the city is no plainer and no more explicit than the section naming the appointive officers, and, if the appointive officers whose nomination shall originate with the mayor can be added to and increased, the elective officers can be increased. In no part of the charter is authority given the commission to increase the number of the appointive officers to be named for appointment by the mayor, and paragraph one of section 16 definitely and finally names the only appointive officers that can be nominated by the mayor. It shows the clear intention to curtail the appointive power of the mayor and take from him the means of fortifying himself in his position, as in the past, by taking from him the power to control the firemen, policemen, and employes connected with other departments of the city government. One of the chief evils sought to be removed by the adoption of a commission government would be enthroned in its old place under aldermanic government, and the departmental heads be made mere puppets in the hands of the mayor, if the contention of appellant should be sustained. Responsibility of each department head is a prime object also in commission government, and that responsibility cannot in justice be exacted, where the department's efficacy depends on employes of a mayor who may at times be antagonistic to the head of the department. In paragraph 3 of section 16, where provision

is made for the creation by the commission of "offices or employments," reference cannot be had to elective or appointive offices, for they had already been named and limited in the charter; and the words, "offices or employment," are necessarily synonymous. The charter has seen proper to divide the servants of the city into elective and appointive officers, officers, employés, servants, or agents, and necessarily its provisions must be followed. It would totally distort the provisions of the charter and stultify and destroy the ends of its creation, if, by a vote of the majority of the commissioners, all those designated as employés could be transformed into appointive officers to be nominated for appointment by the mayor. The language of the charter will not bear such a construction, and we cannot conceive that such was the intention of the makers of the charter.

[4] The provision giving to and enjoining upon the mayor "all powers and duties not distributed or assigned to some other department are hereby assigned to the mayor," cannot be properly construed to destroy the evident purpose of section 16; for therein his nominating powers are specially enumerated and defined, and no general provision can nullify, increase, or enlarge the terms of the special provision. The special provisions as to who are the elective and appointive officers must prevail, and no other elective or appointive officers can be added to the list named. Naming other employés "officers" does not put them in either class named in the charter. This construction of the charter provisions has been sustained by the Supreme Court of Michigan in *Burroughs v. Eastman*, 93 Mich. 433, 53 N. W. 532, wherein it was held:

"We are of the opinion that plaintiff's counsel is correct in his contention. The statute creating the superior court must be construed in reference to the provisions of the charter of the city of Grand Rapids and the police force act; and from an examination of the three acts it appears that policemen of the city and the police officers are not named in the charter, and do not come within the designation of the superior court act as city officers."

As tending to show that, under the term, employés, the charter included those who, under other circumstances, would be classed as officers, such as the chiefs of police and fire and other members of those departments, it is evidently contemplated that some designated as employés shall receive salaries, for in the last line of section 17 it is provided: "All salaries and wages of employés shall be fixed by said commissioners." The word, "salary," usually has reference to the remuneration of one who can appropriately be styled an "officer," the word, "wages," applying to the remuneration of laborers. Of course, this distinction might be set aside by law under construction; but we think that in view of the fact that employés were to be appointed for two years, as demanded by the Constitution of Texas for officers, and that

they are to receive salaries, tends strongly to show that by the term, "employés," the charter meant all those officers and members of the different city departments, except day-laborers. The manner of choosing the elective officers had been provided for, the appointive officers had been named, and, unless we find in paragraph 2 of section 16 authority for the nomination and confirmation of those connected with the different departments as employés or officers, there is no nominating authority named in the charter. The powers of the mayor as to proposing the names of officers was fully defined and limited in paragraph one of section 16, and the object of paragraph two was to define the powers of each of the other commissioners as to those who were to execute and perform the duties and functions of each department. Of course, the mayor is granted no authority by paragraph 2.

It is not a question of who are designated as officers and employés in decisions upon different charters and statutes, but as to who are designated as officers and employés under the charter amendment which went into operation on June 1, 1915. The aim and desire in adopting that amendment was to improve the city government and its administration of municipal affairs, and, if the mayor is still the great dispenser of patronage and each department is to be placed in the hands of men chosen by him, if the influence and power of each head of a department is to be curtailed until it would be the greatest injustice to hold him responsible for the administration of the affairs of his department, then some of the main objects of the amendment have been defeated and destroyed. The charter, as construed by appellant, might be aptly denominated rule by an "autocratic mayor" as defined by McQuillin, *Mun. Corp.* § 93, but would not be a commission government. Under the head of government by "autocratic mayor," the author says he is given not only the veto power, but the sole right to appoint and remove subordinate officials. That is what the people of San Antonio were endeavoring to escape when they adopted the present charter. This is said by this court with no design of implying that the officials of San Antonio are willfully and knowingly endeavoring to prevent the charter from accomplishing its designed ends. There is no design to assail individuals, but to show the untenability of certain constructions of the charter. As stated by McQuillin in his work on *Municipal Corporations*, section 92, the essential feature of commission government is to center responsibility and render the officers directly accountable to the people by providing fewer head officers and simplifying municipal administration.

"The work of municipal administration is apportioned among the commissioners (five is the usual number), each being the head of a department for which he is responsible."

That is the kind of government sought by the people of San Antonio and that is what the charter, rightly construed and administered, gives them. It cannot be attained by placing the selection of all appointive officers and employes of each department in the discretion of the mayor. The power of nomination carries with it the power of appointment and the power of appointment of all officers and employes places the practical government of the city in the hands of the mayor. The people had thoroughly tried that form of government and, rightly or wrongly, desired a change.

In the case of *Perrett v. Wegner*, 139 S. W. 984, the commissioners sought to interfere with the right of the police and fire commissioner to nominate the men who were to serve in his department, and the court, in construing the charter of Galveston, said:

"We think it clear that, construing this section as a whole, it was the intention of the Legislature in its enactment to give to the police and fire commissioner the right to nominate for the office of the chief of police; and, unless such commissioner failed or refused to make such nomination within the time prescribed in said section, the board of commissioners had no right upon the nomination of any other commissioner to appoint any person to said office."

Further, the court stated the axiomatic truth that:

"It is obvious that the good of the department is subserved by entire harmony between the chief and police commissioner, and its efficiency might be greatly lessened by the appointment of a chief objectionable to the police commissioner, and with whom he could not work in harmony."

Co-operation and the utmost harmony between the leader and those he controls are essential to the attainment of efficient service for the public, and in the light of that truth the charter gives the selection of the members of the police and fire forces to the head of the department, who is responsible to the people who elected him. It gives him the selection of all the force and does not perpetrate a joke or enact a farce by giving him the appointment alone of the housesweep, the messenger boy, the scrubwoman, and perchance the janitor, with whom to accomplish the ends for which he was elected, and perhaps have the chief of police and fire chief with all the other members of the department inimical to and arrayed against him.

[5] Appellee prayed that appellant be enjoined and restrained "from proposing, nominating, or appointing any employe in either of the departments of fire or police, and further from submitting any such proposals, nominations, or appointments to said commissioners of San Antonio for their confirmation." The court granted everything asked by appellee, but, in addition, provided that the order of the court should not be construed to apply to the appointment of special policemen temporarily appointed by the mayor as provided in section 25, which was a

part of the old charter. There was nothing in the pleadings upon which to base any reference to section 25, and it can be of no importance to appellee whether special policemen should have been excepted or not. If appellee is correct in contending that section 25 was repealed by an adoption of the amendment, then it can be of no importance to any one, and, if it was not repealed, it does not interfere with any authority vested in appellee, for he is not authorized to appoint special policemen. In either event, it is a matter not properly before this court, and it will not go outside the issues made by the pleadings to inquire into the existence or nonexistence of a matter that cannot possibly affect the powers and prerogatives of the commissioner of fire and police.

In enumerating the extraordinary powers given under former charters to the mayor of San Antonio and in making animadversions upon the customs that grew out of it, no reflection upon any person is intended, but the arraignment is of the system and not of individuals; for most men will use the power delegated to them, and a bad system will in the course of events grow out of such unlimited powers placed in the hands of any one man. The people in adopting commission form of government have been attacking a system grown up and nurtured through many years, and not individuals.

The judgment is affirmed.

KUEHN v. MEREDITH. (No. 8386.)

(Court of Civil Appeals of Texas. Ft. Worth. June 3, 1916.)

1. JUDGMENT \S 199(3)—REQUISITES—CONFORMITY TO VERDICT.

A judgment must always follow the verdict, so that where a judgment was the only one which could have been rendered upon the verdict returned, the appellant was not entitled to a judgment non obstante verdicto on the ground that the finding upon an issue was without evidence to support it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 367; Dec. Dig. \S 199(3).]

2. PATENTS \S 195—CONTRACT—SUFFICIENCY OF EVIDENCE.

In a suit against plaintiff's partner to recover an interest in a patent issued to the defendant, evidence held to sustain a finding that the attorney's fees for obtaining the patent were not paid by the partnership under an agreement that the patent right should become the property of the partnership.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 272-274; Dec. Dig. \S 195.]

3. SPECIFIC PERFORMANCE \S 87—DUTIES OF PLAINTIFF.

In a suit for the specific performance of a contract whereby a patent issued to defendant was to be the property of the partnership consisting of plaintiff and defendant, the plaintiff could not recover where he had not fully complied with his obligations under the contract and did not offer to perform them or show any equitable excuse for his default; and such rule applied notwithstanding the plaintiff, as owner of an interest in the partnership, might

be entitled to some relief in a proper suit therefor.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 225, 238-241; Dec. Dig. § 87.]

Appeal from District Court, Wichita County; E. W. Nicholson, Judge.

Action by A. A. Kuehn against J. D. Meredith. Judgment for defendant, and plaintiff appeals. Affirmed.

Martin L. Allday, of Burkburnett, and Fitzgerald & Cox, of Wichita Falls, for appellant. E. H. Eddleman, S. Heyser, and Chauncey & Davenport, all of Wichita Falls, for appellee.

DUNKLIN, J. A. A. Kuehn instituted this suit against J. D. Meredith to recover a two-thirds interest in a patent right device issued by the United States government to the defendant; the device being known as pipe tongs designed for handling piping or casing in oil wells. From a judgment in favor of the defendant, the plaintiff has appealed.

The plaintiff's suit was predicated upon an alleged agreement on the part of the defendant to transfer the patent to the partnership doing business under the firm name of the Petrolia Machine Shop, in consideration that said firm would bear all expenses necessary to obtain the patent. It was further alleged that plaintiff owned a two-thirds interest in the assets of the partnership firm, and that the defendant owned the remaining one-third interest therein, and that each individually owned the same proportionate interest in the patent right. According to further allegations in the petition the partnership furnished all the money and expenses necessary to obtain the patent, which was later issued, but which the defendant refused to transfer to the partnership firm in accordance with his agreement. In its answer the defendant denied all the material allegations upon which the plaintiff's suit was based.

The case was submitted to the jury upon special issues, which issues, together with the answers thereto, are as follows:

"Issue No. 1. Did, or did not, the defendant propose to plaintiff that if the money needed to patent the device mentioned in plaintiff's petition would be furnished by the Petrolia Machine Shop that the patent right to said invention should become the property of the said Machine Shop? Answer yes or no. Ans. Yes.

"Issue No. 2. If you answer the above interrogatory in the affirmative, then did, or did not, the plaintiff agree to the defendant's proposition? Answer yes or no. Ans. Yes.

"Issue No. 3. If you answer the above issue in the affirmative, then did, or did not, the Machine Shop furnish the money to pay for the patenting of said invention? Answer yes or no. Ans. No."

[1] By the first assignment appellant complains of the action of the trial judge in overruling his motion for a judgment in his favor, non obstante veredicto; said assignment being predicated upon the contention that the

finding of the jury upon the third issue that plaintiff did not furnish the money to pay for the patent was without any evidence to support it, and is contrary to the undisputed evidence. The same contention is presented by other assignments attacking the same finding of the jury, which assignments were urged in plaintiff's motion for a new trial as a reason why the judgment should be set aside.

Even though appellant's contention were true, the first assignment would be overruled for the reason that under our practice the judgment must always follow the verdict, and no other judgment than the one rendered could have been rendered upon the verdict returned. *Ablowich v. Greenville Nat. Bank*, 95 Tex. 429, 67 S. W. 79, 881.

[2] In considering the other assignments we have carefully reviewed the evidence and have reached the conclusion that the same must be overruled. It would serve no useful purpose to review the evidence at length, but we will notice the principal features of it only. The evidence shows that the expenses incurred for models, forms, etc., necessary to procure the issuance of the patent, and amounting to some \$70, were paid by the partnership firm, and that in addition to that expense the sum of \$75 was paid to attorneys in Washington as a fee for their services in procuring the issuance of the patent. The chief controversy turns upon the question whether or not those attorneys' fees were paid by the defendant Meredith or by the partnership firm. The evidence shows without controversy that the attorneys' fees were paid with money drawn out of the bank to the credit of the firm, and upon checks with the firm name signed thereto, payable to Meredith, two of which checks, one for \$35 and the other for \$20, were drawn by the defendant Meredith, while according to some of the testimony another check for \$20 was drawn by plaintiff, and according to other testimony was drawn by the defendant. The evidence conclusively shows that under the partnership agreement between the members of the firm, the defendant was allowed a salary out of the partnership assets of \$75 per month, but \$25 per month of said salary had been left to his credit for several months preceding the date of payment of said attorneys' fees. At the time the checks with which to pay the attorneys' fees were drawn by Meredith, he was the bookkeeper of the firm and had the right to check money out of the bank to its credit. According to his testimony the \$75 so checked out of the bank and used in the payment of the attorneys' fees was charged against his account for salary, leaving a balance still due him by the firm. It appears further that prior to the trial of this suit, there had been a trial of another suit instituted for the purpose of settlement of the affairs of the partnership between the plaintiff and the defendant. According to the testimony of the defendant,

in the accounting they had in that suit, he was charged by Kuehn with the three checks aggregating \$75 used for the payment of the attorneys' fees. The testimony of one of Meredith's attorneys, who represented him in that suit, tends in some measure to corroborate the testimony of Meredith upon that issue. The evidence offered by the plaintiff tended strongly to controvert the testimony of Meredith, particularly in the fact, which is shown without dispute, that the books of account kept by the firm did not show the checks given in the firm name to pay the attorneys' fees were ever entered as a charge against Meredith. But according to Meredith's testimony the books were not correctly kept, and to corroborate that statement he cited the fact that another item of even a larger amount, which was properly chargeable against him, was not so entered upon the books.

The explanation given by Meredith as to the manner in which the firm was to be reimbursed for the expenses incurred by it for forms, models, etc., is rather indefinite and seems to be predicated upon his contention that the agreement between him and the firm relative to furnishing the money with which to procure the patent was that he and the firm were each to share in the profits realized from the manufacture and sale of the tongs after the patent had been procured, but that the firm was not to have any interest in the patent right itself.

In view of the foregoing observations, we cannot agree with appellant in his contention that the evidence shows without controversy that the attorneys' fees were paid by the partnership firm, or that the evidence so strongly preponderated in his favor upon that issue as to require a reversal of the judgment, and, accordingly, the assignments of error now under discussion must be overruled.

[3] It is insisted further that as the jury found that the defendant and the partnership firm entered into an agreement by the terms of which the firm would furnish the money to pay the attorneys' fees and all other expenses, and as there was no finding by the jury nor evidence to show that the firm had ever refused to pay said attorneys' fees, the plaintiff was entitled to recover a two-thirds interest in the patent right, notwithstanding the finding of the jury upon the third special issue.

This assignment is overruled for the reason that the suit was for the specific performance of the contract which the jury found was in fact entered into between the parties, and it is too well settled to need the citation of authorities that in such a suit plaintiff cannot recover where it is shown that he himself has not fully complied with his obligations under the contract, and does not offer to perform the same and has not

shown any equitable excuse for such default on his part. And this rule is controlling in the present suit, notwithstanding the fact that it was conclusively shown that the firm did furnish approximately one-half of the expenses necessary to procure the patent, and that, therefore, plaintiff, as the owner of two-thirds interest in the partnership, perhaps would be entitled to some relief by reason of that fact in a proper suit therefor.

For the reasons indicated, the judgment is affirmed.

NEVILL v. GULF, C. & S. F. RY. CO. *
(No. 8357.)

(Court of Civil Appeals of Texas. Ft. Worth.
April 22, 1916. Rehearing Denied
May 27, 1916.)

1. CARRIERS \S 284(1)—CARRIAGE OF PASSENGERS—CARE REQUIRED—INJURY FROM FELLOW PASSENGER.

It is the absolute duty of a carrier of passengers to protect them, in so far as it can be done by the exercise of the highest degree of care, from the willful misconduct and violence of their fellow passengers and strangers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1125, 1127; Dec. Dig. \S 284(1).]

2. CARRIERS \S 320(6)—NEWS AGENT—INJURY BY PASSENGER.

Considering a news agent as a passenger, and unless his right of recovery had been taken away by virtue of a release executed to his employer and for the benefit of the defendant road, evidence in his action for damages for injury by a passenger held to make the conductor's negligence, in failing to protect him therefrom, a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1126, 1324; Dec. Dig. \S 320(6).]

3. TRIAL \S 48—RECEPTION OF EVIDENCE—EVIDENCE INADMISSIBLE IN PART.

Where certain parts of the excluded testimony were subject to the objection that it was hearsay and inadmissible, it could not be held that the court erred in excluding it as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 120; Dec. Dig. \S 48.]

4. CARRIERS \S 320(6)—ACTION FOR INJURY—TAKING CASE FROM JURY.

Where the evidence bearing upon a railroad's negligence favorable to the plaintiff suing for injury by a passenger, discarding all evidence favorable to the defendant, was sufficient to support a verdict for the plaintiff, the issue of defendant's liability was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1126, 1324; Dec. Dig. \S 320(6).]

5. CARRIERS \S 241—PASSENGER—RELATION—NEWS AGENT.

Under the state or local law, a news agent employed by a news service and entitled under a contract between his employer and the road to free transportation upon passenger trains, was entitled to the rights, privileges, and protection of a passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 977-979; Dec. Dig. \S 241.]

6. CARRIERS \S 307(5)—PASSENGERS—EXEMPTION FROM LIABILITY—VALIDITY.

A news agent entitled under state law to the right of a passenger, even though riding on a pass or accepting free transportation under an arrangement between his employer and defend-

ant road, upon the condition that it would be relieved from liability for injury from its negligence, was not precluded under the state law from recovering damages for such injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1256; Dec. Dig. ¶307(6).]

7. CARRIERS ¶234—CONTRACT OF TRANSPORTATION—WHAT LAW GOVERNS—EVIDENCE.

A contract or agreement of release by a news agent to his employer and inuring to railroads, made in Texas where both the agent and the defendant road resided, relating to the agent's transportation on defendant's trains, to be performed partly in that state and partly in other states, would be assumed to be intended to be performed, in part at least, under circumstances involving interstate transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 965, 1263, 1538; Dec. Dig. ¶234.]

8. CARRIERS ¶234—PASSENGERS—EXISTENCE OF RELATION—WHAT LAW GOVERNS.

Whether agreement of a news agent, traveling under a contract of interstate carriage, with defendant road releasing claims for injury executed to his employer, inured to the roads over whose lines he might travel under his employment, was to be determined by the federal law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 965, 1263, 1538; Dec. Dig. ¶234.]

9. CARRIERS ¶307(1) — NEGLIGENCE — CONTRACT EXEMPTIONS—NEWS AGENT—"PASSENGER."

A news agent in the employ of a news service, under whose contracts he had a right to transportation on defendant's passenger trains engaged in interstate commerce, and who, on entering into such service, executed a release of liability for personal injuries of all kinds sustained in the course of his employment, whether the result of the negligence of any railroad or not, inuring to the benefit of such roads, was not a passenger, and hence not entitled to the benefit of the inhibition against stipulations of special contracts limiting the liability of carriers for damages arising out of negligence of their employes.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1252; Dec. Dig. ¶307(1).]

For other definitions, see Words and Phrases, First and Second Series, Passenger.]

Buck, J., dissenting in part.

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by Gld D. Nevill against the Gulf, Colorado & Santa Fé Railway Company. Judgment for defendant on directed verdict, and plaintiff appeals. Affirmed.

Johnson & Harrell and S. C. Padelford, all of Cleburne, for appellant. Brown & Lockett, of Cleburne, and Lee, Lomax & Smith, of Ft. Worth, for appellee.

BUCK, J. Gld D. Nevill filed suit against the Gulf, Colorado & Santa Fé Railway Company for damages, alleging: That on November 2, 1912, he was engaged as a news agent, or "butcher," on defendant's train running from Ft. Worth, Tex., to Purcell, Okl. That he was a passenger on the said train during the time he was engaged in said business of "butcher," and his duties being to sell papers, magazines, books, fruits, candies, etc., on the

train of defendant for what is known as the Fred Harvey News Service. That prior to said November 2d defendant entered into a contract with said news service for valuable consideration, by the terms of which contract the said Fred Harvey News Service had the privilege and right to sell its wares on the different passenger trains of the defendant in Texas and Oklahoma, and especially on the train referred to in these pleadings, and that under said contract its employes could have and did have a transportation right over the lines and on all passenger trains of the defendant, and that the said employes of the said news service company did, and would, have the right to canvass said trains in selling its articles and wares, and that by virtue of said contract the employes of said news service company for valuable consideration were permitted to ride on the defendant's passenger trains aforesaid, and that all the rights and privileges of a passenger were conferred upon said employes of the news service company while they were on said trains. That on November 2, 1912, while plaintiff was traveling on defendant's train, as a passenger from Ft. Worth, Tex., one Val Mullins was on said train, having boarded the same at Ft. Worth, for Ardmore, Okl. That while the plaintiff was in the discharge of his duties as a passenger and as the agent and employe of said Fred Harvey News Service, and while he was going through the car and coach upon which the said Val Mullins was being carried and was traveling as a passenger, and while he was in the county of Cooke, state of Texas, said Val Mullins insulted him, and threatened violence to plaintiff, and threatened that, if plaintiff should come back into the coach where he, the said Mullins, was, he would throw him out of said car and would injure him, after they had crossed Red River and gotten into Oklahoma. That, at the time this threat was made, Val Mullins was angry. That plaintiff immediately went to the conductor of defendant's train and reported what Val Mullins had said, and asked the protection of the conductor. That the conductor then ordered and directed the plaintiff to go back through said car where Val Mullins was and to attend to his business, and not to pay any attention whatever to said Mullins. That said conductor did not go with plaintiff, or in any way protect, or attempt to protect, the plaintiff from the threatened violence on the part of said Val Mullins. That, in accordance with the direction and instructions of the conductor, plaintiff, while the train was passing through Love county Okl., went back into the coach where Val Mullins was, and proceeded to perform the duties connected with his business as a news agent. That in so doing he did not notice, or speak to, or do anything to, the said Mullins, but, after he had passed said Mullins in said car, Mullins arose

from his seat and, with a show of great anger, grabbed the plaintiff, and pulled out a very large pistol, or six-shooter, and hit plaintiff over the head several times, cutting through the scalp and injuring the bone, knocking plaintiff down. That, as plaintiff attempted to defend himself, the said Val Mullins shot the plaintiff in his left arm and right leg, thereby injuring and crushing his shoulder and hip. That Val Mullins was a very large muscular, and active man, and that plaintiff was a small man and very much inferior in strength and size to said Mullins.

Plaintiff further alleged that, because of the injuries aforesaid, he was permanently incapacitated from performing his accustomed duties, or any other similar labor. Plaintiff further alleged that the defendant railway company, and its conductor and brakeman in charge of the train, knew that Mullins was a dangerous and quarrelsome man, and knew that he was under the influence of intoxicating liquors, and that while he was under such influence he was a very dangerous man, and that he would in all probability carry into effect any threats made at such time, and that the defendant and said employes were negligent in failing to take the proper and necessary steps to protect plaintiff from the threatened violence at the hands of Val Mullins. It was further alleged that plaintiff did not know of the character and disposition of Val Mullins. Damages were alleged in the aggregate sum of \$50,000 covering loss of time, pain and suffering, medical services, hospital fees, and nurse hire, etc.

Defendant answered, and, after general demurrer and special exception, answered in substance: That plaintiff did not have the rights and privileges of a passenger while on the defendant's train. That the defendant, by virtue of the contract between it and Fred Harvey, permitted the plaintiff to travel on its trains as a news "butcher" from Ft. Worth, Tex., to Newton, Kan., and while Val Mullins was on said train, accompanied by his wife and another lady, and occupying the rear seats in the chair car of said train, plaintiff had repeatedly approached the ladies who accompanied said Mullins, offering them his fruits and other merchandise, and insisting upon their purchasing from him, and had been advised by the ladies that they did not care to make such purchases. That the plaintiff sat on the arm of the chair or seat occupied by said ladies, and used familiar and insulting language to them, calling them "girlies," etc., whereupon Mullins told plaintiff that they did not wish to buy any of his wares and that there was no occasion for plaintiff to come where they were any more. But the plaintiff persisted in his attention to the ladies and in his offensive and familiar conduct towards them, and the said Mullins told the plaintiff that if he continued to annoy them he, Mullins, would give plain-

tiff a kick after they crossed Red river. That, after this conversation with Mullins, plaintiff came to defendant's conductor and asked him if anybody had the right to tell him, plaintiff, not to go through the whole train, to which defendant's conductor replied that "he did not think so." Thereafter plaintiff advised the said conductor that he had been directed by Mullins not to come back to where Mullins was and not to bother him any more, whereupon defendant's conductor told the plaintiff that Mullins was going to leave the train pretty soon, and directed the plaintiff to leave said Mullins alone, and not to bother him. Defendant further alleged that, in disregard of the direction given by the conductor, plaintiff continued to go in that portion of the car where said Mullins was, and when near the town of Marietta, Okl., plaintiff approached said Mullins and renewed the difficulty with him, and struck and stabbed the said Mullins with a knife, and that the injuries received by plaintiff were received in the difficulty provoked and brought on by plaintiff, and not because of any negligence of defendant or its employes.

Defendant specially pleaded that at the time plaintiff entered the service of the Fred Harvey Company, and as one of the considerations for entering said service, he, plaintiff, executed on, to wit, October 9, 1912, a certain release which recited that the employment of plaintiff by the said Fred Harvey Company was made upon the condition of his executing said release and agreement. Said release reads, in part, as follows:

"Now, therefore, in consideration of the premises and of my said employment and of being carried on the cars of said companies as such news agent under said contracts where my business or employment under the direction of the said Fred Harvey may call me, I do hereby assume all risks of accidents and injuries of every kind which I shall meet or sustain in the course of my employment, or which may occur to me on any of said railroads on which I may be by virtue of my employment, whether such accident or injury be occasioned or result from the gross or other negligence of any corporation or person engaged in any manner in operating any such railroad, or any employé of any such corporation or person, or otherwise, and whether resulting in my death or otherwise; and neither said Fred Harvey, its successors, or assigns in business, or any of said railroad companies, including the receiver thereof, shall be liable to me or to my personal representatives, or to any other person claiming under me, in any manner for any injury or damage that may happen to me by reason of such accidents or injuries; and I hereby agree to indemnify and save harmless the said Fred Harvey, its successors and assigns in business, of and from any and all claims which may be made against it or them, or its property, by any corporation or person under any agreement which it has made or may hereafter make arising out of any claim or recovery upon my part or the part of my representatives for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation or any employé of any person or corporation or otherwise."

Supplemental pleadings were filed by both plaintiff and defendant, but we think the

above statement of issues made by the pleadings is sufficient for the purpose of this opinion. After the submission of the cause to a jury and the introduction of evidence, the court gave the following instruction:

"The court instructs you to return a verdict in this case in favor of the defendant, the Gulf, Colorado & Santa Fe Railway Company. The court gives this instruction for two reasons: (1) Because the evidence in this case fails to show any liability on the part of the defendant; and (2) if there was any evidence of the defendant's liability, the case of *Northern Pacific v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513, holds that (under) the plaintiff's contract with the news company agrees (agreeing) to relieve said news company and the railroad upon which plaintiff was allowed free of paying any fare, that plaintiff would assume the risk of any injury occurring to him, and under said decision plaintiff cannot recover in this case."

The jury having returned a verdict for defendant in response to the court's instruction, and judgment having been rendered thereon, the plaintiff appeals.

In order to determine the question of whether or not the court was authorized to peremptorily instruct a verdict for defendant, we will have to decide: (1) Whether plaintiff stated a cause of action in his pleadings, regarding plaintiff as a passenger, and (2) whether the evidence, given a construction most favorable to plaintiff, sustains the allegations pleaded.

[1] Plaintiff alleged that he was a passenger and entitled to the privileges and rights of, and that degree of care due a passenger. As is said in the recent and valuable work of *Moore on Carriers*, vol. 2, p. 1146, § 25:

"It has been steadily maintained by the courts that it is the absolute duty of a carrier of passengers to protect them, in so far as this can be done by the exercise of the highest degree of care, from the negligence, willful misconduct, violence, insult, and ill treatment of its servants, while performing the contract of carriage, and from the violence and insults of their fellow passengers and strangers, so far as practicable; and whether this duty arises from contract or from the nature of the employment becomes unimportant, since the duty goes with the carrier's contract, however made, whereby the relation of carrier and passenger is established. The law seems to be now well settled that the carrier is obliged to protect its passenger from violence and insult, from whatever source arising. It is not regarded as an insurer of its passenger's safety against every possible source of danger, but it is bound to use all such reasonable precautions, as human judgment and foresight are capable of, to make its passenger's journey safe and comfortable."

See, also, *Dallas Consolidated Electric Street Ry. Co. v. Gilmore*, 138 S. W. 1134; *Dillingham v. Russell*, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. Rep. 753; *Ry. v. Mackle*, 71 Tex. 491, 9 S. W. 451, 1 L. R. A. 667, 10 Am. St. Rep. 766; *Hutchinson on Carriers* (2d Ed.) p. 626, § 548 et seq.; *T. & P. Ry. v. Johnson*, 2 Willson, Civ. Cas. Ct. App. § 188; *T. & P. Ry. v. Hughes*, 41 S. W. 521; *M. K. & T. Ry. v. Gerren*, 57 Tex. Civ. App. 34, 121 S. W. 905; *G., C. & S. F. Ry. v. Bell*, 165 S. W. 1.

[2-4] The next question for our considera-

tion is, did the plaintiff's evidence, taken in its strongest probative effect, make out a prima facie case of negligence on the part of the conductor, in failing to exercise that high degree of care due a passenger to protect him from threatened injury at the hands of a fellow passenger? Plaintiff testified upon this question, in part, as follows:

"I got on the train about 8:20 or 8:30 that night; this train was bound for the north, to Gainesville, Marrietta, Ardmore, and other towns north and to Newton, Kan. I had my magazines, books, candies, fruits, tobaccos, chewing gum, etc., on the train and had them in the smoker in a place that is set apart for that purpose. I was allowed to occupy two seats in the rear end of the smoker, had two seats turned facing each other, and had my stuff on them. The 'news butch' is allowed to occupy two seats and no more with his wares and goods that he has for sale on the train, and I had my stuff on these two seats. * * * On the occasion in question I was on passenger train No. 6, belonging to the Gulf, Colorado & Santa Fe Railway Company. After we left Ft. Worth, I worked my train between stations in the usual way that I have described above. I would just go through the train with my papers, books, magazines, candies, and things, and call them out to the passengers. Just after leaving Ft. Worth and after the conductor had gotten through taking up the transportation, I started out and went through the train calling off my stuff in the manner described. At Ft. Worth, there was a man by the name of Val Mullins, and two ladies with him, got on the train I was on. I did not know who they were at the time but afterwards learned who they were. These people all sat in the rear end of the chair car, the last chair car. My recollection there were in this train, a smoker, a chair car and a swing car, the swing car being between the smoker and the chair car. There were some sleepers on the train also, but the sleeping cars were on behind the chair car. In other words, there were two cars in which passengers were riding ahead of the chair car."

"I went ahead in the usual way and worked the train in the usual way, going through and calling off my stuff for sale, papers, magazines, candies, and fruits, etc. When I began to get on up the line, I noticed this fellow Mullins; he was sitting on the right-hand side of the chair car in the rear of the chair car; he was asleep and he was on the very last seat on that side of the car, and he looked like a drunk man; his face was red. There were two ladies sitting over on the other side of the car across the aisle from him. I worked my train, and the first thing I said to these ladies or to these folks, or they said to me—these two ladies were sitting in the rear of the chair car, and I had a basket of fruit, and one of these ladies asked me if I had any chocolate candy, and I told her, 'Yes ma'am,' and she asked me to bring back some. I didn't have it with me at that time, and I told her I would bring it. I went back and brought in some candy and had a 25-cent box of chocolate candy. She asked me what it was worth and I told her 25 cents, and she wanted to know if I had any that was cheaper, and I told her that I had some for 10 cents. She said that would do and paid me 10 cents for a box of chocolate candy, and I thanked her and went on back. This occurred a right smart piece this side of Gainesville, but I do not remember what place. At the time I sold this candy to the ladies, they were sitting on the east side of the train and Mullins was sitting on the west side, and the train was going north. * * * After I sold this candy I came back through the car, but I do not remember just what I had for sale that time;

I didn't say anything to these folks at all the next time I was back through the car. Then the next time I came through—this was before I got to Gainesville—I had my books * * * I came to these ladies sitting in the rear end of the car and called off the books, and one of the ladies stopped me and says, 'What kind of books have you?' I told her I had a nice lot of books and some of the latest books out, and named some of them and called her attention to the book 'Their Yesterdays' by Harold Bell Wright. * * * She said she would like to read the book, but that she would not take it that day. About that time this man woke up and grabbed me by the sleeve, and shook me, and says, 'Get on out of here, and don't you come back in here any more.' He says, 'Get on out of here and don't come back.' He says, 'I had trouble with one ——— of a news agent, and if you come back in here after we cross Red river, I'll throw you out of the window.' I kinder laughed and says, 'You just think you will,' and turned around and walked back and set my basket down.

"I walked back to the smoker where my stuff was and set the basket down, and I went back through the smoking car into the negro car where Mr. Granger, the conductor, was. I went in there and told Mr. Granger that there was a man back there, and told him where he was sitting in the rear end of the chair car, and I told him that he was drunk and that he had threatened to throw me out of the window after we crossed Red river, and I told him the words that this man said. I says, 'There is a man back there drunk, he told me to go on out and not come back, and says if I come back in there after we cross Red river that he will throw me out of the window.' I told him that he was a mean-looking man and that I was afraid of him. Mr. Granger says, 'Go on and work your train.' He told me the second time to go on and work the train. He says, 'I know him, it is old Val Mullins,' and he says, 'He is drunk, go on and work your train.' and I went on back and worked the train. That was before I got to Gainesville, and I don't think I went in there any more before we got to Gainesville. After we passed Gainesville, Mr. Granger went through the train and took up the tickets, and after this I went back through and worked the train, after Mr. Granger had been through ahead of me. That was after we passed Gainesville, going north. Yes, I saw Mullins that time when I went through the train. I went on back and I did not go close to Mullins, but I stopped within three or four seats of him; I would stop at the last man on this side of him. * * * I did not go clear on back through the car any more; that was between Gainesville and Thackerville, I think, on the other side of the river. After we passed Thackerville, I came back into this chair car. I had a basket of candy and I went back there in the car, and, as I went in there were one of these ladies sitting over here in the east side where there had been two ladies, and this Val Mullins that had been sitting on the west side was standing up in the back of the chair car, right in the aisle, at the water cooler, getting a drink of water. He had a cup in his hand. I worked my train on down, and when I got to this last man he asked me what the candy was worth and I told him. While we were standing there talking, Val Mullins walked right by me coming up to the front end of the car, and, about the time he walked by me, I turned around to go back to my stuff and he just wheeled around—he didn't walk by me, but he just wheeled around and knocked me in the head with a six-shooter."

Then follows plaintiff's description of the encounter; his testimony being to the effect that he did not make any resistance,

nor use a knife, one he had for cutting grapes, etc., on Val Mullins until after he had been hit on the head several times with the pistol, and that after he had cut Mullins several times the latter fell backwards in the aisle and that plaintiff tried to run over him, and that Mullins kicked plaintiff into the aisle, and that, as he started over him the second time, Mullins shot him in the right leg, breaking the bone all to pieces, and also shot him in the arm, and that plaintiff fell on top of Mullins.

T. H. Benninger, a witness for plaintiff, and in the jewelry business and residing at Cleburne, testified that he was on the train at the time of the difficulty and in the same coach with Mullins and the ladies mentioned, and heard Mullins say something to plaintiff about throwing him out of the window after he crossed Red river. That after the train passed Thackerville, plaintiff went back towards the rear end of the car and near to where witness was sitting, and that he had hardly passed witness until the latter heard scuffling, and raised up and looked over the back of the seat, and that Mullins was rapping the boy over the head with his gun. It seems that Benninger got down behind his seat about this time, and did not see all of the rest of the difficulty but heard the shots fired.

J. R. Holloway, the brakeman, testified by deposition and stated that he thought Nevill was in the aisle when he was shot, about halfway between the center of the car and the rear end; that, when he got into the car after the shooting, Nevill was lying in the aisle on his back and was not doing anything; that Granger was up about the head end of the car about the time of the difficulty, and was probably on the ground, the train having slowed up at Marietta.

On cross-examination, plaintiff testified that he did not think, at the time he went in the car immediately before the difficulty, that there was any danger to him from Mullins. Appellee urges that, since the plaintiff himself did not apprehend any danger in going into the car after the alleged threat on the part of Mullins, the conductor could not be held chargeable with negligence in failing to take steps to protect plaintiff against any threatened attack by Mullins. But appellant urges with some force that plaintiff did not know Mullins or his character or reputation with reference to being a violent and dangerous man, and that the conductor and brakeman in charge of the train did know that Mullins was a dangerous and fighting man and were advised of facts, including a previous difficulty on Val Mullins' part with another news butcher while Mullins was a passenger on one of defendant's trains, in charge of the same conductor and brakeman. Plaintiff reserved a bill of exceptions, to the exclusion of certain testimony of the witness Holloway, with reference to the previous difficulty between

Mullins and the other news butcher, and the bill sets out at length, in question and answer form, the questions asked this witness, the answers thereto, to the exclusion of which, by the court, error is assigned; the bill in part reading:

"The plaintiff offered each and every question and answer above, and to each and every question mentioned above the defendant objected, for the reason that the same was hearsay and was inadmissible and irrelevant; the testimony was offered for the purpose of showing that the defendant, through its agent, J. Granger, knew that Mullins was a dangerous, fighting man, and also to corroborate the plaintiff's testimony as to what Mullins told him with reference to having had a difficulty with a former news butcher, and to what the plaintiff told the conductor just after Mullins had threatened him, as is shown by the testimony in this case."

While the appellant has presented an assignment to the exclusion of this testimony, such assignment is directed to the exclusion of the testimony as a whole; and we are inclined to think that certain portions of the excluded testimony were subject to the objection urged, and therefore we are unable to hold that the court erred in excluding said testimony as a whole.

Plaintiff's testimony heretofore set out was sharply contradicted by defendant's witnesses, including the conductor, upon practically all of the issues of fact presented, but in determining the question now before us we must be guided by the probative effect of plaintiff's testimony. Where the evidence bearing upon the defendant's negligence favorable to the plaintiff, discarding all evidence favorable to the defendant, is sufficient to support a verdict for the plaintiff, the issue of defendant's liability is for the jury. *Lumber Co. v. Railway Co.*, 106 Tex. 12, 155 S. W. 175; *Howard v. Waterman Lumber & Supply Co.*, 134 S. W. 387. Unless plaintiff's right of recovery has been taken away by virtue of the release executed to the Fred Harvey Company, and for the benefit of defendant railway company, which question we will later consider, and considering plaintiff as a passenger at the time of the injury, we are of the opinion that the testimony heretofore set out presents an issue of negligence on the part of the conductor which should have been submitted to the jury under appropriate instructions.

[5, 6] Under the holdings of our state Supreme Court and Court of Civil Appeals, if plaintiff was a passenger, he would not be precluded from recovery for injuries sustained by reason of the negligence of defendant's employes, even though he was riding on a pass or was accepting free transportation, which pass or transportation had been issued by the railway company upon the condition that it would be relieved from responsibility for injuries received, by the user thereof, from defendant's negligence. The common carrier of passengers cannot by contract relieve itself from responsibility, or even limit its liability, for injuries to a

passenger resulting from the negligence of itself or its employes or agents, in the scope of their employment, and this is so with reference as well to passengers traveling free of charge as to those paying full fare. *G., C. & S. F. Ry. v. McGown*, 65 Tex. 640; *Sullivan-Sanford Lbr. Co. v. Cooper*, 105 Tex. 21, 142 S. W. 1168; *Sullivan-Sanford Lumber Co. v. Watson*, 106 Tex. 4, 155 S. W. 179; *Ry. v. Flood*, 70 S. W. 331; *Ry. v. Ivy*, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758. In the case of *T. & P. Ry. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, writ of error denied (no opinion), it was held by this court that under the Constitution (article 10, § 2), declaring railroads public highways, and railroad companies common carriers, and Sayles' Anno. Civil Statutes 1897, arts. 319, 320, imposing on railroads common-law duties and liabilities, and forbidding them to limit or restrict such liability, by general or special notice, or any contract whatever, a railroad cannot contract away its liability for injuries to a newsboy employed by another corporation to sell its wares on the trains of the railroad by an antecedent release, though the execution thereof by the newsboy is imposed as a condition of affording him transportation.

In *G., C. & S. F. Ry. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345, it is said:

"Essentially the relation of carrier and passenger exists in every case in which the carrier receives and agrees to transport another not in its employment, whether this be by contract between them or between the carrier and some other person in whose employment the person to be carried is, for the purpose of transacting on the train the business of his employer, as in case of mail agents, express agents or messengers, and others having duties to their employers to perform, which can be performed only by such persons traveling on railway trains or other public conveyances. Whether the public carrier of passengers receives an agreed compensation for the transportation of such persons, is compensated therefor by the charge for the car or transportation of the property of which the person to be carried has charge, or receives no compensation whatever for the carriage of such a person is a matter of no importance. It is enough that he is lawfully on the car and entitled to transportation to give to him the character of passenger and to entitle him to recover for an injury resulting from the negligence of the carrier or its servants, if this occurs without fault on his part."

We therefore conclude that under our state, or local, law plaintiff was entitled to the rights, privileges, and protection of a passenger, and that, being a passenger, he would not be precluded from recovery by virtue of the release agreement theretofore executed by him, such stipulation being held against public policy in *Ry. v. Flood*, supra, and other cases cited.

[7, 8] We now come to the question as to whether the state law, or the federal law, should apply in the determination of the effect of this release agreement. It is both pleaded and shown by the evidence that when plaintiff was injured he was taking an inter-

state trip, plaintiff alleges from Ft. Worth to Purcell, Okl., while defendant alleges from Ft. Worth to Newton, Kan. His right of transportation depended (1) on the contract made between the defendant railway company and the Harvey Company, and (2) upon the contract of employment between plaintiff and said Harvey Company. That is, plaintiff became entitled to the benefits of transportation over defendant's lines under and by virtue of his contract of employment with the Harvey Company, a condition of which employment was the execution of the release agreement hereinabove set out. Hence it appears that plaintiff, at the time of his injuries, was traveling under a contract of interstate carriage with defendant company, whose terms are to be controlled by the provisions of the two contracts mentioned, which stipulated that the benefits thereof should inure to the railway companies over whose lines plaintiff might travel under his employment with the Harvey Company. We are aware that it has been held that a contract of interstate carriage, evidenced by a ticket, is governed by the law of the state where made. *G., H. & S. A. Ry. Co. v. Wiseman*, 136 S. W. 793 (writ of error denied); *Sawyer v. El Paso & N. E. Ry. Co.*, 49 Tex. Civ. App. 106, 108 S. W. 719; *E. P. & N. E. Ry. Co. v. Sawyer*, 54 Tex. Civ. App. 387, 119 S. W. 110; *Mexican Nat. R. Co. v. Ware*, 60 S. W. 343; *Wharton on Conflict of Laws*, § 471b; *Robert v. C. & A. R. Co.*, 148 Mo. App. 96, 127 S. W. 925. We are of the opinion that this rule of law is subject to the limitation that, where Congress has assumed to legislate concerning a matter constitutionally within its authority, such federal legislation would have controlling effect, and that the federal law, as found and announced by the Supreme Court of the United States, would supersede the state or local law. It has been held in the case of *C., I. & L. Ry. Co. v. United States*, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. Ed. 395, that where a state statute authorizes a railway company, incorporated under the laws of the state, to issue transportation in payment for printing and advertising, such statutes must give way, so far as interstate transportation is concerned, to the provisions of the act to regulate commerce under which a carrier can accept nothing but money in exchange for interstate transportation. Other cases to the same import might be cited, to wit: *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243, 247; *M., K. & T. Ry. v. Haber*, 169 U. S. 613, 626, 18 Sup. Ct. 488, 42 L. Ed. 878, 882; *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108.

While the contract, or agreement of release, executed by plaintiff to the Fred Harvey Company was made in Texas, and both plaintiff and defendant are residents of Texas, yet it must be assumed, from the circumstances pleaded and the evidence, that it was intended by the parties thereto that the con-

tract should be performed, in part at least, under circumstances involving interstate transportation. It was held in the case of *Ryan v. M., K. & T. Ry. Co.*, 65 Tex. 13, 57 Am. Rep. 589, that, where a contract is to be performed partly in one state and partly in another, the intention of the parties gathered from the surrounding circumstances must govern. And in *H. & T. C. R. Co. v. Park*, 1 White & W. Civ. Cas. Ct. App. §§ 332, 335; *Mo. Pac. Ry. Co. v. Harris*, 1 White & W. Civ. Cas. Ct. App. § 1260; *T. & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App. § 191; *Ry. Co. v. Whitehead*, 6 Tex. Civ. App. 595, 26 S. W. 172, in construing article 708, *Vernon's Statutes*, prohibiting the limiting or restricting of the liability, as it exists at common law, of common carriers of goods, wares, and merchandise for hire within this state, by any general or special notice, etc., it was held that the article did not apply to interstate carriage or traffic, but only to intrastate. While, as hereinabove noted, and as might be further shown by citation of authorities, there exists some contrariety of views and holdings upon this question, yet the majority are of the opinion that the better and more reasonable view is that contracts involving interstate carriage or traffic, where Congress has assumed to legislate thereupon, must be construed in the light of the federal decisions. In 5 R. C. L. p. 912, § 6, it is said:

"The authority of the United States government is supreme in its cognizance of all subjects which the Constitution has committed to it. Consequently there can be no conflict of authority between a state and a law of the United States in respect to such a matter; the former being always subordinate and the latter paramount. And so a state law which contravenes a valid law of the United States is void, for in legal contemplation there can no more be two valid conflicting laws operating on the same subject-matter, at the same time, than in physics two bodies can occupy the same space at the same time. If an act of Congress has been construed by the Supreme Court of the United States, the decision of that court controls, and the state courts are bound by it; but until it has received a construction from the highest national tribunal, the various state courts are free to exercise their own judgment in determining the effect. In cases not involving a national question, however, the decisions of the United States courts are not necessarily binding precedents to be followed by state courts. The mere fact that Congress has power to legislate in regard to a certain subject does not exclude the right of the states to legislate on the same subject, except when the power is actually exercised by Congress and the state laws conflict with those of Congress."

In section 25, p. 931, *Id.*, the following language is used:

"It is a familiar rule that the construction and validity of a contract is governed by the law of the place where it is made. This rule is based on sound reason as well as authority; for, while persons have their places of domicile, and property has its situs, it is clear that, apart from the law itself in contemplation of which either expressly or impliedly a contract is made, there is nothing of a discernible nature that can serve to aid the courts in determining the complicated questions of conflict that con-

tinually arise. * * * If the place where the contract is made is also the place where it is to be performed, there is ordinarily no doubt as to the application of the rule, for then the *lex loci contractus* and the *lex solutionis* are the same. The presumption in the absence of any indication to the contrary will always be that a contract is to be performed at the place where it is made."

In section 26, p. 935, *Id.*, it is further said:

"Some of the authorities apparently overlook the fact that the place of execution may be different from that of performance, and in these it is stated that contracts are to be governed by the laws of the country in which they are made or are to be performed. The Supreme Court of the United States has laid down the following rules in reference to the law governing contracts, in cases in which the place of making and the place of performance are not the same. (1) Matters bearing upon the execution, interpretation, and validity are determined by the law of the place where the contract is made; (2) matters connected with the performance are regulated by the law of the place where the contract, by its terms, is to be performed; (3) matters relating to procedure depend upon the law of the forum."

The majority are of the opinion that the question as to whether plaintiff, at the time of his injury, was a passenger must be determined by the United States Supreme Court holdings, inasmuch as the contract of transportation involved interstate carriage. *Myrick v. M. Cent. R. Co.*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325.

[8] It was held in the case of *B. & O. S. W. Ry. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, that an express messenger occupying an express car in charge of express matter, in pursuance of a contract between a railroad company and the express company, is not a passenger within the meaning of the rule of public policy, which denies the validity of contracts limiting the liability of a carrier to a passenger for negligence, and cannot recover of the railroad company for injuries sustained in a collision, where the contract between the companies exempts the railroad company from such liability, while his own contract, voluntarily entered into as a condition of employment, assumes all such risks, and stipulates that he will indemnify and hold his employer harmless from all liability for such accident or injury. It is true that in some respects the conditions of carriage differ in the case of an express messenger from those in the case of a news agent, in that, in the first instance, a special car is provided for his transportation, and he does not come in contact with other persons traveling on the train, and is not subject to dangers arising from contact or conflict with other passengers; while, in the second instance, his duties require that he travel in the passenger coaches and meet and wait upon the passengers generally. But the majority have concluded that there is no real or essential difference in the character of the two employments, or in the nature of the two contracts between the railway company and the express company on the one hand, and the rail-

way company and the news company on the other, and that in neither case can the railway company be said to be holding itself out as a common carrier of the employees of the other company, but undertakes to transport said employees by virtue of a private contract between the railway company and the express company or the news company. As was said by Justice Shiras, delivering the opinion of the court in the cited case:

"It is evident that, by these agreements, there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voigt as a passenger desiring transportation from one point to another on the railroad. His occupation of the car, specially adapted to the uses of the express company, was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. He was on the train, not by virtue of any personal contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him, or to each other, for injuries he might receive in the course of his employment was deliberately entered into as condition of securing his position as a messenger."

In the recent case of *Robinson v. B. & O. R. Co.*, 237 U. S. 84, 35 Sup. Ct. 491, 59 L. Ed. 849, in an opinion by Justice Hughes, the United States Supreme Court follows the Voigt Case and applies the same reasoning and ruling with reference to a Pullman Company car porter, who had been injured while traveling on the railroad company's train and who had, prior to or at the time of his employment with the Pullman Company, executed a release similar to that shown in the Voigt Case and to the one in the instant case. In the Robinson Case just cited, the question was discussed as to whether the release was invalid under section 5 of the Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149, Comp. Stat. 1913, § 8657), which provides that any contract, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void. It was decided by the Supreme Court that the porter, who was employed by and was under the control of the Pullman Company, could not be held to be an employé of the railroad, although there was a contract between the railroad company and the Pullman Company, as in this case between the railway company and the Harvey Company, by virtue of which the railway company received a portion of the contingent profits arising from the conduct of the joint business. In the Robinson Case, also, it was decided that the plaintiff was not a passenger, and was not entitled to the benefits of the inhibition against stipulations of special contracts, limiting the liability of common carriers for damages arising out of negligence of their employees.

In the judgment of the majority, the trial court did not err in instructing a verdict for

defendant, and all assignments are overruled, and the judgment is affirmed.

BUCK, J. (dissenting). I cannot concur with the conclusion of my Brethren that the decision as to whether or not the plaintiff was a passenger at the time of his injuries must be determined by the federal law. The defendant company undertook to transport plaintiff over its lines under and by virtue of two certain contracts, the one entered into by and between the railway company and the other between the plaintiff and said Harvey Company. The so-called release contract, hereinbefore set out in the majority opinion, and the provisions of which it is claimed by appellee inure to its benefit, provides for the transportation of the plaintiff over certain railroads not designated by name, and not shown to be interstate lines; and in consideration of said transportation plaintiff purported to release said railroads from any liability for injuries arising by reason of the negligence of the servants of said railroad companies or otherwise. By the authority of our state Supreme Court and Court of Civil Appeals, some of the decisions being cited in the majority opinion, this contract of release was invalid. Under the well-recognized rule of construction of contracts, that its terms and provisions must be taken most strongly against the party writing the same, this contract should be given the construction as providing for intrastate transportation in the main. 4 R. C. L. p. 803, section 261, says:

"It is an elementary rule of construction that, if a written contract reasonably admits of two constructions, that one is to be adopted which is least favorable to the party whose language it is. To no class of contracts has this rule been applied more stringently than to those in which common carriers seek to limit their liability as it exists at common law. * * * Moreover, the courts look with jealousy on the attempts of common carriers to free themselves from the responsibilities placed on them by the policy of the common law, because of the public nature of their employment and the inequality of the parties to these contracts. All these considerations, therefore, have led to the adoption of a rule, now indubitably established, that any limitation of liability by a common carrier in a bill of lading will, in case of ambiguity, be strictly construed and that construction adopted which is the most favorable to the shipper."

Section 263, p. 805, Id., says, in part, as follows:

"However, in general, it may be said that this matter is governed by the rules as to conflict of laws generally applicable to other contracts. So, if the contract is made and to be wholly performed within one state, the law of that state will govern its validity even where it is brought into question in the courts of another state; and the same rule obtains where a contract for carriage is issued in one state to be performed in several states, among them the state in which the contract was entered into. In such cases, the law of the state where the contract was made and partly performed will govern, even if it was also partly performed in the state in which the validity of its terms is brought into question."

"It is generally agreed that the law of the place where the contract is made is prima facie that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention." 5 R. C. L. § 27, p. 939.

Under the law as prevailing in this state, where the contract was made and where both plaintiff and defendant reside, plaintiff is held, under the circumstances and terms of his employment, to be a passenger. *T. & P. Ry. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548. Therefore it seems to the writer that the parties to the contract of carriage should be held to have entered into the contract with a knowledge of the law as it exists in this state, that under such contract plaintiff would be held to have the rights, privileges, and protection of a passenger while on defendant's train, and that the purported release contract entered into by and between plaintiff and the Harvey Company, the benefits of which are claimed by the railway company, was invalid in so far as it purported to limit the liability of the railway company for accidents arising from the negligence of its employes.

If this view of the question be sound, and in the opinion of the writer it is sustained by practically all of the authorities, it becomes unnecessary to determine whether or not the conditions of employment and the circumstances of transportation with reference to an express messenger or a Pullman car porter are different from those pertaining to a news agent. However, the writer is of the opinion that the conditions and circumstances are essentially different, but does not place his dissent, entirely or principally on that ground.

Without desiring to extend the expression of the reasons for his dissent further, the writer wishes respectfully to enter his dissent from the final conclusions reached by the majority of the court. In his opinion, the judgment of the trial court should be reversed and the cause remanded.

CARTER-MULLALLY TRANSFER CO. v. BUSTOS et al. (No. 5674.)*

(Court of Civil Appeals of Texas. San Antonio. May 24, 1916. Rehearing Denied June 21, 1916.)

1. APPEAL AND ERROR ⇐1060(1)—REVIEW—HARMLESS ERROR — BURDEN OF SHOWING PREJUDICE.

In an action for personal injuries, error of plaintiff's counsel in asking two jurors, who did not serve, if they represented an insurance company, was harmless, where the bill of exceptions fails to show that the question was asked in the presence and hearing of persons who afterwards served on the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. ⇐1060(1).]

2. APPEAL AND ERROR ¶1048(6)—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR.

In an action for personal injuries, where plaintiff unintentionally elicited the information on cross-examination of defendant's witness that defendant was insured and there was nothing in the record tending to show that the plaintiff had any ground for anticipating what the witnesses would testify, the error was not reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4145; Dec. Dig. ¶1048(6).]

Appeal from District Court, Bexar County; W. F. Ezell, Judge.

Action by Adolfo Bustos, by his father and next friend, Joseph Bustos, against the Carter-Mullaly Transfer Company. From a judgment for plaintiff Adolfo Bustos and against plaintiff Joseph Bustos, defendant appeals. Affirmed.

Hertzberg, Barrett & Kercheville, of San Antonio, for appellant. T. H. Ridgeway, of San Antonio, for appellees.

FLY, C. J. This is a suit for damages instituted by Joseph Bustos, for himself, and as the father and next friend of his minor son, Adolfo Bustos; said damages alleged to have occurred by an automobile belonging to appellant running into and dragging the said minor, who was riding a bicycle at the corner of Houston and North Flores streets in San Antonio. The cause was tried by jury and resulted in a verdict against Joseph Bustos, but in favor of Adolfo Bustos for the sum of \$1,000.

The evidence shows that Adolfo Bustos was injured through the negligence of the driver of appellant, and that he was damaged in the sum found by the jury.

[1] The first and second assignments of error are grouped, and are the only assignments presented for the consideration of this court. The first assignment complains of the action of appellees' counsel in asking two jurors whether they represented an insurance company, and the second is that the court erred in permitting appellees to ask witnesses Thomas H. Wade, Miss A. N. Goodenough, and Dr. Redmond "as to what man they talked to after the accident, and, when one of the witnesses answered that he talked to F. M. Coleman, the appellees persisted in asking who F. M. Coleman was, and the answer was that he was an insurance agent." The only proposition is:

"Where there is a persistent effort by counsel for plaintiff, in a personal injury suit, to convey to the jury a suspicion or surmise that defendant holds a policy of insurance in a company not a party to the suit, which will protect the defendant from loss in case a verdict is rendered against it, this is sufficient cause for reversal."

The first assignment of error is supported by a bill of exceptions which fails to show that the question propounded to the two jurors was asked in the presence and hearing

of the persons who afterwards served on the jury, and if it be error to permit such a question to be asked, as has never been held by this court, the contrary having been held by other Courts of Civil Appeals, no harm seems to have come to appellant on account thereof. Neither of the persons to whom the question was directed served on the jury. If any court has held that the mere mention of an insurance company in a personal injury or death case is sufficient to reverse a judgment whether or not such mention had any effect on the case, it is best not to follow it, and to return to the domain of common sense and reason.

In connection with the second assignment of error, the record fails to disclose that any witness was ever asked who F. M. Coleman was, or that any witness ever stated that he was an insurance agent. No such statements are found in bills of exception or statement of facts, and the assignment has no basis in fact upon which to rest. No bill of exceptions was taken to what Dr. Redmond swore, and the word "insurance" is not mentioned in the statement of facts. No such witness as Wade testified, but we will take it for granted that Wayne was meant. A discussion of any issues sought to be raised by appellant might be pretermitted, as there is no basis in fact for the assignment; but we think the questions raised are of such vast importance, in view of the extended business done by casualty and accident insurance companies, that we have concluded to give expression to the views of this court in connection with references in a personal injury or death case to the fact that the defendant was insured.

[2] There is nothing in the record that tends to indicate that appellees, either knew that Wayne would answer that he had talked to "the insurance people," or that Miss Goodenough would, in response to the question, "Did you make a written statement?" reply:

"Yes, sir; some one came there, I think they was from the insurance company, wanting to settle the case, and asked me the extent of his injuries."

Certainly the last part of the statement was not responsive to the question, but was volunteered on the part of the witness. No effort was made on the part of appellant to show that appellees had talked to the witness, knew of what she would swear, or had instructed her as to what her answer should be in reply to the question. The witnesses were both placed on the stand by appellant, and both answers of which complaint is made were elicited on the cross-examination. Is it not more probable that appellant knew what the witnesses would swear than that the adverse party would? Appellant had consulted with the witnesses, had placed them on the stand, and had

drawn out their testimony. There is not one thing in the record tending to show that appellees had any ground for anticipating what the witnesses would testify. In the absence of such testimony, it would be going to dangerous lengths to hold that an irresponsible witness has it in his power to volunteer testimony that would destroy the case made by the plaintiff. Such ruling would place it in the power of any defendant, in cases of the same class with this, to absolutely render it impossible for a plaintiff to obtain a judgment, however just his claim might be. Appellees should not be held responsible for wrongs not emanating from, nor committed by, them, and no judgment in a case like this should ever be reversed merely upon a showing that a witness had given an answer disclosing a second defendant in the case.

We think the proposition that the judgment in any personal injury or death case will be reversed, if it is disclosed by accident or otherwise that an insurance company is interested, is not based upon a sound rule, and we think there are few, if any, decisions so holding. No rule should ever be enforced absolutely that can be made the means of wrong and oppression, and certainly the rule in question places a dangerous instrument in the hands of every defendant. There is no intimation that it has been so used by the appellant in this case, for the record does not disclose any such state of affairs, nor does it show that appellees have deliberately disclosed the fact of insurance on the part of appellant, in order to gain or increase a verdict. It can as readily be held that it was inadvertently done, as that it was conceived by appellees and put into execution. In such a state of the record, we are not willing to extend the rule laid down on the subject, but will confine it strictly, when we enforce it at all, to cases in which it is made to appear that the plaintiff deliberately and persistently labored to inject an issue not made by the pleadings in order to gain a verdict or influence the amount of it.

Without committing this court to the policy of never reversing a judgment in which it is shown that a defendant is insured against accidents, still it appears almost farcical, in these days, when it is known to every man almost, qualified to sit on a jury, that most corporations dealing with the public, and many individuals, are insured in certain sums against liability for accidents, to hold that such insurance is a mystery from which the veil of secrecy should never be lifted, and that, if it is whispered to the jury that such insurance has been obtained, no valid verdict can be returned or valid judgment rendered. Not only is it known that most corporations and many individuals are insured, but it is also known to most intelligent, well-informed men that there is a clause in every accident policy which provides for the

insurer furnishing its attorneys and conducting the defense for the insured. It may be that the insured could compromise for a lower sum than the amount of his insurance, still he must surrender his rights into the hands of the insurer and run the risk of having a larger judgment than the amount covered by his insurance rendered against him, and, while he is the one put forward to receive the buffetings of a trial, it must not be whispered that he is not the true defendant in the case. It would seem just, reasonable, and proper that if the insurance company is conducting the defense, as every reasonable man connected with the trial knows that it is doing, it should not be an act of extreme impropriety to mention the fact. Another and more sensible policy than that heretofore prevailing should be adopted by the courts in such cases. It should never be improper to disclose the true defendant in the case, and draw into the open the real rather than the fictitious party. This court is merely entering its protest against the policy that has been followed in Texas, but recognizes that the decisions of the state must be followed until it is settled differently by the court of last resort. In the meantime there will be no forced or strict interpretation of the facts, but they will be confined within the spirit as well as the letter of the law. It is puerile and absurd to continue to reverse judgments on account of the disclosure of matters to juries which in all probability they already knew. Reason seasoned with justice, common sense leavened with experience, should be the standard in the administration of the laws of the state and the enforcement of rules for the courts. It is not claimed in this case that the verdict is excessive, or that there is any evidence of passion or prejudice on the part of the jury. The naked proposition is that, independent of any injury that may have resulted to appellant by mention of an insurance company, that disclosure will work a reversal of a judgment against which no complaint is, or could be, urged. We do not think this course should be followed by this court.

The facts of this case, if the version assumed by appellant is the true one, show that an insurance company was active in approaching the witnesses, in getting statements from them, and counseling and advising with them while the trial was in progress, and, if the plaintiff dared to inquire into such conduct, a protest is made, and an appeal taken from a judgment of which no complaint is made, and a reversal is asked because a rank outsider who had been approaching appellees' witnesses had been exposed. The facts of this case show the extent to which the rule as to not exposing insurance companies can be carried, and it is full time to call a halt.

The judgment is affirmed.

HUGHES v. UNDERWOOD TYPEWRITER CO. (No. 8365.)

(Court of Civil Appeals of Texas. Ft. Worth. April 22, 1916.)

JUSTICES OF THE PEACE §202(2)—REVIEW—CERTIORARI — PROCEEDINGS TO PROCURE — AFFIDAVIT.

Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 742, 745, providing that certiorari shall not issue to a justice court, unless the applicant, "or some person for him having knowledge of the facts," shall make affidavit setting forth sufficient cause, a petition for certiorari purporting to be that of the applicant's next friend, signed by a third party, together with a verification thereof by the third party stating only that he "believed the facts set forth above to be true and correct," was insufficient.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 781-788; Dec. Dig. §202(2).]

Appeal from Wichita County Court; Harvey Harris, Judge.

Action by the Underwood Typewriter Company against J. R. Hughes. From a judgment of the county court refusing application of defendant by next friend for certiorari to review judgment for plaintiff in justice court, defendant appeals. Affirmed.

W. F. Weeks and Harry C. Weeks, both of Wichita Falls, for appellant. Bonner & Bonner and Joseph R. Ogle, all of Wichita Falls, for appellee.

CONNER, C. J. On February 10, 1915, appellant, D. A. Smith, as next friend of an alleged minor, J. R. Hughes, applied to the county judge of Wichita county for a writ of certiorari to bring up for review a certain cause in the justice court of precinct No. 1 of that county, in which judgment had been rendered in favor of the Underwood Typewriter Company against the said Hughes for the sum of \$161.91. The application was granted, but on April 6, 1915, upon motion of the Underwood Typewriter Company the certiorari was dismissed and a writ of procedendo ordered. From such judgment of dismissal this appeal has been prosecuted.

The principal grounds set up in the petition for certiorari were that said Hughes was a minor and as such was entitled to disaffirm the promissory note upon which the suit in the justice court was predicated. It was further alleged that the judgment, without notice to or the consent of the defendant, had been rendered on a day other than had theretofore been agreed upon as a day for the trial. In the motion to dismiss the writ of certiorari the Underwood Typewriter Company set up some 11 grounds in support of the motion, including an objection that the petition for certiorari had not been properly verified. It will not, we think, be necessary to notice further than we have done the application for the writ, inasmuch as it seems very clear that the application was not supported by a sufficient affidavit, and

hence that the judgment of the county court in dismissing the application was correct on this ground.

The petition for certiorari purported to be that of D. A. Smith, as next friend of J. R. Hughes, alleged to be a minor, and was signed "W. F. Weeks," to which signature was subjoined the following verification:

"I, W. F. Weeks, being duly sworn, on my oath, state that I believe the facts set forth above to be true and correct.

"Witness my hand this 10th day of February, 1915. W. F. Weeks.

"Sworn to and subscribed before me, by W. F. Weeks, this 10th day of February, 1915. A. F. Kerr, Dist. Clerk in and for Wichita County, Texas. [Seal.]"

Article 742, title 21, of Vernon's Sayles' Texas Civil Statutes, provides that:

"After final judgment in a court of a justice of the peace, in any cause, except in cases of forcible entry and detainer, the cause may be removed to the county court by writ of certiorari."

But it is particularly specified in article 745 following that:

"The writ shall not be granted unless the party applying for the same, or some person for him having knowledge of the facts, shall make affidavit in writing, setting forth sufficient cause to entitle him thereto."

It is evident that the affidavit above set forth is not in compliance with the statute and is wholly insufficient. The party filing the petition for certiorari and making the affidavit fails to show his relation to the case, nor does it appear that he has knowledge of the facts embodied in the petition for certiorari. It has been held that when an affidavit is made in the course of a judicial proceeding by one person in behalf of another, his authority should be made to appear from the record. *Cherryhomes v. Carter*, 66 Tex. 166, 18 S. W. 443. In this respect the affidavit under consideration is wholly wanting. Moreover, in the verification no fact alleged in the petition for writ of certiorari is stated to be true within the knowledge of the affiant. It may have been true that W. F. Weeks, who made the affidavit, "believed" that the facts alleged in the petition were true, and yet such facts may have been wholly unfounded. The case of *Spinks v. Mathews*, 80 Tex. 373, 15 S. W. 1101, is one in which the petition for certiorari was signed by an agent and followed by the general statement under oath that "the allegations are true and correct, to the best of his knowledge and belief." On appeal from an order dismissing the petition, our Supreme Court held that the affidavit quoted was too general to constitute a substantial compliance with the law, citing the case of *Graham v. McCarty*, 69 Tex. 323, 7 S. W. 342, to the effect that an affidavit "to the best of affiant's knowledge and belief" is fatally defective. In 1 *Ruling Case Law*, page 770, par. 15, it is stated:

"An affidavit should always be made by one having actual knowledge of the facts, if possi-

ble, and its allegations should be full, certain, and exact, for to be used as evidence an affidavit must state facts positively and not merely upon information and belief; a bare statement of one's belief being absolutely immaterial unless the case is one where an affidavit as to belief only is required"

—the author citing *Dyer v. Flint*, 21 Ill. 80, 74 Am. Dec. 73; *Leigh v. Green*, by the Supreme Court of Nebraska, 64 Neb. 583, 90 N. W. 255, 101 Am. St. Rep. 592.

We conclude that the county court properly dismissed the writ of certiorari herein, and the judgment is accordingly affirmed.

CLOPTON v. CALDWELL COUNTY.* (No. 5683.)

(Court of Civil Appeals of Texas. San Antonio.
May 31, 1916. Rehearing Denied June 21,
1916.)

1. ACCORD AND SATISFACTION ⇐11(1)—ACCEPTANCE AS FULL PAYMENT — EFFECT OF PROTEST.

A contractor's acceptance and cashing, under protest, of a road warrant, stated to be in final settlement of his claim, operated as an accord and satisfaction.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 75, 79–82; Dec. Dig. ⇐11(1).]

2. ACCORD AND SATISFACTION ⇐10(1)—UNLIQUIDATED CLAIMS—WHAT CONSTITUTES.

A road contractor's claim for work done, including an additional item for supervision, is unliquidated where the supervising item is without basis.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 67–72; Dec. Dig. ⇐10(1).]

3. ACCORD AND SATISFACTION ⇐26(3)—EVIDENCE—SUFFICIENCY.

A finding that a road contractor knew that certain warrants were given him in full payment is sustained, where he appeared before the authorities and protested against such limitation before cashing the warrants.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 164, 165; Dec. Dig. ⇐26(3).]

4. ACCORD AND SATISFACTION ⇐5—CONSIDERATION.

The compromise of an amount due a road contractor is sufficient consideration to support an accord and satisfaction.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 40–45; Dec. Dig. ⇐5.]

Appeal from District Court, Caldwell County; Frank S. Roberts, Judge.

Action by A. M. Clopton against Caldwell County. Judgment for defendant, and plaintiff appeals. Affirmed.

Page & Jones, of Bastrop, and O. Ellis & Graves, of Lockhart, for appellant. E. B. Coopwood, E. R. Yellott, and J. B. Hatchitt, all of Lockhart, for appellee.

FLY, C. J. This suit was instituted by appellant to recover a balance of \$1,829.43 alleged to be due appellant by appellee, on a

contract between the parties whereby appellee bound itself to pay appellant for his services "in the supervision and construction of roads, bridges, and culverts in the different precincts of Caldwell county," 10 per cent. of the actual cost of the construction of said roads, bridges, and culverts. The cause was tried without a jury, and judgment rendered that appellant take nothing by his suit.

The court found, in substance, and this court approves his findings, that precinct No. 1, of Caldwell county, had been organized as "road district No. 1," under the laws of Texas; that, by a vote of the people, bonds had been issued for the purpose of constructing and improving roads therein, among which were the roads for work on which appellant sought to recover compensation. On January 14, 1914, the commissioners' court of Caldwell county entered into a contract with appellant for the supervision of the construction of three roads, namely, Prairie Lea, Silent Valley, and Niederwald, and agreed to pay him for his services 10 per cent. of the contract price in case bids were accepted, and actual expense if all bids and estimates were rejected. In pursuance of the terms of the contract, bids were received by the court and one for the Prairie Lea road was accepted; the bids on the other roads were rejected. Afterwards, the vote on the other roads was reconsidered, and contract was made with appellant to construct the other two roads. On a final estimate of the cost of the two roads, the commissioners' court disputed the right of appellant to 10 per cent. commissions and also claimed a credit of \$118 on the account. It was shown that, at the time the contract to construct the two roads was approved, the appellant agreed not to charge the county 10 per cent. on the contract price; and the order awarding the contract was made on the agreement and understanding that he would not charge the county the 10 per cent. demanded by him in this suit. The commissioners' court deducted the 10 per cent. and \$118 from the account for \$3,838 and paid him only \$1,992.49, and on the face of the two warrants given for that sum was written "as final settlement for road work * * * on R. & B. No. 1 fund." The warrants were tendered to appellant in full settlement of all claims by him under the contract and were received and cashed by him. He had knowledge that the warrants were issued to him as a full settlement of all claims, but, knowing such fact, he received and cashed the warrants.

[1] The court decided the case in favor of appellee on the ground of accord and satisfaction, and we think the decision is correct. Where an offer of a part of a claim is made as full payment of the whole claim, and is accepted by the claimant, though under protest, it is a bar to the recovery of the balance. *Daugherty v. Herndon*, 27 Tex. Civ.

App. 175, 65 S. W. 891; *Bergman v. Brown*, 172 S. W. 554; *Hollinger v. Llano Granite Co.*, 173 S. W. 603; *Fuller v. Kemp*, 138 N. Y. 232, 33 N. E. 1034, 20 L. R. A. 785. As said by the Court of Appeals of New York, in the last-cited case, under similar facts to those in the present case:

"The tender and the condition could not be discovered. The one could not be taken and the other rejected. The acceptance of the money involved the acceptance of the condition; and the law will not permit any other inference to be drawn from the transaction. Under such circumstances, the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest can affect the legal quality of his act."

The first assignment is overruled. There is no substantial difference between the finding of the judge and what appellant contends he should have found. No matter how erroneous the finding may have been, which is not conceded, it could not have had any weight in causing the conclusion of law of the trial judge.

The second and third assignments of error present nothing material to a decision of this case and they are overruled. However, the statement of facts supports the finding as to the \$118.

[2] The fourth assignment of error complains of a finding of the court that the final account of appellant was an unliquidated demand. The amount due appellant by appellee was unsettled, undetermined in amount, and consequently was unliquidated. If there had been any basis for the claim for 10 per cent., that may have been liquidated; but it had been fully agreed by and between the parties, before the contract was awarded, that the 10 per cent. should not enter into the contract. It would seem to be preposterous to pay a contractor a percentage of the contract price to supervise his own work. It is argued that, because it was known what appellant claimed as his percentage, the whole claim became liquidated, but that part of the account had no foundation and appellant accepted payment of the other part of the account.

[3] The fifth, sixth, and seventh assignments of error go to the sufficiency of the evidence to sustain certain findings, and are fully answered by our conclusions of facts. They are overruled. Appellant, before he collected the warrants, went before the commissioners' court with his attorney and protested against its order and endeavored to have the order rescinded, which was refused. He then went out and collected the amount of the warrants, and yet it is contended that a finding that appellant knew the warrants were tendered him in full payment is not supported by the facts.

[4] The eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth assignments of error are fully met herein and are overruled. The evidence is sufficient to sus-

tain the finding of accord and satisfaction. The compromise of a debt was a sufficient consideration. As said by this court, through Justice Neill, in *Powers v. Harris*, 42 Tex. Civ. App. 250, 94 S. W. 136:

"Among the numerous modifications and exceptions, none, however, is better established than that if the claim, though evidenced by a bill or note, is in dispute an agreement, by way of compromise, to receive a part payment of the disputed claim in settlement of the whole demand, when performed, will discharge it."

See, also, *Hunt v. Ogden*, 58 Tex. Civ. App. 443, 125 S. W. 386; *Cristler v. Williams*, 62 Tex. Civ. App. 169, 130 S. W. 608; *Fire Association v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84, 35 L. Ed. 860.

There is no merit whatever in the fifteenth assignment of error. The testimony objected to did not tend in any way to vary the terms of the warrants, but was in perfect accord with a recitation in the warrants that they were given as a "final settlement for road work." The case was tried by the court, and it will be presumed that he tried it on legal testimony, and he so states in approving the bills of exception.

The sixteenth assignment of error is overruled. There was no attempt to vary the order of the commissioners' court, but to explain it.

The seventeenth assignment of error is a repetition of other assignments on the question of accord and satisfaction, and that subject has been fully considered. It is overruled.

The judgment is affirmed.

KING et al. v. HARDIN LUMBER CO.
(No. 594.)

(Court of Civil Appeals of Texas. El Paso.
May 25, 1916. Rehearing Denied
June 22, 1916.)

1. ASSIGNMENTS \S 12 — FUTURE EARNINGS UNDER EXISTING CONTRACTS.

A building contractor may assign an indebtedness which is to accrue in his favor under his contract, since the fund has a potential existence.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. \S 20; Dec. Dig. \S 12.]

2. ASSIGNMENTS \S 58 — EQUITABLE ASSIGNMENTS—ORDER ON PARTICULAR FUND.

An order by a building contractor to the owners to pay a materialman a certain sum operates without acceptance as an equitable assignment of the fund to accrue in favor of the contractor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. \S 121-123; Dec. Dig. \S 58.]

3. ASSIGNMENTS \S 131—ACTIONS—PLEADING.

In actions by assignee to enforce payment of the fund assigned, the alleged invalidity of the assignment due to restriction in assignor's contract against assignment is defensive matter which defendant must plead and prove.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. \S 220-226; Dec. Dig. \S 131.]

Appeal from Harris County Court; Clark C. Wren, Judge.

Action by the Hardin Lumber Company against I. H. King and others. From a judgment for plaintiff, defendants appeal. Affirmed.

A. B. Wilson and Cole & Cole, all of Houston, for appellants. Ross & Wood, of Houston, for appellee.

Statement of Case.

HIGGINS, J. By contract dated June 13, 1914, I. H. King agreed with H. R. Byars, B. L. Vineyard, and John G. Logue, owners, to remodel a building. King was to furnish all material and labor, for which the owners were to pay him \$8,925. This sum was payable to King as follows:

"Such an amount every Saturday morning during the progress of the work as is estimated by the architects to be the amount of the pay roll then owing by the contractor for said week and in addition thereto forty (40) per cent. of the amount of the plumbing contract, when said plumbing work has been roughed in, tested and approved, and forty (40) per cent. of the wiring contract, when said work has been roughed in, tested and approved, the balance of said contract price to be paid by the owners to the contractor within thirty (30) days after the work is completed, finished and accepted, save and except ten (10) per cent. of the contract price, which shall be retained by the owners until after the lapse of thirty (30) days from the time when said work has been finally completed and delivered to and accepted by the owners, but the owners shall have the right to refuse to pay over the balance of said contract price until satisfactory evidence has been furnished to them by the contractor of the payment of all claims on the part of laborers, mechanics, materialmen and subcontractors, and all claims of every kind which may be, or constitute a lien against said building or premises, it being the intention of the parties that the contractor shall deliver said building to the owners free from all claim and liens of any kind, and the owners reserve the right, in any event, to retain at least twenty-five (25) per cent. of the contract price until the final completion of said work and the acceptance thereof by them, and in the event, during the progress of the work, any claim of any kind shall be made against the owners on the part of laborers, materialmen, mechanics, or subcontractors, or any one else, the owners shall have the right to retain out of any payments then due or thereafter to become due the contractor, an amount sufficient to completely indemnify them against such claim or claims."

The remodeling was to be completed on or before August 20, 1913. If not so completed, King was to pay the owners as liquidated damages \$5 per day for each day that the work should remain unfinished after said date. The contract provided that if King should fail to prosecute the work with promptness and diligence, the owners might terminate the employment of King and complete the work at his cost. King agreed to execute and deliver to the owners and did execute and deliver to them a bond in sum of \$2,500 to guarantee performance of his contract.

The Hardin Lumber Company agreed to furnish King the materials for the perform-

ance of his contract. It also paid for King's account to a bonding company a premium of \$69.25 for the bond which King gave the owners and a premium of \$50 on casualty insurance taken out by King on the work, making a total of \$119.25 of such premium paid by the Hardin Lumber Company for King's account.

On June 14, 1913, King executed and delivered to said company this instrument:

"Vineyard & Byers, City—Please pay Hardin Lumber Co. the sum of \$1,169.25 (eleven hundred sixty-nine and 25/100 dollars), same being for material to be furnished to me amounting to \$1,060.00 and cash furnished for bonds amounting to \$119.25. Also please pay for all extra material I may use, and deduct said amount from my contract price with you. For value received I hereby assign the above amount to them. Accepted. I. H. King."

On the same date it was presented by the company to Logue, who, it seems, was making the disbursements for himself, Vineyard & Byers to King. He refused to accept same, but stated he would see that appellee got its money. The value of material furnished by appellee to King for remodeling the building aggregated \$1,164.75. King, it seems, delayed the completion of the contract and the owners terminated his employment and completed the same. The evidence does not disclose when they terminated his employment. There was a delay of 52 days in the completion of the contract and the owners charged \$5 for each of said days as provided by the contract, totaling \$260. This item of \$260, together with the other amounts paid by the owners for material and labor to complete the building, aggregated \$583.53 in excess of the contract price. In other words, they paid \$278.53 for material and labor in excess of the contract price which, added to the item of \$260, made \$538.53 due the owners by King. The owners paid to the appellee the said sum of \$1,164.75 to cover the material furnished by it to King and refused to pay the item of \$119.25 covering bond premiums paid for King's account. This suit was brought by appellee to recover this item against King and the owners. The case was tried without a jury, and judgment rendered in favor of appellee. Findings of fact were not filed by the trial court, and in the absence thereof it is presumed that all issues of fact were resolved in favor of appellees. The owners prosecute this appeal.

Opinion.

[1, 2] The indebtedness which was to accrue in King's favor under the contract between himself and the owners had a potential existence when the instrument in favor of appellee was given, and the fund having such potential existence, it was properly subject to equitable assignment. The instrument given to appellee by King constituted an equitable assignment of \$1,050 of the fund applicable to the payment of materials to be furnished by appellee and a like assignment of \$119.25

thereof applicable to the payment of the bond premium items paid by appellee for King's account.

The application by the owners of the money accruing to King under the contract between them is shown by the following statement:

Statement of I. H. King Contract for Remodeling of
Faith Home under Contract with Vineyard,
Byars & Logue.

October 11, 1913.

Contract price, \$6,925.00.

June	21, 1913.....	\$ 110 25
	23, 1913.....	85 80
July	3, 1913.....	94 70
	12, 1913. Modern Plumbing Company	877 60
	12, 1913.....	129 75
	19, 1913.....	153 40
	19, 1913. Modern Plumbing Company	150 00
	26, 1913. George Gardiner.....	35 00
	26, 1913.....	215 60
	30, 1913. George Gardiner.....	25 00
Aug.	2, 1913.....	60 00
	2, 1913.....	183 20
	9, 1913. George Gardiner.....	65 00
	9, 1913.....	211 15
	16, 1913. George Gardiner.....	65 00
	16, 1913.....	203 70
	23, 1913. George Gardiner.....	65 00
	23, 1913.....	113 00
	30, 1913. G. W. Miller.....	123 50
Sept.	1, 1913. George Gardiner.....	65 00
	6, 1913. George Gardiner.....	90 00
	6, 1913. G. W. Miller.....	77 85
	12, 1913. George Gardiner.....	80 00
	12, 1913. G. W. Miller.....	77 30
	13, 1913. E. Rudnick.....	3 15
	20, 1913. George Gardiner.....	40 00
	20, 1913. L. F. Campbell.....	7 88
	20, 1913. Mack Gibson.....	1 20
Oct.	10, 1913. John Lloyd and N. Scott....	12 00
	10, 1913. J. Hedricks.....	15 00
	11, 1913. L. F. Campbell.....	10 50
(Above accounts all paid to I. H. King in person, except where otherwise noted.)		
Total		\$3,444 53
Amount due Vineyard, Byars & Logue, account delay, 52 days at \$5.00 per day.....		260 00
Grand total		\$3,704 53
Amount due I. H. King under contract....		\$3,220 47
Claims against the job:		
	Hardin Lumber Company.....	\$1,284 00
	Modern Plumbing Company....	1,531 40
	C. L. & Theo. Bering.....	240 05
	Louis Seline.....	110 00
	Hartwell Iron Works.....	3 35
	Barthold & Casey.....	63 60
	James Buts Co.....	33 53
	G. W. Miller.....	55 00
	G. W. Gardiner.....	329 12
	J. Hedricks.....	194 25
	Max Gibson.....	6 50
	C. L. Dwyer.....	17 50
	John Burney.....	1 50
Total		\$3,878 25
Excess of claims over balance due		\$657 78

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Grand total \$3,704 53
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Louis Seline..... 110 00
Hartwell Iron Works..... 3 35
Barthold & Casey..... 63 60
James Buts Co..... 33 53
G. W. Miller..... 55 00
G. W. Gardiner..... 329 12
J. Hedricks..... 194 25
Max Gibson..... 6 50
C. L. Dwyer..... 17 50
John Burney..... 1 50

Total \$3,878 25

Excess of claims over balance due \$657 78

Logue made all payments, and he testified that he paid to the defendant King, upon the certificates of the architect according to the contract provisions, the weekly pay roll as he was required to do under his contract; otherwise the contract could not have been carried out. "We did not pay the defendant

King any money except upon certificates issued by the architect as required by the contract, which I was compelled to do as the contract required us to do." He further testified that the amounts shown in the statement were all paid to King, except where it is otherwise indicated therein as having been paid to other parties. It therefore appears that \$1,559.55 was paid to King direct subsequent to the execution of the assignment and notice thereof given to the owners. Under the authority of the decisions to which appellants refer, it may be assumed that these payments were rightfully made as necessary in order to enable King to complete his contract. It may be assumed that this right to make these payments to enable the completion of the contract was a right valuable to appellants and of which they could not be deprived by the assignment. But eliminating this amount of \$1,559.55, it appears that up to October 11, 1913, the sum of \$1,884.98 was paid to other parties out of the fund, and some time subsequent to that date \$2,594.25 was paid to other parties having "claims against the job." The dates these later payments were made does not appear, nor does it appear whether the labor and material was furnished before or after the termination of King's employment under the contract. It is true Mr. Logue testified that the items aggregating these two sums were paid no parties who had furnished material and labor in remodeling the building. But this fact alone would not give the claims of such parties precedence over the assignment held by appellee. There is nothing in the record to show that the claims were secured by lien or had precedence otherwise. The mere fact that material and labor was furnished to King did not fix a lien in favor of such parties or right of precedence. In the condition of this record, the cases to which appellant cite us have no application, and we cannot say the court erred in holding them liable for the items for which appellee sued. *Youngberg v. El Paso Brick Company*, 155 S. W. 715.

[3] It is insisted that the assignment is invalid for want of consent thereto of the architect as required by a clause in the contract between King and the owners, which stipulates:

"The contractor shall not let, assign or transfer this contract, or any interest therein, without written consent of the architects."

The architects' want of consent was affirmative defensive matter, which it was incumbent upon appellants to plead and prove. *Glinners, etc., v. Wiley & House*, 147 S. W. 629, and cases there cited. It was pleaded, but no proof thereof offered.

In view of what has been said, it becomes unnecessary to pass upon the remaining assignment.

Affirmed.

TEXAS BLDG. CO. et al. v. COLLINS et al.*
(No. 8353.)

(Court of Civil Appeals of Texas. Ft. Worth.
April 15, 1916. Rehearing Denied
May 27, 1916.)

1. APPEAL AND ERROR \S 197(2) — PARTIES
ENTITLED TO ALLEGE ERROR—ERROR INVIT-
ED BY OBJECTING PARTY—ISSUES.

Where a railway company and its contractor litigated with a subcontractor's creditors the amount due such subcontractor, they cannot urge upon appeal, for the first time, that the issue was not presented by the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 197(2); Pleading, Cent. Dig. \S 1428-1441.]

2. CONTRACTS \S 287(1) — CONSTRUCTION —
COMPENSATION—AMOUNT.

Under contracts providing that the amount due from a railway company to a subcontractor should be fixed by an estimate signed and certified by the railway company's chief engineer, held that an unsigned and uncertified instrument was not the contemplated final estimate.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1308; Dec. Dig. \S 287(1).]

3. CONTRACTS \S 350(2) — EVIDENCE OF
AGREEMENT—SUFFICIENCY.

Testimony that a subcontractor did not challenge bills charging it certain sums for railway equipment hire, and that such bills were computed from a contract with the subcontractor, is insufficient to establish an express agreement to pay such sums as against the subcontractor's creditors.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1820, 1821; Dec. Dig. \S 350(2).]

4. CONTRACTS \S 234—CONSTRUCTION—COM-
PENSATION—DEDUCTIONS.

A contract provision between a railway contractor and a subcontractor held to authorize the contractor to pay only such claims against the subcontractor as might become liens on the railway.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1099, 1100; Dec. Dig. \S 234.]

5. CONTRACTS \S 234—CONSTRUCTION—COM-
PENSATION—DEDUCTIONS.

A railway company held authorized, by various contract provisions, to pay for posts used by its subcontractor and for which a lien might be filed against the railway, and to charge such cost to the subcontractor, irrespective of his creditors' claims to any amount due him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1099, 1100; Dec. Dig. \S 234.]

6. INTERPLEADER \S 35 — COSTS — PERSONS
ENTITLED—STAKEHOLDER.

In a suit by certain employes and materialmen against a railroad subcontractor, the railway company and the contractor are not entitled to attorney's fees as stakeholders, where they did not pay into court, but contested, the amount found due from them to the subcontractor.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. \S 76; Dec. Dig. \S 35.]

7. APPEAL AND ERROR \S 1073(1)—HARMLESS
ERROR—JUDGMENT.

It was not prejudicial error to order personal judgments against a railway company in favor of a subcontractor's creditors, where the decree relieves it from liability upon payment of the amount due from it to the subcontractor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4240; Dec. Dig. \S 1073(1).]

8. RAILROADS \S 159(4) — LIENS — PERSONS
ENTITLED TO—STATUTE.

Vernon's Sayles' Ann. Civ. St. 1914, art. 5640, giving a lien to mechanics, laborers, and operatives on railway construction work, applies to copartners who work themselves and employed about 30 teams on grading work, especially where no profit was made on the job.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 489, 490; Dec. Dig. \S 159(4).]

9. APPEAL AND ERROR \S 1171(2)—DISPOSAL
—REVERSAL—TRIVIAL EXCESS—ASSIGNMENT
OF ERRORS—SPECIFICATION—PARTICULAR-
ITY.

An assignment of error to an allowance of \$172.55, of which \$34 was possibly erroneous, will be entirely overruled when the \$34 deduction would make no appreciable difference in the result, especially where there is no assignment specifying the \$34 item.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4547, 4548; Dec. Dig. \S 1171(2).]

10. RAILROADS \S 159(4) — LIENS — PERSONS
ENTITLED TO—STATUTE.

Vernon's Sayles' Ann. Civ. St. 1914, art. 5640, giving a lien to mechanics, laborers, and operatives on railway construction work, applies to a subcontractor's foreman or superintendent earning \$200 per month and doing an appreciable amount of manual labor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 489, 490; Dec. Dig. \S 159(4).]

Appeal from District Court, Tarrant County; Marvin H. Brown, Judge.

Action by J. E. Collins and others against the Texas Building Company and others. Judgment for plaintiffs, and certain defendants appeal. Affirmed as modified.

D. E. Decker, of Quanah, and H. A. Turner, of Ft. Worth, for appellants. J. C. Wilson, Thompson & Barwise, Bryan, Stone & Wade, and W. C. Blalock, all of Ft. Worth, for appellees.

CONNER, C. J. In September, 1912, the Quanah, Acme & Pacific Railway Company, a corporation, duly organized under the laws of the state of Texas, contracted with the Southwestern Construction Company, another corporation duly organized under the laws of the state of Texas, to do all the work and furnish all of the material necessary to the construction of the roadbed and to lay the track for a line of railway from Paducah, in Cottle county, Tex., to a point in Motley county, Tex., a distance of approximately 40 miles. The construction company in turn sublet the contract to the Texas Building Company, another corporation, and the latter company in turn contracted with various firms and individuals to do all the grading, clearing, grubbing, excavating, and embankment work on specified miles of the contemplated road, and some of these firms and individuals later in turn sublet portions of the work that they had contracted to do. The contracts referred to in a general sense may be said to be interdependent, and for the gradation work payment was provided in a fixed sum per square foot for grubbing and clearing, and a fixed sum per cubic yard for

the moving of dirt and rock. It appears that the work was completed in October, 1913, and that soon thereafter one W. B. Drake instituted a suit against the Texas Building Company to recover an amount alleged to be due him for services or material furnished in the construction of the road, and garnished the construction company, alleging that there was reason to believe that the construction company had funds of the building company in its possession. At a later period, it appears that J. E. Collins and several others, who had performed labor hereinafter to be more particularly mentioned, instituted suit against the Texas Building Company to recover sums alleged to be due them. These several suits, upon motion duly made, were consolidated, and the railway company and the Southwestern Construction Company answered that there was a balance due from the railway company to the construction company, under the contract between them hereinbefore referred to, of \$27,480.48, which had been retained under the terms of the contract, and this sum the railway company and the construction company, by their answers, tendered into court. These companies also set up that there were numerous other specified parties who had claims against the Texas Building Company; and it was prayed that they might be required to intervene and set up their rights to the fund in question. Numerous parties thereafter did intervene and set up claims, as will hereinafter more particularly appear. The garnishment suit of W. B. Drake against the Texas Building Company was later dismissed on the ground of the notorious insolvency of the building company. So that, in the final form of the litigation, this contest is one between the Quanah, Acme & Pacific Railway Company and the Southwestern Construction Company on the one side, and J. E. Collins and numerous others on the other side. As against the railway company and the construction company, Collins and other laborers and materialmen, asserting claims, substantially alleged that a greater sum than \$27,480.48 as tendered was due from the railway company to the construction company, under the terms of the contract between them. The several claimants, however, as among themselves set up priorities of right to the fund referred to and of lien upon the railroad as alleged.

The trial was before the court without a jury, and the court's conclusions of fact and law are before us. The court found and adjudged that the total amount of the funds remaining in the hands of the railway and construction companies due under the contracts was \$32,185.98, which the judgment of the court required these corporations to deposit in the registry of the court. The claimants were divided into classes A, B, C, and D. In class A were some 13 claimants, in whose favor the court found sums severally aggregating \$23,538; three of the claimants were included within class B, the total of class B's claims amounting to \$2,553.45; there were some five of class C's creditors, whose claims aggregated \$3,310.30. The court found and adjudged that the creditors in class A were entitled to recover of the railway and construction companies their several claims and to a first lien upon the railway, after which the creditors in class B were entitled to a like judgment with foreclosure of lien for their several claims, and that, after the satisfaction and payment of the claims in classes A and B, then what fund remained should be ratably paid to the creditors specified in class C. No lien was found in favor of the creditors in classes C and D. It was adjudged that the creditors in class D take nothing, and, as they are not represented on this appeal, it will be unnecessary to further notice the claims of this class.

The railway and construction companies have prosecuted an appeal from the judgment against them, and one of the creditors in class C has likewise appealed from the court's judgment, complaining of the adjustment of the priorities.

The record before us is very voluminous, and the numerous briefs and conflicting claims of the parties have rendered the case one somewhat difficult of disposition. It seems manifest that we cannot within reasonable limits state or discuss at length all of the details of the case. We think we can but briefly, though perhaps irregularly, dispose of such of the questions presented as we deem material to our final disposition, and, so proceeding, we will first attempt to dispose of the appeal of the railway and construction companies.

[1] Appellants, the railway and construction companies, insist that the court erred in rendering judgment against them in excess of the sum of \$27,480.48, for the reason, as alleged, that none of the interpleaded parties deny the correctness of the sum so tendered, and for the further reason that there is evidence that the sum so tendered was the correct amount. In the interest of brevity, we will not undertake to set out the pleadings of the several interveners relating to the subject; but such pleadings have been examined and we find that several of them allege that "they are without sufficient information to enable them to affirm or deny the allegations of the first paragraph (the paragraph of the answers setting forth the amount due under the railway contracts as claimed by appellants), except that they are informed, and so charge, that the said construction company was at the time complained of, and is now, indebted to the building company in the sum stated, or a greater sum than stated." Another allegation of the intervening creditors is to the effect that in computing the amount due from the construction company to the Texas Building Company, the former

charged certain amounts "for rent or lease of construction material or construction equipments, and other such items which the construction company was not entitled to charge against the building company, and which, if deducted, would make the construction company owe the building company a greater sum than \$27,480.48." Yet another answer of an appellee alleges that "It has not sufficient knowledge to enable it to form a belief as to the amount owing by the construction company on the building company's contract, and demands strict proof as to all of said facts."

The trial seems to have proceeded upon these allegations; the several parties presenting evidence pro and con tending to fix the true amount of the indebtedness of the railway and construction companies to the Texas Building Company, and no objection appears to have been offered to any of this evidence on the ground of a want of pleadings; and such ground will not now be adopted by us as a sufficient cause for disturbing the judgment in respect to the total amount found and adjudged by the court to be due from the construction company to the Texas Building Company, and which is made available for distribution among the claimants of the fund.

[2] Another principal contention of appellants in this connection is that the amount due the building company should have been limited by the court to the amount tendered, for the reason that the amount tendered is the amount shown in the final estimate of the railway company's engineer. It is true, as appellants insist, that the contracts between the railway company and the construction company, and between the construction company and the building company, provide for a final estimate on the part of the railway company's engineer, and in legal effect as between these companies make such reports conclusive; but appellants' failure in this respect consists in the fact that the court has found that no final estimate of the engineer was proven. Appellants offered in evidence an instrument relied upon by them as such final estimate, but it was unsigned and uncertified to by the railway company's engineer, as the contracts provide should be done; and the court found that it was but a mere memorandum and not entitled to the legal effect of a final estimate, and this finding on the part of the court we feel unable to disturb.

[3] Nor, after an examination of all of the evidence, are we able to say that the court's findings and judgment as to the true amount due, except to the extent hereinafter stated, is in other respects unsupported by the evidence. In arriving at the true amount due, the trial court disallowed, some wholly and others in part, certain charges made by the construction company against the Texas Building Company, and which the construction company, in its statement of the ac-

count, had deducted from the total amount due the building company. One of the principal of these items was a charge by the railway company of \$15,841.87 for the rent of cars by the building company from the railway company, during the progress of the work at the rate of \$1 per day. The court found from the evidence that 45 cents only should have been charged for the rent of these cars. Complaint is made of this; but we think we cannot disturb the court's conclusions in this respect. There was evidence tending to show that 45 cents per car was a reasonable and customary charge at the time, and appellants rely only upon an asserted agreement on the part of the Texas Building Company to pay \$1 per car. It is true that an auditor or bookkeeper testified that the charge of \$1 per day had been made in accordance with an agreement between the construction company and the building company; but he acknowledged that he had not seen the agreement and no such agreement was offered in evidence. Nor do we think that the mere fact that from month to month the rental charge for cars appeared in unchallenged statements of the construction company to the building company is conclusive as against appellees, the claimants to the fund. As seen, there is no sufficient proof that the cars were furnished upon a written agreement for \$1 per day; and all that appears, from which any other agreement could be implied, is that it is not affirmatively shown that the Texas Building Company objected to the charge so made. No specific agreement between the construction company and the building company, either before the cars were furnished or later, appears to have been made, and we do not see sufficient reason for disturbing the finding of the court stated, to the effect that appellees were not precluded in any way from contesting the item mentioned.

[4] Another charge of \$50 against the building company for a payment of that amount to a Mexican as damages for personal injuries received during the work was wholly rejected by the court; and, while it is true, as will be a little later more fully shown, that the contract between the construction company and the building company authorized the construction company to pay claims against the building company, we think the contract related to only such claims as might constitute a lien against the railway; and it is not pretended that the claim of the Mexican could be enforced by such a lien. Indeed, there seems to be no serious contention before us that this claim was improperly rejected.

[5] The court further rejected an item of \$460.50 of which ruling appellants complain. As to this item the record shows that one Schraeder in August, 1913, shortly before the completion of the road, shipped to his own order to Paducah, Tex., "Notify Texas Build-

ing Company," two cars of posts; that these posts, without the consent of Schraeder or of the transportation company, were obtained by the Texas Building Company, and used by it in the construction work on the appellant company's railroad, after which the appellant railway company paid Schraeder \$460.50 for the posts, and charged the payment to the account of the Texas Building Company. The trial court held that appellants were not authorized to do this, and charge the same against the funds in its hands; basing his ruling upon the ground that at the time of this payment the claim of Schraeder had not been assigned to the railway company, and that the payment had been made after due notice to the railway company of the claims of the various parties in this cause who have been awarded liens by the judgment, and upon the further ground that the claim for the posts had not been filed in the manner required by law to entitle it to a place in class B relating to the claims of materialmen. The following is one of the paragraphs of the contract between appellant railway company and the appellant construction company:

"Eleventh. Should there be any unsatisfied claims for damages to persons or property at the time of the completion of the work, the chief engineer of the company shall have the right to estimate and finally determine the amount of such damages and pay the same to the proper parties, and all such sums so estimated and paid shall be deducted from what is due the contractors."

Paragraphs 18 and 20 of the contract between the construction company and the Texas Building Company read as follows:

"Eighteenth. Before final payment shall be required to be made by company (the construction company) under this contract, the contractor (the Texas Building Company) shall acknowledge and deliver, under their hands and seals, a release and discharge of and from any and all claims and demands for and in respect of all matters and things growing out of or connected with this contract or the subject-matter thereof, and of or from all claims and demands whatsoever."

"Twentieth. It is finally covenanted and agreed by and between the parties hereto for themselves, the subcontractors, executors, administrators, successors, and assigns, that this contract in all of its terms and provisions shall be binding upon them, and each and every one of them, and that the work covered by this contract and all the money due thereunder, shall be free from and not liable to any liens or charges at law or in equity, or under the mechanics' lien act of this state."

It is perhaps to be implied from the fact that Schraeder shipped the posts to his own order that the sale of the posts was intended as a cash sale, and that, the Texas Building Company having obtained possession of the same without the consent of the railway agent, Schraeder was in position and possibly threatening to repossess himself of the posts; whereupon, the posts being already in place upon the construction work of the railway company, the latter paid Schraeder's bill, as stated. At all events, by reference to Vernon's Sayles' Texas Civil Statutes, ar-

ticle 5623, Schraeder was a materialman having the right under the statute to fix a lien upon the railroad for the value of the posts used in its construction; and, whether this lien had been actually fixed or not by giving written notice to the railway company as provided for in that statute, we think, under the terms of the paragraphs of the contracts which we have quoted, that it was the clear right of the railway company to relieve itself under the circumstances from the claim of Schraeder by the payment of his claim, and no authority has been cited by appellees, and we have found none, that would deny the appellant railway company the right to charge this payment in its settlement with the building company, merely because at the time of the payment some one or more of the creditors in classes A and B had already given the railway company notice of their claims. We accordingly hold that from the sum of \$32,185.98, found by the court to be due from appellants, there should be deducted the said sum of \$460.50, with legal interest thereon from the date of its said payment in August, 1913; and the judgment below will be so reformed as to so show. In other respects the judgment of the court fixing the sum due from appellants to the Texas Building Company will be affirmed.

[6] Another contention of appellants is that the court erred in taxing the costs of the court below against them, and in not allowing them reasonable attorney's fees, the insistence being that appellants are merely in the attitude of stakeholders of the fund contended for by appellees, but we think the contention must be overruled. Appellants are not in the position of mere stakeholders tendering into court the amount due the Texas Building Company. As we have seen, appellants were contestants upon this issue. They combated the contention that more than the amount tendered in their pleadings was due, and they in fact did not tender the true amount due as found by the court, nor indeed did they follow the tender made in their pleadings by an actual deposit of any sum into the registry of the court.

[7] Another contention of the appellant railway company is that the court erred in rendering a personal judgment against it for "any amount"; it being urged that the appellee creditors were only entitled to liens against the railroad as adjudged by the court; but we find no substantial merit in this contention. The appellant railway company confessed its possession of a large fund to which the appellee creditors were entitled. To the extent at least of the fund as so confessed, the railway company was in the position of a stakeholder, and liable in personam; and the court's decree specifically acquits both appellants from all liability of whatever kind, upon the payment into the registry of the court of the amount found by the court to be due from them. It may also

be said in answering this contention that confessedly the creditors in classes A and B, who alone were awarded liens upon the railroad, are entitled to enforce such liens; and there is no evidence indicating that the value of the property upon which the liens are so fixed is insufficient to pay off all claims of creditors in those classes. Nor is the personal judgment in favor of the creditors in class C made to operate beyond the surplus left, if any, after payment of the preferred claims in classes A and B. No prejudicial effect of the personal judgment, therefore, is apparent.

The appellant railway company also attacks the court's findings and judgment in favor of a number of the creditors specified in class A; but, inasmuch as like attacks are more particularly made by the appellant Dupont De Nemours Powder Company, an intervenor below, and one of the creditors of the Texas Building Company placed by the court in class C, we will undertake to dispose of these contentions in answering the brief of the latter appellant.

[8] As stated, the appellant Dupont De Nemours Powder Company was placed by the court in class C, that is to say, as among the creditors of the Texas Building Company, who had furnished material for the construction of the railroad, but who had not fixed liens thereon in accordance with the statutes; and it will be seen by a mere arithmetical computation that the fund directed by the court to be paid into its registry by the appellants, the railway company and the construction company, will be sufficient to satisfy the claims of all creditors in classes A and B to whom are awarded liens, and yet leave a surplus to be divided pro rata among the creditors in class C. In order, therefore, to lessen the number of priorities of claims, and thus increase the amount to be apportioned to creditors in class C, the Dupont De Nemours Powder Company attacks numerous claims specified in class A. Thus it is insisted that the Gaines Bros., a firm composed of Frank Gaines and J. H. Gaines, who are specified among the creditors in class A and who are adjudged to be entitled to recover \$1,679.21, are not entitled to priority over the creditors specified in class C, including the Dupont De Nemours Powder Company, on the ground that:

"There was no proof sufficient to establish a lien in favor of said Gaines Bros., against the railway company or the Southwestern Construction Company, or said fund of \$32,185.98."

The evidence shows that Gaines Bros. had a written contract with the Texas Building Company to do all of the gradation work on mile 19 of the Quanah, Acme & Pacific Railway; that they worked in fulfillment of their contract an average of 30 teams for about 117 days; the Texas Building Company agreeing to make payments to them at prices set forth in the contract, being so much per square foot and per cubic yard for

the different character of work done. The Gaines Bros. also had a contract with one D. R. Morris, a subcontractor under the Texas Building Company, to do all of the gradation work on mile 9, and a few stations on mile 10, at the same prices stipulated in their contract with the Texas Building Company. Frank Gaines testified that there was a balance due on their contract with the Texas Building Company of \$870.40, and a balance due on the contract with D. R. Morris of \$808.74. The Gaines Bros. sought to recover these balances, alleging that they were due them for personal labor and for the use of their teams and tools in the construction of the railroad. The witness further testified that they averaged about 30 hired men per day, and that all of the laborers employed by them had been paid; that they owned all the tools, wheelers, scrapers, and teams used by them; that the witness drove teams, was foreman part of the time, and did just anything there was to do; that his father, J. H. Gaines, cleared and grubbed and drove teams most of the time; that J. H. Gaines was not a foreman, that he just worked on the grade—actual labor; that he cleared and grubbed and drove teams, all but a few days, between October, 1912, and March 6, 1913. He ploughed, or cleared, or grubbed, and did any other manual labor as a laborer during all the time he was there. That the full amount paid to the firm of Gaines Bros. by the building company for their work and the work of Morris was \$13,877.76, all of which was paid out in wages to the men and for expenses in feeding the men and for supplies and for the costs of feeding teams; that there was no "profit in that job"; that if they got all the money it would not make wages for themselves and their teams; that the reasonable market value for the use of such teams and tools as Gaines Bros. had about that kind of work per day was about \$4.50 a day and 10 per cent. for their tools; that the value of the personal services of J. H. Gaines was about \$2 per day.

D. R. Morris testified that he did not think that Gaines Bros. made wages out of the contract he made with them, and the finding of the court was that "none of the persons named in class A earned the respective amounts found to be due as contractors or subcontractors," but earned the same by reason of having performed labor or worked with tools, teams, or otherwise, in the construction of the railroad. Our statute on the subject, Vernon's Sayles' Texas Civil Statutes, article 5640, reads:

"All mechanics, laborers, and operatives, who may have performed labor, or worked with tools, teams or otherwise, in the construction, operation, or repair of any railroad locomotive, car, or other equipment of a railroad, and to whom wages are due or owing for such work, or for the work of tools or teams thus employed, or for work otherwise performed, shall hereafter have a lien prior to all others upon such railroad and its equipments for the

amount due him for personal services, or for the use of tools or teams."

We are of opinion that the evidence above stated fairly brings the firm of Gaines Bros. within the purview of the statute we have quoted. In the case of *Ft. Worth & Denver City Ry. Co. v. Read Bros. & Montgomery*, decided by this court on February 1, 1913, and reported in 154 S. W. 1027, and in which a writ of error was refused, we held upon a very similar state of facts that laborers who have performed labor or worked with tools, teams, or otherwise, in the construction of the road, and to whom wages were due for such work, or for the work with tools and teams thus employed, were entitled, under the statute, to the lien therein specified, and that the right was not destroyed by the fact that the laborers claiming such lien had contracted with the general contractors to move dirt and rock at a specified price per cubic yard and to clear land at a specified price per acre. In the case before us, the Gaines Bros. were not mere contractors, dependent alone upon the profits of a contract and, hence, unprovided for by the statute, but were in a very important sense also actual laborers, and also very clearly worked with teams and tools owned by them in the construction of the road and therefore, especially in view of the fact that they received no profit under the contracts fairly within both the terms and beneficial purposes of the statute, which we think should receive a liberal construction, and hence were entitled to recover the amount due them shown to be the reasonable value of the work done in person and with teams and tools. The court, therefore, as we think, committed no error in so finding and in awarding a lien upon the railway to secure the payment of the sum due the Gaines Bros.

[9] Appellant Dupont De Nemours Powder Company also assails the finding of the court in favor of contractors Breeding and Green, who were awarded the sum of \$758.96, with foreclosure of a lien upon the railway, and like findings of the court in favor of W. R. Parmer for the sum of \$4,551.76; in favor of D. R. Morris for the sum of \$5,980.14; in favor of the assignee of the firm of Owens Bros., composed of J. A. Owens, Jr., and E. M. Owens, for the sum of \$2,184.97; in favor of J. C. Cupp for the sum of \$1,168.51; in favor of W. C. Oglesby for the sum of \$798.75; in favor of H. B. Ashburn for \$172.55 and of C. E. McClelland for the sum of \$590; in favor of T. C. Kennedy and O. W. Kennedy for the sum of \$2,552.40; in favor of B. B. Brown for the sum of \$590; and in favor of J. E. Collins for the sum of \$1,647.65. The persons and firms last named were all placed by the court in class A of the creditors of the Texas Building Company, and the evidence relating to these several claims is so nearly similar and so substantially the same as that given by us in dis-

posing of the attack upon the finding in favor of the Gaines Bros. that we think our conclusions relating to that claim sufficiently disposes of the numerous attacks of the Dupont De Nemours Powder Company last above named, except perhaps we should note that, of the claim of \$172.55 found by the court in favor of H. B. Ashburn, \$34 was charged for hauling and placing pipe in the streets of Paducah, and not shown to have any connection with the construction of the railroad. Objection is made to the allowance of this \$34 in one of the propositions under the assignment attacking the findings in favor of H. B. Ashburn, and possibly a proper deduction of the \$34 should have been made; but the item is so small that a deduction of this amount would make such an inappreciable difference in the final results that we have concluded to overrule the assignment altogether, particularly in view of the fact that the assignment attacks the finding in favor of Ashburn as a whole, there being no specific assignment objecting to the inclusion of the \$34 in his claim.

Appellant Dupont De Nemours Powder Company's second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth assignments of error are therefore all overruled for reason assigned in disposing of the first assignment relating to the finding in favor of the Gaines Bros.

[10] The appellant also attacks the court's finding in favor of C. J. Larimer for the sum of \$646 to secure which the lien upon the railway was adjudged. Larimer is also one of those named by the court in class A of the creditors of the Texas Building Company. The evidence shows that Larimer was employed by the Texas Building Company in connection with the construction of the railroad at a salary of \$200 per month and expenses. He owned none of the teams, tools, or appliances engaged in the construction of the road, but acted as a foreman. Larimer testified that his work on the road was that of a foreman "laborer and anything else"; that he spent about an hour a day manual work, that the reasonable value of his services to work an hour a day at such work would be all the way from \$1.25 to \$1.75 per day; that he was sometimes addressed in communications from the Texas Building Company as "superintendent" and sometimes as "foreman"; that in signing pay checks he designated himself on some of them as "foreman," that he looked after the commissary department when he did not have a commissary clerk, and also looked after collections; that he had an office in Paducah most of the time and had a stenographer; that he hired teams for the building company, and had authority to discharge men; that he advised the company when men were needed, and did whatever was necessary to be done as a superintendent. He further testified:

"The first work I did on that extension, I had charge of the grading and concrete work. I worked at that particular time from the 7th or 12th of October, 1912, until the next March or April, then I quit. I went back to work there in June, about June 20th, and was there until October 5th. I do not remember everything in the way of work that I did. I directed the work part of the time. I handled the shovel and filled in as extra brakeman, and tightened bolts on bridges and repaired fences, and did pretty near everything that a man could do on a job of that kind; I loaded steel and unloaded steel. I was doing those things, just one and then the other during the entire time. I was working for the Texas Building Company in the construction of the line of road up there. The balance due me for July and August and September and five days in October is \$646.02, for my services alone, actually performed on that work, being 97 days at \$6.66 per day, and an expense account of \$177.70. The price of \$6.66 per day was not reasonable for the services which I performed. The character of work which I performed on that construction work, it was not enough; it was below reasonable."

He also testified that he went out as a brakeman two or three times to comply with the full-crew law; that he assisted in coaling the engine once or twice; that he went out and repaired fences; that he actually performed some of the labor in repairing fences; that he assisted in tightening bolts on the bridge; that he helped handle teams in repairing the bridge over Salt Creek; that he helped handle sand for ballast; and that he performed some manual labor nearly every day.

Numerous authorities have been considered in passing upon the claim of Larimer. They are by no means uniform in their holdings, but we have finally concluded to sustain the court's finding in favor of Larimer, and overrule the assignment which attacks such finding upon the authority of Texas & St. Louis Ry. Co. v. Allen & Humphreys, by our old Court of Civil Appeals, and reported in White & W. Civ. Cas. Ct. App. §§ 568-569. A material question in that case was whether one of the Allens, who performed services as a foreman or superintendent of laborers was entitled to the statutory lien in payment therefor. The court, after quoting in part the statute, which in so far as now here pertinent was then the same as the one we have quoted, say:

"Were the services performed by appellee Allen those of a mechanic, laborer, or operative, within the meaning of the statute? The evidence shows that, under a contract with one Bussey, who was a subcontractor of appellant, Allen performed services as the foreman or superintendent of laborers engaged in the construction of appellant's road, furnished certain tools and teams to carry on the work of construction, and sometimes used the tools himself, and at other times directed their use by the laborers. The court below adjudged him to be a mechanic, and based its decision upon the definition of that word given by Webster. We do not think he was a mechanic within the usual and common acceptance of that word, nor within the meaning and intent of the statute. Neither was he an operative. If he is entitled to claim the benefit of the statute at

all, it is as a laborer. It has been held that a timekeeper and superintendent in the employ of a contractor is not a laborer. *Missouri, K. & T. Ry. Co. v. Baker*, 14 Kan. 563. But we are not disposed so to hold. We think the foreman or superintendent of a company of laborers, who remains with them directing their work, and sometimes working himself, is within the meaning and intent of the word 'laborer,' as used in the statute. While he may not actually work with the shovel, scraper, plow or other implement, he performs a laborious and necessary part of that work by overlooking and directing it, and is as indispensable to the construction of the road as the man who actually uses the tools. We think, therefore, that appellees were entitled to their lien to the extent of the labor thus done and performed upon appellant's road."

We have not found where the case, from which we have just quoted, has been disturbed by any subsequent decision of our courts, and conclude, in view of the liberal construction that we think should be given to our statute, that it is our duty to follow and apply the opinion quoted. Appellant Dupont De Nemours Powder Company's thirteenth assignment is, accordingly, overruled.

Other questions presented in the briefs of the parties we think have been sufficiently disposed of in what we have said, and in the trial court's findings. The trial court's findings of fact and law, with exception only as hereinabove noted, are accordingly approved, and the judgment reformed and affirmed, with the costs of the appellant railway and construction companies on appeal adjudged in their favor; the costs in other respects and as to other parties to be taxed as usual.

Ex parte GARCIA.

GAZELL et al. v. GARCIA.

(No. 5663.)

(Court of Civil Appeals of Texas. San Antonio.
May 31, 1916. Rehearing Denied
June 22, 1916.)

1. HABEAS CORPUS ~~§ 83~~—ABATEMENT—NECESSITY OF PLEA.

Where, in habeas corpus involving the right to custody of a child, respondents filed no plea in abatement to the jurisdiction of the court, but merely set up that the court had no jurisdiction to change the custody of the child because a decree of divorce whereby custody of the child was awarded was still in force, such pleading is not equivalent to a plea in abatement setting up the pendency of another suit involving the same matter, but raises only the question whether the court in which habeas corpus was brought has jurisdiction over the subject-matter involved in suit.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 75; Dec. Dig. ~~§ 83~~.]

2. HABEAS CORPUS ~~§ 46~~—CUSTODY OF CHILD.

Where the custody of an infant child is illegally withheld from a parent, the district court has jurisdiction to issue habeas corpus upon application of the complaining parent and in such proceeding to determine the right to the custody of the child.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 36; Dec. Dig. ~~§ 46~~.]

3. DIVORCE \S 303(3) — PROCEEDINGS — JUDGMENT—CONCLUSIVENESS.

Where in a divorce suit the custody of children is awarded, such judgment is conclusive as to the facts and circumstances then existing, but is not a conclusive adjudication preventing subsequent proceedings for the custody of infant children of the marriage, where circumstances and conditions have changed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 794; Dec. Dig. \S 308(3).]

4. DIVORCE \S 303(3)—CUSTODY OF CHILDREN — EXCLUSIVE JURISDICTION OF SUPREME COURT.

Where a district court on granting a divorce awarded the custody of a minor child, such district court does not, the statutes providing for an absolute decree, have exclusive jurisdiction over the custody of minor children of the marriage so as to prevent a court of another district upon change of conditions and circumstances from reviewing the question of the custody of such children; this being true though the court granting the divorce attempted to reserve to itself exclusive power over the matter.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 794; Dec. Dig. \S 303(3).]

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

Petition by Frank H. Garcia for writ of habeas corpus on behalf of the infant, Ivy Garcia, against Mrs. Frank Gazell, in which Bridget Garcia, under the name of Lillie Wilcox, was permitted to intervene. From a judgment awarding custody of the infant to petitioner, defendant and intervener appeal. Affirmed.

A. E. Heilbron and C. L. McGill, both of San Antonio, for appellants. W. R. Camp and Don A. Bliss, both of San Antonio, for appellee.

MOURSUND, J. On August 14, 1915, Frank H. Garcia filed in the district court of Bexar county, Thirty-Seventh judicial district, a petition for a writ of habeas corpus in behalf of the infant, Ivy Garcia, alleging that on February 6, 1911, in a divorce suit between said Frank H. Garcia and Bridget Garcia, the district court of Bexar county in and for the Fifty-Seventh judicial district had awarded the temporary custody of Ivy Garcia to Mrs. Frank Gazell on certain conditions; that said conditions had been violated; that the child had been subjected to influences most undesirable in her rearing, the facts being set out; that petitioner's financial circumstances had changed and he was well situated to have the care and custody of the child. The writ of habeas corpus having been duly issued and served, Mrs. Frank Gazell filed her original answer to said petition on September 29, 1915, wherein she replied to the allegations in the petition, and contended that conditions had not changed since the rendition of the judgment of divorce.

Bridget Garcia, under the name of Lillie Wilcox, was permitted to intervene, and she pleaded that the decree in the divorce suit

between herself and Frank Garcia contained the following provision:

"It is further ordered by the court that for the time being, and subject to the further order of the court, the custody and possession of the child of plaintiff and defendant be and is hereby placed in Mrs. Gazell, the maternal grandmother of said child, provided, however, that the custody and possession of said child be and is hereby given to Frank H. Garcia, the father of said child, for a period of one week in every sixty days, provided that said Frank H. Garcia is to go to the home of said Mrs. Gazell and get the child, and, after keeping the child one week, said plaintiff is to return said child to the said home of Mrs. Gazell."

She then alleged:

"That the decree of said court is still in full force and effect, and that this court has no jurisdiction to change the custody of said child."

She answered further by adopting the allegations of her mother, Mrs. Frank Gazell, relating to the conditions to be taken into consideration in determining the merits of the controversy.

The relator, in reply to the pleadings of respondent and intervener, reasserted that the conditions had changed since the divorce decree had been rendered, setting out fully the facts relied upon. Respondent and intervener filed a general demurrer to his answer and denied all the allegations therein contained. We deem it unnecessary to state the allegations of the parties relating to the merits of the controversy. Appellants do not contend that the relator's pleadings were not sufficient, nor that the evidence does not sustain the findings of fact filed by the trial court, which amply justified his conclusion that conditions had so changed that the best interests of the child required that her custody should be awarded to her father.

[1] The judgment of the court awarding the custody of the child to relator is only attacked upon the theory that because of the existence of, and the wording of, the divorce decree, the district court of the Thirty-Seventh district erred in hearing and passing upon the issues of fact raised by the pleadings and the evidence. We have stated the contention cautiously and therefore broadly, because of the wording of the assignments of error. By the assignments appellants contend the court erred in "overruling appellants' plea in abatement to the jurisdiction of the court." This statement is subject to the construction that appellants relied upon a plea in abatement, when in fact no such plea was filed, and the only pleading from which it can be inferred that objection was made to the right of the court to proceed is the statement contained in intervener's pleading, which reads as follows:

"That the decree of said court is still in full force and effect, and that this court has no jurisdiction to change the custody of said child."

We therefore conclude that there is no basis upon which appellants can rest any contention with reference to a plea in abate-

ment, and that the inquiry must be restricted to the sole issue, whether the district court of the Thirty-Seventh district had jurisdiction of the subject-matter involved in this suit.

[2-4] The trial court in his conclusions of law submitted two reasons in support of his holding that he had such jurisdiction. They are as follows:

"(2) It was not intended by the said decree of the district court of Bexar county, for the Fifty-Seventh judicial district of Texas, to reserve to itself the exclusive jurisdiction of the custody of said child for all time; but said decree meant merely that the respondent should have the custody of said child temporarily until conditions should so change that the best interests of said child would require its custody to be awarded to some other person.

"(3) But even if it should be conceded that said decree should be construed as an attempt to reserve to the district court of the Fifty-Seventh judicial district of Texas the exclusive jurisdiction to hear and determine any controversy that might arise in the future as to the custody of said child no matter where said child might be at the time and no matter how much conditions might have changed, then said court had no power to assume such exclusive jurisdiction, and any such attempt would not prevent any other court of competent jurisdiction of the subject-matter from exercising jurisdiction."

It is well settled that the district court has jurisdiction to issue the writ of habeas corpus upon the application of the parent complaining that such parent's infant child is illegally withheld from the parent, and has the power in such proceeding to decide to whom the custody of the child rightfully belongs. *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281; *Ex parte Will Reeves*, 100 Tex. 617, 103 S. W. 478. It is therefore evident that, had there been no prior adjudication respecting the custody of Ivy Garcia, the district court of the Thirty-Seventh district would have had jurisdiction to entertain and determine this cause. To what extent is this jurisdiction affected by reason of the proceedings had and judgment entered in the divorce suit in the district court of the Fifty-Seventh district? It is well settled that such judgment is *res adjudicata* as to the facts and conditions existing prior to its rendition, and will be given full force and effect so long as the circumstances remain as they were at the time the decree was awarded, but is not binding if the conditions have changed, after the award of such judgment, to such an extent as to require an inconsistent award of custody in the interest of the welfare of the child. We come then to the vital question, whether all subsequent proceedings relating to the custody of the child must be brought in the court which rendered the divorce decree and therein made provision for the custody of the child. Has such court exclusive jurisdiction to adjudicate all future controversies concerning such custody? It is well established in this state that such is not the case when the judgment is entered by a court of another state and the child becomes domiciled in this state.

Wilson v. Elliott, 96 Tex. 472, 73 S. W. 946, 75 S. W. 368, 97 Am. St. Rep. 928. We are unable to find any Texas case which has decided what the rule is when the judgment was entered by another Texas court, instead of a court of another state.

There are expressions in the opinion in the case of *Plummer v. Plummer*, 154 S. W. 597, which tend to sustain the theory that the court which awards the custody of minor children in a divorce suit has a continuing jurisdiction over such minors and that they are the wards of such court. The authorities cited in support of these expressions are all based upon statutes which authorize provision to be made for the support of the children and expressly provide for modification of the decree with respect to support and custody. We can appreciate the force of the contention that, when the power is expressly vested in a court to change its decree from time to time, the necessary implication is that such decree shall be conclusive until changed in the tribunal which is given the power to change it. But we find no provision in our statute authorizing the court to provide for the support of the children in the divorce decree, and no provision authorizing the court to modify or change its decree from time to time. Our Legislature did not see fit to give the district court such power, and the statute contemplates a judgment in the case which finally disposes of the custody of the children upon the facts before the court—a decree which is conclusive in that court or any other court with regard to the custody as long as the conditions remain unchanged. Our statute provides for the division of the property, and contemplates that a final decree with respect thereto shall be made. The judgment in a divorce suit with respect to division of property and custody of the children is as conclusive under our statute as in any other case, and we find no warrant for the theory that the court exercises a continuing supervision over the children and their custody. It adds nothing to a decree to say that for the time being the custody of the children is awarded to one party, and the court has no power to decree that it reserves to itself the exclusive right to determine in the future whether the custody shall be changed. The custody is conclusively adjudicated upon the facts then existing, and a new suit must be brought in that court or some other court of competent jurisdiction in order to change such custody. If it could be held that the court had a continuing jurisdiction, it seems to us it would necessarily follow that such court at a subsequent term could, without the conditions having changed, arbitrarily set aside its judgment and change the provision with respect to the custody of the children. It may be argued that it is unnecessary for us to decide whether the jurisdiction of the court which grants the divorce is a continuing one as to the custody of the child, for the reason

that no plea in abatement was filed in this case, based upon the theory that a case involving the very question was then pending in another court. We think, however, that if it can be deduced that the jurisdiction is a continuing one it might as well be admitted that it is exclusive, for such deduction would necessarily be based on the theory that the child became the ward of that court, and no other court should take away or destroy such wardship. It has been stated by our courts that minors interested in a suit are the wards of the court, and undoubtedly they are to the extent that it becomes the duty of the court to protect and care for their interests in such suit, but not to the extent that a wardship over the persons of the minors continuous in its nature is created, even in a case involving the custody of the minors.

The question in this case is one of great importance, and it would, perhaps, be better to vest the exclusive jurisdiction, with respect to custody of minors, in the court which decrees the divorce; but we believe that the Legislature has not so decreed, and we therefore hold that the trial court had jurisdiction to enter the judgment appealed from.

Judgment affirmed.

RALSTON v. STAINBROOK et al.
(No. 7225.)

(Court of Civil Appeals of Texas. Galveston.
May 26, 1916.)

**1. EXECUTORS AND ADMINISTRATORS — 250—
CLAIMS AGAINST ESTATE — JURISDICTION —
PROBATE AND DISTRICT COURTS.**

The probate court has exclusive, original jurisdiction in a pending administration of claims and liens against the estate, and the remedy upon the administrator's rejection of a lien is in that court, and the district courts have no jurisdiction over the management of the estate, except on appeal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 893-895; Dec. Dig. —250.]

**2. EXECUTORS AND ADMINISTRATORS — 435—
CLAIMS AGAINST ESTATE — JURISDICTION —
STATUTES.**

Under Rev. St. arts. 3443, 3446, 3452, 3450, 3457, and 3488, relating to the presentation of money claims against the executor of an estate, the allowance of such claims, and judgment and execution thereon, the administrator's refusal to recognize a lien upon a part of the land, if a money claim had been allowed, does not authorize the claimant to sue in the district court to subject the land to the payment of the claim.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1716-1725; Dec. Dig. —435.]

**3. EXECUTORS AND ADMINISTRATORS — 431(2)—
CLAIMS AGAINST ESTATE—JURISDICTION—
PROBATE AND DISTRICT COURTS.**

The district courts have no jurisdiction of suits against the estates of deceased persons pending administration, unless the claim is for such an amount as would give such court jurisdiction, and not then unless such claim has been first presented to and rejected by the administra-

tor, or unless the claimant has some legal or equitable right connected with his claim for the adjudication of which the power of the probate court is inadequate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 764, 767, 819; Dec. Dig. —431(2).]

Error from District Court, Matagorda County; Samuel J. Styles, Judge.

Suit by Joseph Stainbrook and others against John Ralston, administrator of the estate of Lyda L. Williams, deceased, in which A. M. Walker intervened. Judgment for plaintiff and for intervener with a foreclosure of their respective liens, directing that an order of sale might issue, and the administrator brings error. Reversed, and cause dismissed.

Krause & Wilson, of Bay City, for plaintiff in error. J. W. Conger, of Bay City, for defendants in error.

LANE, J. This suit was originally instituted by Joseph Stainbrook on the 15th day of September, 1914, against John Ralston, administrator of the estate of Lyda L. Williams, deceased, to recover upon a note executed and delivered to him by said Lyda L. Williams on the 17th day of April, 1911, for the sum of \$2,200, for interest and attorney's fees as provided for in said note, and for foreclosure of a lien on certain real estate belonging to the estate of Lyda L. Williams created by a deed of trust executed by Lyda L. Williams to secure the payment of said note.

On the 5th day of January, 1915, A. M. Walker intervened in the suit, and alleged that said Lyda L. Williams had on the 24th day of February, 1912, executed and delivered to him her certain promissory note for the sum of \$263.74, and that to secure the payment of the same the said Lyda L. Williams had also executed and delivered to him a deed of trust on 4½ acres of the same property on which plaintiff Joseph Stainbrook has a lien. He also alleged that "on the — day of —, 191—," after default had been made in the payment of his said note, the trustee named in said deed of trust had made a legal sale of said 4½ acres of land under the powers conferred upon him by virtue of said deed of trust, that intervener had purchased said land at such sale for \$315.50, and that he is the owner of the same subject only to the prior lien of plaintiff Stainbrook. He concludes with a prayer that a sale of all other lands upon which plaintiff Stainbrook has a lien be first made before resorting to a sale of said 4½ acres claimed by him, and that in the event said 4½ acres is finally sold under said Stainbrook's foreclosure, then that any surplus of the proceeds of such sale remaining after Stainbrook is paid be paid upon his debt against said estate of Lyda L. Williams, and that, if said proceeds be not

sufficient to pay his debt in full, then and in that event he prays that he have judgment for any balance so unpaid against said estate.

It is shown by the petition of plaintiff Stainbrook that Lyda L. Williams died on the 24th day of January, 1914, and that defendant, Ralston, duly and legally qualified as administrator of her estate at the February term, 1914, of the county court of Matagorda county; that he (Stainbrook) had thereafter in proper time and proper manner presented his claim and lien to the administrator, Ralston, for approval; that said administrator had approved and allowed said claim in full, but had expressly refused to recognize his lien. The record does not disclose whether or not intervenor presented his claim to the administrator for approval.

John Ralston, administrator, answered, admitting the execution and delivery of the note and deed of trust as alleged by plaintiff Stainbrook, admitted that he had approved said claim in full as a just claim against said estate of Lyda Williams, but refused to approve the lien asserted by plaintiff, for reasons set out in such written refusal.

Upon the foregoing pleas and admissions the case was submitted to the trial court without a jury. Judgment was rendered for both plaintiff and intervenor for the amounts prayed for against John Ralston, as administrator of said estate, and for a foreclosure of their respective liens, set up in their pleadings, making intervenor's lien subordinate to that of the plaintiff. Said judgment also directs that an order of sale may issue for the seizure and sale of the lands in question, or such parts of the same as is necessary to pay the debts of plaintiff and intervenor, etc. From the foregoing judgment John Ralston, administrator, has appealed.

Appellant presents four assignments, all of which may be disposed of by a proper disposition of the first two. Assignments 1 and 2 are as follows:

No. 1. "The district court was without original jurisdiction to hear and determine this cause, and for that reason the judgment rendered and entered therein is void."

No. 2. "The district court erred in entertaining said cause and proceeding to judgment, because it lacked jurisdiction in that plaintiff sued defendant as administrator upon an allowed claim against the estate of his intestate, and for foreclosure of a mortgage lien, which was rejected, when such lien could only be enforced in the county court."

There is nothing in the record by plea or otherwise tending to show that intervenor, Walker, ever presented his claim to the administrator for approval. Appellee Stainbrook specially and specifically alleges that his claim had been fully allowed by the administrator in writing prior to the institution of this suit, and bases his right to bring this suit in the district court solely upon the grounds that the administrator refused to approve his asserted lien.

[1] The probate court in a pending adminis-

tration has exclusive original jurisdiction over claims and liens against the estate. The remedy, upon rejection of the lien by the administrator, is in the probate court. The district courts have no jurisdiction over the management of an estate in administration except on appeal. *Moore v. Glass et al.*, 6 Tex. Civ. App. 368, 25 S. W. 128; *Western M. & I. Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305.

[2] The law applicable to the present case is to be found in the following articles of the Revised Civil Statutes which read as follows:

"Art. 3443. When any claim for money against an estate shall be presented to the executor or administrator, if the same be properly authenticated in the manner required by this chapter, he shall indorse thereon or annex thereto a memorandum in writing signed by him, stating the time of its presentation, and that he allows or rejects the claim, or what portion thereof he allows or rejects, as the case may be."

"Art. 3446. All claims that have been allowed by the executor or administrator and entered upon the claim docket for the period of ten days shall be acted upon by the court at a regular term, and either approved in whole or in part or rejected, as to the court may seem right, and they shall also at the same time be classified by the court."

"Art. 3452. The action of the court in approving or disapproving a claim shall have the force and effect of a final judgment, and when the claimant, or any person interested in the estate, shall be dissatisfied with such action, he may appeal therefrom to the district court, as from other judgments of the county court rendered in probate matters."

"Art. 3450. No execution shall be issued on a judgment obtained in any such suit, but a certified copy of such judgment shall be filed with the clerk of the county court where the estate is pending within thirty days after the rendition of such judgment, and entered upon the claim docket, and shall be classified by the county judge, and have the same force and effect as if the amount thereof had been allowed by the executor or administrator, and approved by the county judge."

"Art. 3457. No judgment shall be rendered in favor of a claimant upon any claim for money which has not been legally presented to the executor or administrator, and rejected by such executor or administrator, either in whole or in part."

"Art. 8488. Any creditor of a deceased person holding a claim secured by mortgage or other lien, which claim has been allowed and approved or established by suit, may obtain at a regular term of the court, from the county court of the county where the letters testamentary or of administration were granted, an order for the sale of the property upon which he has such mortgage or other lien, or so much of said property as may be required to satisfy such claim, by making his application in writing and having such executor or administrator cited to appear and answer the same. And, in case the mortgage or other lien shall be upon real property, the same notice shall be given of said application as is required to obtain an order for the sale of such property."

In the case of *Western M. & I. Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305, our Supreme Court held that:

"The refusal of an administrator to recognize a lien upon a part of the land claimed to be subject to a mortgage, the claim for money being allowed, did not authorize the holder of the secured claim to sue in the district court to subject the * * * land to the payment of the debt secured by the mortgage."

"Under the Revised Statutes it is only where a claim for money against the estate of a deceased person has been rejected by the administrator that the holder of the claim is entitled to bring an independent suit for its establishment.

"A claim for money means literally the claim that a debt exists. A claim for a lien is something more—a claim not only that there is a debt, but also that a lien exists for its enforcement.

"Upon the approval of a claim for money against the estate the law classifies it with others, and the probate court, upon application of the holder of such claim, will make the necessary orders to enforce payment by sale of property which may then be held subject to such claim.

"The power of an administrator extends no further upon claims presented to him than to allow or to reject; he can pass only upon the question of indebtedness.

"The district court has no jurisdiction in a suit by the holder of an approved claim seeking an order subjecting mortgaged lands to the claim upon the rejection of the lien in part by the administrator."

See, also, *Whitmire v. Powell*, 117 S. W. 433, and *George v. Ryon*, 94 Tex. 317, 60 S. W. 427.

[3] It seems to be well settled that the probate court has exclusive original jurisdiction over claims and liens against estates of deceased persons pending administration, and also that the district courts have no jurisdiction to entertain suits against such estates, unless the plaintiff's claim is for such an amount as would give such court jurisdiction, and not then unless such claim had been first presented to the administrator and by him rejected. The district court may, however, in cases where the claimant has some legal or equitable rights connected with his claim for the adjudication of which the powers of the probate court are inadequate, maintain such actions, but only in such cases can such suits be brought in the district courts. *Cannon v. McDaniel*, 46 Tex. 303; *George v. Ryon*, 94 Tex. 317, 60 S. W. 427. But there is nothing in the present case which cannot be adjudicated in the probate court; hence the district court had no jurisdiction over the subject-matter of this suit, and the judgment rendered thereby is void.

Having reached the conclusion that the district court of Matagorda county has no jurisdiction over the subject-matter of this suit, and that therefore said judgment rendered in said court is void, such judgment is here reversed, and said cause dismissed.

Reversed and dismissed.

WICHITA FALLS TRACTION CO. v. BERRY et ux. (No. 8369.)*

(Court of Civil Appeals of Texas. Ft. Worth. May 13, 1916. On Rehearing, June 10, 1916.)

1. CARRIERS \S 314(5)—PERSONAL INJURY—SUFFICIENCY OF PETITION.

A petition in an action for personal injury while alighting from a car, alleging negligence on the part of defendant and its employes in not providing a safe place to alight, that the

step of the car was $3\frac{1}{2}$ feet from the ground, that the box on which plaintiff stepped turned over because it was almost square and was placed directly under the step, and that defendant negligently permitted dirt to be washed away from the track under and near the step, and permitted her to step on the box without warning as to its unsafe condition, stated a cause of action.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 1273, 1275, 1275 $\frac{1}{2}$; Dec. Dig. \S 314(5).]

2. CARRIERS \S 320(28)—PERSONAL INJURY—QUESTION FOR JURY.

On the evidence in a passenger's action for personal injury while alighting from a car held that whether the defendant's employes knew that the box on which plaintiff stepped had been placed on the side of the car track when plaintiff alighted, or by the exercise of ordinary diligence could have known that the box was not a safe and suitable step to use in alighting, was for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 1244; Dec. Dig. \S 320(28).]

3. CARRIERS \S 284(2)—PASSENGERS—ACTS OF THIRD PARTY—LIABILITY.

While a carrier is not ordinarily liable for the unauthorized acts of third parties, non-employes, it may become liable for negligence in permitting such acts to be done or the consequences thereof to continue, if knowledge has been brought to its servants.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 1128-1129, 1132, 1173; Dec. Dig. \S 284(2).]

4. APPEAL AND ERROR \S 722(1)—ASSIGNMENT OF ERROR—SUFFICIENCY—RULES OF COURT.

An assignment of error in the main charge as more fully shown by the written objections thereto, made and filed after it had been submitted to opposing counsel and before the charge was read to the jury "as is more fully shown by defendant's bill of exception No. 2 which is here referred to and made a part thereof," in view of the absence of any bill of exceptions No. 2, eo nomine, in the transcript, did not comply with rules 25 and 26 for Courts of Civil Appeals (142 S. W. xii), prescribing the form and contents of assignments of error, and hence did not require consideration.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 2990, 2994-2996; Dec. Dig. \S 722(1).]

5. TRIAL \S 85—RECEPTION OF EVIDENCE—EVIDENCE ADMISSIBLE IN PART—OBJECTION TO WHOLE.

Where a part of the testimony objected to as a whole was not subject to the alleged vice of being hearsay, the objection was ineffectual to reach any part of the evidence to which it might be pertinent.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 222-225; Dec. Dig. \S 85.]

6. EVIDENCE \S 314(1)—HEARSAY—RELATED FACTS.

In a passenger's action for personal injury while alighting from defendant's car when a box used for her to step upon overturned, testimony of a witness, who learned of the accident from his wife and thereby fixed the date of the accident with reference to the time when he saw a box on the side of the street, which he sometimes used to alight from the car and which he had used two days before he heard of the accident, that it was low and shaky, without showing that it was the same box as that used by the plaintiff, was not inadmissible as hearsay; since a witness may date a fact which he knows by relating it to the time when he heard another fact, and, in so doing, may state what the

fact heard was to inform the jury of his reason for observing and remembering facts about which he testifies from personal knowledge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1168; Dec. Dig. ¶314(1).]

7. CARRIERS ¶320(28)—PERSONAL INJURY—QUESTION FOR JURY.

In a passenger's action for personal injury while alighting from a car, held on the evidence, that whether a box about which a witness testified was the same box used to assist plaintiff to alight was a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1244; Dec. Dig. ¶320(28).]

8. DAMAGES ¶132(7)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

A verdict for \$1,125 awarded to plaintiff, a woman of 40, who had previously done the cooking and household work for six people, for injury to her knee, hip, and back, tearing the ligaments, causing swelling and keeping her in bed for over two weeks resulting in a weakening of the leg and knee and pain after working and walking, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 878; Dec. Dig. ¶132(7).]

9. APPEAL AND ERROR ¶1069(1)—HARMLESS ERROR—MISCONDUCT OF JURY.

In a passenger's action for personal injury where it appeared that some members of the jury had been in court and heard the trial of another case against the same defendant, and that the attorney representing plaintiff had also represented the plaintiff in that case, that it was charged in the first case that plaintiff was feigning injury, and that there was testimony that plaintiff's counsel had stated that she was not hurt, the statement of at least one juror that he did not believe defendant had treated plaintiff's counsel right in the other trial, the statement of another juror that it made no difference what their verdict was as defendant would get a new trial on appeal, and the statement of another that he thought the defendant had framed up the first case to make the jury believe that plaintiff was not hurt, in view of the jurors' testimony that such remarks had no effect on the verdict, were not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4136; Dec. Dig. ¶1069(1).]

On Rehearing.

10. CARRIERS ¶318(11)—PERSONAL INJURY—SUFFICIENCY OF EVIDENCE.

Evidence in a passenger's action for personal injury while alighting from a street car held to sustain a finding that the defendant and its conductor knew that the box on which plaintiff stepped in alighting had been placed on the ground under the step.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307, 1314; Dec. Dig. ¶318(11).]

11. EVIDENCE ¶588—WEIGHT OF EVIDENCE—CREDIBILITY.

A juror is not required to believe a witness, although he makes a plain statement of what is not impossible and is neither impeached or contradicted by direct evidence, but may discredit him on account of the manner of testifying and attendant circumstances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. ¶588; Witnesses, Cent. Dig. § 1164.]

Appeal from District Court, Wichita County; E. W. Nicholson, Judge.

Action by C. W. Berry and wife against the Wichita Falls Traction Company. Judg-

ment for plaintiffs, and defendant appeals. Affirmed.

Huff, Martin & Bullington, of Wichita Falls, for appellant. W. F. Weeks, of Wichita Falls, for appellees.

BUCK, J. This suit was filed in the district court of Wichita county by C. W. Berry and wife against the Wichita Falls Traction Company, alleging damages in the sum of \$5,000 for personal injuries to Mrs. Berry, alleged to have been sustained by her while alighting from one of the defendant's cars. At the time of the alleged injury, the car on which Mrs. Berry was riding was standing at a switch, awaiting another car. Mrs. Berry, in alighting from the car, stepped on a box which had been placed in position on the ground near the step a few minutes before by another passenger in order for a lady, who desired to board the car, to do so with greater safety and convenience. The box gave way, causing Mrs. Berry to fall, and she alleges that she received injuries in her knee, hip, and back therefrom. Plaintiff alleged negligence on the part of defendant and its employees in not providing a safe place for Mrs. Berry to alight in safety, the bottom step being some 3½ feet from the ground, and in failing to provide a safe means for her to alight. That the box turned over because of the fact that it was almost square and was not placed directly under the step by the conductor and that, at the direction of the conductor, Mrs. Berry stepped near the corner of the box, but, because of the ground being sloping, the box turned to one side, causing Mrs. Berry to fall. It was alleged further that defendant was negligent in permitting dirt to be washed away from said track and under and near the step where plaintiff alighted, and in permitting Mrs. Berry to step on the box without warning as to its insecure condition.

Defendant denied any liability because of the alleged injuries and specially averred that, if plaintiff was injured by the fall, such fall was caused through no neglect of defendant or its conductor; that the conductor did not know at the time plaintiff alighted from said car that said box had been placed near the step, and that it was guilty of no negligence because the conductor failed to warn Mrs. Berry of the presence or condition of said box, nor was it guilty of negligence because its conductor failed to know of the presence of said box and its condition.

The case was submitted, on special issues, and the jury found as follows:

(1) That the defendant company and its employees knew that said box had been placed on the side of the street car track at the point where plaintiff alighted from said car, at the time she did alight therefrom.

(2) That plaintiff fell while alighting from

said car by reason of stepping on said box, and was injured thereby.

(3) That defendant's employes were guilty of negligence in allowing the box mentioned to be placed alongside of its street car track and to be used by plaintiff to step on while alighting from its car.

(4) That defendant and its employes in the exercise of ordinary diligence should have known that said box was not a safe and suitable step for plaintiff to use while alighting from the car, and was guilty of negligence in permitting plaintiff to step on the box at the time she did, and that such negligence was the proximate cause of plaintiff's injuries.

(5) That the box in question was not suitable and safe as a step for plaintiff to use while alighting from said car.

(6) That plaintiff was not guilty of contributory negligence in stepping on the box, or in not stepping upon the center of said box.

(7) That \$1,125 was the sum of money which would fairly and reasonably compensate plaintiffs for the injuries received by Mrs. Berry.

Judgment having been entered for plaintiffs in the sum found by the jury, the defendant appeals.

[1-3] We think the court properly overruled defendant's motion for a peremptory instruction, and that plaintiffs' petition showed a cause of action, and that whether or not the evidence sustained the allegations of negligence made therein was a question for the jury.

Appellant predicates its contention that it was not negligent principally upon the asserted ground that the conductor of the car in question did not know that the box upon which Mrs. Berry alighted was there, and did not know of its unsafe and unstable condition; but we are of the opinion that the evidence is sufficient to sustain the findings of the jury that the conductor did know, or should have known in the exercise of that high degree of care due a passenger, that said box had been placed near the track and immediately under and in front of the step prior to Mrs. Berry's stepping thereon, and that the box was not safe for the purposes and uses to which it was put. Mrs. Nettie Davis, a witness for defendant, testified, in part, as follows:

"I remember along about July 19, last, being out near what they call Field's Switch, between here and the factory district. I got on the street car Sunday morning before this lady, Mrs. Berry, got off; this street car stopped there at the switch, and I got on the car at the switch—I got on just before this lady got off. * * * Our friends were out to see us; Mr. Denton and his wife and I were going to the lake that day. I always got up that way without any box. Mr. Denton insisted upon putting a box there; the box was lying out in the street. He got it, and got it so that I could get up; that was an old box, rickety, and I stepped carefully right across the corner so that I would not fall. He went out in the street and picked up this box and set it down by the street car, just as a step for me to get up. I do not

know whether the conductor had him to bring the box up or not. He brought the box up there and set it down just before I got on the car. My son got on the car after I did. * * * He (Denton) did not get the box before the car stopped. When the car stopped and he saw how high it was from the step down to the ground, he got the box; but I told him that he need not get it for I had gotten on the car that way. He did get it. I used it, but I was careful how I used it, for it was an old rickety thing. It was a dangerous box to step on, and my friend put it there, and I stepped right across the corner this way."

Lewis Davis, a witness for defendant, and the son of Mrs. Nettie Davis, testified in part as follows:

"I saw this lady as she stepped off of the car. The conductor had hold of her arm as she went to get off of the car. I do not know whether any one on the ground also had hold of her arm or not; I observed the conductor. * * * Job Denton brought the box there that my mother used to get upon the car. The box was a tolerably long box, an old, rickety box. I do not know as to the material that it was made out of; I never paid no attention to the box much. It was just an old rickety box, that is just about all that I know about it. * * * The box that Mr. Denton got was laying out there in the street. * * * He went a distance of 20 or 30 feet of where the car stopped to get the box. The reason that he went there and got the box was because that was a pretty high step. It was somewhere near 3½ feet from the ground to the step; it was a very high step for a lady to make. Mr. Denton got the box and moved it up there by the side of the car as soon as it came. * * * The conductor was standing there where he always stands when this fellow put that box there; right there on the back platform. The conductor helped my mother on, and then I got on. Job Denton and his wife also got on the car. * * * I saw the conductor take Mrs. Berry by the arm and assist her down on this box. * * * It had been several days before that that I had seen that box."

The conductor, O. Gibbs, another witness for defendant, testified in part as follows:

"I did not see the box before, until they had it up there. I seen it when she stepped off. I helped Mrs. Davis to get on, but I never noticed the box. I never noticed Mrs. Davis step upon this box and get on. I do not know what was to keep me from seeing it; I had hold of Mrs. Davis' arm helping her up. The box was right there; it was a good-sized box; it was what lard comes in. I guess that it was about two feet across on top. Two feet one way and about 2½ feet the other. I expect something like that. I did not see that box when Mrs. Davis stepped on it. I do not think that I am blind. I saw the box when Mrs. Berry stepped down on it. I was just as close to it in helping Mrs. Davis on as I was in helping Mrs. Berry off. But I was not looking down when Mrs. Davis was getting on. * * * With reference to when I first discovered the box, Mrs. Berry was in the car and I went to assist her down when I saw the box. Mrs. Berry was getting off when I first saw that box. I do not remember whether she was on the top step or on top of the car, or on the bottom step of the car when I saw the box. * * * There was nothing to keep me from examining that box to see what kind of a step I was putting my passengers down on."

Other testimony was introduced to the effect that a box, similar to the one used at the time of Mrs. Berry's alleged accident, had been frequently used for some time prior to this by passengers in boarding and alight-

ing from the car at this switch, and that the box was allowed to remain out in the street or at the side of the street, and that another box was used for the same purpose at the place of stoppage of the car coming from the other direction and in the same block; this box, so used by the passengers boarding or alighting from the car at this place, was left in full view where it could have been seen by the conductors and motormen in charge of the cars, and that it had been in an unstable and "rickety" condition for some time. We think the court was justified in submitting to the jury the question as to whether or not the defendant's employes knew that said box had been placed on the side of the street car track at the point where and at the time when plaintiff alighted from the car, and whether or not said employes knew, or could have known by the use of "ordinary diligence" (finding of jury, paragraph 4), that said box was not a safe and suitable step for plaintiff to use while alighting from the car, and that the finding by the jury favorable to plaintiff on both issues is supported by the evidence.

We do not think that the instant case presents a phase similar to that disclosed in the case of *Railway Co. v. Phillips*, 32 Tex. Civ. 238, 74 S. W. 793, cited by appellant. In the cited case, a passenger was killed while looking out of a window of a coach by his head coming in contact with the swinging gate of a stock pen belonging to the carrier, and the Court of Appeals for the Third District held that a charge tendered by the defendant, in effect instructing the jury that if the defendant company had fastened the gate with appliances reasonably sufficient to hold it, and that the gate was caused to swing loose by the act of some person other than an employe of defendant, and without the knowledge of defendant, that they should find for the defendant, was improperly refused. Nor do we think the facts shown in the instant case are analogous to those disclosed in the case of *Cary v. Los Angeles Ry. Co.*, 157 Cal. 599, 108 Pac. 632, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1329, in which a passenger seeking to recover for injuries received on account of the car starting while she was alighting therefrom, due to the act of a fellow passenger in ringing a start signal to the motorman, was denied a recovery. While a carrier is not ordinarily liable for the unauthorized acts, or the consequences which may flow from such acts, of third parties, nonemployes, yet it may become liable for negligence in permitting such acts to be done, or in permitting the consequences of such acts to remain or continue after knowledge has been brought to the carrier's servants. For instance, if a passenger should be injured by falling over baggage left in an aisle by another passenger, the carrier would not ordinarily be liable for injuries resulting therefrom, unless knowledge of the presence of the baggage in

the aisle was brought to or should be imputed to the servants of the carrier in charge of the train before the accident occurred. Miscreants place an obstruction on the track which causes a derailment; the liability of the carrier for any damages sustained would depend on whether or not the engineer or fireman was guilty of negligence in failing to discover the obstruction in time to have prevented the accident, or in failing to use every reasonable means at their command to prevent the accident after such discovery. In the instant case, by a large preponderance of evidence, the box used as a step at the time of plaintiff's alighting from the car was shown to be "rickety" and unsafe. Defendant's own witnesses testified to such condition. Mrs. Davis testified that she stepped on the corner of the box in boarding the car because she saw its rickety condition. The conductor is shown to have been on the back platform where he could have seen, and in the exercise of perhaps even ordinary care would have seen, the placing of the box by the witness Denton, and the condition of the box with reference to its being safe or not. The jury have found that he did in fact see it and know its condition, or should have done so in the exercise of that degree of care owing to plaintiff. Hence, we conclude that the court did not err in refusing to give the peremptory instruction requested, and appellant's first assignment is overruled.

[4] Appellant's second assignment is as follows:

"The court erred on the trial hereof, in his main charge to the jury, as more fully shown by the written objections to said charge made and filed with the court, after the same had been submitted to the opposing counsel and before the charge of the court had been read to the jury, as is more fully shown by defendant's bill of exception No. 2, and which is here referred to and made a part thereof."

We think that this assignment is too general and vague in meaning to require consideration by us, and does not comply with rules 25 and 26 for the government of Courts of Civil Appeals (142 S. W. xii). By reference to the transcript no "bill of exception No. 2," *eo nomine*, is to be found, but on page 19 is found "defendant's objection and exception to charge of the court," which concludes in the form of a bill of exception, and is probably the instrument to which reference is made in this assignment. Yet in this instrument are urged several objections to the charge, and neither the assignment nor the proposition thereunder points out specifically which one of the objections contained in the said instrument is relied on under the assignment. If, by grace, the so-called bill of exception itself should be taken as an assignment, it certainly is multifarious. But in any event, we do not think any error is disclosed, either in the assignment or the proposition thereunder; the latter, in effect, attacking the action of the court in submit-

ting to the jury special issues requiring findings as to whether or not the box had been placed with the knowledge of the defendant, or its employes, and whether or not the defendant was guilty of negligence in allowing the box to be placed along its street car track where passengers were being discharged. From the evidence quoted and referred to hereinabove, we hold that the issues were properly submitted to the jury. *M., K. & T. Ry. Co. v. Redus*, 55 Tex. Civ. App. 205, 118 S. W. 208 (writ denied); *M., K. & T. Ry. Co. v. Dunbar*, 57 Tex. Civ. App. 411, 122 S. W. 574 (writ denied); *Freeman v. Kennerly*, 151 S. W. 580; *Ry. Co. v. Wininger*, 151 S. W. 556; *Railway Co. v. Davis*, 4 Tex. Civ. App. 351, 23 S. W. 737; *Railway Co. v. Kennedy*, 12 Tex. Civ. App. 654, 35 S. W. 335; *Blair v. Railway Co.*, 141 App. Div. 843, 126 N. Y. Supp. 466. In the last-cited case the street car company was held to be liable to a passenger injured while alighting from a car, said injury being caused by a premature starting of the car on a signal given by another passenger, it appearing that the conductor, though on the platform, was counting transfers and paying attention to nothing else, and that passengers had given the signal before on that trip. To a like effect is the case of *Nichols v. Railway*, 168 Mass. 528, 47 N. E. 427.

[5, 6] Plaintiff's third assignment is directed to the admission over objection of certain testimony of the witness W. F. Carr, to the effect that he rode back and forth on the street car line from Avenue K (near where the accident occurred) to the factory, and saw a box on several different occasions, and that sometimes he used the box for the purpose of boarding or alighting from the car; that he had used the box two days before he heard of the accident to Mrs. Berry; that the box that he used and saw was low on one side and shaky, and looked—

"like one of these meat boxes turned upside down, * * * it looked like an old soft bacon box about 8 or 10 inches deep and about 18 inches wide and about 2 feet long. It appeared to be weak. I saw this box about two days before I heard of the plaintiff's injury. I do not know whether this was the same box that plaintiff used when she was injured or not. I never saw but one box there, and it was either this box or one similar to it. They were thrown on the right-hand side going to the factory."

The objection was made to all of this testimony on the ground that it did not show with any degree of conclusiveness that the box seen by the witness was the same box as used by Mrs. Berry, and because the evidence was immaterial, irrelevant, and hearsay, "and because the negligence of the witness in the use of said box could not be attributed to the street car company and could not bind it in any way." Certainly, a portion of this testimony is not subject to the vice of being hearsay, or to any of the other objections made; and the objections going to the whole would be ineffectual to reach any por-

tion of said testimony to which they might be pertinent. But we are of the opinion that the testimony was admissible and not subject to the objection of being hearsay. The fact that the witness had learned of the accident from his wife, and that thereby he had fixed the date of the accident to Mrs. Berry with reference to the time he saw a box, and the only box on the side of the street and in the block where he lived or boarded the car, would not make such testimony hearsay. A witness may date a fact which he knows by relating it to the time when he heard another fact; and, in so doing, he may state what the fact heard was, in order to let the jury see what reason he had for observing and remembering the fact about which he testifies from personal knowledge. *Harris v. Cent. R. Co.*, 78 Ga. 525, 3 S. E. 355; *Wigmore on Evidence*, vol. 1, §§ 655 and 730; vol. 2, *Wigmore on Evidence*, § 1791; 1 *Thompson on Trials*, § 374.

Or differently stated, for the purpose of identifying the time of facts about which he testified, with reference to some other fact, and when no issue is involved as to the date of the other fact, a witness may state that he heard of the other fact, and that the matters about which he testifies of his own personal knowledge occurred before or subsequent thereto.

[7] This witness testified, further, that, for several days prior to the time Mrs. Berry fell:

"I saw a box there and used it myself several times; I rode back and forth a good deal to my work."

We think it was for the jury to decide whether or not the box about which the witness Carr testified was the same box used at the time of Mrs. Berry's fall, and that the objection that it was not shown with any degree of conclusiveness that the two boxes were the same goes rather to the weight than to the admissibility of the testimony. In the case of *Ry. v. Dunbar*, supra, it was held that, where a passenger was injured by the upsetting of a step box placed on a rough pavement as a means of alighting, he might testify that step boxes used at the station had upset on other occasions when passengers stepped on them. *Railway v. Evansich*, 63 Tex. 54; *Railway v. Richards*, 49 S. W. 687. Therefore, this assignment will be overruled, and likewise the fourth, which urges the insufficiency of the evidence to sustain the finding of the jury to the effect that the defendant and its employes were guilty of negligence in allowing the box mentioned to be placed alongside of its street car track, and to be used by plaintiff to step on while alighting from the car.

[8] The fifth assignment urges the excessiveness of the verdict and judgment for \$1,125. Mrs. Berry, the plaintiff, testified:

"When I got to my daughter's, I went to bed pretty soon, in just a little while; I stayed there a little while. I ate my breakfast. Well,

I sat in a rocking chair a little while until my limb was swelling so I had to have a doctor, and they summoned one. For a good while, they packed ice on my limb. I was in bed two weeks, if not several days over. I could not swear how many days over two weeks. I suffered during that time with my left limb and with my back. I suffered with the lower part of my back, and those ligaments here were torn loose, and my knee and my hip in the joints—in the joints of my knee and hip, and those ligaments. They kept ice on my knee the first night and day, all night and part of the next day, before they could put liniment on it. It swelled up very much indeed. I am still affected in my knee, in walking out straight it pains—in walking out straight any distance. * * * I cannot step down on anything too low on account of my knee. I cannot bend it back this way very much. It is weak and I suffer from it; there is great pain when I bend it clear back. * * * I still suffer with my back; it is weak; I have not any strength in it much. I am not able to do my household duties and do my work like I used to do. There is a whole lot of difference. My limb, when I do very much work, or walk just a little piece, I suffer with it then at night; there is a weakness all the time in my back, and in my knee and those ligaments. I suffer with them all the time, and now, just the going up those steps and the little walking I have been doing this evening, I feel it yet. It is not so much about my hips; my back was hurt there, got such a wrench, it just threw me this way and my weight fell to my left side, and those ligaments in here, that is the torn part."

It was further shown that Mrs. Berry was some 40 years of age at the time of the accident, and prior thereto had done the cooking and household work for six people. It is true that on cross-examination it was developed that for some years before her injury she had suffered from ill health and was at times incapacitated for work, but she testified that for the two years immediately preceding the accident she had been entirely well and strong, and this testimony seems to be uncontradicted. Dr. Lee, the physician who was called in to treat plaintiff, testified that he made three visits to see her, on Sunday, Monday and Tuesday following the accident, and that on his first visit he found plaintiff complaining of pain in her knee and that the knee was sprained or swollen, but there were no contusions, bruises, or abrasions; that he put her knee in adhesive plaster to keep her from moving it, and ordered an ice pack used on it. That he gave her a hypodermic the first night to relieve pain; that subsequent to his last visit plaintiff's daughter called him up and reported that her mother was getting along very well, and that she did not think it was necessary for him to see her any more. That at the time of his last visit the knee was not fully well. That the swelling was there for three or four inches in a contusion of the joints; that a sprain is really a contusion of the joints; that is, a strain of the ligaments. That falling from the step of a street car and careening to one side might produce an injury like plaintiff had. Dr. Lee testified that plaintiff made no complaint to him of any other injury than that to the knee. We

conclude that this assignment must be overruled.

[9] Appellant's sixth and last assignment complains of the alleged misconduct of the jury while deliberating on their verdict, in the following particulars: That some of the members of said jury, being on the jury for the week, had two days before been in the courtroom and heard the trial of another case against the defendant in this case, and that the attorney representing the plaintiff in the first case also represented the plaintiffs in the instant case. That evidence was introduced in the first case tending to show, and the charge was made that the counsel for plaintiff was feigning injury, and that the statement was made during the progress of said first trial; and, in the course of the proceedings which resulted therefrom, it was testified that the counsel for plaintiff had stated that Mrs. Berry, who was his client in the instant case, was not hurt. It is urged and was shown that, during the course of the jury's deliberations, some of them discussed the facts and features developed and disclosed during the trial and subsequent proceedings hereinabove mentioned, and that one juror, at least, stated that he did not believe defendant had treated plaintiff's counsel right in this other trial, and that another juror stated that it did not make any difference what verdict they would render, that the traction company could get a new trial by appealing, and that another juror stated that he thought the traction company had framed up this first case in order to make the jury believe that Mrs. Berry was not hurt.

Several of the jurors were examined in the investigation had by the court on the motion for a new trial, and all of them testified that each time any of the matters referred to were mentioned by any juror that the foreman cautioned them against discussing any such matter or considering it, and each juror testified that nothing that occurred, during the deliberations, of the character mentioned influenced him in the least, in rendering the verdict that was finally rendered; that he agreed to said verdict rendered because in his opinion it reached the truth and justice.

We do not believe that any prejudice to defendant's rights has been shown. It was held by this court in the case of G., C. & S. F. Ry. Co. v. McKinnell, 173 S. W. 937, that a jury who, while deliberating on a verdict, discussed the proposition that plaintiff would be required to pay a large sum to his attorneys for services rendered, and it appearing that by reason thereof a larger verdict was rendered than otherwise would have been rendered, were guilty of misconduct necessitating the setting aside of the verdict. This holding was based on the affidavit of one of the jurors that such discussion was had and that he was influenced thereby to agree to

a verdict in a considerably larger amount than he would otherwise have been willing to agree to. In the case of *W. U. Tel. Co. v. Tweed*, 138 S. W. 1155, the Court of Appeals for the Dallas District, while reversing the judgment on other grounds, commented on the fact that the evidence adduced on the hearing of the motion for new trial showed that the jurors were influenced by, and resented what they believed to be, the action of the defendant company in employing a detective to watch the jury pending a trial, with a view of detecting any misconduct on their part, and to see that their verdict was not affected by any undue or improper influence brought to bear upon them, and that probably the jury were influenced to award a larger sum in damages than it otherwise would had it not been for this feeling of resentment. But as in the instant case the jury was selected with a knowledge on the part of both parties litigant and their counsel that the members of the panel, or at least some of them, had been present in the courtroom when the transactions and proceedings alleged to have been discussed by the jury during their deliberations occurred, and since appellant and its counsel accepted these jurors, knowing this fact, and since upon the investigation each juror testified that none of the happenings of which complaint is made influenced him in the least in reaching the verdict rendered, we conclude that no reversible error is shown in this assignment, and it is, therefore, overruled.

Judgment affirmed.

On Rehearing.

[10, 11] In its motion for rehearing appellant calls our attention to the fact that appellee in her pleadings failed to allege negligence on the part of appellant and its employés, in failing to know or discover that the box had been placed beneath the step where appellee alighted from the car, and therefore that we were not justified in using the following language in our original opinion, to wit:

"Appellant predicates its contention that it was not negligent principally upon the asserted ground that the conductor of the car in question did not know that the box upon which Mrs. Berry alighted was there, and did not know of its unsafe and unstable condition; but we are of the opinion that the evidence is sufficient to sustain the finding of the jury that the conductor did know, or should have known in the exercise of that high degree of care due a passenger, that said box had been placed near the track and immediately under and in front of the step prior to Mrs. Berry's stepping thereon, and that the box was not safe for the purposes and uses to which it was put."

But the jury found, in answer to Special Issue No. 1, that the defendant company and its agents (including the conductor) did know that the box had been so placed. While the

conductor testified that he did not know that the box had been so placed, we conclude, from the evidence quoted in the original opinion, that the jury were justified in finding as they did. The conductor was on the rear platform when Mrs. Davis boarded the car, she using the box as she got on; and he testified that he assisted her in getting on, and there being nothing to prevent the conductor from seeing Denton as he got the box and placed it for Mrs. Davis to use. While there is no positive and direct evidence that the conductor saw the box so placed, the circumstances shown are sufficient to sustain the finding of the jury upon this issue. A jury is not required to believe a witness, although he makes a plain statement of what is not impossible, and is neither impeached nor contradicted by direct evidence, but may discredit him on account of the manner of testifying and the attendant circumstances. *G., H. & S. A. Ry. Co. v. Murray*, 99 S. W. 144, and cases there cited. We withdraw, as inappropriate in the connection used, so much of our language, quoted above, as reads as follows, "or should have known in the exercise of that high degree of care due a passenger." but otherwise we adhere to the conclusion stated.

Counsel for appellant seems to fail to understand the application of the language used in our original opinion in discussing the assignment directed to the admission of the testimony of W. F. Carr, for, in this motion, he says:

"Appellant does not dispute the correctness of the language of the court in stating that if the purpose of this testimony had been to fix the date of the accident to Mrs. Berry, or to fix the date when he heard some other fact, or to impress the jury with his capacity for remembering certain facts about which he testifies, that it would not be open to the objection urged by appellant that it was hearsay," etc.

It is true that Carr's desired testimony was not directly upon the accident to Mrs. Berry, but rather to show that, at or about the time and prior to said accident, he, Carr, had seen a box at the side of the street near the track, and that said box had been used frequently by passengers in boarding and alighting from the car. He could not be permitted to testify that it was the same box involved in this controversy, but he could describe the location of the box, the kind of box it was, and the time he saw it, and it was for the jury to determine whether or not it was the same box as used at the time of the accident to Mrs. Berry. In order to fix the time when he saw the box with reference to Mrs. Berry's accident, the date of which was not in dispute, we held that he could testify that he had been informed by his wife of Mrs. Berry's accident.

As to other matters urged in appellant's motion, we think they have been sufficiently discussed in the original opinion.

The motion for rehearing is overruled.

BIRCHFIELD et al. v. BOURLAND.
(No. 8526.)

(Court of Civil Appeals of Texas. Ft. Worth.
April 29, 1916. On Application for Writ
of Prohibition, May 20, 1916.)

1. APPEAL AND ERROR \S 874(2) — **REVIEW — INJUNCTION.**

Since an order refusing to dissolve a temporary injunction is not appealable, no proceedings on the hearing at which such order was made can be considered on appeal from the order granting the injunction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3533; Dec. Dig. \S 874(2).]

2. APPEAL AND ERROR \S 837(3) — **REVIEW — INJUNCTION—RECORD.**

An appeal from an order granting a temporary writ of injunction will be determined upon the allegations of the petition, in the absence of any denial thereof at the time of granting the writ.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3263; Dec. Dig. \S 837(3).]

3. INJUNCTION \S 118(3) — **PETITION—IRREPARABLE INJURY—SUFFICIENCY.**

Allegations of threatened ouster from a farm and destruction of growing crops held sufficient allegations of irreparable injury to authorize a temporary injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 235; Dec. Dig. \S 118(3).]

4. INJUNCTION \S 14 — **FOUNDATIONS—"IRREPARABLE INJURY."**

An "irreparable injury" is one which cannot be fully compensated in damages or cannot be measured by any certain pecuniary standard.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 14; Dec. Dig. \S 14.

For other definitions, see Words and Phrases, First and Second Series, Irreparable Injury.]

5. INJUNCTION \S 1 — **STATUTORY REMEDY — RULES OF PRACTICE.**

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4643, authorizing a writ of injunction where it appears that applicant is entitled to relief which requires the restraint of some prejudicial act, the right to injunction is not confined to rules of equity jurisprudence.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 1; Dec. Dig. \S 1.]

6. INJUNCTION \S 118(1) — **PETITION — SUFFICIENCY.**

In a petition for injunction, the averments of material and essential elements must be sufficiently certain to negative every reasonable inference of the existence of facts under which petitioner would not be entitled to relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 223-232, 234; Dec. Dig. \S 118(1).]

7. INJUNCTION \S 118(1) — **PETITION — SUFFICIENCY.**

In petition for injunction, allegations that plaintiff was lawfully in possession of land, and that defendants unlawfully entered and forcibly ejected him therefrom, are mere conclusions of law and insufficient to authorize injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 223-232, 234; Dec. Dig. \S 118(1).]

8. INJUNCTION \S 118(2) — **PETITION — SUFFICIENCY—CONSTRUCTION.**

A petition for injunction, alleging that plaintiff's lessor was formerly the owner in fee simple for the year 1916, must be construed as implying that he was not the owner of the land

and had no legal right to lease to plaintiff, and is therefore insufficient to sustain a writ of injunction restraining the ejection of plaintiff.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 233; Dec. Dig. \S 118(2).]

9. LANDLORD AND TENANT \S 75(3) — **SUBLET- TING PREMISES—CONSENT OF LANDLORD.**

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5489, a tenant has no right to sublet premises without the consent of his landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 229; Dec. Dig. \S 75(3).]

On Application for Writ of Prohibition.

10. APPEAL AND ERROR \S 420 — **REVIEW—IN- JUNCTION—NOTICE OF APPEAL.**

Though the notice of appeal recited that appeal was taken from an order dissolving an injunction, but both parties on hearing treated the appeal as from original order granting injunction, the appellate court had jurisdiction to review such original order; no notice of appeal, as required by Rev. St. 1911, art. 2084, in ordinary cases, being necessary in appeals in injunction suits under Vernon's Sayles' Ann. Civ. St. 1914, arts. 4643, 4644.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2147; Dec. Dig. \S 420.]

11. APPEAL AND ERROR \S 384(1) — **REVIEW— APPEAL BOND—CLERICAL DEFECT.**

Clerical defects in an appeal bond in reciting the number of the judicial district of a county named in which the action is pending do not deprive the appellate court of jurisdiction to hear the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2049, 2056; Dec. Dig. \S 384(1).]

12. PROHIBITION \S 5(3) — **ACTS PROHIBITED — INJUNCTION—SECOND WRIT.**

A writ of prohibition will issue to a lower court to prevent a second writ of injunction on a petition alleging only such facts as were averred or should have been averred on the first application.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. \S 24-29; Dec. Dig. \S 5(3).]

13. INJUNCTION \S 8 — **SECOND INJUNCTION— GROUND.**

Where an injunction has been dissolved, complainant by amendment or by supplemental bill may procure a second injunction, but not upon grounds set up in the first bill or which should have been set up therein.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 7; Dec. Dig. \S 8.]

14. APPEAL AND ERROR \S 436 — **EFFECT OF APPEAL—POWER OF LOWER COURT.**

An appeal or writ of error clothes the appellate court with exclusive jurisdiction of the case, and the lower court has no authority to make any orders in reference thereto excepting such as may be necessary to protect the subject of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2191, 2192; Dec. Dig. \S 436.]

15. COURTS \S 207(1) — **JURISDICTION ON AP- PEAL—ENFORCEMENT.**

An appellate court to protect its jurisdiction and enforce its mandates may resort to mandamus, prohibition, or any other appropriate writ.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \S 207(1).]

Appeal from District Court, Tarrant County; J. W. Swayne, Judge.

Suit by John Bourland against G. W. Birchfield and another. From an order

granting a temporary injunction, defendants appeal. Reversed, and injunction dissolved.

After reversal, plaintiff presented an amended petition to the district judge, who again ordered a writ of injunction, which was issued, and defendants apply for a writ of prohibition against plaintiff and the judge of the district court to restrain further action until the original action can be heard on its merits. Writ granted, and second writ of injunction dissolved.

Robert G. Johnson, and Wade & Smith, all of Ft. Worth, for appellants. Cummings & Whiteside, of Ft. Worth, for appellee.

DUNKLIN, J. John Bourland instituted this suit against G. W. Birchfield and Terry Allen to restrain the defendants from molesting plaintiff in his possession of a certain farm consisting of 120 acres, and for a mandatory injunction directing and commanding the defendants to deliver to plaintiff the possession of same. A temporary writ of injunction granting the relief prayed for was issued by the trial judge upon an ex parte hearing of said petition, and from that order the defendants have appealed.

Plaintiff alleged in his petition that he leased the farm for the year 1916 from J. A. Younce, paying a cash consideration therefor of \$100; that the lease was in writing and duly recorded; that immediately thereafter he went into the possession of the farm and planted about 70 acres in corn and moved his household goods upon the premises and held possession from March 20, 1916, to April 4, 1916, when the defendants unlawfully and forcibly ousted plaintiff of possession; that at the time he was so ousted plaintiff was arranging to move his cattle upon the farm and to cultivate, use, and enjoy the same for the year 1916. As a further ground for the issuance of the temporary writ of injunction, it was alleged that during the pendency of the suit plaintiff's crop which had already been planted would go to waste, and his crop for the year would be lost, and he would thereby suffer irreparable injury, unless the defendants were restrained from molesting plaintiff in his possession and he be permitted to continue in possession of the farm for the purpose of cultivating it. It was further alleged in the petition that the farm was "formerly owned by J. A. Younce; * * * that plaintiff leased the same from the said J. A. Younce, who was the owner in fee-simple title for the year A. D. 1916."

We find in the record an answer filed to plaintiff's petition after the temporary writ was granted, also a motion to dissolve the writ, together with a statement of facts showing the evidence introduced on the hearing of that motion, and the order of the trial judge overruling that motion, all of which proceedings were had some days after the granting of the temporary writ. We also

find in the record an agreement by counsel for all parties, approved by the trial judge, in effect, that the hearing by the court of defendant's motion to dissolve might be considered by this court as if it were a hearing for the purpose of determining whether or not the temporary writ of injunction should issue in the first instance.

[1, 2] The statute does not permit an appeal from an order refusing to dissolve a temporary writ of injunction, and as the present appeal is not from that order, but from the order granting the writ, none of the proceedings had subsequent to the granting of the writ can be considered by us, notwithstanding the agreement of counsel referred to, and the merits of this appeal will be determined upon the allegations of the petition, which, in the absence of any denial thereof at the time the writ was granted, must be taken as true. *Holbein v. De La Garza*, 59 Tex. Civ. App. 125, 126 S. W. 45.

[3] We are of the opinion that the allegations referred to above to show irreparable injury were sufficient for that purpose. In the case of *Green v. Gresham*, 21 Tex. Civ. App. 601, 53 S. W. 382, this court, through Justice Stephens, said:

"Besides, to prevent threatened waste injunction has long been a familiar remedy. See *Hammond v. Martin*, 15 Tex. Civ. App. 570, 40 S. W. 347."

[4] In 22 Cyc. p. 813, the following is said: "Where the injury is of such a nature that it cannot be fully compensated in damages, or cannot be measured by any certain pecuniary standard, it is irreparable, and the trespass may be enjoined."

[5] By article 4643, 3 Vernon's Sayles' Texas Civil Statutes, it is provided that a writ of injunction may issue:

"(1) Where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant."

And it has been held by numerous decisions of this state that by virtue of that statute the right to an injunction is not confined to the rules obtaining in equity jurisprudence. *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994; *Holbein v. De La Garza*, 59 Tex. Civ. App. 125, 126 S. W. 45; *Mitchell v. Burnett*, 57 Tex. Civ. App. 124, 122 S. W. 937.

[6] In *Gillis v. Rosenheimer*, 64 Tex. 246, our Supreme Court said:

"The rule is correctly stated in *Harrison v. Crumb*, 1 White & W. Civ. Cas. Ct. App. § 992, as follows: 'The rule of pleading, that the statements of a party are to be taken most strongly against himself, is re-enforced in injunction suits by the further requirement that the material and essential elements which entitle him to relief shall be sufficiently certain to negative every reasonable inference arising upon the facts so stated, from which it might be deduced that he might not, under other supposable facts connected with the subject, thus be entitled to relief.' See *Carter v. Griffin*, 32 Tex. 212; *Martin v. Sykes*, 25 Tex. Supp. 197; *Forbes v. Hill*, *Dallam*, Dig. 486; *Ballard v. Rogers*, *Dallam*, Dig. 460; *Smith v. Frederick*, 32 Tex. 256."

[7] Allegations contained in plaintiff's petition, such as that he was lawfully in possession of the farm, and that the defendants unlawfully entered into and forcibly ejected him therefrom, are mere conclusions of law, and entirely too general of themselves to show a right to the relief prayed for. *Holbein v. De La Garza*, supra.

[8] The allegation that J. A. Younce was formerly the owner of the farm implies that he did not own the title thereto, at the time of the lease to plaintiff, and the inference must be indulged that he was not such owner. The further allegation that J. A. Younce "was the owner in fee-simple title for the year A. D. 1916" also implies that title to the property was not vested in Younce, for the ownership of land for one year only is wholly inconsistent with any conception of fee-simple title.

[9] Applying the rule of construction laid down by our Supreme Court and noted above, the allegations in the plaintiff's petition must be construed as implying that Younce did not own title to the property at the time he leased it to the plaintiff. If he was not the owner of the title, then he was either a trespasser or a tenant. If he was a trespasser, clearly he had no right to lease the property to the plaintiff. If he was a tenant, and in the lawful possession of the farm, as alleged, then he had no legal right to sublet the same to the plaintiff without the consent of the landlord, and, in the absence of some allegation of such consent from the landlord, the petition shows no right in plaintiff as a subtenant. *Vernon's Sayles' Texas Civil Statutes*, art. 5489. The petition contains no showing in whom the fee-simple title is vested, but it does contain allegations that defendants are each claiming some interest in the property, and there are no allegations that the fee-simple title is not vested in them.

For the reasons indicated, we are of the opinion that the petition was insufficient to warrant the issuance of the temporary writ, and for that reason the order granting the writ is reversed, the writ dissolved, without prejudice to plaintiff's right to a trial upon the merits, and this order will be certified to the trial court for observance.

On Application for Writ of Prohibition.

CONNER, C. J. On April 4, 1916, the appellee instituted this suit against appellants G. W. Birchfield and Terry Allen to recover possession of 120 acres of land described in the petition, and from which it was alleged he had been ejected by force, and he prayed for a mandatory injunction commanding the defendants to forthwith deliver to the plaintiff possession of the land. On the same day the petition was presented to the Honorable Jas. W. Swayne, judge of the Seventeenth judicial district of Tarrant county, who without notice or hearing, and upon the allega-

tions of the petition alone, ordered the issuance of a writ of mandatory injunction as prayed for. It further appears that the defendants Birchfield and Allen on the 5th day of April, 1916, filed an answer, among other things denying the facts as alleged in plaintiff's petition, and praying for a dissolution of the injunction that had been in the meantime issued. Upon this motion for a dissolution, testimony was heard, and it was agreed, in substance, by counsel for all of the parties, which agreement was approved by the trial judge, that the evidence on hearing before the judge of the defendant's motion to dissolve might be considered by this court as if the hearing had been for the purpose of determining whether or not the issuance of the original order for the writ of injunction was authorized.

Upon an appeal from the original order, it was held by us, as will be seen from the opinion written by Mr. Justice Dunklin, 187 S. W. 423, on April 29, 1916, not yet officially published, that we could not consider the proceedings upon the motion to dissolve in aid of the averments of the original petition, and further concluded that the allegations of the original petition were insufficient to authorize the issuance of the mandatory writ, as ordered by the judge on said 4th day of April, 1916, and, accordingly, ordered its dissolution.

It was made to further appear in the application now before us that without any motion for a rehearing in this court on the part of the appellee Bourland, and without the issuance of a mandate, the said Bourland prepared an amended petition and presented the same on, to wit, the 1st day of May, A. D. 1916, to the district judge before named, who again, without notice and without a hearing of any kind, ordered the issuance of a writ of injunction as prayed for in the amended petition, restraining and prohibiting the defendants Birchfield and Allen from in any manner dispossessing the plaintiff during the pendency of the suit, and directing said defendants to restore possession of the premises to the plaintiff, etc. A second writ of injunction was forthwith issued in accordance with the order made upon the amended petition, and the defendants Birchfield and Allen presented to this court, on, to wit, May 4, 1916, an application for the issuance of a writ of prohibition, or such other writ as may be appropriate, commanding the said John Bourland and the said Hon. Jas. W. Swayne, as judge of the district court, and all others from further disturbing the possession of appellants Birchfield and Allen to the land described in appellee's original petition, and from otherwise disturbing them, until such time as the original action can be heard upon its merits. We ordered the filing of the application and the issuance of notice to the appellee and to the said judge to appear before us on May 12th, and show cause, if any there was, why the

writ of prohibition should not issue as prayed for. At the time and place designated, all parties appeared, and the matters involved were duly submitted, and the application was on, to wit, May 13, 1916, granted, and we now present and order filed our reasons for the order last made.

[10] The appellee Bourland insisted that we "are wholly and entirely without jurisdiction" to grant the relief now sought, for the reason that the appeal to this court hereinbefore mentioned was from the order of the court dissolving the injunction, and not from the original order granting the prayer of the petition. This contention is based upon the fact that the transcript contains a minute entry of the notice of appeal given at the time of the hearing on the motion to dissolve, and which notice on its face purports to be from the order of dissolution. But it is manifest from a consideration of the record as a whole that the appeal was not from the refusal of the court to dissolve, for in that connection the parties formally agreed, as before stated, that the proceedings upon that hearing should be considered in aid of the original petition, and all parties on said original hearing before this court treated the appeal as from the original order. It was further contended in effect, that, if the appeal is to be considered as from the original order of the judge, then this court was without jurisdiction for the want of a notice of appeal; it being apparent that the notice appearing in the transcript was from the order of the court refusing to dissolve the original injunction. There is nothing in this contention, however; for, as will be seen by reference to the statutes relating to the subject, writs of injunction may in a proper case be issued by a district or county court "either in term time or in vacation." See Vernon's Sayles' Texas Civil Statutes, art. 4643. And an appeal may be prosecuted from such orders upon the execution of the necessary bond provided the transcript shall be filed with the clerk of the Court of Civil Appeals not later than 15 days after the entry of record of the order of judgment granting, refusing, or dissolving the writ. See article 4644. In none of the provisions relating to the particular subject is a notice of appeal prescribed, and in many instances it is evident that a notice of appeal "in open court," as required by article 2084 of the Revised Statutes, and generally applicable, could not be given; for instances are easily conceivable where the order granting the writ was made by the judge in chambers or vacation, and where a regular term of the court would not convene until after the expiration of the 15 days within which the statute provides that the appeal from the order must be prosecuted. Moreover, it has been expressly held that no notice of appeal is required in such cases, and we approve the holding. See *Young v. Dudley*, 140 S. W. 802, and authorities therein cited.

[11] It was further insisted that we were without jurisdiction, in that the appeal bond executed on the appeal from the original order recites that the cause was "pending in the Forty-Eighth district court of Tarrant county" instead of in the Seventeenth judicial district. It is evident however, that the recitation quoted is a mere clerical error, for the bond is properly entitled and numbered, and specifically refers to and is made payable to the proper parties, and further recites that the appeal is taken from the said order of the "4th day of April" granting the writ of injunction.

[12] The foregoing conclusions brought us to the question of whether, under the allegations of the application, we were authorized to issue the writ of prohibition, as prayed for. That the power exists in a proper case was expressly upheld by this court in the case of *Cattlemen's Trust Co. of Ft. Worth v. Willis*, 179 S. W. 1115, and we need not repeat what we there said. The further vital question, however, now presented, is whether a district or county court may, upon an amended petition, direct the issuance of a second writ of injunction after a previous order by the same judge or court has been dissolved. That this may be done under certain exceptional circumstances not necessary now to notice and not here involved, we do not doubt; but, under the circumstances here presented to us, we are of the opinion that it cannot lawfully be done. The record clearly shows that the amended petition, the prayer of which for the second writ was granted by the Honorable Jas. W. Swayne, as hereinbefore stated, contained no new matter not available to the plaintiff in the suit at the time the original order for the writ of injunction was granted. The amended petition merely contains, in substance, what was originally alleged, with added allegations of the facts the appellee attempted to establish upon the motion to dissolve.

[13] It is said in 22 Cyc. p. 780, par. "h," that:

"Where the complainant has obtained an injunction which has later been dissolved, he may be entitled to a second injunction if he amends his bill or files a supplemental one; but he is not entitled to a second injunction on grounds that were set up in his first bill, or should have been set up."

The author cites in support of the text decisions from Georgia, Kentucky, Louisiana, New Jersey, New York, and Ohio. To the same effect are numerous cases cited in 27 Cen. Edition of the American Digest, § 343 of title Injunctions. We approve this line of authorities. Indeed, as we think, the principle was directly involved and determined by our Supreme Court in the case of *Hovey et al. v. Shepherd*, 105 Tex. 237, 147 S. W. 224. In that case, as shown by the records of this court, and by the facts recited in the opinion, the Honorable Jas. Shepherd granted the petition for a second writ of injunc-

tion upon facts substantially embodied in or available at the time of the issuance of a former writ of injunction, which had been dissolved, and the Supreme Court with evident emphasis and promptness ordered the issuance of a writ of prohibition as prayed for in that case. If upon an amended petition of the character here under consideration a second writ of injunction may be granted after the dissolution of a prior one by this court, of what avail to a litigant is our order or jurisdiction? We dissolved the original injunction for want of sufficient allegations in the petition upon which it was granted. The necessary allegations were available and could have been made in the first instance as well as at the time of the amendment. Let us suppose that the appellants should prosecute an appeal from this second order, and we should again hold the petition insufficient and dissolve the second writ of injunction. Should it be said that appellee could further amend and include some necessary allegation pointed out by this court in its determination and again secure a third writ of injunction? Should such a course be maintainable, it is evident that, by amendments and additional writs of injunction, orders on the part of this court might be rendered entirely nugatory, and appellee would or could get all the relief originally sought, and appellants perhaps suffer irreparable injury. The appeal from the original order vested in this court full jurisdiction over the question therein involved, to the exclusion of the lower court.

[14] As said, with citation of numerous authorities, in 3 Corpus Juris, p. 1255, and following:

"As a general rule, when an appeal or writ of error is perfected, the cause becomes one for the cognizance of the appellate court, and for that court alone; the authority of the lower court is terminated, and it cannot proceed in the cause, at least as to the subject-matter of the appeal or writ, until the appeal or writ of error is heard and determined. So, pending an appeal from a decree in chancery, the chancellor has no power to render any further decree or order affecting the rights and equities of the parties. The appellate court acquires jurisdiction in all matters pertaining to the subject-matter of the appeal or writ of error itself and to the proper hearing thereof, and also in regard to all applications which, by statute, may, after the taking of the appeal or suing out of the writ, be made to such court, and the lower court cannot proceed in any manner so as to affect the jurisdiction acquired by the appellate court, or defeat the right of appellant or plaintiff in error to prosecute his appeal or writ of error with effect, although it may make such orders or decrees as may be necessary for the protection and preservation of the subject of the appeal, and which do not destroy or impair the same. Unauthorized proceedings in the lower court under the original judgment are generally held to be void."

[15] And in speaking of the effect of an appeal and of its power to enforce its orders, our Supreme Court said:

"So soon as the jurisdiction attaches under an appeal or writ of error, this court has full

control of the cause, and can make such orders concerning it as may be necessary to preserve the rights of the parties and enforce its mandates. This jurisdiction continues until the case, as made by the appeal or writ of error, is fully determined by this court and its judgment is completely executed by the court below. If the judgment below is affirmed, or reversed and rendered or reformed, this court can see that the party in whose favor its decision has been given has the benefit of all proceedings below necessary to enforce its judgment. If remanded for a new trial, it retains control until the new trial is allowed in accordance with its mandate. If reversed and sent down to have some special judgment rendered by the court below, jurisdiction remains until that particular judgment is entered up, and the mandate of the court obeyed. For the purpose of enforcing all such orders coming within the appellate jurisdiction of the court, it may resort to the writ of mandamus, or any other appropriate writ known to our system of jurisprudence." *Wells v. Littlefield*, 62 Tex. 30, 31.

We approve what is said in the authorities quoted, and on the whole conclude that appellants' application for a writ of prohibition should be granted, and that the said second writ of injunction issued upon the said amended petition on the 8th day of May, 1916, should be dissolved and appellants restored to the possession originally held by them if in the meantime they have been disturbed. It is further ordered that appellee, his agents and attorneys, and the said the Honorable Jas. W. Swayne, as judge of the Seventeenth judicial district, are enjoined and prohibited, until such time as appellee's case against the appellants may be tried upon its merits, from further interfering with or disturbing the appellants as complained of. This opinion, however, is not to be construed as denying the right of injunction upon final hearing if upon the facts proven it should be proper, or as denying the issuance of a further temporary writ upon sufficient facts not heretofore available to the plaintiff.

PICKETT et al. v. MICHAEL. (No. 7190.)

(Court of Civil Appeals of Texas, Galveston.
April 28, 1916. Rehearing Denied
May 25, 1916.)

1. JUDGES \S 15(1)—DISQUALIFICATION—SPECIAL JUDGE.

The selection of a special judge by agreement of the parties, after the trial had proceeded for several days before the regular judge, and upon his statement, as he was about to prepare his instructions, that he would have to undergo a surgical operation the following day, was a nullity, as the regular judge was not disqualified merely by absence, and the acts of the special judge were void.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 48-50; Dec. Dig. \S 15(1).]

2. JUDGES \S 19—SPECIAL JUDGE—JURISDICTION—ESTOPPEL TO DENY.

Where the parties elect a special judge where the regular judge is not disqualified, but is absent from any cause, they are not estopped from denying the special judge's jurisdiction.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 64-67; Dec. Dig. \S 19.]

Appeal from District Court, Harris County; John A. Read, Judge, and W. J. Howard, Special Judge.

Action between A. B. Pickett and others and Charles L. Michael. Judgment for Michael, and Pickett and others appeal. Reversed and remanded.

Stanley Thompson, of Houston, for appellants.

McMEANS, J. The trial of this case was begun before the Honorable John A. Read, judge of the Sixty-First judicial district court of Harris county, with the assistance of a jury, on the 6th day of May, 1915, and evidence was introduced on the 6th, 7th, and 8th days of May, 1915. At about 11 o'clock a. m., on the 8th, the court excused the jury from further attendance at the trial until the following Monday morning at 9 o'clock, in order that Judge Read might, with the suggestion of counsel for both parties, prepare his instructions to the jury in the form of special issues, which were accordingly prepared. Thereupon Judge Read informed counsel for both parties that on the next day he would have to undergo a surgical operation, and requested them by agreement to select some member of the bar to preside during the rest of the trial, whereupon the parties, upon the following Monday morning, agreed upon and selected the Honorable W. J. Howard as special judge to preside during the further trial of the case; and Judge Howard consenting to so act, the oath required by law was duly administered to him, and the trial proceeded. Judge Howard then read to the jury the charge prepared by Judge Read, presided during argument of counsel, and thereafter received the verdict of the jury, but did not enter judgment thereon, but this was done several days later by Judge Read after he had sufficiently recovered from the effects of the operation to permit him to resume the bench. All these facts are substantially shown by the recitals in the judgment rendered in the case.

[1, 2] This case is before us, in part, upon a suggestion by the appellants of fundamental error apparent upon the face of the record; the contention being that the selection of a judge by agreement of the parties in any case other than where the regular judge is disqualified is a nullity, and that the acts of the judge so selected are without judicial authority and void. It is further contended that when the parties select a special judge, where the regular judge is not disqualified, but is absent from any cause, they are not estopped from denying his jurisdiction. Both these contentions are sustained by the cases of *Dunn v. Home National Bank*, 181 S. W. 690, and *Summerlin v. State*, 69 Tex. Cr. R. 275, 153 S. W. 890, and we refer to those cases for the reasons, which, we think, fully sustain the appellants' contentions.

In delivering the instructions to the jury, in presiding over the deliberations of the trial during the argument, and in receiving the verdict, Judge Howard performed material and essential judicial duties in the trial of the case; and we cannot well distinguish this case in its essential features from the cases above referred to.

The judgment must be reversed, and the cause remanded for a new trial. This action obviates the necessity of passing upon the question as to whether the failure of appellants to obtain a statement of facts entitles them to a reversal.

Reversed and remanded.

KANSAS CITY, M. & O. RY. CO. OF TEXAS v. DURRETT. (No. 553.)*

(Court of Civil Appeals of Texas. El Paso.
May 4, 1916. Rehearing Denied
June 22, 1916.)

1. TRIAL \S 41(5)—WITNESSES UNDER RULE— VIOLATION—DISCRETION OF COURT.

The fact that a witness talks to another during the trial, after the rule has been invoked, does not disqualify him; but the court may, within its discretion in the enforcement of the rule, refuse to permit him to testify.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 106; Dec. Dig. \S 41(5).]

2. EVIDENCE \S 547—OPINIONS—EXPERTS— ADMISSIBILITY.

Testimony of doctors as to what was found by their first examination of plaintiff, as well as what they found in the last examination to make comparisons, not based upon the statements or voluntary acts of plaintiff, was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2364; Dec. Dig. \S 547.]

3. TRIAL \S 76—OBJECTIONS TO TESTIMONY— TIME TO OBJECT.

Objections to testimony should be made to the questions or by motion to exclude the answers giving the reasons, so that the trial court may rule on the objections made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 172, 183-190, 237; Dec. Dig. \S 76.]

4. APPEAL AND ERROR \S 1048(7)—WITNESSES \S 318—REVIEW—HARMLESS ERROR.

In an action for personal injuries, the action of the court in permitting a physician, a witness for the plaintiff, to testify that he had testified for certain railroads in similar cases was error, where there had been no attempt to impeach him, but is not reversible where the bill of exceptions shows that defendant asked the witness if he was to be paid by plaintiff, and other physicians testified as to the extent of plaintiff's injuries.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4160; Dec. Dig. \S 1048(7); Witnesses, Cent. Dig. §§ 1084-1086; Dec. Dig. \S 318.]

5. DAMAGES \S 185(2)—EVIDENCE—PERSONAL INJURY—CONDITION OF PLAINTIFF.

In an action for personal injuries, testimony that plaintiff became in a toxæmic condition from eating and drinking, and that this caused fever while in a hospital after the accident, in no way tended to prove that plaintiff was not laboring under a total disability proximately caused by the accident.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 506; Dec. Dig. \S 185(2).]

6. TRIAL \S 350(6) — SPECIAL ISSUES — EVIDENTIARY FACTS.

In an action for personal injuries received at a railroad crossing, defendant's special issue "what was the distance from the crossing where the automobile attempted to cross to the caboose on the passing track?" requested on the theory that if the jury had found that there was from 60 to 70 feet of unobstructed track, it would be a finding that plaintiff was negligent, was properly refused; since it was an evidentiary fact to be considered by the jury with other facts, and in no event could be conclusive on the issue of negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 830; Dec. Dig. \S 350(6).]

7. TRIAL \S 260(2) — INSTRUCTIONS — REQUESTS — MATTERS ALREADY COVERED.

Where given charges contain all issues required to be submitted under the pleadings and evidence, the refusal of the court to give special charges requested is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 652; Dec. Dig. \S 260(2).]

8. RAILROADS \S 346(5) — INJURIES AT CROSSING — EVIDENCE — BURDEN OF PROOF.

In an action for personal injuries received at a railroad crossing, where there was nothing in plaintiff's pleadings to indicate that he was negligent, and nothing in his evidence to suggest it, the burden is on the defendant to prove contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1121; Dec. Dig. \S 346(5).]

9. APPEAL AND ERROR \S 82(14) — REVIEW — INVITED ERROR.

In an action for personal injuries received at a railroad crossing, where the pleadings and facts did not warrant the submission of the issue as to whether defendant was negligent in failing to ring the bell and blow the whistle 80 yards distant from the crossing, the error was invited by defendant's requesting its submission by offering a special issue to the same effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3604; Dec. Dig. \S 882(14).]

10. APPEAL AND ERROR \S 1062(2) — HARMLESS ERROR — REFUSAL OF ISSUE — CURE BY FINDING.

In an action for personal injuries received at a railroad crossing, error of the court in failing to submit question as to whether or not the driver of the automobile in which plaintiff was riding was the agent or under the control of the plaintiff, so as to charge plaintiff with his negligence in causing the accident, was harmless, where the jury found that the driver was not guilty of negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4213; Dec. Dig. \S 1062(2).]

11. NEGLIGENCE \S 93(1) — IMPUTED NEGLIGENCE.

Where plaintiff was injured at a railroad crossing while riding in an automobile, the negligence of his companion who was engaged in a joint enterprise with him could not be imputed to plaintiff.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 147, 148; Dec. Dig. \S 93(1).]

12. DAMAGES \S 134(1) — EXCESSIVE DAMAGES — PERMANENT INJURIES.

Where plaintiff was 40 years of age, was general manager of a telephone company, earning \$125 a month, and had been recently reduced from \$175 a month because his company was not making much money, that he had formerly earned \$200 a month, and was working for less money to build up the business of the company in which he owned stock and was interested, and

that he was seriously and permanently injured, a verdict of \$8,500 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 363, 386, 389-394; Dec. Dig. \S 134(1).]

Appeal from District Court, Pecos County; W. C. Douglas, Judge.

Action by R. T. Durrett against the Kansas City, Mexico & Orient Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

H. S. Garrett and C. E. Mays, Jr., both of San Angelo, and Williams & Jackson, of Ft. Stockton, for appellant. Howell Johnson and W. A. Hadden, both of Ft. Stockton, and Jones & Thurmond, of Del Rio, for appellee.

HARPER, C. J. This is an appeal from a judgment in favor of appellee for \$3,500 damages for personal injuries. Appellee charged the appellant with negligence proximately causing his injury in the following particulars:

(a) In placing a train of box cars along a side track so that same obstructed the view of the main line track and the engine being operated thereon, by one approaching the crossing along the public road from the direction which he was traveling, and the view of those operating said engine of persons approaching the crossing and about to use the same.

(b) Failure to sound the signals for said crossing, by whistle and bell, at least 80 rods from said crossing as required by law.

(c) Failure to give any warning of any kind of the approach of said engine toward said crossing and of the purpose to pass over the same therewith, notwithstanding the obstructions to the view occasioned by said train of cars.

(d) Failure to blow whistle and ring bell on the engine at least 80 rods from the crossing, and to keep the bell ringing until the crossing had been passed.

(e) Failure to keep a lookout for persons about to use the crossing.

(f) Failure to station a watchman at said crossing under the circumstances and conditions existing at the time.

(g) Propelling the engine over the crossing at an excessive and dangerous rate of speed under the existing circumstances.

Defendant answered that, at the time of the accident, the plaintiff and B. F. Greber were engaged in the inspection of certain telephone lines and being transported by automobile, and that they were guilty of negligence in driving upon its railway track at the time and under the circumstances. That the driver of the automobile was guilty of negligence in not keeping a proper lookout which was imputable to plaintiff, and further denied that its servants were guilty of negligence in the manner and way charged.

The first and second assignments charge

that it was error for the trial court to permit certain doctors to testify upon the trial of the case because by certain qualifying questions, in the absence of the jury, it was disclosed that they had on the night previous made an examination of the plaintiff for the purpose of enabling them to testify as witnesses, and not for the purpose of treating him professionally; that their testimony would be based upon this examination, therefore incompetent, etc.

[1] The interrogation of the witnesses revealed that, at an early period of plaintiff's injuries, they had made examinations, and that the purpose of the last examination was to make comparisons. They said that their testimony, if permitted to testify, would be based upon what they found, as well as what was said and done by the patient. If this was simply a question of whether a part of this testimony, afterwards given, was admissible, an objection to it at the time the questions were asked should have been sustained; but we have a very different question presented by these assignments. There is nothing here presented which disqualified the witnesses. Appellant, by proposition, suggests that the witnesses were under rule. The fact that a witness talks to another during the trial after the rule has been invoked does not disqualify him, but simply means that the court may, in the enforcement of the rule, refuse to permit him to testify, and this is within the sound discretion of the court.

[2, 3] Certainly, when the court had refused to enforce the rule as to these witnesses, their testimony as to what was found by their first examination and their opinions thereon, as well as what they found in the last examination, not based upon the statements or voluntary acts of plaintiff, would be admissible. And therefore, if there was any portion of their testimony not admissible, the objection should have been made at the time the questions were asked or after the witness had made his statement in motion to exclude, giving the reasons why any such was not admissible, thus giving the trial court a chance to rule upon the objections made. *M., K. & T. Ry. Co. v. Johnson*, 95 Tex. 409, 67 S. W. 768.

[4] The third, that Dr. Berry, a witness for plaintiff, was permitted to testify in reply to questions asked by plaintiff that he had testified for certain railroads in similar cases, was error, because immaterial etc., the propositions being that there had been no attempt to impeach the witness, nor his testimony attacked in any way; therefore it was error to admit evidence in support of his credibility.

The bill of exceptions shows that the defendant asked witness if he was to be paid by plaintiff for coming to court, and the amount of his fee, etc. We therefore think the questions and answers complained of do

not present reversible error, especially in view of the fact that we fail to see how such questions and answers could have or likely did affect the verdict. Other physicians testified fully as to the extent of plaintiff's injuries.

[5] The fourth:

"The court erred in refusing to permit the witness, Mrs. Parmeter, to testify that within two or three days after plaintiff went to the hospital at Fort Stockton he became in a toxæmic condition, due to eating and drinking and lack of bowel movement, and that this caused fever, but that said toxæmic condition responded to treatment, was rejected on the objections of the plaintiff that the witness was not qualified to testify, and which action of the court was error, because it was shown by the witness' testimony that she was qualified to testify as to such matter, and because said testimony was pertinent and material to show that the fever which the plaintiff had for the first few days after reaching the hospital was not due to the injuries he received or to any infection of the lungs or pleural cavity as contended by plaintiff, all as is more fully shown by defendant's exceptions reserved at the time."

From the evidence in the record, we could consistently hold that the witness was not qualified to express the opinion called for, but, if she were, we fail to see how the fact that the plaintiff "became in a toxæmic condition a few days after the accident from eating and drinking" tends to prove any matter urged as a defense. If we concede that the then fever condition was caused as suggested, such evidence in no way tends to prove that the plaintiff is not now laboring under total disabilities which were proximately caused by the accident.

The fifth charges error in refusing to give this special issue at the request of appellant:

"What was the distance from the crossing, where the automobile attempted to cross, to the caboose on the passing track?"

[6] The theory upon which this charge was requested is that, if the jury had found that there was 60 to 70 feet of unobstructed track along which the engine, which struck the machine in which plaintiff was riding, passed before it struck the automobile, it would be a finding that plaintiff was guilty of negligence, and upon it a judgment should have been entered for defendant. This was a closely controverted question of fact, but merely an evidentiary fact to be considered by the jury with other facts in evidence in arriving at their answer to the question propounded by the court as to whether plaintiff was guilty of negligence, and in no event could it be conclusive of the issue of negligence.

[7] The sixth, sixth-a, seventh, seventh-a, eighth, ninth, tenth, twelfth, fourteenth, nineteenth, twentieth, twenty-ninth, thirty-fifth, thirty-eighth, and thirty-ninth all complain of the refusal of the court to give special charges requested, and are overruled because the charge given contained all the issues required to be submitted under the pleading and evidence. The eleventh, twenty-first, twenty-second, twenty-sixth, twenty-

seventh, twenty-eighth, thirtieth, thirty-first, thirty-second, thirty-third in one form or another urge that the answers of the jury to the questions propounded are not supported by the evidence, are contrary to the evidence, etc.; in other words, they raise the question of the sufficiency of the evidence to support the verdict. The answer is that we find sufficient evidence to support the findings of the jury upon the material acts of negligence charged.

[8] The thirteenth urges that the court erred in charging the jury that the burden was upon the defendant to prove contributory negligence upon the part of plaintiff. There was nothing in plaintiff's pleadings to indicate that he was guilty of contributory negligence and nothing in his evidence to suggest it; but, on the other hand, he has, by the evidence of his witnesses, clearly shown that he was not so guilty; when such is the case, the burden is upon the defendant. *Railway Co. v. Shieder*, 88 Tex. 162, 30 S. W. 902, 28 L. R. A. 538.

[9] The fifteenth, sixteenth, seventeenth, and eighteenth are based upon objections of appellant to the questions submitted by the court upon the issue as to whether the defendant was guilty of negligence in failing to ring the bell and blow the whistle 80 yards distant from the crossing, upon the ground that the evidence did not warrant the submission of the question. We are of the opinion that the pleadings and facts called for the submission of the issue, but, if not, appellant requested its submission by offering a special issue to the same effect, and, if error, it was invited.

The twenty-third, twenty-fourth, and twenty-fifth are to the effect that there is no evidence to authorize the court's charge nor the verdict thereon upon the issue of actionable negligence because of excessive rate of speed at which the engine was being operated.

It could serve no purpose to quote the evidence, so we simply answer the assignments by saying that there is sufficient evidence to warrant the charge and to justify the verdict.

[10] The thirty-fourth and thirty-fifth charge that the charge of the court is "deficient and erroneous" because it failed to submit the question as to whether or not the driver of the automobile was the agent or under the control of the plaintiff, so as to charge plaintiff with his negligence in causing the accident. The court submitted the following:

"Was Gentry Murray guilty of negligence in connection with the collision of the engine and automobile in failing to discover the approach of said engine in time to have avoided the collision? Answer: No."

Murray was the driver of the machine which was hired by plaintiff. If he was not negligent it could make no difference whether he was the servant or agent of plaintiff

or not, and the jury found that he was not guilty of negligence.

[11] The thirty-seventh, thirty-eighth, thirty-ninth, and fortieth are that the court erred in refusing to submit to the jury the issue as to whether plaintiff and one Greber, who was also in the car at the time of the accident, were engaged in a joint enterprise, for the reason that in such case, if the jury so found, his negligence would be imputed to plaintiff. We know of no authority for such a proposition of law, and appellant has cited none.

[12] The forty-first is that the verdict for \$8,500 is excessive. The evidence shows that appellee, at the time of his injury, was 40 years of age; was secretary and general manager of a telephone company; his salary, at the time of his injury, was \$125 per month, and had been recently reduced because his company was not making much money. Prior to that time, his salary had been \$175 per month. He owned stock in the company and interest in it. Before coming to Ft. Stockton, his salary with those for whom he had been working was \$200 per month. The reason he was working for less money was that he was trying to build up the business of his company so as to get it upon a paying basis, that he was seriously and permanently injured. We think the evidence would sustain a much larger verdict.

The assignments are therefore overruled, and the cause affirmed.

HOUSTON TRANSP. CO. et al. v. TEXAS CO. (No. 7199.)

(Court of Civil Appeals of Texas. Galveston. May 1, 1916. Rehearing Denied May 25, 1916.)

APPEAL AND ERROR §66 — GROUNDS OF APPELLATE JURISDICTION—FINAL JUDGMENT BELOW.

No appeal will lie to the Court of Civil Appeals, where there has been no final judgment in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 329-331, 335-343; Dec. Dig. §66.]

Error from District Court, Harris County; Wm. Masterson, Judge.

Action by the Texas Company against the Houston Transportation Company and others, in which the defendant files a counterclaim. From a judgment for plaintiff, defendants bring error. Appeal dismissed for want of jurisdiction.

T. J. Lawhon, of Houston, for defendant in error.

LANE, J. The appellee the Texas Company brought this suit against the Houston Transportation Company and J. G. Tod, to recover upon eleven promissory notes executed and delivered by the Houston Transportation Company to appellee, and indorsed in

blank by J. G. Tod. J. G. Tod answered and averred that, if he was liable on said notes, he was only liable as indorser, and prayed that he have judgment over and against his codefendant for the amount of such judgment as may be rendered against him. The cause was called for trial on the 3d day of February, 1915, and thereupon all the parties agreed in open court that plaintiff's cause of action is predicated and based upon certain promissory notes, described in its petition; that said notes were executed and delivered to plaintiff by the Houston Transportation Company and John G. Tod, defendants; that said Houston Transportation Company is principal, and said John G. Tod is surety on said notes; and that plaintiff, the Texas Company, is entitled to have and recover of the defendants the Houston Transportation Company and John G. Tod, a joint and several judgment for the principal and interest due on said notes in the sum of \$2,151.39, and that the defendants and each of them should take nothing on their cross-action or counterclaim filed in the suit. Said agreement is recited in the body of the judgment rendered. The cause was submitted to the court, without a jury, upon said agreement. Judgment was rendered by the court for plaintiff against both defendants, jointly and severally, for the sum of \$2,151.39, and against defendants upon their cross-action; but no judgment was rendered in favor of the surety, John G. Tod, over against his codefendant as prayed for. From the judgment as rendered and entered, defendant Tod has appealed.

Appellee, by its attorney, T. J. Lawhon, has filed its brief in this court, wherein we find the following:

"We are not a partisan in taking the position that the judgment herein is not final and will not support this appeal. That we by inadvertence prepared judgment which, under the law, we feel cannot be upheld as final, is, to us, most regrettable.

"The court will note the judgment finds as a fact: 'That the defendants and each of them should take nothing on their cross-action or counterclaim filed herein.' And we were inclined to the opinion that this was a sufficient determination of all pleas and issues raised by the pleadings, but the Trammell-Rosen Case, 106 Tex. 132, 157 S. W. 1161, seems to settle this issue against us: 'To be final, the judgment should further contain the declaration of the court pronouncing the legal consequences of the facts found.'

"The judgment in this case finds, as a fact, that the defendants should take nothing on their cross-action and counterclaim, but the decree pronouncing the legal consequences of the facts is silent.

"Again, we sought consolation from that line of authorities which hold that a general judgment in favor of the plaintiff against the defendant by implication disposes of all questions raised by counterclaim or cross-action as much so as if expressly adjudicated in the judgment. This principle would be controlling here, if Tod were asserting a claim against the plaintiff; but such is not the case. He is asking relief against a codefendant, and, while the general

judgment in favor of the plaintiff against Tod, by implication, determines and adjudicates all questions between them, it could by no analogy or reasoning be extended to a determination of claims asserted by and between the codefendants.

"We therefore have not been able to satisfy ourselves that the judgment herein is final. The authorities cited, together with the numerous cases cited in those opinions, contain practically all leading cases in this state on the proposition when a judgment is or is not final."

As appellant Tod has filed no brief in this court, and as there has been no final judgment rendered in the court below, and as no appeal will lie to this court from a judgment not final, this appeal is dismissed for want of jurisdiction.

Dismissed.

ROARING SPRINGS INDEPENDENT
SCHOOL DIST. v. McABEE.
(No. 8388.)

(Court of Civil Appeals of Texas. Ft. Worth.
June 3, 1916.)

1. VENUE \S 22(1) — RESIDENCE OF DEFENDANT.

In a suit for a specific fund to which other litigants make claim, the venue of the action may be laid in any county in which any one or more of the proper or necessary defendants reside.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 35; Dec. Dig. \S 22(1).]

2. VENUE \S 27—RESIDENCE OR SITUS OF DEFENDANT—ASSIGNMENT AS AFFECTING VENUE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1830, providing that transfer or assignment of a chose in action shall not change the venue, in an action on contract against a school district in which the receiver of plaintiff's assignor is a party defendant, the school district may claim a transfer under article 1832 to the county of its situs notwithstanding nonresidence of such receiver.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 41; Dec. Dig. \S 27.]

Appeal from Wichita County Court; Harvey Harris, Judge.

Action by W. H. McAbee against the Roaring Springs Independent School District. Order denying defendant's plea of privilege and judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Decker & Clarke, of Quanah, for appellant. E. W. Napier, of Wichita Falls, for appellee.

CONNER, C. J. Appellee instituted this suit in the county court of Wichita county to recover an indebtedness of \$488.10, alleged to be due from the appellant, the Roaring Springs independent school district of Motley county, to R. S. Glenn, an architect, for plans and specifications of a public school building erected by the trustees of the district named. It was alleged that the board of trustees of the district had employed the said Glenn to prepare the said plans and had contracted to give him therefor the sum for which the suit was instituted, and that Glenn

had later duly assigned the claim to him, the plaintiff in the suit. One Lester Jones was also sued as the receiver of the partnership of Glenn Bros. & Ferguson, of which the said R. S. Glenn was a member. The school district presented its plea of privilege to be sued in Motley county, and also answered to the effect that the contract made with Glenn was invalid by reason of the fact that, at the time the contract was made with the architect for the erection of the school building, it had no funds with which to make the payment specified. The plaintiff in reply alleged in the alternative that the school district nevertheless later in fact erected the school building and used the plans prepared and furnished by Glenn, and that therefore the district was equitably obligated to pay the reasonable value thereof. The trial resulted in a denial of the appellant's plea of privilege, and in a judgment for appellee, evidently on his plea of quantum meruit, for the sum of \$400.

[1, 2] We think the action of the court in overruling appellant's plea of privilege to be sued in Motley county cannot be sustained. Appellant by virtue of the statute is a body politic, capable of suing and of being sued, and as such entitled to all of the rights of other litigants, among which is the right of being sued in the county of its existence and operation. Vernon's Sayles' Texas Civil Statutes, art. 1830, provides that "no person who is an inhabitant of this state shall be sued out of the county in which he has his domicile," except in the cases particularly mentioned. Numerous exceptions are then specified, but the only one by virtue of which it can be pretended that appellee was entitled to maintain his suit as against the appellant school district in Wichita county is exception 4 of the article, which reads:

"Where there are two or more defendants residing in different counties, in which case the suit may be brought in any county where any one of the defendants reside. Provided that the transfer or assignment of note or chose of action shall not give any subsequent holder the right to institute suit on such note or chose of action in any other county or justice precinct than the county or justice precinct in which such suit could have been prosecuted if no assignment of transfer had been made."

The proviso in exception 4 above quoted was added by an amendment of the Legislature in 1913, and was evidently intended to

meet grievous complaints theretofore arising on the part of litigants sued out of the county of their residence on allegations that the plaintiff, by assignment from a person resident in the county of the suit, owned the claim alleged to be due from the nonresident.

In the suit now before us no reasonable contention can be made that appellant was not entitled, as it alleged in its plea of privilege, to be sued in Motley county, other than as appellee attempted to show that the receiver made a defendant resided in Wichita county where the suit was instituted. Appellee alleged, as stated, that Lester Jones had been appointed a receiver of the partnership firm of which R. S. Glenn was a member, and further alleged that said receiver was claiming the fund for which appellee sued. But, as we construe the record, this is not the ordinary case of a plaintiff suing for a specific fund to which some other litigant asserts a claim and whose right thereto under equitable rules may be determined in the plaintiff's suit. In all such cases the rule in equity is that such claimants at least are proper parties, and in such cases we do not doubt that a plaintiff could file his suit in any county where any one or more of the necessary or proper parties resided; but here the plaintiff's suit is not for the recovery of specific property or of a specific fund, but is upon an alleged contract, express or implied, to pay for certain plans and specifications made and furnished by R. S. Glenn, and the right of the plaintiff to recover upon this contract, too, is expressly based upon an alleged transfer or assignment of the claim by R. S. Glenn to the plaintiff. The plaintiff, thus, as we think, is precluded from suing in Wichita county by the very exception to the general rule upon which alone he could under any circumstances claim the right to sue in Wichita county.

We conclude that the court should have sustained the appellant's plea of privilege, and should have, in accordance with the provisions of article 1832 of Vernon's Sayles' Texas Civil Statutes, transferred the cause to the county court of Motley county.

The judgment below will, accordingly, be reversed, and the cause remanded, with instructions to proceed in accordance with this opinion and of the statute last cited.

BUCK, J., disqualified and not sitting.

HIGHT v. MARSHALL. (No. 65.)

(Supreme Court of Arkansas. June 19, 1916.)

1. EVIDENCE §130 — ACTION FOR COMMISSION—SIMILAR FACTS.

In a real estate dealer's action for commission, testimony of defendant and other witnesses that he had listed the lands for sale with other real estate dealers at the price of \$13,800, offered in corroboration of defendant's contention that such was the price at which plaintiff was authorized to offer the land, was properly refused.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 403; Dec. Dig. §130.]

2. BROKERS §38(5)—INFIDELITY OF AGENT.

Where a landowner, listing it for sale with a broker, had intimated that if he could not secure the price named he would be willing to consider less, the broker's remark to a prospective purchaser that if the purchaser would let the broker work it out for him he might be able to buy it for a little less was not fraudulent conduct as a matter of law toward the landowner.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 34; Dec. Dig. §38(5).]

3. BROKERS §85(9) — GOOD FAITH — EVIDENCE.

In a realty broker's action for commission, where the landowner had intimated to the broker that if he could not secure the desired price he would be willing to consider less, the fact that the broker told the prospective purchaser that he might be able to buy it for a little less than the price first fixed was a circumstance for the jury's consideration in determining whether or not the broker had acted in good faith.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106, 111; Dec. Dig. §85(9).]

4. BROKERS §56(2) — REALTY BROKERS — RIGHT TO COMMISSION.

Where realty brokers procure a sale to be made without notice of revocation of authority, they are entitled to commission, though the sale is made directly by the owner to the purchaser procured by them, and their right does not depend upon the owner's knowledge that they brought about the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 85; Dec. Dig. §56(2).]

5. BROKERS §57(2) — REALTY BROKERS — RIGHT TO COMMISSION.

A landowner, who himself sold to a purchaser procured by a realty broker at a price satisfactory to himself, was liable to the broker for commission, though he had only authorized him to accept a higher price for the land, since under the circumstances the broker is deemed to have been the procuring cause of the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. §57(2).]

Appeal from Circuit Court, Crawford County; Jas. Cochran, Judge.

Action by W. H. Marshall against I. L. Hight. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

Sam R. Chew, of Van Buren, for appellant. Geo. F. Youmans, of Ft. Smith, and E. L. Matlock, of Van Buren, for appellee.

MCCULLOCH, C. J. This is an action instituted by appellee against appellant to recover commissions alleged to have been earned in the sale of certain real estate. Appellant resides at Mulberry, Crawford county,

Ark., and owned a tract of 276 acres of land in Oklahoma, only a short distance from Ft. Smith. Appellee is in the real estate business at Ft. Smith. The lands were listed with appellee, and, according to the testimony, he made considerable efforts towards procuring a purchaser. He showed the land to numerous prospective buyers, and finally showed it to W. L. Brett, who subsequently purchased the land directly from appellant. Appellee alleged in his complaint that he was authorized by appellant to sell the lands for \$13,000, and that he was to receive a commission of 5 per cent. of the purchase price. Appellant in his answer denies those allegations, but alleges, on the contrary, that he authorized appellee to sell the land for \$50 per acre, or \$13,800, and agreed to pay him the sum of \$500 as commission if he made the sale at that price, but that appellee failed to make the sale and that he (appellant) sold the land himself to Brett. The case was tried before a jury, and a verdict was rendered in appellee's favor for the recovery of the sum of \$500.

Appellee testified that after appellant listed the land with him for sale at the price of \$13,000, he showed the property to numerous parties, and that one day appellant approached him and urged him to make a sale, and intimated that he might take less than the price he had already named; that shortly afterwards he began negotiations with Brett, and early one morning took Brett out to see the place, and that on the return he gave Brett, at the latter's request, the name and address of the owner. It seems that on the afternoon of that same day, Brett, without appellee's knowledge, drove over to Mulberry to see appellant, and they verbally closed the trade at the price of \$12,000, which was consummated two or three days later. The evidence does not show that appellant knew, at the time he made the oral agreement with Brett, that appellee had taken Brett out to see the land, or had otherwise negotiated with him. Appellee testified that the next day a man named Steward, who was appellant's tenant on the place, called at the hotel and left word for him not to take any further steps towards selling the land, and that he thereupon called appellant over the telephone and had a conversation with him about the matter. He undertakes to detail that conversation, and from it it appears that appellant made evasive statements, and was endeavoring to conceal the fact that he was about to close the trade with Brett. Appellee notified him, however, that he had taken Brett out to see the lands, and that he would claim a commission. Brett testified that appellee did not give him the name of the owner, but that he ascertained the name of the owner from Steward, the tenant on the place, when he was looking at it. He also testified that on the return trip to Ft. Smith, after he and appellee had

been out to look at the place, he told appellee that he would not be willing to give \$13,000 for the place, and that appellee made the following statement to him:

"If you will let me work it for you I might be able to buy it for a little less."

[1] Appellant offered to prove by his own testimony and that of other witnesses that he had listed the lands for sale with other real estate dealers at the price of \$13,800. This testimony was offered in corroboration of appellant's contention that that was the price at which appellee was authorized to offer the land, and that he was not authorized to sell at a lower price. The court was correct in refusing to permit the testimony to be introduced, for it related to transactions between appellant and other parties, and was without probative force in establishing the terms of the contract between the two parties to the present controversy.

[2, 3] It is insisted very earnestly by counsel for appellant that appellee was guilty of infidelity to his principal, which ought to prevent him from recovering commission. It is claimed that his statement to Brett was a breach of his duty to appellant. In that it was his duty to secure the highest price he could get for the land, and that he had offered to serve the prospective purchaser in trying to get the price down as low as possible. We do not think, however, that if the testimony of Brett be accepted as true, it necessarily makes out a case of fraudulent conduct on the part of appellee. It must be borne in mind that according to appellee's testimony appellant had intimated to him that if they could not secure the price named (\$13,000), he would be willing to consider a lower price; and, if appellee made the remarks to Brett accredited to him, it was perfectly consistent with good faith in taking up the matter again with appellant to ascertain whether or not he would take less than the sum named. The statement does not manifest a willingness on the part of appellee to neglect the interests of his principal and to turn to the service of the prospective purchaser. The question of fraud on the part of appellee was, however, submitted in two instructions, one of which (No. 6) was given in the form requested by appellant, and the other (No. 2) was given with a modification. Instruction No. 2, as requested by appellant, reads as follows:

"The law requires that plaintiff, as the agent or broker of the defendant, shall act in absolute good faith towards the defendant; and, if you believe from the evidence that plaintiff stated to the purchaser, Mr. Brett, that the lands could be bought for a less price than defendant had agreed with plaintiff to take; that if he, plaintiff, was given time he could procure the lands at a less price from defendant for Mr. Brett—then, in that event, plaintiff's actions were, in law, fraudulent towards defendant, and your verdict must be for the defendant."

The court modified it by striking out the words "were in law fraudulent towards de-

fendant, and your verdict must be for the defendant," and by adding the words "may be considered by you in determining whether he acted in good faith." The modification was correct, because, as we have already said, it was improper to tell the jury that if appellee made the statement to Brett attributed to him, it would constitute fraud which would prevent recovery. It was only a circumstance to be considered by the jury in determining whether or not appellee had acted in good faith.

[4] It is contended also that appellee ought not, in any view of the testimony, to be permitted to recover, for the reason that appellant sold the land in good faith to Brett without knowledge of appellee's previous negotiations with Brett. The law on this subject is, however, settled by the decision of this court against appellant's contention, in *Stiewel v. Lally*, 89 Ark. 195, 115 S. W. 1134, where we held that if real estate brokers procured a sale to be made without notice of revocation of authority, they were entitled to recover commission even though the sale was made directly by the owner to a purchaser procured by the brokers, and that their "right to recover commission did not depend upon knowledge upon the part of the owner that they had brought about the sale." The instructions of the court conform to the law stated by this court on the subject.

[5] Appellant asked the court to instruct the jury to the effect that, unless appellee produced a purchaser "ready, willing, and able" to buy the lands on the terms and at the price which appellant had authorized appellee to accept, there could be no recovery; but the court modified the instruction so as to permit a recovery on the price and terms which appellant fixed in his direct trade with Brett. The evidence showed that the reduction of the price was voluntarily made by appellant. In other words, he sold to a purchaser procured by appellee; and at a price which was satisfactory to himself, and therefore he is liable for the commission. Appellee is, under those circumstances, deemed in law to have been the procuring cause, and is entitled to the commission. *Stiewel v. Lally*, supra.

We are of the opinion that the case went to the jury upon conflicting evidence and upon correct instructions, and that the issues have been settled by the verdict of the jury. We find no prejudicial error in the record, and the judgment is therefore affirmed.

WATSON v. STATE. (No. 67.)

(Supreme Court of Arkansas. June 19, 1916.)

1. LARCENY—§80(5)—INDICTMENT—DESCRIPTION OF PROPERTY—CATTLE.

A larceny indictment describing the property merely as "one cow the property of" a certain person is sufficient, although not good practice.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 69; Dec. Dig. §80(5).]

2. LARCENY \S 64(7)—EVIDENCE—SUFFICIENT—CY—ASPORTATION.

In larceny trial, evidence of disappearance of two cows and their being found at or near accused's house with marks freshly changed to accused's own mark, held sufficient to sustain conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. \S 177; Cent. Dig. \S 64(7).]

3. LARCENY \S 55—EVIDENCE—CIRCUMSTANTIAL AND DIRECT.

All the elements of the offense of larceny may be established by circumstantial evidence, and unexplained possession of recently stolen property will sustain conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. \S 152, 164, 165, 167-169; Dec. Dig. \S 55.]

Appeal from Circuit Court, Lafayette County; Geo. R. Haynie, Judge.

Manuel Watson was convicted of grand larceny, and appeals. Affirmed.

Warren & Hamiter, of Lewisville, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. [1] Appellant was convicted of the crime of grand larceny, alleged to have been committed by stealing a cow, the property of G. H. Chisholm. There was a demurrer to the indictment, which was overruled by the court, and it is suggested by appellant's counsel in the brief that there was error of the court in that respect; but no reason is stated why the indictment was insufficient, and we are unable to discover any. The indictment followed the language of the statute, and the only suggestion about a defect is as to the description of the property merely as "one cow, the property of G. H. Chisholm." The better practice is, of course, to give a more specific description of the property in an indictment for larceny; but we think that the general description of the animal was sufficient. *State v. Parker*, 34 Ark. 158, 36 Am. Rep. 5; *Atchison v. State*, 90 Ark. 457, 119 S. W. 651.

The only ground really urged here for reversal is that the evidence was insufficient to sustain the verdict. It is contended that the evidence is not sufficient to prove the asportation so as to make out the crime of larceny.

[2] Chisholm bought two cows from one Rowan, who lived about $2\frac{1}{4}$ miles distant from appellant. The cows were turned into the range by Chisholm, and something more than a month later they disappeared from the range. Chisholm went to look for the cows, and as he passed appellant's house he observed one of his cows standing out in the lane next to appellant's cow pen, with her head turned towards the pen, and a calf was on the inside of the pen. The teats of the cow showed foam on them as if the calf had just been sucking, and the cow's ears were freshly marked; there being freshly dried blood on the ears showing that the marks were fresh. When the two cows were

turned out, each of them was marked in Rowan's mark, which was an underbit in the right ear, and the mark of this cow was changed to an underslope in the left ear and a crop and split in the right ear. There was evidence tending to show that the mark in which the cow was found was that of the appellant; that is to say, that his mark was an underslope in the left and a crop and a split and an underbit in the right. He undertook to prove by his own testimony and that of other witnesses that it was his mother's mark, and that his mark was an underslope in the right and a crop and a split and an underbit in the left—the same marks, except that they were in different ears.

Chisholm testified that, while he was standing looking at the cow, appellant walked up from the direction of his mother's house, and that he (witness) addressed appellant, saying, "Manuel, I see my cow is here." And appellant replied, "Yes, Doctor, is that your cow?" He stated, also, that appellant claimed that his children had driven the calf into the lot. Witness stated that he called appellant's attention to the fact that the cow was freshly marked, and that appellant replied: "Well, Doctor, she has been; but I didn't do it." Witness stated that he then asked appellant about the other cow, and that the latter replied that he knew the cow, but that she had not been there about his place. Witness then went out in search of the other cow, and the dogs started her, and she ran back up to appellant's house and was found to be marked the same as the other cow; that is to say, that the mark had been changed into appellant's mark.

[3] We are of the opinion that the evidence is sufficient to prove the taking and carrying away of the cow so as to make out the complete offense. It is not altogether clear from the record which one of the cows the state intended as the subject of the charge, and there was no question raised on that point below; but we think the evidence was sufficient to show that the crime was complete as to either one of the cows. All the elements of the offense may be established by circumstantial evidence. *Fletcher v. State*, 97 Ark. 1, 132 S. W. 918. We have held, in testing the legal sufficiency of evidence, that unexplained possession of recently stolen property is sufficient to sustain a conviction.

The incriminating circumstances are that the two cows disappeared from the range and were both found at or near appellant's house, with marks freshly changed to appellant's own mark. One of the cows was found at his house with her calf in the lot, and the other cow ran to his house as soon as she was started by the dogs. The two cows were running together, and the circumstances show that they were both kept at appellant's house. We think that those cir-

circumstances are sufficient to establish the fact that appellant took the cows up from the range and carried or drove them to his house and put them up and marked them.

The state had the right to prosecute either for the larceny or for the marking with intent to steal.

Judgment affirmed.

CHICAGO, R. I. & P. RY. CO. et al. v. JONES. (No. 68.)

(Supreme Court of Arkansas. June 19, 1916.)

1. RAILROADS \S 398(1)—INJURIES ON TRACK—SUFFICIENCY OF EVIDENCE.

In suit against a railroad for death on its track, evidence held sufficient to warrant finding that decedent did not leave the track from the time the whistle first blew for a station until he was struck by the train; that he was walking upon the track with his head "drooped."

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1356, 1363; Dec. Dig. \S 398(1).]

2. RAILROADS \S 376(2)—INJURY ON TRACK—DUTY TO TRESPASSER.

The mere fact that decedent was seen by the engineer and fireman of a locomotive walking along the track half a mile away, where he continued until he was struck by the engine, did not render the road liable, as decedent under the circumstances was a trespasser to whom the road owed no duties until his employees discovered, or by the exercise of ordinary care could have discovered, that he was in a perilous situation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1276; Dec. Dig. \S 376(2).]

3. RAILROADS \S 376(1)—INJURIES ON TRACK—NEGLIGENCE.

Where decedent walking along the railroad track had nothing in his appearance indicating that he would not get off, which he did in fact, the engineer and fireman of the road's locomotive were not negligent in failing to sound the alarm or slow down or stop the train to prevent injury to decedent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1275, 1278; Dec. Dig. \S 376(1).]

4. RAILROADS \S 400(1)—INJURIES ON TRACK—QUESTION FOR JURY.

In an action against a railroad for death on a track, whether plaintiff's witness could have seen that decedent was walking with his head down, so that he did not see the train, was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1365, 1367; Dec. Dig. \S 400(1).]

5. RAILROADS \S 398(1)—INJURIES ON TRACK—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for death on its track, evidence held sufficient to warrant jury in concluding that decedent was oblivious of the rapidly approaching train, and that the road's servants discovered, or might have discovered, his condition by the exercise of ordinary care in time to have prevented the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1356, 1363; Dec. Dig. \S 398(1).]

6. RAILROADS \S 390—INJURIES ON TRACK—LIABILITY OF ROAD.

Where decedent walked on a railroad track toward the road's train unaware of its approach or incapable of caring for himself and avoiding danger, and the engineer saw him and by keeping a constant lookout should have discovered his condition and danger in time to have warned him of the approach of the train or to have

stopped it by the use of ordinary care, which he negligently failed to do, the road was liable, though decedent was wrongfully on the track and guilty of negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1324, 1325; Dec. Dig. \S 390.]

7. RAILROADS \S 376(1)—INJURIES ON TRACK—DUTY OF ROAD.

Where decedent was walking on or near a railroad track toward an approaching train apparently aware of its approach, there was no duty on the part of the operatives of the train to sound any alarm, or attempt to stop or slow down until it was apparent that decedent did not know the train was coming, or, knowing that, had determined upon putting himself in its way or was incapable of appreciating the danger and avoiding it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1275, 1278; Dec. Dig. \S 376(1).]

8. TRIAL \S 260(1)—INSTRUCTIONS ALREADY GIVEN.

Prayers for instructions fully covered by charges given were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 651; Dec. Dig. \S 260(1).]

Appeal from Circuit Court, Perry County; Robt. J. Lea, Judge.

Suit by R. A. Jones, administrator, against the Chicago, Rock Island & Pacific Railway Company and others. From a judgment for plaintiff, defendants appeal. Judgment affirmed.

This was a suit instituted by the appellee, as administrator of the estate of T. W. Edmondson, deceased, against the appellants, to recover damages for the benefit of the widow and next of kin for the alleged negligent killing of Edmondson.

The complaint alleged that Edmondson was walking on the track of appellant along a pathway which was a regular and customary pathway for pedestrians; that appellant's train was in charge of Michael Mann, as engineer, who suddenly and violently ran the train upon Edmondson, killing him; that the killing was the result of a failure of Mann and other employees on the train to keep a lookout as required by the statute; that if such lookout had been kept they could have discovered Edmondson's perilous situation on the track in time to have avoided killing him. The appellant denied the allegations of negligence and set up the defense of contributory negligence.

The testimony on behalf of the appellee tended to show that Edmondson, on the morning of the killing, was intoxicated; that he had his gun and shells, and in this condition was walking upon appellant's track going west from the town of Houston; that appellant's track west from the town of Houston was straight for about a mile. The attention of a witness was attracted by the blowing of the train whistle for the station before the train came in sight. Witness observed Edmondson walking on the track towards the west. The train was approaching him and got so close to him that it threw a shadow over Edmondson, and witness could

not see him; but almost immediately afterwards he saw him go up in the air. Edmondson was on the mound between the rails just before he was struck. Witness had been watching him for some time before he was hit and did not see him step off of the track before he was struck. Edmondson was about a half mile west of the depot when he was hit, and the track was clear for half a mile beyond where Edmondson was. The track at that point was downgrade towards Houston. Witness did not hear any ringing of a bell or any alarm whistle until the back-up whistle after the accident occurred. It was a little hazy that morning, and the wind was blowing; but witness could see the man on the track. The only whistle that witness heard was the station whistle. Witness did not observe any indications that Edmondson was aware of the approach of the train.

Another witness for the appellee testified that he was at the depot on the platform at Houston and witnessed the accident in which Edmondson was killed. He saw Edmondson walking up the track, and as the train approached him witness watched him more closely, and continued to watch him until he was hit. Edmondson was "walking along up the track with his head down." He never got out from between the rails from the time witness first saw him until he was struck. Witness heard the train whistle for the station before it came in sight. Witness could see something like three-quarters of a mile up the track. The train did not whistle after it whistled for the station until it sounded three back-up whistles after the accident occurred. Edmondson did not seem to be aware of the danger. Just before he was struck, or about the same instant, he seemed to get a little to the right. No bell was ringing. Witness watched Edmondson all the time after the train came in sight, and he remained on the track until he was killed. Witness' attention was attracted to the "condition he (Edmondson) was walking." Witness "thought he was sick, or that something was the matter." Witness could not see "whether he had his hat pulled down over his eyes, but could see he had his head drooped."

It was shown that the people usually walked along the center of the track at this point; that such was the custom. They could walk along the side of the track if they wanted to. One witness testified that:

"West from the point where Edmondson was struck there is a straight unobstructed view for about half a mile. There is nothing to keep the engineer from seeing a man coming up the track. The track is straight for a mile west of the depot.

There was testimony tending to show that when Edmondson was struck he was carried from 40 to 45 feet.

The testimony of the engineer and fireman, who were on the train at the time Edmondson was killed, tended to show that they saw a man coming up the center of the

track before the whistle was blown for the station. They got in about two telegraph poles from the man, and started to blow the whistle, when the man stepped off of the track. The engineer's view was then cut off by his engine; he had a large boiler. In a second after the engineer lost sight of the man, the fireman said to him: "Stop! That man started to walk over the engine." The engineer put on the emergency and stopped as quick as he could. His train went about 800 or 900 feet before it stopped. When he first saw the man on the track, he was something like four telegraph poles ahead of the engine, and as the engine approached him he stepped off on the fireman's side, and did not get back on the track until after the view of the engineer was cut off by his engine. The engineer did not know that he was struck until his fireman jumped down and threw up his hands. The man was walking towards the engine, and there was nothing in his appearance to indicate that he would not get off, and he did get off.

The fireman testified:

"When we got about two pole lengths from him, or maybe three, he stepped out from between the rails and got down from the ends of the ties. When we got down closer, he got over further to the bank, and, just before we got to him, he took two or three steps up towards the ties, and the pilot beam hit him. We were just two or three steps from him, right on him, when he stepped in front of the train. He had his face towards us, looking up the track."

The court instructed the jury:

"If you find from the evidence that the deceased was walking on the track of the defendant railway company towards the train, and that he was unaware of its approach, or was incapable from any cause of caring for himself and avoiding the danger, if any, and was in a perilous position, and if you find that the engineer in charge of the engine saw him on the track, and, by keeping a constant lookout ahead, should have discovered his perilous condition and danger in time, by the use of ordinary care and prudence, to have warned him of the approach, or, if necessary, to have stopped the train, and could have prevented the injury, and that he negligently and carelessly failed to do so, and that by reason thereof deceased was injured and death resulted, * * * the verdict will be for the plaintiff, even though you find the deceased was wrongfully on said track and guilty of negligence on his part."

And the court, at the request of appellant, instructed the jury to the effect that, if Edmondson was walking on or near the railroad track towards the approaching train and apparently aware of its approach, there was no duty on the part of the operatives of the train to sound any alarm, nor to attempt to stop the train, or cause it to slow down, until such time as it became apparent that the deceased did not know that the train was coming, or, knowing that, had determined upon putting himself in the way of the train for the purpose of letting it strike him, or was incapable from any cause of appreciating the danger and avoiding it. And, further, that if Edmondson stepped off of the railroad track and was walking in a place where he would not be struck by the train as

it passed him, and that just as the train reached the point where he was walking he stumbled or stepped close enough to get struck by the engine, and thus was killed, neither the defendant Mann nor the railway company was liable, and their verdict should be in favor of both the defendants. And, further, that neither the railway company nor Mann, the engineer, was liable if Mann acted as an ordinarily prudent person would have acted under the circumstances after seeing Edmondson on the track coming towards the train. And, further:

"The mere fact that the deceased, Edmondson, was struck and killed, does not entitle the plaintiff to a verdict at your hands; but, before either of the defendants is held liable, the engineer must have been guilty of negligence as defined in these instructions."

The court refused to give appellants' prayer for a directed verdict in their favor. The court also refused appellants' prayers to the effect that appellant railway company's engineer and fireman were under no duty to stop the train or check its speed or sound the alarm because they discovered a person walking on or near the railroad track; that they had a right to presume that such person would get out of the way of the train without danger to himself, and to act on this assumption; and that the defendant would not be liable for any failure on the part of the operatives to stop the train or sound a warning unless such operatives discovered, in time to have avoided the accident, that the deceased did not know the train was coming or that, knowing it, he determined to put himself in the way of the train.

From a judgment in favor of the appellee, this appeal has been duly prosecuted.

Thos. S. Buzbee and H. T. Harrison, both of Little Rock, for appellants. T. N. Robertson, of Little Rock, and E. H. Timmons, of Perry, for appellee.

WOOD, J. (after stating the facts as above). [1] The testimony of appellant's engineer and fireman shows that they were keeping a lookout, and that they saw Edmondson on the track, but that he left the track, and then again stepped upon it so suddenly that they did not have time, after doing all in their power to stop the train, to prevent the same from killing Edmondson. But the testimony on the part of appellee warranted the jury in finding that Edmondson did not leave the track from the time the whistle first blew for the station until he was struck by the train; that he was walking upon the track, with his head "drooped."

If Edmondson did not leave the track from the time appellee's witnesses discovered him walking on the same until he was struck by the train, then the engineer and fireman saw, or could have seen, his perilous situation in time, by the exercise of ordinary care, to have prevented injury to him, for the

witnesses for appellee testified that their attention was drawn by the whistling of the train for the station, when they noticed that there was a man walking on the track approaching the train; that the whistle sounded before they could see the train; and that when the train came in full view Edmondson was about half a mile from it. Therefore, if the testimony of the witnesses for the appellee was true, the engineer and fireman saw, or by the exercise of ordinary care could have seen, Edmondson upon the track in ample time to have avoided injuring him if he had remained on the track; yet they say that he left the track and returned to it so suddenly that it was impossible for them to have prevented killing him.

[2] It will thus be seen that there was a sharp conflict in the evidence as to whether Edmondson left the track at all after he was seen by the engineer and fireman, and the jury were warranted in finding that he did not leave the track. Therefore, giving the evidence its strongest probative force in favor of the appellee, it must be accepted as an established fact that Edmondson was seen, or could have been seen, by the engineer and fireman for a distance of half a mile walking upon appellant's track, and that he continued on the track until he was struck by the engine. Nevertheless this fact alone would not render the appellant liable, for in walking upon appellant's track Edmondson, under the circumstances, was a trespasser, and appellant owed him no duty until its employees discovered, or by the exercise of ordinary care could have discovered, that he was in a perilous situation.

[3] Appellant's engineer and fireman testified that there was nothing in Edmondson's appearance to indicate that he would not get off of the track, and that he did get off, and, if this testimony were true, of course appellant's servants were not negligent in failing to sound the alarm, or slow down, or stop the train in order to have prevented the injury. But here again there was a sharp conflict in the evidence. The testimony of a witness on behalf of the appellee was that Edmondson was "walking along up the track with his head down"; that he had his head "drooped." Witness thought from this that he was sick, or something was the matter.

[4-7] Counsel for the appellant contends that this testimony was contrary to the physical facts and should not have been believed by the jury in contradiction of the testimony of appellant's witnesses to the effect that Edmondson was walking with his eyes open right in the face of the advancing train, and in contradiction of the testimony to the effect that he had good eyes and ears, and therefore must have been aware of his danger. But we cannot say as a matter of law that it was impossible for the appellee's witness to have seen that Edmondson was walking with his head down. This was a ques-

tion for the jury. Accepting the testimony of this witness on behalf of the appellee, the jury were warranted in concluding that Edmondson was oblivious of the rapidly approaching train, and that the appellant's servants discovered, or might have discovered, his condition by the exercise of ordinary care in time to have prevented the injury. These were issues of fact, and they were submitted under instructions which correctly declared the law as announced in many decisions of this court. See *Railway Co. v. Wilkerson*, 46 Ark. 513; *Memphis, Dallas & Gulf Ry. Co. v. Buckley*, 99 Ark. 422, 138 S. W. 965, and cases cited; *St. L., I. M. & S. Ry. Co. v. Scott*, 102 Ark. 417-421, 144 S. W. 917; *St. L. & S. F. Ry. Co. v. Newman*, 105 Ark. 284-288, 289, 151 S. W. 255; *St. L., I. M. & S. Ry. Co. v. Morgan*, 107 Ark. 202, 218, 219, 154 S. W. 518.

[8] Appellant's prayers for instructions which the court refused were fully covered by those given.

The judgment is therefore correct, and it is affirmed.

ROBERTSON et al. v. JOHNSON. (No. 53.)

(Supreme Court of Arkansas. June 12, 1916.)

1. TAXATION §534 — TAX SALES VOID FOR MISTAKE OF COLLECTOR.

An attempt to pay taxes, made in good faith by landowner or his agent and frustrated by mistake, negligence, or other fault of the collector, renders the subsequent sale of land for nonpayment of taxes void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 990; Dec. Dig. §534.]

2. TAXATION §530 — PAYMENT OF TAXES — MISTAKE OF COLLECTOR—EFFECT ON TAX SALES.

Where agent of landowner paid taxes at collector's office and took receipt from person in charge, it being shown by testimony of collector and his deputy that at times they left another person in charge with authority to collect taxes and issue receipts, *held* payment was made to collector, and mistake of description in issuing the receipt, resulting in the sale of lands for taxes, rendered the tax sale void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 985, 988; Dec. Dig. §530.]

3. TAXATION §580—TAX SALES—VACATION—MISTAKE OF COLLECTOR.

A tax sale of lands, caused through mistake of the collector in crediting the payment of taxes to the wrong description, will be set aside, notwithstanding the failure of the collector to collect the penalty prescribed by Acts 1909, p. 783, § 1, for failure to pay taxes within 30 days after the first Monday in October.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 985, 988; Dec. Dig. §580.]

Appeal from Mississippi Chancery Court; C. D. Frierson, Chancellor.

Action by David F. Johnson against J. T. Robertson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. D. Gravette, of Blytheville, for appellants. P. A. Lasley, of Blytheville, for appellee.

HART, J. This action was instituted in the chancery court by appellee against appellants under section 1 of Act 262 of the Acts of 1909. The object of the suit was to vacate and set aside a decree ordering the land sold for the nonpayment of levee taxes, upon the ground that the owner had paid the taxes on the land for the year for which it was sold. The material facts are as follows: The appellee, D. F. Johnson, a resident of the state of Illinois, in December, 1906, purchased for the sum of \$2,400 the N. ½ of the N. E. ¼ of section 19, township 15 north, of range 11 east, containing 80 acres, in Mississippi county, Ark. He at once went into possession of the land through his tenants, and is still in possession of it. J. B. Fields, a resident of Mississippi county, was his agent, and paid taxes on the land for him. On November 15, 1911, Fields went to the office of the collector and notified the person in charge of the office that he wished to pay the levee taxes on Johnson's land in section 19, and the person in charge of the office gave him a receipt on the regular printed form used by the collector, but in it, by mistake, described the land as the south half instead of the north half of the section. Fields paid to the person in charge of the office the amount of taxes which he stated was due on the land. Johnson had no other land in said section 19 or in Mississippi county. Fields testified that he told the person in charge of the collector's office that he wanted to pay the levee taxes on his own land and on that of Mr. Johnson, and that he does not think he told him the numbers of the land, but is positive he told the particular section the land was in. The collector and his deputy both testified that the receipt was not in their handwriting but they stated that the receipt was on the regular printed form used by them in collecting levee taxes, and that sometimes they left other parties in charge of the office, with authority to issue receipts and collect the levee taxes. The lands of Johnson were returned as delinquent, and proceedings were had under the statute to collect the taxes by suit. R. A. Nelson became the purchaser at the sale, and subsequently a deed, properly acknowledged by the commissioner appointed to sell the land under the decree, was executed and presented to the chancellor, who examined and approved the same. The deed from the commissioner to the tax purchaser was duly recorded. Subsequently Nelson sold the land to J. T. Robertson. Robertson paid part of the purchase money in cash, and gave his note for a part of it. Nelson transferred the note to J. M. Wilhite. Johnson instituted this action in the chancery court within three years after the rendition of the final decree in the suit to collect the delinquent taxes against his land, and Robertson, Nelson, and Wilhite are all made parties to the action. Nelson executed a warranty deed

to Robertson for the land. The chancellor found that Nelson was financially able to carry out his warranty contained in his deed, and was also of the opinion that the sale for the nonpayment of taxes made by the commissioner should be set aside because the taxes had been paid by the agent of Johnson. A decree was therefore entered, canceling the tax sale and divesting out of the defendants any interest in the land and vesting the title thereto in the plaintiff. It was also decreed that the plaintiff pay the costs of the action and reimburse Nelson the amount of the purchase price paid by him for the land, together with 6 per cent. interest thereon from the date of the purchase. The defendants have appealed.

[1] It is the settled rule in this state that an attempt to pay taxes, made in good faith by the landowner or his agent, and frustrated by the mistake, negligence, or other fault on the part of the collector, renders the subsequent sale of the land for the nonpayment of taxes void. *Hickman v. Kempner*, 35 Ark. 505; *Gunn v. Thompson*, 70 Ark. 500, 69 S. W. 261; *Scroggin v. Ridling*, 92 Ark. 630, 121 S. W. 1053; *Knauff v. National Cooperage & Woodenware Co.*, 99 Ark. 137, 137 S. W. 823.

[2] It is insisted by counsel for the defendants that in the first place the payment was not made to the collector or his deputy. The payment was made by the duly authorized agent of Johnson. He went to the collector's office and paid the taxes to the person left in charge of the tax books, and received a receipt on the regular printed form used by the collector. While the collector and his deputy testified that the receipt was not in their handwriting, they admitted that at times they left another person in charge of the office, with the power to collect taxes and issue receipts therefor. Under these circumstances we think the payment was made to the collector.

[3] It is next insisted that, the payment having been made on November 15th, the collector could not receive the taxes without the penalty, and that, no penalty having been paid by the plaintiff, there could be no valid payment of the taxes. It is true that under Act 262 of the Acts of 1909 (Acts of 1909, p. 783) the collector is required to proceed to collect the assessments on the first Monday of October in each year, and if said assessments are not paid within 30 days, a penalty of 25 per cent. shall at once attach for such delinquency. While the 30 days had expired on November 15th, and the penalty had attached, still the collector was authorized to receive the taxes. The tax books properly made out and duly certified to the collector constituted his warrant for the collection of taxes. The collector was the legal custodian of the tax books, which contained a correct description of all the lands in his county and the amount of taxes assessed

against them. The collector is supposed to familiarize himself with the numbers and descriptions of the lands in his county. It is his duty to inform the landowner of the amount of taxes and penalty against his land, and it is not right for an error or mistake on the part of the collector in this respect to aid in depriving the owner of his land. Here the landowner by his agent went to the office of the tax collector and offered to pay him all the taxes assessed against his land. He told the person in charge of the office and of the tax books the section in which the land was situated. The lands were assessed in the name of the owner, and the tax books showed this fact. He paid the amount demanded, and by mistake of the collector, the amount was credited to an adjoining tract. The landowner did all that was required of him. He made a bona fide attempt to pay all the taxes assessed against his land, and his acts, under the circumstances, should stand as the equivalent of actual payment. This is in application of the principles decided in our own cases cited above and of the almost universal rule which substitutes a tender for performance when the tender is frustrated by the act of the party entitled to performance. It was the official duty of the person in charge of the collector's office to have stated to Fields, who applied on behalf of Johnson, in good faith, to pay all the taxes on the land, the entire amount of all the taxes and penalty against it. The failure of Johnson under these circumstances to pay the penalty was not his fault, but its nonpayment was owing to the mistake or failure of the collector to perform his duty. For these reasons we hold that the plaintiff was entitled to the relief granted him by the chancellor. See *Bray & Choate Land Co. v. Newman*, 92 Wis. 271, 65 N. W. 494; *Laird v. Hlester*, 24 Pa. 452.

The law and equities are all with the plaintiff, and the decree will be affirmed.

WILSON v. STATE. (No. 77.)

(Supreme Court of Arkansas. June 19, 1916.)

1. INTOXICATING LIQUORS §236(11)—CRIMINAL PROSECUTIONS—EVIDENCE—SUFFICIENCY.

In prosecutions for illegal sales of intoxicating liquors a felony, where two witnesses testified in each case to a sale, evidence held sufficient to support a conviction.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 313-315; Dec. Dig. § 236(11).]

2. CRIMINAL LAW §742(1) — TRIAL — QUESTION FOR JURY.

In a criminal case the credibility of a witness is for the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1719; Dec. Dig. § 742(1).]

3. CRIMINAL LAW §507(1) — EVIDENCE — TESTIMONY OF ACCOMPLICES—STATUTE.

Under Kirby's Dig. § 2384, providing that conviction cannot be had in case of felony upon

the testimony of an accomplice unless corroborated by other evidence and the corroboration is not sufficient if it merely shows that the offense was committed, where a witness assisted accused in the purchase of intoxicating liquors, confining his participation in the transaction exclusively to the buying and not to the selling, he is not guilty of any offense, and is not an accomplice in the sale.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082, 1084, 1087, 1091, 1095; Dec. Dig. § 507(1).]

4. CRIMINAL LAW § 1206(1)—PUNISHMENT—CONSTITUTIONAL LAW.

Acts 1915, p. 98, § 2, prohibiting the manufacture, sale, or giving away of intoxicating liquors, and section 3, making a violation of the act a felony, imposing a penalty of imprisonment in the state penitentiary for one year, and that no court shall suspend a sentence or permit a plea of guilty to be entered, and continue the cause for a second offense, are not unconstitutional as not providing varying degrees of punishment, since the Legislature has the authority to define a fixed punishment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3271-3273, 3275; Dec. Dig. § 1206(1).]

5. CONSTITUTIONAL LAW § 55—LEGISLATIVE POWERS — ENCROACHMENT UPON THE JUDICIARY.

Acts 1915, p. 98, §§ 2, 3, are not violative of the constitutional powers of the judiciary in prohibiting the suspension of sentence upon conviction.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 58-60, 71, 80, 81, 83; Dec. Dig. § 55.]

Appeal from Circuit Court; Lafayette County; Geo. R. Hayne, Judge.

Charles Wilson was twice convicted for violation of the liquor law (Acts 1915, p. 98), and he appeals. Affirmed.

Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was twice indicted and convicted for a violation of Act No. 30 of the Acts of 1915, p. 98. This is the act which prohibits the issuance of liquor licenses and makes the sale of intoxicating liquors a felony, punishable by imprisonment in the State penitentiary for a period of one year. The cases have been briefed and argued together, and as the issues are identical, we dispose of them as a single case.

[1] Appellant questions, first, the sufficiency of the evidence. Upon this question it may be said that two witnesses, one named Arnold, and another named Morris, testified in each case to a sale, and their evidence, if true, would leave no doubt of appellant's guilt.

[2] Appellant says, secondly, there is no proof of his guilt except the evidence of Morris, and that the proof shows Morris was an accomplice, and that therefore the evidence is insufficient for the want of legal corroboration. This could not be true unless the jury totally disregarded the evidence of Arnold, and it was within the province of the jury to pass upon his credibility.

[3] The contention that Morris was an ac-

complice is based upon his own evidence that he was interested in trying to break up blind tigers and had helped Arnold to buy the liquor for the purpose of prosecuting the person who made the sale, and upon the evidence of Arnold, who testified that when he and Morris met appellant in the room where the liquor was delivered, Morris said, "Arnold is all right, he won't give you away." Upon this question the court gave an instruction which directed the jury to find whether Morris was an accomplice, and instructed them, in accordance with the provisions of section 2384 of Kirby's Digest, that a conviction could not be had on this evidence unless they found Morris was corroborated as required by said section. In the oral argument appellant contends that the purchaser is an accomplice of the seller, and that a conviction cannot therefore be had on his evidence without corroboration. We have held, however, that when the statute is directed against the sale, and not against the purchase, of whisky, one who assists the purchaser in buying intoxicating liquor, and confines his participation in the transaction exclusively to the buying, and, not to the selling, is not guilty of any offense. The penalties of this act are denounced against one who sells, and not against one who buys. See *Dale v. State*, 90 Ark. 579, 120 S. W. 389; *Fenix v. State*, 90 Ark. 589, 120 S. W. 388, and cases there cited. See, also, 12 Cyc. 447, and cases cited.

[4, 5] It is finally insisted that sections 2 and 3 of the act are unconstitutional, because any corporation which violates the act is made guilty of a felony, and because the act names a fixed punishment, and does not leave to the court or jury any discretion in fixing the punishment, and because the court is denied the right to suspend sentence upon a conviction being had before the jury. We need not consider here whether a corporation can violate this act. The Legislature evidently intended to prevent any one and everybody from selling liquors, and even though the provision as to corporations was void, that fact would not invalidate the remainder of the statute, as it is plainly manifest that the Legislature intended the penalty of the act to apply to any one who violated its provisions. We know of no constitutional requirement that varying degrees of punishment be provided for the violation of a statute. It is ordinarily true that a maximum and minimum punishment is prescribed, but this is done that the court and jury may exercise a discretion in imposing the penalty, dependent upon varying circumstances which might appear to justify or require a heavier or a lighter sentence. Still the Legislature has the authority to define a fixed punishment, and has heretofore exercised this right in other cases, as, for instance, in fixing the fine for profanity at \$1.

Nor do we think the act is void as abridg-

ing the constitutional powers of the judiciary in prohibiting the suspension of sentence upon conviction. Several recent cases have held that the court may enter sentence upon a verdict or plea of guilty at a term subsequent to the one at which the conviction was had or the plea entered. These cases are based upon the authority of *Thurman v. State*, 54 Ark. 120, 15 S. W. 84, in which case it was held that the statute did not require that the sentence be pronounced and judgment entered at the same term at which the plea was entered. That case treated the subject as one for statutory regulation. There being no constitutional inhibition against this legislation, we must hold it valid.

The judgment of the court below will therefore be affirmed.

LAPRAIRIE et al. v. CITY OF HOT SPRINGS. (No. 49.)

(Supreme Court of Arkansas. June 12, 1916.)

1. MUNICIPAL CORPORATIONS ~~§~~979—TAXATION—INJUNCTION—ENFORCEMENT OF ORDINANCE.

The collection of an illegal tax imposed by ordinance may be enjoined.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2120-2123; Dec. Dig. ~~§~~979.]

2. LICENSES ~~§~~6(1)—DELEGATION OF POWER OF STATE.

The Legislature has authority under the Constitution to delegate to cities the power to tax occupations.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 5, 6; Dec. Dig. ~~§~~6(1).]

3. MUNICIPAL CORPORATIONS ~~§~~57—POLICE POWER—SCOPE.

Municipalities possess no inherent powers, and can exercise only such powers as are delegated to them by the Legislature, either expressly or by necessary implication.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 144, 148; Dec. Dig. ~~§~~57.]

4. LICENSES ~~§~~8(1)—POLICE POWER—OCCUPATION TAX.

Acts 1907, p. 782, entitled "An act for the enlargement of the powers of cities of the first and second class and incorporated towns in Independence county," in the first section granting to cities of the first and second class and incorporated towns the power of imposing various licenses or occupation taxes, and by section 2 restricting the application of the act to Independence county and "any other county or counties that may desire to take advantage of the provisions of this act," applies only to Independence county, since the language of the act is ambiguous, justifying reference to its title, although the title forms no part of the enactment.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 16; Dec. Dig. ~~§~~8(1).]

Hart, J., dissenting.

Appeal from Garland Chancery Court; J. P. Henderson, Chancellor.

Suit by Charles Laprairie and others against the City of Hot Springs. From a decree for respondent, complainants appeal. Reversed and remanded, with directions.

Davies & Davies, of Hot Springs, for appellants. Jas. W. Mehaffy, of Little Rock, for appellee.

McCULLOCH, C. J. Appellants, who are citizens and taxpayers engaged in various business pursuits in the city of Hot Springs, instituted this action in the chancery court of Garland county to restrain the enforcement of an ordinance of the city council requiring those who desire to operate certain lines of business to procure a license and pay the fee therefor. The contention is that it amounts to an occupation tax, which the city has no power to impose. On final hearing of the cause, the chancellor decided that the ordinance was valid, and dismissed the complaint for want of equity.

It is not contended by counsel for appellee that the imposition was intended otherwise than as an occupation tax, and it seems clear from a consideration of the terms of the ordinance that it was so intended and that such is its necessary effect. It is not really necessary, however, to determine that question, for there are occupations included in this controversy which the city council is not empowered even to regulate or to license, unless it is under the statute relied on by appellee, and the controversy here narrows to a decision of the question whether or not the statute mentioned has any general application, so as to confer authority upon the city council of Hot Springs.

[1] It is clear that the appellants had the right to institute this action, not for the purpose of restraining criminal prosecutions, but to enjoin the collection of an illegal tax. *Taylor, Cleveland & Co. v. City of Pine Bluff*, 34 Ark. 603; *City of Little Rock v. Prather*, 46 Ark. 471.

[2] We may treat as settled that the Legislature "has authority under the Constitution to delegate to cities the power to tax occupations." That question was expressly decided in the case of *City of Little Rock v. Prather*, supra. The clear reasoning of that opinion leaves nothing further to be said on that subject, and its force has been recognized in subsequent decisions of this court. *Ft. Smith v. Scruggs*, 70 Ark. 549, 69 S. W. 679, 58 L. R. A. 921, 91 Am. St. Rep. 100; *Conway v. Waddell*, 90 Ark. 127, 118 S. W. 398. The *Prather* Case involved the validity of the act of March 21, 1885 (Acts of 1885, p. 92), the fifth subdivision of section 3 of which expressly authorized the council of any city of the first class, by a two-thirds vote, to pass an ordinance imposing an occupation tax, and the court decided that the power thus delegated was not in contravention of any provision of the Constitution and that the statute was valid. That part of the statute was, however, repealed by the General Assembly of 1887. Acts 1887, p. 44. The doctrine of the *Prather* Case has not been in the slightest degree impaired by any subse-

quent decision of this court. It is true, in the case of *Ft. Smith v. Scruggs*, supra, Judge Riddick, in delivering the opinion, said that a tax upon the use of property might under some circumstances amount to a tax on the article as property, but that the ordinance then under consideration, which imposed a tax on vehicles, was not a property tax, but in effect an imposition of the payment of tolls upon those who used the streets of the city. The force of the *Prather Case* was clearly recognized.

[3] Municipalities possess no inherent powers, and can exercise only such powers as are delegated to them by the legislative branch of the state government, either expressly or by necessary implication. There is no general statute in operation in this state authorizing municipalities of any class to impose an occupation tax, unless that authority be found in an act of the General Assembly of 1907, entitled "An act for the enlargement of the powers of cities of the first and second class and incorporated towns in Independence county." Acts 1907, p. 782. The contention of appellee is that, while the title of this act indicates that its operation was restricted to Independence county, the scope was broadened by the full text of the statute so as to make it general in its nature.

[4] The three sections of the statute read as follows:

"Section 1. That in addition to the powers now conferred by law upon cities of the first and second class and incorporated towns, that for the purpose of raising revenues to defray the expenses of additional police force and fire protection, they be and are hereby empowered to, by proper ordinance, require the payment of a license from all merchants, restaurant keepers, hotels, butcher shops, barber shops, ten pin alleys, and all other places of business within their limits where articles are kept for sale or exchange, or where any kind of game is indulged in and a charge is made therefor, and to provide penalties for the violation of such ordinances, as now prescribed by law for the violation of ordinances of a similar character.

"Sec. 2. That this act shall apply only to Independence county and any other county or counties that may desire to take advantage of the provisions of this act.

"Sec. 3. That this act take effect and be in force from and after its passage."

It will be observed that section 1, which undertakes to prescribe the powers to be conferred upon municipalities, is general in its nature and contains no restriction to any particular locality; but the language of section 2 is very peculiar, to say the least of it, and when considered in the light of the title it is by no means clear that the Legislature intended to enact a general statute, or that it adopted language of sufficient force to accomplish that end. *St. L., I. M. & S. R. Co. v. State*, 86 Ark. 561, 109 S. W. 545. When in doubt, we are at liberty to look to the legislative title of the statute, and there is certainly enough ambiguity in this one to warrant us in giving careful consideration to the language of the title. *Western Union Tel. Co. v. State*, 82 Ark. 302, 101 S. W. 745.

There is no provision in the Constitution of 1874, as there was in the Constitution of 1868, requiring that there be a title to every statute, and that "no act shall embrace more than one subject, which shall be embraced in its title." Article 5, § 22. The only provision of the Constitution of 1874 prescribing any restrictions as to the unity of subjects to be embraced in a statute relates to general appropriation bills. Const. 1874, art. 5, § 29. The Constitution provides a form of the enacting clause of all statutes (article 5, § 18), but stops there, without any further restriction.

However, the legislative form of affixing a title to a statute is a custom of such general nature in American legislation that it has been always followed here, regardless of any express requirement in the organic law. The title itself forms no part of the enactment, but in this instance it shows very clearly the legislative intent that the statute was meant only to supply to Independence county. Section 1 is couched in very broad language, but the next section was evidently intended either to explain, restrict, or amplify the preceding section; and if any meaning be given to it at all, it is that it was intended to put the statute into immediate operation in Independence county, whether it applied to any other locality or not. If it had been intended by the lawmakers to make the statute apply generally, section 2 need not have been inserted at all; so, if we are to give any effect to that section, we must construe it to mean that the Legislature intended to put the statute into operation in Independence county, as distinguished from its operation in other localities, and leave it to the option of other counties whether or not the benefits of the provision should be taken advantage of.

It is argued that, the statute being one merely to delegate authority to city councils, the language in the last clause of section 2 was evidently intended to confer authority upon municipalities in other counties, and that such is a fair interpretation of the statute. This part of the statute was dealing, however, not with separate municipalities within a given territory—that is to say, with municipalities included within the territory of the county named—and it does not warrant the inference that the Legislature merely meant to say that the act should be one of general application, to be taken advantage of by the municipalities in any other county. It is possible that the framers of the statute intended to use that language as an invitation to representatives from other counties to include their constituents in the bill during its passage through the Legislature. It is well known that bills for statutes are often inartificially drawn, and have to be gotten into shape during the progress of the passage of the statute by those who are more skillful in the framing of laws. But we often find examples where a statute has failed of its purpose because of the fact that in the hurry

of legislation the defects have escaped attention.

Whatever may have been the purpose, and however much we may speculate as to what this language means, we are of the opinion that it does not demonstrate to a certainty that the Legislature meant to enact a general statute, operative, without any further action, in all of the counties of the state. It is too clear that the Legislature intended to make some distinction between Independence county and other localities of the state, so far as concerns the immediate effect of the statute. In other words, there is a very clear manifestation to put the law into effect in Independence county, but only to open the way for its adoption in other localities, and that language is not strong enough to provide a method for its adoption. A mere declaration that the act shall apply in "any other counties that may desire to take advantage" of it wholly fails to provide any means for extending the scope, even if that could be done otherwise than by a positive declaration of the lawmakers extending the provision.

The Constitution recognizes a clear distinction between special legislation, having only local effect, and general legislation. There are certain requirements concerning such special legislation that are not imposed as to general legislation. Whether or not the Legislature has the power to embrace both classes of legislation in one enactment we need not stop to inquire at this time, since we have reached the conclusion that the language of the statute now under consideration is only effective to put it into operation as a special one in the particular locality named, and that it does not extend the operation of the statute to other localities. In reaching this conclusion we do not attach any importance to the prohibition in the Constitution (article 5, § 22) against reviving, amending, or extending the provisions of the law by title only, for this is not an attempt to extend the provisions of the statute by reference to title. If the Legislature had put into the statute a clear expression of the intention to make it one of general application, it would not have offended against the provision of the Constitution just referred to.

Having reached the conclusion, however, that the language is not sufficient to extend the provision, it renders that part of the statute, which declares that it shall apply to other counties which may desire to take advantage of it, wholly inoperative. We recognize our duty to give effect to every sentence and every word in a statute, if possible to do so in harmony with all of its provisions; but this statute presents a case where something must be rejected, and we are of the opinion that, if we give any effect at all to that part of the statute which makes it special in its application to Independence coun-

ty, it necessarily results that the other language intended to be more general must be rejected, as being without sufficient potency to accomplish what the lawmakers may have intended.

We have not overlooked, in our consideration of this question, the decision in *Russell v. Board of Dir. of Red River Levee Dist. No. 1*, 110 Ark. 20, 160 S. W. 865, and in *Young, Adm'r, v. Red Fork Levee Dist.*, 186 S. W. 604, construing the act of the General Assembly of 1905 (p. 143), which referred especially to the St. Francis levee district, and we held that the statute was general in its application. The language of that statute, however, was entirely different from the statute now under consideration, and notwithstanding the fact that it mentioned a particular levee district the remaining language was of sufficient force to extend the operation to all other districts in the state. The present statute, however, only constitutes an attempt to make it apply to such other counties as may desire to take advantage of it, and, as there is no provision made for manifesting a desire to so adopt its provision, the language fails to be of any effect.

There being no statute in the state delegating to municipalities the authority to impose an occupation tax, it follows that the chancery court erred in not restraining the officials of the city of Hot Springs from undertaking to enforce the ordinance.

The decree is therefore reversed, and the cause remanded, with directions to enter a decree in accordance with the prayer of the complaint.

HART, J., dissents.

SPECIAL SCHOOL DIST. NO. 33, GREENE COUNTY v. HOWARD et al. (No. 76.)

(Supreme Court of Arkansas. June 19, 1916.)

1. STATUTES \Leftrightarrow 211—CONSTRUCTION—TITLE.

Although the title of an act may be looked to, to ascertain its meaning, it is no part of the act, and is not controlling.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. \Leftrightarrow 211.]

2. SCHOOLS AND SCHOOL DISTRICTS \Leftrightarrow 22 — CREATION—STATUTES.

Acts 1909, p. 947, permitting organization of special school districts by petition to county judge, is repealed only as to Greene county by Acts 1915, p. 108, allowing county courts upon petition to change boundaries of school districts established under the first act, and limiting its application to Greene county.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 41; Dec. Dig. \Leftrightarrow 22.]

3. SCHOOLS AND SCHOOL DISTRICTS \Leftrightarrow 36 — ALTERATION—VESTED RIGHTS.

Acts 1915, p. 108, allowing county courts upon petition to change boundaries of certain school districts, gives power to the county court to dismember districts organized under Acts

1909, p. 947, as to organization of special school districts.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 59½; Dec. Dig. ¶36.]

4. SCHOOLS AND SCHOOL DISTRICTS ¶22 — CREATION OR ALTERATION—POWER OF LEGISLATURE.

The power of the Legislature in enacting laws for the formation or dissolution of school districts is plenary, provided contractual obligations are not impaired.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 41; Dec. Dig. ¶22.]

Appeal from Circuit Court, Greene County; W. J. Driver, Judge.

Petition to change school district boundary lines by Richard Howard and others. Remonstrance was filed by Special School District No. 33, Greene County, and others. From a judgment of the circuit court, reversing judgment of the county court for remonstrators, the named remonstrator appeals. Affirmed.

R. E. L. Johnson, of Paragould, for appellant. Huddleston, Fuhr & Futrell, of Paragould, for appellees.

SMITH, J. Appellees filed a petition in the county court of Greene county, in which they prayed the court to make an order changing the boundary lines of special school district No. 33 of that county, by carving out certain portions thereof and adding the same to common school districts 12 and 39 of said county; said common school districts being adjoining districts thereto.

[1] The question in the case is whether the county court of that county has the authority to change the boundary lines of a special school district organized under Act No. 321, p. 947, of the Acts of 1909, and the decision of the case is controlled by the construction given Act No. 35, p. 108, of the Acts of 1915. The title of this act would indicate that it was intended to repeal act No. 321 of the Acts of 1909; but a perusal of the entire act discloses the fact that the last enacted statute is a special act, which applies only to Greene county. While the title of an act may be looked to, to ascertain its meaning, it is still no part of the act, and is not controlling in its construction. *Laprairie v. City of Hot Springs*, 187 S. W. 442.

[2, 3] This special act is not entirely free from ambiguity, but a study of its provisions leads to two conclusions. The first of these conclusions is that Act 321 of the Acts of 1909 is repealed in so far as it applies to Greene county. Section 4 of this special act provides that sections 1, 2, 3, and 4 of Act 321 be repealed in so far as it applies to Greene county; but there are only four sections of that act, and its language should be read as if it said the entire act was repealed in so far as it related to Greene county. The second conclusion is that the Legis-

lature intended to give the county court the authority to dismember districts which had been organized under the prior act. Section 3 of this special act also provides that such order of dissolution shall not conflict with vested rights which have accrued. But that restriction does not diminish the power there conferred. This limitation would exist, even in the absence of express legislative recognition.

[4] We have several times said that the power of the Legislature in enacting laws for the formation or dissolution of school districts was plenary, provided contractual obligations were not impaired.

The motion to dismiss and the demurrer to the petition, both of which question the validity of the special act, were properly overruled, and the judgment of the court is therefore affirmed.

SCOGGIN v. CITY OF MORRILTON.

(No. 83.)

(Supreme Court of Arkansas. June 26, 1916.)

1. INTOXICATING LIQUORS ¶224 — ILLEGAL SALE—BURDEN OF PROOF—PRESUMPTION OF INNOCENCE.

The state has the burden of proving beyond a reasonable doubt the guilt of one charged with illegal sale of intoxicating liquors, which cannot be sustained by mere inference from facts not necessarily implying guilt; every presumption being in favor of innocence.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 275-281; Dec. Dig. ¶224.]

2. INTOXICATING LIQUORS ¶236(11) — ILLEGAL SALE—EVIDENCE—SUFFICIENCY.

Evidence that defendant drew money orders payable to wholesale liquor dealers, left a key at the express office, and ordered delivery of packages at an old house in a dark alley, that the packages contained whisky, and that many empty cartons were found in the house, is legally insufficient to show illegal sale of liquors.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 313-315; Dec. Dig. ¶236(11).]

3. SALES ¶1(1)—AGREEMENT—TRANSFER OF PROPERTY.

A sale is a contract for the transfer of property from one person to another for valuable consideration (citing *Words and Phrases*, "Sale").

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1; Dec. Dig. ¶1(1).]

4. INTOXICATING LIQUORS ¶236(11) — SALES—EVIDENCE—SUFFICIENCY.

While a sale may be proved by circumstances, as well as by affirmative evidence, circumstances must warrant the inference that there was a seller and a purchaser and compensation for the thing sold.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 313-315; Dec. Dig. ¶236(11).]

Appeal from Circuit Court, Conway County; A. B. Priddy, Judge.

Arthur Scoggin was convicted under affidavit charging unlawful sale of intoxicating liquor in the City of Morrilton, and he appeals. Reversed and remanded.

J. A. Eades, of Morrilton, for appellant.
Edward Gordon, of Morrilton, for appellee.

WOOD, J. Upon an affidavit charging him with the unlawful sale of intoxicating liquor in the city of Morrilton on or about November 15, 1915, appellant was convicted, and he appeals to this court.

The only question for our consideration is whether the evidence is sufficient to sustain the verdict. Giving the evidence its strongest force in favor of the appellee, it shows that appellant left at the express office in the city of Morrilton, Ark., a key to an old house that opened into a back alley, and instructed a delivery man of the express company to deliver packages for appellant at this old house. The old house was a place where Carl Meyer kept eggs and hides. It was very dark of nights in the alley on which this old house was located. It was shown that between the 7th of October and the 29th of December, appellant had bought money orders payable to Sandefur-Julian & Co. and Laskar Bros. liquor dealers of Little Rock, amounting to \$171.75. It was proved that a large quantity of empty cartons was found in the old house. The delivery man took two packages in one day to this house. Each package was labeled whisky. They were of the same size. The first package contained pint bottles of whisky. The second package was captured by the city marshal, and it contained 24 pints of whisky. The second package was not shipped in appellant's name, but in the name of McBurke. McBurke testified that the whisky in the second package belonged to him, and he introduced an express bill which contained his name. The express bill, however, did not show the destination of the package. McBurke, who testified that the whisky belonged to him, did not make affidavit to that effect before the mayor, and permitted the whisky to be destroyed without claiming it. He testified that was the only express bill or receipt that he had ever seen, although he had ordered whisky a number of times.

[1-3] It devolved on the state to prove appellant guilty beyond a reasonable doubt. Every presumption is in favor of innocence, and the proof necessary to establish guilt cannot be supplied by mere inference from facts that do not necessarily imply guilt. The evidence is not legally sufficient to prove that appellant made a sale of liquor to any one.

"A sale is a contract for the transfer of property from one person to another for a valuable consideration." 7 Words and Phrases, "Sale," pp. 6291, 6292. "To constitute" a sale of liquor in violation of the law "there must be the assent of two parties; there must be a vendor and a vendee. But no words need be proved to have been spoken. A sale may be inferred from the acts of the parties, and no disguise which the parties may attempt to throw over the transaction with a view of evading * * * the law can avail them if in truth such sale is found to

have taken place." Commonwealth v. Thayer, 49 Mass. (8 Metc.) 525, 526. See, also, Cunningham v. State, 105 Ga. 676, 31 S. E. 585, 586.

[4] A sale may be proved by circumstances as well as by affirmative evidence. But where it is sought to prove a sale by circumstances, they must warrant the inference that there was a seller and a purchaser, a thing to be sold and compensation in some form from the purchaser to the seller for the article sold. The most that can be said of the evidence here is that it was sufficient to arouse a strong suspicion that appellant was making illegal sales of liquor, but suspicion is not proof and cannot take its place. The evidence falls short of that substantial proof necessary to convict.

The judgment is therefore reversed, and the cause is remanded for new trial.

EVANS et al. v. WILLIAMS et al. (two cases).
(No. 388.)

(Supreme Court of Arkansas. May 8, 1916.)

1. MORTGAGES \S 497(1)—JUDGMENT OF FORECLOSURE—CONCLUSIVENESS—COLLATERAL ATTACK.

A judgment in a suit to foreclose a mortgage against the widow and heirs of deceased mortgagor, in which no plea of limitations was interposed, being regular on its face and showing jurisdiction, is not subject to collateral attack by minor heirs.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 1469, 1471, 1473; Dec. Dig. \S 497(1).]

2. MORTGAGES \S 502—JUDGMENT—SALE—APPLICATION TO RENEW ORDER—NOTICE TO MINOR HEIRS.

An application to renew the order of sale made in mortgage foreclosure proceedings does not require notice to the minor heirs under Kirby's Dig. \S 6248, and section 4431, subd. 8, since it is not an action to divest them of any interest in real property or require a conveyance from them.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 1470, 1489; Dec. Dig. \S 502.]

3. BILLS AND NOTES \S 527(2)—PAYMENT—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence held sufficient to prove payment of note by check, although payee's cashier testified the amount of such note had been subsequently included in a larger note, such testimony not being entitled to much weight, where such cashier was confidential agent for the maker who executed such papers as he directed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1848, 1849; Dec. Dig. \S 527(2).]

4. MORTGAGES \S 114—FORECLOSURE—DEBTS INCLUDED IN FORECLOSURE.

Where mortgage covers only indebtedness to bank, foreclosure cannot be had for commissions due the cashier of such bank as confidential agent of mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 223, 224, 241; Dec. Dig. \S 114.]

Appeal from St. Francis Chancery Court; E. D. Robertson, Chancellor.

Suit by Eugene Williams and others against Mary E. Evans and others to renew decree of sale under mortgage foreclosure.

and suit by Mary E. Evans and others against Eugene Williams and others to set aside original decree of sale. From a decree renewing the order of sale and denying application to set aside original decree, Mary E. Evans and others appeal. Reversed and remanded, with directions.

Appellees in the first above-styled case brought suit to renew the order of sale of certain lands, decreed to be sold under a foreclosure of a mortgage, in the case of J. W. Robinson et al., Trustees, v. Mary E. Blanton et al.; the day of sale of said lands in the original decree having passed, and it being necessary to appoint a new commissioner for the purpose. The petition stated that the Bank of Forrest City had guaranteed to the Home Life & Accident Company, the present owner of said decree, the payment of the amount thereof in the sale to it and was interested on that account in the foreclosure.

It appears that J. P. Blanton, now deceased, with his wife Mary E. Blanton, now Evans, appellee herein, on January 23, 1901, executed to the Colonial & United States Mortgage Company their promissory note for \$5,000, due January 1, 1906, with interest, and a deed of trust of the same date, on certain lands and town lots in St. Francis county to secure the payment thereof.

J. P. Blanton died May 10, 1904, testate. His wife, Mary E. Blanton, their two children, minors, John Cecil and Annie Bell, were the sole beneficiaries under his will. The note was assigned by the mortgage company to John W. Robinson on April 11, 1910, who obtained said decree of foreclosure, in a suit against Mary E. Blanton and the minor children. The decree was assigned to the Bank of Forrest City, January 13, 1911, which released the N. W. $\frac{1}{4}$, section 34, township 4 N., Range 3 E., from its lien, and assigned it afterwards, on January 16, 1911, to the Mississippi Valley Life Insurance Company, which assigned it on December 9, 1912, to A. B. Banks, who on November 20, 1913, transferred it to the Home Life & Accident Company, which with the Bank of Forrest City brought this suit to renew the order of sale thereunder. Mrs. Blanton, who since married Evans, for herself and as next friend for the two minors brought suit against Eugene Williams, the Bank of Forrest City, the Mississippi Valley Insurance Company, A. B. Banks, and the Home Life & Accident Company, to cancel and set aside said decree, in which the order of sale was sought to be renewed in the other suit, alleging that it had been paid and fraudulently transferred, stating all the facts relative thereto, by Eugene Williams, the cashier of the Bank of Forrest City, who was her confidential adviser and agent.

The answers denied that the decree had been paid or fraudulently transferred, and alleged the purchase in good faith of same by

each assignee for a valuable consideration paid, and "for the purpose of saving a foreclosure or sale of the land condemned to be sold thereunder and of giving the plaintiff, Mary E. Evans, an extension of time thereon, and with her knowledge, consent, and by her approval, and that said decree is a valid and subsisting judgment against the land ordered to be sold thereunder." Eugene Williams and the Bank of Forrest City answered, admitting the allegations of the complaint, except as to the payment and transfer of the decree, denied that the transfer thereof was fraudulent, and alleged that the different transfers were made in order to secure an extension of time, and that they were made with the knowledge, consent, and approval of said Mary E. Evans, who was unable to pay it, stating all the facts relative thereto.

An amendment was filed to the complaint and a response to the motion or petition for appointment of a commissioner and order to sell, in which it is alleged that the decree was null and void as to the minors, since the demand was not presented to the executrix of the estate before suit brought thereon, and a judgment by default was rendered against the minor defendants.

A master was appointed to state on account, and did so, covering a period of several years, showing the transactions between Eugene Williams, who was cashier of the bank, as agent of Mrs. Mary Evans, and the Bank of Forrest City and herself as a depositor in the bank.

The record is voluminous, and the account intricate, and the abstract and brief not especially helpful in clearing up certain points of contention. The undisputed testimony shows that Mrs. Evans sold a piece of her individual property for \$4,000 cash, which she stated was done for the purpose of obtaining money to pay off the judgment of the Colonial mortgage; that she gave this money to Eugene Williams, the cashier of the Forrest City Bank, who was her confidential agent and adviser, which, with about \$2,000 other money he held for her, she directed paid in satisfaction of said judgment. Williams admitted taking the \$4,000 and enough additional money from the bank, which was charged to her account, with which to pay the judgment; that he went to Memphis and paid this money to the owners of the judgment and took a transfer thereof to the Bank of Forrest City, he said, by the consent and approval of Mrs. Evans, who had asked him to take care of the judgment and procure an extension of time, saying she was unable to do so. She flatly contradicted this statement, and said it was for the purpose of paying the judgment; that it was directed by her to be paid, and she had no information that it had not been paid until long afterwards and after several of the assignments had been made.

The evidence also discloses that Eugene Williams, the cashier of the bank, kept an account as her agent, depositing her funds to his credit as such, and from time to time transferring certain amounts to her credit, as a depositor, usually about the time her bank balance was becoming small, and sometimes not till it had been largely overdrawn. He explained that this was done in order to discourage the expenditure of too much money on her part, and because she was spending money in excess of her income and ability. The accounts kept by the bank show, however, that she was credited with the full amount for which the judgment sold upon the assignment of it, having been charged with the amount required to purchase it in the first instance as Williams claimed was the only way in which to secure an extension of time and prevent a sale of the lands. The bank held a second mortgage upon the piece of land, the separate property of Mrs. Evans, sold by her for the \$4,000 given to Williams for payment on the judgment, according to her contention.

The master's statement of account shows the balance due from Mrs. Evans to the bank, which included \$453.11 to Eugene Williams for commissions for compensation as her agent, which was approved and confirmed in all things by the chancellor, and sale of the lands ordered for the payment thereof, from which judgment this appeal comes.

Grant Green, of Clarendon, and J. W. Morrow and C. W. Norton, both of Forrest City, for appellants. R. J. Williams and Mann, Russey & Mann, all of Forrest City, for appellees.

KIRBY, J. (after stating the facts as above). We are unable to say, after a careful consideration of the whole record, that the chancellor's finding against the contention that the decree was paid and should have been satisfied is clearly against the preponderance of the testimony. It is undoubtedly true that enough money to satisfy it was taken by Eugene Williams to Memphis and paid to the owner of the decree, but about \$2,000 of this sum was furnished by the bank and charged against Mrs. Evans as a depositor, and the other \$4,000 was realized from a sale of a piece of land, her separate property upon which the bank held a second mortgage. Said Williams, the bank cashier, stated positively that Mrs. Evans was unable to pay the decree, desired an extension of time that the lands might be saved to the estate or something realized from it therefor, and that he was unable in any other way to procure such extension. He took the transfer of the judgment to the bank, and thereafter sold and transferred it, crediting her account as a depositor in the bank with the entire sum realized from its sale, the amount that was paid in the purchase of it. She made no com-

plaint at the time about this transaction, and, although it is true she said she had no notice of it, it is undisputed that the whole amount of the money realized from the assignment of the judgment by the bank, to which it was transferred in the first instance, was checked out and used by her, which transaction corroborates the cashier's statement that it was but a purchase of the judgment in the first instance and a matter of bookkeeping in the accounts to secure the desired extension of time.

[1] The contention that the debt upon which the Robinson decree was entered was barred by the statute of limitation, in so far as it affected the rights of the Blanton minors, and should be set aside and vacated as to them, is without merit. The proceeding was an ordinary suit for foreclosure of a mortgage against the widow and heirs of the deceased mortgagor, Blanton, and not against the executrix of his estate, and there was no plea of the statute therein, and the decree, being regular on its face and showing the court had jurisdiction, is not subject to collateral attack by the minors. 22 Cyc. 704; *Trapnall v. State Bank*, 18 Ark. 53.

[2] It is not such a decree as the infant heirs are allowed to show cause against by the statute (section 6248 and division 8, § 4431, Kirby's Digest), being one for the foreclosure and sale of mortgaged premises for the payment of the debt secured, and not to divest them of an interest in land or require of them a conveyance of lands in which they had a personal interest (*Blanton v. Rose*, 70 Ark. 415, 68 S. W. 674; *Paragould Trust Co. v. Perrin*, 103 Ark. 67, 145 S. W. 886). The decree in No. 4078 is, accordingly, affirmed.

[3] It is urged in No. 4079 that the chancellor's finding that the \$300 note dated February 19, 1909, had not been paid, is not supported by the testimony, and this contention must be sustained. There is decided conflict in the testimony upon this point, the appellant testifying that she sent a check from Hot Springs for \$300, payable to the order of the bank, which was later charged to her account, in payment of the note. This check appeared to be personally indorsed on the back by her, and the cashier, who had no recollection of the transaction, thought from the indorsement that the money had been paid directly to her, and it also appeared that the amount of the note had been included in a larger note of later date given in renewal of all her smaller notes due and unpaid to the time of its execution. Her positive statement that the note was paid with the check payable to the bank for the amount thereof, which was later charged to her account and denial of the collection of the check or receipt of any money thereon, with the inability of the master to find where she could have been credited with the whole of said sum, if the principal part thereof had been paid to her in cash, as the cashier thought was the case, furnishes a clear pre-

ponderance of the testimony against the finding that the note was not paid.

The fact that the amount thereof was claimed to be included in a note for a much larger amount executed by her in renewal of all smaller notes, due and unpaid at the bank, is not entitled to much weight, under the circumstances of this case, against the testimony showing the payment of the note, since she relied implicitly upon the bank cashier, who was her confidential agent and adviser, and executed such papers as he requested her to sign. The amount of the decree must, accordingly, be reduced by said sum of \$300.

[4] The chancellor's finding relative to the commissions due Eugene Williams as agent for Mrs. Evans for making collections and attending to her affairs, and foreclosing a lien therefor under the mortgage to the bank, is likewise erroneous. According to the master's report, said Williams was not entitled to more than the sum of \$953.11 on all business transacted, and the undisputed testimony, and his own admissions, show that he has received and been paid more than \$1,000 commissions for his services, and the finding that \$453.11 was due him on that account was clearly against the great preponderance of the testimony, and, since the mortgage taken to secure her indebtedness to the bank did not cover any indebtedness due to her said agent, the chancellor erred in so finding and decreeing a foreclosure therefor.

The decree is erroneous, and will be reversed, and the cause remanded, with directions to reduce the amount of the recovery against appellant, Mrs. Evans, in the sum of the said items of \$800, and \$453.11, \$753.11 in all, and to enter a decree for the balance due after making such reduction and for the foreclosure of the lien and sale of the land.

It is so ordered.

BROWN v. MORROW. (No. 71.)

(Supreme Court of Arkansas. June 19, 1916.)

1. FRAUDS, STATUTE OF §24 — DIRECT OR COLLATERAL PROMISE—EVIDENCE.

In determining whether an oral promise is original or collateral, the intention of the parties at the time it was made must be regarded; and the words of the promise, the situation of the parties and all the conditions attending the transaction should be considered.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 20; Dec. Dig. §24.]

2. FRAUDS, STATUTE OF §23(3)—CONSIDERATION—DIRECT OR COLLATERAL PROMISE.

A contractor's representation that he had money in his hands that would belong to a subcontractor on a final settlement, and that he would pay the subcontractor's orders on him if plaintiff would refrain from suing the subcontractor and garnishing him, and would endeavor to induce the subcontractor to complete his contract, to which plaintiff agreed and charged the account to the contractor, was

of direct benefit to the contractor, supported by a sufficient consideration, and hence was an original and not a collateral promise.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. §23(3).]

3. APPEAL AND ERROR §1002—QUESTIONS OF FACT—VERDICT.

Where the evidence is conflicting, but there is evidence of a substantial character to support a verdict, judgment thereon will be affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. §1002.]

Appeal from Circuit Court, Clay County; J. F. Gautney, Judge.

Suit by M. V. Morrow against W. R. Brown. Judgment for plaintiff, and defendant appeals. Affirmed.

G. B. Oliver, of Corning, for appellant. L. Hunter, of Piggott, for appellee.

HART, J. M. V. Morrow sued W. R. Brown, before a justice of the peace, to recover \$198.62 alleged to be due for clearing the right of way and cutting and piling wood on the right of way in a drainage district. Morrow recovered judgment in the justice court, and Brown appealed to the circuit court. There the jury returned a verdict in favor of Morrow for the amount sued for, and Brown has appealed to this court.

The only assignment of error, relied upon for a reversal of the judgment, is, that the court erred in refusing to direct a verdict for the defendant, Brown. The facts are substantially as follows: The defendant Brown entered into a contract with a drainage district for constructing three lateral ditches. Brown then entered into a contract with George Halford to clear the right of way and cut and pile the wood on the right of way. He agreed to pay him \$15 an acre for clearing the right of way, and \$1.50 per cord for the wood cut and placed in piles. The plaintiff, Morrow, had a storehouse near by, and paid off the men working for Halford and also sold them supplies. Halford would pay Morrow by giving him orders on Brown for amounts due him under his contract.

On the 1st day of September, 1914, Morrow presented to Brown an order given him by Halford. Brown paid Morrow \$71.95 and that left a balance of \$198.62. Brown told Morrow that he was holding back 10 per cent. of the monthly estimates and that, when Halford finished work, there would be more than enough to pay the claim and that he would pay it then. Subsequently Morrow told Brown that he was going to sue Halford and have a writ of garnishment issued against Brown. Brown told Morrow not to do that, that Halford had been after him for some money, and that he had told him that he would not pay him any more until he completed the right of way and Morrow's debt was paid. Brown told Morrow that 10 per

cent. of the monthly estimates were being held back, and that, if Morrow would use his influence with Mr. Halford to get him to complete his contract, he would pay him when Halford finished his work. This conversation occurred September 20, 1914. Under this state of facts, it is contended by counsel for Brown that his promise to pay Morrow was a collateral agreement to answer for the debt of Halford, and was, therefore, within the statute of frauds. On the other hand, it is contended that the promise of Brown was an original promise and that the testimony was sufficient to warrant the verdict of the jury.

[1,2] In determining whether an oral promise is original or collateral, the intention of the parties at the time it was made must be regarded; and in determining such intention the words of the promise, the situation of the parties, and all of the conditions attending the transaction, should be taken into consideration. *Millsaps v. Nixon*, 102 Ark. 435, 144 S. W. 915. In the application of this rule, in *Robinson & Son Contracting Co. v. Twin City Bank*, 103 Ark. 219, 146 S. W. 523, the court held that a verbal promise by a principal contractor, that he would reimburse a certain bank for money advanced to a subcontractor upon time checks, issued by the subcontractor in completing the contract work, is not within the statute of frauds. The reason given was that the principal contractor was the beneficiary of the work done by the subcontractor, received pay for it, and in turn was liable to the subcontractor for the work done by him.

The principal contractor knew that the subcontractor could not do the work unless certain advances were made to him, and knew that the bank made the advances with the expectation that such advances would be paid out of the money due the subcontractor by the principal contractor. The reasoning of the court in that case is directly applicable to the facts of this case. Brown represented to Morrow that he had money in his hands, which would belong to Halford when there was a final settlement made with him, and that he would pay Morrow if the latter would refrain from suing Halford and garnishing him (Brown), and would also use his influence with Halford to get him to complete his contract. Morrow agreed to this and charged the account to Brown. The promise thus made by Morrow, at the request of Brown, was of direct benefit to the latter and was a sufficient consideration to support the promise of Brown to pay the debt of Halford and make the promise an original one. Hence the court did not err in refusing to direct a verdict for the defendant.

[3] No objection was made to the instructions given by the court, and, we think, in the application of the rule above stated, the jury was warranted in returning a verdict for the plaintiff. It is true the testimony of the wit-

nesses for the plaintiff was contradicted by the testimony of the defendant, but this conflict in the testimony was settled against the defendant; and, there being evidence of a substantial character tending to support the verdict, the judgment will be affirmed.

WEATHERTON v. TAYLOR. (No. 82.)

(Supreme Court of Arkansas. June 26, 1916.)

1. DIVORCE \S 312 — CUSTODY OF CHILD — RIGHT TO APPEAL—"FINAL ORDER."

An order of the chancery court in divorce, awarding temporary custody of a child to one parent, is a final order, entitling the other parent to appeal, although jurisdiction is retained to modify it.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 806; Dec. Dig. \S 312.]

2. DIVORCE \S 312 — CUSTODY OF CHILD — RIGHT TO APPEAL.

An interlocutory order may be made, relating solely to the right to visit a child without depriving the parent of the custody, and that sort of an order would not be final and appealable.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 806; Dec. Dig. \S 312.]

3. DIVORCE \S 303(3)—CUSTODY OF CHILDREN —SUCCESSIVE ORDERS—NECESSITY OF PROOF.

An order, granting custody of a child to one parent, is an adjudication that such parent, and not the other, is a proper person to have custody, and proof to the contrary, justifying a change, is prerequisite to an order awarding custody to the other.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 794; Dec. Dig. \S 303(3).]

4. DIVORCE \S 303(3)—CUSTODY OF CHILDREN —SUCCESSIVE ORDERS—NECESSITY OF PROOF.

Personal knowledge of the chancellor is not sufficient basis for awarding custody of a child to one parent without proof after it was once awarded to the other parent.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 794; Dec. Dig. \S 303(3).]

5. DIVORCE \S 300—CUSTODY OF CHILDREN —JURISDICTIONAL LIMITS.

If the established facts justify the conclusions that the mother of the child is capable of giving proper care to the child, and that she will comply with the orders of the court, it would not be beyond the power of the court to permit her to take the child to her home in another state.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 789; Dec. Dig. \S 300.]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Petition by Mrs. C. C. Taylor against Joe B. Weatherston. Decree for petitioner, and defendant appealed, having secured a supersedeas which the Supreme Court extended pending hearing on the merits. Reversed and remanded.

Manning, Emerson & Morris, of Little Rock, for appellant. Grover T. Owens, of Little Rock, for appellee.

MCCULLOCH, C. J. Appellant and appellee were formerly husband and wife, but in the year 1912 were divorced by a decree of

the chancery court of Pulaski county. There is a child, the issue of said intermarriage, a girl, who was about three years of age at the time the divorce was granted, and the chancery court in its decree awarded the custody of the child to appellant, the father. There was a clause in the decree, reciting that the court retained jurisdiction over the custody of the child for the purpose of making further orders from time to time as might be considered proper upon consideration of the circumstances. Appellant has continued to reside in the city of Little Rock, and resides here now. Appellee removed to Dallas, Tex., and is living there now. Each of the parties has married again, and appellee filed a petition in the chancery court of Pulaski county on May 25, 1916, asking that the custody of the child be awarded to her during the summer vacation, and that she be permitted to take the child with her to her home in Dallas. It is alleged in the petition that appellee has been married for the past four years and has a comfortable home in Dallas, and that she and her husband are capable of taking proper care of the child. Appellant filed an answer, denying that appellee has a suitable home in Dallas, or that she is a suitable person or is of sufficient financial ability to take proper care of the child. Without hearing any testimony, and over objections of appellant, the court rendered a decree, awarding the custody of the child to appellee—

"until the further orders of this court, but not later than one week before the opening of the public schools in the city of Little Rock, Ark., in the fall of 1916."

The decree further specified that appellee could take the child with her to Dallas, but she was required to execute a bond in the sum of \$1,000, conditioned that she would return the child to the custody of appellant when ordered by the court, not later than one week before the opening of the public schools. An appeal has been duly prosecuted to this court, and an order was made by one of the judges of the court, superseding the decree of the chancery court. Said order of supersedeas has been extended by this court until the cause can be heard on its merits.

[1] The first question presented is whether or not the order of the chancery court, temporarily transferring the custody of the child from appellant to appellee, and permitting the latter to remove the child beyond the jurisdiction of the court, is a final order so as to be appealable. We are of the opinion that the order is final in the sense that the complaining party has a right to prosecute an appeal to this court. The chancery court has a continuing power with respect to the custody of the child, even without a reservation in the decree, and any order which the court may, from time to time, make can be subsequently changed on sufficient showing of a change in the circumstances. An order

of the chancery court with respect to the custody of a child is never final in the sense that it is unchangeable, but any change in the custody of the child deprives the parent who has the custody of a substantial right, and the order may be appealed from.

[2] When only property rights are involved in litigation, the court, under some circumstances, may impound the subject-matter of the litigation for the purpose of preserving it, and an order of that kind is interlocutory; but not so when the order concerns the custody of a child, for it is not the child itself that is the subject of the controversy, in a property sense, but the right to enjoy the privilege of having it in custody. When one is deprived of that right for any appreciable length of time, it is a final adjudication of the rights of the parties to that extent, and an appeal may be prosecuted. An interlocutory order may be made, relating solely to the right to visit a child, without depriving the parent of the custody, and that sort of an order would not be final and appealable. But an order which deprives a parent of the custody of the child for any length of time is, as before stated, different in effect, and constitutes a final order.

[3] The only remaining question is whether or not the court erred in order the change in the custody without hearing proof on the issues presented in the pleadings. The contention of appellant is that the court committed error in making such an order without proof, and we are of the opinion that that contention is sound. While chancery courts possess a continuing power over the matter of custody of a child which has been awarded to one of the parents, it does not follow that an order changing the status can be made without proof showing a change in circumstances from those which existed at the time the original order was made. The original decree constituted a final adjudication that appellant, and not appellee, was the proper one to have the child, and before an order can be made changing the status, there must be proof on the subject justifying the change. The following statement of the law on the subject is found in 9 *Ruling Case Law*, p. 476:

"A decree made at the time of the divorce cannot anticipate the changes which may occur in the condition of the parents, or in their habits and character, and their fitness to have the custody and care of the children. The parent having the custody of the children may marry; may become poor and unable properly to maintain and educate them; may become vicious and morally unfit to have the control of children. These changes, and other sufficient causes, may make it necessary for the good of the children that their custody should be changed. * * * Moreover, a delinquent parent may, in the course of time, become entirely fit to have and retain the custody of his or her child. And so it has been held that the presumption of unfitness on the part of a father for the custody of his child, raised by refusal of the court to award it to him upon granting a decree of divorce against him, is overcome by

evidence of an exemplary life for many months after the passing of the decree. A decree fixing the custody of a child is, however, final on the conditions then existing, and should not be changed afterward unless on altered conditions since the decree, or on material facts existing at the time of the decree, but unknown to the court, and then only for the welfare of the child."

There has been no decision of this court on the precise point, but several decisions clearly recognize the correctness of the above-stated rule. Thus it was said in *Meffert v. Meffert*, 118 Ark. 582, 177 S. W. 1, that an order of the chancery court, awarding custody of the child to one of the parents, "is not a final one, and that it may be changed at any future time by the chancellor for cause." In the recent case of *O'Kane v. Lyle*, 185 S. W. 281, we held that it was error for the chancery court to change an order, concerning an allowance for the support of a child, without taking proof to show a change in the circumstances. It was held, in other words, that the original decree was a bar to any further order until there was shown a change in the circumstances of the parties. The same principle applies with respect to the change of the custody of the child. Several cases cited by appellant on the brief support this view. In *Koontz v. Koontz*, 25 Wash. 336, 65 Pac. 546, the court said:

"A decree of the superior court, which determines the custody of infant children, from which no appeal has been taken, is conclusive upon the court which rendered the decree and upon all other courts, in the absence of a material change in the condition and fitness of the parties, or the requirements for the welfare of the child."

[4] The order is defended on the ground that the chancellor had personal knowledge of the parties and their fitness, respectively, to care for the child. It is suggested in the argument of counsel for the appellee that the chancellor often had the parties before him and conferred with them. That, however, is not sufficient basis for a decree adjudicating the rights of the parties. The personal knowledge of the chancellor is not judicial knowledge of the court, for there is no way of testing the accuracy of knowledge which rests entirely within the breast of the court.

[5] It is also argued that the court erred in permitting the child to be taken beyond the jurisdiction of the court, but that question can only be decided when proof is taken establishing the circumstances of the parties. We do not hold that it is beyond the power of a court to make such an order, for if the established facts justify the conclusion that the mother of the child is capable of giving proper care to the child, and that she will comply with the orders of the court, it would not be beyond the power of the court to permit her to take the child to her home in another state.

For the error in entering a decree in the

absence of proof, the decree is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

ST. LOUIS, I. M. & S. R. CO. v. INGRAM. (No. 14.)

(Supreme Court of Arkansas. May 22, 1916.)

1. MASTER AND SERVANT §265(9)—INJURIES—ACTION—BURDEN OF PROOF.

Under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665), a railway company is not chargeable with negligence by mere proof of a defect in its appliances, but actual or constructive notice thereof must be shown.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 882-889, 900-905; Dec. Dig. §265(9).]

2. MASTER AND SERVANT §286(24) — INJURIES—ACTION—QUESTION FOR JURY—DEFECTIVE TOOLS.

In an action under the federal Employers' Liability Act, evidence that plaintiff was injured by breaking of an unloading skid, an old bridge timber which had long been exposed to the weather, the question whether defendant was negligent in directing its use, without inspection as to its soundness, was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1029; Dec. Dig. §286(24).]

3. JURY §97(1) — COMPETENCY — PREVIOUS LITIGATION WITH A PARTY.

Holding competent to serve as juror one who has previously recovered in litigation against the defendant railroad company, but who states that he has no prejudice, the defendant exhausting its last peremptory challenge on him, is not error, although not advisable.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 431, 435, 436; Dec. Dig. §97(1).]

4. DAMAGES §134(3)—EXCESSIVE—PERSONAL INJURIES.

In recovery against railroad by employé for injury to leg, necessitating seven operations, causing great pain and long confinement and loss of earning capacity, verdict for \$9,000 was not excessive, although the leg was not amputated nor was its use lost.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 368, 389-392; Dec. Dig. §134(3).]

5. RAILROADS §161—LIENS FOR DAMAGES.

Where employé sued a railroad for injuries within a year after injury, but, after judgment for him had been reversed on appeal and remanded for new trial, he took a nonsuit and brought a new suit therefor more than a year after injury, he was not entitled to the lien for his damages given by Kirby's Dig. § 6661, upon the railroad property over prior mortgages and other similar liens, being barred by Kirby's Dig. § 6662, providing such lien shall not be effectual unless suit is brought or claim is filed with receiver of the road within one year after the claim accrues; since the time fixed is a condition precedent, not subsequent.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 482; Dec. Dig. §161.]

Appeal from Circuit Court, Jackson County; Jno. W. Stayton, Special Judge.

Action by William Ingram against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Troy Pace, of Little Rock, for appellant. Gustave Jones and L. L. Campbell, both of Newport, for appellee.

SMITH, J. This is the second appeal of this case. The opinion upon the former appeal will be found in 118 Ark. 377, 176 S. W. 692, and the facts as there stated are substantially the same as those developed at the trial from which this appeal is prosecuted, except in the respects to which attention will be called. At the trial from which the first appeal was prosecuted, appellee predicated his right of recovery on the act of the General Assembly of this state approved March 8, 1911 (Acts 1911, p. 55); but on the remand of the cause appellant amended its answer and alleged that, at the time of his injury, appellee was employed in interstate commerce and that his right of recovery, therefore, depended upon the federal Employers' Liability Act of April 22, 1908, and not upon the state statute under which the first trial was had. Appellee conceded that this was correct, and all the instructions given were drawn to conform to the federal statute. The difference between the two statutes, so far as it is material here to consider the difference, is that under section 2 of our statute the railroad company is deemed to have had knowledge of the defect in its appliances, and proof of the existence of the defect is prima facie evidence of negligence; while, under the federal statute, the common-law rule in this respect has not been changed.

[1] Under the state statute the servant need only to prove that he was injured by reason of a defective appliance to make a prima facie case; while, under the federal statute, the presumption prevails, even after proof of the defect, that the railway company was not aware of its existence; and, until it is shown that the railway company knew, or, in the exercise of ordinary care, should have known, of the defect, it is not charged with that knowledge.

At the trial from which the first appeal was prosecuted, it was shown that appellee was injured by reason of the fact that a skid broke and threw a piece of piling on him. There was expert evidence showing that a sound skid should have safely supported a weight several times greater than that of the piling which caused the skid to break. Thereupon the court directed the jury to find for the plaintiff upon the question of negligence, and submitted to the jury the question only of the assessment of damages. We held that this was error, as, under the evidence, the jury should have been permitted to pass upon the question of the primary negligence of the company. Attention was called to the evidence of the foreman of the gang of which appellee was a member, wherein he stated that "he observed the guard rails after they were taken from the bridges, and that there were no defects in them." At the

trial from which this appeal is prosecuted the foreman was not so definite on the subject of the inspection of the timbers from which the skids were made. Indeed, appellant undertook to impeach him by proof of contradictory statements on this subject contained in his evidence on the former trial. At this last trial he was asked, "How close did you ever get to the skids that were being used?" and he answered, "I suppose I passed them in my work laying on the ground." He was asked the following questions and gave the answers set out:

"At that time did you give them any particular inspection? A. No, sir. You just saw them, like passing by this courthouse, and see them? A. Yes, sir. Did you ever make inspection of the skid that broke with a view to see if it was defective? A. No, sir."

It appears, therefore, that the jury was warranted in finding that no inspection was in fact made.

[2] Appellant insists, however, that the evidence is not sufficient to warrant the finding that reasonable care required that an inspection be made; and it also insists that an inspection, such as would have been required by the exercise of ordinary care only, would not have revealed any defect in the skid. In other words, if a defect existed, the exercise of ordinary care in inspecting the skid would not have disclosed its existence. As at the former trial, so in this the proof showed that a skid the size of the one in use when appellee was injured should have safely supported several times the weight of the piling which caused it to break. The expert witness stated it should have sustained ten times the weight of the piling. The conclusion, therefore, is warranted that the skid was, in fact, defective. It will be borne in mind that appellee was not employed at the skid which broke, and he was not, therefore, afforded an opportunity to make an inspection of it.

Appellant insists that this case is controlled by the principle announced in the case of St. L., I. M. & S. R. Co. v. Andrews, 79 Ark. 437, 96 S. W. 183, in that an inspection, which ordinary care only would have suggested, would not have revealed the defect in the skid. The Andrews Case contains a very clear declaration of the law on this subject. The master is required to make an inspection only when ordinary care suggests the necessity for it. And the inspection made must be such as ordinary care suggests as being necessary under the circumstances of the case. Was the jury warranted, under the evidence in this case, in finding that such a duty rested upon appellant and that there was a negligent failure to discharge it? As has been shown, the jury was warranted in finding that an inspection was not made, and no attempt is made to show that appellee was guilty of contributory negligence. The timbers were old and had been long in use on a bridge and thereby exposed to the action and effect of the weather. They had been so exposed for a sufficient length of time to sug-

gest the necessity that they be replaced with newer timbers. They had been "dapped" or notched so as to fit down over the ties about two inches. Before they had been "dapped" they were 6x8 timbers. When they were removed these notches were trimmed down so that the timber became a 4x8. The interval between the time they were "dapped" and afterwards trimmed down represents the time they were used as guard rails on the bridge, and the length of this time is not shown further than that it had become necessary to replace them. These guard rails were trimmed down to be used as stakes to put on the sides of flat cars as uprights to hold lumber or logs on the flat cars when wired at the top, and might have been safe when used for this purpose without also being safe for skids. At least, the jury might have so found. This skid was not produced at the trial, and the nature of the defect can only be conjectured. Yet that it was defective is reasonably certain, or it would have safely held up the weight which caused it to break. Although similar skids have been safely used for loading this piling, it is not shown that this defective skid had been so used. Notwithstanding the timber had been dressed down to be used as a guard stake the foreman directed its use as a skid and did this without causing any inspection to be made to ascertain whether its previous use and exposure had rendered it unfit for that purpose. We think this evidence presents the question whether the master discharged his duty in failing to make an inspection.

[3] It is insisted that error was committed in holding competent to serve as a juror one J. T. Craft, who was a member of the regular panel of the petit jury. It was shown that Mr. Craft was the plaintiff in the case of *St. L., I. M. & S. R. Co. v. Craft*, 115 Ark. 483, 171 S. W. 1185, which case was carried to, and affirmed by, the Supreme Court of the United States (237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160), and that in all this litigation he had been represented by the same firm of attorneys which was representing appellee at the trial below; and he admitted that during the progress of this trial some ill will had been engendered between himself and some of the subordinate officials of the railroad company. In answer to the question if he did not entertain some slight ill will towards the appellant company he answered:

"Not a thing in the world, sir, not a thing in the world against them. My difficulty was settled, I will say, satisfactorily settled."

And in other answers he disclaimed any bias or prejudice which would have disqualified him. He was held competent, and appellant exhausted its last peremptory challenge on him. As has been said in numerous cases, the trial court is, of necessity, vested with a large discretion in passing on the questions of fact which arise in the examination of a juror on his voir dire. He sees and hears the examination and can judge of the candor and

truthfulness of the answers to the questions asked; and, in such cases, we reverse only where it appears that the trial judge abused his discretion. While it is true that in a case such as this, where it appears that the juror has recently had protracted litigation with one of the parties to the suit before the court, in which ill will was engendered, and in which the juror was represented by the same attorney who is then appearing against the juror's former adversary, it is safest always, in view of the frailty of human nature, to hold such juror disqualified without reference to the juror's existing opinion as to his own freedom from bias or prejudice; yet we cannot say, as a matter of law, that this should be done in all cases, nor can we say that error was committed in not so holding in the present case.

[4] It is urged that the damages assessed are excessive, the verdict having been for \$9,000, for which amount a judgment was rendered. It is true appellee did not lose his leg as a result of his injury nor will he entirely lose the use of it; yet there is evidence to support the finding that the injury is a permanent one. According to appellee and the evidence in his behalf his damages are far greater than they would have been had he lost his leg by amputation. Seven different operations were performed on his leg, each being done under an anæsthetic, and these operations were made necessary by a condition which confined appellee in hospitals for many weeks, during which time his suffering was very intense. In view of this suffering and the loss of time and expense and the impaired earning capacity, we cannot say the verdict is excessive.

A supplemental motion for a new trial was filed, in which a showing was made that appellee's injuries were exaggerated by him; but this motion was heard and disposed of on conflicting evidence, and we cannot say the finding of the court is unsupported by the evidence.

[5] It appears that the former appeal in this case was prosecuted from the Independence circuit court, in which county the suit was originally brought, but that upon the remand of the case a nonsuit was taken and a new suit brought in the Jackson circuit court, but that more than a year had elapsed after appellee's injury before this last suit was brought; yet, notwithstanding this fact, the lien provided by sections 6661 and 6662 of Kirby's Digest was adjudged in his favor.

Section 6661 provides that:

" * * * Every person who shall sustain loss or damage to person or property from any railroad for which a liability may exist at law * * * shall have a lien on said railroad * * * for said * * * damage and * * * upon the roadbed, buildings, equipments, income, franchise, right of way, and all other appurtenances of said railroad, superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees, and beneficiaries, under trusts or owners."

Section 6662 reads as follows:

"The lien mentioned in the preceding section shall not be effectual unless suit shall be brought upon the claim, or the claim shall be filed by order of court with the receiver of said railroad within one year after said claim shall have accrued."

Appellee insists that these sections should be construed to mean that the claimant has one year, after his claim has been reduced to judgment, in which to file his claim with the receivers who now have charge of the appellant railway company. We think the language of the statute, however, precludes any such construction. No difference in time is made in favor of a claimant against a railroad company which is in the hands of a receiver over that given a claimant against a road which is not being operated by a receiver; and, if there was no receivership, the contention would scarcely be made that more than one year was given in which to bring the suit. We think the word "claim" as here used refers to the cause of action and that the suit to establish it must be brought within one year after it accrued. Such appears to be the effect of the decisions of this court in the cases of *St. L. & N. Ark. R. R. Co. v. Bratton*, 93 Ark. 234, 124 S. W. 752, and *St. L., I. M. & S. R. Co. v. Love*, 74 Ark. 528, 86 S. W. 895.

Nor do we think that the fact that a suit was brought within one year of the accrual of the cause of action entitles appellee to the benefit of this lien. The present suit in which a lien is sought to be enforced was not brought within a year, although it was brought within less than a year of the date of the nonsuit in the former case. That fact might be sufficient to give the benefit of the lien if the provision for bringing the suit within one year was treated as a statute of limitations. But we think it is not to be so treated. It is rather a condition upon the performance of which the right to the lien is created. A very similar question was involved in the case of *Anthony v. St. L., I. M. & S. R. Co.*, 108 Ark. 219, 157 S. W. 394. That was a case arising under section 6290 of Kirby's Digest, commonly known as Lord Campbell's Act, in which certain minors sought to recover damages for the alleged negligent killing of their father, more than two years prior to the institution of their suit. It was there contended that the provision that the suit be brought within two years of the death of the person for whose death damages were claimed was a statute of limitations and did not apply to persons under disabilities, which exempted them from the operation of the statute of limitations, but it was there said that, when a statutory right was created which did not exist at common law, and the statute which gave the right also fixed the time within which the right might be enforced, the time so fixed becomes a limitation or condition upon the

right of action and controls; and that, inasmuch as the act which created the limitation also created the action to which it applied, the limitation was not merely of the remedy, but also of the right of action itself. See authorities there cited. So, here, a preference is given for which no authority can be found in the common law. The preference exists only because the statute has given it, and one who wishes to avail himself of its benefits can do so only by complying with its terms.

As appellee did not bring his suit within the time limited by the statute he cannot claim the lien there given and, in this respect the judgment of the court below will be modified, and, as thus modified, will be affirmed.

BRYANT LUMBER CO. v. FOURCHE RIVER LUMBER CO. (No. 20.)

(Supreme Court of Arkansas. May 29, 1916.)

1. CONTRACTS — 131 — LEGALITY OF OBJECT AND CONSIDERATION.

Under Kirby's Dig. §§ 6545, 6546, providing for the granting of railroad charters by the state board of railroad incorporation, which shall investigate, hear, and determine in each case whether in the interests of the public a railroad charter shall be granted, conferring plenary powers, absolute discretion, and the exercise of quasi judicial functions upon the board, a contract whereby plaintiff, in consideration of the building of a railroad over its land and hauling of its freight for a specified price, was to grant defendant a right of way and join with the incorporators of the railroad in their efforts to procure a charter, was wholly void as against public policy, as being the purchase of an influence on a public officer.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 594-607; Dec. Dig. —131.]

2. CARRIERS — 13(2) — DISCRIMINATION — CONTRACTS — INVALIDITY — LEGALITY OF OBJECT AND CONSIDERATION — PUBLIC POLICY.

Under Const. art. 7, §§ 3 and 6, and Kirby's Dig. §§ 6802 to 6805, inclusive, prohibiting undue or unreasonable discrimination in freight charges and facilities for transportation, a contract of which as a part of the consideration for a right of way and plaintiff's services in aiding defendant's efforts to obtain a charter defendant was to haul plaintiff's lumber then owned at a specified rate fixed by the parties, and after-acquired lumber at a price to be fixed by arbitration, was void as against public policy, in that it allows unjust or undue discrimination.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 22, 24; Dec. Dig. —13(2).]

3. CONTRACTS — 131 — LEGALITY OF CONSIDERATION — PUBLIC POLICY — OFFICIAL ACTS.

Under Kirby's Dig. §§ 6802, 6803, making it the duty of the Railroad Commission to fix the tariff charges for freight, a contract whereby plaintiff agreed to grant a right of way and assist in securing a charter for a railroad to be built in consideration in part of the carrying of its lumber then owned by the railroad at a specified rate, and after-acquired lumber at a rate to be fixed by arbitration, was void as against public policy, in that it interfered with official action.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 594-607; Dec. Dig. —131.]

4. CONTRACTS — 137(1)—PARTIAL LEGALITY—SEPARATION OF ILLEGAL COVENANTS.

Where a contract containing illegal covenants and consideration furnishes no basis for a separation of the covenants and apportionment of the consideration, it is wholly invalid; as the courts cannot make contracts for the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 701, 706-712; Dec. Dig. — 137(1).]

Hart and Kirby, JJ., dissenting.

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Suit by the Bryant Lumber Company against the Fourche River Lumber Company. From a judgment for defendant sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Appellant and appellee are lumber corporations organized under the laws of the state of Arkansas. Appellant had its principal place of business at Fourche, and the appellee its principal place of business at Bigelow, in Perry county.

Appellant instituted this suit against the appellee in the Perry circuit court to recover damages growing out of an alleged violation by the appellee of a written contract between appellant and appellee entered into on the 3d day of August, 1905. The complaint is based on the contract, and the contract is set out in full and made an exhibit to the complaint.

The appellant alleged substantially that it owned a sawmill plant and was engaged in the manufacture of lumber at Fourche, Ark.; that it owned large bodies of timbered lands that were situated several miles from its plant; that the removal of the timber from these lands to the mill of appellant was necessary in the operation of its business; that the appellee desired to build a railroad running through the timbered lands owned by appellant, and entered into a contract with appellant whereby it was agreed that the appellant should convey a right of way over its lands to the appellee, and in consideration therefor the appellee was to build and have built a railroad over this right of way. It was alleged that the railroad was to be built 34 miles from a point 10 miles south of Bigelow; that certain specified distances were to be completed within specified times, and the whole to be completed by August 3, 1910. Appellant also alleged that by the terms of the contract appellee was to haul and carry all timber equally and impartially for the appellant over its railroad when constructed; that the appellee changed the route of the railroad and ran the same into timbered lands which were owned solely by the appellee; and that by the failure of the appellee to construct the road as required by the contract and to have the timber of appellant carried on equal terms with that of the appellee appellant was damaged.

The complaint alleged that appellant had complied with all the terms and provisions of

the written contract on its part, and alleged that the appellee had violated the contract in the particulars above mentioned, which were set forth in detail, together with the various amounts constituting the damages claimed by appellant, which, in the aggregate, were alleged to be over \$400,000, for which the appellant prayed judgment.

The appellee demurred to the complaint, setting up that the obligations on the part of the appellee were based upon reciprocal obligations of the appellant which constituted an entire consideration; that by the terms of the contract appellant had obligated itself to join with the incorporators of the Fourche River Valley & Indian Territory Railroad Company in their efforts to secure a charter in accordance with the articles of association and map presented to the board of railroad incorporation; that in consideration of the obligations on the part of the appellant, as set up in the contract, the appellee had agreed on its part that the railway company, when it was incorporated and its road built, would haul the timber then owned by the appellant at a rate specified, and that the price for hauling timber acquired in the future should be fixed by a board of arbitrators.

The appellee set up that the contract, in the particulars named, was contrary to public policy and in violation of the acts of Congress and of the state of Arkansas regulating the conduct of business of railroad companies.

It is unnecessary to set out the complaint and the contract at length. Both parties have treated the contract as a part of the complaint, and such portions of the contract as may be necessary will be set out and commented on in the opinion. The above are substantially the issues. The court sustained the demurrer and entered a judgment dismissing appellant's cause, from which judgment this appeal has been duly prosecuted.

W. M. Lewis, C. C. Reid, and Sam Frauenthal, all of Little Rock, for appellant. Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, and J. F. Sellers, of Morrilton, for appellee.

WOOD, J. (after stating the facts as above). [1] It appears by the preamble to the contract under review that the appellee had already constructed a railroad across lands belonging to the appellant, and that there was a controversy between appellee and appellant as to whether or not the appellee had any authority to build this railroad, and it was recited that the controversy between the parties was detrimental to the interests of each other, and that, in order to settle the same in so far as it affected the future rights of any and all the parties and their successors as to the building, maintaining, and operating a railroad and the grant-

ing of rights of way, hauling freight, etc., the parties had agreed to settle said controversy by entering into mutual covenants and agreements. The preamble shows, in other words, that the covenants and agreements entered into by one of the parties were in consideration of the covenants and agreements entered into by the other.

Under this contract the appellee bound itself to haul the timber then owned by the appellant when loaded by it on the cars of the appellee at the rate of 37½ cents per 1,000 feet, and also to haul timber thereafter acquired by the appellant, when loaded on the cars of the appellee, at a price to be fixed by arbitration, and to haul after-acquired timber of the appellant for a period of ten years to points on the lines of the Fourche River Valley & Indian Territory Railroad Company, or to the end of its line, if consigned to points beyond it, without transfer of freight from one car to another. The appellee also bound itself to cause the incorporators of the Fourche River Valley & Indian Territory Railroad Company to renew its application for a charter, and, if a charter was granted, it guaranteed that certain parts of the railroad should be completed within certain specified dates on a definite line specified, and that the whole should be completed within five years from the date of the charter.

In consideration of these obligations on the part of the appellee the appellant bound itself "to join with the incorporators of the Fourche River Valley & Indian Territory Railroad Company in their effort to secure a charter" for that company in accordance with the articles of association and map that had been presented to the board and which were then on file in the office of the secretary of state. It also bound itself to allow the appellee to enjoy the right of way occupied by it over the lands of the appellant and to execute a deed for the right of way over the lands of appellant to the Fourche River Valley & Indian Territory Railroad Company as soon as that company was incorporated.

The contract contained also the following provision:

"No application shall be made to the board of railroad incorporators for the incorporation of the Fourche River Valley & Indian Territory Railroad Company until this contract is ratified by the respective boards of directors of the Bryant Company and the Fourche Company as above provided for. * * * This contract shall be void unless the charter of the Fourche River Valley & Indian Territory Railroad Company shall be granted by the board of railroad commissioners within sixty days from this date."

By these and other provisions of the contract it appears that appellee and appellant entered into the contract in order that the appellee, under the name of the Fourche River Valley & Indian Territory Railroad Company, might incorporate, build, and operate a line of railroad in accordance with certain articles of incorporation and a map

then on file in the office of the secretary of state, and to enable the appellant to have the timber on the lands it then owned hauled over appellee's railroad at a specified rate fixed by the parties to the contract, and to have the timber that it might thereafter acquire hauled at a price not specified, but to be fixed by arbitration.

Under our law charters to railroads are granted by a state board of railroad incorporation composed of certain state officers. It is made the duty of this board—

"whenever any articles for the incorporation of any railroad company have been filed with the secretary of state, together with a preliminary survey of the route to be occupied and appropriated by said company, and the affidavits of the directors, at the request of said directors, to meet at the office of the secretary of state for the purpose of determining whether or not it may be to the interest of the public, and whether such charter should be granted.

"Said board shall hear and determine the matters in interest as between the public and said company, and as to whether there may be any interferences in the territory to be occupied and appropriated by the said company. Said board shall have power and it shall be its duty to investigate, and if, in the opinion of the majority of the board, it is to the interest of the public that said company should be invested with corporate powers, the president and secretary shall indorse their approval and thereupon said company shall become incorporated and chartered." Kirby's Digest, §§ 6545, 6546.

It will be observed that this statute confers upon the board plenary power and absolute discretion in the matter of incorporating and granting charters to railroads. It is made the duty of this board, in the interest of the public, to investigate, and it is expressly provided that it shall determine the matters in interest as between the public and the company and as to whether there may be any interferences in the territory to be occupied and appropriated by the company. In hearing and determining the matters in interest between the public and the company seeking a charter the board exercised quasi judicial functions. These functions must be exercised in the interest of the public. Hence the question as to whether a charter shall be granted or refused a particular company applying therefor cannot be made the subject of a contract between that company and some other company.

Sound public policy forbids that the fountain source from which charters to railroads must emanate shall be subjected to contaminating influences. The necessary tendency and effect of contracts between individuals or companies by which one of the parties to the contract, for a money consideration or its equivalent, agrees that he will use his influence to aid the other party in procuring a charter, is to bring to bear upon the board of railroad incorporation a corrupting influence. A contract of this kind is of no greater validity than would be a contract between parties by which one agreed, for a money consideration, or upon mutual covenants requiring the expenditure of money, to assist

the other in obtaining a decision in his favor on an issue that might be pending between him and some other before a judicial tribunal, and of no more validity than would be a contract by which one party agreed, for a money consideration, to assist another in procuring advantageous legislation. All such contracts are absolutely void. Courts will not inquire as to whether the board in the particular instance under consideration was incorruptible, or whether the contract had any effect in fact on the conduct of the public officials. Such contracts will be judged by their tendency, and not by the actual results in any given case.

As was aptly said in *Doane v. City Railway Co.*, 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588:

"Contracts for the purchase of the influence of private persons upon the action of public officials, either executive or legislative, are against public policy, and void. It is sufficient that their tendency is bad."

In 9 Cyc. 481, the authors, speaking of such agreements, said:

"The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance." *Brooks v. Cooper*, 50 N. J. Eq. 761, 26 Atl. 978-981, 21 L. R. A. 617, 35 Am. St. Rep. 793; 6 R. C. L. pp. 730, 741.

See, also, *Buchanan v. Farmer*, 184 S. W. 33.

While the contract under review does not disclose the precise nature of the service that the appellant was to render the appellee to enable it to procure the charter, yet the purpose in entering into the contract, as shown by the preamble and various provisions in the body of the contract, was to enable the appellee, under the name of the Fourche River Valley Railroad Company, to build a railroad according to a certain map and the articles of association of that company then on file with the secretary of the board of railroad incorporation. It is shown by the preamble that there was a controversy between the appellant and the appellee affecting "the future rights of the parties as to the building, maintaining, and operating a railroad."

If the appellant could have presented to the board of railroad incorporation any valid reasons why such board, acting in the interest of the public, should withhold a charter from the appellee, the board, charged with the duty of making an investigation to see whether appellee should be granted a charter, was entitled to know those reasons. If appellant had any such valid objections as would cause the board to refuse appellee a charter, then in granting such charter the interests of the public would be injuriously affected. As a consideration to appellant for joining in the efforts of the appellee to procure a charter the latter was to perform certain covenants on its part. Thus virtually the effect of such a contract would be to enable the appellant and the appellee to convert conditions and influences that might be

utilized by the board in the interest of the public for their own private gain. But, as we have seen, even though the public interest might not, in fact, be injuriously affected, the tendency of the contract into which such a covenant enters is bad, and unless the covenant which gives the taint can be eliminated, leaving legal and enforceable obligations, the whole contract will be declared void.

To sustain this contract appellant relies upon certain decisions of this court in which we held that, where a railroad obtained a deed to its right of way, upon consideration that it would locate a depot at a certain place, it would be liable in damages for a failure to comply with the contract. *Ark. Central Rd. Co. v. Smith*, 71 Ark. 189, 71 S. W. 947; *St. L. & N. Ark. Rd. Co. v. Crandell*, 75 Ark. 89, 86 S. W. 855, 112 Am. St. Rep. 42; *St. L., I. M. & S. R. Co. v. Berry*, 86 Ark. 309, 110 S. W. 1049. But in these cases the issue now presented was not raised or decided, and the principle was not the same or analogous even. Until the passage of Act 149, p. 356, Acts 1907, there was no public agency or tribunal in this state charged with the duty of locating depots. See *St. L., I. M. & S. R. Co. v. Bellamy*, 113 Ark. 384, 169 S. W. 322, L. R. A. 1915D, 91. That was left to the companies. Hence in above cases influence to control the conduct of public functionaries was no part of the consideration for the contract. Appellant also relies upon *Fourche River Lbr. Co. v. Bryant Lumber Co.*, 97 Ark. 633, 634, 135 S. W. 796, as sustaining this contract. But that case likewise is not in point. The validity of the contract was not challenged in that case.

Learned counsel for appellant contend that the covenant on the part of appellant to join with the appellee in its efforts to obtain a charter may be removed and leave the appellee to respond in damages for violations of its other covenants.

"It is perfectly well settled that, where one provision in a contract, which does not constitute its main or essential feature or purpose, is void for illegality, or otherwise, but is clearly separable and severable from the other parts which were relied upon, such other parts are not affected by the invalid provision, and may be enforced as though no such provision has been incorporated in the contract." 6 R. C. L. p. 815, § 214; *Ft. Smith, L. & T. Co. v. Kelley*, 94 Ark. 461, 127 S. W. 975.

But this doctrine has no application here, for the reason that this tainted covenant on the part of the appellant to join appellee in its efforts to procure a charter, as appears from the preamble and various provisions of the contract, was an essential, if not the sole, inducement for the reciprocal covenants and obligations on the part of the appellee.

When the contract is viewed as a whole, it is clear that the appellee would not have entered into the separate covenants on its

part if it had not realized that its efforts to obtain the charter sought might fall unless appellant joined in those efforts. And it is likewise clear that the appellant would not have entered into such a covenant unless the appellee had agreed on its part to do the things specified in its separate covenants. The tainted covenant therefore permeates and poisons the whole contract, rendering it illegal and void.

[2] There is another reason why the contract is against public policy and void. It is the policy of the laws of this state, as evidenced by constitutional provisions and statutory law, to prevent undue or unreasonable discriminations in freight charges and facilities for transportation. All individuals, associations, and corporations have equal rights in these particulars, and there shall be no unjust or undue discrimination in these matters by common carriers in this state. Const. Ark. art. 17, §§ 3 and 6; Kirby's Digest, c. 133, §§ 6802 to 6805, inclusive.

To insure the public having business with common carriers as shippers of that fair and equal treatment in the matter of uniform rates of freight and in the other matters mentioned in the Constitution and statutes, railroads, as common carriers, are not only liable in damages to the party aggrieved, but there is a heavy penalty prescribed, to be recovered by a suit in the name of the state, for a violation of the statutory requirements providing for uniform rates of freight. See Kirby's Digest, §§ 6808, 6813.

[3] Even if the appellee and the Fourche River Valley & Indian Territory Railroad Company should be treated as independent corporations, the contract nevertheless entered into between the appellant and the appellee bound the appellee to have the Fourche River Valley & Indian Territory Railroad Company violate the provisions of the statute in regard to freight charges. In entering into this contract the appellant and the appellee, by their mutual covenants, assumed to usurp the functions of another one of the public agencies of the state, to wit, the Railroad Commission, whose duty it is to fix the tariff charges for freight in this state. See Kirby's Dig. c. 133, §§ 6802, 6803.

In 6 R. C. L. p. 713, it is said:

"Contracts are against public policy when they tend * * * to the violation of a statute, or to interfere with or control executive, legislative, or other official action, or to prevent competition whenever a statute or any other known rule of law requires it."

In *Heart v. Brewing Co.*, 121 Tenn. 71, 113 S. W. 364, 19 L. R. A. (N. S.) 964, 130 Am. St. Rep. 754, the court said:

"It is a principle of general application that all contracts are void which provide for doing a thing which is contrary to law, morality, and public policy."

In the recent case of *Arlington Hotel Co. v. Rector*, 186 S. W. 622, we held that in determining whether or not a contract was against public policy courts will look to see

whether any principles set forth in the Constitution and laws of the United States or of the state in which the contract was executed, or the principles set forth in any of the decisions of their courts were violated; that these sources must be consulted in determining the issue as to whether a contract is contrary to public policy. When these sources are consulted, the contract under consideration must be condemned. In addition to this the contract in suit must fall under the condemnation of statutory law.

While the charter was to be granted in the name of the Fourche River Valley & Indian Territory Railroad Company, the language in the various provisions of the contract make it plain that the incorporators of that company were the stockholders and owners of the appellee. They are treated as identical in the complaint and in the contract between the parties to this litigation, and on the issue here presented the appellee must be regarded as the Fourche River Valley & Indian Territory Railroad Company. Appellee assumes throughout the contract to act for that company. The parties therefore to this contract, by their mutual covenants, violated the provisions of the statute requiring railway companies to transport freight at uniform tariff rates fixed by the Railroad Commission, and preventing them from demanding or receiving from any shipper any greater or less rate for similar and contemporaneous services than is demanded or received from any other shipper, etc. Kirby's Digest, §§ 6802-6804. But appellant contends that the covenant as to the rates is only incidental to the main purpose of the contract, which was to have the timber transported; that this covenant as to rates, if illegal, should be ignored, and damages awarded for alleged violations of the contract as set up in the complaint just as if the illegal provision as to the rates did not exist. The contention is unsound. It would have been legitimate for appellee and appellant to have entered into a contract whereby appellee obligated itself to pay for a right of way over appellant's lands by building a railroad on same and by transporting appellant's timber at a schedule of rates fixed according to law. They could have contracted that the right of way should be paid for in money or in legitimate services, or both. But they could not contract that appellee should pay appellant for a right of way by making a preference in its favor in the matter of freight charges. *C.*, R. I. & P. Ry. Co. v. Whedbee, 106 Ark. 237-240, 153 S. W. 86; *St. L., I. M. & S. R. Co. v. Miller*, 103 Ark. 37, 42, 43, 145 S. W. 889, 39 L. R. A. (N. S.) 634; *St. L., I. M. & S. R. Co. v. Wolf*, 100 Ark. 25, 139 S. W. 536, Ann. Cas. 1913C, 1384; *Myar v. St. L. S. W. Ry. Co.*, 71 Ark. 552, 76 S. W. 557; *N. Y., N. H. & H. R. Co. v. Int. State Com. Commission*, 200 U. S. 361, 391, 392, 26 Sup. Ct. 272, 50 L. Ed. 515; *Armour Packing Co. v. U. S.*, 209 U. S. 56, 72, 80, 28

Sup. Ct. 428, 52 L. Ed. 681. See, also, *Fourche River Lbr. Co. v. Bryant Lumber Co.*, 230 U. S. 316, 33 Sup. Ct. 887, 57 L. Ed. 498; *Adams Exp. Co. v. U. S.*, 212 U. S. 522, 523, 29 Sup. Ct. 315, 53 L. Ed. 635.

[4] Along with the covenants which would be legal and valid, if standing alone, the parties to this contract have included other covenants for illegal services to be performed by each. These covenants are so correlated to and dependent upon each other as to constitute one entire contract. As we said in *Ensign v. Coffelt*, 102 Ark. 568, 572, 145 S. W. 231, 233:

"Where the contract is entire, and a part of the consideration thereof is illegal, and the illegal portion is not separable from the whole consideration, then the whole contract is unenforceable."

Such is this case.

Appellant by reason of its ownership of the lands over which appellee desired to build was able, it appears, to dominate the situation so far as procuring the charter was concerned. The obtaining of the charter was fundamental. It was an essential feature, because the road could not have been built without it. All the promises made by appellee therefore were necessarily conditioned upon securing the charter. Having its charter appellee could have condemned appellant's right of way and built its road, notwithstanding any opposition of appellant. Then who can say that appellant would have consented to join appellee in its efforts to procure the charter without exacting in return the obligation of appellee to build the road, and also to give appellant preferential rates, and who can say that appellant did not also demand preferential treatment in regard to freight rates as an essential feature of the consideration for its covenant to join efforts in procuring the charter and granting appellee the right of way? The contract furnishes no basis for separation of the covenants and apportionment of the consideration. These are matters of contract between the parties, and the courts cannot make contracts for them. This is not a suit for the value of the right of way. But appellant bottoms its action on the contract and prays damages for its breach. It is necessary for appellant to prove the illegal contract; therefore courts will not enforce it. *Wood v. Stewart*, 81 Ark. 41, 48, 98 S. W. 711; *Peay v. Pulaski County*, 103 Ark. 611, 148 S. W. 491.

The judgment is therefore correct, and it is affirmed.

HART and KIRBY, JJ., dissenting.

FITZPATRICK v. OWENS. (No. 141.)
(Supreme Court of Arkansas. July 10, 1916.)
Dissenting opinion.
For majority opinion, see 186 S. W. 832.

HART, J. I do not think the construction placed upon the act under consideration is

justified by its language, and it seems to me that the construction is opposed to the trend of our former decision relating to the question. In the case of *Kies v. Young*, 64 Ark. 381, 42 S. W. 669, 62 Am. St. Rep. 198, the court expressly recognizes the rule in the construction of married women acts to be that, where the Legislature does not, by express words or by clear implication, express an intention to repeal the existing law in regard to married women, the presumption is that they intended the rule should remain.

The court said that the common-law unity of husband and wife still exists in this state except so far as the legislative purpose to change it has been expressed by statute. The statute under consideration is as follows:

"Section 1. That, from and after the passage of this act, every married woman, and every woman who may in the future become married, shall have all the rights to contract and be contracted with, to sue and be sued, and in law and equity shall enjoy all rights and be subjected to all the laws of this state, as though she were a feme sole." Acts 1915, p. 684.

Reliance seems to be placed in the decision of the majority in the dissenting opinion of Judge Harlan in *Thompson v. Thompson*, 218 U. S. 611, 31 Sup. Ct. 111, 54 L. Ed. 1180, 30 L. R. A. (N. S.) 1153, 21 Ann. Cas. 921. A statute governing the District of Columbia was under consideration in that case, and it specially provided that married women might sue for torts committed against them as fully and freely as if they were unmarried; and Judge Harlan's dissent was based upon this special provision of the statute. I think that an examination of his dissenting opinion will lead to the conclusion that, had it not been for this special provision, he would not have dissented from the majority opinion.

The first part of our act, providing that married women shall have all rights to contract and be contracted with, to sue and be sued, I think gives her the right to make contracts with her husband as well as with third persons, and to sue or be sued by him as well as others in regard to such contracts. Before the passage of the act, by the common law, a husband and wife were deemed to be one person and no suit at law of any character could be maintained by one against the other in this state. Suits between a husband and wife, however, have long been permitted in equity.

It seems to me that the object of the statute was the placing of the husband and wife upon an equal footing in regard to the making of contracts and ascertaining their rights thereunder. Under the common law, the husband did not have the right to sue the wife for a tort. I do not think the language of the present statute indicates a legislative intent, "to make a departure from the common law so radical and so opposed to its general policy, as the authorization of a suit

by the husband or wife against the other for injuries to the person or character." See *Peters v. Peters*, 156 Cal. 32, 103 Pac. 219, 23 L. R. A. (N. S.) 699. In the case of *Jackson v. Williams*, 92 Ark. 486, 123 S. W. 751, 25 L. R. A. (N. S.) 840, it was held that a husband was liable for a tort of the wife not committed in his presence, and the ruling was based upon the unity of person in husband and wife. But it is said that no force can be given to the latter part of the section, unless the construction placed upon the act by the majority opinion is adopted. It can be said, with equal force, that all the language preceding that is useless, if the opinion of the majority is adopted; because, if the language of the latter part of the section is broad enough to include suits by the wife against the husband for personal torts, it is certainly broad enough to include suits by her against him on contracts, and it was entirely useless to have embodied the language used in the first part of the section in the statute. It is our duty to give force and effect to every part of the statute, if we can do so without doing violence to its language. I think the first part of the section gives the wife the right to contract and be contracted with by her husband and that the words "sue and be sued" have relation to such contracts, and that the latter part of the section, which provides that "in law and equity shall enjoy all the rights and be subject to the laws of this state as though a feme sole," were intended to remove the rigor of our former rule in regard to making the husband liable for torts of his wife not committed in his presence, and other matters of that kind. I believe, however, it was the intention of the lawmakers to still preserve the legal unity of husband and wife, and that marriage still "acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other." In other words, if the Legislature had intended such a radical departure from the rule as it now exists as indicated by the majority opinion, it would have said so in plain terms. Many cases might be cited to show that statutes broader than ours have not conferred upon husband and wife the right to sue each other for personal tort.

But my dissent is based upon what I believe to be an adherence to the principles of law heretofore decided by this court. I have no regret that, by judicial construction, the rules of the common law on this subject "have gone to that bourne from which no traveler returns, where they must rest undistinguished by a single tear shed for their departure."

Mr. Justice WOOD concurs in this dissent.

WEBB et al. v. BOWDEN et al. (No. 176.)
(Supreme Court of Arkansas. Feb. 14, 1916.
Dissenting Opinion June 26, 1916.)

1. ELECTIONS \S 51—APPOINTMENT OF ELECTION JUDGES—STATUTE.

Under Kirby's Dig. §§ 2764, 2765, 2799, 2800, relative to the appointment of judges of election by the election commissioners of a county, and prescribing their qualifications, the removal of old election judges by the commissioners prior to an election relative to a change in the location of a county seat and the appointment of new judges favorable to the change was within the authority of the commissioners.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 44, 45; Dec. Dig. \S 51.]

2. COUNTIES \S 35(1)—COUNTY SEAT—ELECTION—UNFAIR CONDUCT OF ELECTION COMMISSIONERS.

Where, prior to an election relative to a change in location of a county seat, the election commissioners appointed election judges who did not possess the requisite qualifications and who were all strong partisans of a particular location, such conduct of the election commissioners, though a manifest impropriety tending to show a spirit of unfairness, did not invalidate the election.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 38–41; Dec. Dig. \S 35(1).]

3. COUNTIES \S 35(3)—COUNTY SEAT—ELECTION—LOSS OF POLL BOOKS—RESPONSIBILITY FOR LOSS—SUFFICIENCY OF EVIDENCE.

On the contest of a county seat election, evidence held insufficient to warrant a finding that the election commissioners were responsible for the loss of the pollbooks of the election.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 43, 44; Dec. Dig. \S 35(3).]

4. COUNTIES \S 35(3)—COUNTY SEAT—ELECTION—LOSS OF POLLBOOKS—EFFECT.

Though election commissioners of a county were parties to a theft by which the loss of pollbooks of a county seat election was brought about, the fact did not justify the circuit court, in suit to contest the election, in ignoring the official returns made by the judges of election.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 43, 44; Dec. Dig. \S 35(3).]

5. COUNTIES \S 35(3)—COUNTY SEAT—ELECTION—FRAUDULENT RETURNS—BURDEN OF PROOF.

Contestants were not relieved of the burden of proving the allegations of their petition that the election returns were fraudulent and void, though the proof connected contestees, election commissioners, with a theft of the pollbooks.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 43, 44; Dec. Dig. \S 35(3).]

6. COUNTIES \S 35(3)—COUNTY SEAT—ELECTION—ILLEGAL INDIVIDUAL VOTES—EFFECT.

Where there were irregularities on the part of the election officers, resulting in illegal votes, but the conduct of the officers did not evidence a willful and deliberate fraud upon the ballot, the returns will be purged, but the election will not be invalidated.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 43, 44; Dec. Dig. \S 35(3).]

7. COUNTIES \S 35(3)—COUNTY SEAT—ELECTION—CONTEST—BURDEN OF PROOF.

On the contest of a county seat election, where more votes were cast in a township for removal of the county seat than were shown on the printed list of those who had paid their

poll taxes and were entitled to vote, the contestants adducing proof making it probable that the excessive votes did not occur in any legitimate way, the contestees, election commissioners, had the burden to show that the excessive votes were those of qualified electors, since the presumption of the regularity and correctness of the official action of the election officers is overcome when there is direct and undisputed proof of facts tending to impeach the returns and to show that prima facie evidence of correctness is not true.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 43, 44; Dec. Dig. ¶35(3).]

8. ELECTIONS ¶291 — QUALIFICATION OF VOTERS—PRESUMPTION.

Where it appears that a person registered, or that his vote was accepted by the election officer, there is a presumption, in the absence of proof to the contrary, that such person was a qualified voter.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 288; Dec. Dig. ¶291.]

9. EVIDENCE ¶5(2) — JUDICIAL NOTICE — MATTER OF COMMON KNOWLEDGE — ELECTIONS.

It is a matter of common knowledge that at general elections, where there are candidates of opposing parties, and especially in presidential years, the interest of the electorate is stirred, so that they are usually brought to the polls in full voting strength.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. ¶5(2).]

10. COUNTIES ¶35(3)—COUNTY SEAT—ELECTION—CONTEST—RETURNS—IMPEACHMENT — SUFFICIENCY OF EVIDENCE.

Contestants' affirmative evidence held sufficient to impeach the integrity of the official returns from a township, where more votes were cast for the removal of the county seat than were shown on the printed list of those who had paid their poll taxes and were entitled to vote.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 43, 44; Dec. Dig. ¶35(3).]

11. COUNTIES ¶35(3)—COUNTY SEAT—ELECTION—CONTEST—APPEAL AND ERROR—REMAND.

Where there was a discrepancy between the printed list of taxpayers and those who had voted at the election in a township, but the evidence was not fully developed, so that it was possible that the contestees might show that the election returns were correct, the case will be remanded to give the contestees an opportunity to prove the correctness of the election returns.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 43, 44; Dec. Dig. ¶35(3).]

12. APPEAL AND ERROR ¶302(5)—RESERVATION OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL—ASSIGNMENT.

Where the court, in addition to special findings, made a general finding and holding in favor of the contestees and against the contestants, the general assignment in the contestants' motion for new trial, that the verdict was contrary to the law and the evidence, was sufficient to challenge the correctness of the finding and judgment of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1727; Dec. Dig. ¶302(5).]

McCulloch, C. J., dissenting.

Appeal from Circuit Court, Hempstead County; Geo. R. Haynie, Judge.

Petition to contest an election by Jas. H. Webb and others against J. H. Bowden and others. From a judgment for the contestees,

contestants appeal. Judgment reversed, and cause remanded for new trial.

Dan W. Jones, of Little Rock, Etter & Monroe, of Washington, Ark., and D. B. Sain, of Nashville, for appellants. Jas. H. McCollum, O. A. Graves, and T. C. Jobe, all of Hope, for appellees.

WOOD, J. In pursuance of an order of the county court of Hempstead county, Ark., made on the 8th day of July, 1914, an election was held in the various voting precincts in that county on the 15th day of August, 1914, on the proposition of the removal of the county seat from the town of Washington to the city of Hope, in Hempstead county. The returns were made by the judges of the election to the commissioners, who canvassed the same and declared the result of the election in favor of the removal of the county seat to Hope. The appellants, citizens and taxpayers of Hempstead county, instituted this proceeding in the county court for contesting the election. There was a trial and judgment in that court in favor of the contestees, and on appeal to the circuit court the cause was heard anew in that court upon the depositions of witnesses and record and documentary evidence.

The contestants, in their petition, set forth specifically numerous grounds of illegality, irregularity, and fraud on the part of the election officers, which they contend invalidated the election. These were specifically denied by the contestees.

Among other things the contestants alleged that the election commissioners, a majority of whom favored the removal of the county seat, willfully and corruptly removed all of the regular judges of election who had been appointed at previous general elections because they did not favor the removal, and appointed men who were in the employ of and had received money from the contestees and were strong partisans of the contestees, and failed to give contestants any representation in the appointment of the election judges, thereby perpetrating a fraud upon contestants and the citizens of Hempstead county who were opposed to the removal. They further alleged that they demanded of the election commissioners a copy of the pollbooks returned by the judges of election of the various wards and precincts, but that the election commissioners, under the advice of the contestees, refused to give contestants a copy of the pollbooks or to permit the same to be copied by them, and that contestants were therefore unable to specify and name each illegal and fraudulent vote that was polled. And, by way of amendment, they set up that since the institution of the suit to contest the election the contestees had destroyed the pollbooks and tally sheets of the election.

In addition to these charges of misconduct

on the part of the election commissioners and the contestees, the contestants further, at great length, charged that the election judges at various voting precincts in the county, which are designated in the complaint, knowingly, willfully, and corruptly permitted and induced many illegal votes to be cast for removal in the several precincts named. In some of the allegations there is a general charge of fraud on the part of the election judges, and in others the judges are charged with specific acts of fraud.

At the conclusion of the evidence the contestants asked the court to find certain facts, to the effect that as soon as the result of the election was declared by the election commissioners the contestants served them with written notice that the election would be contested and to preserve the ballots, pollbooks, and tally sheets as evidence to be used in the contest; that the contestants requested the election commissioners to permit them to inspect and copy the pollbooks, which they refused; that the pollbooks were stolen or destroyed while in the possession of two of the election commissioners, and that the contestants therefore never had an opportunity to inspect the same, and that the commissioners failed to produce the pollbooks to be used as evidence in the case after demand made upon them, and failed in that respect to comply with the order of the court. The court made these findings of fact as requested by the contestants.

The contestants further asked that the court make several findings of fact, numbered from 1 to 5, inclusive, to the effect that there was such fraud practiced by the election judges at the several voting precincts in certain townships, designated, as rendered the election at those precincts void. Among these requests for findings were several covering the various precincts in De Roan township, in which the city of Hope is situated. The court refused to make these special findings as requested.

The court found that those who paid their poll taxes in the county for the year 1913 were 5,315, and that more than 2,658 qualified electors, and therefore a majority of such electors of Hempstead county voted at the election for a change and removal to the city of Hope, and entered a judgment declaring the city of Hope to be the county seat of Hempstead county, with proper orders for the removal of the county seat from the town of Washington to the city of Hope, and from such judgment this appeal has been duly prosecuted.

To sustain their allegations of misconduct on the part of the election commissioners appellants proved that two of the election commissioners were partisans of Hope, and that on the 8th day of August, 1914, they met at Hope, and, over the protest of one of the commissioners, who was not a partisan of Hope, they passed a resolution removing all of the then election judges and appoint-

ing in their stead other judges. Appellants contend that this action of the election commissioners was illegal and a part of a prearranged plan to hold a dishonest election.

[1] The statute provides that the election commissioners shall meet at the courthouse at least 20 days prior to the general election and organize themselves into a body; that after their organization, and not less than 5 days before any general election, they shall appoint three judges of election for each voting precinct in the county. The statute further provides that those appointed to be judges of election shall continue to be judges of election within their respective precincts until the next general election, unless sooner removed by the county election commissioners. Kirby's Digest, §§ 2764, 2765, and 2800.

The removal of the old election judges by the commissioners and the appointment of new judges, under the above provisions of the law, even though all the new judges selected were strong partisans of Hope, was within the authority of the commissioners. The statute only prescribes that the judges of election shall be discreet persons, able to read and write the English language, and qualified electors in the precincts for which they are appointed, and that they shall not be selected from the same political party if competent persons of different politics can be found. Kirby's Digest, § 2799.

There is no statute requiring that the meetings of the election commissioners, after their organization, shall always be held at the courthouse.

[2] It will thus be seen that the selection of the judges by the commissioners in the manner charged was not illegal, and therefore, even though the election commissioners appointed judges who were strong partisans of Hope, there was nothing in this to constitute a conspiracy on their part to hold a dishonest election. Moreover, even if the election commissioners had appointed judges who did not possess the requisite qualifications, and although they appointed judges who were all strong partisans of one side of the issue to be determined at the election, this conduct, while a manifest impropriety tending to show a spirit of unfairness on the part of the election commissioners, nevertheless did not make void the election. See *Sweepston v. Barton*, 89 Ark. 556.

The proof showed that the election commissioners, after the election, refused to allow the contestants to inspect the pollbooks, and that the issue as to whether or not they could be so inspected was raised and finally determined by this court in favor of the contestants; that before this question had been determined, and while it was pending in the courts, one of the election commissioners, a partisan of Hope, in a conversation in regard to whether or not the contestants were entitled to inspect the pollbooks, stated:

"The people of Washington [the contestants] will never get them; they will never see them."

It was further shown that a brother-in-law of this same election commissioner, in a conversation with a witness, was discussing the question of the right of contestants to see the pollbooks, and witness said to him, "You fellows ought to show up;" and he said, "It will be a cold day in August when we [meaning the contestants] would get to see them pollbooks." Witness asked him why contestants should not see the pollbooks, and he said, "They [contestees] could not afford to permit them to do so;" said, "If we do not show them, then there might be two or three go to the pen, and, if we were to, a whole bunch might go." The party using this language said he was in favor of the removal. This conversation was had after it was decided by the trial court that the contestants were entitled to see the pollbooks. Witness stated that there were several present during the conversation, and they were all jolly, laughing and talking, including the man who used the above language, but that he did not seem to be joking about what he said.

It was further shown that after it had been decided by this court that the contestants were entitled to inspect the pollbooks the attorneys for the contestees had requested the election commissioners to furnish them a copy of the pollbooks. One of the commissioners, who was not in favor of the removal, held the key to the box in which the pollbooks, tally sheets, etc., had been locked. Without sending for him, one of the other commissioners went to a hardware store and procured a key and unlocked the box, and he and the third commissioner were proceeding to make a copy of the pollbooks. They continued about this work until near half past 9 or 10 o'clock in the evening, and, not having finished the copy, they adjourned until the next morning. Davis, one of the commissioners, at the suggestion of Cornellius, the other commissioner, took charge of the pollbooks, and, having the same under his arm in a brown paper, started to his home with them. It was several blocks to where he was going. He details what took place with reference to the taking of the pollbooks away from him as follows:

"I met a man. He punched me in the side, and told me to throw up my hands, and he said, 'I want that bundle.' I didn't know the man. He had his hat pulled down. He took the bundle. I didn't give him the package. He took it. I did what he told me. I was surprised. I didn't know what it was. There was just one man. He didn't ask for any money. What he said was, 'I want that bundle.'"

Appellant contends that this testimony was sufficient to show that the pollbooks were stolen by the election commissioners, and that, when taken in connection with the other charges of fraud and misconduct on their part, it showed a conspiracy on the part of the election commissioners to destroy the evidence by which the contestants would be

able to show that the election was fraudulent and void, and that contestees, who would reap the benefit of this spoliation of the election returns, should be held responsible therefor and the election declared null and void on that account.

[3-5] In answer to this contention, it is sufficient to say that the evidence would not warrant a finding that the contestees were responsible for the loss of the pollbooks. The most that could be said of it would be that it would be sufficient to sustain a finding that the two election commissioners who were making a copy of the pollbooks were chargeable with their loss. But the evidence would not warrant this court in overruling a finding of the trial court to the contrary. Furthermore, even if it had been proved that the two election commissioners were parties to the crime by which the loss of the pollbooks was brought about, still this fact would not justify the trial court in ignoring the official returns made by the judges of election. These returns are presumed to voice the will of the electorate throughout the county, and any spoliation of the pollbooks by the election commissioners would not have the effect of invalidating the election or shifting the burden of proof to the contestees to show the validity of the election, and that the result as declared was correct. "Against a party not privy to the destruction no prejudicial inference arises." 16 Cyc. p. 1059, and cases cited. Even if the proof had connected contestees with the spoliation of the pollbooks, this would not have relieved the contestants of the burden of proving the allegations of their petition that the election returns were fraudulent and void.

The rule of law applicable to such a case is well stated in *Patch Mfg. Co. v. Protection Lodge*, 77 Vt. 294, at page 329, 60 Atl. 74, at page 84, 107 Am. St. Rep. 765, at page 790, as follows:

"The presumption arising from the fact of spoliation of evidence does not relieve the other party from introducing evidence tending affirmatively to prove his case so far as he has the burden. It cannot supersede the necessity of other evidence. The presumption is regarded as merely matter of inference in weighing the effect of evidence in its nature applicable to the question in dispute. *Cartier v. Troy Lumber Co.*, 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470, 471; 16 Cyc. 1058, 1059."

It follows that the court did not err in refusing the following request for a declaration of law:

"The conduct of the election commissioners in destroying the pollbooks and other election returns rendered such returns void, and throws upon the contestees the necessity of showing what votes were cast in De Roan township, and by whom."

It is unnecessary for us to set out and discuss in detail the evidence concerning the alleged fraud on the part of the judges of election at the various voting precincts outside of De Roan township. It would extend this opinion at great length to do so. It suf-

lices to say that we have carefully examined the same and have reached the conclusion that the court did not err in refusing to make the findings requested by the appellants to the effect that the conduct of the judges of election in these several precincts resulted in permitting illegal votes and was such fraud as vitiated and destroyed the result of the election as shown by the returns from those precincts.

While certain irregularities were shown at many of these voting places we do not feel warranted in holding as matter of law that there was no substantial evidence to sustain the finding of the trial court to the effect that these irregularities did not render the entire election returns at those places void. The most that could be said of the conduct of the election judges at the various precincts outside of De Roan township is that it was irregular in some particulars which resulted in permitting some illegal votes to be cast. But the evidence does not show that there was such a system of illegal voting permitted by the election officers as indicated that they knowingly perpetrated illegal acts in connection with the election, such as constituted a fraud in holding the same and vitiated the entire returns from those precincts. At least we are not warranted in overturning the finding of the trial court holding, in effect, that there was no such fraud in these precincts as vitiated the entire returns therefrom, and such as rendered the election therein void.

This court, in *Freeman v. Lazarus*, 61 Ark. 247, 257, 32 S. W. 680, 683, quoted approvingly the following from *McCrary on Elections*, § 539:

"If an officer is detected in a willful and deliberate fraud upon the ballot box, the better opinion is that this will destroy the integrity of his official acts, even though the fraud discovered is not of itself sufficient to affect the result. The reason of the rule is that an officer who betrays his trust in one instance is shown to be capable of defrauding the electors, and his certificate is good for nothing."

[8] Having in view this rule, we do not find in the conduct of the election judges in the voting precincts outside of De Roan township any evidence of a willful and deliberate fraud upon the ballot. The irregularities on the part of the election officers, resulting in the illegal votes that were cast in those precincts, should only result in purging the returns of such illegal votes. But if the returns had been purged of all the illegal votes shown to have been cast in those precincts, it could not have affected the general result.

"It is no valid objection to an election that illegal votes were received or that legal votes were rejected if they were not numerous enough to overcome the majority." *Swepton v. Barton*, *supra*.

"Frauds of individual voters and the casting of unqualified and fraudulent votes do not vitiate the returns unless the officers are parties thereto; but in such cases the returns are accepted and purged of the illegal votes." *Schu-*

man v. Sanderson, 73 Ark. 187-193, 88 S. W. 940, 942.

"Where an election has been legally held and fairly conducted, nothing will justify the exclusion of the vote of an entire precinct except the impossibility of ascertaining for whom the majority of the votes were given." *Dixon v. Orr*, 49 Ark. 241, 4 S. W. 776, 4 Am. St. Rep. 42.

This brings us to a consideration of the question as to whether the court erred in refusing to make the findings of fact requested by the appellants numbered 16 to 21, inclusive, to the effect that the election returns in various voting precincts of De Roan township were fraudulent and void and should be thrown out. In this connection, the court made the following finding of fact:

"That the paid poll tax receipts as shown by the collector of Hempstead county, Ark., for the year 1913, for De Roan township, in said county, were only 1,299, and at the county seat election held for removal of county seat on the 15th day of August, 1914, the judges of the various wards and precincts in said De Roan township, as shown by the certificate of the county election commissioners, that 2,144 votes were cast on the question of removal, and 13 against removal, leaving a majority of 2,131 votes for removal in De Roan township."

The undisputed evidence showed that at the general election in September, 1912, there was a total of 905 votes cast in De Roan township. They were distributed according to the voting precincts as follows:

270 votes cast in ward 1.
114 votes cast in ward 2.
48 votes cast in ward 3.
114 votes cast in ward 4.
294 votes cast at Bridewell's office box, and
65 votes cast at Shover Springs.

At the general election subsequent to the county seat election, held in September following, it was shown that the greatest number of votes cast for any state officer without opposition was 838, and that the total votes cast for Governor, including all of the votes that were cast for each of the party candidates in that election, was 814. The 838 votes were distributed in the different wards and precincts as follows:

226 votes cast in ward 1.
120 votes cast in ward 2.
86 votes cast in ward 3.
124 votes cast in ward 4.
235 votes cast at Bridewell's office box, and
47 votes cast at Shover Springs.

The 2,131 votes that were cast in De Roan township for removal of the county seat, as shown by the election returns, were distributed in the various wards and precincts as follows:

617 votes in ward 1.
359 votes in ward 2.
113 votes in ward 3.
366 votes in ward 4.
596 votes at Bridewell's office box, and
80 votes at Shover Springs.

These, with the 13 votes that were returned as against removal, made the total of 2,144 votes cast in De Roan township.

There was evidence on behalf of the contestants to the effect that parties were permitted to vote at the various voting precincts

in De Roan township who were not qualified electors. For instance, it was shown that at Bridewell's box several persons voted who did not live in that voting precinct and in a different township were permitted to vote without being asked questions. It was shown on cross-examination of these witnesses that they lived near the line between Ozan and De Roan townships, and most of them had been in the habit of voting in De Roan township, but had voted at times in Ozan township. They were "liners." At this box a minor was permitted to vote without being asked any questions. One voter lived close to the town of Washington, but voted in De Roan township. The judges asked him no questions. Another witness who did not live in De Roan township told the judges the place where he lived, but they asked no questions as to the township. Another witness voted there, stating that one of the judges knew where he lived; that the judges told him to vote there. He had voted before in De Roan township, but did not live in that township.

Another witness testified that he was a timber man from Louisiana. He had been in Hope 6 or 7 days; thought his home would be in North Arkansas. He went in and they took his name and he voted "for the courthouse to come to Hope." He voted at that election just because he was asked to vote. He first tried to vote at ward 3. The fellow at the gate told him that they wanted to do the right thing, and told him to go over to the other ward, closer to where he lived, and vote. The judges at the ward where he voted asked him no questions whatever as to his qualifications. He had paid no poll tax. The judges made out the ticket. The ticket was made out right there by the box where they deposited the vote, at the table where the men sat all the time. He never had the ticket in his hands and did not see them deposit the ticket in the box.

Another witness testified that he came from Louisiana on the 4th or 5th of August. His home was in Texas. He voted in Hope at a box just below the Capitol Hotel, near the depot. He had never paid a poll tax in Arkansas. A fellow called him in there and asked him if he wanted to vote, and witness told him he did not have a poll tax receipt, and the man said it didn't make any difference, and asked him, "Do you want the courthouse to come to Hope?" Witness replied, "Yes; I guess so." The man made out a ticket for witness and handed it to the fellow that was over inside at a desk like. It was the man in the inside of the house that called witness in. Witness did not know whether he was one of the judges of election or not, but he was the man that made out the ticket. The man that sat at the table made out their tickets.

Another witness, a brother of the last witness, testified substantially to the same effect, except that he had come from Missouri, and had arrived at Hope 3 or 4 days before

they voted him; stated that he and his brother were standing in front of the polls and some fellow came to the door and invited them in and asked them if they wanted to vote. Witness replied that he had no poll tax receipt, and the man said that didn't make any difference, to come and vote anyway. Witness on that occasion was on a visit to his brother-in-law, who lived in Hope. He stated that the man who invited them in went back and got a ticket and made it out. "They asked me to vote for Hope. He signed my name and wrote something on the ticket." Witness could not say what the man did with the ticket. The deputy sheriff at that box on that day, who was around or near the voting place all day, testified, denying the testimony of the last two witnesses above mentioned.

It will be observed that at the Bridewell box, at this—the county seat—election, there were 596 votes. It was shown that at ward 3, in the city of Hope, there were 34 votes cast of persons whose names did not appear on the printed list of those who had paid their poll taxes for the year 1914. It was shown that in ward 2 a minor voted who was 20 years old in December after the election. The witness testified that they asked him if he was 21 and he told them that he was going on 21. That was all that was said, and they did not swear him; said he knew all the judges and clerks. Witness did not see the judges put the ticket in the box; he saw them write his name on the pollbooks. Witness weighed 137 pounds and was 5 feet 7½ or 7¾ inches in height. This witness voted for removal.

Another witness, who was 21 years old in November following the election, voted for removal, stated that the judges asked him no questions.

[7] We have set forth the above testimony because it tends to throw light upon the conduct of the officers conducting the election at the various precincts in De Roan township; and while this testimony of itself would not be sufficient to overcome the finding of the trial court to the effect that there was no fraud upon the part of the election judges in De Roan, at least no such evidence of fraud as would justify throwing out or excluding from the count the entire vote of De Roan township, as shown by the returns of the election officers, yet this testimony, when taken in connection with the undisputed evidence showing that there were 845 more votes cast for removal of the county seat to the city of Hope than were shown on the printed list of those who had paid their poll taxes and were entitled to vote, convinces us that the court was in error in refusing appellant's prayer for declaration of law No. 3, as follows:

"The court declares the law to be that the discrepancy as shown by the collector's list of poll taxpayers in De Roan township and the number of votes alleged to have been cast at

said election casts upon the contestees the burden of proof to show that the excess votes were qualified electors."

In *Powell v. Holman*, 50 Ark. 85-94, 6 S. W. 505, 509, we said:

"The duly certified official returns of election officers are not subject to the same rules or suspicious reflections and doubtful imputations as attend the ballots under certain circumstances. The official returns are quasi records and stand with all the force of presumptive regularity, and prima facie integrity, not only till suspicion is cast upon them, but until their self-authenticated verity is overcome by affirmative proof that they do not speak the truth. * * * These returns may be impeached by any legitimate evidence, showing that they do not speak the truth, and when so overcome they lose their character as evidence, and thereupon other sources must be looked to for testimony in ascertaining and establishing the result of the vote. Had it been shown by appellee that fraud, unfairness or illegal voting attended the election, entered into and became a part of the official count, and thus involved the correctness of the certified returns, * * * or any other legitimate proof, tending to impeach the verity of the returns so placed in evidence, then the trial court might have found specially that the presumption of credit and prima facie truthfulness which the law gives to the official acts and returns of election officers had been overcome."

[8] It is familiar doctrine, as announced by this court in many cases, and as late as *Letchworth v. Fflinn*, 108 Ark. 301, 306, 157 S. W. 402, 404:

"That where it appears that a person was registered, or that his vote was accepted by the election officers, there is a presumption, * * * in the absence of proof to the contrary, that such person was a qualified voter."

But it is equally well settled by the authorities that the presumption of the regularity and correctness of the official action of election officers is overcome when there is direct and undisputed proof of facts tending to impeach the integrity of the returns and to show that the prima facie evidence of correctness is not in fact true. Such proof being made by those who challenge the returns, the law then casts upon those who would be benefited by the prima facie returns the burden of showing that they are in fact true and correct.

The law is well expressed by the Supreme Court of Illinois in *Rexroth v. Schein*, 206 Ill. 80, 84, 69 N. E. 240-242, as follows:

"It became incumbent upon the appellant, in order to justify the court in rejecting the ballots of these voters, to overcome by proof this presumption of innocence on the part of the voters and the presumption of the regularity and correctness of the official action of the election officers. As the law cast upon the appellant the burden of proving a negative, full and complete proof in rebuttal of these presumptions is not required, but, in order to remove the presumptions, it is necessary proof should be produced sufficient to render the existence of the negative probable"—citing cases.

Mr. McCrary lays down the law and gives an illustration applicable to the facts of this record as follows:

"Every circumstance which tends to show that an election was fraudulent may be proven, and the court must determine, from all the evidence, whether fraud has been shown. As,

for example, if the aggregate vote cast is largely in excess of the number of legal voters resident in the precinct, or if the vote cast at the election in question is largely in excess of the vote cast at any previous or subsequent election, such facts as these, if unexplained, will often establish the fact that frauds have been perpetrated and illegal votes cast, and make it necessary to throw out the poll altogether, unless it can be sifted and purged. While it is true that mere irregularities in the conduct of an election, where the will of the voter has not been suppressed or changed, will be disregarded, yet a succession of unexplained irregularities, and a disregard of law on the part of the officials, is sufficient to deprive the ballot box and the returns of the credit to which they are otherwise entitled, and shift the burden upon the party maintaining the legality of the official count." *McCrary on Elections*, §§ 582, 583.

In *Todd et al. v. Cass County*, 31 Neb. 150, 47 N. W. 748, the following language, applicable in that case, is also exceedingly apposite to the facts under review in the instant case:

"Had proof shown that the number of votes cast in 1887 and 1888 were but 1,300, and that the number of votes cast at the general election in 1889 were about 1,300, and that this number at the bond election, June, 1889, had been swelled to more than 2,200, the conclusion would be almost irresistible, in the absence of proof explaining such votes, that the increase had been obtained by fraud. * * * Where, however, a city or precinct without adequate cause shows a grossly excessive vote, which is unexplained, it may be cause for reducing the vote to the ordinary, average limit, or, if it cannot be separated, and it is clearly apparent that fraud has been perpetrated, rejecting it altogether."

Appellees' counsel urge that the official poll taxpayers cannot be accepted as the correct number of legal voters because persons may have paid their poll tax whose names were not put on the official list, and because such list would not show the names of minors who became of age since the first Monday in July previous, when the official list was made up, and because such list would not show the names of those voters who may have moved from other counties of the state into Hempstead 6 months and into De Roan township 30 days before the election.

[9] A complete answer to that argument is that contestants have adduced proof which makes it probable that the excessive vote in De Roan township, over the official list of qualified voters, did not occur in any of the legitimate ways suggested. Contestants have proved by the figures set out above that at nearly all of the voting precincts in De Roan township the vote at this special county seat election was more than double that of the vote in these precincts at the general election of 1912, and also at the general election of 1914, which occurred about a month after the special election. It is a matter of common knowledge that at general elections, where there are candidates of opposing parties, and especially in presidential years, as was the year 1912, the interest of the entire electorate is stirred and they are usually brought to the polls in full voting strength. Contestants also showed by affirmative evi-

dence that the judges of election in De Roan township permitted a considerable number of illegal votes to be cast. Whether this was done through negligence or corruption on the part of the judges is immaterial, as contestants have proved that there was a difference of 845 votes between the official list of poll taxpayers and the election returns of De Roan township. The testimony thus adduced by contestants was sufficient to render it probable that the disparity shown between the official list of poll taxpayers and the official returns of the election judges was caused by illegal voting. Contestants, therefore, have fully met the requirements of the rule heretofore announced, placing upon them the burden of proving a negative; that is, of overcoming the presumption of the prima facie correctness of the official returns.

[10] Contestants having adduced affirmative proof to this effect, it was then incumbent upon the appellees to explain how this excessive vote between the official list of poll taxpayers and the official returns occurred. Appellees did not attempt to show by the election judges themselves, or otherwise, any facts that would warrant the learned trial judge in finding that the 845 votes could be accounted for by any of the legitimate methods now suggested in the brief of counsel for the appellees. The court could not find that such was the case without any evidence upon which to base such finding. So the affirmative evidence on the part of the contestants has impeached the integrity of the official returns from De Roan township, and the trial court erred in not so holding, and these returns cannot now be considered in the count which would result in favor of the county seat remaining at the town of Washington.

[11] But as it has been suggested by appellees that it might have been shown in the manner indicated that these returns were indeed correct, and as it is manifest that the evidence has not been fully developed along these lines, the appellees should be and will be given the opportunity on a new trial to purge the official returns of De Roan township and to lift the cloud that now hangs over them. See *Rhodes v. Driver and Lovell v. Bowen*, 69 Ark. 501-511, 64 S. W. 272.

[12] Since the court, in addition to certain special findings, also made a general finding and holding in favor of the appellees and against the contestants, the general assignment in the motion for new trial that the verdict is contrary to the law and the evidence was sufficient to challenge the correctness of the finding and judgment of the court.

For the errors indicated, the judgment is reversed, and the cause will be remanded for a new trial.

McCULLOCH, C. J. (dissenting). The following words of warning were written by

Judge McCrary in his work on Elections, § 523:

"The power to reject an entire poll is certainly a dangerous power, and though it belongs to whatever tribunal has jurisdiction to pass upon the merits of a contested election case it should be exercised only in an extreme case; that is to say, a case where it is impossible to ascertain with reasonable certainty the true vote."

These words find echo in the following statement by this court in *Wheat v. Smith*, 50 Ark. 266, 7 S. W. 161:

"Elections are not to be lightly set aside, though the law has not been strictly complied with."

The majority have, in their decision, overturned not only the certificate of the sworn election officials, but the findings of fact made by the circuit judge in drawing the inferences from the evidence adduced before him. The rule as to conclusiveness of the findings of the trial court upon conflicting evidence applies to a contested election case. *Schuman v. Sanderson*, 73 Ark. 187, 83 S. W. 940.

It seems to me that the court has done violence to the utterance in *Powell v. Holman*, 50 Ark. 85, 6 S. W. 505, as follows:

"The duly certified official returns of election officers are not subject to the same rules of suspicious reflections and doubtful imputations as attend the ballots under certain circumstances. The official returns are quasi records and stand with all the force of presumptive regularity, and prima facie integrity, not only till suspicion is cast upon them, but until their self-authenticated verity is overcome by affirmative proof that they do not speak the truth."

The effect of the decision in the present case is to hold that the validity of the certificate of the election officers, concerning the number of votes that were cast at the election in August, 1914, is overturned by the county clerk's certificate of the number of poll taxes paid the preceding year in De Roan township. It is conceded that the other facts proved by the contestants do not establish fraud conclusively, and that testimony cannot be pieced together with the conflict between the two certificates in order to set aside the trial court's finding of fact. The turning point of the case then comes down to this: Does the prior certificate of the clerk, concerning the number of poll taxes paid, as a matter of law, overturn the apparently conflicting certificate of the election officers? I say that it does not. The two certificates are of equal dignity. The first was based upon and related back to an assessment of taxes made more than a year before this election was held, and there being more than a year intervening, the presumption of regularity ought to attend the last certificate, which was that of the election officers, until it is overturned by sufficient evidence. At least it ought to, and does in my judgment, raise such a presumption as, in the absence of proof, the trial court is authorized to draw the inference of regularity.

The discrepancy is indeed large, but we have authority for the application of the rule of presumption concerning a much larger discrepancy than that. *Todd v. Cass County*, 30 Neb. 823, 47 N. W. 196; *Id.*, 31 Neb. 150, 47 N. W. 743. The intervening period of time between the original assessment for taxes in the year 1913, and the election held in August, 1914, was sufficient to make it possible for there to have been a substantial increase in the number of voters. This could have been brought about by the coming of age of young men, and the removal of voters into the township from other sections of the state, inside as well as outside of the county. There was no proof offered on this score, but the trial court had the right, in determining what inferences to draw from the two conflicting certificates, to find that it was possible for the number of voters to have been very substantially augmented. In addition to that, there may have been many mistakes in the original assessment rolls as to the residences of voters, whether in the school districts composing that township or in other portions of the county; and also mistakes of the collector in registering the paid poll taxes. It is true that there was no proof introduced on that subject, and the court's opinion constitutes an imposition on the contestants of the duty of making that proof.

It is said in the opinion of the majority that when it appeared that the certificate of the election officers was in conflict with the prior certificate of the county clerk, the burden of proof shifted to the appellee to make an affirmative showing of the correctness of the last certificate. I do not think that is the correct statement of the law, for the burden of proof does not shift. It abides throughout the trial with the contestants, upon whom rests the duty of establishing the affirmative of the issue which they present. The statute of this state declares that: "The party holding the affirmative of an issue must produce the evidence to prove it," and that "the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." *Kirby's Digest*, §§ 3106, 3107.

In the *American and English Encyclopedia of Law* (volume 5, p. 22) the rule with respect to the burden of proof is stated as follows:

"The burden of proof in the sense of the duty of producing evidence passes from party to party as the case progresses, while the burden of proof meaning the obligation to establish the truth of the claim by a preponderance of evidence rests throughout upon the plaintiff; and unless he meets this obligation upon the whole case, he fails."

That rule has been adopted in several well-considered cases. *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285; *Supreme Tent Knights of Maccabees v. Stensland*, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137; *Maxwell v. Wright*, 160 Ind. 515, 67 N. E. 267; *Shepard*

v. Western Union Telegraph Co., 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796; *Boardman v. Lorentzen*, 155 Wis. 566, 145 N. W. 750, 52 L. R. A. (N. S.) 476. The rule is also stated substantially the same in 10 *Ruling Case Law*, p. 897:

"Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end."

Now the application of that rule to the present case it seems to me is this: Conceding that the production of the prior certificate made out a *prima facie* case in favor of the contestants, which, unless overcome, warranted the inference of the falsity of the last certificate, and in that sense the burden was shifted to the contestees, yet the burden upon the whole case of establishing the affirmative of the issue was upon the contestants, and as long as it was possible to draw different inferences of fact from the conflict in the two certificates it was within the province of the trial court to determine which of the inferences should be drawn. The findings of the trial court, based upon legitimate inferences, should not be overturned because, as has already been decided by this court, there is a conclusive presumption in favor of the findings of the trial court if there was evidence upon which it is based.

Even if there was an irreconcilable conflict between the two certificates, why should we say that the circuit court erred in concluding that the certificate of the election officers was correct and that the former certificate of the clerk concerning the number of poll taxes was incorrect? Is that consistent with the oft-repeated rule that the official returns are quasi records and stand with all the force of presumptive regularity and *prima facie* integrity, not only till suspicion is cast upon them, but until their self-authenticated verity is overcome by affirmative proof that they do not speak the truth. But the two certificates are not in irreconcilable conflict, for it is possible to harmonize the two upon the assumption that the number of qualified electors had increased by reason of the coming of age of young men, and removals into the precinct. It was the duty of the circuit judge to reconcile those two certificates if possible to do so, and I do not think that we ought to say as a matter of law that the circuit court erred simply because the contestees failed to introduce proof tending to show that there had been an increase in the number of voters. As long as the certificate of the election officers bore the verity which the law says shall be attached to it, it cast upon the contestants the burden of offering proof tending to show that there had been no change in the number of voters

since the last assessment. That was not compelling them to prove a negative, but to offer proof which overcame the prima facie case made out by the certificate of the election officers.

Some significance is attached in the opinion to the fact that there were more votes cast at this election than at the last preceding general election and the next succeeding one, and the majority of the judges express the view that there is more interest manifested at general elections than at a special election of this kind. I think it may be stated to be a matter of common knowledge, at least in Arkansas, that no kind of an election excites keener interest than a contest over the removal of a county seat. It is a matter of common knowledge, too, that in this state a nomination by the dominant political party is equivalent to an elec-

tion, and that there is comparatively little interest manifested in the general elections. Therefore I think the fact that the vote in the general elections, preceding and subsequent, falls short of the number of votes cast at the special election, which is being contested, ought not to be cast into the scales against the contestees so as to make them account for the discrepancy.

This case seems to have received the most painstaking care and attention of the trial judge, and I am unwilling to say that he erred in refusing to declare as a matter of law that the discrepancy between the two certificates concerning the number of poll taxpayers in that township made out an undisputed case of fraud which destroyed the integrity of the polls.

I dissent, therefore, from the conclusions of the majority.

ARENSMAN v. STATE. (No. 4084.)

(Court of Criminal Appeals of Texas. May 24, 1916. Rehearing Denied June 21, 1916.)

1. CRIMINAL LAW § 829(1) — TRIAL — INSTRUCTION—REPETITION.

The refusal of special charges, covering matters properly submitted, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829(1).]

2. CRIMINAL LAW § 1111(3) — APPEAL — ACCEPTANCE OF QUALIFIED BILLS OF EXCEPTIONS.

Where appellant accepted allowance of his bills of exceptions as qualified and explained by the trial judge, he is bound thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2894; Dec. Dig. § 1111(3).]

3. CRIMINAL LAW § 422(5) — EVIDENCE — STATEMENTS OF CONSPIRATORS.

In a prosecution for arson, where the testimony was sufficient to authorize the jury to find that there was a conspiracy between defendant and his wife to burn a building and the wife's millinery stock therein, and collect the excessive insurance, testimony of a witness, that while he was sick defendant's wife told him in the absence of her husband that if times got dull she would burn and get the insurance before she would go broke, was admissible if the jury found the existence of a conspiracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 984; Dec. Dig. § 422(5).]

4. WITNESSES § 52(7) — DISQUALIFICATION — HUSBAND AND WIFE.

The statute prohibiting the state from making a wife testify against her husband had no application to the case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 132-134; Dec. Dig. § 52(7).]

5. CRIMINAL LAW § 1028—APPEAL—RESERVATION OF GROUND OF REVIEW—OBJECTION TO EVIDENCE.

In a prosecution for arson, where defendant merely objected to testimony as to the contents of a letter and postal from his wife to a witness, but assigned no ground, so that the court made no ruling and defendant did not except to the admission of the evidence or any ruling of the court or the failure of the court to make a ruling, there was no error; proper predicate having been laid for the secondary evidence by showing that the papers were without the jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619, 2620; Dec. Dig. § 1028.]

6. CRIMINAL LAW § 520(1)—EVIDENCE—CONFESSION.

Where defendant made written confession to the city marshal under promise of suspended sentence, which could not be given, so that the written confession was inadmissible, testimony of a witness embodying a confession or admission of defendant made later, after defendant was out on bond and had retained and consulted his attorneys, was admissible in the absence of anything indicating that the statements to the witness were not wholly voluntary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1175, 1181, 1184; Dec. Dig. § 520(1).]

7. CRIMINAL LAW § 406(1)—EVIDENCE—ADMISSION.

In a prosecution for arson, testimony of the city marshal that defendant, after the fire, admitted that he lied when he denied he was in

the building immediately preceding the fire, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894, 895; Dec. Dig. § 406(1).]

8. CRIMINAL LAW § 721½(2)—TRIAL—ARGUMENT OF COUNTY ATTORNEY — FAILURE TO CALL WITNESS.

Where there was a conspiracy charged between defendant and his wife to burn property for the insurance, the county attorney had a right to make an argument based upon the fact that defendant failed to introduce his wife as a witness for him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1673; Dec. Dig. § 721½(2).]

9. CRIMINAL LAW § 1159(3)—APPEAL—REVIEW—MISCONDUCT OF JURY—QUESTION FOR TRIAL COURT.

Where defendant attacked the verdict on account of misconduct of the jury in discussing his failure to testify, testimony tending to support defendant's contention, opposed to testimony tending to disprove it, raised a question of fact for the trial judge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8076; Dec. Dig. § 1159(3).]

10. CRIMINAL LAW § 841—TRIAL—CHARGE—OBJECTIONS.

Objections to the charge must be made before reading to the jury, and specifically point out claimed errors or admissions therein; it being too late to do so after trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2022; Dec. Dig. § 841.]

11. ARSON § 41—TRIAL—INSTRUCTION.

In a prosecution for arson, where the contradicted evidence showed that defendant was on the ground if he actually committed the offense, and no intimation was made that any other party outside of himself or wife committed it, the inclusion of the words in the latter part of a charge on principals, "whether in point of fact all were actually bodily present or not," was not erroneous.

[Ed. Note.—For other cases, see Arson, Dec. Dig. § 41.]

12. ARSON § 41—TRIAL—INSTRUCTION.

In a prosecution for arson, where the court told the jury under what circumstances they could consider defendant's wife's statements in his absence tending to show by them a common design, purpose, or intent to burn "said stock of millinery," he should have said "said building."

[Ed. Note.—For other cases, see Arson, Dec. Dig. § 41.]

13. CRIMINAL LAW § 809—TRIAL—INSTRUCTION.

In a prosecution for arson by burning a building for the insurance, the charge that the jury could consider defendant's wife's statements in his absence tending to show a common design, purpose or intent to burn "said stock of millinery," when he should have said "said building," was not misleading, where the court charged, when the testimony was admitted, that the jury could only thus consider it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961-1967; Dec. Dig. § 809.]

14. INDICTMENT AND INFORMATION § 174 — PRINCIPALS—ACTS OF ACCUSED.

A principal offender may be charged directly in the indictment with the commission of the offense, though it may not have actually been committed by him, and it is never necessary to the validity of an indictment, or the introduction of evidence establishing that the ac-

cused is a principal, that the indictment shall allege the acts which make him a principal.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 540-543; Dec. Dig. § 174.]

15. CRIMINAL LAW § 822(1) — TRIAL — INSTRUCTION—CONSTRUCTION AS WHOLE.

The whole of the charge must be considered where objections are made to excerpts or short paragraphs thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1994, 3158; Dec. Dig. § 822(1).]

Appeal from District Court, Wise County; F. O. McKinsey, Judge.

L. D. Arensman was convicted of arson, and he appeals. Affirmed.

Ratliff & Spencer and Frank J. Ford, all of Decatur, and Arnold & Taylor, of Henrietta, for appellant. M. W. Burch, Co. Atty., of Decatur, and C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of arson and assessed the lowest punishment.

The state's theory and contention was, which was denied by appellant, that he himself, or with his wife, as a principal, committed the offense, and before the offense was committed they had agreed and conspired to commit it. The evidence was largely circumstantial. Some testimony was introduced which tended to show, if it did not positively do so, that appellant made admissions sufficient to show his guilt. There was no conflict in the testimony on any material point. Neither appellant nor his wife testified, and he introduced no testimony other than two witnesses who testified to his good reputation in another county where he lived some year and a half or two years before he was charged with this offense.

The state proved, and the jury were clearly authorized to find and believe, that in August, 1914, appellant's wife and another lady bought out a millinery stock and fixtures in Decatur, paying therefor \$50 cash and executing three notes for \$50 each, for the balance. This partnership was dissolved in January following, Mrs. Arensman taking all the stock and fixtures and assuming all indebtedness. She then took out a policy for \$300 insurance on the stock. She later made purchases on credit and also made sales on credit. She was unable to collect for sales she had made on credit. Appellant signed some of the notes with her, which she gave for the purchase of some of the stock.

About, or shortly prior to, January 1, 1915, Mrs. Arensman rented from Mrs. Beard the second story of a storehouse in the center of a solid block of storehouses, north of the square in Decatur, which fronted south, the courthouse being in the center of the square. This second story was cut up into four rooms. She conducted her millinery business in the two front rooms and rented the rear two to

Mr. Inman, who occupied these two rooms with his family until the latter part of May, when they removed to Oklahoma. Inman's stepfather and mother part of the time occupied these two rooms with his family. When he removed his family, he and his stepfather both left part of their household goods stored in these two rooms. There was an entrance to this second story by stairs from both the front and rear, the rear on an alley. The fastening of the back door from the rear stair was by an inside bar across the door underneath the doorknob or latch. Inman first went to Oklahoma, where he got work, the last of February, leaving his family in said rooms in Decatur. He got sick the last of March and returned to his rooms with his family, where he was sick in bed for two weeks. This would put him there sick from the last of March to about the middle of April. While Inman was there sick, Mrs. Arensman was in to see him. They got to discussing the frequent fires in Decatur, and in the conversation Mrs. Arensman told him she could not collect money for what she had sold and had some notes coming due which she was going to have to pay; that if times got dull she would burn up and get the insurance before she would "go broke." Just at this time appellant himself applied to the insurance agents for a policy of insurance in addition to the \$300 policy his wife then had on the millinery business, and procured the issuance of a policy for an additional \$200, which was issued to her on the millinery stock. The two policies at that time and continuously until the fire aggregated \$500, one, \$300, and said additional one, \$200. Shortly prior to the fire, Mrs. Arensman tried to sell her business to other milliners, who inspected her stock at the time with the view of purchasing. She then asked \$300 therefor. The prospective purchasers would not have been willing to have given her more than \$150 or \$175 therefor.

There can be no question but that said millinery stock and the store in which it was located were purposely set on fire and willfully burned on the night of June 7, 1915, some time between 9 and 11 o'clock, most of the testimony showing that it was near 11 o'clock. The appellant, his wife, and family lived together in a residence in the south part of Decatur. On the day preceding the fire that night, appellant several times passed up and down before an adjoining store to said building which was burned that night. Appellant and his wife, just after dark on the night of the fire, which must have been near 9 o'clock, were seen to come down the back stairway into the alley from said second story where said millinery business was conducted, which was much later than they ordinarily left said millinery store. Again that night, about 25 or 30 minutes before the fire, they were seen together to come out of said

alley back of said store building, cross the street running north from the northwest corner of the square, and start as if they were going north. Instead of doing so, they immediately turned and went south on the sidewalk on the west of said street until they got near the corner, then crossed that street diagonally, got on the sidewalk in the front of the block of buildings north of the courthouse, and continued directly to the front stair where said millinery stock was. They disappeared up this stair, but were not seen when they came out. The next time they were seen was from one to three minutes before the fire was discovered, when they were met on the sidewalk on the west side of the square, about the middle of the block, going south towards their residence. Two parties there met them. These two parties went north on this same sidewalk to near the northwest corner of the square, cut across the square to the sidewalk on the north, in front of said building and millinery business. Just as they passed the millinery store, they heard some noise which attracted their attention and remarks. They, however, proceeded east to near the corner of the square, when they again started diagonally across the street to the store on the northeast corner, when they stopped, and, upon looking back, discovered that said millinery store was on fire. They immediately ran back to this building, upstairs, and broke in one of the doors of said millinery store, when they discovered that a whole lot of paper and millinery goods were heaped in a pile against, or near, the partition wall between the two millinery rooms, and on fire. The smoke was then dense and the heat considerable. They fled and gave the alarm of fire, when a large crowd at once gathered, the fire company appeared, and succeeded in later extinguishing the fire before it consumed the entire building, though it consumed the roof, partition wall, considerable of the floor of the second story, and most, if not all, of the millinery stock.

The next day, the city marshal, C. C. Lewis, and appellant were in said second story of said building. The city marshal asked him if he had any enemies, or something like that, that would burn him out. He said he didn't know that he had a single one. The city marshal then asked him if he was not in the building the night before, immediately preceding the fire. He at first said he was not. The city marshal said to him: "We are both Odd Fellows. Don't lie to me. I know you was in this building." Appellant replied: "I will admit that I did lie. I was in this building"—that he had come up to get something, a paper or record.

Mr. Beard, the husband of Ella Beard who owned said store building, the next day after the fire, went from Ft. Worth to Decatur to see about it. That evening he met appellant and asked him if he had any insurance. Appellant replied:

"They tell me they are going to have an investigation, and if they are going to do that, rather than bother about the insurance, I will let the whole thing go."

A few days after the fire and after appellant had been arrested and gave bond, he talked with Mr. Dixon and said to him that his attorneys had told him if the Odd Fellows would keep quiet, he could beat this—the witness didn't remember whether he said "case" or what it was. The witness told him the Odd Fellows could not help him. He then said if they—called three names, Mr. Wasson, Mr. Birchfield, and Mr. Ben Watkins, and, while he did not call the witness' name, yet linked him with these three other parties—would not tell what they knew, or would keep quiet, it would be all right. The witness said to him that he had never confessed to him anything about burning the building, and he didn't want him to. Appellant said he was not afraid of Wasson, but did not know about Birchfield and Watkins, and asked the witness to see them and speak to them about it and ask them not to tell. When the alarm of fire was given and parties gathered at the building to put out the fire, it was found that the said back door at the head of the back stair in the alley was unfastened.

[1, 2] Appellant requested a large number of special charges which were refused. It is unnecessary to discuss them separately. We have examined them all. None of them should have been given. Wherever they cover any matter which was proper to submit, the court in his main charge properly submitted the question. He has several bills to the admission of certain testimony. Some of them embrace substantially the same character of testimony. It will not be necessary to take each up separately. What we will say as to one covers the others along the same line. Every one of his bills were qualified and explained by the judge when he allowed them. Some, he, in effect, refused to allow. Appellant accepted them with this action of the court and is bound thereby, as all the authorities so hold.

[3] In his first bill, he objected to that part of Mr. Inman's testimony, wherein he testified what Mrs. Arensman said to him while he was sick, which is substantially above given. The bill, as allowed and approved by the court, shows that he objected to that testimony only on the grounds that it was hearsay, not in his presence; that there was no evidence of a conspiracy existing at the time; it was no part of the res gestæ; was highly inflammatory and prejudicial to his rights, and was requiring his wife to testify against him. The court further stated, in effect, that he admitted this testimony because he thought it tended to throw light upon and explain the subsequent conduct of appellant and his wife, the other evidence tending to show they formed a conspiracy to burn the building in question and were

acting together in such design. That at the time he admitted it, he expressly then verbally instructed the jury that it was admitted and to be considered by them and given whatever weight they thought it entitled to receive, and not consider it for any other purpose, unless they believed from all the evidence that there was a conspiracy or agreement between appellant and his wife to burn said building, and that he would further give them a written charge when he charged them, and that he later gave such written charge, properly limiting this testimony. In our opinion, under all the authorities, this testimony was admissible. The testimony was amply sufficient to authorize the jury to believe and find that there was a conspiracy, or agreement, between appellant and his wife to burn said building and millinery stock, so that they could collect the said excessive insurance.

Mr. Branch in his annotation of our Penal Code, under article 78, on principals (page 352 et seq.), has collated many cases from this court and laid down propositions thereby established applicable to the questions herein. We will state and quote liberally from him. He says (page 353):

"If either the husband or wife * * * is on trial for the completed offense, proof of the acts or declarations of either, though made in the absence of the other, is admissible against the other, if done or made pending the conspiracy and in furtherance of the common design. *Smith v. State*, 46 Tex. Cr. R. 275, 81 S. W. 936, 108 Am. St. Rep. 991; *Smith v. State*, 48 Tex. Cr. R. 240, 89 S. W. 817."

That such agreement, or conspiracy, is contemplated and provided for by our statutes themselves is fully shown by Judge Henderson, in the opinion of the court in said latter case just cited.

Again, Mr. Branch says (page 352):

"When a conspiracy is shown, proof of the acts and declarations of coconspirators is admissible to show the common design, purpose, and intent of all the conspirators, whether such acts and declarations were made before or after the formation of the conspiracy, or whether the same were made before or after the defendant on trial entered into the conspiracy"

—citing a large number of the decisions of this court, unnecessary to copy here, specifically holding what he announces as the rule.

[4] Again, he says (page 353):

"Proof of what was said and done by any of the conspirators, pending the conspiracy and in furtherance of the common design, is admissible against the one on trial, though said or done in his absence."

He cites a still larger number of the decisions of this court exactly in point and clearly establishing the rule stated by him. The statute prohibiting the state from making the wife testify against the husband has no application to this question or in this case.

[5] Appellant prepared a bill, wherein he claimed he made some objections to the court's admitting Inman's testimony to the contents of a letter and postal from Mrs.

Arensman to him, notifying and requiring him to remove his and his stepfather's goods stored, as stated above. The court, in effect, refused the bill, stating that, when said witness was testifying, appellant merely objected but assigned no ground therefor, and for that reason he made no ruling, and appellant did not except to the admission of the evidence or any ruling of the court or the failure of the court to make a ruling. However, he further states that, if the proper objection had been made, he would have admitted the testimony, because the proper predicate had been laid for the secondary evidence, and that the letter and postal, if not lost, were in Oklahoma, outside of the jurisdiction of this court. As thus explained, this bill, if not refused outright, shows no error.

As explained and allowed by the court, his fourth bill, to the exclusion of a letter from Mrs. Inman to Mrs. Arensman, shows no error.

[6, 7] Appellant's fifth bill shows he objected to the testimony of said Dixon. The court, in explaining and qualifying the bill, states:

"The only objection made to said testimony was that it embodied no confession or admission of the defendant, and that theretofore defendant Arensman had made a written confession to the city marshal, Claude Lewis, and that said written confession had been excluded by the court because it was obtained by promising the defendant a suspended sentence; that there is no evidence that that promise made by an officer was ever removed from the defendant's mind; and that there is no evidence to show that he was not laboring under the same impression, even when he talked with his lawyers.

"The defendant had, two or three days before his arrest on this charge, made a written confession of his guilt in this case in the presence of Claude Lewis, city marshal, and the county attorney. This confession was excluded by the court, because, under the evidence submitted to the court in the absence of the jury, the court thought the same was induced to be made by the promise of a suspended sentence, said promise being made by the city marshal in good faith, however, he not knowing at the time that the suspended sentence law did not apply to convictions for arson. But the foregoing statements of the defendant were made some time after his arrest and after he was out on bond and had retained and consulted with attorneys; besides, there is nothing in the testimony or in any other evidence to indicate that the statements of (to) the witness Dixon were not wholly voluntary."

Said Dixon's testimony was admissible. So was the testimony of the city marshal, Lewis, as to what appellant admitted to him, shown above.

[8] Appellant has two bills to the argument of the county attorney. As explained and qualified by the court, neither shows any error. The county attorney clearly had the right, under all the authorities, to make an argument based upon the fact that the appellant had failed to introduce his wife as a witness for him. That she was implicated as a principal would not prevent such argument.

[9] In his motion for a new trial, appel-

lant attacked the verdict, on account of claimed misconduct of the jury in discussing his failure to testify. The court heard all the jurors testify on the subject. Their evidence is properly preserved in appellant's ninth bill. We have fully considered this bill and the evidence of the jurors. Excerpts from the testimony of several of them can be culled, which would tend to support appellant's contention. Like excerpts can be culled from the testimony of these same jurors which would tend to disprove his contention. The testimony of many of the other jurors would also tend to disprove his contention. This, of course, raises a question of fact, which must be decided by the trial judge. He sees and hears the jurors, and is better able to determine the truth of the matter than this court can possibly be from reading a statement of their testimony. We fully discussed this character of question in the opinion on rehearing in *Lamb v. State*, 169 S. W. 1160, and in other cases, both before and since then. In our opinion, the district judge was clearly authorized to find as he did and deny a new trial, and under the circumstances and law we would not be justified in reversing this case on that point.

[10-13] Appellant made several objections to the court's charge. We have carefully considered them all. Our statute now, which has been uniformly followed by this court in many decisions, requires that the objections to the court's charge shall be made before it is read to the jury, and that such objections shall specifically point out claimed errors or omissions therein, and that it is too late to do so after the trial. In some instances, appellant now, after the trial, points out specifically what he claims are errors in the court's charge; but his objections which the trial judge passed upon did not point out and direct his attention then to these matters. Doubtless if they had, he would have changed his charge to meet the objections. Thus in his charge on principals, he quoted what is denominated a favorite charge on principals, quoted by Mr. Branch in section 685 of his Ann. P. C. Complaint is now made, but was not then made, that the court in the latter part included these words: "Whether in point of fact all were actually, bodily present or not," etc. Doubtless if the court's attention had been called thereto by appellant's objections at the time, he would have omitted this language. However, in this case, it would present no error, because the uncontradicted evidence would show that appellant was on the ground if he actually committed the offense, and no intimation is made from the testimony that any other party, out-

side of him or his wife, committed the offense. He in no way set up alibi, and the evidence in no way tended to show that he was a mere accomplice. So, in another place, where the court told the jury under what circumstances they could consider his wife's statements, etc., in his absence, which tended to show by them a common design, purpose, or intent to burn "said stock of millinery" when he should have there said "said building." This could in no way have misled the jury, for when the testimony was admitted, the judge specifically, orally charged them that they could thus consider it, only if it was shown that it was the common design, purpose, and intent of both appellant and his wife to burn "said building." There can be no doubt that if the judge's attention had been called at the time to the fact that he had used said words, "stock of millinery," instead of "building," he would at once have corrected this. Besides, the uncontradicted evidence showed that fire was set to the millinery, which necessarily burned the building.

[14] It has always been held that a principal offender may be charged directly in the indictment with the commission of the offense, although it may not have been actually committed by him, and that it is never necessary to the validity of an indictment, or to the introduction of evidence establishing that an accused is a principal, that the indictment shall allege the acts which make him a principal. Section 676, Branch's Ann. P. C., and cases there cited.

[15] It is elementary that the whole of the charge must be considered when objections are made to excerpts or short paragraphs thereof. Appellant excepted to some of the paragraphs of the court's charge, claiming that they were on the weight of the evidence. We think none of these objections are sustained by the record. We think the charge nowhere expresses any opinion as to the weight of the evidence or assumes that any given fact may be true; but, on the contrary, every issue of fact necessary to be submitted was left entirely to the jury for the jury alone to decide; and every fact essential to appellant's conviction by the charge was required to be believed by the jury beyond a reasonable doubt before they were authorized to convict.

We think the charge an admirable one, and fairly and fully presented everything that was necessary or proper in the case. We see no necessity of quoting the charge, or any part of it, or of taking up separately appellant's objections thereto.

The judgment will be affirmed.

HARPER, J., not present at consultation.

FERGUSON v. STATE. (No. 4072.)

(Court of Criminal Appeals of Texas. June 7, 1916. Rehearing Denied June 23, 1916.)

1. FORGERY \S 21—DEGREES—STATUTORY PROVISIONS.

As the statute on principals applies to all offenses, so far as forgery is concerned, it is exactly the same as if specifically embraced in and a part of the forgery statute.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. \S 57; Dec. Dig. \S 21.]

2. FORGERY \S 37 — ADMISSIBILITY OF EVIDENCE.

In a prosecution for forgery in inducing the making of a false note, testimony that the person, whose name was forged, delivered cotton as a credit on a note previously made by him, was not objectionable, irrelevant, immaterial, incompetent, or as an "inquiry about a transaction happening long after the execution of the note."

[Ed. Note.—For other cases, see Forgery, Cent. Dig. \S 105-107, 111; Dec. Dig. \S 37.]

3. CRIMINAL LAW \S 1120(3) — APPEAL AND ERROR—BILL OF EXCEPTIONS.

A bill of exceptions which did not contain the answer of the witness to a question objected to showed no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2931, 2932; Dec. Dig. \S 1120(3).]

4. FORGERY \S 37 — EVIDENCE — ADMISSIBILITY.

In a prosecution for forgery in inducing the making of a false note payable to the bank of which defendant was vice president, testimony of a witness on examination of the books of the bank, that they did not show a credit on another note of the person whose name was forged payable to the bank, was admissible.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. \S 105-107, 111; Dec. Dig. \S 37.]

5. FORGERY \S 37 — EVIDENCE — ADMISSIBILITY.

Testimony as to notes made by the person whose name was forged and payments thereon was admissible and material.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. \S 105-107, 111; Dec. Dig. \S 37.]

6. WITNESSES \S 271(1)—CROSS-EXAMINATION—SCOPE—FORGERY.

Where a witness had testified that defendant was not present on the date the false note was signed, exhibition to the witness on cross-examination of various notes and documents of different dates not offered as exhibits, which he had witnessed and questions concerning his recollection of their dates, was not improper, although separate and distinct transactions and having no connection with the note under inquiry.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 953, 959; Dec. Dig. \S 271(1).]

7. CRIMINAL LAW \S 1168(2)—APPEAL—BILL OF EXCEPTIONS.

A bill of exceptions, showing that court sustained appellant's objection to a question asked a witness, shows no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3124, 3129-3136; Dec. Dig. \S 1168(2).]

8. CRIMINAL LAW \S 1124(2)—APPEAL—BILL OF EXCEPTIONS.

A bill of exceptions to overruling by court of a motion for new trial, where the motion is

on many grounds, and none of them stated in the bill, will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2946; Dec. Dig. \S 1124(2).]

9. CRIMINAL LAW \S 1090(14) — APPEAL — PRESERVATION IN LOWER COURT OF GROUNDS FOR REVIEW.

Where requested special charges merely appeared copied in the record, nothing in them or in connection with them showing at what time they were presented, acted upon, or why they should have been given, and no bill of exceptions was taken to the court's refusal to give them, the court will not review the court's action.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2818, 3204; Dec. Dig. \S 1090(14).]

10. CRIMINAL LAW \S 1144(14) — APPEAL — PRESUMPTIONS—INSTRUCTIONS—STATUTE.

Where the court's original charge was delivered to defendant's attorneys for examination, and the court made some corrections to conform to objections made, there being nothing in the record to the contrary, it will be assumed that the court complied with the statute and resubmitted the charge to defendant's attorneys after making the corrections.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2767, 2901, 3032; Dec. Dig. \S 1144(14).]

11. CRIMINAL LAW \S 792(3)—INSTRUCTIONS—"PRINCIPAL."

An instruction which, in giving the general definition of a principal, quoted the statute to the effect that any person who advises or agrees to the commission of an offense and is present when it is committed, whether or not he aids in the illegal act, is a principal, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1818-1820; Dec. Dig. \S 792(3).]

For other definitions, see Words and Phrases, First and Second Series, Principal.]

12. CRIMINAL LAW \S 792(3)—INSTRUCTIONS—"PRINCIPAL"—STATUTE.

An instruction which quoted substantially article 77, of the statute (Pen. Code 1911) on principals, providing that any one, employing another who cannot be punished to commit an offense, becomes a principal, omitting the reference to poison or preparing means whereby a person may injure himself, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1818-1820; Dec. Dig. \S 792(3).]

13. CRIMINAL LAW \S 792(3)—INSTRUCTIONS—"PRINCIPAL."

An instruction quoting from Pen. Code 1911, art. 932, under which the prosecution was had, the words "all persons engaged in the illegal act are deemed guilty of forgery," was not error, as it was applicable to the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1818-1820; Dec. Dig. \S 792(3).]

14. FORGERY \S 6 — INTENT — AUTHORITY TO MAKE INSTRUMENT.

Where a person making an instrument in writing acts under an authority which he has good reason to believe, and does believe, to be sufficient, he is not guilty of forgery.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. \S 26; Dec. Dig. \S 6.]

For other definitions, see Words and Phrases, First and Second Series, Forgery.]

15. CRIMINAL LAW \S 1172(7) — APPEAL — HARMLESS ERROR—INSTRUCTION.

An instruction, that where a person making an instrument in writing acts under what he believes, or has reason to believe, is sufficient an-

thority is not guilty, although not called for by the testimony, was harmless error, since it was favorable to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3160; Dec. Dig. ¶1172(7).]

16. FORGERY ¶48—INSTRUCTIONS.

In a prosecution for forgery in inducing the making of a false note and passing it, an instruction as to passing a forged instrument was not error.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 124-128; Dec. Dig. ¶48.]

17. CRIMINAL LAW ¶1172(8) — APPEAL — HARMLESS ERROR—INSTRUCTIONS.

In a prosecution for forgery in inducing the making of a false note and passing it, where the defendant was not convicted of passing the instrument, error in an instruction as to passing a forged instrument was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3161; Dec. Dig. ¶1172(8).]

18. CRIMINAL LAW ¶1172(1) — APPEAL — HARMLESS ERROR—INSTRUCTIONS.

Error in using the word "possibly" in an instruction which told the jury that it need not be proved in a trial for forgery, that the forgery was intended to, or did, injure any person, but it is sufficient that "possibly" some one might be injured, was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154; Dec. Dig. ¶1172(1).]

19. INDICTMENT AND INFORMATION ¶94—OFFENSE CHARGED—FORGERY—INDUCING OFFENSE.

In a prosecution for forgery in inducing the making of a false note, an indictment for forgery under and in the words of Pen. Code 1911, arts. 924, 932, which provide that making shall include writing or causing to be written, alleging that defendant unlawfully, without authority, and with intent to injure and defraud, did willfully make a false instrument, without alleging that defendant caused to be written the signature on the forged note, was sufficient to support a conviction, on proof that he caused it to be made, since the acts which make a defendant a principal need not be alleged in the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. ¶94.]

20. FORGERY ¶21—PERSONS LIABLE—AGENCY—"PRINCIPAL."

Where a person commits forgery by an agent he is guilty as a principal, whether or not the agent is also guilty.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 57; Dec. Dig. ¶21.]

21. CRIMINAL LAW ¶1134(1)—APPEAL—REVIEW—SCOPE.

On appeal the court is not compelled to discuss all questions discussed by appellant's attorneys in their briefs.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2986, 3056; Dec. Dig. ¶1134(1).]

22. CRIMINAL LAW ¶739(2)—QUESTION FOR JURY—ALIBI.

In a prosecution for forgery in inducing the making of a false note, the question whether accused had proved an alibi held for the jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. ¶739(2).]

23. FORGERY ¶44(2) — EVIDENCE — SUFFICIENCY.

In a prosecution for forgery in inducing the making of a false note, in which defendant attempted to prove an alibi, it appearing that the note was signed by a clerk at the direction of the

defendant who was vice president of the bank, made payee in the forged note, evidence held sufficient to support a verdict of guilty.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 117½, 118; Dec. Dig. ¶44(2).]

Appeal from District Court, Cherokee County; L. D. Gulnn, Judge.

H. W. Ferguson was convicted of forgery, and he appeals. Affirmed.

Perkins, Perkins & Perkins, of Rusk, W. B. Wynne, of Wills Point, Guinn, Imboden & Gulnn, of Rusk, and E. C. Gaines, of Austin, for appellant. C. C. McDonald, Asst. Atty. Gen., and Norman, Shook & Gibson, of Rusk, for the State.

PRENDERGAST, P. J. Appellant was convicted of forgery, and his punishment assessed at four years in the penitentiary.

The indictment is in two counts. The first, with proper allegations, avers that appellant forged the name of G. W. Earle to a note for \$145; the second, that he passed that forged note. The court submitted both counts to the jury for a finding. The jury found him guilty of forgery only.

The court did not err in overruling appellant's motion to quash the indictment (bill No. 1), nor in permitting proof of the forgery of the note copied in the indictment (bill No. 2), because it was claimed there was a variance between the name of Earle, whose name was forged. The record shows no variance whatever.

Appellant has some bills of exceptions to the admission of testimony. They are very meager. The state urges that under the long and well-established rules they are wholly insufficient to require or authorize this court to consider them. While we think the state's contention is true, yet we will consider all of them in the light of the whole record.

[1] This prosecution and conviction was had under articles 924, 932, P. C., in connection with our statute on principals. Our statute on principals applies to all offenses. And so far as forgery or passing a forged instrument in concerned, they are exactly the same as if they were specifically embraced in and a part of our forgery statute.

Article 924 is:

"He is guilty of forgery who, without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing, purporting to be the act of another, in such manner that the false instrument so made would (if the same were true) have created, increased, diminished, discharged, or defeated any pecuniary obligation, or would have transferred, or in any manner have affected, any property whatever."

Article 932 is:

"He is guilty of making, under art. 924, who, knowing the illegal purpose intended, shall write, or cause to be written, the signature, or the whole, or any part of a forged instrument. All persons engaged in the illegal act are deemed guilty of forgery."

The uncontradicted testimony clearly shows that appellant for some time before January

1, 1914, until some time in July, 1915, was the active vice president of the Guaranty State Bank, at Mt. Selman, Tex., and as such he handled the bank's business almost exclusively. On January 28, 1914, G. W. Earle borrowed from said bank through appellant \$125, and at the time executed to said bank his note for \$145, due October 1, 1914. On October 31, 1914, Earle carried to appellant a bale of cotton to sell and apply the proceeds on said note. He turned the bale of cotton over to appellant for that purpose, and took his receipt therefor. Appellant, at the time, advised Earle not to sell the cotton that day but to hold it for awhile in order to get a better price, appellant at the time agreeing to sell it for Earle and apply the proceeds as a credit on said note. This was agreed to between them. Later, appellant did sell the cotton, and, after taking out what he claimed was an attorney's fee due by Earle on said note, there remained \$21.08 net to be credited on that note. On December 28, 1914, Earle paid to appellant \$15, cash, to be credited on said note, and got a receipt from appellant therefor. Earle was unable to make further payments on said note. On April 27, 1915, he saw appellant, and at the time it was agreed between them that Earle should make a new note to the bank for the difference between said note and the remainder, after allowing said \$15 credit and the credit for the proceeds of said cotton. Appellant had sold said cotton at the time, but then claimed to Earle that he had placed said \$145 note in the hands of an attorney for suit and collection, and that he did not then know what the attorney's fees and court costs would be, but the two then estimated that the new note, after allowing these credits, would amount to \$90 or \$100. Thereupon it was agreed between them that Earle should then sign a blank note to be filled out by appellant with the correct balance after deducting said two credits, as soon as he could get the \$145 note back and ascertain the attorney's fees and costs, and then send the said \$145 note to Earle. Thereupon Earle did sign a note in blank payable to said bank, dated April 27, 1915, due October 1st following. Some time later, but the date not disclosed with certainty, appellant filled out said blank note, making it for \$130, without deducting at all the proceeds of said cotton; and he himself kept that note, as well as the \$145 note, in his possession. He never at any time sent to Earle said \$145 note, and did not turn over to the bank either of said payments of \$15, or \$21.08, the proceeds of said cotton.

On or about April 19, 1915, appellant, without any authority of Earle, had Mr. Burns, who was then cashier of said bank, to make out and sign Earle's name to a new note to the bank for \$145, bearing said date, due October 1, 1915, and had that note placed in the bank as a genuine note. At the time he had this done, he claimed to Burns that he had the authority from Earle to do this. Burns

believed from what appellant then told him that he had this authority, and had no notice that appellant had no such authority. About December 10, 1915, Earle, who lived some considerable distance from Mt. Selman, went to see appellant there to have a complete settlement with him or the bank. He had considerable trouble and delay in getting appellant to a settlement. While thus seeking a settlement that day, Mr. Rankin, who was then a bookkeeper in the bank, met appellant on the street, and appellant told him that Earle was there to pay some on his note and told him not to show Earle said \$145 note, dated April 19th. Dr. Gee was at that time president of the bank. Later in the evening, Earle succeeded in getting appellant into the bank to procure a settlement. When he did, appellant told Dr. Gee that said \$145 note, dated April 19, 1915, was a bogus note—that it was made for the purpose of getting by the bank examiner. While Earle was then seeking a settlement and appellant was delaying it, Earle went to the bank and called on the president for a settlement. The president presented to him the said \$145 April 19th note. Earle, upon looking at it, immediately denounced it as a forgery. That was the only note against him, then in the possession of the bank. When Earle did get appellant into the bank, he, appellant, Dr. Gee, and Rankin were the only persons therein. When Dr. Gee showed him the April 19th note, he examined it, and in appellant's presence again denounced it as a forgery. Appellant then touched Dr. Gee, and they went in the back end of the bank and had a private conference. Dr. Gee then returned to Earle, and then for the first time presented to him said \$130 note, when Earle told him that that was his genuine signature to that note. Dr. Gee swore that on this occasion appellant told him that said \$145 note of April 19th was a bogus note. That it had been fixed up to pass the bank examiner. That "we" fixed it up to pass the bank examiner. That on this occasion appellant had in his hands and produced said \$130 note and also produced the genuine \$145 note, dated January 28th, 1914. Earle refused to have anything to do with said April 19, 1915, \$145 note.

The testimony further shows that at the time appellant had Burns to write out and sign Earle's name to said \$145 note, dated April 19, 1915, appellant was actually present in the bank and was either actually present right at, and saw Burns when he did this, or was, at least, in the bank near him when Burns did this. Burns swore: That, after the discovery by Earle of said forged note, appellant had a conversation with him, with reference to Earle's signature to the forged note, and the frame-up was appellant wanted him to testify that they met Earle in the road one day, and Earle then authorized them, or him, to sign his name to the note. That Burns was to swear that he and ap-

pellant met Earle in the road one day and he gave Burns authority to sign said last \$145 note. Further:

"I never met Earle in the road, though, and he never gave me authority to sign his name to said note. The reason that he (appellant) told me for me swearing that we met Earle, and he gave me authority to sign his name to the note, was to get authority to sign his name to it. I didn't have any such authority at the time I signed the note, but Mr. Ferguson said Earle told him to renew the note. Earle was a negro."

The testimony establishing the facts as above recited were disputed by no other testimony. Appellant did not testify. His defense was alibi, and he contended that the claimed forged note was not executed for the purpose of defrauding any one; in other words, that the making of said alleged forged note was without the intent to injure or defraud. His wife, his clerk, Mr. Cole, and others testified that he was not in Mt. Selman on the day said alleged forged note was dated, nor until at least a day later; that he went to Dallas a day or two before that date and remained out of Mt. Selman for two or three days.

[2, 3] We will now take up each of appellant's other bills. In one (No. 3) he objected when the state asked said Earle this question: "Now, I will ask you about this credit of \$21.08 on this note, bale of cotton \$21.08. Did you actually deliver this cotton to Mr. Ferguson?" His objection to this was that "it was an inquiry about a transaction happening long after the execution of the note that defendant was being prosecuted for, and about a separate and distinct note of \$130, payable by Earle to said bank, and was irrelevant, immaterial, and incompetent." The bill in no way shows what the answer of the witness was, and for that reason alone would show no error, but, even if he did tell that he actually delivered the cotton to appellant, it would have been admissible.

[4] In another bill (No. 4) he objected to this testimony of the witness Rankin:

"As to what the Guaranty State Bank of Mt. Selman received on the 10th and 11th of December, 1915, on account of these Earle notes, there doesn't seem to be anything shown on the books. We received the \$130 note from Mr. Ferguson on that date—the bank did. The books don't show that the bank received \$21.08 on account of G. W. Earle on either the \$130 note or the \$145 note. This book I have here and have examined is the teller's cash. It is the office of this book to show the daily transactions of the bank."

His objections to this testimony are mere objections alone and are not certified by the judge as facts or true. The objections were that the books were not kept correctly and the state had failed to show that the witness was acquainted with the books, and without this proof the excerpts from them were inadmissible, and that it was an inquiry about a credit on a \$130 note and was immaterial and irrelevant. The bill does not show that the witness testified to any entries in the book. He simply testified that the books showed no entry of a credit of

\$21.08. Any one would have been competent to so testify if he had examined the books for that purpose. It is not like testifying of entries in the books, but was to show what was not in them. *Strong v. State*, 18 Tex. App. 24; *Wilson v. State*, 61 Tex. Cr. R. 628, 186 S. W. 447.

[5] All the testimony about said notes and payments thereon was admissible and material. The state had the right to show all about them.

[6] After appellant's clerk and witness Cole had testified so positively that appellant was not at Mt. Selman on the date said alleged forged note bore, and the details of why he claimed he remembered the date so accurately, the state on cross-examination, for the purpose of testing his accuracy as to dates, exhibited to him some notes and written documents of different dates, which, it seems, he had witnessed, and then asked him several questions about his recollection of the dates these several documents, etc., were executed. The state did not offer any of them in evidence, but used them merely to exhibit to the witness and cross him, as stated. The bill (No. 5) shows no error in the court's action in permitting this character of cross-examination over his objections that it was a separate and distinct transaction, and had no connection with the Earle note under inquiry, etc.

[7] In another bill (No. 6) it is shown the state continued in this cross-examination of Mr. Cole for said purpose, and asked him about a certain R. R. Warren note. When appellant objected to this, the court sustained his objection, as shown by the bill. This bill shows no error.

[8] The only other bill is merely to the overruling by the court of his motion for a new trial. We never consider such bills when, as in this case, the motion for a new trial is on many grounds, none of them stated in the bill.

[9] Appellant requested several special charges. They merely appear copied in the record. Nothing in them or in connection with them shows at what time they were presented to the judge nor acted upon by him, nor any reason why they should have been given. He in no way took a bill to the court's refusal to give either of them. Under such circumstances, it has been the uniform holding of this court in a great many cases that such matters cannot be reviewed by this court. It is unnecessary to collate these cases, but see *Ross v. State*, 170 S. W. 305, and a large number of cases since then, following that decision; also, *Ryan v. State*, 64 Tex. Cr. R. 637, 142 S. W. 878; *Byrd v. State*, 69 Tex. Cr. R. 35, 151 S. W. 1068, and a large number of cases since then, following these decisions.

[10] When the court's charge as originally prepared was delivered to appellant's attorneys for examination, they at the time made

several objections thereto. It is certain from an inspection of the charge that after these objections were made, the court made corrections to conform to some of said objections at least. We must assume, as there is nothing in the record to indicate to the contrary, that the court complied with the statute, and after making these changes resubmitted his charge to his attorneys, and nothing shows that they made any further objection thereto or took any bill of exceptions whatever to the failure or the refusal of the court, to further correct or modify his charge. Under the circumstances, it is doubtful if we are called upon to pass upon any of said objections, but we have considered them all. As to his first, clearly the court changed his charge to comply therewith, for what he there objected to is not in the charge as shown by the record.

[11-13] There was no error in the court, giving the general definition of who was a principal, to quote the statute to the effect that any person who advises or agrees to the commission of an offense and who is present when the same is committed is a principal thereto, whether he aids or not in the illegal act. The facts of this case called for that specific charge, and it is applicable herein. Nor did the court err in quoting substantially in his general definitions article 77, one of the articles of our statute on principals, omitting therefrom that part with reference to poison or preparing means whereby a person may injure himself, etc. Nor did the court err in one sentence of his general definitions, telling the jury, "all persons engaged in the illegal act are deemed guilty of forgery," for that is a specific portion of the statute of forgery (article 932, P. C.), under which this prosecution and conviction were had, and was entirely applicable to the testimony.

[14, 16] Surely appellant has no ground to complain of that paragraph wherein the court told the jury that when a person, making an instrument in writing, acts under an authority which he has good reason to believe, and actually does believe, to be sufficient, he is not guilty of forgery, though the authority be in effect insufficient and void. Such is not only a true proposition of law, but was called for by the testimony. Even if the testimony did not call for it, it was in his favor and would benefit, not injure, him.

[16, 17] The sixteenth paragraph as to passing a forged instrument was also correct and applicable herein; but whether it was or not, as appellant was not convicted of passing the instrument, such charge even if error became immaterial. For the same reason, his objections to the twenty-second paragraph pass out. The twenty-first paragraph to which he objects, on the subject of principals is clearly and distinctly the law and fully applicable to this case.

The only other objection appellant made to the charge was in the use of the word

"possibly" in the twenty-fourth paragraph, the whole of said paragraph being:

"You are charged that in the trial for forgery it need not be proved that the party committing such forgery, if any, did so with intent to injure or defraud any particular person or corporation; or that any particular person or corporation was injured or defrauded by the forgery, if any there was; but it is sufficient if it appears that possibly some one might be injured or defrauded thereby."

Probably it would have been better for the court to have omitted this word, but, clearly taking the charge as a whole, which must always be done, and the undisputed facts of this case, no injury could have occurred to appellant by reason thereof, as has been expressly held by this court in *Lucas v. State*, 39 Tex. Cr. R. 49, 44 S. W. 825.

[18-20] Appellant's contention now made, that he was indicted for one offense and convicted of another, is untenable. The indictment alleged that he unlawfully, without authority, and with intent to injure and defraud did willfully and fraudulently make a certain false instrument, etc. The indictment follows the very language of the statute (articles 924, 932) above quoted, and the proof follows and establishes the offense as alleged. The statute is: He is guilty of forgery who shall make a false instrument, etc., and he is guilty of such making who shall write, or cause to be written, the signature, or the whole or any part, of the forged instrument. It was wholly unnecessary for the indictment to allege that appellant caused to be written the signature or the forged note. The allegation made was all that was necessary. Under the allegation and the law, proof that he caused it to be written, and the signature thereto, was embraced in the allegation as made. Besides, "What a man does by his agent he does by himself." *Smith v. State*, 21 Tex. App. 122, 17 S. W. 552; *Strang v. State*, 32 Tex. Cr. R. 220, 22 S. W. 680; *Welsh v. State*, 3 Tex. App. 421. And especially is this true when the agent he used was an innocent one, though it would make no difference so far as appellant was concerned whether he was a guilty or an innocent agent. If a guilty one, then both would be principals. *Dillard v. State*, 177 S. W. 99.

It is elementary that:

"The acts which make the defendant a principal need not be alleged in the indictment. A principal offender may be charged directly with the commission of the offense, although it may not have actually been committed by him. *Cruit v. State*, 41 Tex. 477; *Williams v. State*, 42 Tex. 392; *Bell v. State*, 1 Tex. App. 598; *Davis v. State*, 3 Tex. App. 93; *Tuller v. State*, 3 Tex. App. 501; *Mills v. State*, 13 Tex. App. 489; *Farris v. State*, 26 Tex. App. 105, 9 S. W. 487; *Watson v. State*, 28 Tex. App. 40, 12 S. W. 404; *Finney v. State*, 29 Tex. App. 184, 15 S. W. 175; *Gallagher v. State*, 34 Tex. Cr. R. 306, 30 S. W. 557; *Campbell v. State*, 63 Tex. Cr. R. 595, 141 S. W. 233, Ann. Cas. 1913D, 858; *Oliver v. State*, 65 Tex. Cr. R. 150, 144 S. W. 616; *Madrid et al. v. State*, 71 Tex. Cr. R. 420, 161 S. W. 95; *Dillard v. State*, 177 S. W. 102." 1 Branch's An. P. C. § 676; *Arnes-*

man v. State, 187 S. W. 471, recently decided but not yet officially reported.

[21-23] The oral arguments and the several briefs filed by appellant's attorneys have taken a somewhat wide range in the discussion of this case; but we are not called upon to discuss all these questions discussed by appellant's attorneys. We have carefully considered all the testimony. The jury disbelieved appellant's witnesses, wherein they attempted to prove an alibi for him. That unquestionably was for the jury, not this court. The evidence by the state was amply sufficient to disprove his alibi. There can be no question from this record that the evidence was amply sufficient to clearly establish appellant's guilt.

The judgment will be affirmed.

RUTHERFORD v. STATE. (No. 4113.)
(Court of Criminal Appeals of Texas. June 7, 1916.)

1. PHYSICIANS AND SURGEONS § 6(11)—UNLAWFULLY PRACTICING—PUNISHMENT.

Under Pen. Code 1911, art. 756, providing that the punishment for unlawfully practicing medicine shall be by fine of not less than \$50 nor more than \$500, and by imprisonment for not exceeding six months, a jury finding accused guilty in a trial for violation of the law must assess both a fine and imprisonment within the legally fixed maximum and minimum.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 6(11).]

2. PHYSICIANS AND SURGEONS § 6(9)—PRACTICING WITHOUT LICENSE—INDICTMENT.

An indictment for practicing medicine unlawfully should allege either that accused was temporarily residing in the county in which the prosecution was brought, if such was the fact, and if not a fact, then if his residence was unknown, the indictment should charge that he had not recorded a certificate authorizing him to practice in the county, and also that he had no certificate authorizing him to practice.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 9; Dec. Dig. § 6(9).]

Appeal from Johnson County Court; B. Jay Jackson, Judge.

J. S. Rutherford was convicted of unlawfully practicing medicine, and appeals. Reversed and remanded.

Ratliff & Spencer, of Decatur, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of unlawfully practicing medicine, and his punishment assessed at a fine of \$100.

[1] Article 756 of the Penal Code provides that the punishment for unlawfully practicing medicine shall be by fine of not less than \$50, nor more than \$500, and by imprisonment in the county jail for any period of time not exceeding six months. It is thus seen that the Legislature has fixed some imprisonment at a minimum punishment the jury can assess. The punishment assessed

must be always within the minimum and maximum fixed by law. This court, and no other court in this state, can assess a punishment that the law does not authorize. Fowler v. State, 9 Tex. App. 149; Jenkins v. State, 28 Tex. App. 86, 12 S. W. 411; Brown v. State, 50 Tex. Cr. R. 626, 99 S. W. 1001; Dillard v. State, 177 S. W. 107.

[2] This will necessitate a reversal of the case, but there is one other question, we think, which should be mentioned. While the court did not err in overruling the motion to quash the indictment on the grounds presented in the motion, yet we think on another trial the indictment either should allege and the proof show that appellant was temporarily residing in Johnson county if such be the fact; or if this be not a fact, then, as it is alleged appellant's residence is unknown, the indictment should not only allege that he had not recorded a certificate authorizing him to practice in Johnson county, but should further allege that he had no certificate authorizing him to practice, and proof that he had recorded no certificate would be prima facie proof that he had none by virtue of the statute.

The judgment is reversed, and the cause remanded.

COLEMAN v. STATE. (No. 4126.)
(Court of Criminal Appeals of Texas. June 21, 1916.)

1. BURGLARY § 22—INDICTMENT—SUFFICIENCY—DEFINITENESS.

An indictment averred that accused broke and entered the house of C. Suderman with intent to commit the crime of theft. The evidence showed that the house belonged to Charles Suderman, the father of Charles W. Suderman, who lived with him, and that property of both was stolen. *Held*, that the indictment was sufficient without averments that the house belonged to C. Suderman, Sr.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 55-61, 66; Dec. Dig. § 22.]

2. BURGLARY § 45 — PROSECUTION — JURY QUESTION.

Where accused was proven to have been in recent possession of stolen goods, the question whether his explanation was sufficient is for the jury.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 110; Dec. Dig. § 45.]

3. WITNESSES § 49—COMPETENCY—CONVICTS.

One convicted of a felony, whose sentence was suspended in good behavior, is until the suspension is revoked and sentence pronounced, a competent witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 116-118; Dec. Dig. § 49.]

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Dave Coleman was convicted of burglary, and he appeals. Affirmed.

J. Vance Lewis, of Houston, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the state penitentiary.

[1] The indictment alleges that appellant broke and entered the house of "C. Suderman," with the intent to commit the crime of theft. The evidence shows that the house belonged to Charles Suderman, the father of Charles W. Suderman; that when the house was entered, some automobile tires belonging to the father were taken, and two pistols belonging to the son, Charles W. Suderman, were also stolen. When this developed, appellant contended that the indictment should have been more definite, and alleged that the house belonged to Charles Suderman, Sr., instead of alleging only that it belonged to C. Suderman; that there was a Charles Suderman, Sr., and a Charles Suderman, Jr., as shown by the testimony; that the allegation was too indefinite, etc. The question here raised has been decided adversely to appellant's contention. The indictment alleged the house to be occupied and controlled by "C. Suderman," and when the evidence showed that it was the property of C. Suderman, the father, it was wholly unnecessary to place "Sr." after his name, even though he had a son named C. W. Suderman. Neither was there any variance in the proof and allegations, because the evidence showed that the father was named Charles Suderman and the son, Charles W. Suderman, and that the house belonged to C. Suderman, the father, and was in his control and custody, even though the property stolen belonged in part to the father and in part to the son. The allegation was that the house was broken and entered with the intention to commit the crime of theft. The property in the house, regardless of whom it belonged to, was in the care and custody of C. Suderman, the father.

[2] The evidence of David Earls, the accomplice, was fully corroborated. He testified to appellant's breaking and entering the house, while he stood on the outside; that when appellant came out of the house, he gave him one of the pistols, which he sold to Charley Stew. Charley Stew testified to purchasing the pistol from Earls, and it was identified as one of the pistols stolen from Suderman's house. Another pistol was stolen at the same time and place, and the evidence of Leon Habine shows he purchased this pistol from appellant. Appellant admits he sold the pistol to Leon Habine, but claimed to have won it gambling. As the possession of the stolen pistols was traced directly into his hands, it was a question of fact, to be determined by the jury, whether or not they believed his explanation of his possession of the stolen pistol. The verdict evidences the fact that the jury did not believe he won it gambling, but that he took it from the Suderman premises.

[3] The fact that David Earls had been also convicted of the offense of burglarizing this house would not render him an incompetent witness until sentence had been pronounced. As the jury recommended that the sentence of Earls be suspended during good behavior, he remains a competent witness until the suspension shall be revoked and sentence pronounced, if occasion ever arises for such action to be taken.

As the court refused to approve the bill reciting the fact that the county attorney had used certain language, it is not verified in a way that would authorize this court to pass thereon.

The judgment is affirmed.

LILLIE v. STATE. (No. 4110.)

(Court of Criminal Appeals of Texas. June 7, 1916.)

CRIMINAL LAW §772(1) — INSTRUCTIONS — FORMER JEOPARDY.

Where accused shot at his wife three times, only one of the shots striking the wife, but two others striking and killing a little girl nearby, a charge in a prosecution for killing the girl that unless the shot that killed her was separate and distinct from the one that struck accused's wife, to acquit him, sufficiently presented his plea of former conviction of assault with intent to murder his wife, for the two offenses would not constitute the same transaction, unless the shot that struck accused's wife killed the girl.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1812, 1817; Dec. Dig. § 772(1).]

Appeal from District Court, Hill County; Horton B. Porter, Judge.

Monroe Lillie, alias Monroe Shavers, was convicted of manslaughter, and he appeals. Affirmed.

C. D. Works, of Hillsboro, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of manslaughter. He was indicted and tried for the murder of Jennie Allen, a negro girl about eight years old. The court committed no error in overruling his motion for a continuance. His motion was so wholly insufficient that it is needless to state or discuss it.

The undisputed testimony shows that at a supper at a negro's house at night appellant shot at his wife three distinct times (though he said only twice). The first shot struck his wife in the leg above her knee. The second shot struck the little negro girl in the side of the head, the ball passing entirely through her head, from which she instantly fell and died. The third shot struck the child in the leg just above the ankle. The testimony clearly shows that the situation of his wife from the negro girl when he fired the first shot at his wife was such as that it was not the first shot that struck both his wife and killed the negro girl. The proof

excludes the idea that it was the same shot.

Appellant was first indicted and convicted of an assault with intent to murder his wife. The jury fixed his penalty at two years in the penitentiary, evidently on the theory that if he had killed her he would have been guilty of manslaughter. He pleaded former conviction as his defense herein.

No complaint whatever was made of the court's charge or exception taken thereto. He requested two charges. In one he requested the court to charge the jury: "If you believe from the evidence that Jennie Allen was shot in the same transaction in which Rosa Shavers [his wife] was shot" to acquit him. The court correctly refused this and gave his only other special charge in the language he asked it, wherein he told the jury that unless you believe beyond a reasonable doubt that the shot that killed Jennie Allen was a separate and distinct shot from that shot that struck Rosa Shavers, to acquit him, with a proviso to it just as he had asked it.

The fact that appellant killed the child on the same occasion in which he shot at his wife would not be the same transaction when as the proof shows the shot that killed the child was a separate and distinct shot from that which struck his wife. The special charge given by the court at his request was in effect submitting his plea of former conviction, and he got the benefit of his plea by this charge. *Augustine v. State*, 41 Tex. Cr. R. 59, 52 S. W. 77, 96 Am. St. Rep. 765; *Taylor v. State*, 41 Tex. Cr. R. 564, 55 S. W. 961; *Ashton v. State*, 31 Tex. Cr. R. 482, 21 S. W. 48; *Samuels v. State*, 25 Tex. App. 538, 8 S. W. 656; *Keaton v. State*, 41 Tex. Cr. R. 621, 57 S. W. 1125; *Ford v. State*, 56 S. W. 918; *Harris v. State*, 50 Tex. Cr. R. 411, 97 S. W. 704; *Parks v. State*, 57 Tex. Cr. R. 569, 123 S. W. 1109; *Miller v. State*, 72 S. W. 856; 12 Cyc. 289; *Bishop's New Crim. Law*, 1061; *Gunter v. State*, 111 Ala. 23, 20 South. 632, 56 Am. St. Rep. 17.

The judgment is affirmed.

RESENDEZ v. STATE. (No. 4131.)
(Court of Criminal Appeals of Texas. June 21, 1916.)

1. HOMICIDE \S 165, 166(3)—EVIDENCE—MOTIVE.

In a prosecution for the murder of his wife, defendant's statement, made on her request to sign a waiver so that she might secure a divorce, that he would not sign any divorce, and that she should be careful, because she would know what she was going to get, was admissible as bearing upon the relation of the parties and the defendant's motive.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. \S 319, 823; Dec. Dig. \S 165, 166(3).]

2. CRIMINAL LAW \S 1091(4)—BILL OF EXCEPTIONS—SUFFICIENCY.

A bill of exceptions, alleging error in admitting a conversation between defendant and

the deceased, relative to defendant's signing of a waiver in her divorce case, could not be considered, where the bill did not state the conversation nor any facts in connection with it.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 2316, 2331, 2332, 2931-2933; Dec. Dig. \S 1091(4).]

3. HOMICIDE \S 165—EVIDENCE—RELATION OF PARTIES.

In a prosecution for the murder of his wife, evidence that defendant, about two weeks before, had gone to his own house with a policeman and had taken his clothes away with him was admissible as bearing upon the relation of the parties.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. \S 819; Dec. Dig. \S 165.]

4. CRIMINAL LAW \S 1091(4) — BILL OF EXCEPTIONS—SUFFICIENCY.

A bill of exceptions reciting that a witness was permitted to testify that, about two or three days after defendant had taken his clothes from his house, he stopped his wife, the deceased, and her sister, and sought to have a conversation with his wife, but which did not state the conversation, presented nothing for review.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 2316, 2331, 2332, 2931-2933; Dec. Dig. \S 1091(4).]

5. CRIMINAL LAW \S 1091(5)—SUFFICIENCY OF BILL OF EXCEPTIONS—EVIDENCE.

A bill of exceptions, reciting that defendant's witness stated that in his official capacity, he had had a conversation with defendant before the homicide or defendant's arrest, that it was expected to show by such witness that, a few days before the homicide, defendant called upon witness, a deputy sheriff, and requested that he arrest one for coming to his house and raising a disturbance and trying to kill him, and that he had discovered such person conversing in a low tone with his wife at a late hour of the night, but which did not state the purpose in offering such testimony, presented nothing for review.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 2316, 2331, 2332; Dec. Dig. \S 1091(5).]

6. CRIMINAL LAW \S 1091(4) — BILL OF EXCEPTIONS—SUFFICIENCY.

A bill of exceptions, reciting that, while defendant was testifying, the state asked whether he had not made repeated threats to kill his wife and that objections thereto were overruled, but not setting out the answer, presented nothing for review.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 2316, 2331, 2332, 2931-2933; Dec. Dig. \S 1091(4).]

7. CRIMINAL LAW \S 1091(4)—BILL OF EXCEPTIONS—SUFFICIENCY—CHARACTER OF EVIDENCE.

A bill of exceptions, reciting that the state's witness, in answer to the prosecuting attorney, said that he had been at defendant's house until about 10 o'clock at night, and that, over defendant's objection, such witness stated that he had gone to treat defendant's wife who was sick, without showing its connection or relevancy, or how the testimony could be harmful, presented nothing for review.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 2316, 2331, 2332, 2931-2933; Dec. Dig. \S 1091(4).]

8. HOMICIDE \S 250 — SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for wife murder held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. \S 515-517; Dec. Dig. \S 250.]

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

Callixtro Resendez was convicted of murder, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of murder, and given 99 years in the penitentiary.

[1] A bill of exceptions recites that the witness Barron was permitted to testify that, about a week prior to the killing, the defendant had been requested by the deceased to sign a waiver so that she might secure a divorce, and appellant at the time it was offered objected because it was irrelevant, immaterial, and had no bearing on or connection with the crime with which the defendant is charged, nor did it tend to establish a motive for such a heinous crime as that of which the defendant was accused, nor did it show malice towards his wife. These objections being overruled, the witness stated defendant refused in the following language: "I will not sign no divorce, but you be careful, because you will know what you are going to get." This statement was admissible. The bill is hardly sufficient to present the connection in which this testimony got into the case or why it was inadmissible. There are no surrounding facts stated as to why it was or why it was not admissible, or its bearing or want of bearing upon the issues of the trial. It, however, does apparently show on its face that it was admissible as bearing upon the relation of the parties to each other, they being husband and wife, and the divorce proceedings about which the waiver was asked. It may have furnished or assisted in furnishing a reason for affecting or as having a bearing upon the relations of the wife to the husband, and the feeling that may have prompted him in going to her house at night and killing her. The bill recites that this conversation occurred, and his refusal to sign the waiver, about a week before he killed his wife.

[2] The next bill recites that the court erred in permitting to go to the jury the conversation between defendant and the deceased relative to the signing of the waiver in her divorce case; and, at the time it was offered appellant objected, setting out various reasons why he objected. The conversation is not stated, nor any of the facts in connection with it further than that there was a conversation. In order to enable this court to intelligently revise this question, the conversation and its relation to the case should have been stated.

[3] Another bill recites that the same witness, over objection of appellant, was permitted to testify that, about two weeks before the killing, defendant came to his own house with a policeman and took his clothes away with him, and the conversation relative to

same which defendant had with his wife. The defendant, at the time it was offered, objected. There is nothing stated that shows how this affected the case before the jury or could have done so. It was admissible to show that he went to his house just prior to the killing and took his clothes away from home. From this it might be inferred there was a separation between the parties, at least showing that they were not then living together. The conversation that occurred at the time may have been admissible or it may not have been.

[4] Another bill recites the same witness, Barron, was permitted to testify that, about two or three days after defendant had gotten his clothes from his house, defendant stopped his wife, the deceased, and her sister, as they were coming to town, and sought to have a conversation with his wife. Various objections were urged. The conversation is not stated, and we cannot review the matter.

[5] Another bill recites the defendant placed a witness named Diaz on the stand, and propounded to him the following question: "Prior to his, the defendant's, arrest, and prior to this killing, or homicide, did you have a conversation with him, the defendant?" The witness replied, "I did." The witness was then asked: "In your official capacity?" To which the witness replied: "Yes, sir." Then the witness was asked: "What was it?" The state objected for various reasons. The bill then recites that it was expected to elicit from the witness the statement that, a few days prior to the alleged homicide, the defendant called upon the witness in his official capacity as deputy sheriff of Bexar county, and requested that he arrest one Rodriguez, a musician, for coming to his house, or in front of his house, and raising a disturbance and trying to kill him, and that the said Rodriguez was caught at the gate talking in a very low tone at a very late hour at night with his, defendant's, wife. The purpose of offering this testimony is not stated. The object and purpose, however, should be stated in a bill of exceptions, unless such purpose is manifest or obvious, where testimony has been rejected when offered by the defendant. Just what the purpose was in offering it would be but inference, as defendant stated no reason why he offered the testimony.

[6] Another bill recites that, while the defendant was testifying, the state asked him the following question: "Hadn't you made repeated threats to kill your wife prior to that time?" Objections were urged to this, which were overruled. The answer of the witness, however, is not set out in the bill. It simply recites that the question was asked. Whether he answered that he had made or had not made the threats is not shown.

[7] Another bill recites that, while the state's witness Moran was testifying, the prosecuting attorney asked him the following

questions: "Were you at her (the deceased's) house prior to her death?" The witness responded: "I stayed there until 10 o'clock that night." The witness was then asked: "State what you were doing at her house that night." To this defendant objected because it was immaterial and irrelevant. The court overruled the objection, and the witness answered: "I just went to doctor that lady that night; she was a little sick." What connection this had with the case, or its relevancy, is not shown by the bill of exceptions, nor are any of the facts set out to show or indicate why the testimony could possibly be hurtful. In the absence of this character of showing, the bill will not be reviewed.

[8] These cover the questions raised by the record, and none of them show any reason why the judgment should be reversed. The evidence is ample to sustain the verdict of the jury. The appellant was the second husband of the deceased, her prior husband having died. He had been married to her about four years, his wife being the mother of a couple of children at the time he married her. There came no children from the second marriage. Dissensions arose between them with reference to the children, and appellant did not seem to contribute anything particularly to the support of the family. But, be that as it may, these dissensions reached a culmination a short time before the homicide and it seems deceased brought suit for a divorce, which appellant refused to sign, making the qualified threat as set out in one of the bills of exception above stated. Prior to the homicide, appellant had gone to their home accompanied by an officer, had obtained his clothes, and carried them away. On the night of the homicide he went to the house where deceased and her children were living, entered the house, and killed the deceased by stabbing her with a knife. The sister of deceased, Eufracia Barron, was an eyewitness to the matter. Deceased seemed not to have been well that night, and one of the witnesses who testified in the case had been at her house administering to her wants until about 10 o'clock, when she left. Along near midnight, appellant came and called the deceased. Her sister, Eufracia Barron, testified to witnessing the transaction, giving details as to the transaction. We think the testimony sustains the verdict. The appellant testified in his own behalf. He says he went to the house that night, and, when outside of the house, he heard a conversation in a low tone of voice, and thought he heard somebody kissing his wife, and he went in the house to see about that and a man ran out, and, in striking at what he thought was the man, he happened to strike his wife. This was his side of the case. The jury evidently did not believe it; they could have believed his story had they seen prop-

er to do so, but they discarded it, and there is no reason why this court should disturb their finding under the facts of this case.

The judgment, therefore, will be affirmed.

DE LEON v. STATE. (No. 4127.)

(Court of Criminal Appeals of Texas. June 21, 1916.)

CRIMINAL LAW §1097(6)—APPEAL—STATEMENT OF FACTS.

The grounds of the motion for a new trial, in the absence of a statement of facts, cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2947; Dec. Dig. §1097(6).]

Appeal from District Court, El Paso County; W. D. Howe, Special Judge.

Mateo De Leon was convicted of hog theft, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of hog theft, his punishment being assessed at two years' confinement in the penitentiary.

The record contains neither a statement of facts nor bill of exceptions. The grounds of the motion for new trial, in the absence of the statement of facts, cannot be considered, and some of them set forth matters which could not be reviewed in the absence of bill of exceptions.

The judgment on the record as presented will therefore be affirmed.

WEBB v. STATE. (No. 4096.)

(Court of Criminal Appeals of Texas. June 14, 1916.)

1. CRIMINAL LAW §369(8)—EVIDENCE—OTHER OFFENSES—RAPE.

In trial for assault to rape, evidence of other offenses against the prosecutrix committed at about the same time is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822, 823; Dec. Dig. §369(8).]

2. RAPE §44 — EVIDENCE — SOCIAL RELATIONS.

In a prosecution for assault to rape, evidence of no change in social relationships between family of defendant and family of prosecutrix after the family of the latter had notice of the alleged assaults is admissible, to be considered in determining whether any assault was made, and its consideration should not be limited to impeach members of prosecutrix's family, except where such testimony amounted only to impeachment.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 63; Dec. Dig. §44.]

3. CRIMINAL LAW §369(1)—EVIDENCE—ADMISSIBILITY—OTHER OFFENSES.

In a criminal prosecution, evidence of other offenses, or offenses of a like nature, are as a rule inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. §369(1).]

4. CRIMINAL LAW §371(1)—EVIDENCE—ADMISSIBILITY—OTHER OFFENSES.

In a criminal prosecution, where intent is an element, and there is testimony tending to show that an act otherwise illegal was committed with innocent intent, evidence of other offenses of like nature are admissible on the question of intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. § 371(1).]

5. CRIMINAL LAW §371(9)—EVIDENCE—OTHER OFFENSES—ASSAULT TO RAPE.

In a prosecution for assault to rape, evidence of other similar offenses against other persons than prosecutrix are admissible on the question of intent, where defendant's testimony tends to show that his otherwise illegal acts were without wrongful intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. § 371(9).]

6. RAPE §16(5)—ASSAULT TO RAPE—FEMALE UNDER AGE OF CONSENT—FORCE.

Where a man takes hold of a girl under 15 years of age and handles her in such manner as to show a present intent on his part to have sexual intercourse with her, he is guilty of assault with intent to rape; proof of defendant's intention to use whatever force was necessary to obtain sexual intercourse being unnecessary.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 17; Dec. Dig. § 16(5).]

7. RAPE §59(23)—INSTRUCTIONS—AGGRAVATED ASSAULT.

In a prosecution for assault to rape, an instruction on aggravated assault is proper, where there is the evidence tending to show that defendant's acts towards prosecutrix were without intent to rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 59; Dec. Dig. § 59(23).]

8. CRIMINAL LAW §673(5)—RAPE—INSTRUCTIONS LIMITING EVIDENCE—INTENT—OTHER OFFENSES.

In a prosecution for assault to rape, the jury should be instructed that evidence of other similar offenses against prosecutrix should be considered only to determine defendant's intention to have sexual intercourse with her at the time of the assault for which he is on trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1876; Dec. Dig. § 673(5).]

9. CRIMINAL LAW §673(5)—RAPE—INSTRUCTIONS LIMITING EVIDENCE—OTHER OFFENSES—INTENT.

In a prosecution for assault to rape, the jury should be charged that evidence of other offenses may be considered in determining whether defendant intended to have sexual intercourse with prosecutrix, not whether he attempted to have such intercourse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1876; Dec. Dig. § 673(5).]

Appeal from District Court, Callahan County; Thomas L. Blanton, Judge.

Louis Webb was convicted of assault to rape, and he appeals. Reversed.

Scott & Brelsford, of Eastland, and W. P. Mahaffey, of Abilene, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction for an assault to rape a girl under 15 years of age. We will not

state fully nor discuss the testimony, in view of the fact that the case must be reversed. Neither will it be necessary to discuss the several bills of exceptions as to the introduction of testimony and other matters. Some of these bills are extremely lengthy. Nearly all are explained and qualified by the judge. However what we say will embrace all the matters raised, so as to be a guide for another trial.

[1] In trials for this character of offense, other acts upon her than the one upon which the prosecution is based, occurring along about the same time, are admissible, under the case of *Battles v. State*, 83 Tex. Cr. R. 147, 140 S. W. 783, and that line of decisions following it. Therefore the testimony of the assaulted girl, wherein she testified to an assault upon her at a gin and also in the pasture, were admissible.

[2] It was shown that the families of both appellant and the alleged assaulted girl, Thelma Parish, lived in the same town just across the street from one another, both families having children, girls and boys, and that the families had for years been intimate and frequent visitors, one to the other. Appellant claimed that after the alleged repeated assaults upon Thelma, and notice thereof to her mother and other members of her family, the social relationship between the respective families, including the father and mother and all the children of each, continued somewhat the same as before said claimed assaults. We think such testimony was admissible to enable the jury to determine whether or not the alleged assault had occurred, and it was improper for the court to limit the jury to the consideration of such testimony solely for the purpose of impeaching the mother or other members of the family of Thelma. Of course, if some particular portion of such testimony amounted only to a specific impeachment of some given fact, by other witnesses, then it would be proper in those particulars for the court to restrict such testimony for impeachment alone; but otherwise it would be improper to restrict such consideration for that purpose. It could be considered by the jury to determine the credibility and weight to be given to the respective witnesses, and would be embraced under that general charge of the court, that the jury are the judges of the credibility of the witnesses, etc., and should not be otherwise restricted, as stated.

[3, 4] The rule in this state is well established that ordinarily other offenses, or offenses of a like nature, cannot be introduced in evidence against an accused unless in certain contingencies. Among them is the question of the intent of the accused, in which instance an exception to the rule is as well established as the rule itself, to the effect that when intent is an element of the offense, and the testimony of an accused, or other

testimony, should tend to show that an act otherwise illegal was committed without any intent to commit the offense charged, then such other like acts can be proven for the purpose of showing the intent of accused.

[5] Appellant did not testify. It is unnecessary for us to determine now whether or not the question of what the girl testified he did was with an innocent intention or not. If on another trial he should testify and claim such innocent intent, or otherwise he should make such contention, then such other acts would be admissible. On the other hand, if no such issue is raised by the testimony offered in behalf of appellant, the testimony would not be admissible. We say this in view of the testimony of the girl Nellie Horn. Her testimony may or may not be admissible under the theories we have just above stated. If admissible and attacked as she was, then the testimony of Dr. Bettes and Newt Mahaney would be admissible to support her; but, if it should develop that her testimony on another trial is inadmissible, then, of course, that of Dr. Bettes and Mahaney would also be inadmissible. The rules of law applicable to such matters are clearly laid down in *Gray v. State*, 178 S. W. 337, and many other cases. What we have said as to the testimony of Bettes and Mahaney applies also to the testimony of Nellie Horn shown by appellant's fourth bill of exceptions.

[6] It is now considered the settled doctrine of this court that if a man take hold of a girl under 15 years of age and handle her in such manner as under the circumstances to show a present intent on his part to have sexual intercourse with her, with her consent or without it, he would be guilty of an assault with intent to rape. It is not necessary that other force should be used, like it would be if the woman was more than 15 years of age. This is settled by such cases as *Hightower v. State*, 65 Tex. Cr. R. 323, 148 S. W. 1168, *Cromeans v. State*, 59 Tex. Cr. R. 611, 129 S. W. 1129, *Love v. State*, 68 Tex. Cr. R. 228, 150 S. W. 920, *Collins v. State*, 66 Tex. Cr. R. 602, 148 S. W. 1065, *Duckett v. State*, 68 Tex. Cr. R. 331, 150 S. W. 1177, *Croomes v. State*, 40 Tex. Cr. R. 672, 51 S. W. 924, 53 S. W. 882, and other cases. This case was tried by the lower court on the law as thus laid down. We regard the doctrine as so well established as to need no further discussion. The appellant, both in his attack on the court's charge and in special charges requested, contended the reverse, and that it was necessary to show such force as to show that a man intended to have sexual intercourse and to use whatever force was necessary to accomplish it. Therefore, all of his attack on the court's charge on his theory is not the law, and his special charges on the same theory were correctly refused.

[7] We are also of the opinion that the evidence in this case did not raise the question

of aggravated assault and that the court committed no error in not submitting such an issue to the jury. Of course, on another trial, if it should develop, as stated above, that the appellant should testify, or introduce other testimony, tending to show that his intention was not that of having sexual intercourse with the girl, but some other intent, then it would be necessary for the court to submit the issue of aggravated assault.

[8, 9] There is one other question we think it necessary to mention. In the event the testimony of Nellie Horn should be admitted upon another trial, then it would be proper for the court to limit the jury to the consideration of her testimony and that also of Thelma as to the claimed assaults at the gin and in the pasture, for the purpose alone of showing, or tending to show, whether or not appellant's intention was to have sexual intercourse with Thelma at the time he committed the alleged assault upon her in the kitchen. It seems the court so limited by oral instruction to the jury that testimony when it was admitted, but when he charged the jury in his main charge, he told them in effect that they could consider all that testimony "in determining whether defendant did in fact attempt to have sexual intercourse with said Thelma." This charge must, of course, be corrected on another trial. The evidence, if admissible, was not for the jury to determine whether appellant attempted to have sexual intercourse with her, but whether or not it was his intent to do so.

For the errors pointed out, the judgment is reversed, and the cause remanded.

BLOSS v. STATE. (No. 4109.)

(Court of Criminal Appeals of Texas. June 7, 1916.)

CRIMINAL LAW §1131(4)—APPEAL—CRIMINAL PROSECUTION—RECOGNIZANCE.

Where accused, after conviction, instead of entering into a recognizance, gives an appeal bond and is released from custody, his appeal will be dismissed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2974, 2976, 2977; Dec. Dig. §1131(4).]

Appeal from District Court, Eastland County; Thomas L. Blanton, Judge.

Edward Bloss was convicted of pandering, and appeals. Dismissed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of the offense of pandering, and his punishment assessed at five years' confinement in the state penitentiary.

The record contains no bills of exception, and no statement of facts accompanies the transcript.

The indictment charges an offense, and un-

der such circumstances there is no question presented we can review.

It is further made to appear that while the court was in session, appellant, instead of entering into a recognizance, gave an appeal bond and was released from custody. Consequently, the state's motion to dismiss the appeal must be sustained.

The appeal is dismissed.

SAN ANTONIO & A. P. RY. CO. v. JACKSON & ALLEN. (No. 5688.)

(Court of Civil Appeals of Texas. San Antonio. June 7, 1916. Rehearing Denied June 21, 1916.)

1. CARRIERS §228(3) — CARRIAGE OF LIVE STOCK—ACTION—EVIDENCE—LIMITATION OF LIABILITY.

Under the provisions of Vernon's Sayles' Ann. Civ. St. 1914, arts. 708, 731, fixing the liability of carriers as it exists at common law, and making void any special agreement to the contrary, all portions of a shipping contract relating to the reciprocal rights and duties of the parties are inadmissible in an action for damages to shipment of live stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. 228(3).]

2. CARRIERS §228(1) — CARRIAGE OF LIVE STOCK—ACTION—PRESUMPTION.

Where a carrier accepts uninjured cattle for shipment and delivers them injured, its negligence is presumed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957, 958; Dec. Dig. §228(1).]

3. CARRIERS §228(5) — CARRIAGE OF LIVE STOCK—ACTION—PRESUMPTION.

In such case nonliability of the carrier because of negligence of the shipper was not established by mere proof that the cattle when shipped were securely tied by the shipper, and while in the exclusive charge of the carrier became untied, since this did not show negligence of shipper, and, if it had, there was no proof that such negligence caused the damage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. §228(5).]

Appeal from Caldwell County Court; J. T. Ellis, Judge.

Action by Jackson & Allen against the San Antonio & Aransas Pass Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Boyle & Storey, of San Antonio, and Jeffrey, Jeffrey & Fielder, of Lockhart, for appellant. A. E. Holland, of Luling, for appellees.

SWEARINGEN, J. On October 31, 1914, appellees filed a petition against appellant, alleging substantially that appellant was a common carrier for hire, and that on the 13th day of March, 1914, appellees intrusted to appellant 36 head of cattle for transportation from Luling, Tex., to Ft. Worth, Tex.; that the cattle were in good and merchantable condition when delivered to and accepted by appellant; that through the negligence of appellant the cattle were injured and some of them killed before redelivery to appellees at

destination, causing appellees damage in the sum of \$241.

Appellant denied that it transported the cattle; denied that it negligently handled the cattle, but averred that it transported the cattle with care and prudence, and averred that the cattle were received by it, and that it transported them under a written contract between it and appellees, and that this contract prescribed the respective duties, rights, liabilities, and obligations of both appellees and appellant in regard to transportation of the cattle; that appellees failed to load and care for said cattle while in transit, which failure was the proximate cause of the injury; that appellees failed to securely fasten said cattle in the car while in transit and this caused the injury; that this shipment was a mixed car of live stock, and that circular No. 4442, adopted by the Railroad Commission, made it the duty of the appellant to require the appellees to securely tie each bull; that appellees did not tie the bulls securely and this caused the injury; that appellees assumed all risks of transporting the cattle which resulted from proper vices, natural propensities, and inherent natures of the cattle. Further, appellant answered that it was the duty of appellees to securely tie the bulls shipped; that appellees attempted to tie the bulls securely, but that the bulls got loose from their fastenings; and that it was appellees' failure to securely tie the bulls that caused the damage.

In the first supplemental answer appellant avers that the car contained dangerous and vicious animals which were not properly or securely tied, and that the injuries and damages were caused by appellees' failure to securely tie the bulls, which by their vicious acts and natural propensities caused all the damage.

Special issues were submitted to and answered by the jury. The trial court rendered judgment in accordance with the jury's answer against appellant for \$205.76.

The facts are that 36 head of mixed cattle, including bulls and cows, were delivered to appellant at Luling for transportation to Ft. Worth. They were in good condition when loaded. Appellees tied the bulls securely in the car as required by that agent of appellant, whose duty it was to inspect the loading and tying. The cattle, as loaded and tied, were accepted by appellant and transported. Upon redelivery at destination several cows were dead and others crippled. At Yoakum, an intermediate point, the agents of appellant discovered that the bulls were loose, five cows were down, three of them dead, and two of them died a few hours later. The bulls were riding the cows. Appellees did not accompany the shipment.

[1] The first error assigned is that the trial court erred in excluding from the jury that portion of the contract relating to the recip-

cal rights, duties, obligations, and liabilities of appellant and appellees in their capacities as common carrier and shippers, respectively. The court offered to admit all other portions of the contract, which appellant declined. The court very properly excluded the contract; for the statute, and not contracts, fixes the liability of carriers as it exists at common law. Any contract which limits or restricts this liability is invalid. This has been the law since 1863. Paschal's Digest contains the statute. P. D. 452. It is now, and has been continuously, the law of Texas. Many decisions have construed the statute and announced such to be the law so clearly and unequivocally that none should mistake it. *Railway v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494; *Railway v. Harris*, 67 Tex. 166, 2 S. W. 574; *Vernon's Sayles' Civ. Stat. art. 708*; *Vernon's Sayles' Civ. Stat. art. 731*. The first assignment is overruled.

[2] Appellant's second assignment urges that the court erred in refusing to peremptorily instruct the jury, for the reason, as appears in its propositions, that appellees failed to prove the alleged negligence of appellant. The court should not have given the peremptory instruction. The appellant is liable as an insurer, even though no negligence is affirmatively shown. Negligence of the carrier under the facts as alleged and proven in this case will be presumed. *Railway v. Powers*, 117 S. W. 459, and many cases cited on page 461; *Railway v. Drahn*, 157 S. W. 282. Appellant's counsel in their brief emphatically state that:

"The whole question in this case (the case at bar) is whether plaintiffs (appellees) are required to prove their allegations of negligence." (Appellant's Brief, p. 13.)

The statement is correct, and the question has been positively decided against appellant time and time again. See the *Powers and Drahn Cases*, above cited, the many cases cited therein, and the many cases citing them.

[3] By the third assignment appellant announces the strange doctrine that because the jury found the bulls were securely tied by the shipper when accepted by the carrier, but were not tied hours later while in the exclusive care of the carrier, and because the jury said it did not know how the bulls became untied, therefore the court should have entered judgment for the defendant. The only escape from liability by appellant, after accepting the cattle for transportation, was to prove affirmatively that the injury was due to the negligence of the shipper, which permitted the bulls by their viciousness to inflict the injury. That the bulls got loose after being tied does not of itself prove negligence of the shipper. Neither does the fact that the jury did not know how the bulls got loose. To help appellant, the jury must have found that the bulls got loose through the negligence of the shipper. Then, again, even if the bulls got loose through the negligence

of the shipper, it was further necessary for the jury to find specially in the affirmative this issue: Was the injury caused by viciousness of the bulls? This issue was not submitted to the jury by the court in its main charge. Appellant did not object to the main charge. Appellant requested special issues, all of which were given, but this issue was not requested. It must therefore be considered by this court that appellant waived the submission of that issue, and that the court found upon it adversely to appellant; in other words, we must consider that the court properly found that the cattle were not injured by the viciousness of the bulls. The evidence warranted such a finding. *Vernon's Sayles' Stats. art. 1985*. The third assignment is overruled.

The fourth, fifth, sixth, and seventh assignments present arguments upon the evidence which were probably appropriate and pertinent arguments for the jury and were no doubt unavailing made to it. However, if relevant even in a discussion to the jury, they present no question that would authorize this court to reverse the judgment herein. The fourth, fifth, sixth, and seventh assignments are accordingly overruled.

Appellant's eighth assignment complains that the jury had no evidence upon which to find that appellant handled the shipment involved herein carelessly and negligently.

Under the facts of this case, it was not even necessary for the jury to have that or a similar issue submitted to them, as it was unnecessary to prove specifically negligence. The court was authorized, under the facts of this case, to presume negligence on the part of appellant. However, the issue was submitted with the consent of appellant, and it therefore waived the objection that there was no evidence to warrant the submission of the issue. There was no error in the trial court presented in the assignment.

The judgment of the trial court is affirmed.

FIRST NAT. BANK OF ROSWELL, N. M.,
v. BROWNE GRAIN CO. et al.
(No. 1006.)

(Court of Civil Appeals of Texas. Amarillo.
May 31, 1916. Rehearing Denied
June 21, 1916.)

1. JUDGMENT \Leftrightarrow 18(1) — TRIAL \Leftrightarrow 396(1) —
FINDINGS OF COURT—PLEA ELIMINATED.

A plea having been eliminated, by the sustaining of exceptions thereto, will not sustain a finding, and the judgment thereon, for defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 34, 35; Dec. Dig. \Leftrightarrow 18(1); Trial, Cent. Dig. § 935; Dec. Dig. \Leftrightarrow 396(1).]

2. TRIAL \Leftrightarrow 396(2)—FINDINGS OF COURT—ABSENCE OF PLEA.

A finding for a drawee of a draft, sued by the payee, who had cashed it for the drawer, that the drawer had a deposit with the payee, suffi-

cient to repay it, is unauthorized, in the absence of plea of such fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 935; Dec. Dig. § 396(2).]

3. BANKS AND BANKING § 175(3)—COLLECTING DRAFT—NEGLIGENCE—EVIDENCE.

Evidence in an action against a bank for negligence in not collecting a draft, sent to it with bill of lading attached, held sufficient to exonerate it of negligence, on the ground that the drawee obtained possession of the goods shipped on an order from the consignor and drawer.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 635, 640-646; Dec. Dig. § 175(3).]

Appeal from Collin County Court; H. L. Davis, Judge.

Action by the First National Bank of Roswell, N. M., against the Browne Grain Company and others. From an adverse judgment, plaintiff appeals. Affirmed in part, and in part reversed and remanded.

Jas. M. Muse, L. C. Clifton, and Mort W. Muse, all of McKinney, for appellants. J. R. Gough, W. R. Abernathy, and G. R. Smith, all of McKinney, for appellees.

HENDRICKS, J. One R. E. Levers, of Roswell, N. M., agreed to sell to the Browne Grain Company, of McKinney, Tex., a carload of alfalfa hay for the sum of \$247.17, the hay to be shipped from Farwell, Tex., to Simsboro, Tex. The shipment was by Levers as consignor, to himself as consignee, and the bill of lading so stated, with the freight prepaid. At the time of the shipment he drew a draft upon the Browne Grain Company, payable to the order of the First National Bank of Roswell, N. M., for the purchase price of the hay, and which was cashed by the bank; the amount being credited in Levers' account as a customer of the bank. The bill of lading was attached to the draft, and by the Roswell bank was transmitted to the Collin County National Bank, at McKinney, Tex., for presentation and payment. This draft and bill of lading was returned by the Collin County National Bank to the Roswell bank on March 21, 1912, uncollected, with instructions that an order should be furnished by the owner of the hay, as a requisite to the delivery of same to the Browne Grain Company, the purchaser.

An order was made out by Levers, the consignor, in the bill of lading, and got into the hands of the Browne Grain Company, who presented the same to the railway company, and upon the strength of which the railway company delivered the hay to the grain company. The Roswell bank sued the Browne Grain Company, also the Collin County National Bank, claiming that Levers wrote the order for the hay, delivered the same to it, and that in compliance with the instructions of the Collin County bank it forwarded said order to the latter bank, with a return of the draft and the bill of lading.

The Collin County bank claims that, when said draft and bill of lading were returned

to it for re-presentation to the Browne Grain Company for collection, no order, authorizing the railway company to deliver the hay, accompanied said draft and bill of lading. Browne, of the Browne Grain Company, testified that Levers forwarded said order directly to the Browne Grain Company, and that, when the draft was presented for collection, no order was attached to it, nor to the bill of lading. One of the employes of the bank, who attended to the collection, also testified that no order was attached to the papers. The Browne Grain Company again refused to pay the draft, and the same was again returned to the Roswell bank, and the trial court, without the assistance of a jury, found that the Collin County National Bank, was not culpable with reference to the collection of the draft, or the delivery of the hay by the railway company to the Browne Grain Company, and adjudged that the Roswell bank could not recover against said Collin County bank.

[1, 2] The Browne Grain Company answered that at the time the order was sent by Levers, directly to it, to take charge of the hay, Levers was indebted to the Browne Grain Company in an amount more than the value of the car of hay and that said car of hay was received by the grain company upon a previous understanding and agreement with Levers that there would be a settlement and adjustment between then with reference to said previous indebtedness, of which the Roswell bank had knowledge. The trial court sustained exceptions to this plea, but at the trial, notwithstanding the elimination of the plea, found against the Roswell bank, in favor of the Browne Grain Company. The ninth finding is in substance that plaintiff had notice that the defendant Browne Grain Company was claiming that Levers was due the grain company in the several sums as set out in their answer, and that Levers had on deposit, in his name, money in plaintiff's bank, more than enough to repay it for the amount placed to the credit of said Levers at the time the draft was cashed by plaintiff. There is no plea in the record to sustain such a finding, nor the judgment entered thereupon.

If the Roswell Bank had notice of an offset in favor of the Browne Grain Company against Levers, and if Levers had a deposit in the Roswell bank, over which it had control, and out of which said bank could have protected itself on account of the nonpayment of the draft, such a question is academic, on account of the lack of pleading to sustain such a contention. If the trial court had not sustained exceptions to the pleadings, declaring an offset, neither is there any allegation that Levers had a deposit at the time when the Roswell bank elected to pursue its remedy against the Browne Grain Company for the hay.

[3] We have noted carefully appellee's au-

thorities, but think it unnecessary, in the condition of the record, to discuss the question. The testimony is sufficient to exonerate the Collin County National Bank upon the issue of negligence as to the collection of the draft from the Browne Grain Company, and there is no complaint by appellant against the railroad company in this appeal.

The judgment of the trial court will be affirmed in favor of the bank and the railroad company, but is reversed and remanded against the Browne Grain Company.

GALVESTON, H. & H. R. CO. v. ANDERSON. (No. 7179.)*

(Court of Civil Appeals of Texas. Galveston. May 18, 1916. Rehearing Denied June 15, 1916.)

1. NEGLIGENCE \S 85(3) — INFANTS — CARE — PRESUMPTIONS.

A child of very tender years may be presumed as a matter of law not to have sufficient discretion to appreciate dangers obvious to one of maturer age; but no such presumption can be indulged in favor of a boy 14 years old.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 124; Dec. Dig. \S 85(3).]

2. MASTER AND SERVANT \S 154(1) — INJURIES TO SERVANT — FAILURE TO WARN.

Where a railroad callboy 14 years old knew and appreciated the danger of trains in the yards where he was required to work as well as any one else, the railroad company's failure to warn him does not constitute negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 308; Dec. Dig. \S 154(1).]

3. MASTER AND SERVANT \S 95 — INJURIES TO SERVANT — EMPLOYMENT OF MINORS.

Where a railroad callboy 14 years old employed about railroad yards appreciated the danger as fully as an adult, and was as capable as an adult of protecting himself, the railroad company cannot be held liable for injuries, on the theory that it was negligent in employing so immature a person.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 141, 160; Dec. Dig. \S 95.]

Error from District Court, Galveston County; Robt. G. Street, Judge.

Action by James Anderson, by his next friend, against the Galveston, Houston & Henderson Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

John L. Darrouzet, of Galveston, and Jno. T. Garrison, of Houston, for plaintiff in error. Geo. G. Clough, of Galveston, for defendant in error.

PLEASANTS, C. J. This suit was brought by W. J. Anderson, as next friend of his minor son, James Anderson, against appellant railroad to recover damages in the sum of \$10,000 for personal injuries to said minor, alleged to have been caused by the negligence of the railroad company.

Plaintiff's petition alleges in substance that said James Anderson, a minor 14 years of

age, was on or about the 27th day of July, 1913, in the employment of the defendant in the capacity of night callboy in defendant's yards in the city of Galveston, and, while in the performance of the duties of his employment, was struck and run over by a train operated by defendant in its said yards, and received injuries which are fully described in the petition. The acts of negligence upon which the cause of action is based are thus alleged in the petition:

"Plaintiff would represent and show to the court that the injuries received by him were the immediate and proximate result of the negligence of the defendant, its agents, servants, and employes for this, that he was but a child of 14 years of age, and small and undeveloped for one of such years; that the defendant, its agents, servants, and employes were negligent in employing him in such dangerous occupation as that of callboy, which required him to go in and about the yards where trains were switching, and at nighttime; and the defendant, its agents, servants, and employes were negligent in permitting him to go in, upon, and about said yards where trains were switching and at nighttime; that said yards are not lighted, so that employes and persons in and about said yards might see the approach of trains; that plaintiff was inexperienced, and the hazardous and dangerous occupation and employment of a callboy was not made known to him by the defendant, its agents, servants, and employes, and he was not cautioned or warned by the defendant, its agents, servants, or employes of the hazardous and dangerous nature of such employment, and such hazardous and dangerous employment was not realized by him.

"Plaintiff would further represent that the defendant was further negligent in the premises for this, that the train of cars which struck plaintiff and caused the injuries hereinbefore mentioned was not protected with a lookout; that is to say, no person was stationed at the front end of said cars to guard against injuries to persons in and about said yards, and that said train of cars so propelled was not equipped with lamps or headlight, or any other character of warning signal to warn or notify persons, having business in said yards, of the approach of said train; that no whistle was being blown, nor bell rung, and there was nothing whatever upon the front or moving end of said car which struck plaintiff to give any notice or warning of the approach of said train of cars; that the night in question was very dark, and that a proper lookout was not kept by any employé or switching crew of the defendant operating said train, and plaintiff is informed, and upon such information charges the fact to be, that said train consisted of 13 to 15 cars between the end which struck the plaintiff and the engine which propelled the said cars, and that the headlight of such engine, if any there was, was completely obstructed by said cars, and that no signalling device and no light of any character was maintained at the front or moving end of said cars to apprise the employes of the defendant, and particularly the plaintiff herein, of the approach of such cars.

"Plaintiff further charges that the defendant was negligent in the premises in that such switching engine or train was operated with a short crew; that is to say, only two switchmen were working at the time of such injury in conjunction with such switching engine, and that two switchmen to a switching crew are wholly insufficient to properly and adequately give warning signals of the presence and movements of such switching engine and train, on a dark night in an unlighted railroad yard, and to ap-

prise the employes, such as plaintiff, of the movements of such a switching engine or train."

The defendant's answer denies generally and specially all of the allegations of negligence alleged in the petition, and also charges, in effect, that plaintiff's injuries were due to acts of negligence on his part, which are fully set out in the answer, but the nature of which need not be stated in this opinion.

The trial in the court below with a jury resulted in a verdict and judgment in favor of plaintiff for the sum of \$4,000.

The evidence shows that James Anderson, at the time of his injury, was 14 years old. He had been in the employment of appellant as night callboy in appellant's yards at Galveston for three months; the duties of his employment being to take messages, call crews, and do other errands which required him to go in and about all parts of appellant's yards at night. His home, at the time of the injury and for some time prior thereto, was within a few blocks of appellant's yards, and he was thoroughly familiar with the general use of the yards for switching and transfer purposes, and knew that trains were almost constantly being operated over the various tracks in said yards. On the night he was injured, with the permission of Mr. Cassidy under whom he was working, he started to his home to get his night lunch, which he had neglected to bring with him when he came to his work that evening. While riding on his bicycle along between two of the tracks in the yard, on his way to his home to get his lunch, he was struck and knocked down by a train which was backing down behind him, and received serious injuries. No one saw the accident. His testimony as to the occurrence is as follows:

"I was going along between Forty-Fourth and the yard office, and before I ever could turn around or anything something behind hit me, and that is the last I remember until I got to the hospital, and they gave me ether and then came to. I was about half way between the yard office and Forty-Fourth street when I was hit. I was right this side of the main line when I was hit, north side of the main line. I was on my wheel. I was heading east to Forty-Fourth and going to go down Forty-Fourth to get my lunch. I was living at 4412 F. I usually took that route in going to and from my work and to and from my lunch; I went down this side of the main line and took Forty-Fourth, and went home to get my lunch, and go from home down there the same way. That is the only way I had to go to work, unless I would go down Thirty-Seventh, and then I would have to go over tracks. When I started out of the yard office that night to go and get my lunch, I never heard, seen, or observed anything until all at once something hit me, and that is all I remember, hit me up here (witness indicated the right side of his face). I don't know exactly how many feet I had traveled on my bicycle from the yard office before I was struck. I guess it was about 40 feet, or something like that, somewhere along there. I know the yard office sits about in the middle of Forty-Fifth and between Forty-Fourth and Forty-Fifth, and I traveled half way from the yard office to Forty-Fourth. The yard is lighted at nights only by switchlights

and lights on trains; but I didn't see a light on any train or box car either; there was no light at all, only the switchlights. The switchlights are red and green. The switchlights are two feet or a little over from the ground. There is no electric light at Forty-Fourth street and Market. There is one on Forty-Fourth and Winnie. There are no pole lights there in the yard anywhere. The night I was struck, it was a dark night. When I started out on my bicycle to ride down there to Forty-Fourth street to go get my lunch, I did not see or hear any signals of any sort. I had my lantern with me, one of the switchmen's lanterns, one that the switchmen use. I had it in my hand on the handlebars. I didn't come to until they gave me ether in the hospital."

The undisputed evidence shows that James Anderson was possessed of at least the average mind and intelligence of boys of his age and had no physical infirmity of any kind. He started to the public school when he was seven years of age and made his grade every year except the last in which he attended school, which was his thirteenth year. He testified that he knew the dangers incident to his employment, and that his father tried to persuade him not to continue in the service because it was dangerous. Previous to taking employment with appellant he had been employed in a similar capacity by the Southern Pacific Railway Company. In regard to his knowledge of the danger incident to his work, he states in his testimony:

"I knew just about how dangerous it was as anybody could tell me. They always warned every one over at the Southern Pacific about the danger. I knew it was dangerous without anybody telling me. I had been warned at the Southern Pacific, and warned by my father it was dangerous. They might have told me it was dangerous. I already knew that; but they could have told me about the yard. They never explained nothing when I went to work there. They could have told me the roads not to go, and the exact road to go, and where to go. They could have told me just what tracks they would come on, and what tracks were in use, and what was not. I had been there three months, and it seemed to me they used the main track and all for switching. I had seen that time and again. After I had worked there, I seen it. At the time I was injured, I knew that constantly backward and forward trains were moving on their tracks out there. I knew there were no lights, electric lights in the yard."

In the second paragraph of the charge to the jury, the trial judge states the grounds of negligence relied on by plaintiff as follows:

"(a) That the service was a dangerous one and that in consideration of his immaturity in age, knowledge, and experience the defendant was negligent in employing him in such service at all; (b) that it was negligent in not warning and instructing him with respect to the dangers of the service; (c) in not having its yard lighted; (d) that he was struck by a negligently moving train, which was not protected by a lookout or with headlight or lamps at the end of the train approaching the point where he claims he was hurt, and that no signal was given of such approach."

The fourth and fifth paragraphs of the charge are as follows:

"(4) The defendant owed to the plaintiff the duty of giving him such warning and instruction with respect to the dangers of the service as the immaturity of his years, and degree of

capacity, intelligence, knowledge, and discretion, would require to enable him to perform the service without unnecessary danger; and a failure to discharge such duty would be negligence. But the defendant will be excused from performing such duty, notwithstanding the plaintiff's immaturity of years, if it appears from the evidence that he in fact had the capacity, intelligence, knowledge, and discretion to understand the dangers of the service, provided he did in fact understand and appreciate such dangers and the extent thereof.

"(5) The defendant is liable for such alleged injuries shown by the evidence as were proximately caused in the manner stated as may be shown by the evidence, by the negligence of the defendant, its agents, or servants, if any, except as otherwise herein instructed. It is not otherwise liable in this case. Negligence is the failure to use such care for the safety of another as one of ordinary prudence would use under the same or similar circumstances."

[1, 2] The first assignment of error presented in appellant's brief complains of the fourth paragraph of the charge above set out, on the ground that it submits an issue of negligence not raised by the evidence. This assignment must be sustained. The question of the duty of a master to warn a minor or inexperienced servant of the dangers incident to his work has generally arisen in cases in which the failure to give such warning is offered as an excuse for the contributory negligence of the servant. In those cases it has been uniformly held that, unless there is some evidence tending to show that, on account of immature age, the minor was so wanting in intelligence and discretion as to be unable to appreciate the dangers of his employment, it is error to submit to the jury the question of the capacity of the minor to appreciate the dangers of the service. A child of very tender years may be presumed as a matter of law not to have sufficient discretion to appreciate dangers that would be obvious and apparent to one of maturer age; but no such presumption can be indulged in favor of a boy 14 years of age. *Railway Co. v. Shiflet*, 94 Tex. 131, 58 S. W. 945; *Railway Co. v. Trigo*, 101 S. W. 257.

When the failure to warn is relied on as an independent ground of negligence authorizing a recovery, it goes without saying that such failure on the part of the defendant must have been a proximate cause of plaintiff's injury. We think the evidence before set out conclusively shows that the failure of defendant to warn plaintiff of the danger of being struck by some train operated in its yards could not have in any way contributed to plaintiff's injury. This danger was obvious and apparent, and plaintiff admits that he knew just as well about how dangerous it was as anybody could tell him. We do not think there is any room for difference in the conclusion from plaintiff's own testimony that the failure of defendant to warn him, when it employed him as night callboy in the railroad yards, that in going about over the yards he must look out for moving trains had no causal connection with plaintiff's in-

jury. According to his own testimony, he was not put to work in a place of danger of which he was ignorant, or of which he was incapable of appreciating. Such being the state of the evidence, the failure of defendant to warn plaintiff does not constitute actionable negligence, and that ground of recovery should not have been submitted to the jury. *Oil Co. v. Barnes*, 103 Tex. 409, 128 S. W. 375, 31 L. R. A. (N. S.) 1218, Ann. Cas. 1913A, 111.

[3] The charge is further objected to under the third assignment of error on the ground that, when the second and fifth paragraphs of the charge are considered together, the charge submits as ground of recovery the alleged negligence of defendant in employing a person of the age and inexperience of plaintiff in a service as dangerous as that in which plaintiff was employed. We think this objection to the charge should also be sustained. As we have before stated, there is nothing in the evidence tending to show that plaintiff was not possessed of the intelligence and discretion sufficient to enable him to fully recognize and appreciate the dangers of the service, or that he was not just as capable of protecting himself from the dangers of the service as an adult. It would be an unwise rule to prohibit the employment of a person under 21 years of age as night messenger or callboy in railroad yards, on the ground that a person so employed incurred the risk or danger of being struck by a train; and to allow plaintiff to recover in this case, on the ground that defendant was negligent in employing him to do the work, would in effect bar the employment of persons under 21 years of age as night messenger boys in railroad yards.

If any errors are pointed out in the remaining assignments, they are not likely to occur upon another trial; and therefore said assignments will not be discussed.

For the errors indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

BLACK v. WILSON. (No. 5695.)

(Court of Civil Appeals of Texas. San Antonio. June 14, 1916. On Motion for Rehearing, June 30, 1916.)

1. BROKERS' COMMISSION — REALTY BROKER — RIGHT TO COMMISSION.

Where a party employed to sell land discovered a party who desired to purchase, and the owner sold to such party, the right to commission accrued, the agent obtaining an ultimate purchaser to whom she only gave an option to purchase, since he became a purchaser through her efforts.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57(1).]

2. BROKERS' COMMISSION — REALTY BROKER — ACTION FOR COMMISSION — EVIDENCE.

In an action for broker's commission, where the owner did not deny that he executed a deed

to the purchaser procured by plaintiff, and the secondary evidence was sufficient to show delivery by the fact of its record, such deed was admissible to show that the owner accepted the purchaser procured by plaintiff and delivered a deed to him.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 112; Dec. Dig. ¶85(7).]

3. BROKERS ¶85(7)—ACTION FOR COMMISSION—EVIDENCE—MATERIALITY.

In such action, deeds which would not disprove anything testified to by the purchaser procured by plaintiff, and had no tendency to show that plaintiff was not the procuring cause of the sale, were properly excluded from evidence.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 112; Dec. Dig. ¶85(7).]

4. TRIAL ¶29(2)—CONDUCT OF COURT—REMARKS ON EXCLUDING EVIDENCE.

Remarks of the trial judge explanatory of his action in excluding immaterial deeds were not improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 81; Dec. Dig. ¶29(2).]

5. BROKERS ¶53—REALTY BROKER—RIGHT TO COMMISSION.

A broker employed to procure a purchaser could recover commission against the owner, though the purchaser procured desired the land and was interested in the transaction before he was procured by the broker.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 74; Dec. Dig. ¶53.]

6. BROKERS ¶85(6)—EVIDENCE—DECLARATIONS.

In an action for broker's commission, the court properly rejected statements made by the partner of the purchaser procured, which could not bind plaintiff.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 111; Dec. Dig. ¶85(6).]

7. TRIAL ¶29(2)—REMARK OF COURT.

The court, in rejecting testimony of statements made by a third person, which could not bind plaintiff, was justified in asking defendant, "How in the world could any statement made to Black by other people bind this plaintiff in this case?"

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 81; Dec. Dig. ¶29(2).]

8. BROKERS ¶85(6)—EVIDENCE—COMPETENCY.

Testimony of the mere mention by plaintiff that she had been offered by a third person 5 per cent. to sell the land, and that defendant said "he would be as good as" the third person and would give the 5 per cent., was not improper.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 111; Dec. Dig. ¶85(6).]

9. APPEAL AND ERROR ¶1051(3)—HARMLESS ERROR—EVIDENCE.

In an action for broker's commission, where defendant admitted an option to the purchaser procured, the admission of secondary testimony on the subject was harmless to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4164, 4167; Dec. Dig. ¶1051(3).]

10. BROKERS ¶85(1)—EVIDENCE—COMPETENCY.

In an action for broker's commission, where plaintiff knew whether she had sold to a particular party, and whether defendant had authorized her to sell, he admitting that he had employed her to sell, she was properly allowed to testify to such facts.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106, 108, 110, 115; Dec. Dig. ¶85(1).]

11. APPEAL AND ERROR ¶1051(1)—HARMLESS ERROR—EVIDENCE.

Any error in permitting a witness to testify to facts already proved by defendant's letter was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161, 4162, 4163, 4166; Dec. Dig. ¶1051(1).]

12. BROKERS ¶49(1)—REALTY BROKER—RIGHT TO COMMISSION.

A landowner, who contracted to pay plaintiff commission if she sold, was liable therefor, though the buyer whom she procured was buying for a company.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 70; Dec. Dig. ¶49(1).]

13. TRIAL ¶252(16)—INSTRUCTION—ABSTRACTNESS.

Where there was no evidence that plaintiff was limited to three months in which to sell, defendant's request seeking to inject such an issue into the case was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 606; Dec. Dig. ¶252(16).]

14. TRIAL ¶251(1)—INSTRUCTIONS—EVIDENCE TO SUPPORT.

Pleadings without proof do not justify the submission of an issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587, 588, 594; Dec. Dig. ¶251(1).]

15. BROKERS ¶49(1)—REALTY BROKER—RIGHT TO COMMISSION.

A landowner, who agreed to pay commission if plaintiff sold his land, was liable therefor, plaintiff having procured a purchaser, though plaintiff's agency was not exclusive.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 70; Dec. Dig. ¶49(1).]

16. TRIAL ¶255(13)—INSTRUCTION—DUTY TO REQUEST.

If defendant desired a definition of "efficient and procuring cause" given the jury, he should have requested it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 639; Dec. Dig. ¶255(13).]

17. APPEAL AND ERROR ¶230—RESERVATION OF GROUNDS OF REVIEW—OBJECTION TO REMARKS OF COUNSEL.

Error cannot be predicated upon remarks of counsel not excepted to when made.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶230.]

18. TRIAL ¶132—REMARKS OF COUNSEL—WITHDRAWAL.

Error cannot be predicated upon remarks of counsel which were withdrawn.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 315, 316; Dec. Dig. ¶132.]

Appeal from District Court, La Salle County; J. F. Mullally, Judge.

Suit by Lula Wilson against J. R. Black. From a judgment for plaintiff, defendant appeals. Affirmed.

Covey C. Thomas, of Cotulla, for appellant. John W. Willson and Fred Chadwick, both of Cotulla, for appellee.

FLY, C. J. This is a suit by appellee to recover from appellant the sum of \$776.25 alleged to be due her as commissions on the sale of certain land in Florida, according to the terms of an oral contract by and between appellant and appellee. She alleged a promise to pay her 5 per cent. on the amount of the sale if the land was sold for as much as

\$40, and that she sold the land for \$45 an acre to James P. Martin, and a deed to the same was executed to said Martin by appellant to the land in question. It was answered by appellant that appellee, her mother, and other heirs of her deceased father, owned a one-fourth interest in 420 acres of land out of a 460-acre tract; that the land, three-fourths of which was owned by appellant, was sold through the efforts of appellant; and that appellee had nothing whatever to do with the sale, and at no time procured a purchaser ready, willing, and able to buy the land. The cause was submitted on special issues, to which the jury answered in effect that appellant promised to pay appellee a commission of 5 per cent. if she sold the land for \$45 an acre; that the promise was made on condition that appellant was to be at no expense or trouble to effect a sale; that appellee was the efficient, procuring cause of the sale that was made of the 460 acres of land to James P. Martin; that appellant went to Florida and devoted about five weeks of his time to selling his part of the land, as well as to selling about 1,360 more acres in which he or a trust company was interested; that he received compensation and expenses, other than such as resulted from the sale of the 460 acres of land for his stay and labor in Florida, and such compensation was enough to reasonably repay appellant for his time, services, and expenses while engaged in selling the lands. In addition, the court found that the appellee sold three-fourths of the 460 acres of land in Florida for \$45, and that the commission agreed to be paid therefor amounted to \$776.25, and judgment was accordingly rendered for that sum with interest from June 16, 1913.

[1] We conclude that the responses of the jury and the findings of the court are sustained by the facts. This conclusion disposes of the first assignment of error. Appellee discovered a man who desired to purchase the land, and appellant sold the land to him, and it is immaterial whether appellee obtained a man to whom she only gave an option to purchase. He became a purchaser through her efforts. Appellant executed a deed to him, and it does not matter whether he was ready, willing, and able to buy the land or not. That question only becomes important when the trade is not consummated, and can be of no importance whatever when the landowner actually sells to the man procured by the broker. Appellant cannot be heard to deprecate the financial responsibility of the man to whom he sold his land, or to call in question his readiness and willingness to buy.

[2] The second assignment of error is overruled. The copy of the deed from appellant to Martin was not introduced to prove title, but merely to show that appellant accepted the purchaser procured by appellee and delivered a deed to him. Appellant did not deny the execution of a deed to Martin, and

the secondary evidence was sufficient to show delivery by the fact of its record. *Hall v. Southland Ass'n*, 53 Tex. Civ. App. 592, 116 S. W. 831. Appellant seeks to apply rules laid down in actions of trespass to try title to this case.

[3, 4] The two deeds from James P. Martin to appellant were not pertinent or material to any issue in the case and were properly rejected. The deeds would not have disproved anything testified to by Martin and had no tendency whatever to show that appellee was not the procuring cause of the sale to Martin. The remarks of the court, when he refused to admit the deeds, were merely explanatory of his action and could not have had any effect on the jury. The court did not assume proof of any fact.

However anxious appellee may have been to sell hers and her mother's interest in the land, that would not prevent her recovery of a commission for the sale of appellant's interest, under his contract with her.

[5] The evidence, the rejection of which is complained of in the sixth assignment of error, was immaterial and had no bearing on the case. No matter how much Martin may have desired the land before he was procured as a purchaser by appellee, still she would be entitled to her pay for leading him to appellant. It would be a singular doctrine that a land agent could not recover his commission if the purchaser had been interested in and desired to purchase the land before the agent induced him to enter into a trade with the landowner. In spite of his interest in and desire to purchase the land, if appellee was the procuring cause of the sale of the land, she should recover. The remark of the court, that the letter written by appellee to J. S. Taylor had absolutely nothing to do with the case, was correct, and could not have injured appellant.

[6, 7] The court properly rejected the statements made by S. Booth to appellant. His statements could not bind appellee, though he had been James P. Martin himself, instead of being, as claimed, a partner of Martin. This disposes of the eighth and ninth assignments of error. We think the court was justified in asking appellant: "How in the world could any statement made to Black by other people bind this plaintiff in this case?" The remark could not have affected the case of appellant with the jury.

[8] The mere mention by appellee that she had been offered by Taylor 5 per cent. to sell the land, and that appellant said "he would be as good as Mr. Taylor" and would give the 5 per cent., was not at all improper, and the court rightly overruled the objection to it. How could that statement about Taylor have possibly injured appellant?

[9] There was no question about the option to Martin, appellant admitted it, and it is inconceivable how secondary or any other kind of testimony on the subject could have

injured appellant. The eleventh and fourteenth assignments of error are overruled.

[10] Appellee knew if she had sold the land to Martin, and she knew whether appellant had authorized her to sell the land, and was properly allowed to testify to those facts. The authorities cited have no bearing on the matter. Appellant admitted employing appellee to sell the land.

[11] A letter from appellant to appellee was introduced in evidence which authorized the latter to sell the land, and stating that whatever she did would be satisfactory, and it is utterly immaterial that Verdi Wilson was allowed to testify to those facts. They were already proven by the letter of appellant. Nor does the statement that he wrote, after he had received the service, that he did not owe appellee and would not pay it, affect the case. He is still in that state of mind.

There is no merit in the sixteenth assignment of error. The evidence complained of is not open to the objections urged against it. The jury allowed 5 per cent. on the amount of the sale, and not \$5 per acre, and testimony on that subject could not have injured appellant.

[12] That the sale was made was beyond discussion or dispute, and the court could assume that fact. The eighteenth assignment of error is overruled. It would be unreasonable to hold that because Martin, to whom the land was contracted by appellee, was buying for a company, appellee should not receive pay for her services. Payment of a just debt cannot legally be evaded on such an untenable technicality.

The jury in effect found that appellant incurred no trouble or expense in making the sale of his interest in the 460 acres of land. They found that he was fully remunerated for his time and expenses. The nineteenth assignment is overruled. The trade was in reality consummated before appellant went to Florida.

[13,14] There was no evidence that appellee was limited to three months, and it would have been error to have given the instruction asked by appellant which sought to inject such an issue into the case. Pleadings without proof do not justify the submission of an issue. This disposes of the twentieth, twenty-first, and twenty-third assignments of error, and the twenty-second, which seek to interpolate the question as to whether the land was sold to Martin or the Old Dominion Trust Company, which has been disposed of under another assignment of error. Martin was the ostensible purchaser, and it does not matter for whom he bought the land. The jury found that the land was sold to Martin.

[15] It was utterly immaterial, under the facts, whether appellee had an exclusive agency or not. She sold the land to Martin

and earned the commission even if there had been a hundred other agents. The evidence raised no such issue, and the court very properly refused to charge upon it.

[16] If appellant wanted a definition given of "efficient and procuring cause," he should have requested it, although we are of the opinion that the jury showed by their answer that they fully understood the meaning of the words.

The twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, and thirtieth assignments of error complain of the action of the court in submitting the issues it did to the jury. These issues have been fully considered and held proper and pertinent, the answers thereto forming a sound basis for the judgment.

[17,18] The remarks of counsel, complained of in the thirty-first and thirty-second assignments of error, were mild and inoffensive and could not have had any tendency to inflame the minds of the jury. The remarks complained of in the thirty-first assignment of error were not excepted to when made, and those assailed in the thirty-second assignment of error were withdrawn. The assignments are overruled.

The matters sought to be raised in the thirty-third and thirty-fourth assignments of error have been fully considered in passing upon other assignments and they are overruled.

The judgment is affirmed.

On Motion for Rehearing.

The facts fail to show that the trip to Florida by appellant was necessary in order to close the trade with Martin; but in a letter, written by appellant to appellee, he stated, regardless of the sale to Martin, that he intended to go to Florida. That letter clearly indicated that appellant desired to visit Florida, in order to make other land trades, and that he intended to spend quite a time there "to look things over well and try and make some money down there." He could have signed the option to Martin at his home in Texas, but when it was sent to him he failed to sign it and went to Florida. If he incurred any expense or trouble in going to Florida, it was voluntary on his part, and he cannot escape his debt to appellee on that ground. He went to Florida and raised the price on the land \$5 an acre on the plea to Martin that he wanted to give appellee \$5 an acre for her labor, and if there was any trouble it was caused by appellant. The evidence fails to show that appellant was put to any trouble or incurred any expense to close the trade with Martin. Appellant went to Florida, not to close a trade with Martin, but to consummate other and larger sales.

The motion for rehearing is overruled.

AMERICAN NAT. INS. CO. v. NUCKOLS.*
(No. 5686.)

(Court of Civil Appeals of Texas. San Antonio.
June 7, 1916. Rehearing Denied June 27,
1916.)

1. INSURANCE \S 556(2) — LIFE INSURANCE —
PROOF OF LOSS — ESTOPPEL — POWER OF
AGENT.

Where the company agent was notified of death and viewed the body and said he was satisfied and that loss would be paid, and the adjuster recognized his authority until suit was brought, and then denied it, the company was estopped to deny the agency.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1375; Dec. Dig. \S 556(2).]

2. INSURANCE \S 549 — LIFE INSURANCE —
PROOF OF LOSS—AUTOPSY—TIME.

Where the policy gave the insurer the right to an autopsy, but it was not demanded at the time of death, the insurer could not, six weeks after interment, insist on such right, especially where it was undisputed that the insured died by an accident covered by the policy and the only dispute was whether his neck was broken or dislocated.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1356; Dec. Dig. \S 549.]

3. INSURANCE \S 549 — LIFE INSURANCE —
PROOF OF LOSS—AUTOPSY—TIME—EXHUMA-
TION.

To give the insurer the right of exhumation of the insured's body, such right must be clearly expressed in no uncertain words in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1356; Dec. Dig. \S 549.]

4. INSURANCE \S 549 — LIFE INSURANCE —
PROOF OF LOSS—AUTOPSY—TIME—EXHUMA-
TION.

Insurer's right to exhume insured's body, if covered by right to autopsy, can be exercised only at once and upon showing that it will show fraud or mistake.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1356; Dec. Dig. \S 549.]

5. INSURANCE \S 549 — LIFE INSURANCE —
PROOF OF LOSS—AUTOPSY—TIME—EXHUMA-
TION.

Where insurer pleaded that doctors' conflicting statements that insured died from broken neck, and from dislocated neck, meant the same thing, it could not base its right to an autopsy on such conflicting statements.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1356; Dec. Dig. \S 549.]

Appeal from District Court, Travis County; Chas. A. Wilcox, Judge.

Action by Maggie Nuckols against the American National Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Williams & Neethe, of Galveston, and N. A. Stedman, of Austin, for appellant. S. W. Fisher, N. A. Rector, and Robt. L. Thompson, all of Austin, for appellee.

FLY, C. J. This suit was brought by appellee, the surviving wife of Claude A. Nuckols, deceased, to recover the sum of \$1,000 insurance on his life, \$250 as attorneys' fees, and 12 per cent. on the \$1,000 as damages for a failure and refusal to pay the amount of the insurance. It was alleged that deces-

ed had obtained from appellant a policy insuring him against bodily injuries inflicted through external, violent, and accidental means; that on May 24, 1914, while said policy was in full force and effect, deceased came to his death through external and accidental means, as provided in the policy, and within a reasonable time after his death, namely, on the same day on which Claude A. Nuckols was killed, and at a time prior to the burial of his body, appellee gave appellant due notice of the accident and death of said Claude A. Nuckols, and furnished all proof required by the policy; and that payment of the policy had been refused. Appellant admitted the existence and vitality of the policy, but denied valid notice, and set up that part of the policy permitting "an autopsy in case of death." The cause was tried, without a jury, and judgment rendered in favor of appellee for \$1,045, principal and interest, \$120, the statutory penalty, and attorneys' fees for \$250, aggregating \$1,415.

The facts show that Claude A. Nuckols was killed on June 24, 1914, by accidentally falling from an engine in the roundhouse of a railroad company, upon which he was working at the time; that his neck was broken or dislocated by the fall, resulting in immediate death; that on the day after the accident, and before the interment of the body, notice was given of the death of Claude A. Nuckols to G. F. Evans, the local agent in Travis county, Tex., of appellant, and the "superintendent of the industrial department" of appellant, and he in company with a relative of the deceased viewed the body and received information as to how Claude A. Nuckols had died, and that two physicians and a justice of the peace had determined that the neck of deceased was broken. The agent stated that he was satisfied, and that the amount of the policy would be paid upon the proper proofs being made, and the agent made no request for an autopsy and did not request a postponement of the burial in order that he might communicate with the officers of the company in regard to an autopsy.

On May 26, 1914, the two physicians who had examined the body made written statements on blanks, furnished by appellant, in which one physician stated that death was caused by a broken neck, and the other by fracture of the cervical vertebra, and on same day Evans wrote appellant's claim adjuster, at Galveston, that Claude A. Nuckols had met his death by accident while in the performance of his duties, and requested that the necessary proof blanks be sent to his widow, the appellee. The adjuster received the latter on May 27th. The blanks were furnished appellee, and on May 28th she filled them out, stating therein the cause of death as: "Broken neck caused by fall while at work." The claim and proofs were at once forwarded by Evans to the claim adjuster, whereupon he wrote to Dr. Hudson,

a railroad physician, asking him the cause of Nuckols' death, and he replied that he did not know the cause of his death. Afterwards the claim adjuster procured the report made by Hudson to his railroad company. On July 13, 1914, more than six weeks after the burial of the body, the adjuster requested an autopsy, which demand was refused. Evans was recognized as the local agent of appellant in its accident department, and the adjuster made no objections as to receiving notice through him. The notices required by the policy were given in the time designated therein and to an agent of the company. We approve the findings of fact made by the trial judge.

[1] Our conclusions of fact dispose of the first, second, third, and fourth assignments of error which assail the findings of fact as to the agency of G. F. Evans. The claim adjuster testified:

"At the time of his accident and death, we did not have any one else in Austin other than Mr. Evans as our representative and agent. He was the only one; it is possible there might have been a traveling man in and out. He was the only man we had here at that time, and had probably five or six subagents under him. He was the boss man here in Austin."

This adjuster was agent in the accident department. The adjuster recognized the authority of the agent until he began to search for something upon which he could predicate a contest, and appellant is estopped from denying Evans' agency. *Continental Casualty Co. v. Bridges*, 114 S. W. 170. The question of Evans' agency was not raised until this suit was brought, and the only reason given by the adjuster why he did not pay the amount of the policy was that the doctors differed as to what killed deceased.

[2] The evidence was ample to show that the neck of Claude A. Nuckols was either dislocated or broken, and in either event was undoubtedly the cause of his death. While there can be no doubt that the accident caused the death of deceased through the blow on his neck, and an autopsy was utterly unnecessary, still as "it is so nominated in the bond" appellant had the right to an autopsy if it had applied for it in a reasonable time after the death. The adjuster, who it seems was the controlling genius of the corporation, knew on May 28th that two doctors had examined the body of deceased and stated that he died from a broken or dislocated neck, and learned in June that the railroad doctor had stated that he did not know what killed deceased, and yet the body had been in the ground over six weeks when he demanded an autopsy. He knew then, as he and his company have known ever since, that Claude A. Nuckols had lost his life by an accident within the literal terms of the policy, and yet, at that late hour, an autopsy was demanded of a body no doubt in advanced stages of decomposition. No one has ever doubted that the man was killed by an accident for which he was not responsible;

appellant even does not deny this. He was insured by appellant against such an accident, and yet, because one doctor said he was killed by his neck being broken, another, by a dislocation of the cervical vertebra, and another, that he was killed by some cause unknown to him, appellant, six weeks after the interment, wanted an autopsy. The demand was utterly unreasonable and was properly refused. No reason was given or attempted for the delay. There was no evidence tending to show that the death came within any exception exempting from payment and as said in the case of *Wahle v. U. S. Accident Ass'n*, 153 N. Y. 117, 47 N. E. 35, 60 Am. St. Rep. 598:

"We hold, in this case, that the provision authorizing an examination of the body of the insured should have been availed of immediately upon the receipt of the notice of the death, which was conceded to have been immediately given, and that the delay in the demand for an examination of the body was, as a matter of law, so unreasonable, in the absence of any facts or circumstances excusing it, as to deprive the defendant of any defense to the action upon that ground."

If an autopsy had been held, it could not have altered the fact that deceased died by an accident, and it was utterly immaterial whether death was caused by a broken neck or dislocated vertebra. The man was dead, and dead by an accident insured against by appellant.

In the case of *Johnson v. Insurance Co.*, 129 Minn. 18, 151 N. W. 413, L. R. A. 1915D, 1199, Ann. Cas. 1916A, 154, an autopsy was demanded at 10:18 a. m., at a time when friends were arriving for the funeral and the body was being prepared. Compliance with the request would have delayed the funeral, and it was held:

"We are of the opinion, however, that the time and circumstances of the demand were such that its refusal did not operate to defeat plaintiff's right of action. We must bear in mind that, except for some formal requirements, and except for the chance that the autopsy would develop facts of which we have no knowledge, the right of action upon this policy had fully accrued. The forfeiture of a right of action through the operation of a condition subsequent will be enforced only where the right to such forfeiture is plain."

[3] It is not pretended that there had been any fraud practiced by the widow of the deceased, or that deceased had not been accidentally killed, or that an autopsy would have revealed anything that would have been of benefit to appellant. Suppose it had been ascertained that deceased died, not from a broken or dislocated neck, but from another cause superinduced by the fall, as must undoubtedly have occurred, what would it have profited appellant? There was no clause in the policy that relieved appellant of liability if the neck of appellant was not broken or dislocated. The provision as to an autopsy was not a warranty, and there was no provision whatever as to exhumation. In order to have the right of exhumation such right must be clearly expressed, and in no un-

certain words, in the policy. *Joyce, Ins. § 3491*. As said in the case of *Ewing v. Commercial & Accident Ass'n*, 55 App. Div. 241, 66 N. Y. Supp. 1066, affirmed in 170 N. Y. 590, 63 N. E. 1116:

"In any case, I think a party who alleges a contract right to invade the tomb, or the graves of the buried dead, should be sure of the language of his written agreement. It should at least be unmistakably clear. The purpose should be apparent, and the terms so plain that inference or conjecture need not be resorted to to discover the true intent of the contracting parties. If the policy in question in plain terms stated to an applicant for membership that by accepting membership the applicant bartered to the insurer the right at any time to dig up and examine or dissect his dead body, it is quite conceivable that there would be few applicants for membership."

The policy in question has no such provision, and the right to an autopsy cannot be made broad enough to include a disinterment weeks after burial. *Root v. Accident Co.*, 92 App. Div. 578, 86 N. Y. Supp. 1055, affirmed in 180 N. Y. 527, 72 N. E. 1150. As said in *Sudduth v. Travelers' Ins. Co. (C.)* 106 Fed. 822:

"If there is a fair doubt as to the meaning of the words used in a policy, it should be solved in favor of the insured, because there appears to have been no reason why the plainest words could not have been employed by the company in framing the condition. It may be that the right to dissect a body, even after burial, is or would be an important right to the company; but that would make it all the more necessary for it to express it in language in no way ambiguous or doubtful, or which, in order to effect the company's purpose, would have to be extended beyond its ordinary import."

[4] If the right of an autopsy carried with it the right of exhumation of a body, it must certainly be asked for promptly, and then not to satisfy an idle curiosity or to form the basis for a forfeiture, but it must appear that the desecration of the graves of the dead and the pain inflicted on those left behind will reveal something that will show fraud or mistake and that will inure to the absolute benefit of the insurer. This disposes of the sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth assignments of error.

[5] Appellant is in no position to contend that it should be entitled, not only to an autopsy, but an exhumation of the body weeks after its burial, because there is a conflict in the statements of the two doctors as to the cause of death, in that one said it was a broken neck and the other fracture of the cervical vertebra, because in its answer appellant pleads that both statements meaning, as defendant understands, the same thing.

Appellant not only waived its right to an autopsy through its agent Evans, who was satisfied as to the proof as to how Claude A. Nuckols died, permitted his burial without protest or objection, but through the failure of the adjuster to demand an autopsy until long after the interment of the body and then for no reason then or afterwards

given for violating the grave and giving pain to the relatives of deceased. This court does not recognize the right of appellant to demand its "pound of flesh" and ruthlessly invade the sanctuary of the dead without any efficient reason given therefor. Deceased, according to all the testimony, died by a fall, not intentional on his part, appellant in such case promised to pay his widow \$1,000, and it will be required at its hands.

The judgment is affirmed.

NANNY v. VAUGHN et al.

(Court of Civil Appeals of Texas. Ft. Worth. April 9, 1910.)

1. BOUNDARIES — SURVEY — FORCE OF PRIORITY.

Where the eastern tiers of surveys were located before the western tiers and their east lines can be ascertained, their calls should prevail over the western calls even if there is a slight variance.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 187; Dec. Dig. —25.]

2. BOUNDARIES — SURVEY — CALLS — EXCESS.

An excess of 1,500 varas in an 18-mile line is not so great as to require rejection of all calls in the survey.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 66-76; Dec. Dig. —8.]

3. BOUNDARIES — FIELD NOTES — PRESUMPTIONS.

The law presumes that surveys were made as stated in field notes approved by the General Land Office.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 146-152; Dec. Dig. —33.]

4. APPEAL AND ERROR — REVIEW — HARMLESS ERROR — INSTRUCTIONS.

Rejection of a requested charge is immaterial, where the jury by its verdict did the precise thing the charge would have required, if given.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4230; Dec. Dig. —1068(5); Trial, Cent. Dig. § 475.]

Appeal from District Court, Swisher County; R. C. Joiner, Special Judge.

Boundary controversy between T. F. Nanny and M. B. Vaughn and others. From the judgment rendered, Nanny appeals. Affirmed.

Turner, Hendricks & Boyce, of Amarillo, for appellant. H. C. Randolph, of Plainview, and L. W. Dalton, of Matador, for appellees.

CONNER, C. J. We find no reason to disturb the judgment in this case. Appellant claims sections 21 and 22, block S-2, and section 91, block M-11, and these sections were awarded to him by the judgment below. He makes no claim to the Ardrey survey owned by appellee, which undisputedly lies south of the south line of said sections 21 and 22; the call for the northeast corner of the Ardrey being for the southeast corner of section 21.

The disputed question is as to the proper

location of said sections 22 and 21. It appears that blocks 10-T, 9-T, and S-2 were office surveys, and if sections 21 and 22 be located, as appellant contends should be done, by calls for course and distance alone from the well-identified corner fixed by John Summerfield on the west boundary line of block M-6, adopted for the southwest corner of section 347 and northwest corner of section 346 in said block M-6, then said sections 21 and 22 will lie south and west from the southeast corner of section 91, block M-11, which is made the beginning corner of section 21, and so extended would overlap and cover appellee's Ardrey survey; but we feel unable to say that the jury were unwarranted in finding, as they evidently did, that the calls for section 91, in block M-11, should be given effect. The evidence warrants the inference that in plotting blocks 10-T, 9-T, S-2, and M-11 the surveyor who made out or adopted the field notes of these several blocks had in mind and was controlled by other lines and objects as well as by the common corners given of sections 347 and 346, block M-6. The north line of block M-11 distinctly calls for the south line of block M-8 and block M-6. The northwest corner of block M-8 and northeast corner of block 2-Z is distinctly fixed by the evidence at a well-identified corner constituting the southwest corner of section 208, block 6 and the southeast corner of block B-5; this corner being nine miles south of the well-identified northeast corner of block B-5. The field notes of block M-8, signed by Hedrick and filed and approved in the Land Office, call for mounds all along the west line of block M-8, and the surveys along the east line of M-6 likewise call for the same mounds, it being the evident intent of the locator of these blocks that blocks 6, B-5, 2-Z, M-8, and M-6 should adjoin and cover all of the territory included by the outer calls; and the testimony of Hutchinson, who surveyed the west line of M-8 and the east line of M-6, authorizes the inference that along this line he found the original mounds called for in the field notes of these two blocks, that he fixed therein, allowing for an excess found, iron pipes, thus definitely fixing upon the ground the south lines of block M-8 and block M-6, and by calls for course and distance fixed the south line of block M-11, fixing as the southeast corner of said section 91, block M-11, an iron pipe, and the jury thus evidently fixed the beginning corner of appellant's section 21, block S-2, at the southeast corner of section 91, block M-11, for which the field notes in section 21 call.

[1, 2] While the testimony of Summerfield fixes the west line of block M-6, we do not think it necessarily follows therefrom that the east line of this block is to be drawn away from block M-8 for which it calls. The proof tends to show that the eastern tiers of surveys in block M-6 were located before

those along the western line, and, if the eastern line of the block can be fixed with certainty by the calls for adjoining blocks on the north and east, the surveys on the east should be established in accordance with such calls, regardless of the fact that to go to the western line of the block as established by the Summerfield objects would create an excess. It is not contended that the excess is more than about 1,500 varas, which is not so excessive in a line 18 miles long as to require the rejection of all calls along the eastern and northern lines of the block. Besides, the evidence of Summerfield as a whole, we think, warrants the inference that in plotting blocks 10-T, 9-T, M-11, and S-2, other lines and calls than the calls for the long base line of Summerfield were distinctly had in mind and considered. For instance, he states that from the mound on his base line, now known as the southwest corner of survey 347, block M-6, McClelland and others ran a line east towards the west line of block M-8; that he then ran in the various courses and distances stated by him, and finally connected with McClelland and others; and that at least 10 miles of the line east from the southwest corner of 347 was adopted, and he nowhere states that other calls in these blocks were disregarded.

What we have said we think will dispose of many of the assignments of error, but we will refer to some of them briefly. We think the rejection of Flannigan's testimony, complained of in the first assignment, immaterial for the reason that there seems to be but little, if any, dispute about the location of the southwest corner of 347, block M-6; the issue and the only issue material as we conceive it under the testimony was whether surveys 21 and 22, block S-2, should be located by calls for course and distance alone from the corners mentioned, or whether the jury might locate these surveys by their calls for sections 91 and 92, block M-11, and other evidence to which we have referred.

[3] Nor do we think the sixth and seventh clauses of the court's charge erroneous in ignoring the part Summerfield took in making out the field notes of the surveys in blocks M-6, 9-T, 10-T, M-11, and S-2. The field notes and surveys purport to have been made by Hedrick, and the presumption of law is that the surveys were made as stated in the field notes approved by the General Land Office. It would not do therefore for the court to assume that Summerfield's testimony indisputably established the fact, as appellant contends, that the location of blocks 10-T, 9-T, M-11, and S-2 are to be controlled by calls for course and distance alone from the established common corners of 347 and 346, block M-6. Moreover, as we have before had occasion to mention, Summerfield's own testimony tends to show that the blocks named were platted, not alone upon the Summerfield base line, but

also from other ascertainable lines and corners.

[4] If paragraph 9 of the court's charge, to which objection is made in the twelfth assignment, is erroneous, but which we do not think, the error was invited by appellant's special charge No. 5. The jury by their verdict did the precise thing that appellant's special charge No. 7 would have instructed them to do had the court given it. Its rejection, therefore, cannot be material. By appellant's charges Nos. 8, 10, 11, mentioned in the fifteenth, seventeenth, and eighteenth assignments of error, appellant sought to authorize the jury to reject calls other than course and distance from the west line of block M-6 as fixed by the testimony of Summerfield. This we think would have been erroneous.

We conclude that all assignments of error should be overruled, and the judgment affirmed.

Affirmed.

PULLMAN CO. v. FRANKS et al.
(No. 7195.)

(Court of Civil Appeals of Texas. Galveston.
June 8, 1916.)

1. CARRIERS ⇐417—PASSENGERS—SLEEPING CARS—ACTION FOR LOSS OF PASSENGER'S EFFECTS—EVIDENCE.

In action against sleeping car company for loss of passenger's money by theft of porter or failure to keep watch over it, evidence that the money was lost and that the porter had opportunity to take it, there being others in the car with equal opportunity, *held* not to raise an issue of theft by porter.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1590-1600; Dec. Dig. ⇐417.]

2. CARRIERS ⇐417—PASSENGERS—SLEEPING CARS—ACTION FOR LOSS OF PASSENGER'S EFFECTS—EVIDENCE—INSTRUCTIONS.

In such action, it was error to submit the issue of porter's theft to jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1590-1600; Dec. Dig. ⇐417.]

3. APPEAL AND ERROR ⇐1062(1)—HARMLESS ERROR.

In such action, where the evidence tending to show negligence on the part of the company in failing to keep watch was extremely meager, the erroneous submission of the issue of theft by the porter *held* reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4212; Dec. Dig. ⇐1062(1).]

Appeal from Harris County Court; Clark C. Wren, Judge.

Action by Mrs. Chas. T. Franks and another against the Pullman Company. From a verdict for plaintiffs, defendant appeals. Reversed and remanded.

Andrews, Streetman, Burns & Logue, R. H. Kelley, and M. E. Kurth, all of Houston, for appellant. Gill, Jones & Tyler and Hugh Potter, all of Houston, for appellees.

PLEASANTS, C. J. This suit was brought against appellant by appellee Mrs. Franks,

joined by her husband, to recover the sum of \$230 which she alleged was stolen from her while she was a passenger occupying a berth in one of appellant's sleeping cars. The petition charges, first, that said money was stolen from plaintiff's berth in said car by a servant of appellant who was employed as porter on said car. It then charges in the alternative:

That, "if the said porter did not purloin the said \$230, the defendant and its servants failed to keep such watch during the night of June 30, 1913, as it is its and their duty to keep and as would prevent the loss of said property belonging to the plaintiff, a passenger in said car of defendant. That the defendant, the Pullman Company, and its employes, failed to use reasonable care to protect the plaintiff herein from theft of her personal property, either in having in its employ a porter who purloined the same, or in failing to keep such watch during the night of June 30, 1913, as would reasonably well protect the plaintiff from loss of her property carried into the defendant's car."

The defendant answered by general demurrer and general denial. It also pleaded specially that the money lost by Mrs. Franks was greatly in excess of a reasonable sum for traveling expenses, and was therefore not properly carried by her as baggage, and defendant was under no obligation to protect and guard it. Defendant further pleaded contributory negligence on the part of plaintiff in failing to put her money in a safe place in her berth. The trial in the court below with a jury resulted in a verdict and judgment in favor of plaintiffs for the sum claimed by them.

Mrs. Frank was the only witness who testified in the case. After stating that the train on which she made the trip from Chicago to Houston left Chicago about 12 o'clock at night, she testified as follows:

"I had lower berth No. 4, but do not remember the number of the car. It was, however, the car from Chicago to Houston on the Chicago & Alton train; I remember that. When I walked up to the sleeper on the outside, I did not see any one connected with the Pullman Company except the porter. When I got on the car, he followed me in with my grip to the berth. After I got on, I did not do anything but put my grip in my berth, and he (the porter) stood by the side of the berth all the time. After I put my grip in the berth, I went to the washroom, and when I came back I asked the porter for a glass to get a drink of water, and he gave me my cup, and I went back and got a drink. I came back again and asked him if he was going to Houston, and he said, 'Yes,' he was going right through, and I went back to the toilet again to prepare to retire, and he was still standing outside of my berth all the time, and I retired a little after 1 o'clock. During all the time that I was making the several trips to the toilet and back I had the \$230 on my person, and I did not take it off my person until after I had gone to bed in the berth. When I went to bed, I took the \$230 out of my purse, and I took a handkerchief and folded the \$230 and put it inside the purse. Yes, that is my purse. I put it right in that compartment. I had those two articles in the compartment at the time, and I found them outside my berth in the morning. After I put the money in the bag, I closed it up,

like this, and put it away between the foot and head of the berth on the side toward the window. That made the purse between me and the window of the sleeping car, on top of the cover. I had the sheet pulled up over me. When I retired, I closed the curtains at the middle and at the bottom, but not at the top. The reason I did not close them at the top was that it was rather a warm night. The windows were up a little, but both of them had a screen. From the time I first got on the Pullman car until I got in my berth I did not see any one except the Pullman porter in that car. Each time I started to the toilet and came back I noticed the porter right outside my berth. He was not doing anything because both of these berths were not occupied. He was not opening the windows, nor attending to any of his other duties. He was not making up any of the berths, but just standing there all the time.

"After I went to sleep that night, I woke up about half past 3 in the morning and looked at my watch, and it was not time to get up, so I dozed off again. I was not sleepy. Consequently, about 6:10 or 6:15 I got up and went to the washroom; and on getting out of my berth saw the porter standing at the other berth down below, and he looked at me right hard. As soon as I discovered that the \$230 was not where I put it, I reported my loss to the porter. He said that it was very funny, that there was nobody around but him, and that he had seen no one; and I told him to go and get the two conductors, and I reported my loss, and they told me that they were very sorry. The porter kept walking around and making up the berths, and I watched him continuously. When I advised the porter that I had lost this money, he didn't do anything, just kept on working around the berths. Neither of the Pullman conductors did anything. Neither one of them made any effort to find my money, but told me I could not do anything until I got to Houston and talked to my husband."

"When I got up in the morning about 6:30 and went to the toilet and discovered the loss of the \$230, I didn't notice any one at that time except the porter. The berths on the back of me were made down, but the ones next to the corner were not made down. Neither was the berth directly opposite me made up, nor the one in the next corner was not made up."

"I found two little trinkets which I had along with me outside of my berth in the morning when I noticed that my money was gone; that was when I first got up and came back from the washroom. They were right in front of my berth on the floor. When I found these little trinkets on the floor, I spoke to the porter about it. I asked him if he knew anything about it. He said he did not, but that he noticed that on the floor early in the morning. The Pullman porter showed me all of Mrs. Fox's jewelry which he said she had given him the night before, and he told me if he had been given my money it would have been perfectly safe with him, but I didn't say anything further to him."

"At Palestine I had my breakfast outside and went back to the Pullman car. The conductor and porter were searching Mr. and Mrs. Fox's grips for a mesh bag that she had lost. They were looking for the mesh bag, and they had taken her berth to pieces again and had made it up and looked all through her bag, and I asked the conductor what they were looking for, and he told me that she (Mrs. Fox) had lost her mesh bag, and didn't know whether she had lost it the night before, or after she had gone to breakfast. They didn't find that mesh bag, so far as I know. With reference to this particular transaction, I spoke to the Pullman conductor, and he told me that he would not trust any of the porters; he told me there were some detectives on the train."

On cross-examination Mrs. Franks testified as follows:

"Yes, I did say that I didn't close the curtains at the very top when I went to bed on account of the heat, but I could not see out into the aisle through the curtains. The big heavy curtains were open at the top, but closed at the bottom. The screens have a sort of catch on them in the inside, and the screens were in the same position when I awoke as they were when I went to bed. I don't think there was any opportunity for anybody to reach into my berth from the outside and get that purse; I mean from the outside of the car. I had opened my bag and I gave him a tip, but this \$230 was entirely on my person at that time, and not in my bag. The Pullman porter nor anybody else could have known that the \$230 was in the bag, unless they watched me put it there after I got in my berth. My curtain was closed, but there was plenty of room, as the next berth was not made. From about 3:30, the time I looked at my watch, until I got up, I dozed very little. I don't think there would have been any opportunity during that time for anybody to get into my purse without me being aware of it."

"Yes, it reduces itself to the proposition that the money must have been taken out of my bag between the time I went to sleep and the time I woke up about 3:30."

"From the little diagram which Mr. Potter has prepared, and which I now examine, I can indicate what berths were made, and which were unmade. Nos. 1, 2, and 3 were unmade, and so far as I remember, with that exception, all the other berths were made down."

"From the time I stepped on that Pullman car until the time I awoke in the morning at 6:30 and went to the toilet and found my money gone, I did not see any one around my berth in that car except the Pullman porter."

"When I got up in the morning at about 6:30 and went to the toilet and discovered the loss of the \$230, I did not notice any one at that time except the porter. Later on, when the people began to get up, I noticed that there were other people in the car; I suppose the car was pretty near full. The berths on the back of me were made down, but the ones next to the corner were not made down, neither was the berth directly opposite me made up, nor the one in the next corner was not made up. There were three of the berths not made up."

Under an appropriate assignment of error, appellant complains of the following paragraph of the court's charge:

"If you should believe from a preponderance of the evidence that the porter on the car in which the plaintiff was sleeping (if she was so sleeping) purloined any of plaintiff's money, which she was then and there entitled to carry as 'baggage,' then in this event you will find for plaintiff in the amount of such money purloined, if any, and this is true even though you may believe that the plaintiff was guilty of negligence."

This complaint is based upon the proposition that the evidence does not raise the issue of the theft of Mrs. Franks' money by the porter, and therefore that issue ought not to have been submitted to the jury.

[1, 2] We think the assignment should be sustained. We have set out above all of the testimony bearing upon this issue and do not think the facts and circumstances shown by this testimony can be regarded as any evidence that Mrs. Franks' money was stolen by the porter. All that the testimony shows is that the money was lost and that the porter had the opportunity to take it. There

was nothing in his acts or statements to show that he was guilty of the theft. The testimony shows that there were a number of other persons in the car during the night whose opportunity to commit the theft was equal to that of the porter. There is no testimony as to the number of persons in the car when Mrs. Franks retired to her berth, and no testimony as to whether any passengers came in or left the car during the night. The testimony hardly justifies a surmise or suspicion that the porter stole the money, and certainly does not do more, and cannot be regarded as sufficient evidence to raise the issue of theft by the porter. *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059; *Pullman Co. v. Hatch*, 30 Tex. Civ. App. 303, 70 S. W. 771.

[3] The evidence tending to show negligence on the part of appellant in failing to protect Mrs. Franks from having her money stolen, if sufficient to raise that issue, is extremely meager. In this state of the evidence, the submission of the issue of theft of the money by the porter, when such issue was not raised by the evidence, cannot be regarded as immaterial error, but is one which requires that the judgment be reversed and the cause remanded, and it has been so ordered.

Reversed and remanded.

ABERNATHY RIGBY CO. v. McDOUGLE, CAMERON & WEBSTER CO. (No. 997.)

(Court of Civil Appeals of Texas. Amarillo. May 17, 1916. Rehearing Denied June 14, 1916.)

1. PARTNERSHIP §239(4) — LIABILITY OF PARTNER—PRINCIPAL OR SURETY.

A partner who sold out to his two partners, who assumed a partnership indebtedness but whom the creditor did not release, was bound on the note, and the creditor was entitled to a judgment against him; the agreement between himself and his partners not changing his relation from that of a principal obligor to a mere surety without the creditor's consent.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 498; Dec. Dig. §239(4).]

2. COMPOSITIONS WITH CREDITORS §27 — PARTNERSHIP'S DEBT — "COMPOSITION AGREEMENT WITH CREDITORS."

Where a creditor of a partnership agreed to take 60 cents on the dollar of their indebtedness in full settlement if a third person would take the partnership's stock of goods at 60 per cent. and induced other creditors to accept that settlement, and such third person refused to take over the stock on such terms, and the creditor thereafter notified the debtor and the other creditors that it withdrew its proposition to take 60 cents on the dollar, there was no composition agreement between the debtor and the creditors; "a composition agreement with creditors" being an agreement between an insolvent or embarrassed debtor and his creditors, whereby the creditors in consideration of an immediate payment agree to accept a dividend less than the whole amount of their claim to be distributed

ed pro rata in discharge and satisfaction of the whole debt.

[Ed. Note.—For other cases, see Compositions with Creditors, Cent. Dig. §§ 2, 78, 85, 86, 93, 94; Dec. Dig. §27.]

For other definitions, see Words and Phrases, First and Second Series, Composition.]

3. COMPOSITIONS WITH CREDITORS §13—EFFECT—FRAUD.

In such case a secret understanding between a bank, one of the largest creditors, the party who was to take over the partnership's stock, and the partnership, that the bank should be paid its debt in full, was a fraud upon the other creditors, which would defeat a composition agreement if any had been in fact made.

[Ed. Note.—For other cases, see Compositions with Creditors, Cent. Dig. §§ 23-37, 87-94; Dec. Dig. §13.]

4. APPEAL AND ERROR §1046(3)—HARMLESS ERROR—RIGHT TO OPEN AND CLOSE.

Error, if any, in refusing defendant the right to open and close the evidence and argument, was harmless, where the court properly took the case from the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4130; Dec. Dig. §1046(3).]

Appeal from Dallas County Court at Law; T. A. Work, Judge.

Suit by the McDougle, Cameron & Webster Company against the Abernathy Rigby Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Johnson & Harrell, of Cleburne, and W. L. Ward, of Dallas, for appellant. Short & Field, of Dallas, for appellee.

HUFF, C. J. The appellee instituted this suit to recover a balance due on a \$1,000 note, executed December 1, 1913, by appellant, a partnership composed of L. H. Rigby, J. C. Abernathy, and W. B. Harrell. The credits made on the note were set out with the date thereof, leaving a balance amounting to—principal, interest, and attorney's fees—\$306, at the date of the trial.

The appellants allege that Rigby sold out his interest in the partnership, and the other two parties, Abernathy and Harrell, assumed the indebtedness due appellee, together with all other indebtedness due by the partnership, and that appellee agreed to release him from the debt. It is also alleged that by a composition agreement with the creditors of the firm and with appellee, by which they were to take 60 cents on the dollar of the indebtedness, that appellants were not indebted in the amount sued for, and that since such agreement appellants have paid \$100, and that 60 cents on the dollar of the balance due on the note, less the \$100, left the sum now due about \$125. These allegations are each and all denied by the appellee.

The facts show that Rigby did sell out his interest in the partnership business as alleged, and that the remaining partners assumed the indebtedness. The appellee's agent was so notified by Rigby, but it is uncontroverted that, when requested to release Rigby, he re-

fused to do so. Rigby admits in his testimony that appellee informed him it would look to him and hold him on the note.

The partnership, appellant, was composed of the members as alleged. The facts in this case establish that appellee agreed to take 60 cents on the dollar of their indebtedness in full settlement. J. B. Dobry, an outside party, was to take the stock of goods at 60 per cent., and the agreement, according to Mr. Morgan, appellee's representative, was that appellee would take 60 cents, provided Dobry bought the goods. Dobry testified that he agreed to take the goods and pay the creditors 60 cents on the dollar, and so notified Mr. Morgan, who agreed to do what they agreed upon, and would take 60 cents on appellee's debt. It appears that appellants furnished to Dobry a list of their creditors, but upon investigation he found the amounts stated in this list were less than was owing by the firm, and he refused to go through with the trade. While this trade was pending appellee wrote a circular letter to some 10 of the creditors of the partnership and phoned some of them that Dobry was going to purchase the stock and would pay 60 per cent. of the debts, advising that appellee was willing to accept that amount for its claim, and also advised the various creditors to whom it wrote that it would be to their interest to do the same. Some of these creditors wrote to appellee, stating that they were willing to accept the settlement, and these letters were sent to Dobry, who in the meantime, however, had refused to purchase the goods, because, as he says, the claims were more than stated on the list, and he so notified appellee. Upon this notice appellee notified all the creditors that it would withdraw its proposition to take 60 cents, and also notified appellant to the same effect. This statement is not denied or controverted.

There is a suggestion in the testimony that the stock of goods was afterwards sold to some one else, but for how much is not shown, or whether the other creditors accepted 60 per cent. There is evidence also that, while Dobry was negotiating for the purchase, the list furnished by appellant showed an indebtedness to the bank in the sum of \$2,000, and that he (Dobry), appellants, and the bank agreed that if he bought the bank would extend the note six months, but Dobry was to indorse the note and pay the full sum due the bank.

[1] The trial court, instructed a verdict for the appellee for the balance due, as shown by the note, after allowing the credits paid thereon. Rigby contends that by the assumption of the other partners he was released, and that he is only a surety by virtue of the assumption. The testimony is uncontroverted that appellee did not release Rigby, but refused to do so upon request. Rigby was bound upon the note and for the debt, and therefore appellee was entitled to judgment against him thereon. *Shapleigh v. Wells*, 90

Tex. 110, 37 S. W. 411, 59 Am. St. Rep. 783; *White v. Boone*, 71 Tex. 712, 12 S. W. 51. There is no prayer over against the copartners by Rigby for judgment, or that the appellee be first required to make its debt out of their property. The agreement of Rigby and his partners as to appellee would not change his relation from a principal obligor to a mere surety without its consent. 90 Tex. 110, 37 S. W. 411, supra.

The assignments are not sufficient to attack the judgment as to its failure to direct execution against the remaining partners' property first.

[2] The pleadings and facts in this case do not warrant the holding that there was an accord and satisfaction as between appellants and appellee. All that is set out or attempted to be shown by the facts was a composition agreement between the debtors and creditors. This clearly is not shown. The trade upon which the attempted composition was sought did not go through, and appellee then notified appellant it would not take 60 cents, and also notified all the creditors with whom it had communicated. This fact is not denied or disputed. It is not shown that the other creditors ever acted upon such agreement and accepted 60 per cent., except upon the condition of Dobry's contract, which he refused to consummate. "A composition agreement with creditors is an agreement between an insolvent or embarrassed debtor and his creditors, whereby the creditors, in consideration of an immediate payment, agree to accept a dividend less than the whole amount of their claim, to be distributed pro rata in discharge and satisfaction of the whole debt." *Lanes v. Squyres*, 45 Tex. 382. The circular letter sent shows what the terms of the agreement were to be. Dobry was to buy and pay for the goods and pay the creditors 60 cents on the dollar. This he never did, but refused to do. No other agreement is attempted to be shown, and in so far as the appellee is concerned in this case, what others may have agreed or accepted thereafter could not affect it, especially after it had notified all that it would not take 60 cents when Dobry declined to take the stock of goods.

[3] In this case it was shown that there was a secret understanding between the bank, one of the largest creditors, Dobry, and appellant, which was unknown to appellee at the time, and not until the day before the trial of this case was it informed of such secret understanding; that is, that the bank should be paid in full its debt. This was a fraud upon the other creditors, and would defeat the composition agreement relied upon, if it in fact had been made. *Willis Bros. v. Morris*, 63 Tex. 458, 51 Am. Rep. 655; *Danaby v. Frieberg*, 76 Tex. 463, 13 S. W. 331.

[4] Appellant complains at the action of the court in refusing to permit them to open and close the evidence and argument.

If error, it is harmless, as the court took the case from the jury, and we believe, under the facts of this case, he properly did so.

The case will be affirmed.

MARTIN v. BLAIR & HUGHES CO.*
(No. 8861.)

(Court of Civil Appeals of Texas. Ft. Worth.
April 15, 1916. Rehearing Denied
May 20, 1916.)

1. GUARANTY — §80 — REQUISITES — WRITTEN GUARANTY — FORM.

Where defendant wrote to the president of a corporation guaranteeing a third party's debt he knew was due the corporation, the guaranty was available to the corporation.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 80–82; Dec. Dig. § 80.]

2. GUARANTY — §86(2) — OPERATION — EXTENT OF LIABILITY.

Where defendant guaranteed a third party's debt due plaintiff, he was liable only for the then existing debt with legal interest, and not for the interest and attorney's fees stipulated in notes subsequently made by the debtor to plaintiff for the debt in question.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 88; Dec. Dig. § 86(2).]

Appeal from District Court, Wichita County; J. W. Akin, Judge.

Action by the Blair & Hughes Company against F. D. Martin. Judgment for plaintiff, and defendant appeals. Reformed and affirmed.

A. T. Cole, of Clarendon, for appellant. Huff, Martin & Bullington, of Wichita Falls, for appellee.

BUCK, J. Plaintiff, Blair & Hughes Company, a corporation, filed suit against F. D. Martin, in the district court of Wichita county, May 15, 1915. Defendant's answer consisted of a general demurrer, general denial, and a plea of absence of consideration for the execution of the letter and instrument set out in plaintiff's petition, and under which Martin was sought to be bound. It is agreed by the parties hereto that the facts set out in plaintiff's original and supplemental petitions are true, but it is contended by the defendant that such facts do not constitute a cause of action against him. Therefore, as a predicate to our conclusions as to this issue, we will note herein what we consider to be the material portions of such pleadings.

Plaintiff alleged it was a corporation doing a wholesale grocery business, with its domicile at Wichita Falls, Tex., and that the Martin-Bennett Company was a mercantile corporation, with its place of business at Jericho, Tex. That F. D. Martin, during 1913 and 1914, was a stockholder in said latter corporation. That on March 21, 1914, Martin-Bennett Company was indebted to plaintiff in the sum of \$1,098.71, for merchandise, and that the account was at said time long past due. That plaintiff was de-

manding payment of said account, and informed said defendant Martin of the existence of said indebtedness, and that unless personal, or other satisfactory, security was given plaintiff, it would no longer carry said account. That for the purpose of inducing plaintiff to close said account with notes, and to extend the time of payment of said indebtedness, defendant Martin wrote the following letter to Wiley Blair, president of plaintiff company:

"Ft. Worth, Texas, March 21, 1914.

"Mr. Wiley Blair, Wichita Falls, Texas—Dear Mr. Blair: After my phone conversation with you a few days ago, I wrote to Mr. Bennett in regard to the Jericho matter. I had a letter from him to-day stating that he had taken up this matter with your representative and that he would be able to pay your firm this summer, and had offered to close the matter with note. He assures me that he will be able to pay every dollar the firm owes, if given time. When I left there I turned everything over to Bennett with the understanding that he would liquidate, and I have every confidence in his ability to do so. I appreciate the courteous and lenient manner in which you have treated us, and assure you, you will not lose anything on the Martin-Bennett Co., and you can look to me to see that this promise is carried out. Bennett is straight as a string, and you can absolutely rely on his making good any promise he makes. I feel sure you and he can adjust this matter, and having put it in his hands I would rather he make the settlement. If you are in Ft. Worth, any time soon, I would be glad to talk this over with you. Bennett wrote me that he is getting the accounts due the firm into secured notes payable this fall.

"With kind personal regards, I am,

"Yours very truly,

"[Signed] F. D. Martin."

That defendant Martin caused the letter to be delivered to plaintiff, and thereby promised to answer for the debt of Martin-Bennett Company. That plaintiff accepted said guaranty contained in said letter, and so advised defendant. In pursuance of said agreement between plaintiff and defendant, plaintiff accepted three notes, each for \$200, and one note for \$498.71, all dated April 1, 1914, bearing interest at 10 per cent. per annum from date, and 10 per cent. attorney's fees, payable at Wichita Falls; said notes being signed by Martin-Bennett Company, acting by its vice president, J. G. Martin. That subsequently Martin-Bennett Company became insolvent, and that the only payments made on said notes, which were alleged to be past due, aggregated \$184.51. Plaintiff sued for the balance of principal, interest, and attorney's fees, as the notes provided. It was alleged that defendant had been duly notified of the failure of Martin-Bennett Company to pay said notes, and that he had failed to pay the same. That Martin-Bennett Company had been adjudicated a bankrupt.

Judgment was rendered June 21, 1915, for plaintiff in the sum of \$1,136.40, and defendant appeals.

[1] We conclude that the trial court did

not err in holding defendant liable as a guarantor. While it is a generally accepted principle that only the particular person to whom the guaranty is made, or to whom it is directed, has the legal right to act thereunder or rely thereon, and that the law of guaranty must be strictly construed and applied, it being *lex strictissimi juris* (*Smith v. Montgomery*, 3 Tex. 199; *Brandt on Suretyship and Guaranty*, § 117; *Donley v. Bush*, 44 Tex. 8; *McRea v. McWilliams*, 58 Tex. 333; *Schoonover v. Osborne*, 108 Iowa, 458, 79 N. W. 285; *Crane v. Specht*, 39 Neb. 131, 57 N. W. 1018, 42 Am. St. Rep. 567), yet we think the fact that this letter was directed to Wiley Blair, whom the petition alleges to have been the president of plaintiff corporation, would not cause the offer to come within the inhibition of the strict rule laid down by the authorities. Plaintiff, being a corporation, must have acted through its duly constituted officers. It is shown that the indebtedness due by Martin-Bennett Company was to the Blair & Hughes Company, not to Blair as an individual, of which fact defendant was well informed. It is admitted, as alleged in the petition, that the letter was written to "Wiley Blair, president of Blair & Hughes Company." As it is said in 20 Cyc. p. 1431:

"Where it appears upon the face of the letter of guaranty that it is addressed to some one in a representative capacity, or there is some uncertainty as to who is intended to avail himself of the guaranty, parol evidence is admissible to identify the real party in interest."

Where the offer was made to a person designated as president, parol evidence was held to be admissible to show that the real party intended was the bank of which the addressee was president. *Bank v. Peck*, 28 Vt. 200, 65 Am. Dec. 234. It was pleaded, and therefore admitted as true, that defendant "caused this memorandum in writing * * * to be delivered to plaintiff, and thereby promised to plaintiff to answer to it for the debt of the said Martin-Bennett Company."

While we have carefully examined appellant's 26 assignments, the first 25 presenting practically the same questions, yet we do not deem it necessary to discuss each separately. We find no reversible error presented in said assignments 1 to 25, inclusive, and hence they are overruled.

[2] The twenty-sixth and last assignment alleges error in the action of the court in rendering judgment for 10 per cent. interest on the notes, and 10 per cent. attorney's fees, and we believe the contention should be sustained. The promise or guaranty of defendant, as we view it, went only to the debt then owing plaintiff, and should not be extended so as to include more than the principal sum due April 1, 1914, when the open account was closed by notes, with legal interest thereafter. *Vogelsang v. Mensing*, 1 White & W. Civ. Cas. Ct. App. § 1165.

Therefore we will reform the judgment, so as to give plaintiff judgment for the principal due April 1, 1914, less the payments made and pleaded, with interest at 6 per cent., and, as so reformed, the judgment will be affirmed. The costs of appeal will be taxed against appellee.

Reformed and affirmed.

LITTLE v. NICHOLSON. (No. 7227.)

(Court of Civil Appeals of Texas. Galveston. May 31, 1916.)

HUSBAND AND WIFE — 248 — COMMUNITY PROPERTY—INVALID MARRIAGE.

Where, when a man undertook by marriage ceremony to marry a woman, he had, as at all times thereafter, a living wife from whom he was not divorced, property purchased by him and the second putative wife from their joint earnings, the deeds naming both as grantees, was not at any time the community property of himself and such wife, but was the joint or partnership property of the two, so that the putative wife was not divested of her one-half undivided interest in such property by levy and sale under judgment against her husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 880; Dec. Dig. § 243.]

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Suit by Carrie E. Nicholson against R. N. Little. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

Edward H. Bailey, of Houston, for appellant. Atkinson, Graham & Atkinson, of Houston, for appellee.

LANE, J. This is a suit in trespass to try title, filed by appellee, Carrie E. Nicholson, on April 24, 1913; appellee Nicholson in her original petition alleging that she and appellant, R. N. Little, each owned an undivided one-half interest in lots numbered 8, 9, 10, 11, and 12, in block No. 19, of West Houston addition to the city of Houston, Harris county, Tex., of the reasonable value of \$1,000, and that appellant Little refused to recognize her one-half interest, and that on the 1st day of January, 1913, he entered upon said land and dispossessed appellee Nicholson therefrom, and has ever since the said last-named date continued to withhold from appellee the possession thereof, to her damage in the sum of \$250. Appellant Little filed his original answer to said petition on October 16, 1913, which original answer is composed of a general demurrer, general denial, and a plea of not guilty, with prayer for judgment of the court that appellee take nothing by her suit, and for costs of court. On October 16, 1913, there was filed in said suit an agreement of the evidence, or a statement of the facts, on which said suit should be and was submitted for trial, said agreement of the evidence or statement of facts being duly signed by the attorneys of record of the parties to said suit, which

agreement of the evidence, or statement of facts, will be hereafter set out in full. On November 22, 1915, the case was tried before the court, a jury having been waived, and resulted in a judgment for appellee, Carrie E. Nicholson, for title and possession of an equal undivided one-half of said lots, and for costs of court.

By appellant's first and only assignment it is insisted that the trial court erred in rendering judgment in favor of appellee for a one-half undivided interest in property sued for, because such judgment has no support by facts agreed to by both parties to the suit; such agreed facts being all the evidence submitted.

The agreed facts upon which the case was tried are as follows:

"(1) That the property in controversy between plaintiff and defendant consists of lots numbered 8, 9, 10, 11, and 12, in block No. 19, West Houston addition to the city of Houston, in Harris county, Tex.

"(2) That plaintiff, Carrie Nicholson, was formerly known by the name of Carrie Howard. That on the _____ day of _____, 1897, plaintiff in good faith went through a marriage ceremony with George W. Howard, believing that the said George W. Howard had the right to marry her, and knowing that there was no reason why she on her part was not free to marry him, and they subsequently lived together and held themselves out as man and wife until December, 1903, when the said Howard left the country and has not been heard from since. That plaintiff did not learn of his former marriage until 1904, after he left.

"(3) That at the time of said attempted marriage between the said George W. Howard and this plaintiff, the said George W. Howard had a lawful wife, named Hattie Howard, who resided in the town of Yelleville, Ark. and that he has never been divorced from said Hattie Howard.

"(4) That on June 3, 1902, a deed was made by Wm. E. Floyd and Adelia H. Floyd to the said George W. Howard and Carrie Howard to all of said property except lot No. 11.

"(5) That on June 21, 1902, a deed was made by J. S. Hansford conveying lot No. 11 to the said George W. Howard and Carrie Howard, and that said George W. Howard and Carrie Howard were both named as grantees in each of said deeds, and the consideration was paid from their joint earnings.

"(6) That on the 24th day of April, 1903, while plaintiff and the said George W. Howard were thus living together and holding themselves out to the public as man and wife in the city of Houston, Harris county, Tex., defendant, R. N. Little, loaned to the said George W. Howard the sum of \$115. This note was secured by a lien on a barber shop belonging to said Howard, from which the sum of \$35 was realized and credited on the judgment against Howard. That on the 3d day of November, 1903, this defendant sued the said Howard in the justice court of Harris county, Tex., precinct No. 1, on the note given for said \$115, and on the 30th day of November, 1903, obtained a judgment against him for the sum of \$126.70, and costs of court, amounting to \$9.55, making a total of \$136.25 on which execution was issued on the 11th day of December, 1903, and an abstract of judgment was duly filed and recorded in the judgment records of Harris county, Tex., on the 6th day of February, 1904, and on the 16th day of March, 1911, alias execution was issued out of said court against the said Howard, and on May 2, 1911, the constable of said precinct No. 1, Harris county, Tex., levied said execu-

tion on said property, and, after legal notice, sold all the right, title, and interest of the said George W. Howard in and to the said lots 8, 9, 10, 11, and 12, in block 19, West Houston addition to the city of Houston, Harris county, Tex., to this defendant, R. N. Little, and a deed thereto was executed by said constable to defendant, R. N. Little, and forthwith recorded in the deed records of Harris county, Tex. Said R. N. Little bid the sum of \$50 at said sale, which was credited on his judgment against Howard.

"(7) The only question to be determined in this cause is as to whether said sale passed the title from this plaintiff to R. N. Little. The said R. N. Little claims that said land was community property between the said George W. and Carrie Howard, and subject to community debts, and that the sale as made passed the entire property to defendant, and plaintiff claims that she was a joint owner in said property, that, as there was never any marriage between her and the said George W. Howard, she had no community interest in said property, that the real wife, Hattie Howard, had a community interest in the half of said property which belonged to the said George W. Howard, and that the interest of plaintiff was that of a joint tenant or partner in acquiring said property, and that as there was no judgment of execution against her individually no title to her half of said property passed to the said R. N. Little at said constable's sale. This question is submitted for the consideration of the court."

In the case of Chapman v. Chapman, 32 S. W. 504, it is said:

"It being admitted that there was no divorce, the court cannot presume or find that there was, and hence Thomas Chapman was legally incapable of contracting a second valid marriage, and his connection with Emma Chapman, though assumed under the forms of a lawful and regular marriage, did not have any validity as a marriage. Under the laws of this state, a man cannot, while legally married to one woman, form a legal marriage with another. The earlier decisions as to the effect of putative marriages on property rights under the Spanish law are not applicable to attempted marriages entered into in this state since the adoption of the common law and our statutes regulating the subject. The opinion of Judge Walker in Routh v. Routh, 57 Tex. 589, in our judgment correctly states the law on this subject. The right given by our statutes to the survivor of a marriage to administer the estate of the deceased spouse and the property which belonged to them in common (Rev. St. arts. 2165, 2167, 2181) is given to him or her who is recognized by the law as the lawful husband or wife of the deceased, and, as appellant was never lawfully married to Thomas Chapman, she had not the right to administer in preference to any one else. For the same reason there was no community estate, such as is contemplated by the statute, between herself and the deceased. The community estate is created by law as an incident of marriage, and does not arise from contract between the parties. It is created by law only as between those who occupy towards each other the relation of husband and wife. Whatever may be the interest of parties related to each other as were appellant and Thomas Chapman, in property acquired during their connection, such interests do not constitute the community estate recognized by law to exist between the parties to a lawful marriage. If appellant had an interest in any of the property which was sought to be brought into this litigation, it was because she acquired right or title to it in some other way than by the mere operation of the statute under which the right to half of the property acquired by either husband or wife during marriage is vested in the wife. Such right

is given by law to the wife, as such, because she is the wife, and not because of the performance of services to the husband, or because she is permitted by her companion to assume the station and enjoy the other privileges belonging to a wife, where she is not such in law and fact. If appellant acquired the right to any of the property, or an interest in it, by the operation of other principles, it belongs to her in her own right, and needs no administration. There was no marital partnership between herself and Thomas Chapman such as the law establishes between husband and wife as resulting from marriage which needed winding up, and hence there was nothing upon which her claim to administer a community estate could rest. The only community estate was that of Thomas Chapman and appellee. The right to the appointment as administratrix of Thomas Chapman, as well as the right, as survivor of the marriage, to control the community estate, belonged to appellee, and appellant has no ground to complain that the court below so held."

It being admitted that at the time George W. Howard undertook by marriage ceremony, to marry and make appellee, Carrie Nicholson, his wife, and that at all times since said time, he had and has a living wife, from whom he has never been divorced, it is evident that the property in question was never at any time the community property of himself and Carrie Nicholson, but that it was the joint or partnership property of the two. This being true, appellee, Carrie Nicholson, could not be, and she was in fact not, divested of her one-half undivided interest in said property by the levy and sale under the judgment against George W. Howard. The purchaser at such sale acquired only the undivided interest of George Howard, or the community interest of Howard and his real wife, who resided in Arkansas from the time of the pretended marriage of Howard to Carrie Nicholson until the land in question was sold under execution to pay Howard's debt.

The deeds from W. E. Floyd and J. S. Hansford, by which the property in question was conveyed to George W. Howard and Carrie Nicholson, conveyed the land to such parties by naming both of them as vendees. Such conveyances were to such parties as partners, or joint investors, and not as husband and wife, and therefore the title to one-half undivided interest therein passed to and vested in Carrie Nicholson, of which she has not been divested by the sale under the said judgment against said Howard, and the court did not err in so holding and in rendering judgment for appellee.

The judgment of the trial court is affirmed. Affirmed.

BRADY v. RICHEY & CASEY. (No. 5630.)
(Court of Civil Appeals of Texas. San Antonio.
May 17, 1916. Rehearing Denied June 14,
1916.)

1. BROKERS \S 86(1)—ACTION FOR COMMISSION—SUFFICIENCY OF EVIDENCE.

In an action for a commission for effecting a lease of defendant's theater property through

negotiations carried on by plaintiff and its employé at defendant's solicitation, and with defendant's acquiescence and acceptance of benefits, evidence held to sustain a verdict for the plaintiff.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 117, 118; Dec. Dig. \S 86(1).]

2. BROKERS \S 82(4)—ACTION FOR COMMISSION—PLEADING—VARIANCE.

In a broker's action for a commission for effecting a lease of defendant's property for a term of 15 years, the failure of the petition to show that the lease contained a provision under which it might be canceled by the lessee on the forfeiture of a certain amount did not prevent a recovery on a ground of a variance between the allegation and proof.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 103; Dec. Dig. \S 82(4); Pleading, Cent. Dig. § 1334.]

3. BROKERS \S 69—COMMISSION—AMOUNT.

Under an express agreement that a broker's services should be rendered to an owner directly soliciting such services to effect a lease, or under an implied agreement showing the owner's appropriation of such services, and where the compensation was not agreed upon, the law implied a promise to pay a reasonable amount.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 55; Dec. Dig. \S 69.]

4. BROKERS \S 8(3)—ACTION FOR COMMISSION—AUTHORITY FROM OWNER.

In a broker's action for a commission for effecting a lease of defendant's property, evidence held to show the defendant's express authority to secure a contract to rent to a certain party on the terms finally embraced in the contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 9; Dec. Dig. \S 8(3).]

5. BROKERS \S 82(4)—ACTION FOR COMMISSION—COMMISSION—EVIDENCE.

A pleading that defendant became liable to pay the fair and usual commission for a broker's services in effecting a lease was sufficient to authorize proof of what was the reasonable value of the services performed.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 103; Dec. Dig. \S 82(4); Pleading, Cent. Dig. § 1334.]

6. CUSTOMS AND USAGES \S 18—PLEADING AND PROOF—KNOWLEDGE—BROKER'S COMMISSION.

In a broker's action for a commission for effecting a lease, where it was not alleged that the defendant knew of any custom as to the commission for such services, or that any custom prevailed which was so commonly known that he was legally chargeable with notice thereof, the custom of the real estate business would not be binding upon him and enter into the contract alleged to be made by him, so that proof of such custom was inadmissible.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 40; Dec. Dig. \S 18.]

7. CUSTOMS AND USAGES \S 11—PLEADING—EFFECT.

Where it is pleaded and proved that there is a custom as to the commission for effecting a lease of which a party defendant had knowledge, or that there was a custom so notorious as to charge him with knowledge thereof, the law implies a promise to pay the compensation fixed by such custom.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 22; Dec. Dig. \S 11.]

8. BROKERS \S 69—COMPENSATION—AMOUNT.

Where no custom binding on the parties is pleaded and proven, a broker is entitled to rea-

sonable compensation in the absence of an agreement as to the amount.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 55; Dec. Dig. ¶ 69.]

9. BROKERS ¶ 85(10)—ACTION FOR COMMISSION—EVIDENCE—CUSTOM.

In a broker's action for commission for effecting a lease for a term, where no custom as to the amount of the commission was pleaded and proven, the end accomplished, as well as the time and effort expended, were to be considered, though evidence that there was a customary rate for renting property for a term, and that there was a custom for the landlord to pay the commission for leasing property, was inadmissible.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 114; Dec. Dig. ¶ 85(10).]

10. APPEAL AND ERROR ¶ 926(7)—REVIEW—PRESUMPTION—QUALIFICATION OF WITNESS.

Under an assignment of error in the admission of testimony of a witness as to a reasonable commission for effecting a lease, not objecting that the witness had not qualified himself to state his opinion on that matter, it would be assumed that he was duly qualified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3745, 3746; Dec. Dig. ¶ 926(7).]

11. EVIDENCE ¶ 472(10)—MATTERS DIRECTLY IN ISSUE—AMOUNT OF COMMISSION.

In such action, testimony of a witness that he considered 2 or 3 per cent. to be a reasonable commission for effecting a lease for a term, relating to the direct issue in the case, was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186, 2187; Dec. Dig. ¶ 472(10).]

12. APPEAL AND ERROR ¶ 728(1)—ASSIGNMENT OF ERROR—SUFFICIENCY OF OBJECTION.

An assignment that there was no basis for a question as to what was a reasonable commission for a broker's services on the ground that the services alleged to have been rendered were different from those stated in the hypothetical question submitted was too general, because not pointing out just what should have been changed in the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3010; Dec. Dig. ¶ 728(1).]

13. EVIDENCE ¶ 553(3) — EXAMINATION OF EXPERT—HYPOTHETICAL QUESTION.

In a broker's action for a commission for effecting a lease for a term, it was not error to permit him to embrace in a question as to what was a reasonable commission for such services his own construction of the terms of the lease, especially in the absence of a construction thereof by the court; as, where the terms of an instrument are ambiguous and the question as to what the parties intended is for the jury, it is proper to ask a witness to state his opinion based upon the construction contended for by a party, upon which the other party may inquire thereon, taking into view his construction of the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2871; Dec. Dig. ¶ 553(3).]

14. TRIAL ¶ 136(3)—QUESTION FOR JURY—CONSTRUCTION OF CONTRACT.

If a contract is not ambiguous it is proper to ask the court to construe it and to require it to be described in all questions in accordance with the court's construction, and if it is ambiguous, but the evidence makes its intention clear beyond dispute, it is proper for the court to construe the contract for the jury and require

them to accept such construction in estimating the value of the services.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 326; Dec. Dig. ¶ 136(3); Pleading, Cent. Dig. § 75; Witnesses, Cent. Dig. § 851.]

15. EVIDENCE ¶ 543(2)—OPINION EVIDENCE—VALUE OF SERVICES.

A skilled witness, who is familiar with services connected with some particular profession, trade, or calling, may estimate their value, and it is not required that he should be intimately acquainted with the nature of the services which he is appraising, but he may know them in a very general way.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2356½; Dec. Dig. ¶ 543(2).]

16. EVIDENCE ¶ 317(1) — DECLARATIONS — CONVERSATIONS BETWEEN THIRD PERSONS.

In a broker's action for a commission for effecting a lease for a term, evidence of a conversation between the broker's employé and the lessee, not in the presence of the lessor, to the effect that the lessee had made a bad lease and the lessor a good one, was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1174; Dec. Dig. ¶ 317(1).]

17. EVIDENCE ¶ 471(6) — FACTS OR CONCLUSIONS.

In such case, the lessee should be required to testify to the facts with regard to what occurred between himself and the broker's employé, instead of his conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2154; Dec. Dig. ¶ 471(6); Witnesses, Cent. Dig. § 833.]

18. BROKERS ¶ 85(10)—ACTION FOR COMMISSION—EVIDENCE.

The fact that plaintiff's services had procured a lessee who had paid seven months' rent might be considered by the jury in estimating the reasonable value of the services.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 114; Dec. Dig. ¶ 85(10).]

19. BROKERS ¶ 54—ACTION FOR COMMISSION — RESPONSIBILITY OF LESSEE—ESTOPPEL.

Where a broker alleged a contract to procure a responsible lessee, the defendant, who accepted the lessee, procured and entered into a lease with him, was estopped from alleging anything against the lessee's responsibility, except fraud on the part of broker's employé, inducing his acceptance.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75–81; Dec. Dig. ¶ 54.]

20. BROKERS ¶ 85(3)—ACTION FOR COMMISSION—EVIDENCE—RELEVANCY.

Where the lessor did not allege fraud on the part of the broker's agent in inducing his acceptance of the lessee, testimony of the lessee that he was able to carry out the lease contract was irrelevant, and it was also irrelevant in view of the trial court's construction of the contract, so that the lessee could comply with it by failing to pay rent, thereby forfeiting a certain amount on deposit with the lessor.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 106; Dec. Dig. ¶ 85(3).]

21. APPEAL AND ERROR ¶ 1050(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Such evidence was calculated to impress the jury with the idea that it was the lessee's intention to keep the property and pay on the lease promptly during the term and to cause them to allow compensation on the theory that the lease would continue for the entire time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. ¶ 1050(2).]

Appeal from District Court, Bexar County; W. F. Ezell, Judge.

Action by Richey & Casey against Thomas F. Brady. Judgment for plaintiffs, and defendant appeals. Reversed, and cause remanded.

Tallaferro, Cunningham & Birkhead and Leo Tarleton, all of San Antonio, for appellant. Boyle & Storey and Wm. Church, all of San Antonio, for appellees.

MOURSUND, J. R. A. Richey and L. A. Casey, composing the firm of Richey & Casey, sued Thos. F. Brady for \$5,400, with interest thereon at the rate of 6 per cent. per annum, alleging: That plaintiffs were engaged in the real estate, rental and brokerage business in the city of San Antonio, and in order to properly conduct the same were compelled to employ many agents. That defendant, Brady, is the owner of a certain building, a portion of which is adapted and intended for use as a theater. That—

"on or about February 1, 1914, plaintiffs, acting by and through one of their said agents and employes, to wit, R. C. Hill, were duly employed by said defendant, as his agent, by directly soliciting their services, by approving and participating in all negotiations, and by agreeing to, acquiescing in, and accepting the benefits of said services and negotiations, to secure a responsible tenant, under contract of lease, for said theater, said lease to cover a period of 15 years, at a monthly rental of \$1,500, payable in advance, the yearly rental of said theater being the sum of \$18,000, or for a total amount of \$270,000 for the full term of said 15 years; that in pursuance of said employment by said defendant, plaintiffs, acting by and through their said agent and employe, R. C. Hill, immediately proceeded to carry out the terms and conditions of their said employment, by energetic negotiations for securing a tenant for said theater, under the terms and conditions and for the period of time for which the same was to be leased, said defendant participating in said negotiations, instructing said plaintiffs by and through said Hill how such negotiations should be conducted, said negotiations being directed at and confined to one W. J. Lytle, until on or about July 21, 1914, when plaintiffs, acting by and through said Hill, succeeded in successfully closing a contract in writing for the lease of said theater, the same being made and entered into by and between the defendant and the said Lytle, under the terms and conditions heretofore set out, to wit, at the rate of \$1,500 per month for the full term of 15 years, said contract of lease being prepared by said plaintiffs, acting by and through said Hill, under the instructions and at the special instance and request of said defendant; that in pursuance of the provisions, conditions, and terms of said contract, on or about September 10, 1914, a formal lease was prepared by said Hill and signed by and between said Lytle and said defendant, Brady, embodying substantially the terms of said contract, whereby the said Lytle agreed and bound himself to lease said theater, and did lease the same, for a period of 15 years at an annual rental of \$18,000, payable monthly in advance at the rate of \$1,500 per month, and said lease since said date, and now, is in full force and effect."

Plaintiffs further alleged that:

"In addition to and irrespective of the solicitation, approval, acquiescence in and acceptance of said services of plaintiffs as aforesaid, it is the usage and custom, in transactions of the nature and character herein set out, to wit, in the rental, lease, or sale of real property,

buildings, or otherwise by an agent or broker, that his commission or compensation therefor shall be paid by the owner of such property so rented, leased, or sold, unless by special agreement or understanding the same shall be paid by the lessee or vendee thereof, and plaintiffs specially allege that no such contract, agreement, or understanding was had in this instance by or with either said defendant or the said W. J. Lytle."

—that by reason of said services so rendered by the plaintiffs the defendant became liable to pay the fair and usual commission and compensation for such services, and that the usual, reasonable, and customary fee is and was 2 per cent. of the amount due for the full period, namely, 2 per cent. of \$270,000. Defendant's answer consisted of a general demurrer, special exceptions, and denials of the material allegations of the petition. The trial resulted in a verdict and judgment in favor of plaintiffs for \$5,400, with interest thereon at the rate of 6 per cent. per annum.

[1] The first 10 assignments of error question the sufficiency of the evidence to sustain the verdict and judgment. In deference to the verdict of the jury we find that Brady, knowing Hill to be an employe of Richey & Casey, who were engaged in the real estate and insurance business, expressly agreed to avail himself of Hill's services for the purpose of procuring a lessee for the theater portion of his building for 15 years; that the conversations between them were of such character as to reasonably charge Brady with notice that Hill expected compensation for his services; that no inquiry was made by Brady with regard to the amount of compensation he would be expected to pay, nor was any statement made by Hill in regard to compensation until after the preliminary contract was signed; that Hill prepared the preliminary contract, which was approved by Brady and Lytle, and a meeting was then had at which it was signed by them; that the preliminary contract provided for various things to be done by Brady in preparing the theater for use, and fixed September 19, 1914, as the last day upon which a final contract should be executed; that the final contract was prepared by Brady, who, on September 10, 1914, reminded Hill that the final contract must be signed, and asked him to bring Lytle to Brady, and Hill did so, whereupon the final contract was signed. Hill testified that after the preliminary contract was signed he told Brady he presumed the latter was then ready to pay the commission; that Brady first said he supposed Lytle was going to pay the commission, to which Hill replied that it was always customary for the owner to pay the commission; that he gave Brady a letter he had procured from the Real Estate Exchange, stating what the customary commission would be, but Brady did not have his glasses and said he would read it later; that in the next conversation Brady said he would talk to

Hill about the commission in a few days; that in the third conversation Brady said he did not think the matter of commission ought to be taken up until after the lease was signed, as the first was just a preliminary contract, and Hill said that would be agreeable; that after the final lease was signed he again broached the subject of commission, whereupon Brady complained of illness, and asked Hill to see him at the end of the week; that he did so, and Brady put him off until the first of the next week, and at that time contended he ought not to pay a commission on the full 15-year lease because he did not know that the tenant would stay in the building; that they argued the matter for quite a while, and Brady finally told him to come back in a few days; that finally Brady told him he thought it would be better to leave it to Richey & Casey to suggest the basis for estimating commission, and for Hill to tell them to see Brady; that he notified Richey & Casey, and had no further conversations with Brady. Richey & Casey took up the matter with Brady, but no agreement was reached. Richey & Casey contended for 2 per cent. on the amount which would be paid in the 15 years if the lease was kept in force, while Brady contended that Lytle was not bound to carry out the lease, for there was a clause in the contract which permitted him to give it up by forfeiting \$9,000. The final contract, in part, reads as follows:

"For and in consideration of nine thousand (\$9,000.00) dollars the receipt of which is hereby acknowledged, first party this day agrees to lease to second party the theater, now in course of construction, at the corner of St. Mary and College streets in this city for a term of fifteen (15) years beginning on the date that same is completed and ready for occupancy and ending on the corresponding day in the year 1929, fifteen (15) years thereafter.

"For the use thereof second party is to pay fifteen hundred (\$1,500.00) dollars per month or eighteen thousand (\$18,000.00) dollars per year, paying the same monthly in advance.

"As a guaranty for the carrying out of the provisions of the lease contract second party shall deposit with the first party nine thousand (\$9,000.00) dollars on which deposit first party will pay 6 per cent. interest per annum, paying the same semiannually as it accrues. Said nine thousand (\$9,000.00) dollars to apply as the rent for the last six months of the lease contract if not forfeited under the conditions therein specified.

"Should there at any time be any default in the payment of rent for five days from the date it is due or in any of covenants herein contained, then it shall be lawful for the first party to re-enter said premises and remove all persons therefrom without prejudice to any legal remedies which may be used for the collection of rent, all and every claim for damages for or by said re-entry being expressly waived, and should legal services be employed to collect any rents after default is made, then and thereupon 10 per cent. is hereby added to the rent or rents so defaulted for an attorney's fees. And in the event of such default the guaranty of nine thousand (\$9,000.00) dollars shall at once become the property of first party as liquidated damages in full settlement for breach of the lease contract."

The other portions are not deemed material in this suit. The preliminary contract contained the same language with reference to time of lease, and the clause relating to default is almost a literal copy of a similar clause in the preliminary contract.

The above conclusions of fact dispose, adversely to appellant, of most of his contentions with regard to the sufficiency of the evidence, but there is one which requires further consideration. Appellant contends that the evidence wholly fails to show that appellees procured for appellant a lease contract such as is described in the petition; that the petition alleges plaintiffs were employed to secure a lease contract for 15 years, at a monthly rental of \$1,500, payable in advance, or for the total amount of \$270,000 for the term of 15 years, and that the contract introduced in evidence is one which can be forfeited by Lytle at any time by failing to pay, in which event the \$9,000 deposited with Brady would be forfeited as liquidated damages for the breach of the contract, and that therefore plaintiffs only secured for defendant an option contract.

We have copied, in stating the case, the allegations of the petition material to be considered. It will be noted that, in addition to the first allegation with respect to the nature of the employment, the further allegation is made, in paragraph 5, that a contract was successfully closed in writing for the theater, which was entered into by defendant and Lytle under the terms and conditions thereinbefore mentioned, which contract was prepared by plaintiffs, acting through Hill, under the instructions and at the special instance and request of defendant.

The question raised is not one which goes to the question of whether Brady is liable to plaintiffs under the evidence adduced, but whether the case alleged has been established by the evidence. Had plaintiffs pleaded that they were employed to procure a lease contract containing certain terms and naming all the terms of the contract introduced in evidence, the objection could not have arisen, nor could it have been urged if a copy of the contract had been attached and referred to as a copy of the contract which plaintiffs were employed to procure, even if plaintiffs had stated an erroneous construction of its terms in the petition. But plaintiffs relied upon their general description of the contract to be obtained, and their allegation that the contract actually executed was such a contract as they had been employed to secure. When the contract is introduced, it is found that it purports to be a lease contract for 15 years, but contains a clause relating to default upon the proper construction of which the parties are unable to agree, and which defendant contends renders the contract subject to be terminated by Lytle by failing to pay rent, leaving Brady with no further rights than to retain the

\$9,000. While the last sentence of that portion of the contract hereinbefore copied, if considered alone, supports the contention, when it is considered in connection with what precedes it, a serious doubt arises as to what the intention of the parties really was. Was it their intention that if Lytle failed to pay rent within five days after it accrued or failed to comply with any other covenant, the contract should be at an end, whether or not Brady elected to so treat it, or did the parties by the words, "such default," used in the last sentence mean a default availed of by Brady to retake possession of the premises. The contract provides that Brady may, in case of default, enter upon the premises "without prejudice to any legal remedies which may be used for the collection of rent," thus evidencing an intention that the rent accrued, at least, is to be paid by Lytle and not to be covered by the \$9,000, even if Brady enters upon the premises.

[2] Brady testified to statements on his part, made to Richey, according to which the intention was to provide that Lytle could forfeit the contract at any time upon paying \$9,000. But, conceding that the contract contained a clause giving Lytle the right to cancel by failing to pay rent, nevertheless it is a lease contract which may remain in existence for 15 years. Appellant relies upon the cases which hold that where a broker is engaged to sell property the mere procurement of a prospective purchaser who enters into an option to buy the property, but never in fact does so, is not sufficient to entitle the broker to commission. The rule relied on is a correct one, as is the further one that, even if the optional contract is signed by the employer, it will not be construed as a waiver of the original terms of employment and an acceptance of the services as a complete performance on the part of the broker. By granting the option the owner is merely assisting the agent in his efforts to bring about a sale. If the option is exercised, or the person holding the option is willing to exercise it, but is prevented by the owner, the broker becomes entitled to his commission. We do not think these rules apply in this case. The contract finally made by the parties was not a contract to enter into a lease in the future, but constituted in itself a lease. There was nothing further that the agent could do. The lease was made pursuant to instructions of Brady and was executed by him. On its face it purported to be a lease for 15 years, and, conceding that it contained a provision under which it could be canceled by the lessee, should that fact be held to make it a different instrument from the one which plaintiffs alleged they were employed to secure, and did secure? To hold that the variance is fatal would be requiring such strictness of accord between pleading and proof as is unnecessary to effectuate the purposes of the rule requiring proof to correspond to the allegations. Defendant was

apprised by plaintiffs' pleadings that they sought to recover compensation for procuring the particular contract, and their failure, in describing the contract, to state that it contained the clause relating to default, setting it out, should not prevent a recovery. We overrule assignments 1 to 9, inclusive.

[3] We regard the objections to the pleadings made in assignments 10 and 11 as being without merit. Plaintiffs alleged an express agreement that the services should be rendered, by stating that defendant directly solicited their services to make the lease, and alleged an implied agreement, by stating facts showing a conscious appropriation by defendant of their labors. In either case, the compensation not being agreed upon, the law implies a promise to pay a reasonable amount.

[4] By assignments 12 and 13 complaint is made of paragraph 1 of the charge. Several objections are urged, but some are too general. It is contended that the court assumes in said paragraph that an express contract was made, but the charge is not subject to such objection. It is contended, further, that there was neither pleading nor evidence justifying a finding of an express agreement of employment, and that the charge did not limit the jury to an implied contract, but permitted them to find whether there was any contract of employment. We have stated our view of the pleadings in discussing the preceding assignments. The evidence of Hill was to the effect that Brady, knowing Hill was with Richey & Casey in the real estate business, expressly authorized Hill to go ahead and see what he could do with the people in regard to renting the theater. As Hill said, "We believe we can rent it," Brady must have known he was speaking for his employers, Richey & Casey, and his subsequent statements and conduct as testified to by Hill show an express authorization to secure a contract to rent to Lytle on the very terms finally embraced in the contract. The assignments are overruled.

The fourteenth assignment complains of the second paragraph of the charge, wherein the court instructed the jury that if Brady by words, acts, or conduct, if any, authorized Hill to act for him in procuring Lytle as a tenant, and if they found that, through the acts and negotiations of Hill, Lytle executed the contract of lease introduced in evidence, then to return a verdict for plaintiff. The objection is the same as was made to the sufficiency of the evidence, namely, that the pleadings did not authorize a recovery upon the contract introduced in evidence, and, there being no alternative prayer on a quantum meruit, no recovery could be had. We overrule the assignment for the reasons stated in discussing the first nine assignments.

Assignments 15 to 23, inclusive, are overruled.

[5, 6] Plaintiffs pleaded that defendant became liable to pay the "fair and usual com-

mission and compensation for such service"; that the usual, reasonable, and customary fee for such services is and was 2 per cent. of the amount due for the full period of 15 years, namely \$5,400. This pleading, we think, was sufficient to authorize proof of what was the reasonable value of the services performed, but not to permit proof of custom, for it is not alleged that Brady knew of any such custom, or that a custom prevailed which was so commonly known that Brady was legally chargeable with notice thereof. As it was not alleged that Brady was engaged in the real estate business, the customs and usages of that business would not be binding upon him and enter into the contract alleged to have been made by him, unless it was alleged and proven that he had knowledge of the custom relied upon, or that the custom was so general or universal that he was chargeable with knowledge thereof. *Gano v. Palo Pinto County*, 71 Tex. 90-103, 8 S. W. 634; *Johnson & Moran v. Buchanan*, 54 Tex. Civ. App. 328, 116 S. W. 875; *Holder v. Swift*, 147 S. W. 600; *Groscup v. Downey*, 105 Md. 273, 65 Atl. 930.

[7-9] If it be pleaded and proved that there is a custom of which defendant had knowledge, or the custom is so notorious as to affect the defendant with knowledge thereof, then the law implies a promise to pay the compensation fixed by such custom. If no custom binding on the parties is pleaded and proved, the broker is entitled to reasonable compensation, and in determining what is reasonable under the circumstances of a given case, the end accomplished, as well as the time and effort expended, should be taken into consideration. *Ruling Case Law*, vol. 4, §§ 42, 67. It was therefore error to permit plaintiff Richey to testify that there was a customary rate for renting property upon a term of years and to state what that rate was. Assignments 24 and 25 are sustained. In this connection, we also sustain assignments Nos. 29, 30, and 31, whereby complaint is made because the court permitted plaintiffs to prove that it was the custom for the landlord to pay commission for leasing property.

Assignment No. 32 shows error, which is of little consequence and would not require a reversal, but in view of another trial we call attention thereto.

[10, 11] Assignment No. 26 is overruled. The witness, Rhodius, was asked, "What would be the reasonable commission for making a transaction of that sort?" to which he answered, "Two or 3 per cent., as I have stated before." The question must be confined to the issue made by the assignment of error. Such assignment contains no objection to the effect that the witness had not qualified himself to state his opinion on the subject under investigation, so we assume he had duly qualified. This being the case, there is no merit in the assignment, for the question related to the direct issue in the case.

[12, 13] Assignments 27 and 33 relate to the same character of proof as assignment No. 26, but contain the additional feature that plaintiffs stated to the witnesses that the transaction was one where a piece of property is rented for \$1,500 per month, payable monthly, the lease being for 15 years, amounting to \$270,000 in all, with a provision that there shall be a deposit of \$9,000 as a guaranty, and then asked the witness what would be a reasonable commission for a broker to make that lease. Each replied that 2 per cent. would be a reasonable commission. The objections presented under assignment No. 27 are regarded as without merit. Under assignment No. 33 it is contended that there was no basis for the question, the contention being that the services alleged to have been rendered by the plaintiff were different from those stated in the hypothetical question submitted. This objection was too general, for it did not point out just what should have been changed in the question. *Rogers v. Banking Co.*, 103 S. W. 463. We do not think it was error to permit plaintiffs to embrace in the question their construction of the terms of the lease, especially in the absence of a construction by the court of the terms thereof. In cases in which the terms are ambiguous and oral testimony is adduced, it frequently becomes a question for the jury to determine what the parties really intended, and in such cases it would be proper to ask the witness to state his opinion based upon the construction contended for by plaintiffs, and defendant could then, if he wanted to do so, ask concerning the value of the services, taking into view his construction of the contract. *Railway v. Compton*, 75 Tex. 673, 13 S. W. 667.

[14, 15] If the contract is one not ambiguous, it would, we think, be proper to ask the court to construe it and to require it to be described in all questions in accordance with the construction given it by the court. If the contract is ambiguous, but the evidence makes its intention clear beyond dispute, it would be proper for the court to construe the contract for the jury, and require them to accept such construction in estimating the value of the services. A skilled witness, who is familiar with services connected with some particular profession, trade, or calling, may estimate their value, and it is not required that he should be intimately acquainted with the nature of the services which he is appraising. He may know them in a very general way. *Chamberlayne on Modern Law of Ev.* vol. 3, § 2163. But, as the nature of the contract is of such controlling importance in fixing the compensation for its procurement, it appears to us that its correct construction must enter into the basis upon which the jury allows compensation, and the jury's verdict must rest upon testimony based upon such construction. As the contention is presented by the assignment, we hold that no

error is shown. Both assignments of error are overruled.

The twenty-eighth assignment discloses no error in so far as the question and answer therein copied are concerned.

The thirty-fourth assignment is also overruled.

[16, 17] Assignments 35, 36, and 37 point out errors of such character that we would not be justified in reversing the case thereon, but upon another trial evidence of conversations between Hill and Lytle, not in the presence of Brady, the purport of which was that probably Lytle made a bad lease and Brady a good one, should be excluded, and Lytle should be required to testify to the facts with regard to what occurred between him and Hill, instead of his conclusions.

[18] We overrule assignment No. 38. In estimating the reasonable value of Hill's services, the fact that such services have procured a renter who has paid seven months' rent may properly be considered by the jury.

[19-21] By assignment No. 39 complaint is made of the admission of Lytle's testimony to the effect that he was able to carry out the lease contract. This testimony should have been excluded. It is true that plaintiffs alleged their contract to be one to procure a responsible tenant, but, as Brady accepted Lytle and entered into a lease with him, he is estopped from alleging anything against Lytle's responsibility, except fraud on the part of Hill in inducing the acceptance. No such issue was raised, and the testimony was irrelevant. In view of the construction placed on the contract by the trial court, the testimony was irrelevant because under such construction Lytle could comply with the contract by failure to pay rent, thus forfeiting the \$9,000 on deposit with Brady, and therefore the testimony, if rightly understood, was of no aid to the jury. The testimony was calculated, however, to impress the jury with the idea that it was Lytle's intention to keep the property and pay the least promptly during the 15 years, and to cause them to allow compensation on the theory that the lease would continue for the entire time. If Lytle's ability to perform the contract had been an issue, the facts relating thereto should have been called for, and not his conclusion. The assignment is sustained.

The judgment is reversed, and the cause remanded.

JEFFRESS et al. v. WESTERN UNION TELEGRAPH CO. (No. 7213.)

(Court of Civil Appeals of Texas. Galveston. May 10, 1916. Rehearing Denied June 8, 1916.)

LIMITATION OF ACTIONS §124—AMENDMENT OF PLEADINGS—JOINDER OF NEW PARTIES.

Where two individuals are jointly interested in a contract, but action for breach thereof was begun by only one of them, an amended petition joining the other as coplaintiff in the same cause

of action is not the commencement of a new suit within the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 541; Dec. Dig. § 124.]

Appeal from District Court, Harris County; John A. Read, Judge.

Action by E. C. Jeffress and Sam Isaacs against the Western Union Telegraph Company. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

A. B. Wilson and Cole & Cole, all of Houston, for appellants. Hume & Hume, of Houston, for appellee.

LANE, J. The nature of this case and the result of the trial in the court below may be stated as follows:

On the 11th day of June, 1910, E. C. Jeffress, one of the appellants, entered into an oral contract with the appellee, Western Union Telegraph Company, whereby it was mutually agreed between the parties thereto that for and in consideration of the sum of \$25 paid by said Jeffress to said telegraph company, said company would furnish Jeffress at the opera house in Amarillo, Tex., with a detailed telegraphic report of the Jeffries-Johnson fight to be pulled off at Reno, Nev., on the 4th day of July, 1910.

While the contract was made by E. C. Jeffress alone with the telegraph company, it was in fact made for himself and Sam Isaacs, the other appellant, but this fact was unknown to said telegraph company. After the plaintiff Jeffress had incurred expenses in the sum of \$249.70 in preparing to receive said telegraphic reports, including the \$25 paid to said telegraph company, rent of opera house, etc., defendant telegraph company notified plaintiff Jeffress that the associated press objected to its giving plaintiff said reports of said prize fight, and declined to furnish plaintiff with such reports, thereby breaching its contract with plaintiff. On the 3d day of April, 1912, about eighteen months after the breach of said contract, E. C. Jeffress, as sole plaintiff, filed his original petition in which he alleged the breach of said contract, and the consequent damages suffered by him by reason of such breach. On the 22d day of July, 1912, more than two years after the breach of said contract, E. C. Jeffress, the original plaintiff, joined by Sam Isaacs by leave of the trial court, filed a first amended original petition in lieu of their original petition filed on the 3d day of April, 1912. By this amended petition the two plaintiffs, Jeffress and Isaacs, declare upon the same cause of action set up in Jeffress' original petition; the practical effect of said amended petition was only to make an additional plaintiff. On the 7th day of October, 1912, the appellee, Western Union Telegraph Company, filed its answer, specially excepting to plaintiffs' cause of action as follows:

"(1) That the first amended original petition filed herein by the original plaintiff Jeffress joined by a new and additional plaintiff Isaacs is insufficient in law, and of this it prays judgment of the court.

"(2) That said petition states a new, different, and distinct cause of action in favor of the original plaintiff Jeffress and the new plaintiff Isaacs, as upon a joint contract entered into between them and defendant, that the original petition in this cause was filed by said plaintiff Jeffress, and as in his own exclusive right and as upon a contract entered into between himself and defendant; that said petition of Jeffress and Isaacs asserts a right in them jointly under a joint contract between them and defendant to damages for the breach of said contract and for moneys paid out and expenses jointly incurred; whereas the original petition of plaintiff Jeffress asserts an exclusive right in himself as upon a sole or several contract between himself and defendant and asserts a sole and exclusive right for recovery of all the moneys alleged to have been paid out, and all expenses incurred and to all the damages resulting from the breach of said contract; that the cause of action set up in the second petition is upon a joint contract asserting different rights from those sought to be set up in the original petition of Jeffress, as upon a several contract, and that the two causes of action are distinct and independent; recovery in the very nature of things being permissible under one theory only, and not under both. That suit on said cause of action alleged in said amended original petition filed July 24, 1912, not having been commenced within two years after the accrual of the cause of action, is barred by limitation under the statute.

"(3) Defendant further excepts to said original amended petition as being insufficient in law for this: Said petition seeks to set up for the first time a right in one Isaacs as a coplaintiff under the contract with defendant, whereas it appears on the face of the record that no right was asserted by said Isaacs under said contract within two years after the accrual of his cause of action thereunder; said cause of action having accrued prior to July 1, 1910, and said amended petition asserting for the first time a right in plaintiff, having been filed July 24, 1912, said cause of action and plaintiff's right therein are barred by the statute of limitation of two years. Wherefore defendant prays judgment.

"(5) Further answering in this behalf, defendant says that the cause of action in said amended original petition alleged was not sued upon until July 24, 1912, said cause of action having accrued on or about July 1, 1910, and that suit therein was not commenced within two years after the accrual of the cause of action, and is barred by the two-year statute of limitation, and this defendant is ready to verify.

"(6) Further answering defendant says that it is not liable to said Isaacs, plaintiff, under the contract alleged, that cause of action, if any, accrued to plaintiff on or about July 1, 1910; that said Isaacs, plaintiff, did not commence suit upon said cause of action within two years after its accrual, and is not entitled to recover, and is barred by the two-year statute of limitation, and this defendant is ready to verify."

On the 11th day of May, 1915, plaintiffs filed their third amended petition wherein they alleged that in the contract made by Jeffress with said telegraph company it was made by Jeffress for the joint interest of himself and his coplaintiff, Sam Isaacs, under an agreement between said plaintiff that said plaintiff Jeffress should in his own name act for both, in making said contract with the appellee, and with the further agreement that the profits to be earned from such contract was to be equally divided between said

plaintiffs, and again sue for the identical items of damages alleged in the original petition.

On July 8, 1915, the cause was called for trial. Whereupon the trial court sustained appellee's exception to the cause of action set up by plaintiffs on the theory that the plaintiffs' third amended petition, upon which they went to trial, set up a new cause of action from that set up in the original petition filed by plaintiff Jeffress on the 3d day of April, 1912, and that it appeared upon the face of said third amended petition that the cause of action thereby set up and declared upon was barred by the two-year statute of limitation at the time said petition was filed. Judgment was accordingly rendered that the plaintiffs take nothing by their suit, and that the defendant go hence without day, and that it recover of plaintiffs its costs incurred.

Plaintiffs, Jeffress and Isaacs, have appealed from the judgment of the trial court and assign the action of the court in sustaining appellee's plea of limitation as error.

[1] We do not think plaintiffs by either of their petitions set up a different or new cause of action from the one first set up in the original petition filed by plaintiff Jeffress on the 3d day of April, 1912; the same being filed within two years after said cause of action arose. We therefore conclude that the court erred in sustaining appellee's said special exception, and in consequence thereof rendering judgment for appellee.

The making of Isaacs a party plaintiff by the amended petition was not such change in the suit as to constitute a new cause of action. In the case of *Half Co. v. Waugh*, 183 S. W. 839, this court said:

"The propositions subjoined to the assignments are that, in a suit by an individual for damages, recovery cannot be had where the damages are shown to have been sustained by the firm of which he was a member, and that the burden of proof is upon a party asking damages to prove his right to recover, and that the damages were sustained by him individually. The evidence is sufficient, we think, to show that the truck was used in connection with the *Gee-Whiz Auto Transfer & Storage Company*, which was a copartnership composed of defendant and one or more of his sons, and that the profits arising from the use of the truck inured to the benefit of the copartnership."

And again:

"The negotiations in regard to the truck were between Waugh and the corporation only, and in their subsequent dealings in reference thereto Waugh, and not the partnership, was recognized by the corporation as the contracting party. The assignments are overruled."

For cases strongly in point see *Baker v. G., C. & S. F. Ry. Co.*, 134 S. W. 257, and authorities therein cited; *Roberson v. McIlhenny*, 59 Tex. 615; *Garrett v. Muller & Co.*, 37 Tex. 589.

In the case last cited it is said:

"M., the managing partner of the firm of M. & Co., instituted suit in his own name on an open account due the firm. Subsequently he amended his petition by merely setting out the names of the other partners of the firm, and alleging

that he had entire control of the firm business. More than two years had elapsed between the accrual of the cause of action and the filing of the amended petition. Defendant, treating the amended petition as setting up a new cause of action, pleaded the statute of limitations. Held not necessary to have joined the dormant partners as plaintiffs in the action, and, as the original petition was filed within two years after the accrual of the cause of action, the plea of limitation was unavailable."

What we have said disposes of all of appellants' assignments. For the error pointed out the judgment of the trial court is reversed, and the cause remanded.

Reversed and remanded.

PIERCE-FORDYCE OIL ASS'N v. WARNER DRILLING CO. (No. 8370.)

(Court of Civil Appeals of Texas. Ft. Worth. May 6, 1916.)

1. DAMAGES ⇨124(3) — OIL WELLS — CONSTRUCTION OF CONTRACT — DAMAGES FOR BREACH.

Under a written contract between plaintiff and defendant oil association, whereby defendant was to pay plaintiff \$1.75 per foot for the drilling of five wells to the depth of 1,000 feet, and to furnish casings, water, and fuel, reserving the right to stop operation on the wells if oil or gas was found in paying quantities at any depth, and, if stopping operations before a depth of 500 feet, to pay for a depth of 500 feet, the plaintiff, after a well drilled to a depth of 1,000 feet had been abandoned and paid for, upon defendant's refusal to permit the drilling of any of the other four wells, was not limited in its action to recover profits which would have been realized by drilling the other wells to the profits on a drilling to a depth of 500 feet each, or 2,000 feet in the aggregate.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 332-334, 337, 338; Dec. Dig. ⇨124(3).]

2. CONTRACTS ⇨147(2)—OBJECT—"CONSTRUCTION."

The term "construction" implies uncertainty as to the meaning of a contract, for, when the meaning is clear and unambiguous, there is nothing to be construed, and, as when the language employed is unequivocal, though the parties may have failed to express their real intention, its legal effect will usually be enforced as written, as no other meaning can be added by implication or intentment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 730; Dec. Dig. ⇨147(2).]

For other definitions, see Words and Phrases, First and Second Series, Construction.]

Appeal from District Court, Wichita County; J. W. Akin, Judge.

Action by the Warner Drilling Company against the Pierce-Fordyce Oil Association. Judgment for plaintiff, and defendant appeals. Affirmed.

Huff, Martin & Bullington, of Wichita Falls, for appellant. W. F. Weeks, of Wichita Falls, for appellee.

DUNKLIN, J. The Pierce-Fordyce Oil Association entered into the following contract in writing with the Warner Drilling Company, a partnership:

"This agreement made by and between the Warner Drilling Company, hereinafter called contractor, party of the first part, and the Pierce-Fordyce Oil Association, St. Louis, Mo., hereinafter called the Company, party of the second part, witnesseth:

"I. The Company agrees to pay the party of the first part one and seventy-five one hundredths (\$1.75) dollars per foot for the drilling of such wells as designated below to the depth of one thousand feet (1,000), and also agrees to furnish all casings, water and fuel to said wells. The five wells to be drilled in a radius of four miles.

"II. Be it further understood that the Company reserves the right to stop operations on said wells if oil or gas be found in paying quantities at any depth, but, if stopped before a depth of five hundred feet (500) is reached, the Company agrees to pay for a depth of five hundred feet (500).

"III. Well No. 1; Well No. 2; Well No. 3; Well No. 4; Well No. 5.

"IV. It is expressly understood that the foregoing is satisfactory to the party of the first part, and is acknowledged by signature of the same below.

"Wichita Falls, March 18, 1914."

Pursuant to that agreement the Drilling Company drilled one well to a depth of 1,000 feet, which was abandoned because no oil was found. The Oil Association paid the contract price for that work and refused to permit the drilling of any of the other four wells mentioned in the contract. Thereupon the Drilling Company instituted this suit against the Oil Association to recover alleged profits which they claimed they would have realized by drilling the other four wells to the stipulated depth of 1,000 feet had not the defendant breached its contract therefor, and also for the value of their services rendered in withdrawing the casing from the well that was drilled. From a judgment in favor of the plaintiff for \$2,625, lost profits by reason of the breach of said contract, and the further sum of \$203 as value of services in withdrawing the casing from the well that had been drilled, the defendant has appealed.

[1, 2] The defendant filed the following special plea:

"Defendant, in answer to paragraphs 12, 13, and 14 of the plaintiff's amended petition, says that the written contract was, in fact, the only contract made for the drilling of any well, but that it was reasonably within the contemplation of the parties making said contract and within the meaning of said contract that the defendant should have the right at any time to suspend the drilling of any well or wells therein provided for and in that event should not be required to pay more than \$1.75 per foot for each 500 feet of undrilled wells, and in that event would not be responsible to the plaintiff for more than his reasonable profits arising from the drilling of 2,000 feet at the rate of \$1.75 per foot; and, while the defendant admits that it has not tendered to plaintiffs any particular sum in settlement of this suit, yet it is now and always has been ready and willing to pay the plaintiffs their reasonable damages in case it should be held by the court that L. S. Kempher had authority to contract for more than one well which has been paid for by the defendant."

The contention so made in that plea that appellant had the right to stop the drilling of any well at a depth of 500 feet, even

though oil was not found therein, and hence was not liable under the contract for profits in excess of what plaintiff could have realized for drilling an aggregate depth of 2,000 feet in the four undrilled wells, is the only contention presented upon this appeal.

There was no plea of fraud, accident, or mistake in the drafting of the contract. Neither was there any evidence tending to show that the parties to the contract understood its meaning to be different from that which its language imports. The evidence does show that the contract was prepared by O. E. Warner, one of the members of plaintiff's partnership firm, and appellant invokes that fact as the reason why the contract should be construed most favorably to it.

The contract is plain and unambiguous, and is not, in our opinion, susceptible of the construction urged in the special answer copied above. Appellant has cited numerous authorities giving the rules of construction of written contracts which are obscure or ambiguous, but same have no application to the contract in the present suit, which is perfectly plain and free of any ambiguity whatever. In 2 Elliott on Contracts, § 1506, the following is said:

"The term 'construction' implies uncertainty as to the meaning of the contract; for, when the meaning is clear and unambiguous, there is nothing to be construed. Moreover, when the language employed is unequivocal, although the parties may have failed to express their real intentions the legal effect of the instrument will usually be enforced as written. Where no uncertainty exists, there is no room for construction. When the meaning is plain, another meaning cannot be added by implication or intentment."

In 6 Ruling Case Law, § 231, p. 841, the following was said:

"Where the language of a contract is ambiguous or susceptible of several significations, conjectures are necessarily resorted to to determine the meaning of the parties; and for this purpose conjectures may be drawn from the subject-matter and from the circumstances of the contract. This rule, however, is applicable only where the language in which the parties have expressed themselves, either from the terms or their arrangement, leaves their intentions doubtful. For otherwise the most usual and natural import is to be given to the instrument or evidence of contract; and to resort to rules of construction would be to substitute probable conjectures for evidence that is direct and unalterable. Accordingly it is said that the agreement of the parties is to be ascertained from the plain language used by them, and such agreement is to be enforced no matter what the intention may have been, and that, where the meaning of a contract is plain, another meaning cannot be added by implication or intentment."

The foregoing announcements, of course, have no reference to the right of a party to a contract to avoid the effect of its literal meaning by showing fraud, accident, or mistake in its execution. As said already, the contract in the present suit is too plain to admit of the construction suggested by appellant, and accordingly appellant's assignment of error to the refusal of the court to

peremptorily instruct the jury that plaintiff could not recover profits for drilling in excess of an aggregate of 2,000 feet on the four wells which were undrilled is overruled, and the judgment is affirmed.

Affirmed.

KAKER v. PARRISH. (No. 8372.)*

(Court of Civil Appeals of Texas, Ft. Worth.
May 6, 1916. Rehearing Denied
June 3, 1916.)

1. BREACH OF MARRIAGE PROMISE ¶23—SUFFICIENCY OF EVIDENCE.

Evidence in a suit for damages for the breach of a promise of marriage *held* to sustain a finding that there had been a contract of marriage as alleged.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 31, 37; Dec. Dig. ¶23.]

2. BREACH OF MARRIAGE PROMISE ¶23—SUFFICIENCY OF EVIDENCE — RESCISSION OR ABANDONMENT.

Evidence in a suit for damages for the breach of a promise of marriage *held* to sustain a finding that the contract had not been mutually rescinded or abandoned.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 31, 37; Dec. Dig. ¶23.]

3. BREACH OF MARRIAGE PROMISE ¶34—RELEASE—WORDS.

The fact that plaintiff in a suit for the breach of a promise to marry, in answer to the defendant's statements that he did not know that he would "ever marry," and "that his affection for the plaintiff was not what it had been formerly," had replied, "Well, we just as well quit then," did not, as matter of law, amount to a waiver or surrender of her rights under the promise; as she was not required, in order to preserve such rights, to then insist on its performance and again express her willingness to perform her part of the contract.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. § 50; Dec. Dig. ¶34.]

4. NEW TRIAL ¶44(3)—MISCONDUCT OF JUDGE—STATEMENT AS TO DEFENDANT.

In an action for damages for breach of a promise to marry, where it appeared that defendant had told plaintiff that he wanted to leave the country, that he was afraid to marry her, and that he had been intimate with two other women, the statement of a juror to the jury that he thought that defendant was the man who had ruined a girl and had been forced to marry her was not so prejudicial as to make the refusal of a new trial on that ground an abuse of its discretion, especially when made after the jury had agreed to find for the plaintiff on the issue of the breach, and where the verdict was not attacked as being excessive.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 82-84; Dec. Dig. ¶44(3).]

5. NEW TRIAL ¶52—MISCONDUCT OF JURY—VERDICT BY LOT.

The fact that it was suggested by a juror that they find the amount of damages against defendant by dividing the amount which each juror was in favor of assessing by 12, resulting in a verdict substantially for the amount awarded, where there had been no agreement to abide by such verdict, and the calculation was several hours before the final verdict was agreed upon, was not such misconduct as to make a denial

of a new trial on that ground an abuse of discretion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 101; Dec. Dig. ¶52.]

6. NEW TRIAL ¶44(3)—MISCONDUCT OF JURY—DAMAGES—ATTORNEY'S FEES.

In an action for breach of promise to marry, where defendant's counsel had stated that the plaintiff's lawyers would doubtless get a large share of the damages, that the jury discussed how much plaintiff would have to pay as lawyer's fees and expenses, in the absence of anything to show that such items were included in the damages, and the fact that a juror followed the law of another state in assessing damages, though he was not ultimately controlled by it and did not communicate it to the other jurors, was not such misconduct as made the trial court's refusal of a new trial an abuse of its discretion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 82-84; Dec. Dig. ¶44(3).]

7. NEW TRIAL ¶143(2)—MISCONDUCT OF JURORS—STATUTE—BURDEN OF PROOF.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2021, which, contrary to the rule of the common law, authorizes a consideration of the testimony of jurors for the purpose of impeaching their verdict, a litigant, seeking to disturb a verdict against him, has the burden of showing, not only that the matters of which he complains amount to misconduct on the part of the jury, but also that they operated to his prejudice.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 292, 293; Dec. Dig. ¶143(2).]

8. APPEAL AND ERROR ¶978(3)—DISCRETION OF TRIAL COURT—IMPEACHMENT OF VERDICT.

Under such statute expressly committing the determination of questions as to the misconduct of jurors to the discretion of the trial court, its discretion is reviewable on appeal, but its action in overruling the motion for new trial on the ground of the jury's misconduct will not be disturbed where it seems that it acted fairly in its investigation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3870; Dec. Dig. ¶978(3).]

9. BREACH OF MARRIAGE PROMISE ¶22—EVIDENCE—CHARACTER.

In an action for damages for breach of promise, where there was no attack upon the character of the defendant's present wife, evidence for defendant that her general character was above suspicion was inadmissible.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 31-36; Dec. Dig. ¶22.]

Appeal from District Court, Wise County; F. O. McKinsey, Judge.

Suit by Miss Lee Parrish against Lawson Kaker for the breach of a promise of marriage. Judgment for plaintiff, and defendant appeals. Affirmed.

R. E. Carswell, of Decatur, Sam Shadle, of Weatherford, and L. D. Ratliff, of Decatur, for appellant. McMurray & Gettys, of Decatur, and H. E. Lobdell, of Bridgeport, for appellee.

CONNOR, C. J. Miss Lee Parrish instituted this suit against Lawson Kaker to recover damages for the breach of a promise of marriage. The plaintiff alleged that the mutual agreement to marry was made during the year 1912 and was breached about February 15, 1915. The defendant denied the

allegation of a marriage contract, and specially pleaded that, if any agreement of marriage had ever been entered into, it was by mutual consent rescinded and abandoned on about December 25, 1914. He further pleaded that after such agreement of marriage, if one was made, he learned that the plaintiff was a confirmed user of snuff, which habit was very distasteful to him, that he requested plaintiff to abandon the habit, which she had agreed to do, but that, notwithstanding such promise, she persisted in the use of snuff, by reason of which he concluded that marriage with such a person would not be pleasant, and hence on that account that he was justified in refusing to marry her.

The trial was before a jury, with instruction on the part of the court that, in event the jury should fail to find that there had been a contract of marriage, as alleged by plaintiff, they should find for the defendant. The jury were further instructed that, if they believed that such a contract had been entered into, but that thereafter it had been mutually abandoned, their verdict should be for the defendant, and further, that if they should find that the plaintiff and defendant became mutually engaged to marry, but that before said engagement the plaintiff was addicted to the use of snuff, and that the fact was unknown to the defendant, and should further believe that the plaintiff persisted in the habit over the defendant's objection after it became known to him, and that by reason of such continuance of the use of snuff the defendant broke his engagement, and that in so doing he acted as a person of ordinary temper, prudence, and foresight would have acted under like circumstances, then also they should find for the defendant. The trial resulted in a verdict and judgment in favor of the plaintiff for the sum of \$5,333, and the defendant has appealed.

[1] Contrary to appellant's first contention, we think there can be no doubt of the sufficiency of the evidence to sustain the verdict and judgment on the issue of an agreement of marriage. The appellee testified, among other things:

"We were engaged to be married. We became engaged about the middle of 1912, I suppose. * * * He and I became engaged to marry about six months after he began going with me. That would be right along I suppose about the middle of 1912. * * * I do not remember just the words he used. I accepted the proposal. I do not know that I can give the substance of the words he used any nearer than I have. He wanted to know if I would marry him, and I said I would."

The plaintiff further testified to numerous visits on the part of defendant, and to numerous conversations in which reference was made to their engagement, to the character of house they would occupy, etc. The defendant did not deny these conversations, and, among other things, testified:

"If I ever agreed to marry Miss Parrish, it was conditionally. Q. She had no condition in

the world? A. Yes; if she had quit dipping snuff. * * * Q. Would you have married her if she had quit dipping snuff? A. Well, of course, I don't know. Q. On the night of the 24th of December, when you went there and found that toothbrush, if you had not found it, and she had been faithful, would you have married her? A. I don't know about that. I loved her a good deal better when I promised her, if I promised her at all, than I did when I quit. I told her in the fall of 1914 my affections was not for her what they had been. I don't know why. They just was not."

The plaintiff also introduced a number of letters written by the defendant and received by her. These letters breathe the spirit of a man making the effort to win the love of a woman. We will quote but a few of them. For instance on February 21, 1912, the defendant wrote to the plaintiff as follows:

"I am here meditating on affairs pertaining to future happiness. I do not feel like I could be altogether pleased unless you should decide to accept my love and fix your determination and surrender your affections to me; if this is done, I will be painstaking and make your life on my part as near as you desire it to be."

On February 27, 1912, the defendant again wrote:

"I have studied your nature very carefully, and find you to be a lady whom my heart yearns for, and truly believe if you should permit yourself to fall in love with me I shall always treat you in a manner that you will not regret that you surrendered your love to me."

On March 29, 1912, the defendant wrote, in part, as follows:

"Dear Lee: It is needless for any one but you to apply for my love. The last few remarks you made on last night aroused my feelings for you to such a great extent that I could not sleep for several hours after retiring. I thought delightfully of the many good things that might fall in our pathway if we should be permitted to join the ranks of matrimony."

After a number of other letters the defendant again wrote on December 7, 1912, in part, as follows:

"I feel very much gratified over the results of my undertaking; it doesn't seem to me that any one could take you from me although I may be too sure. While I am writing you I have my thoughts concentrated upon you and your future happiness. I can see your image standing in the midst of beautiful surroundings realizing that your strong intellectual power enables you to comprehend the meaning of everything pertaining to love and happiness set apart for every married person who wish to enjoy themselves, and that is what we are looking for."

On January 11, 1913, the defendant wrote, in part:

"I wish it was possible for me to be with you as much as I am away from you, then this life would be differently spent. However, the condition will not permit such a thing at present. I think when we are united we will enjoy ourselves the better trying to gain what we lost in the past."

On April 10, 1913, the defendant again wrote, in part:

"I believe if we are permitted to spend a married life together it will be so remarkable that our friends and relatives will place us in the foremost ranks of kind, true, and permanent lovers, and I assure you that there could be no greater compliment passed on me than to hear that I was true to the one that I had promised to love the remainder of my life."

On November 19, 1913, the defendant again wrote, in part:

"When I am absent from you it seems as though I cannot find anything that will relieve me of that miserable feeling which I have and often times think that my happiness will be incomplete until we are married; my love for you is continuously increasing, and feel positive that you love me equally as well, and for that reason I think our future happiness will be just what we are expecting it to be."

Appellant's first assignment of error is accordingly overruled.

[2, 3] Appellant next contends that:

"The evidence by overwhelming preponderance shows that whatever negotiations or arrangements looked to a marriage between appellee and appellant were rescinded and abandoned on December 25, 1914, and that the verdict of the jury upon that issue is clearly against and unsupported by the evidence, and it clearly appears that such verdict was influenced and produced by prejudice and undue and improper influence."

This contention is predicated mainly upon the testimony of the defendant to the effect:

That some time in January, 1913, he ascertained that Miss Parrish dipped snuff, which upon inquiry she did not deny, but stated that she used it only occasionally; that he told her if she continued the practice their courtship was at an end, and she finally agreed to quit; that again about the first of the year 1914 "I asked her when she took a dip of snuff, and she said, 'This morning.' I said, 'That is a nice way of quitting—continue keeping it up.' Well, she agreed again, and says, 'Well if nothing else will please you, I will quit.' Then December 25, last year, 1914, last Christmas, that was the third time. We first sat down in the parlor. We didn't have any stove there, and we went into the room where they had a stove. After we had been in there a little bit I discovered a toothbrush with snuff on it lying on the table. It was thoroughly saturated with snuff. I told her, 'I have put you to a thorough test, and think it is best for our courtship to end.' She said, 'All right; if that pleases you it pleases me.' I really do not remember everything that occurred there that afternoon. I made her a present that Christmas. I gave her—I took a lavalliere and a ruby ring and told her she might select one of them. For some little time she could not decide what she wanted, and later she decided to take the lavalliere. She took this lavalliere prior to the time I rounded her up about dipping snuff. After the incident about the snuff she just handed me back the lavalliere. I asked her to keep it as a friendly gift. She says, 'No; if our courtship is at an end I don't want you to be to any more expense,' and gave it back to me. * * * She told me she had a laundry bag almost finished; she would like me to accept that. I told her I would not do it. I considered my relations with her were at an end, and we agreed that afternoon we would quit and neither of us make any unkind remarks about the other. We agreed to be friends, and she had a school about six miles west of Bridgeport, road very rough, and I told her if it suited her she could come in when she wanted to and I would take her back to her school. I did that twice; made two trips. There was no further intercourse between us with reference to matrimony. Up to that time I did not think she and I had reached any definite agreement to marry. I never reached any definite agreement with her to marry. I was still investigating to see whether she would suit me for a wife. * * * I don't know that the toothbrush was what finally decided it; yes, really it was. It is a fact that right then I was engaged to my present wife. I think I had been engaged to her about three or four months at that time. I intended to marry

my present wife; that is, if we suited each other."

Miss Parrish testified, among other things, that:

"Mr. Kaker came to see me last on the 15th of February, 1915. At that time he and I did not cancel our engagement. I had not agreed up to that time to release him. I expected up to that time he was going to carry out his agreement. I did not know that he was not going to carry out his agreement to marry me until I knew that he was married. Before that time I had never agreed to release him. I do not remember seeing the defendant on the 24th of December, 1914. I saw him on the 25th. I did not agree at that time nor at any time to release him. He did not ask me to release him at any time. * * * On Christmas Day, 1914, Mr. Kaker and I had a conversation. * * * He had made me some presents, and I kept them a while. I gave them back to him about an hour after he gave them to me. He gave me a lavalliere; nothing else. I made him a present of a laundry bag. I have the laundry bag. He did not receive it. That occurred on the 25th day of December, Christmas Day. I do not know what was the matter between him and me then. There was not anything particular on my part. He made the remark just after he got there—He brought a ring and a lavalliere both, for me to select the one I preferred, and I took the lavalliere, and so after awhile—I guess about an hour after he had done it—he seemed to be upset about something, I didn't know what. I didn't know at the time; I suppose I have found out later; and he remarked that, along about the first of the conversation, that a married woman was giving him trouble, crossing his trail, or something like that, I don't remember just exactly the remark, and then he made the remark, not at that time, but in the conversation, that his affections for me were not what they once were. I says, 'Well, why didn't you tell me this?' 'Well,' he says, 'we ought to have married.' I says, 'Why didn't you do it?' 'Well,' he says, 'We were afraid we would disappoint—' I said that their disappointment would not be as great as ours. So we talked along awhile, and then directly he says, 'Well I don't know that I will ever marry; I haven't come up according to the terms; I have been intimate with two women.' I says, 'Well, we just as well quit then,' and I took off the lavalliere and gave it to him, and he told me, 'You keep this.' I says, 'No; I don't want you to spend your money on me.' He says, 'Well, I rather spend it on you than any one else.' But he took the lavalliere back, and then it was about 5 o'clock then, that evening, I had never presented the laundry bag to him, it was about 5 o'clock that evening when I presented it, and, of course, he refused to take it because I had not taken the lavalliere; and then on Sunday—he was back again Sunday afternoon, and I made the remark to him if he would accept the laundry bag I would accept the lavalliere. He said he didn't know whether he could get it then or not, as they were either selling out fast or nearly all gone, I don't remember just which remark he made, when he got this one. I told him that did not make any difference to me; I was not tired of my locket, anyway; I did not particularly care about the lavalliere. Mr. Kaker and I were together that day all the afternoon. * * * I said, 'We better quit.' He did not say anything to that right then. About the time I said that, I just suggested we just as well quit then, and I took off the lavalliere and gave it to him, and he remarked to me to keep it, and I told him I didn't want him spending his money on me. He did not say anything about quitting. He remarked something during the afternoon about, 'Well, we will still be friends.' I agreed to that. * * * On the 25th of De-

cember, 1914, nothing was said between Mr. Kaker and me about my dipping snuff. It is not a fact that he found a toothbrush of mine filled with snuff, and that he taxed me about it. Nothing of that sort occurred. * * * He kept telling me all along not to give up hopes. That was after the lavalliere matter on the 25th of December. This was the latter part of January. Mr. Lawson Kaker came to see me just as regularly after Christmas as he ever did before. Nothing was said after that about severing our relations. We continued to talk about marrying just the same as before. There was nothing in Mr. Kaker's conversation or demeanor up to the 15th of February to lead me to the suspicion that he had abandoned the idea of marrying me as he had promised. He married on the 25th of February, 1915. * * * Up until about the 15th of February he came to see me quite often. In that conversation the last of January when he spoke about going away and that he had a good notion to go where he would never be heard of, and I says, 'Won't I hear from you?' and he made the remark, 'Yes,' but I would not be allowed to tell, and no telling how long he would have to stay. I made the remark I would be willing to wait for him ten years if it was necessary. He did not say anything to that. * * * He told me about being in trouble and wanted me to help him, and then I proposed marrying him. He said that if he married he was afraid he would get his head shot off. That is the time he told me he was thinking about leaving. * * * That was at the January meeting. The next time I met him was the next week, I guess. I am certain that I never came home without seeing him, what time I was there, and, as I said a while ago, I came home every week except one. I lived about 400 or 500 yards, I guess, from where Mr. Lawson Kaker lived in Bridgeport. I never failed to see him when I came home from my school. I gave up my school after the first week in February and stayed at home in Bridgeport. * * * Q. I am trying to get at what passed between you at this February meeting, Friday in the first week in February. What did he say then about his troubles? A. Well, that is a delicate subject to undertake. He told me all about his troubles. He made the remark at three different times about going and in one remark he said I would hear from him again. He still expressed the hope that everything would come out all right; that he and I would marry. * * * We had another meeting before the 15th of February and that was the following Friday night. * * * Then the same subject was principally up for discussion about his troubles. He remarked that night not to give up hopes, everything would come out all right. I still expected to marry him. I knew nothing about his engagement to Mrs. Bailey."

Mrs. Bailey is the lady whom the evidence shows the defendant married on the 25th of February, 1915.

We are unable to say that the testimony as a matter of law required a finding on the part of the jury that the engagement between the plaintiff and the defendant was mutually canceled. The plaintiff herself is specific in her denial that such was the case, and these denials are not necessarily shown to be false merely because, in answer to appellant's statements on December 25, 1914, that he did not know that he would "ever marry," and "that his affection for the plaintiff was not what it had been formerly," plaintiff replied, "Well, we just as well quit then," and returned the lavalliere. Some such expression and some manifestation of resentment on the plaintiff's part was under the circumstances

not unnatural, and the defendant's continued association with the plaintiff and his assurances to her thereafter all seem inconsistent with the theory that there was any mutual agreement to rescind the contract of marriage as established in the testimony of the plaintiff. In the case of *Fisher v. Barber*, 62 Tex. Civ. App. 34, 130 S. W. 872, in which a writ of error was refused by our Supreme Court, it appears that the defendant relined, in part at least, upon an alleged rescission or abandonment of a contract of marriage theretofore entered into between the parties. The defendant testified that upon a date mentioned he sent the plaintiff word by one Epperson that he, the defendant, would have to withdraw his offer of marriage on account of the opposition of his children, and that in response to the plaintiff's request communicated to him by Epperson he went to see her that night and told her of the opposition of his children to their marriage, and that on that account he could not marry her; that when he told her this she replied "that she was sorry, and it was what she expected." Epperson testified that when he delivered defendant's message to the plaintiff, she replied: "All right; just as I expected." The court in disposing of the testimony held that the issue of a release by the plaintiff or a cancellation of the contract of marriage by mutual agreement was not raised by the evidence. It was said:

"The defendant did not ask the plaintiff to agree to a cancellation of the contract. He sent Epperson to her, not to obtain a consent to the abandonment of the contract, but to inform her that he had determined not to marry her, and to tell her why he could not carry out his agreement with her. When she received this information she was not required, in order to preserve her right under the contract, to insist on its performance by the defendant, and again express willingness to perform her part of it. Her statement to Epperson that 'it is all right' and that 'she expected it,' not having been made in response to any request by defendant for a cancellation of the contract, cannot be treated as an agreement on her part that the contract should be canceled. * * * It cannot be expected that a woman upon the receipt of a message of this kind would not attempt to hide from the messenger her feelings of regret and humiliation, or that she would insist upon defendant's carrying out his contract with her, and plaintiff's statements to Epperson before set out can only be regarded as expressions made for the purpose of hiding her feelings of wounded pride. * * * There is no intimation in any of the testimony that, if she had pleaded with defendant to reconsider his determination to abandon her, he would not have refused to marry her. On the contrary, he had ample opportunity to reconsider and to offer to perform his contract after he knew she was not willing to release him, and yet he made no such offer. It is also clear that nothing said by plaintiff to Epperson or to the defendant could be given the effect of a release by her of the damages caused her by defendant's breach of his contract. If the statements made by her or her conduct on the occasions mentioned could be construed as evidencing an intention on her part to release her claim for damages, such release could not be held binding, because it was wholly without consideration."

The latter part of the court's remarks would seem to have application here; for here, as in the case cited, it cannot be pretended that the evidence authorizes the conclusion that the plaintiff waived or surrendered her right to the damages otherwise established in the evidence. In the case of *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 30 S. W. 581, a breach of promise case in which a writ of error was denied by our Supreme Court, it was said, among other things, quoting from one of the headnotes:

"Evidence of the return by plaintiff to defendant of his ring and letters does not show, as matter of law, that she had released him from his promise."

See, also, *Folz v. Wagner*, 24 Ind. App. 694, 57 N. E. 564; 5 Cyc. p. 1017, par. E.

We accordingly overrule appellant's second assignment of error.

[4-8] By several assignments of error appellant attacks the verdict on the ground of misconduct on the part of the jury. We will attempt to group and briefly present these several complaints together. It appears, in substance, that during the deliberations of the jury, and while discussing a part of Miss Parrish's testimony to the effect that the defendant on the occasion named told her as a reason why he wanted to leave the country that he was afraid to marry her, etc., that "he was in trouble," that "he had been intimate with two women," "that he was afraid he would get his head shot off," that getting into trouble with that other woman was nothing compared with this, it was just like going into hell this one," etc., one of the jurors remarked that, "We were in the dark about the former troubles of the defendant," to which another jurymen, Jim Deaton, replied that he thought he (defendant) was the young man "that ruined Mr. X's daughter"; that he "probably was the man that was forced to marry X's daughter." The juror Jim Deaton testified, "I never said for sure that he was the man that done that, but that I thought he was the man that done that meaness," "that he said nothing more about it," and at the time remarked, "That has nothing to do with the case." It further appears in this connection that all of the jurors testified that the remarks of the juror Deaton above indicated had no effect on the verdict. It also further appears that at the time of these remarks and of this discussion the jurors had all agreed upon a finding against the defendant on the issue of liability.

A further complaint is that the verdict of the jury was arrived at by lot, but the evidence of the jurors on this subject so plainly shows that there was no agreement to abide by such verdict that we will not set out the testimony. The testimony amounts to no more than that during the deliberations among the high men on the jury and the low men that one or two of them suggested that they ascertain the amount which each juror was in favor of assessing as damages, divide

it by 12, and see what the result would be. This, it appears, was done, and the result amounted substantially to the sum finally found by the jury. The testimony, however, shows that this calculation was several hours before the final verdict was agreed upon, and, as stated, all of the jurors testified that there was no agreement to be bound by any such computation.

A further complaint is that the supposed amount of attorney's fees that plaintiff would be required to pay was included in the amount of the verdict returned. While the evidence shows that "something was said in the jury room about how much the plaintiff would have to pay as lawyer's fees and expenses," we think the evidence as a whole shows that nothing for these items was included in the verdict, and that the remarks were given no substantial effect. Moreover, the trial judge, in qualifying the bill of exception presenting this complaint, states that:

"It is probable that one of the counsel for defendant was to some extent responsible for the jury discussing the matter of attorney's fees. He stated to the jury in his argument, in substance, that he did not know what part of the \$50,000 plaintiff was asking for the lawyers would get, but that doubtless they would get a large share of it, and that plaintiff was asking them to give her this enormous sum for 'heart balm and attorney's fees.'"

Another complaint is predicated upon the affidavit of one of the jurors that in the assessment of damages he "followed the law of Illinois." It appears that the juror understood that by the law of Illinois upon proof of a breach of promise to marry the damages to be assessed should be one-half of the proven estate of the defendant. In this case it had been proven that the estate of the defendant amounted to some \$18,000, and the juror in the beginning was in favor of a verdict for \$8,000 damages. It, however, further appears that this conception of the juror was not communicated to the others, and that he was not ultimately controlled by it, as evidenced by the fact that he agreed to a considerably less sum. At most, the matter, as it seems to us, merely indicates a want of sufficient qualification that should have been developed in the voir dire examination.

The testimony relating to the several subjects above mentioned is too voluminous to wholly embody in this opinion, but it has all nevertheless been carefully considered, together with the judge's qualification of the bill of exceptions which sets out the testimony, and it is to be remembered that our statute (Vernon's Sayles' Texas Civil Statutes, art. 2021) which authorizes a consideration of the testimony of jurors for the purpose of impeaching their verdict is contrary to the rule of the common law, and hence that a litigant so asking to disturb a verdict against him has the burden of showing, not only that the matters of which he complains amount to misconduct on the part of the jury, but also that the same operated to his prejudice. San Antonio Traction Co.

v. Cassanova, 154 S. W. 1190, and cases therein cited. It is also to be remembered that the statute expressly commits the determination of such questions to the "discretion" of the trial court, and, while such discretion is reviewable on appeal, his action in overruling the motion for a new trial on the ground of misconduct of the jury will not be disturbed when it seems that the trial judge acted fairly in the investigation. See *Railway Co. v. Gray*, 105 Tex. 42, 143 S. W. 606.

The remarks of the juror Jim Deaton present, perhaps, the most difficult question in this connection, but no prejudicial inference that could have been drawn from the remarks of the juror Deaton is more forceful than the statements of appellant himself, as testified to by Miss Parrish, and which the jury had the right to consider. As already indicated, Miss Parrish testified that defendant told her "all about his troubles"; "that he had been intimate with two women;" "that he was afraid he would get his head shot off;" "that getting into trouble with that other woman was nothing compared with this, it was just like going into hell this one." If the jury believed Miss Parrish in so testifying, as they had the right to do under the law, then it could not be misconduct on the part of the jury to infer that the defendant on former occasions had wronged some women other than the plaintiff, and that the juror Deaton may have thought it was X's daughter is wholly immaterial so far as disclosed in appellant's brief. If any one or more of the jury knew either X. or his daughter, it has not been made to appear. Moreover, the remarks of the juror Deaton, as has already been stated, occurred after there had been an agreement on the part of the jury to find for the plaintiff on the issue of a breach of the marriage contract, so that it affirmatively appears that the remarks could not, and did not, operate to appellant's prejudice on that issue. It may also be stated that appellant has not attacked the verdict on the ground that it is excessive, and nothing in the evidence indicates to us that it is so, or that the amount of damages as found by the jury was in any way augmented by reason of any prejudice or improper motive on the part of the jury. So that, in addition to the denials of the jurymen, it affirmatively appears, as it seems to us, that the several matters complained of occurring in the jury room did not operate to appellant's prejudice, in the legal sense of that term. We cannot, therefore, say that the trial court abused the discretion vested in him by law in overruling appellant's motion for a new trial on the several grounds indicated. Appellant's third, fourth, fifth, and sixth assignments of error are accordingly overruled.

[9] But one other question is raised, and that is presented in appellant's seventh assignment of error. Therein complaint is

made of the exclusion of the testimony of John Slover, by whom appellant offered to show, and could have shown, that the "general character as a lady" of appellant's present wife, formerly Mrs. Bailey, was "above suspicion." We find nothing in the evidence which constitutes the exclusion of the testimony of Slover prejudicial. Appellant offered his wife as a witness in his behalf, and she testified, among other things, without objection:

That she had never met Mr. Kaker until in April, 1913; that "he began paying attention to me about the 28th of April, 1913. Mr. Kaker was always perfectly gentlemanly in his conduct with me. He married me voluntarily. There was no circumstance of compulsion on my part which caused him to marry me. Nothing in my association with him that made it necessary for him to marry me if he did not voluntarily want to."

Nothing in all of the testimony, as we consider it, tends to refute the truth of the statement as so made by Mrs. Kaker. No attack, as we view the evidence, of any kind was made upon her character in any respect, and counsel for appellee so avowed at the time Slover's testimony was offered. In the absence of some reasonably definite attack, we think the court properly excluded the testimony as immaterial.

All assignments of error are accordingly overruled, and the judgment is affirmed.

HUTH v. HUTH et al. (No. 7266.)*

(Court of Civil Appeals of Texas, Galveston.
May 5, 1916. Rehearing Denied
June 1, 1916.)

1. EXECUTORS AND ADMINISTRATORS §22(2) — TEMPORARY ADMINISTRATOR — WILL CONTEST.

Under Rev. St. art. 3301, providing for the appointment of a temporary administrator pending the contest of a will to continue in force until the termination of the contest and until the appointment of a permanent executor or administrator with full powers whenever such appointment is necessary to preserve the estate from waste, it is not only the right but the duty of the county judge to make such appointment when necessary.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 117-122; Dec. Dig. §22(2).]

2. EXECUTORS AND ADMINISTRATORS §122(2) — COMMUNITY PROPERTY — TEMPORARY ADMINISTRATOR — POWERS.

Under Rev. St. art. 3556, relating to the administration on the estate of a deceased husband or wife leaving common property, a temporary administrator appointed pending the contest of a will has the power, when so given by the court in his order of appointment, to take possession of all the common property of the estate and hold the same in trust for the benefit of those entitled until such contest is determined.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 495, 495½; Dec. Dig. §122(2).]

3. PARTITION §13—ESTATE OF DECEDENT—PERSONS ENTITLED.

Under Rev. St. arts. 3557, 3560, relating to partition of property held jointly by a decedent's estate and a third person, one who has a joint

interest with the estate of a decedent in any property, real or personal, may apply to the county court in which administration is pending for the partition of the property belonging to the joint estate, and, when such application is made, it is the duty of the court to make a partition between the applicant and the estate of the deceased.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 36, 81; Dec. Dig. §13.]

4. INJUNCTION §28—PROBATE PROCEEDINGS—REVIEW.

Under Rev. St. art. 3631, providing that a person aggrieved by the decision, order, or judgment of the county court shall have the right to appeal therefrom, the remedy by appeal must be resorted to, and one aggrieved cannot restrain the enforcement of such decision of the county court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 62-65; Dec. Dig. §28.]

5. EXECUTORS AND ADMINISTRATORS §30 — TEMPORARY ADMINISTRATOR.

Under Rev. St. art. 3362, allowing a testator to appoint an executor, and article 3201, providing for the appointment of administrators by the probate court under certain conditions, though an executor named in a will qualified by taking the oath required, he abandoned his office where he gave no bond, failed to take possession of any part of the estate, or to do any act showing his intention to act as such executor, but is contesting the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 183-185; Dec. Dig. §30.]

6. CONSTITUTIONAL LAW §306 — HUSBAND AND WIFE §276(1)—DUE PROCESS OF LAW — ADMINISTRATION OF ESTATES.

Appointment of a temporary administrator to take charge of all of the community property belonging to the plaintiff and the estate of his deceased wife, made under Rev. St. art. 3559, providing that an executor or administrator shall acquire possession of all common property of a community estate, is not violative of Const. Tex. Bill of Rights, §§ 9, 13, or Const. U. S. Amend. 14, as to due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 928, 936, 939, 942-946, 948, 949; Dec. Dig. §306; Husband and Wife, Cent. Dig. §§ 1032, 1036; Dec. Dig. §276(1).]

Appeal from District Court, De Witt County; W. F. Ezell, Special Judge.

Suit by John L. Huth for injunction against C. J. Huth and others. From the action of the court in denying the injunction in part and requiring plaintiff to give bond, plaintiff appeals, and, from the action of the court in granting temporary injunction in part, defendants appeal. Judgment refusing the injunction in part affirmed, and judgment granting the injunction in part reversed and rendered.

Proctor, Vandenberg, Crain & Mitchell, of Victoria, for appellants. Crain & Hartman, Davidson & Bailey, and H. W. Wallace, all of Cuero, for appellee.

LANE, J. For the purposes of this opinion the following statement is sufficient:

John L. Huth, plaintiff herein, and Mrs. Wilhelmine Huth, were husband and wife. Mrs. Huth died in April, 1912. At the time of her death there existed a community es-

tate between her and her said husband, John L. Huth, of the estimated value of \$75,000. On May 29, 1912, John L. Huth and W. H. Huth, a son of plaintiff and Mrs. Huth, deceased, filed for probate in the county court of De Witt county an instrument purporting to be the last will and testament of said Mrs. Huth, in which they were named as joint executors. On the 3d day of July, 1912, said will so filed was duly probated as the last will of Mrs. Huth. Plaintiff, John L. Huth, never qualified as one of the executors, but W. H. Huth, the other party named as executor in the will, qualified by taking the oath as required by law on the 13th day of July, 1912. On the 12th day of July, 1912, the day before W. H. Huth qualified as said executor, three persons named as appraisers, joined by plaintiff, John L. Huth, prepared what purports to be an inventory and appraisal of the community property of John L. Huth and his deceased wife, Wilhelmine Huth. Said inventory and appraisal was made up, signed, and sworn to by said appraisers and plaintiff, John L. Huth. W. H. Huth, who took the oath as executor on the day after said inventory was made up, never signed or swore to said inventory, nor is there anything to show that he had anything to do with the making or filing of the same.

Among other provisions of said will admitted to probate is the following:

"I give and bequeath to my beloved husband, John L. Huth, all the property of which I shall die seised and possessed, both real and personal, as well as choses in action, of every kind and nature whatsoever and wheresoever situated, to have and to hold, to use and dispose of, absolutely as he may see fit.

"If after the death of my husband there remains any part of my estate, then I desire such remainder to be equally divided among my children, share and share alike.

"I constitute and appoint my son William Huth and my husband, John L. Huth, to be executors of this will and direct that no security be required of them as executors.

"It is my will that no other action shall be had in the court * * * in the administration of my estate than to prove and record this will and to return an inventory and appraisal of my estate and list of claims. And I authorize and empower my said executors, or the one who shall qualify as such, to sell and dispose of any portion of my estate, real or personal, at public or private sale, in the manner as may seem best to him or them, for the purpose of paying my debts and carrying out the intention of this my last will."

After the probate of said will, W. H. Huth never at any time took possession or control of any portion of said estate, but plaintiff, John L. Huth, took entire and complete possession and control of all the property of said estate and thereafter proceeded to control, manage, and dispose of the same absolutely and exclusively as he saw fit.

On the 4th day of January, 1916, appellees, including W. H. Huth, executor (except defendants Hagans), filed their petition in the county court of De Witt county contesting the probate of the said will of Mrs. Huth which was probated on the 3d day of July,

1912. They alleged in their petition: That there were no debts against said estate, and that, some years prior to the pretended execution of said instrument, the plaintiff conceived a violent and unreasonable dislike of and prejudice against them, his children, and determined that they, and none of them, should have or receive anything from his estate, or from the estate of their mother, the said Mrs. Wilhelmine Huth, deceased. That said Mrs. Wilhelmine Huth, deceased, at the time of the pretended execution of the said will was past 84 years of age and had been suffering for many years prior thereto from physical disease, bedridden a great part of the time, and constantly suffering physical pain. That plaintiff is a man of violent and unreasonable prejudices, moods, and notions, and because of his violent and unreasonable prejudices against them, as aforesaid, and in pursuance of his plan and determination to prevent them, or either of them, from receiving anything from the estate of their mother in the event of her death, which, on account of her bodily infirmity and great age, was naturally to be expected at any time, proceeded systematically and constantly to quarrel at, abuse, and threaten the said Mrs. Wilhelmine Huth that, unless she executed the document aforesaid, or some such instrument as would by its terms give and bequeath all of her property and estate unto the plaintiff alone, he would deny her simple desires and comforts; and so constantly worked on the said Mrs. Wilhelmine Huth, influenced her, threatened, and coerced her that finally, in order to secure temporary cessation from the terrible annoyance and cruel overbearing conduct of the plaintiff, she executed the said instrument, if it was ever executed in fact.

"That the said John Huth is now past 93 years of age, feeble in mind and body, and is physically and mentally incapable and incapacitated to handle, care for, and preserve said estate, to wit, the said community estate of himself and the said Mrs. Wilhelmine Huth, deceased, of which these petitioners are entitled to an undivided one-half by reason of being all of the children and heirs at law of the said Mrs. Wilhelmine Huth, deceased. That said estate consists largely of money, notes, securities, choses in action, and other personal property, requiring the constant attention of a man of good and capable mental and physical ability. That the said John Huth, by reason of his advanced years and mental and physical debility and senility, is easily a prey to designing persons, who endeavor to and succeed in inducing him to make and enter contracts disadvantageous to said estate, and into venturesome and unwise investments and enterprises. That said John Huth conceived a violent, unreasonable, and almost insane dislike of and prejudice against petitioners, who are his own children, and which prejudice and animosity is wholly unjustified, and he had repeatedly threatened to give away and dispose of during his lifetime all of the said property belonging to said community estate and to the estate of the said Mrs. Wilhelmine Huth, all of which is now in his hands, and petitioners have good reason to believe, and do believe, that, unless their rights are preserved by the immediate appointment of a temporary administrator, he will give away, lose, dissipate, and squander a

large part, if not all, of the said community estate and the estate of the said Mrs. Wilhelmine Huth, deceased. That by reason of such facts as hereinbefore stated, a necessity exists for the immediate appointment by this court of a temporary administrator of all the said community estate of the said Mrs. Wilhelmine Huth, deceased, and the said John Huth, under and by virtue of articles 3301 and 3559 of the Revised Statutes of Texas, as well as other laws in such cases made and provided, with full power to take and hold the same subject to the provisions of law in such cases and under the orders of this court, to preserve, control, and manage the same, to pay the necessary taxes, fire insurance, and other fixed charges for the preservation of the said property, to collect the rents, notes, interest, and other claims owing to said estate, to rent the real estate, and in general to preserve, husband, and properly care for all of said community estate, and that such appointment continue in force until the termination of this contest of the said pretended will of the said Mrs. Wilhelmine Huth, deceased.

"Wherefore, petitioners pray that citation issue to the said John L. Huth in the terms of the law, and that the order of the court, made on July 3, 1912, admitting the said pretended will of Mrs. Wilhelmine Huth, deceased, to probate, be vacated, canceled, and forever held for naught, and that said pretended will of Mrs. Wilhelmine Huth, deceased, be by this court denied admission to probate and of record, and same be adjudged and decreed null and void and of no force and effect whatsoever, and for such other relief, both special and general, as these petitioners may show themselves entitled to upon a trial of this cause; and they further pray that the court immediately make and enter its order in this case appointing some proper and qualified person as temporary administrator of all of said community estate of said Mrs. Wilhelmine Huth, deceased, and said John L. Huth, under said bond as to the court may seem proper, with powers as hereinbefore stated, and such additional powers and duties as to the court may seem proper."

On the 8th day of January, 1916, the judge of the county court granted the prayer of appellees and entered an order duly appointing E. Hagans temporary administrator of the estate of Mrs. Huth, with power to take into his possession the entire community estate of John L. Huth and his said deceased wife, pending said contest of said will. Thereafter, on the said 8th day of January, 1916, said Hagans duly and legally qualified as such temporary administrator in manner and form as required by law and undertook to perform the duties incumbent upon him as such temporary administrator.

It is also shown that on the 14th day of January, 1916, appellees (except Hagans) filed and offered for probate in said county court a certain instrument alleged to have been executed by Mrs. Wilhelmine Huth, on the 28th day of November, 1910, as her last will, and that citation was duly issued upon such application for such probate as required by law, returnable to the next term of said court.

On the 4th day of February, while said will contests and temporary administration were still pending, plaintiff, John L. Huth, presented his petition to the Honorable John M. Green, judge of the district court of De Witt county, praying for a writ of injunction against all of the appellees, to wit, the chil-

dren of Mrs. Huth, deceased, and said temporary administrator, E. Hagans, to restrain them (1) from longer asserting any claim or demand whatever against plaintiff, John L. Huth, based upon said order of said county court of De Witt county in said contest proceedings, and (2) to restrain said E. Hagans from acting as temporary administrator of said estate and from asserting any authority as such, or from asserting any right whatever to any possession, control, or authority over said property constituting the community estate of plaintiff and his said deceased wife. Judge Green refused to act upon plaintiff's petition for good reason shown, and the same was then presented to W. F. Ezell, judge of the Seventy-Third district court of San Antonio, Tex. On the 9th day of February, 1916, while said contest and temporary administration was still pending, Judge Ezell heard said petition and entered an order restraining E. Hagans from exercising any possession, control, or authority over the interest of plaintiff John L. Huth in the community property of plaintiff and his deceased wife, Wilhelmine Huth, and from dispossessing the said John Huth of such property upon the giving of a bond by plaintiff as required by law in the sum of \$2,000. But the injunction prayed for was refused in so far as it was sought to restrain said temporary administrator, E. Hagans, from asserting authority and right to the possession, control, and management of the interest in said community property owned by the said Wilhelmine Huth, deceased. From the action of the court in denying said injunction in part and in requiring plaintiff to give bond, the said John L. Huth has appealed, and, from the action of the court in granting said temporary injunction in part as against appellees, they have appealed.

Appellant John L. Huth presents his complaint by 17 main, and 9 subsidiary, propositions. To discuss these numerous propositions separately and in detail would necessitate an opinion of unreasonable length. We shall therefore condense said propositions by giving their substance and decide the matters presented in a general discussion.

Appellant contends: First, that as he was in peaceable possession of the property in question, of the estimated value of \$80,000, one-half undivided interest of which belonged to him as the reward of his own thrift, and the other one-half undivided interest of which being the subject-matter of a devise from his wife, under the terms of a duly probated will, he cannot be deprived of the possession of such property, of such value, by an order or decree of the probate court of De Witt county, because the amount in controversy is beyond the jurisdiction of said court; that the probate court cannot dispossess him of such property under probate proceedings, such as a contest, or proceedings to set aside the probate of his wife's will, and as ancillary thereto the appointment of a temporary

administrator; and that the attempt so to do by said probate court is void, and an absolute nullity for any purpose, and therefore the exercise of the powers attempted to be conferred by the orders and decrees of said court in appointing E. Hagans temporary administrator of the estate of his deceased wife, with powers to take from appellant the possession, control, and management of all or any portion of said property, should have been enjoined by the district court as prayed for. Second. That as W. H. Huth, and appellant, John L. Huth, are named in the will of Mrs. Huth, which had been probated on the 3d day of July, 1912, as independent executors, and as W. H. Huth, one of the parties so named, had qualified by taking the oath as such executor, an administration of the estate of Mrs. Huth was pending, and the property belonging to said estate was, as a matter of law, in the possession of a permanent independent administrator, and as, at the time the judge of the probate court of De Witt county appointed E. Hagans temporary administrator in said contest proceedings, such permanent administration was pending, such appointment was a nullity and void, and conferred no power upon said Hagans to take or attempt to take possession of said property, and therefore the district court should have granted the injunction prayed for in full.

The appellees' contention is that the judge of the probate court of De Witt county had the power to appoint E. Hagans temporary administrator with power to take possession, control, and management of the undivided community estate of John L. Huth and his deceased wife, pending said contest of the will of said wife, that the same might be preserved pending said contest under the provisions of article 3301 of our Civil Statutes; that he did so appoint said Hagans; that said Hagans duly qualified as such temporary administrator; that such temporary administration was, at the time the injunction prayed for in this case was asked for, and partly granted, pending, and is still pending in said probate court, and therefore W. E. Ezell, judge of the district court of the Seventy-Third judicial district, had no authority to grant any part of the injunction prayed for; and that he erred in so doing.

That a discussion of the questions above presented may be better understood, we here quote the following articles of our Civil Statutes.

Chapter 26, arts. 3527 to 3555, makes provision for the partition and distribution of estates of deceased persons by the probate court.

Articles 3556, 3557, 3559, 3560, 3301, and 3631 provide as follows:

"Art. 3556. When any husband or wife shall die leaving any common property, the survivor may: At any time after letters testamentary or of administration have been granted, and an inventory, appraisal and list of the claims of the estate have been returned, make application

in writing to the court which granted such letters for a partition of such common property, which application shall be acted upon at some regular term of the court.

"Art. 3557. If, upon the hearing of such application, there appear to be any such common property, and such surviving husband or wife shall execute and deliver to the county judge an obligation with two or more good and sufficient sureties, payable to and approved by the said county judge, for an amount equal to the value of his or her interest in such common property, conditioned for the payment of one-half of all debts existing against such common property, then the county judge shall proceed to make a partition of said common property into two equal moieties, one to be delivered to the survivor and the other to the executor or administrator of the deceased; and all of the provisions of this chapter respecting the partition and distribution of estates shall apply to any partition made under the provisions of this article, so far as the same may be applicable."

"Art. 3559. Until any such partition of common property is applied for and made as herein provided, the executor or administrator of the deceased shall have the right, and it shall be his duty, to recover possession of all such common property and hold the same in trust for the benefit of the creditors and others entitled thereto under the provisions of this title.

"Art. 3560. Any person having a joint interest with the estate of a decedent in any property, real or personal, may make application to the county court from which letters testamentary or of administration have been granted on said estate, to have a partition thereof; whereupon the court shall proceed to make a partition of said property between the applicant and the estate of the deceased; and all the rules and regulations contained herein in relation to the partition and distribution of estates shall govern partitions under this article so far as the same are applicable."

"Art. 3301. Pending any contest relative to the probate of a will, or the granting of letters of administration, whether such contest be in the county court or in the district court, it shall be the duty of the county judge, should he deem it necessary, to appoint a temporary administrator in the manner prescribed in the preceding articles in this chapter, with such limited powers as the circumstances of the case may require; and such appointment may continue in force until the termination of the contest and the appointment of an executor or administrator with full powers."

"Art. 3631. Any person who may consider himself aggrieved by any decision, order, decree or judgment, of the county court shall have the right to appeal therefrom to the district court of the county, upon complying with the provisions of this chapter." This article is embraced in chapter 22, Revised Statutes relating to probate matters.

From the articles of the statutes above quoted, we conclude:

[1] First. That at any time, pending the contest of a will, whether such contest be pending in the district court on appeal, or in the county court, it is not only the right, but the duty, of the county judge to appoint a temporary administrator with such powers as the circumstances of the case may require, whenever he deems such appointment necessary to preserve such estate from waste, and to continue in force such temporary administration until the termination of such contest, and until the appointment of a permanent executor or administrator with full powers is made. Revised Statutes, art. 3301.

[2] Second. That such temporary adminis-

trator has the power, when so given by the court in the order of appointment, to take or recover possession of all the common property of the estate, and to hold the same in trust for the benefit of those entitled thereto, until such contest is determined. Revised Statutes, art. 3556.

[3] Third. That if any person has a joint interest with said estate of a decedent in any property, real or personal, he may make application to the county court in which the administration of such estate is pending, to have a partition of the property belonging to said joint estate, and, when such application is made, it is the duty of the court to proceed to make a partition of said property between the applicant and the estate of the deceased. Revised Statutes, arts. 3557, 3560.

[4] Fourth. That if any person may consider himself aggrieved by any decision, order, decree, or judgment of the county court, he has the right to appeal from such decision, order, decree, or judgment to the district court of the county in which such administration is pending, and that he must resort to the remedy thus given for relief, and that he is not entitled to an injunction to restrain the enforcement of such decision, order, decree, or judgment of the county court.

[5] We think from what has already been said it is evident that we think the trial court erred in granting an injunction in any manner restraining said temporary administrator from exercising the powers conferred upon him by the order of the probate court.

But the appellant contends that, at the time E. Hagans was appointed temporary administrator, the estate in question was in the hands of a permanent administrator, or of appellant as devisee under the will of Mrs. Huth, and therefore no necessity existed for the appointment of a temporary administrator, and that for this reason the order making such appointment was a nullity, and, being a nullity, a court of equity had the right to enjoin such appointee from interfering with his possession, control, and management of said estate.

We think we may state the following to be undisputed facts: The will probated on July 3, 1912, purporting to be the last will of Mrs. Huth, named John L. Huth, her husband, plaintiff herein, and W. H. Huth, her son, as independent executors without bond; that plaintiff, John L. Huth, never qualified as executor under said will; that W. H. Huth took the oath required by law of executors, and only to this extent qualified as executor under said will; that W. H. Huth never at any time took possession, control, or management of any portion of the property belonging to said community estate, or in any wise exercised, or attempted to exercise control or management of the same; that John L. Huth, a man of 90 years of age, took exclusive possession, control, and management of the entire property belonging to said community

estate of himself and his deceased wife, in July, 1912, under the claim that he owned a one-half undivided interest thereof as the reward of his own thrift, and that he owned the other one-half thereof under the will now being contested in the probate court of De Witt county; that said John L. Huth has, since the death of his wife, disposed of a large portion of said common property, and that he was, at the time said temporary administrator was appointed, threatening to dispose of the remainder thereof; that W. H. Huth, nor any other person, was under bond as executor or administrator to said estate or any part thereof; that said W. H. Huth had at all times failed to take possession of any part of said estate after his qualification as executor under said will, or to do any other act showing an intention to act as such executor, but, on the contrary, he joined the other children of Mrs. Huth in contesting the instrument probated as her will, under which he is said to have qualified as such executor, and thereby abandoned his executorship.

From the facts above recited, we think it clear that there was no qualified executor or administrator of the estate of Mrs. Huth, deceased, and that no one was administering said estate, at the time the probate court of De Witt county resumed jurisdiction over the same and appointed E. Hagans temporary administrator. We think it equally clear from such facts, and from the law hereinbefore cited, that the order of said probate court appointing E. Hagans temporary administrator with power to take charge of, hold, and manage said estate until the pending contest of the will of Mrs. Huth is terminated, and until a permanent administrator, if necessary thereafter, is appointed and qualified, was lawfully made and entered, and that such order is not a nullity or void, as contended by appellant. *Roy v. Whitaker*, 92 Tex. 346, 48 S. W. 892, 49 S. W. 307; *Langley v. Harris*, 23 Tex. 569; *Prather v. McClelland*, 76 Tex. 584, 13 S. W. 543; *In re Estate of George W. Grant*, 93 Tex. 68, 53 S. W. 372.

In the case first cited, our Supreme Court held that the object of article 3362, Revised Statutes, was to enable a testator to commit the management of his estate to such person or persons as he might name, but not to so far withdraw the estate from the jurisdiction of the court that the settlement of it could not be resumed in case the trust should lapse by the failure of the executor to discharge his duties; that, if the person named as independent executor in the will fails to accept or to exercise the trust, it is at an end, and the court must appoint an administrator to administer the estate under the control of the court; that if the estate should cease to be represented by the abandonment of the trust by the executor named in the will, it would fall within the provisions of article 3291, Revised Statutes, which provides for the appointment of administrators

of estates by the probate court under certain conditions.

In the case of *Estate of George Grant*, supra, in speaking of the duties of the probate court when an independent executor, named in a will, abandons his trust, it is said:

"It must treat the provision for an independent administration as having failed for the want of an executor, and must proceed under the general law and resume entire control of the administration."

In the case of *Langley v. Harris*, supra, it is held that, when the executor named in the will fails to accept and exercise the trust, it is at an end; and the county court must appoint an administrator with the will annexed.

We do not think that in the face of the authorities cited, and the facts of the case, it can longer be seriously contended that the county court of De Witt county did not have the authority to appoint a temporary administrator to take charge of the property belonging to the estate of Mrs. Huth, deceased, pending the contest of her will.

[6] Appellant, however, makes the further contention that if it be conceded that the county court of De Witt county had the lawful authority to appoint a temporary administrator of the estate of his deceased wife, with power to take possession of the property belonging to said estate, still said court had no lawful authority to empower said temporary administrator to take possession of appellant's one-half undivided interest of the community property belonging to himself and the estate of his deceased wife; that the order of said court intending to confer such powers is void, because such appointment is an attempt to unlawfully seize and deprive appellant of his property without due process of law, in violation of sections 9 and 13 of the Bill of Rights of the Constitution of the state of Texas, and the Fourteenth Amendment to the Constitution of the United States.

We do not think this contention tenable. The whole of the property in question was the common property of appellant and the estate of his deceased wife, a one-half undivided interest of which was owned by appellant and the other one-half of which belonged to the estate of his deceased wife. Such property consisted of real and personal property, money, notes, choses in action, etc., and is incapable of an equitable partition and division between appellant and the estate of his deceased wife, without the intervention of a court of competent jurisdiction. It is provided by article 3559, Revised Statutes, that, until a partition of common property is applied for and made as therein provided, the executor or administrator of the deceased shall have the right, and it shall be his duty, to recover possession of all such common property and hold the same in trust for the benefit of the creditors and others entitled thereto under the provisions of said

article. We think that, in view of what has been said, there can be no serious doubt that the county court had the authority to appoint and empower the temporary administrator to take possession of the whole of said common property and to hold the same until a partition is had, as provided for by article 3560, Revised Statutes, hereinbefore set out, or until said will contest is terminated and a permanent administrator is appointed and qualified. Therefore it follows that the order appointing said temporary administrator with such powers was not void, nor was there any attempt to deprive appellant of his property without due process of law, as contended by him.

What has been said disposes of all the contentions made by both parties to this appeal.

Our conclusion is that the trial court should have wholly refused the injunction prayed for by appellant. Therefore so much of the judgment of the trial court as refused the injunction in part is affirmed, and so much of said judgment as enjoins and restrains E. Hagans, as temporary administrator as the estate of Wilhelmine Huth, deceased, from asserting authority or right as such temporary administrator, to the possession, control, and management of the whole of said community property, is here reversed, and it is here ordered that said prayer of appellant for said injunction be wholly refused.

Affirmed in part. Reversed and rendered in part.

OLIVER et al. v. SMITH, County Treasurer, et al. (No. 5744).*

(Court of Civil Appeals of Texas. San Antonio. June 7, 1916. Rehearing Denied June 30, 1916.)

1. SCHOOLS AND SCHOOL DISTRICTS \S 36—REDUCING AREA—POWER OF TRUSTEES.

That a maintenance tax has been voted in a common school district does not affect the power of the county school trustees to reduce the district's area.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. \S 59½; Dec. Dig. \S 36.]

2. SCHOOLS AND SCHOOL DISTRICTS \S 36 — CHANGE OF BOUNDARIES—QUO WARRANTO.

Any power of the district court to correct any abuse of discretion of county school trustees, in taking territory from one common school district and adding it to another, can be exercised only in a quo warranto proceeding instituted in the name of the state, or by some individual, under the authority of the state, who has a special interest affected by the change.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. \S 59½; Dec. Dig. \S 36.]

3. INJUNCTION \S 114(1) — PROCEEDING TO DECLARE SCHOOL DISTRICT INVALID—PARTIES.

To proceedings to declare invalid common school districts, as established by county school trustees through change of boundary, the trustees of the districts, by *Vernon's Sayles' Ann.*

Civ. St. 1914, art. 2822, constituted bodies corporate, are necessary parties.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 202; Dec. Dig. § 114(1).]

4. PARTIES § 84(4)—DEFECT—DEMURRER.

Omission of necessary parties is a defect rendering a petition subject to general demurrer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 136-138, 141, 142; Dec. Dig. § 84(4); Pleading, Cent. Dig. § 494.]

5. SCHOOLS AND SCHOOL DISTRICTS § 80 — TERRITORIAL LIMITS.

A common school district, as established by the county school trustees, by adding territory so that the farthest line thereof is more than four miles from its center, contrary to Vernon's Sayles' Ann. Civ. St. 1914, art. 2815, can have no legal existence.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 50; Dec. Dig. § 30.]

Appeal from District Court, Frio County; J. F. Mullally, Judge.

Suit by J. G. Oliver and others against O. L. Smith, County Treasurer, and others. From an adverse judgment, plaintiffs appeal. Affirmed.

Hicks, Hicks, Teagarden & Dickson, of San Antonio, for appellants. S. T. Phelps and R. W. Hudson, both of Pearsall, for appellees.

MOURSUND, J. This is an appeal from an order dissolving a temporary injunction which had been granted on the petition of J. E. Bandy, J. G. Oliver, B. F. Cude, Arch Dunlap, and Ed. Beidiger, filed February 22, 1916, complaining of O. L. Smith, county treasurer, E. E. Coleman, county collector, S. T. Dowe, county superintendent of schools, B. C. Vining, G. C. Harrison, O. E. Milam, W. E. Wickware, and H. E. Johnson, the last five named being the county school trustees of Frio county. The plaintiffs alleged that said county school trustees on December 14, 1915, willfully, improperly, and illegally attempted to create out of a portion of school district No. 2, which had theretofore been legally established, another district, and to attach same to a district in Medina county known as common school district No. 16, for the purpose of creating a county line district. They alleged that the county school trustees acted contrary to the best interests of school district No. 2, and without authority of law, because there had been voted a school tax in said district, which the patrons of the school were entitled to have applied to the best interests of said district No. 2, and to the maintenance and operation of the schools in said district as is provided by article 2836, Vernon's Sayles' Statutes. It was also contended that, by virtue of article 2815b of Vernon's Sayles' Statutes, in case of an existing tax upon a common school district, a part of which may be added to a common county line district, the tax is required, when collected, to be diverted to the benefit of

such common county line district. The court, pursuant to plaintiffs' prayer, granted an injunction restraining—

"the defendants in said application from, in any manner, diverting or attempting to divert the school funds or any part thereof collected, levied, or charged against the territory in Frio county as set forth in Exhibit A to said pleading, on property therein, or any funds on said territory arising by taxation, from common school district No. 2, of Frio county, Tex., and further enjoining said defendant school trustees from doing any act or thing attempting to carry into effect the division or change of said territory mentioned in Exhibit A to said pleading from common school district No. 2."

On March 6, 1916, J. E. Bandy, one of the plaintiffs, withdrew from the suit as a party plaintiff. On March 7, 1916, the county school trustees of Frio county, Tex., a corporation, made itself a party to the suit, and, together with defendants Vining, Harrison, and Wickware, county trustees, who acted in their individual capacity, filed an answer, duly verified, consisting of a general demurrer, various special exceptions, a general denial, and a special answer, the substantial allegations of which will be stated. Defendants alleged that on April 14, 1913, the county commissioners' court of Frio county entered an order fixing the boundaries of common school districts, and that the boundaries so fixed had never been legally changed in any manner so far as the same affect common school districts Nos. 2 and 10, the territory involved in this suit, and that said two districts, ever since said date, have had a board of trustees duly organized and charged with the management of said school districts under the law; that on August 28, 1915, the county school trustees, without notice to the inhabitants of, or the president of, District No. 10, and without any petition signed by a majority of legally qualified electors of said district, made an order abolishing said district and dividing its territory between districts 2 and 9. This order was copied in the answer, and it appears therefrom that the change was to be made "on certain defined lines," and the county surveyor was ordered to prepare the field notes clearly defining the changes and giving the boundaries of districts 2 and 9 as reconstructed, and that such field notes be duly recorded in the commissioners' court minutes. Defendants then alleged that said order was the only order ever made with reference to the subject-matter therein mentioned, and that such order was never recorded as required by law, and that no order giving the boundaries of districts 2 and 9, as they were to be reconstructed, has ever been made or recorded as required by law; that, if such boundaries had been established, the geographical center of district 2 would have been more than four miles from the farthest line of such district, and that Frio county has a population of less than 10,000 inhabitants. Defendants alleged, further, that

on December 14, 1915, the county school trustees, at a regular meeting, rescinded the action taken on August 28, 1915, and re-established the boundaries of district No. 10 as they existed prior to August 28, 1915. A copy of this order was attached to the answer as an exhibit, and it was alleged that such order had been duly entered in the minutes of said county school trustees; that on May 13, 1908, the commissioners' court of Frio county, by an order duly entered on the minutes, authorized the levy, assessment, and collection of a tax at the rate of 15 cents on each \$100 valuation of property in district No. 2, for the purpose of paying interest on a bond for \$800, issued by said district, and to provide sinking fund for payment thereof, which levy was made by virtue of an election duly held in said district; that on July 31, 1915, another election was held in said district No. 2, at which it was determined to issue bonds and levy a tax, and by virtue thereof on November 8, 1915, the commissioners' court entered an order levying a tax of 13 $\frac{3}{4}$ cents on the \$100 valuation of property in said district; that, when these elections were held, no part of the territory embraced in district No. 10 was contained in such district No. 2; that on May 22, 1912, by order entered by said commissioners' court, pursuant to an election held in said district No. 2, the maintenance tax was increased to 35 cents on each \$100 valuation of property in said district; that said maintenance tax and bond taxes aforesaid aggregate 53 $\frac{3}{4}$ cents on the \$100 valuation of property in said district, which is in excess of the amount permitted by law; that on November 20, 1915, at an election held in district No. 2, it was determined that a tax of 50 cents on the \$100 valuation of property in the district should be levied for maintenance purposes, and on December 13, 1915, the commissioners' court canvassed the returns and declared the tax to have carried, and decreed that the court was authorized to levy, and have assessed and collected, annually, said tax; that such tax is null and void for the reason that there had been theretofore levied, in said district, taxes exceeding 50 cents on the \$100 valuation of property; that, prior to the time said tax was voted, the tax rolls had been delivered to the collector, and said tax could not have been assessed or collected until the year 1916; that no taxes have been collected upon the territory known as district No. 10, and defendants have never sought or attempted to take any part of any taxes levied, assessed, and collected for the benefit of district No. 2, and divert same to district No. 10, or to the county line district composed of district No. 10 and district No. 16 of Medina county. Defendants prayed that the temporary injunction be dissolved, and that plaintiffs take nothing, etc.

On April 5, 1916, the defendants, who had

appeared and answered, filed a formal motion to dissolve the temporary injunction wherein they referred to their sworn answer, and stated two reasons relied upon to procure the dissolution of the injunction, as follows:

"(1) Because the plaintiffs named in said petition lack capacity and interest to maintain this suit.

"(2) Because there are no equities shown by plaintiffs' bill, which have not been fully controverted in defendants' answer."

On April 7, 1916, the judge entered an order dissolving the temporary injunction, but granted a stay until the appeal should be disposed of, except that the injunction should in no wise prevent the building of a new schoolhouse in the territory described in plaintiffs' petition as "Exhibit A," being that part of district 10 which had been added to, and afterwards taken from, district No. 2. The order contains a recital to the effect that the court is of the opinion that ground No. 1 stated in the motion was well taken, and therefore the injunction should be dissolved. All of the plaintiffs, except Bandy, who had withdrawn from the suit, joined in perfecting an appeal.

If, upon a consideration of the petition and answer, the injunction should have been dissolved, the judgment must be affirmed, regardless of whether the court placed his decision upon the correct ground.

Plaintiffs seek to set aside and hold for naught the order by the county trustees re-establishing district No. 10, whereby a portion of the territory embraced in district No. 2, at the time the 50 cents maintenance tax was voted on November 20, 1915, was taken out of said district. It is not alleged that any bonds had been issued in district No. 2, while said territory was a part thereof, nor is it alleged that either district No. 2, or district No. 10, as finally established, was not laid out for the convenience of the scholastic population. This is not a suit to compel the county trustees to redistrict in order to create districts convenient for the scholastic population, in other words to compel them to perform the first duty enjoined upon them by article 2817, Vernon's Sayles' Statutes. It is a suit having for its object the annulling of districts 10 and 2 as created by the county trustees, on the ground that a maintenance tax was voted in district No. 2 before it was changed. We are not referred to any statute which prohibits taking territory from a district in which a maintenance tax has been voted. Plaintiffs alleged the tax had been voted, but failed to allege that it had been levied, and the order declaring the result of the election, a copy of which is attached to the answer, shows that the commissioners' court did not undertake to levy the tax but merely decreed that it was authorized to levy the tax. The very next day the territory, formerly a part of district No. 10, was taken from district No. 2. It is not shown that

any taxes so voted had been levied, and there is nothing in the claim that taxes accrued to district No. 2 would be diverted from such district. In fact, the theory appears to be that the commissioners' court will probably levy the maintenance tax upon all property within the boundaries of district No. 2, at the time the tax was voted, regardless of the fact that such district had been reduced in area by an order of the county trustees. We think the matter of diversion of funds may be eliminated from consideration.

[1, 2] The case reduces itself to one in which plaintiffs rely upon the fact that a maintenance tax was voted in a common school district, to defeat the order reducing the area of such district. Did the county school trustees have the power to make the order? We are not referred to any statutory prohibition against such a change in a district, nor do we find any, although we do find that a reduction in area is prohibited when bonds have been issued and are outstanding. The Legislature knew that taxes for maintenance would be voted in more districts than for bond issues, but did not see fit to prohibit the reduction in area of such districts. We therefore conclude that the county school trustees had the power to make the change. We are unable to determine from appellants' argument, filed in lieu of brief, whether the contention is that the county school trustees were without power to make the change, or whether it is that, in making the change under the circumstances pleaded, said county trustees abused the discretion vested in them, and that the district court in the exercise of its revisory power should correct such abuse of discretion by setting it aside. The trial court doubtless understood the latter to be the contention relied upon, and therefore held that plaintiffs did not have capacity to maintain the suit. We have heretofore expressed the opinion that, if the district court has the power in the exercise of its supervisory control to declare an order void, because the district was not laid out for the convenience of the scholastic population thereof, it is clear that such power could only be exercised in a quo warranto proceeding instituted in the name of the state or by some individual under the authority of the state, who has a special interest which is affected by the existence of the school district. *Minear v. McVea*, 185 S. W. 1048, not yet reported. We think the same rule should be applied in this case, wherein it is also sought to have certain districts declared invalid, because of alleged abuse of discretion on the part of the county trustees. Said districts are bodies corporate under our statute, and we see no reason why a different rule should be applied than was applied by our Supreme Court in the case of *Crabb v. Celeste Ind. School Dist.*, 105 Tex. 194, 146 S. W. 528, 39 L. R. A. (N. S.) 601,

wherein it was held that the above-stated rule applied to an independent school district, to which territory had been annexed, which annexation was sought to be set aside and declared invalid. The court did not err in holding that plaintiffs, in the capacity in which they sued, could not maintain a cause of action on the grounds stated, for the purpose of annulling districts Nos. 10 and 2 as established by the county school trustees on December 14, 1915. *Parker v. Drainage Dist.*, 148 S. W. 351; *Davis v. Parks*, 157 S. W. 449; *Cochran v. Kennon*, 161 S. W. 67; *Cohen v. City of Houston*, 176 S. W. 809; *Wilson v. Brown*, 145 S. W. 641.

[3, 4] It appears that, if plaintiffs could maintain the suit, the trustees of the county line district and district No. 2, who are constituted bodies corporate by article 2822, Vernon's Sayles' Statutes, are necessary parties, for it is proposed to destroy the existence of such bodies corporate. *Renshaw v. Arnett*, 158 S. W. 1197. The omission of necessary parties is a defect rendering a petition subject to general demurrer. *Minear v. McVea*, supra, and authorities therein cited.

[5] If the power of the district court extends so far as to permit it, in the exercise of its supervisory power, to declare invalid certain districts, because it is not deemed to the interest of the scholastic population thereof to have a district reduced after it has voted a maintenance tax, it appears to us that, if the plaintiffs had the capacity to bring such suit and the necessary parties were before the court, the sworn answer of defendants stated facts showing conclusively that the injunction should have been dissolved. The defendants alleged that the territory in which the tax election was held on November 20, 1915, was never legally created into a school district; that it could not have had any legal existence as a school district because the farthest line thereof would have been more than four miles from the geographical center in a county having less than 10,000 population, contrary to the provisions of article 2815, Vernon's Sayles' Statutes. They also alleged that a portion of such territory formerly composing district No. 2, and composing district No. 2, as finally established by the county trustees, had, prior to the attempt to add part of district No. 10 thereto, voted upon itself greater taxes than were permitted by law, and that therefore the tax election held on November 20, 1915, was void. These allegations effectively answered all allegations in plaintiffs' petition relied upon to show that the county trustees abused their discretion in entering an order re-establishing district No. 10, fixing the boundaries of district No. 2 as they were before the commissioners' court undertook to add, to district No. 2, a part of district No. 10.

The judgment is affirmed.

MYERS v. GRANTHAM. (No. 5694.)

(Court of Civil Appeals of Texas, San Antonio, June 7, 1916. Rehearing Denied June 27, 1916.)

1. ACCOUNT, ACTION ON — 6(1)—ACTIONS—PLEADING—"OPEN ACCOUNTS."

An action on implied agreement to pay for labor performed and contract to pay commission for procuring buyer for land is not an "open account," and pleadings need not conform to statute as to open accounts.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 8; Dec. Dig. 6(1).]

For other definitions, see Words and Phrases, First and Second Series, Open Account.]

2. APPEAL AND ERROR — 930(3)—PRESUMPTIONS.

By specific requirement of Vernon's Sayles' Ann. Civ. St. 1914, art. 1983, if an issue made by the pleadings is not submitted to the jury, no request therefor having been made, it will be deemed to have been found by the court to support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3759; Dec. Dig. 930(3).]

3. ACCORD AND SATISFACTION — 26(1), 27—BURDEN OF PROOF.

Accord and satisfaction must be proved as any other agreement, and peremptory instruction thereon is properly refused in the face of conflicting evidence.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 31, 59, 83, 97, 110, 135, 150, 162; Dec. Dig. 26(1), 27.]

4. TRIAL — 29(1)—CONDUCT OF COURT—INTERROGATION OF JURY.

The court may interrogate the jury when it reports as to its answer to a special issue, in open court and in the presence of counsel for both parties.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80, 508; Dec. Dig. 29(1).]

5. APPEAL AND ERROR — 1170(1)—SCOPE OF REVIEW—HARMLESS ERROR.

Under rule 62a (149 S. W. 2d x) the court will not reverse a judgment for errors not reasonably calculated to cause, or not causing, rendition of an improper judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4454, 4540; Dec. Dig. 1170(1).]

6. WORK AND LABOR — 30(2)—REASONABLE VALUE—QUESTION FOR JURY.

Where the petition alleged that the reasonable value of services was a certain sum, the issue of reasonable value was for the jury.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-62; Dec. Dig. 30(2).]

Appeal from Caldwell County Court; J. T. Ellis, Judge.

Action by J. R. Grantham against A. E. Myers. Judgment for plaintiff, and defendant appeals. Affirmed.

Fred L. Blundell, and Monroe & Richards, all of Lockhart, for appellant. Jno. N. Gambrell and T. De Witt Gambrell, both of Lockhart, for appellee.

SWEARINGEN, J. Appellee sued for compensation for services or labors rendered appellant during the year 1912 upon an implied promise by appellant to pay appellee one-half the gross receipts for pasturage received by

appellant from various persons who might use appellant's pasture, which was alleged to be the reasonable value of his services. The services or labor rendered, described in general terms, was riding the pasture fence, keeping them in repair, caring for the stock pastured, and keeping the stock in the pasture. The amount sued for was \$25 which was one-half of \$50, the gross receipts by appellant for the year. Appellee also sued for a balance of \$79.50 due on an express contract, by which appellant promised appellee 5 per cent. of the price paid by A. L. Clem, the buyer for appellant's land. There were 960 acres alleged to have been sold for \$8.50 per acre. All the commission had been paid to appellee except, as alleged, \$79.50. Appellant denied both items of indebtedness, answered that he had paid all that the agreement for commission called for, and pleaded accord and satisfaction of the amount of the commission. Also set out several other defensive pleas not necessary to mention. The court submitted special issues to the jury, which answered all questions in favor of appellee. Upon the jury's verdict, after a remittitur of \$6, the court rendered judgment against appellant for \$100.91.

[1] The first and second assignments complain that the trial court erred in overruling appellant's exception to appellee's petition. The exceptions to the petition were founded upon the mistaken theory that the implied agreement for services in looking after appellant's pasture and the contract to pay appellee a commission for procuring a buyer for appellant's land were open accounts, and that appellee's petition was not in compliance with the statute, providing manner of pleading and proof of open accounts. Vernon's Sayles' C. S. art. 3712. The obligations sued on were not open accounts within the meaning of the statute (article 3712). *McCamant v. Batsell*, 59 Tex. 363; *Railway v. Daniels*, 62 Tex. 70; *Ballard v. McMillan*, 5 Tex. Civ. App. 683, 25 S. W. 327. The first and second assignments are overruled.

[2, 3] The third assignment is that the court erred in refusing to give the following requested instruction:

"You are instructed as part of the law applicable to this case that plaintiff cannot recover of defendant any amount due as commissions for the sale of land."

The reason urged by appellant for this peremptory instruction to find for appellant appears in the first proposition as follows:

"Where a claim is unliquidated or disputed, payment and acceptance of a less sum in satisfaction thereof operates as an accord and satisfaction."

The issue of accord and satisfaction was made by the pleadings, and there was a conflict of evidence upon the issue. The issue was not submitted to the jury. But the submission of the issue was not requested in writing by the appellant. The issue will be

deemed by this court as found by the trial court to support the judgment. Vernon's Sayles' C. St. art. 1885. The facts of the case at bar did not authorize a peremptory instruction because of accord and satisfaction, because accord and satisfaction must be proven as any other agreement. *Bergman Produce Co. v. Brown*, 172 S. W. 554; *Johnson v. Hoover*, 165 S. W. 900. The testimony of appellee positively denied any agreement of accord and satisfaction; denied the claim was disputed; showed it was a liquidated claim; denied that the last check for an amount, plus the others, less than the whole sum claimed, was either given or accepted in full satisfaction. On the other hand, appellant's testimony tends to show that appellant told appellee the check was in full settlement of a disputed claim, and that appellee accepted it with that condition. This conflict in the testimony was decided in favor of appellee by the court, as shown above. The third assignment is overruled.

[4] The fourth assignment is based upon the conduct of the court in discussing with the jury its answer to special issue No. 9 and sending the jury back for further deliberation. The court had the right to interrogate the jury as it did in open court, in the presence of counsel for both parties. There is no improper conduct of the court shown by the bill of exception. Furthermore, if error, it was not such prejudicial error as authorizes a reversal, because the issue was immaterial in this: The jury had already found that an expense contract was made between appellant and appellee for 5 per cent. commission to appellee on the price received by appellant for the land, and had already found that there were 960 acres of land which appellant sold for \$6.25 per acre. This finding fixed the amount of commission, and that appellant owed it to appellee, less the payments made. The assignment shows no reversible error. Arts. 1980, 1981, Vernon's Sayles' C. St.; *Roche v. Dale*, 43 Tex. Civ. App. 287, 95 S. W. 1100; 62a [149 S. W. x] Rules for Court of Civil Appeals.

[5] The fifth, sixth, and seventh assignments urge error in submission to the jury of three questions raised by the pleadings, but admitted and not disputed by the evidence. The jury answered them in accordance with the evidence. It is not entirely clear that the questions are undisputed, or that it was error to submit them; but even if the court should not have submitted the questions, the error did not amount to such a denial of the rights of the appellant as was reasonably calculated to cause, or did cause, the rendition of an improper judgment in the case. Hence we cannot reverse the judgment for the errors complained of in the fifth, sixth, and seventh assignments. 62a Rules Tex. Courts of Civil Appeals. The fifth, sixth, and seventh assignments are overruled.

[6] The error urged in the eighth assign-

ment is that in the pleadings there was no issue of reasonable worth of the services rendered by appellee in caring for the pasture of appellant, and the court erred in submitting the issue to the jury. Appellee's amended petition alleged that his services in caring for the pasture, fence, and stock during the year 1912 were reasonably worth one-half of all rents for pasture collected by appellant, and that appellant collected the sum of \$50 for pasturage during the year. The issue was raised by the pleadings and the evidence, and was very properly submitted to the jury. The eighth assignment is overruled.

The error complained of in the ninth assignment is immaterial, as will appear from our discussion of the fourth assignment.

The tenth assignment is that the court should have set aside the verdict and granted a new trial because the verdict is not supported by the evidence, but is contrary thereto. The evidence abundantly supported all the findings of the jury and the judgment. This assignment is overruled.

There is no error shown in the record. The judgment is affirmed.

GALVESTON ELECTRIC CO. v. HANSON. (No. 7186.)

(Court of Civil Appeals of Texas. Galveston.
May 10, 1916.)

1. TRIAL \Leftrightarrow 191(9), 253(4) — INSTRUCTIONS — ASSUMPTION AS TO FACTS — IGNORING ISSUES.

In an action for injuries to a woman alighting from a street car, the charges that, if the injuries were caused by the conductor's failure to use the care of a competent and prudent man in starting the car, verdict should be for plaintiff, but if he used such care in starting the car, or the woman caused or contributed to cause her fall by failure to use the care of a woman of ordinary prudence, verdict should be for defendant, were not erroneous as assuming the conductor's failure to exercise proper care, and as authorizing finding for plaintiff, though the jury should find the woman was guilty of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420, 430, 613, 615; Dec. Dig. \Leftrightarrow 191(9), 253(4); Carriers, Cent. Dig. § 1337.]

2. APPEAL AND ERROR \Leftrightarrow 1064(1)—HARMLESS ERROR.

Where no harm resulted to defendant by unnecessary correction of a proper charge and re-reading it to the jury, there was no error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. \Leftrightarrow 1064(1); Trial, Cent. Dig. §§ 475, 525, 528.]

3. APPEAL AND ERROR \Leftrightarrow 742(5)—ASSIGNMENT OF ERROR—COMPLIANCE WITH RULES.

Under Rules for the Courts of Civil Appeals 29, 30, 31 (142 S. W. xii, xiii), an assignment of error to the refusal to give a charge will not be reviewed, when not followed by any proposition or statement of facts which would call for such a charge; the testimony of no witness being set out, and the Court of Civil Appeals not being referred to the page or pages of the record where such testimony might be found, no proposition following the assignment, and the only

statement thereunder being a copy of appellant's bill of exceptions to the refusal of the charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ¶ 742(5).]

4. NEW TRIAL ¶ 56—MISCONDUCT OF JURY—HARMLESS ERROR.

That a juror stated that he had never been represented by an attorney for plaintiff, when in fact he had been so represented when charged with a misdemeanor, was not ground for setting aside the verdict for plaintiff, or for granting new trial, in the absence of some showing that defendant was injured by accepting the juror, or that the latter was in some manner influenced against defendant; improper conduct of the jury not being ground for reversal, unless shown to be injurious to the party complaining.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 116-119; Dec. Dig. ¶ 56.]

5. APPEAL AND ERROR ¶ 978(3) — REVIEW — OVERRULING MOTION FOR NEW TRIAL FOR MISCONDUCT OF JURY.

Where the trial court makes full investigation of the alleged misconduct of the jury, and finds that it was not such as influenced the jury in returning their verdict, his action in overruling motion for new trial based on such alleged misconduct will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3870; Dec. Dig. ¶ 978(3).]

Appeal from Galveston County Court; George E. Mann, Judge.

Suit by Ralph Hanson against the Galveston Electric Company. From judgment for plaintiff, defendant appeals. Judgment affirmed.

Terry, Cavin & Mills, John G. Gregg, and E. H. Cavin, all of Galveston, for appellant. H. C. Hughes and Thos. C. Turnley, both of Galveston, for appellee.

LANE, J. This suit was instituted by Ralph Hanson against the Galveston Electric Company to recover damages for personal injuries alleged to have been suffered by Mrs. Alberta Hanson, the wife of plaintiff, while alighting from one of the street cars of appellant, Galveston Electric Company.

The plaintiff alleged that on or about October 8, 1914, Alberta Hanson, wife of Ralph Hanson, entered one of the cars operated by the defendant, known as Twenty-First and Twenty-Fifth street car, and became a passenger thereon and paid the regular fare of five cents; that when the said car approached Twenty-First street and Avenue J, plaintiff's wife, wishing to get off of the car, gave the customary signal, and that the defendant and its agent, while the plaintiff's wife was alighting from the car, negligently caused the car to start, throwing plaintiff's wife violently to the ground and causing her injuries, for which he asks damages in the sum of \$1,000, together with \$10 for drug bills and \$25 for doctor's bills.

Defendant answered by general demurrer and a special demurrer that the allegations of injury were too vague and indefinite, and a denial that its agents violated any duty towards plaintiff's wife, or that they negligently gave a signal to start the car and negli-

gently started the car upon which plaintiff's wife was riding prior to her alighting therefrom, or while she was on the step of said car, and denied that any negligence of defendant in suddenly starting the car, or otherwise, was the direct or proximate cause of plaintiff's wife falling to the ground.

Defendant further pleaded that the plaintiff's wife, by reason of her contributory negligence, caused whatever injuries she may have sustained, and that such contributory negligence was the proximate cause of such injuries, if any; that, while the car was standing still, plaintiff's wife, in attempting to alight, failed to use that degree of care and caution which an ordinarily prudent person would use for her own safety, under the same or similar circumstances; and that by reason thereof in some manner she let her foot slip, which caused her to fall to the ground while she was alighting from the car.

Plaintiff filed a supplemental petition, denying all the material matters of defense set up in defendant's answer. The cause was tried before a jury, which returned a verdict for the plaintiff, Ralph Hanson, for the sum of \$200, and judgment was rendered accordingly. From this judgment defendant has appealed.

By paragraphs 1 and 2 of the court's charge the jury were instructed as follows:

"If the jury find from the evidence that the injuries sustained by plaintiff's wife were caused by the failure of the conductor to use such care in starting the car as a very competent and prudent man would have exercised under the same or similar circumstances, your verdict will be for plaintiff.

"But if the jury find from the evidence that the conductor used such care in starting the car as a very competent and prudent man would have exercised under the same or similar circumstances, or if the jury find from the evidence that the woman caused or contributed to causing her fall by failure to use the care that a woman of ordinary prudence would have used under the same or similar circumstances, then your verdict will be for the defendant."

Appellant objected to so much of said charge on the grounds that it assumed that the conductor in charge of the street car upon which appellee's wife was riding at the time of the alleged injuries failed to exercise such care in starting the car as a very competent and prudent man would have exercised under the same or similar circumstances, and that such charge authorized the jury to find for plaintiff, even though it should find from the evidence that the plaintiff's wife was guilty of negligence contributing to her injuries. The charge of the court was read to the jury as above set out. After said objection was urged, the court added the words "if you find the car was so started" after the word "circumstances" in the first paragraph of said charge, to meet the objection urged in part, and then re-read said charge, as corrected, to the jury.

Appellant's first assignment of error is as follows:

"The court erred in reading to the jury over the defendant's objection that part of the first paragraph of the court's charge in which the court authorized to find for the plaintiff, even though they may also find that Alberta Hanson was guilty of contributory negligence, all as more fully set out in defendant's bill of exceptions No. 1, and then after said reading said portion of said paragraph No. 1 of said charge correcting or altering the same, and re-reading it to the jury as altered."

The complaint made by said assignment, and the sole proposition presented thereunder in appellant's brief, is that the court erred in the preparation of the first paragraph of his charge above set out, and in reading it to the jury before the correction thereof was made, and thereafter re-reading it to the jury after such correction. The insistence is that incurable injury had been inflicted upon appellant by reading the charge to the jury as originally constructed, and that the correction made by the court to meet the objections presented by the assignment and proposition thereunder did not cure such injury.

[1, 2] The contention of appellant is untenable. When paragraphs 1 and 2 of the court's charge are read together, they, nor either of them, are subject to the objections urged to them by appellant, and the amendment or correction made by the court to meet such objections was unnecessary. No harm, however, resulted to appellant by making the correction and then re-reading the charge, as corrected, to the jury; hence the first assignment is overruled.

[3] By appellant's second assignment it is insisted that the court erred in refusing to give in charge to the jury appellant's charge No. 2, which is as follows:

"If you find from the evidence that the car of the defendant was standing still at the time Alberta Hanson fell, then you will find a verdict for the Galveston Electric Company."

This assignment is not followed by any proposition, or a statement of any facts, which would call for the submission, or even justify the trial court in giving such charge. It is true that under the head of "Remarks" in appellant's brief the statement is made that the testimony introduced by the defendant was that the car was standing still at the time the plaintiff's wife, Alberta Hanson, fell. But the testimony of no witness is set out, nor are we referred to the page or pages of the record where such testimony may be found. Rule 29 (142 S. W. xii) prescribed by the Supreme Court for the government of the Courts of Civil Appeals provides that appellant, in order to prepare properly a case for submission when called, shall have filed a brief of the points relied on, in accordance with, and confined to, the distinct specifications of error relied on; each ground of error being separately presented under the proper assignment, and each assignment not copied in the brief and accompanied with its appropriate propositions and statements shall be regarded as abandoned.

Rule 30 (142 S. W. xiii) provides that each point under each assignment shall be stated as a proposition unless the assignment itself may sufficiently disclose the point. Rule 31 (142 S. W. xiii) provides that:

"To each of said propositions there shall be subjoined a brief statement in substance, of such proceedings, or part thereof, contained in the record, as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record. This statement must be made faithfully, in reference to the whole of that which is in the record having a bearing upon said proposition, upon the professional responsibility of the counsel who makes it and without intermixing with it argument, reasons, conclusions or inferences."

There is no proposition following the assignment and the only statement thereunder is a copy of appellant's bill of exception to the refusal of the court to give his special charge No. 2, which is copied in the bill. This is not a compliance with rules 29, 30, and 31 above mentioned. We are therefore not called upon to consider said assignment.

[4, 5] By appellant's third assignment it is insisted that the court erred in not granting appellant a new trial because of the misconduct of the juror Douglass Bauss, in this: That when said juror was being questioned touching his qualifications as a juror, counsel for appellant asked him if he or any one related to him was at that time or had been at any time represented by Mr. Thomas Turnley, or Messrs. King & Hughes, attorneys for appellee, in the capacity of attorney or counsel, and that in answer to such question the juror replied that he had not been so represented; that said answer was untrue; that in fact and in truth said juror had been represented by Thomas Turnley on the 24th day of March, 1915, in a case wherein said juror was charged with a misdemeanor; that, had counsel for appellant known such fact, he would not have accepted said juror.

The evidence on the motion for new trial, however, shows that Mr. Turnley did so represent the juror. Appellant made no attempt to show that he was in any way injured by accepting said juror, nor does he now contend that he was in fact so injured. The fact that the juror stated that he had never been represented by Mr. Turnley, when in fact he had been so represented, was no ground for setting aside the verdict of the jury, or granting a new trial, in the absence of some showing that appellant had been injured by accepting said juror, or that the juror was in some manner influenced against appellant by reason of the fact that he had been so represented by Turnley. Improper conduct of a juror is not ground for reversal, unless it is shown that such improper conduct worked injury to appellant. We cannot presume that the mere fact that Turnley represented the juror in a misdemeanor case would in any way influence said juror to render an improper verdict against appellant. Where the trial court, as in this case, makes a full investigation of the alleged misconduct

of a juror, and finds that such misconduct was not such as probably influenced the jury in rendering its verdict, his action in overruling the motion for new trial, based on such alleged misconduct, will not be disturbed. The fifth assignment is overruled.

We find no error committed in the trial of the cause which should cause a reversal of the judgment rendered by the trial court. Therefore said judgment is affirmed.

Affirmed.

SOUTHERN TRACTION CO. v. WILSON. (No. 5603.)

(Court of Civil Appeals of Texas. Austin. April 5, 1916. Dissenting Opinion April 12, 1916. On Motion for Rehearing, June 7, 1916.)

1. APPEAL AND ERROR \S 930(4)—REVIEW—PRESUMPTION—VERDICT.

Where no special issues are submitted and the jury returns a general verdict, on appeal it is presumed that the jury found in favor of appellee on every issue necessary to sustain the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3760, 3761; Dec. Dig. \S 930(4).]

2. STREET RAILROADS \S 113(7) — ACCIDENTS — ACTIONS—EVIDENCE—COMPANY'S RULES.

In an action against street railway company for injuries to the driver of a laundry wagon, evidence that the motorman was violating the company's rules in not running slowly at the place of the accident was admissible as tending to show absence of negligence by plaintiff, it appearing plaintiff knew of the rule, since he might have relied upon its observance until he discovered the contrary.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. \S 238; Dec. Dig. \S 113(7).]

3. STREET RAILROADS \S 93(2) — COLLISION WITH VEHICLES—WHAT CONSTITUTES NEGLIGENCE—VIOLATION OF OWN RULES.

The violation by motorman of a street railway company of its rule to run slowly at a certain point does not of itself give an injured person a right of action.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. \S 196, 200; Dec. Dig. \S 93(2).]

4. NEGLIGENCE \S 83 — DISCOVERED PERIL — CONTINUING CONTRIBUTORY NEGLIGENCE.

The "last clear chance" or "discovered peril" rule applies only where the operation of the injured person's negligence in getting into a position of peril has come to an end, as by his ignorance of, or inability to escape from, such place of danger, and does not apply when his contributory negligence continues to the time of the injury—as by his persistence in remaining in or going on to occupy the position of danger—since in such case the negligence of the person charged cannot be said to intervene so as to become the sole proximate cause; but the negligence of both parties concurs, thus rendering the injured person's contributory negligence a bar under the usual rule as to concurring contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 115; Dec. Dig. \S 83.]

5. DAMAGES \S 62(2)—DUTY OF INJURED TO PREVENT DAMAGE—INJURIES TO PERSON.

One injured by another's fault is required to use only ordinary care to prevent the aggravation of his injuries.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 120-123; Dec. Dig. \S 62(2).]

On Motion for Rehearing.

6. STREET RAILROADS \S 110(2) — ACCIDENTS — ACTIONS—PLEADING CONTRIBUTORY NEGLIGENCE.

In action against a street railway company for injuries by collision, an answer alleging that plaintiff was in plain view of the car, and that he negligently drove his wagon upon the track without making any effort to avoid collision, was a good plea of contributory negligence after discovered peril on the part of plaintiff, at least where no exception was taken.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. \S 224; Dec. Dig. \S 110(2).]

Key, C. J., dissenting.

Appeal from District Court, McLennan County; Tom L. McCullough, Judge.

Action by J. A. Wilson against the Southern Traction Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Nat Harris and Spell & Sanford, all of Waco, and Templeton, Beall & Williams, of Dallas, for appellant. Pat M. Neff, of Waco, Chas. R. Miller, of Houston, and Chas. L. Black, of Austin, for appellee.

JENKINS, J. Appellant is a street railway company, operating its cars in the city of Waco. Appellee, while driving a laundry wagon, was struck by appellant's car and injured. He brought suit to recover for such injury, alleging negligence on the part of appellant (1) in operating the car too rapidly; (2) in failing to sound the gong; (3) in failing to have the car under control; (4) in failing to keep a proper lookout; (5) in failing to have the car equipped with air brakes; (6) in the motorman's disregarding the rule of the company to run slowly at the place of the accident; and (7) discovered peril.

The appellant, in addition to special denials of each of the alleged grounds of negligence, pleaded contributory negligence on the part of appellee. Each of the alleged grounds of negligence was submitted to the jury under a general charge, and there was a verdict for appellee, assessing his damages at \$13,500. No error is assigned as to the amount of the judgment.

The evidence was sufficient to require the submission of each of these issues to the jury. There was no error in the court's definition of negligence, viz., the failure to exercise ordinary care, for which reason we overrule appellant's assignments of error 1, 2, 2a, 3, 4, 5, 6, and 7.

[1] This case, as well as all cases where more than one distinct ground of recovery is alleged, should have been submitted upon special issues. It was alleged that the appellant's motorman failed to keep a proper lookout, and was thereby guilty of negligence; that he failed to discover appellee's peril in time to prevent injuring him; that the company was negligent in not equipping its car with air brakes. The jury may have

found either of these allegations to have been true, but they could not all have been true. If the motorman did not discover the appellee's peril, or if he did discover the same but was unable to thereafter stop his car for the want of air brakes, the doctrine of discovered peril is not in the case. On the contrary, if the facts show discovered peril, the failure to keep a proper lookout, or the failure to have the car equipped with air brakes, is immaterial. As no special issues were submitted and the jury returned a general verdict, we cannot know what the verdict was based upon; consequently we must presume that they found in favor of the appellee upon every issue necessary to sustain the judgment.

[2, 3] In its seventh assignment of error, appellant complains of the charge of the court in submitting the issue of the violation of the company's rules, as indicated by the "slow" sign. Evidence upon this issue was admissible on the part of appellee as tending to show the absence of negligence on his part. It appears that he knew of said sign and rule of the company, and he might have relied upon the observance of the same until he discovered the contrary. *Railway Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 60; *Id.*, 11 Tex. Civ. App. 21, 31 S. W. 323; *Hayward v. Street Ry. Co.*, 74 N. J. Law, 678, 65 Atl. 737, 8 L. R. A. (N. S.) 1062, and note to same, pages 1064, 1065. But the violation of this rule did not of itself give the appellee a cause of action, and the court did not so instruct the jury herein. The appellee's cause of action, in so far as speed is concerned, depended upon whether or not the car was being operated at a dangerous rate of speed, and the rule of the company neither added to nor took from his cause of action, if any he had.

"The care [which] employes of companies must exercise in the operation of cars, so far as the general public is concerned, is to be determined by the principles of law, and not by the rules adopted for the guidance of its employes." *Railway Co. v. Gaugh*, 133 Ky. 467, 118 S. W. 278.

See, also, *Fonda v. Railway Co.*, 71 Minn. 438, 74 N. W. 169, 70 Am. St. Rep. 341; *Isackson v. Railway Co.*, 75 Minn. 27, 77 N. W. 433; *O'Keefe v. Railway Co.*, 33 App. Div. 324, 53 N. Y. Supp. 943.

We think this charge was upon the weight of the evidence, but not for the reasons assigned by appellant; hence we have overruled the assignment as to this charge.

There is no affirmative error in the charge of the court complained of in the eighth assignment of error, for which reason the same is overruled. *Manufacturing Co. v. Femelat*, 79 S. W. 872; *Railway Co. v. McVey*, 81 S. W. 999, 1000; *Robinson v. Varnell*, 16 Tex. 387; *Abney v. Bank*, 152 S. W. 734.

[4] Paragraph 14 of the court's charge is as follows:

"If you believe from the evidence that, at the time of the accident, the plaintiff was in

plain view of defendant's car which struck him and his laundry wagon, as said car was moving south over its line on North Twelfth street, and that he drove his horse and wagon upon defendant's track without making any effort whatever to avoid a collision between his said wagon and defendant's moving car, and that plaintiff, J. A. Wilson, was thereby guilty of negligence which caused or contributed to his injury, and that but for such negligence on his part, if any, such injuries would not have been received by him, then you will return a verdict for the defendant, unless you find for plaintiff under paragraph 16 of this charge."

Paragraph 16 is as follows:

"If you believe from the evidence that, when the defendant's car that collided with plaintiff's laundry wagon was approaching the crossing of Washington and North Twelfth streets upon the occasion in question, the defendant's motorman in charge of said car saw the plaintiff and his laundry wagon on Washington street near the defendant's track at said crossing, driving towards said crossing, and it reasonably appeared to said motorman in charge of said car that said J. A. Wilson would not probably stop before he reached said track, or would not pass over the same in time to avoid a collision with said car, and that the plaintiff was in peril and that defendant's said motorman knew he was in peril, if he was, and you further believe from the evidence that said motorman then failed to use all the means that he had at his command, consistent with the safety of said car and the passengers in the same, to stop the same and prevent a collision; and if you further believe from the evidence that, by the use of all the means he had at command for stopping said car, he could have stopped the same or so reduced the speed thereof as to avoid a collision with said laundry wagon, you will find for the plaintiff, J. A. Wilson, even though you may believe that said J. A. Wilson was guilty of contributory negligence, as alleged by the defendant, in the manner in which he approached and drove upon said street car track."

The defendant "alleged" the manner in which plaintiff approached and drove upon said street car track to be that plaintiff—

"was in plain view of defendant's car as it was moving south over its line on Twelfth street in the city of Waco at a reasonable rate of speed, and that plaintiff recklessly and negligently drove his horse and wagon upon defendant's track without making any effort whatever to avoid a collision between his said wagon and defendant's moving car. * * * That he saw defendant's car in ample time to have stopped his horse before going upon defendant's track and thus have avoided the collision and consequent injuries resulting therefrom, if any; but said plaintiff recklessly and negligently drove upon defendant company's track in front of defendant's moving car, with full knowledge of the fact, and with full knowledge of the fact that those in charge of the car were making every effort in their power to prevent a collision between said moving car and plaintiff's wagon * * * and if the plaintiff was injured, as he alleges, it was because of his own contributory negligence, and was the direct and proximate cause thereof."

This charge is contradictory in that it instructs the jury, in effect, to find for plaintiff if they believe that defendant's motorman failed to use all the means in his power to stop the car, although they may believe that plaintiff drove upon the track with full knowledge that the motorman was "making every effort in his power to prevent a collision between said moving car and plaintiff's

wagon." Such was the allegation in defendant's answer to which this charge refers. But, construing this charge in the light most favorable to appellee, it instructs the jury that, if the motorman discovered the appellee's peril and could have avoided injuring him by the use of all means at his command, the plaintiff is entitled to recover, though he also discovered that the car would not stop, and realized the peril of attempting to cross in front of it and recklessly drove in front of the car, doing nothing to avoid the injury.

We have been cited to no case in this state presenting the issue raised by appellant's assignment of error as to this charge. In none of the cases in this state involving discovered peril, so far as we know, unless it be *Railway Co. v. Jacobson*, 28 Tex. Civ. App. 150, 66 S. W. 1111, does it appear that the plaintiff discovered his peril when he could have extricated himself therefrom, but negligently failed to do so, or that he realized the peril to which a certain course of conduct would expose him, but nevertheless recklessly adopted such line of conduct.

Before entering upon the discussion of this issue, we deem it proper, as the basis of our conclusion, to call attention to some well-recognized fundamental principles of the law of negligence:

- (1) Negligence implies a breach of duty.
- (2) It is the duty of every person to use ordinary care to avoid injuring the person or property of another.
- (3) It is the duty of every person to use ordinary care to avoid being injured in his person or property by the acts of another.
- (4) The failure to exercise such care is negligence.
- (5) Negligence implies inadvertence or neglect to perform a duty and excludes malice or injuries intentionally inflicted.
- (6) One who, by his negligence, proximately causes injury to another is liable in damages to the injured party.
- (7) Where the injured party is himself negligent, and his negligence concurs with the negligence of the party inflicting the injury and is also a proximate cause of the injury, he cannot recover.

The rule stated in paragraph 7, *supra*, omitting the word "proximate," was first announced in *Butterfield v. Forester*, 11 East, 60 (2d American Ed. 43), April, 1809. That case did not qualify the plaintiff's right to recover by making his act of negligence the proximate cause, but announced the broad rule that the plaintiff could recover in no case where his negligence concurred, even though remotely, with the negligent conduct of the defendant in producing the injury. This rule was modified by the celebrated case of *Davies v. Mann*, 10 M. & W. — (1842), and which held that the owner of a donkey who had negligently left it fettered upon the highway was entitled to recover against a party who negligently drove over and killed

the donkey, holding, in effect, that the prior negligence of the owner of the animal was but a condition or remote cause of the injury, and that the negligence of the defendant was the sole proximate cause. This case has been many times cited and followed by the courts in England and in this country. The effect of the decisions is that, if the negligence of the plaintiff is not the proximate cause of the injury, it is, in law, no cause at all. It is not a juridical cause but only a condition. The case of *Davies v. Mann* involves the modern doctrine of "last clear chance" and "discovered peril," though it does not seem to hold that it is necessary that the peril should have been actually discovered, if by the use of reasonable diligence it might have been.

Before further discussing the issue involved under this assignment, let it be remembered that willful or malicious injury does not involve negligence, or, in other words, in such case the law conclusively presumes that the willful and malicious act of the defendant was the proximate cause of the injury and refuses to consider the prior negligence of the plaintiff, though, but for such intentional injury on the part of the defendant, such prior negligence of the plaintiff might have been a bar to recovery. *Rider v. Rapid Transit Co.*, 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 129; *Holwerson v. Railway Co.*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; 7 Am. & Eng. Ency. Law, 443; 29 Cyc. 509; *Shearman & Redfield on Negligence* (5th Ed.) 64. In the instant case, willful injury was neither alleged nor submitted to the jury; consequently it cannot be considered in support of the verdict.

Unless the doctrine of discovered peril when alleged and proven, like that of willful injury, puts negligence out of the case, then the contributory negligence of the plaintiff, if not merely prior to but also concurrent with the negligence of the defendant and constitutes a proximate cause of the injury, must be taken into consideration, and will defeat plaintiff's right of recovery.

As indicating that the willful or wanton conduct of the motorman, if any, cannot be considered as supporting the verdict, we cite the fact that the basis of recovery as submitted in the charge of the court excludes malice or wantonness, and the evidence is by no means conclusive that such conduct was willful or wanton. The court instructed the jury that the ground for recovery would be that the motorman, after discovering plaintiff's peril, failed to use every means at his command to avoid the injury. The motorman testified that he did use every means at his command after discovering appellee's peril. The facts which he stated were that he put on the emergency brakes, and, the track being wet, the wheels slipped; that he loosened the brakes and immediately tightened them again, and that thereafter he broke the circuit overhead. He and several other witnesses

es testified that he sounded the gong, but a number of witnesses testified that he did not. Now the jury may have concluded that, though he made considerable effort to avoid the injury, and that he believed that he was making every necessary effort, still, that he was negligent in not breaking the circuit when he first discovered the peril, or in releasing the brakes after having tightened them, or in not sounding the gong. The jury might have concluded that his failure to use some means that he did not use was negligence, but not that it was willfulness or wantonness. Willfulness or wantonness implies not only the intentional doing or omission of an act, but also the contemplation and intention of its consequences. However, as above stated, the doctrine of malicious injury is not involved in this case.

Mr. Justice Denman in *Railway Co. v. Breadow*, 90 Tex. 31, 36 S. W. 412, said:

"If defendant, through the parties in charge of the engine, knew of Breadow's peril in time to have avoided the same, such knowledge imposed upon it the new duty of using every means then within its power, consistent with the safety of the engine to avoid running him down, and a failure to do so would render it liable, notwithstanding he may have been guilty of contributory negligence in being exposed to the peril. This new (duty) and liability for its breach is imposed, upon principles of humanity and public policy, to prevent what would otherwise be, as far as civil liability is concerned, the licensed destruction of persons negligently exposing themselves to peril. The same principle of law, which, on grounds of public policy, will not permit a person to recover when his own negligence has proximately contributed to the injury, will not permit the party who has inflicted the injury in violation of such new duty to defend upon the grounds of such negligence."

In other words, this new duty puts out of the case the negligence of the plaintiff, and prevents it from being a proximate cause of his injury; for, as stated in the foregoing quotation, the law will not permit a person to recover "when his own negligence has proximately contributed to the injury." But when has his own negligence proximately contributed to the injury? As applied to the facts in the *Breadow* Case, the excerpt above set out is in harmony with all of the well-considered cases on negligence of which we have any knowledge, as well as with the fundamental principles of the law of negligence. The negligence of *Breadow* consisted in his failure to discover his peril, as he might have done by looking for the engine which struck and killed him. In other words, it was prior negligence which merely produced the condition upon which the negligence of the engineer acted, if he discovered *Breadow's* peril, as the sole proximate cause. In such case, the humane doctrine referred to requires that the defendant should use every means in his power to prevent the injury. But it has not been held in this state, nor elsewhere so far as we are aware, that the plaintiff could recover when his negligence was subsequent to the discovery of

his peril by the defendant, and thereafter actively and proximately concurred with the negligence of the defendant in producing the injury. In such case, to say that his negligence is not the proximate cause is to destroy the doctrine of proximate cause. This humane doctrine is embedded in the case of *Davies v. Mann*, as appears from the following excerpt from the opinion therein:

"Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify driving over goods left on a public highway, or even over a man lying asleep there."

And yet no one ever supposed that the decision in *Davies v. Mann* abolished the law of contributory negligence.

We quote from the able and exhaustive note to *Bogan v. Railroad Co.*, 55 L. R. A. 419, as follows:

"It is said that the rule in *Davies v. Mann* simply furnishes a means of determining whether the plaintiff's negligence is a remote or proximate cause of the injury; that before the introduction of the rule any negligence on the part of the defendant (plaintiff), which in any degree contributed to the accident, was judicially treated as a proximate cause, and constituted contributory negligence which barred a recovery. A similar statement is made in *Nashua Iron & Steel Co. v. Worcester & N. R. Co.*, 62 N. H. 159, and the same ideas expressed in other terms in many of the other cases. When the doctrine is stated in this form, it becomes apparent that it is not an exception to the general doctrine of contributory negligence, and that it does not operate to permit one to recover in spite of contributory negligence, but merely to relieve the negligence of the plaintiff or deceased, which would otherwise be regarded as contributory, from its character as such; and this result it accomplishes by characterizing the negligence of the defendant, if it intervenes between the negligence of plaintiff, or deceased, and the accident, as the sole proximate cause of the injury, and the plaintiff's antecedent negligence merely as a condition or remote cause. The antecedent negligence of the plaintiff or deceased having been thus relegated to the position of a condition or remote cause of the accident, it cannot be regarded as contributory, since it is well established that negligence, in order to be contributory, must be one of the proximate causes. *Tanner v. Railroad Co.*, 60 Ala. 621; *Richmond v. Railway Co.*, 18 Cal. 351; *Button v. Hudson River R. R. Co.*, 13 N. Y. 248; *Troy v. Railway Co.*, 99 N. C. 298, 6 S. E. 77 [6 Am. St. Rep. 521]."

Substitute "discovered peril" for "*Davies v. Mann*" in the excerpt from that case heretofore given, and it will correctly express our views upon the subject. But it will be observed that neither in that case nor in the numerous cases, with reference to "last clear chance" or "discovered peril" growing out of the doctrine announced in *Davies v. Mann*, is this doctrine applied, where the plaintiff also discovered his peril and was thereafter guilty of negligence which concurred with the negligence of defendant in producing the injury. In other words, the rule announced in *Butterfield v. Forester*, supra, continues to be the rule of decision in all common-law countries, modified by the doctrine of proximate cause as announced in *Davies v. Mann*.

The same ground of public policy, which prevents a plaintiff from recovering in ordinary cases of contributory negligence, will prevent his recovering when he also discovers his peril, and thereafter negligently contributes to his injury. In such case, his subsequent act of negligence is as much the proximate cause of his injury as if both parties had been negligent and neither had discovered the probable consequences of his negligence. In case the plaintiff discovers his peril and thereafter is negligent in failing to avoid the injury, his negligence, tested by all authorities on contributory negligence and by reason and common sense, is a proximate cause of his injury and will prevent his recovering.

We think that the legal basis for the doctrine of discovered peril is the rule of law as to proximate cause. The duty to avoid injuring another and the duty to avoid being injured, are reciprocal; and hence, when an engineer has negligently failed to discover a person on the track, and such person has negligently failed to discover the approach of the train and is injured, he cannot recover, not because the engineer did no wrong, but because the wrong of the injured party was a proximate cause of his injury. When an engineer discovers a person in a position of peril, the new duty imposed by the principles of humanity requires that he should use every reasonable means at his command to avoid the injury; and, if the other party is not thereafter guilty of a like act of negligence, the negligence of the engineer becomes in law the sole proximate cause of the injury. But, if the party in peril likewise discovers his peril, the same principles of humanity require that he should use every reasonable means to avoid being injured; and, if he should negligently fail to discharge this new duty, his negligence becomes a proximate cause of his injury, and if a proximate cause he cannot recover. Neither in morals nor in law has a man any more right to injure or destroy himself than he has to imperil or destroy another.

If the plaintiff in the instant case is entitled to recover against the street car company, he is likewise entitled to recover against the motorman. To drive a vehicle upon the track in front of a moving car may endanger the motorman and the passengers. The evidence in this case shows that the motorman was injured by the collision. Suppose the plaintiff had sued the motorman and the motorman had sued the plaintiff herein, and the evidence had shown that each discovered the peril of the other in time to have avoided the injury to the other, but that each negligently failed to do so, and that each was injured to the same extent, upon the doctrine of discovered peril, as announced by the charge herein, each could have recovered a judgment against the other for the same amount for injuries growing out of the same

transaction. The law does not tolerate such an absurdity.

If the law, as to discovered peril, does not rest upon the doctrine of proximate cause, then it must rest upon the doctrine of malice. If so, the courts should not require juries to find as a fact, in order to render a verdict against the plaintiff, that the conduct of the defendant, after discovering the peril, was negligence. Such finding excludes malice. It is not true that one who discovers the peril of another, and not only does not desire to injure him, but is not indifferent as to such injury, and in an attempt to avoid such injury makes some effort to prevent it but does not do everything that he ought to have done, is guilty of a malicious wrong if injury results. His failure to use some additional means may render him liable upon the general doctrine of negligence, where all of our decisions place it; but it does not convict him of malice. We do not say that the failure to use certain available means to avoid the discovered peril might not be sufficient evidence of malice, if that issue was raised by the pleading, but that would be an issue to be passed upon by the jury under appropriate instructions. There is no such issue in this case.

We deduce from the authorities and from the basic principles of the law of negligence the following rule, as applicable to the facts of the charge here under consideration: If the negligence of the plaintiff merely resulted in placing him in a dangerous position, he not having discovered his peril, though he was negligent in failing so to do, and if his peril was discovered by the defendant, who could thereafter have avoided the injury by the use of all the means at his command, and he negligently (not willfully) failed to use such means, he is liable for the injury inflicted, upon the ground that such failure was the sole proximate cause of the injury; the law, upon the principle of humanity, refusing to consider for any purpose the prior negligence of the plaintiff. But if the plaintiff also discovered the peril to which certain conduct on his part would expose him, and thereafter negligently persisted in such conduct, however reckless it may be, such negligence, concurring with that of the defendant to produce the injury, is a proximate cause of the injury and he cannot recover. In support of our conclusions as announced in the foregoing portion of this opinion, we cite: *Powers v. City Ry. Co.*, 143 Iowa, 427, 121 N. W. 1097; *Holwerson v. Railway Co.*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 858; *Gahagan v. Railway Co.*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 444; *Rider v. Rapid Transit Co.*, 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; *Watson v. Railway Co.*, 133 Mo. 246, 34 S. W. 574; *Green v. Railway Co.*, 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 76; *Smith v. Railway Co.*, 114 N. C. 723, 19 S. E. 863, 923, 25 L. R. A. 297; *Farmer v. Railway Co.*, 88 N. C. 570; *Meredith v. Railway Co.*, 99 N. C. 581, 582, 5 S. E. 656;

Drown v. Railway Co., 76 Ohio St. 234, 81 N. E. 328, 329, 10 L. R. A. (N. S.) 421, 118 Am. St. Rep. 844; *O'Brien v. McGlinchy*, 68 Me. 552, 558; *Ward v. Railway Co.*, 96 Me. 145, 51 Atl. 947; *Sher. & Redf. Neg.* vol. 1, § 101; *Thomp. Neg.* vol. 2, § 1666; *Beach, Con. Neg.* §§ 54 to 59.

"The duty of the defendant's employé to avoid the injury to the plaintiff, approaching its track, was not greater than the duty of the plaintiff to avoid injury from the approaching car, and these duties were concurrent and continuous up to the moment of the accident." *Powers v. City Ry. Co.*, supra.

"We think the better rule is that, except where the injury is willfully inflicted, or is inflicted under such circumstances as to amount to willfulness, the rule that contributory negligence is a good defense applies without qualification, unless the company is guilty of negligence subsequent to that of the plaintiff, and not merely contemporaneous and concurrent with that of the plaintiff." *Holwerson v. Railway Co.*, supra.

"The negligence of neither is an excuse for concurrent want of care in the other, because for an injury resulting from the concurrent negligence of both neither can recover." *Gahagan v. Railway Co.*, supra.

"The contributory negligence of the injured party cannot be taken from the jury, except in cases where it is clear that there was some new act of negligence on the part of the defendant that was the proximate cause of the injury. The negligence of the deceased, if any, was substantially concurrent with that of the defendant, if any. * * * In determining whether the cause of the accident is proximate or remote, the same test must be applied to the conduct of the injured party as is to be applied to the defendant. The conduct of the latter cannot be judged by one rule and that of the former by some other rule." *Rider v. Rapid Transit Co.*, supra.

"In order to avoid the effect of the unquestioned negligence of deceased, plaintiff charges that defendant's employés failed to observe proper care, after the peril to which he had exposed himself was known to them. * * * The rule is thus invoked, which is well settled in this state, that, though one has negligently placed himself upon a railroad track in front of a moving train, those operating it owe him the duty of care to avoid injuring him, and his previous negligence will not bar a recovery if injury results to him from neglect of such duty. But to carry this doctrine to the length of saying that one, who knowingly crosses the track of a railway in such close proximity to a moving train as to be struck thereby before he could cross would not be guilty of concurring negligence would virtually abolish the law of contributory negligence altogether, and render nugatory a long and uniform line of decisions of this court. *Boyd v. Railway Co.*, 105 Mo. 371, 16 S. W. 909, and cases cited. The rule first stated presupposes a previous, or in point of time a prior, negligence of plaintiff, the effect of which could be avoided by defendant. It does not exempt plaintiff from the consequences of his own contemporaneous negligence, which is an immediate, direct, and proximate cause of the injury. 'Where the negligent act or omissions of the parties to the action were contemporaneous, or, what is to say the same thing, when the catastrophe is the result of concurring or mutual acts of negligence, the plaintiff cannot recover damages.' *Beach, Contrib. Neg.* § 56." *Watson v. Railway Co.*, supra.

"It (the rule as to discovered peril) has no application, however, to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it." *Green v. Railway Co.*, supra.

"Whether the plaintiff was guilty of con-

tributory negligence depends upon whether his act 'was a proximate or a remote cause. If the act is directly connected so as to be concurrent with that of the defendant, then his negligence is proximate and will bar his recovery.'" *Smith v. Railway Co.*, supra.

"If the plaintiff's negligence merely put him in the place of danger, and stopped there, not actively continuing until the moment of the accident, and the defendant * * * knew of his danger, * * * then, if the plaintiff's negligence did not concurrently combine with defendant's negligence to produce the injury, the defendant's negligence is the proximate cause of the injury, and that of the plaintiff is a remote cause. This is all there is of the so-called doctrine of 'the last chance.'" *Drown v. Railway Co.*, supra.

"It is not enough that a defendant might, by the exercise of due care upon his part, have avoided the consequence of the plaintiff's negligence, when that negligence is contemporaneous with the fault of the defendant. But, if the plaintiff's negligence is so remote as not to be a proximate cause contributing to the injury, then a defendant's failure to exercise due care to avoid the consequences of the plaintiff's earlier and remote negligence, when, by the exercise of such care, it could have been avoided, will render the defendant liable." *Ward v. Railway Co.*, supra.

"The foregoing rule (as to discovered peril) obviously does not apply, where the plaintiff's contributory negligence is in order of causation either subsequent to or concurrent with that of defendant. Therefore, while one negligently walking upon a railroad is generally entitled to recover if the engineer, seeing him, makes no effort to check the train, he cannot recover if, after becoming aware of his danger, he makes no proper effort to escape." *Sher. & Redf. Neg.*, supra.

"Where a traveler recklessly thrusts himself in front of a moving train, his injury is ascribed to his own rashness and folly as its proximate cause; and this is generally held to be so, without any regard to the negligence of the man in charge of the engine or train, unless the same is so gross as to amount to willfulness or wantonness." *Thompson Neg.*, supra.

"When the negligent acts or omissions of the parties to the action were contemporaneous, or, what is to say the same thing, when the catastrophe is the result of concurring or mutual acts of negligence, the plaintiff cannot recover." *Beach Contrib. Neg.*, supra.

The case of *Railway Co. v. Jacobson*, supra, viewed only with reference to certain language therein, would seem to be against the conclusion which we have reached as hereinbefore set out. But the language of every case should be construed with reference to the facts thereof, and, in so far as it is not applicable to the facts, it is dicta. In that case, the deceased was upon a bridge in the discharge of his duty, and therefore was not guilty of negligence in being there. He did not discover the approaching train until it was within "one telegraph pole" of him. His failure to leave the railway motorcycle upon which he was riding and jump off the bridge, if he could have done so in time to have saved himself, was not negligence.

"Negligence will not be imputed to a person who, under an impulse of sudden terror, acts erroneously, commits an error of judgment or, in general, acts differently from the manner in which a man exercising reasonable or ordinary care would act under the circumstances." *Thomp. Neg.* § 1616.

Thus it appears from the undisputed facts that deceased was not guilty of negligence at all, and hence the doctrine of contributory negligence was not in the case. On the other hand, the engineer discovered the deceased upon the bridge when he was 2,040 feet from him, within which distance the train could have been stopped; but, if he had not discovered the deceased, his failure to do so was negligence, and therefore the company was liable, the deceased not being negligent. This was recognized by the court delivering the opinion therein, as shown from the following excerpt therefrom:

"We understand the law to be that, as to persons rightfully on the track where the operatives of a train may expect them to be, the operatives owe the general duty of lookout and must exercise ordinary care to discover them, as well as to avoid injury after the peril is discovered. * * * Under the portion of the charge complained of, this duty was imposed and no more."

It appearing from the undisputed evidence in the case that the railway company was guilty of negligence, and that the deceased was not guilty of negligence, the writ of error was properly refused by the Supreme Court. It appears that the appellant in that case requested a charge to the effect that, if the deceased discovered his peril in time to avoid the injury, and failed to do so, he could not recover, which charge was refused. The requested charge is not set out. It was rightfully refused, for the reason that the evidence did not raise the issue of negligence on the part of the deceased.

Commenting on the issue sought to be raised by the requested charge referred to, the court said:

"The doctrine of liability upon the discovered peril of one in fault is based upon the grounds of public policy, which forbid the killing or maiming of another even with his consent or acquiescence, and this high duty to avoid such consequences would devolve on the operatives, * * * whatever the fault of the person in peril."

We concede the correctness of the statement that, under such circumstances "this high duty to avoid such consequences would devolve on the operatives, * * * whatever the fault of the person in peril," but not that the violation of such duty would, in all cases, render the party inflicting the injury liable in damages. The duty to avoid negligently injuring another is binding in morals in all instances, but, upon the ground of public policy, the law will not permit the injured party to recover, if his negligence is likewise a proximate cause of his injury. The rule which forbids one to recover if he is guilty of contributory negligence is also based upon public policy. It is true the law would punish one criminally who took the life of another at his request, but we know of no rule of public policy that would allow one, who was injured in an attempt to take his life at his request, to recover damages for such injury. If two men should

fight a duel and each should wound the other, each would be guilty of a penal offense, but we apprehend that neither would be compensated for his wrong by allowing him to recover damages from the other wrongdoer. The law punishes the offense for the protection of society, but does not award damages to the wrongdoer.

The statement of the court in the *Jacobson Case*, supra, 28 Tex. Civ. App. page 156, 66 S. W. 1114, that "the courts have not sought to justify it (the doctrine of discovered peril) on the * * * ground that the defendant's failure to resort to every means at hand to prevent the disaster is a new and intervening cause," is not correct, and is not sustained by the cases referred to, viz., *McDonald v. Railway Co.*, 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803, *Railway Co. v. Staggs*, 90 Tex. 461, 39 S. W. 295, and *Railway Co. v. Breadow*, 90 Tex. 27, 36 S. W. 410. In neither the *McDonald* nor the *Breadow Case* was the peril of the injured party discovered before the infliction of the injury. The language used by Mr. Justice Denman in the *Breadow Case* was dicta, but we concede that it is a correct statement of the law as applicable to the facts of that case. He distinctly rests the liability of the company upon its failure to exercise proper care after the discovery of the peril as being "a new and intervening cause." He refers to it as a "new duty." It was the duty of the engineer to keep a proper lookout. It was also the duty of Breadow to keep a proper lookout. Failure to discharge such duty by both of the parties would have made an ordinary case of contributory negligence; but if the engineer had discovered Breadow's peril and had realized that Breadow had not discovered his peril, though he was negligent in failing to do so up to the very time of his injury, the principles of humanity, as well as public policy, imposed upon the engineer a new duty which superseded and put out of the case both his former duty to discover the peril and Breadow's duty to exercise due care, and made the failure to avoid the injury after such discovery the new and sole proximate cause of such injury. This is but a proper application of the doctrine of *Davies v. Mann*, and, as shown by the authorities hereinbefore cited, is all there is in the doctrine of discovered peril or last chance.

In the *Staggs Case* the jury were charged that if Staggs, after becoming aware of his danger, either willfully or negligently failed to leave the track in time to avoid being struck, he could not recover. *Railway Co. v. Staggs*, 37 S. W. 612. No error was assigned upon this portion of the charge. The question certified to the Supreme Court was as to whether the plaintiff was entitled to recover, notwithstanding the negligence of the deceased—

"If the train operatives, after discovering Staggs upon the track between a quarter and a half a mile in front of the moving train, failed to use

the care of ordinary prudence to *discover in time to prevent or lessen the injury when he was in actual danger*, and that he would not probably leave the track in time to prevent the injury." (Italics ours.)

Thus it appears that the question was as to negligence in failing to discover the peril of the deceased, and not as to the duty of the engineer after discovering such peril. The only thing decided by the Supreme Court in the Staggs Case was:

"The district court erred in charging the jury as stated in the question." Ry. Co. v. Staggs, 90 Tex. 461, 39 S. W. 295.

Appellant's tenth assignment of error relates to the refusal of the court to give the following special charge:

"Gentlemen of the jury: The court in its main charge has presented the question of discovered peril, which is commonly known as the humanitarian doctrine, which means that, notwithstanding plaintiff's negligence or contributory negligence in his failure to exercise ordinary care in approaching and attempting to cross defendant's track, if the person in charge of the operation of the street car discovered the impending danger of collision with the plaintiff's wagon in time to have avoided danger by stopping the car with the means and appliances at hand, a new duty arose, and if the persons in charge of the street car did realize the danger and peril, and if they did fail to utilize the means at hand by which they could have stopped the car and averted the danger before the plaintiff drove upon the track, in front of the moving car, then the defendant would be liable for the injury inflicted upon plaintiff; provided, however, that if you believe from the evidence that the said plaintiff, J. A. Wilson, failed to use such care as an ordinarily prudent man would, under the same or similar circumstances, in approaching and attempting to cross defendant's track, then the said Wilson was at the time of the collision engaged in an act of negligence, and concurrent negligence which continued so far as he was concerned up to the very time of the collision, and in such case what is known as the rule of discovered peril does not apply, and you will return a verdict for the defendant."

For the reasons heretofore stated, the refusal to give this charge was error.

Special charge No. 9, as set out in the fifteenth assignment of error, should have been given, except for the fact that that portion of the same which instructed the jury that the motorman and conductor had a right to presume that the plaintiff would stop his wagon, before it collided with defendant's car, would, under the facts of this case, have been a charge upon the weight of evidence.

[5] The court did not err in its charge with reference to the injury suffered by appellee, by reason of the treatment which he received subsequent to his injuries, nor in refusing the special charge requested in reference to such matter. A party who is injured by the fault of another is required to use only ordinary care in order to prevent the aggravation of his injuries. *Railway Co. v. McKenzie*, 30 Tex. Civ. App. 293, 70 S. W. 237; *Railway Co. v. Duncan*, 55 Tex. Civ. App. 440, 120 S. W. 368.

Appellant assigns error as to the misconduct of the jury. As this case is to be re-

versed upon other points, we will not pass upon the issue as to whether or not the misconduct shown was sufficient to warrant a reversal of this cause, but will content ourselves with saying that the conduct of the jury complained of was improper.

We have carefully examined all of the assignments of error in this case, and the points of law raised in some of those which we overrule are worthy of more extended comment than we have given them; but, as this opinion has unavoidably attained such great length, we will not further discuss such issues.

For the reasons stated, this case is reversed and remanded for a new trial.

Reversed and remanded.

KEY, C. J. (dissenting). While I indorse much that is said in the able opinion of Mr. Justice JENKINS in this case, I do not concur in the result reached, and do not believe that the case should be reversed. The reversal is based upon alleged error in the sixteenth paragraph of the trial court's charge, and the action of that court in refusing to give a requested instruction, both of which are set out in the majority opinion. Since the amendment of 1913, it is now statutory law in this state that objections to charges given, or exceptions to the action of the trial court in refusing charges that are not made before the case is submitted to the jury, shall be regarded as waived; and the effect of that statute is to preclude a complaining litigant from urging any objection in that regard which was not presented to the trial court in time for correction by that court. So it becomes important in this case to note the objections urged by appellant in the court below against paragraph 16 of the charge, and, as revealed by the transcript, the only objections so urged were as follows:

"The defendant specially excepts to all that part of paragraph 16 of the court's main charge wherein the doctrine of discovered peril is attempted to be stated to the jury, because the jury are told that if it appeared to the motorman in charge of the car that J. A. Wilson would not probably stop before he reached said track or would not pass over the same in time to avoid a collision with said car and that the plaintiff was in peril, etc., because the said charge wholly ignores the principle of law that the motorman in charge of the car had a right to presume that the plaintiff would not drive upon defendant's track in front of the moving car, but would stop before he reached the same, and that the defendant owed him no duty other than ordinary care until it actually discovered and realized the plaintiff's perilous position and that he could or would not extricate himself therefrom. The said charge further ignores the concurrent negligence of the plaintiff in connection with the acts and negligence, if any, on the part of the defendant company or its agents, servants, and employes in charge of the car. If the concurrent acts of negligence operated with the concurrent act of the defendant, then the doctrine of discovered peril would not apply, and the plaintiff would not be entitled to recover."

The first objection set out above is not strenuously urged in this court, nor sustained by the majority opinion, and is not

tenable, because the charge complained of required the jury to find that the motorman realized that the plaintiff was not going to stop and was in actual peril before he, the motorman, was required to take steps for his protection, etc. The second objection is vigorously urged by appellant's counsel, and is sustained by the majority opinion; and those are the only questions this court is called upon to decide in reference to that paragraph of the court's charge, or the refusal of the court to give the requested instruction set out in the majority opinion. Attention is called to these facts in order to prevent misconstruction, as I do not desire to have it understood that I believe the paragraph of the court's charge referred to is free from all objections that might have been made to it. In fact, if it had been objected to, as withdrawing from the jury the question of the motorman's negligence or want of care in taking steps to prevent the injury, and thereby violating the statute which prohibits a trial judge from commenting upon the weight of the testimony, I am strongly inclined to the view that such objection, if timely made and preserved, would have required a reversal of the case, unless it be that such error was invited by appellant's special charge set out in the majority opinion, which seems to state the duty of the motorman, after discovering appellee's perilous situation, in substance the same as in the court's charge. *S. A. & A. P. Ry. Co. v. Hodges*, 102 Tex. 524, 120 S. W. 848. In the case cited, the Supreme Court said:

"We think it proper to say that we agree with counsel for plaintiff in error in their contention that the duty of those operating an engine and discovering a person in peril in its path is to exercise ordinary care, that is, such care as persons of ordinary prudence in their situation would use, to avoid injury. The difference in the expressions on the subject found in the decisions is due to the fact that some of them state this legal standard of duty, while others describe the diligence to be employed to constitute such ordinary care—the performance of the duty. In situations of such imminent peril, the care of an ordinarily prudent person consists of a very high degree of diligence to avert injury, and the decisions discussing the question mean this rather than that more than ordinary care is exacted by law. That degree of care is all that any one owes to another, except when certain special relations exist. The jurors trying a case are the judges as to what constitutes this ordinary care, and, abstractly, it is improper for the court in its charge to decide for them just what should or should not have been done by the party whose conduct is under investigation. But it is also often true that a charge that is addressed to the particular things that should have been done rather than to the legal standard of duty is unobjectionable because, practically viewed, it exacts no more than the doing of that which obviously was necessary under the facts of the particular situation to constitute the care required, and therefore does not invade the province of the jury. But whenever a real question exists under evidence, whether or not precautions should have been taken, other and different from those which the party judged to be sufficient, and therefore took, that question is for the jury to decide by applying

the standard of care of a person of ordinary prudence, and it should be left to the jury by the charge. In this case the charge made the defendant liable, if the fireman discovered the peril of the deceased and could have signaled the engineer in time for the latter to have averted the accident by stopping the engine. Under the facts of this case, the charge assumed nothing about which there could be any question. The fireman, but not the engineer, saw the deceased at work on the track for a long distance as the engine approached him, but took no precaution until too late, assuming that deceased would get out of the way. The true question was submitted to the jury and was, did the fireman soon enough realize the perilous situation to have prevented the catastrophe, and not what measures he ought to have taken to that end. That, if he discovered the danger, he ought to have had the engine stopped, admits of no question."

The reason given in the *Hodges* Case for holding that it was not reversible error to depart from the rule of ordinary care in that case does not exist in this case; but it is not necessary to further consider that question, because, as that objection was not made to the charge in the trial court, it must be regarded as waived, and cannot be considered on appeal as fundamental error or otherwise, because the statute referred to declares that all objections not so made shall be regarded as waived.

In *Railway v. Jacobson*, 28 Tex. Civ. App. 150, 66 S. W. 1111, it was contended on behalf of the railway that, although its employees may have discovered the perilous situation of the deceased, and may have been guilty of negligence in failing to use the means at hand to prevent injuring him, nevertheless, if the deceased was guilty of contributory negligence at the very time of his injury, the plaintiff could not recover. The very clear and satisfactory opinion of the Court of Civil Appeals in that case was prepared by Mr. Justice Gill, who dealt with that question as follows:

"The charge of the court on contributory negligence is assailed upon two grounds: First, because it charges the law of discovered peril as a part of the law of contributory negligence; and, second, because, in the event it should appear that the operatives of the train discovered the peril of deceased in time to have avoided the injury, a recovery was permitted, even though deceased saw the train in time to escape, and negligently failed to do so. This latter point was also presented by special charges, which were refused.

"Regarding the first objection, we are of the opinion the court did not err in the respect complained of. The law of discovered peril, or the duty arising therefrom, when the peril is due to the negligence of the party injured, is in a sense a part of the law of contributory negligence—a modification of the rule forbidding a recovery by reason thereof. Under one phase of this case, contributory negligence of deceased did not necessarily defeat a recovery, and the court in that connection properly called to the attention of the jury the law which, under a certain state of facts, would permit a recovery notwithstanding the fault of deceased.

"Under the second objection, appellant contends that, while it is true if the negligence of a person places him in a position of peril, and the company's servants in charge of an approaching train discover his peril in time to avoid injury, and fail to do so, the company is liable, notwithstanding the fault of the per-

son injured, yet this is true only in a modified sense; that is to say, when the negligence of the injured person is not continuous and existent at the time of the injury. And it is not true if the person injured also discovers his peril in time to avoid it, but continues his negligent course after discovery of peril, and does nothing to save himself.

"The idea of appellant's counsel seems to be that, if the recklessness of the person in peril, but able to save himself by the exercise of ordinary care, is equal to the recklessness of the train operatives who might avert the injury by a resort to the means at hand, but do not, there can be no liability. The doctrine of liability upon the discovered peril of one in fault is based upon grounds of public policy which forbid the killing or maiming of another, even with his consent or acquiescence, and this high duty to avoid such consequences would devolve on the operatives of a train, whatever the fault of the person in peril. It seems to us the very reasons which underlie the doctrine constitute a complete answer to appellant's contention. In such a case, the question of negligence on the part of the operatives is in a sense eliminated. The duty to resort to every means at hand, consistent with the safety of the train, to avoid the injury is absolute, and the failure to do so partakes of the nature of a wanton wrong, against which no act on the part of the person injured will be a defense. The rule has been adopted without qualification in this state. The courts have not sought to justify it on the questionable and technical ground that the defendant's failure to resort to every means at hand to prevent the disaster is a new and intervening cause. It is based rather on the broad ground of public policy, which forbids the interposition of such a defense by a wrongdoer, who knowingly fails to prevent the destruction of a human life when he can. *McDonald v. Railway*, 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803a, and authorities cited; *Railway Co. v. Staggs*, 90 Tex. 481, 39 S. W. 295; *Railway Co. v. Breadow*, 90 Tex. 27, 36 S. W. 410."

The appellant in that case made application to the Supreme Court for writ of error, which application has been examined by the writer, and shows that the ruling of the Court of Civil Appeals, indicated by the foregoing excerpt from its opinion, was vigorously assailed; and, in the argument of the counsel presenting the application, some of the authorities referred to in the majority opinion in this case were cited in support of the doctrine there contended for and sustained and applied by this court in this case. The Supreme Court refused to grant a writ of error in that case, which, in my judgment, elevates that decision to the plane of final authority against the doctrine announced and applied by the majority opinion in this case. An attempt is made in the majority opinion of this court to distinguish this from the *Jacobson Case*, upon the theory that the evidence in that case did not raise the issue of contributory negligence, because the deceased was rightfully upon the railroad track; had no time to escape and was so frightened and terrorized as to relieve him from the charge of negligence. The report of the case in the books does not undertake to set out all the testimony, but the trial court, the Court of Civil Appeals, and, presumably, the Supreme Court considered the question of contributory negligence as involved in the case;

and, in my judgment, the facts recited in Judge Gill's opinion justified that assumption, and there may have been other testimony not adverted to by Judge Gill. His opinion discloses that there was testimony tending to show that the bridge on which the accident occurred was less than six feet from the ground; that, when the engine of the approaching train was as far away as one telegraph pole, the deceased looked back and made a signal for the train to stop, but made no effort to get off of the bridge and the train ran upon and killed him. There was no direct testimony that he became frightened or terrorized, and for that reason failed to jump from the bridge; but a proper charge upon that subject was given and, assuming that the testimony raised that question, nevertheless, in my opinion, it was the duty of the trial court to instruct the jury as to what effect the law would give to his negligence, if any, in failing to get off the bridge after he discovered the approach of the train. The trial court performed that duty by instructing the jury that, if the engineer in charge of the train, after discovering deceased's perilous position, failed to exercise ordinary care for his protection, the railway company would be liable, although the deceased may have been guilty of contributory negligence in remaining upon the track. It was contended in that case, as is held by the majority opinion in this case, that, if the negligence of the deceased existed at the very time of the injury, the plaintiffs were not entitled to recover. It will not do to say that the question of contributory negligence was not involved in that case, for the reason that, when the deceased discovered the approaching train, it was too near for him to avoid injury by jumping off the bridge. Judge Gill's opinion does not disclose just how near the train was when the deceased discovered it, but states that the engineer testified that it was one telegraph pole away. There may have been other testimony showing that, upon that road, telegraph poles were such distance apart as to indicate that the deceased had time to avoid injury by jumping from the bridge after discovering the approaching train.

So it is that I am unable to concur in the review of that case contained in the majority opinion, and feel quite sure that it was intended by both the Court of Civil Appeals and the Supreme Court to hold that, in cases involving the doctrine of discovered peril, the negligence or wrongful conduct of the injured party, though continued up to and existing at the very time of the injury, will not avail as a defense. In my judgment, in order for the doctrine of discovered peril to apply and avoid the defense of contributory negligence, the conduct of the party sought to be held liable must be either willful or wanton, and whatever proof will show that the conduct referred to was neither willful nor wanton will take the case out of the doctrine of discovered peril. However, the Supreme

Court of this state seems to have established the doctrine that when a person in charge of a railroad engine, street car, or other dangerous instrumentality, discovers that another person is in imminent peril of being seriously injured by his manner of operating it, and fails to exercise ordinary care with the means then at hand to prevent the injury, he is deemed in law to have willfully or wantonly inflicted it. Whether or not that is the sounder rule, and the best that could have been adopted, need not be discussed in this case. The law relating to discovered peril seems to have afforded room for divergent views among various courts; and, although I may be of opinion that it would have been better to have held, in direct terms, that in order to avoid the defense of contributory negligence, it must be made to appear that the conduct of the person complained of was willful or wanton, and then leave it for the jury to determine, from all the facts and circumstances, whether the conduct in each case is of that character, without undertaking to declare that when the perilous situation is discovered, the failure to exercise ordinary care will establish the fact that such conduct was willful or wanton. When, in the course of judicial procedure and development in this state, it became necessary for the Supreme Court to deal with the question of contributory negligence in connection with discovered peril, that tribunal was confronted with confusing, and, in some instances, conflicting decisions in other jurisdictions; and, having established a doctrine which can be understood and applied, and which is supported by sentiments of humanity, I believe that inferior tribunals should acquiesce and apply the doctrine so established.

Appellee's petition presented the question of discovered peril substantially as submitted in the court's charge. There was no testimony tending to show that, on the occasion in question, appellee attempted to commit suicide, nor did the testimony, in my opinion, raise any issue of reckless conduct on his part; but it did present the question of contributory negligence, and that was the only question relating to appellee's conduct that appellant asked to have submitted to the jury. That question was submitted in the fourteenth paragraph of the court's charge set out in the majority opinion and in another charge, given at appellant's request, more specifically applying the doctrine of contributory negligence, and it was applicable as a defense as against any negligence charged against the motorman prior to his discovery of the imminent danger and peril in which appellee became involved, by reason of his going upon the track immediately in front of the nearby and approaching car. The court then in the sixteenth paragraph of its charge instructed the jury as to what would constitute a modification of the general doctrine of contributory negligence as a defense, if the motorman discovered appellee's perilous situation, etc.,

and refused appellant's requested instruction set out in the majority opinion, by which it was sought to have the jury instructed that, if appellee was guilty of negligence at the very time of the collision by which he was injured, such negligence would constitute a bar to his right to recover damages. Appellant did not request the court to instruct the jury as to what rule of law would govern in the event they found that appellee willfully or recklessly thrust himself in front of an approaching car, realizing the fact that he would probably be injured by so doing; and therefore, in my judgment, that question is not involved in this case, and calls for no discussion on my part.

Appellant has presented no assignment of error challenging the verdict of the jury as being unsupported by testimony, otherwise than assignments complaining of the action of the trial court in refusing to peremptorily instruct a verdict for it. The majority opinion does not base the reversal upon that ground, and the writer is of the opinion that the peremptory instruction was correctly refused.

I concur in so much of the majority opinion as rules against appellant on several questions discussed therein; and, as I do not concur as to the grounds upon which the reversal is based, it follows that I am of the opinion that the judgment should be affirmed.

On Motion for Rehearing.

JENKINS, J. Upon a more careful consideration of special charge No. 10, requested by the appellant, we have concluded that it does not clearly present the issue of discovered peril on the part of the plaintiff, but might have been construed by the jury as meaning that if plaintiff was guilty of negligence "in approaching and attempting to cross defendant's track" by reason of his failure to look for and discover the approach of the car, and that such negligence continued up to the time of the collision, he could not recover. For this reason, we withdraw so much of our original opinion herein as holds that the court erred in refusing to give special charge No. 10.

The able attorneys for appellee have filed herein a motion for a rehearing and a forcible argument in support thereof, which evidences much learning and great research, but it has failed to convince us that we erred in our holding as to the effect of discovered peril on the part of the plaintiff.

We here briefly restate our holding upon this point as follows: Though the plaintiff was guilty of negligence in failing to discover the approach of the car before driving upon the track, and this negligence continued up to the moment of the collision, and, but for the doctrine of discovered peril, would be a concurring, proximate cause of his injury, yet, if the defendant discovered plaintiff's peril in time to have avoided injuring him,

and negligently failed to do so, the law, upon humanitarian grounds, excludes from the consideration of the court and jury such negligence of the plaintiff, and leaves the negligence of the defendant as the sole proximate cause of the injury. But, if the plaintiff also discovered his peril, and thereafter negligently failed to avoid the threatened injury, his subsequent act of negligence becomes a concurring, proximate cause of his injury, and he cannot recover.

Appellee cites the recent case of *Railway Co. v. Rosenbloom*, 173 S. W. 215, wherein the court said: "The negligence of the party killed is no defense to an action based on discovered peril." But in that case there was no act of negligence done by the deceased after he discovered his peril. All that he did was to attempt to escape from his peril. *Rosenbloom* was at work where he had the right to be. We quote from that decision as follows:

"It does not appear in the statement of facts that any notice was given to *Rosenbloom* so that he might have escaped before the engine came so near to him. * * * There is no * * * negligence on his part, except the fact that under the conditions he attempted to make his escape on the side track in front of the approaching engine."

It is well settled that this did not constitute negligence. The engineer had the right, in the absence of any one's being where *Rosenbloom* was, to run upon the side track; so that, but for his discovery of *Rosenbloom's* peril, he would not have been guilty of negligence. The engineer saw *Rosenbloom* when he started across the track, and so the only issue was as to whether the engineer "failed to use all necessary efforts to avoid killing him." This was the only issue submitted by the trial court, and the issue before the Supreme Court was as to whether the trial court erred in so doing. The Supreme Court held that this was not error. This decision does not contravene our holding in the instant case.

[6] Appellee insists that though the law be as announced in the majority opinion of this court, this case ought not to be reversed for the reason that contributory negligence on the part of the plaintiff, after he discovered his peril, was not alleged by the appellant.

We quote from the twenty-ninth paragraph of appellant's answer as follows:

"That he (plaintiff) was in plain view of defendant's car as it was moving south over its line on Twelfth street in the city of Waco at a reasonable rate of speed; that said plaintiff recklessly and negligently drove his horse and wagon upon defendant's track, without making any effort whatever to avoid a collision between his said wagon and the defendant's moving car."

It is true that there is not here a specific allegation that appellee saw the car, and perhaps it was not a good plea of discovered peril on the part of the plaintiff as against a special demurrer. But no exception was taken, and we think it is sufficient in the absence of exception. A common acceptance of recklessness is a disregard of apparent or apprehended danger; and when it is alleged, as in the instant case, that appellee was in plain view of the moving car and recklessly drove in front of it, we think that it should be construed, in the absence of any exception thereto, to mean that he saw the car and realized that there was danger in attempting to cross the track in front of it.

In *Railway Co. v. Wallace*, 164 Ala. 209, 51 South. 371, the court said:

"As the complaint charges negligence subsequent to a discovery of the plaintiff's peril, he was chargeable only with negligence after becoming conscious of his danger. * * * The special pleas failing to aver knowledge by the plaintiff of his peril or that he was guilty of any negligence, subsequent to a discovery of his peril, were subject to the demurrers interposed."

To the same effect is *Railway Co. v. Turney*, 183 Ala. 398, 62 South. 887. But in each of these cases there was a special exception to the defendant's answer in so far as it attempted to set up discovered peril on the part of the plaintiff, and his subsequent negligence.

For the reasons stated, the motion for rehearing is overruled.

Motion overruled.

KEY, C. J. For the reasons stated in my dissenting opinion heretofore filed, I think the motion for rehearing should be granted; and therefore I dissent from the action of this court in overruling the same. I concur in the construction placed upon the pleadings.

YATES v. WATSON et al. (No. 571).*

(Court of Civil Appeals of Texas. El Paso.
May 25, 1916. Rehearing Denied
June 22, 1916.)

1. GUARDIAN AND WARD §58 — ACCOUNTING AND SETTLEMENT—REVIEW.

Under Rev. St. 1911, art. 4300, a bill of review is proper to correct errors in orders of county court approving guardian's final report and account on his application for discharge and may be entertained at any time after final order of discharge until barred by statute.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 531-537; Dec. Dig. § 165.]

2. GUARDIAN AND WARD §58 — CHARGES AGAINST ESTATE — EXPENSES PAID BY GUARDIAN PRIOR TO APPOINTMENT.

Under Rev. St. 1911, art. 4131, requiring authorization for payments out of the principal of a ward's estate, a guardian cannot recover expenses paid by him prior to his appointment and never filed and approved by the court, although allowed and approved on his final account.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 264-282; Dec. Dig. § 58.]

3. GUARDIAN AND WARD §58 — EXPENSES CHARGEABLE TO ESTATE—BURIAL EXPENSES OF FATHER.

The estate of a minor ward is not chargeable with burial expenses of the father of such ward.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 264-282; Dec. Dig. § 58.]

4. APPEAL AND ERROR §1011(1)—FINDINGS OF COURT—CLAIMS ALLOWED AGAINST MINOR'S ESTATE.

The finding of the trial court under conflicting evidence on disputed claims allowed the guardian of a minor's estate is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. § 1011(1).]

5. GUARDIAN AND WARD §54 — DUTY OF GUARDIAN TO INVEST MONEY — LIABILITY FOR INTEREST.

Under the statute, where the guardian of a minor's estate by the exercise of due diligence could have loaned funds and failed to do so, he is chargeable with interest thereon at the highest legal rate.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 242-253; Dec. Dig. § 54.]

6. APPEAL AND ERROR §597(1)—CROSS-ASSIGNMENTS OF ERROR — OBJECTIONS — SUFFICIENCY.

Under rule 101, District and County Courts (159 S. W. xi), cross-assignments of error need not be copied in the transcript, and an objection that they were not filed in the trial court, without other showing, is not sufficient to prevent their consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2627-2631, 2635-2638; Dec. Dig. § 597(1).]

7. GUARDIAN AND WARD §58—LIABILITY OF GUARDIAN — ATTORNEY'S FEES PAID WITHOUT AUTHORITY.

Where the guardian upon appointment paid a reasonable attorney's fee due for collection of personal injury compensation constituting the estate, which amount was never inventoried as part of the estate, he was not liable therefor, although such payment was never approved by the court.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 264-282; Dec. Dig. § 58.]

8. GUARDIAN AND WARD §58 — EXPENSES CHARGEABLE AGAINST ESTATE—CLAIMS NOT FILED AND APPROVED.

Traveling expenses of the guardian, not verified, filed, and approved by the county court, are not chargeable against the minor's estate.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 264-282; Dec. Dig. § 58.]

9. GUARDIAN AND WARD §58 — EXPENSES CHARGEABLE AGAINST ESTATE — COSTS IN OTHER COURTS.

Court fees and costs in other courts retained out of money belonging to ward's estate are properly chargeable by the guardian against the estate of the ward, though not filed nor approved.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 264-282; Dec. Dig. § 58.]

Walthall, J., dissenting in part.

Appeal from District Court, Jones County; Jno. B. Thomas, Judge.

Bill by Mrs. N. K. Watson and others against I. H. Yates to revise and reinstate the final account of defendant as guardian. From a judgment reinstating certain items of such account, both parties appeal; Yates being herein called appellant. Reformed and affirmed.

Cunningham & Oliver, of Abilene, and Hunt, Myer & Teagle, of Houston, for appellant. Scott W. Key and W. H. Murchison, both of Haskell, for appellees.

WALTHALL, J. Appellees, Mrs. N. K. Watson, joined pro forma by her husband, J. T. Watson, as next friend for her minor children, Guyton Ray Wilson, Ikie Avoca Wilson, and Willie Malinda Wilson, and Mrs. Ola May Treadwell, née Wilson (joined pro forma by her husband, E. D. Treadwell), filed a bill of review in the county court of Jones county for the purpose of revising and restating the final account of appellant, I. H. Yates, as guardian of the estates of Ola May Treadwell, née Wilson, Guyton Ray Wilson, Ikie Avoca Wilson, and Willie Malinda Wilson, minors. The bill of review came on to be heard in the county court of Jones county and resulted in a judgment restating certain items of the guardian's account, from which both parties appealed to the district court of Jones county. Upon the trial of the cause in the district court, judgment was rendered removing appellant, Yates, from the guardianship of the estates of said minors, and ordering that he pay to the guardian of three of the estates three-fourths of \$1,745.81, being the amount of the principal and interest found to be due the estates of said minors, and ordering that one-fourth of said sum be paid to Mrs. Ola May Treadwell.

The issues presented here can more readily be understood by reference to the findings of fact and conclusions of law made by the trial court, which are as follows:

"(1) On the 5th day of November, 1904, W. B. Wilson was killed in an accident while working for the St. Louis & San Francisco Railway Company, as an employé on its line of road.

"(2) He left surviving him his widow, Mrs. N.

K. Wilson (who subsequently married J. T. Watson, and who is plaintiff herein as next friend for her minor children), and his four minor children, Ola May Wilson, aged about eight years, Guyton Ray Wilson, aged about five years, Ikie Avoca Wilson, aged about two years, and Willie Malinda Wilson, who was born on June 16, 1905, after the death of her father.

"(3) That the said W. B. Wilson left no estate and no money, and that neither Mrs. N. K. Wilson, the widow, nor said minors, had any ready money, and no estate except the claim for unliquidated damages against said railroad company for negligently causing the death of their husband and father, and I. H. Yates, father of Mrs. Wilson and grandfather of the said minors, paid the funeral expenses of W. B. Wilson out of his own funds, which amounted to \$131.10, and were reasonable.

"(4) After the death of W. B. Wilson, Mrs. N. K. Wilson, acting for herself and as next friend for her minor children, employed Wolf, Hare & Maxey, a firm of attorneys at Sherman, Tex., to bring suit against the said railway company for damages sustained by her and her said four minor children by reason of the death of the said W. B. Wilson. That in said contract of employment, which was in writing, it was agreed that the said attorneys should receive for their compensation one-third of the amount recovered by them from said railroad company for damages sustained by her and her said four minor children by reason of the death of the said W. B. Wilson. That in said contract of employment, which was in writing, it was agreed that the said attorneys should receive for their compensation one-third of the amount recovered by them from said railroad company, and at the time said contract was made said minors had no estate except their claim against the railroad company and had no guardian of their estates.

"(5) That pursuant to said contract of employment said attorneys thereafter filed suit in the United States court at Sherman, Tex., on behalf of the said Mrs. N. K. Wilson and her four minor children, for damages sustained by them by reason of negligence in causing the death of their husband and father, against said railway company, and on the 4th day of June, 1906, in said court a judgment was rendered in favor of the said Mrs. Wilson for \$2,000 and in favor of the said four minors for \$4,000; said judgment providing by its terms that the defendant railway company should pay the said \$4,000 adjudged to said minors into the registry of the said court, to be paid out only upon the order of the court, and on the 27th day of June, 1906, said railway company did pay into the registry of said court the sum of \$4,013.75 for said minors, being the principal and accrued interest on said judgment in favor of said minors.

"(6) On the 7th day of June, 1906, the said I. H. Yates made application to the county court of Jones county, Tex., for letters of guardianship on the estates of said minors, and was on the same day appointed temporary guardian of their estates; the order of appointment reciting that the same should become permanent at the next regular term of said court unless the same was contested. On the 3d day of July, 1906, the said Yates duly qualified as the guardian of the estates of said minors, and at the September term of said court, which convened on the 3d day of September, 1906, the guardianship became permanent, but no court has ever appointed any guardian of the person of said minors.

"(7) On the 9th day of August, 1906, the said Yates, as guardian aforesaid, filed his application in the federal court at Sherman, Tex., setting forth his appointment as guardian of the estates of said minors, and praying for an order of court directing and authorizing the clerk of said court to pay to him as such guardian the said sum of \$4,000 and interest thereon, which had theretofore been paid into the registry of said court by the railway company for

the minors, and on the same day said court made an order authorizing and directing the clerk to pay to said Yates, as guardian, the moneys in the registry of said court belonging to the said minors after deducting and retaining the commissions allowed by law to the clerk upon said fund, which was one per cent. of the amount thereof, or \$40.13.

"(8) On the 10th day of August, 1906, pursuant to said order, the clerk of said court paid to the said Yates, as the guardian of said minors, the money belonging to said minors in the registry of said court, by issuing a warrant upon the funds in the registry of said court in the sum of \$3,973.62, payable to the order of I. H. Yates as guardian of the estates of Ola May Wilson, Guyton Ray Wilson, Ikie Avoca Wilson, and Willie Malinda Wilson, which warrant was countersigned by the judge of said court, and indorsed on the back thereof, 'I. H. Yates, guardian,' and being the stamp of a bank at Sherman, Tex., showing the same to have been paid on August 10, 1906, and being for the full amount of the funds belonging to said minors in the registry of said court, less the commissions due said clerk of \$40.13. That said warrant was delivered to said Yates and accepted by him, and he also signed a receipt to the clerk of said court acknowledging the payment to him as guardian of the estates of said minors of said sum of \$3,973.62.

"(9) That immediately after said warrant came into the hands of the said Yates for \$3,973.62, he paid to the firm of Wolfe, Hare & Maxey one-third of said amount out of the funds belonging to said minors, which payment was made in compliance with the contract made by Mrs. Wilson, the mother of said minors, with said attorneys, agreeing to pay them one-third of the recovery as their attorney's fees, in compensation for their services in recovering the same. That the fee so paid said attorneys was a reasonable one, and the services rendered by them were necessary to recover the judgment in favor of said minors, and was a just claim against their estates. That the said firm of attorneys did not file any claim for their said fees with I. H. Yates, as guardian of the estates of said minors, and the same never allowed by the guardian in any manner except by the payment of same as aforesaid, and it was never placed on the claim docket or approved by the court, and no order was ever entered of record by the probate court approving the same.

"(10) That the said I. H. Yates and Mrs. N. K. Wilson jointly looked after the prosecution of the suit against the railway company at Sherman, Tex., for the said Mrs. Wilson and her minor children, and the said Yates expended the sum of \$38.20 in traveling from his home in Jones county, Tex., to Sherman, Tex., making at least two trips to Sherman, one of which was on or about August 10, 1906, for the purpose of receiving the money belonging to said minors as aforesaid. He also paid the expenses of Mrs. N. K. Wilson from Jones county, Tex., to Sherman, Tex., for at least one trip for which he made no claim against the estates of the minors. That the sum of \$38.20 so expended by him for traveling expenses was reasonable and necessary in looking after the prosecution of the suit of his daughter Mrs. Wilson and her minor children against said railroad company. That, after his appointment as guardian, the said I. H. Yates did not file his verified account for such traveling expenses in the probate court of Jones county, and the same was never entered on the claim docket nor approved by the court in any manner.

"(11) That from the death of W. B. Wilson on November 4, 1904, to the time that I. H. Yates qualified as guardian, and thence to May 26, 1908, the said Mrs. Wilson and her four minor children lived in the home of the said I. H. Yates, who resides in Stith, Tex., a small village in the rural portion of Jones county, Tex., where said minors were fed, clothed, and treated by their grandfather, I. H.

Yates, as members of his own family, and were well provided for by him. That the mother of said children, Mrs. Wilson, during said time, assisted the members of the family of I. H. Yates (who had a wife and three children then at home) in their domestic duties, such as cooking, sewing, washing, and other household duties, and made some effort to earn money to assist in the support and maintenance of herself and her minor children; but the contribution by her for this purpose was slight, and the great burden of maintaining and educating said minors, and supporting their mother, was borne by the said I. H. Yates. That the said Mrs. Wilson shared with the said Yates the personal care and custody of said children. That on or about the 25th day of May, 1908, the said Yates removed the said Mrs. Wilson and her four minor children from his home in Stith, Tex., to Merkel, Tex., where they lived in a three-roomed house owned by him without paying any rent therefor, and the said Yates continued to feed and clothe them as before, and continued to treat them as members of his own family, furnishing them with all the necessities of life, and providing for them in a substantial and comfortable manner.

"(12) That from the time of the death of W. B. Wilson, the father of said minors, to the date of the recovery of the judgment against said railway company, Mrs. N. K. Wilson and her said minor children were destitute and wholly dependent upon the said I. H. Yates for the necessities of life.

"(13) That the said I. H. Yates, after his appointment as guardian of the estates of said minors, made application to the probate court of Jones county, Tex., for an allowance for him for the year embraced between the dates of June 1, 1906, and June 1, 1907, for the care, education, and maintenance of the said minors, and praying 'that an allowance of \$480 per annum for the care, maintenance, and education of said minors be made by the court out of the funds now in his hands as such guardian.' That the court made an order for such an allowance, dated September —, 1906, which was duly entered of record and is as follows, to wit: 'This day came on to be heard the application of I. H. Yates, guardian, for an allowance for the care, maintenance, and education of the said minors, Ola May Wilson, Guyton Ray Wilson, Ikie Avoca Wilson, and Willie Malinda Wilson, and, it appearing to the court that \$480 per annum is a reasonable allowance for such care, education, and maintenance, it is therefore ordered, adjudged, and decreed by the court that the said I. H. Yates, guardian, be allowed for the care, education, and maintenance of the said minors, Ola May Wilson, Guyton Ray Wilson, and Willie Malinda Wilson, the sum of \$480 per annum out of the funds now in his hands as such guardian, to be paid semi-annually, as the law directs.' The court finds said amount to be reasonable and necessary.

"(14) That after the said I. H. Yates was appointed guardian, he did not authenticate his claim for care, maintenance, and education of said minors or either of them, accruing prior to his appointment as such guardian, and did not present the same to the probate court of Jones county, Tex., and the same was not put upon the claim docket, and was not in any manner approved by said court, and no approval of same was ever entered of record, except in his final account.

"(15) That after said Yates was appointed guardian he did not authenticate his claim for the funeral expenses of W. B. Wilson, and did not present the same to the probate court of Jones county, Tex., and the same was never placed on the claim docket nor in any manner approved by said court, and no approval of same was ever placed of record, except in his final account.

"(16) That after Mrs. Wilson married J. T. Watson and left the house of I. H. Yates and went with her minor children to live with the

said Watson, the said Yates made several payments to her for the support, maintenance, and education of her children, which payments aggregated the sum of \$375.

"(17) That at the time the judgment was collected from the St. Louis & San Francisco Railway Company as aforesaid for said minors, the sum of \$2,000 was also collected for Mrs. Wilson in the same suit and under the same contract with the attorneys as the \$4,000 for the minors. Out of this \$2,000 belonging to Mrs. Wilson, one-third was paid to her attorneys, and the remainder, approximately \$1,333.33, was turned over to the said I. H. Yates by Mrs. Wilson. This entire sum was repaid to Mrs. Wilson after she married J. T. Watson in December, 1908, in two checks, one for \$1,000 and the other for \$333.

"(18) That in October, 1913, the county court of Jones county, Tex., passed an order requiring the said I. H. Yates to file an annual account as guardian of the estates of said minors, and duly cited him to appear and file the same.

"(19) That on December 15, 1913, the said I. H. Yates filed his final account as guardian of the estates of said minors, in obedience to said subpoena, which said final account is as follows:

"No. 211. Guardianship of Ola May Wilson, Guyton Ray Wilson, Ikie Avoca and Willie Malinda Wilson, Minors. In the County Court, Jones County. To the Honorable Judge of Said Court: Comes now I. H. Yates, guardian of the above-named minors, and in obedience to the citation issued by this court on the 22d day of November, 1913, and served upon him, he makes and presents his report which he prays the court to receive and accept as his final report of said guardianship, same being as follows:

"(1) No property, rents, revenues or profits have been received by the guardian belonging to his said wards during his guardianship save and except the sum of \$2,666.66, which was received by him as the proceeds of a judgment collected on account of personal injuries which resulted in the death of the father of said minors, and is here debited to said guardian, \$2,666.66.

"(2) The disposition made of said money which came into the hands of said guardian is as follows:

To amount paid clerk of this court as costs of these proceedings.....	\$ 10 80
To amount paid as railroad fare from Merkel, Tex., to Sherman, Tex., two trips in obtaining and collecting the judgment above mentioned	35 20
To amount paid to hotel fare at Sherman, Tex., while attending to the collection of said judgment	3 00
To amount paid J. R. Wilson, undertaker, for services in connection with the burial of the father of said minors.....	19 85
To amount paid as attorneys' fees in these proceedings	50 00
To amount paid as commissions to the clerk of the federal court at Sherman, Tex., for receiving and keeping the funds belonging to said minors, being the proceeds of said judgment	60 00
To amount paid Street & Harper Furniture Company for casket, box, burial robe and embalming the deceased father of the minors	111 25
To amount paid for board, care and schooling for three of said minors from November 5, 1904, to December 25, 1906, at \$10 per month, each, as allowed by the orders of this court.....	1,491 00
To amount paid for care, board, and maintenance of one of said minors from birth, June 16, 1906, to December 25, 1906.....	423 00
To amount paid Mrs. N. K. Wilson for the support, maintenance, and education of all minors since December 25, 1906.....	498 00

Total paid out..... \$2,666 10
To balance due guardian..... 25 44

"(3) There are no expenses or debts against the estate of said minors remaining unpaid known to the guardian except the expenses due the guardian as above stated.

"(4) No property of the estate of said minors remains in the hands of the guardian.

"(5) The above shows fully and definitely the exact condition of said guardianship.

"Wherefore, the said guardian prays that the account and final report be filed, that citation be issued and served as required by law, and that inasmuch as said minors are not now in the custody of this guardian, and inasmuch as they have no property or estate to be administered in this court, and inasmuch as they are now in the custody of their mother in Haskell county, Tex., the guardian prays that his guardianship affairs be closed, that he be discharged without further liability in connection with the same, and that this final report, upon hearing, be accepted, allowed and approved.

"Respectfully submitted, I. H. Yates.

"State of Texas, County of Haskell.

"Before the undersigned authority on this day personally appeared I. H. Yates, guardian of the minors mentioned, who, after being by me duly sworn, deposes and says upon his oath that the foregoing account and report and all statements made therein are true and correct.

"I. H. Yates, Guardian.

"Subscribed and sworn to before me by I. H. Yates, guardian, on this, the 13th day of December, 1913. C. B. Long, Notary Public, Haskell County, Texas. [Seal.]

"(20) That on December 18, 1913, citation by publication was issued on the above account as on a final account, returnable to the February term, 1914, of the county court of Jones county, Tex. Said citation contained the statement that the guardian had made application for his discharge from his guardianship. The return shows that it was published in the Western Enterprise, a newspaper published in Jones county, Tex., on January 23 and 30, and February 6 and 13, 1914. There was no personal service on any of the minors.

"(21) That during the February term of court, 1914, the following order was duly made and entered of record by the court, viz.: 'No. 211. Guardianship of Ola May Wilson et al. Be it remembered that on the 19th day of February, A. D. 1914, there came on to be heard and considered the final account and report of I. H. Yates, guardian in the above-styled and numbered cause, and it appearing to the court that citation has been duly served upon all persons entitled thereto with reference to and since the filing of said account and report, and the court having heard the evidence in support of and against the same, and from the evidence the court having found said account and report to be fair, just and correct, and having found that no property or money remain in the hands of said guardian belonging to the estates of said minors, or either of them, it is therefore ordered, adjudged and decreed by the court that said account and said report be, and the same is hereby in all things, approved, and the said I. H. Yates, guardian aforesaid, be, and he is hereby, discharged, and his said guardianship be, and the same is hereby, closed and the clerk of this court is hereby ordered and directed to enter this order to said effect upon the minutes of this court.'

"(22) That the said Yates filed no annual accounts or reports of his guardianship except the account and report hereinbefore set out.

"(23) That immediately after he qualified as guardian of the estates of said minors, the said Yates filed an inventory and appraisement of the estates of said minors, showing that the only estates owned by said minors was a two-thirds interest in the judgment rendered by the federal court at Sherman, Tex., in favor of said

minors, and appraising their two-thirds at \$2,666.66. The one-third of said judgment which was paid over to the attorneys who recovered the same was never inventoried or appraised as a part of the estate of said minors, and no objection has ever been filed to said inventory and appraisement.

"(24) That from the time said guardian received the funds belonging to said minors, he has had on hand funds to the amount of \$1,024.10, which by the exercise of due diligence he could have invested or loaned at the rate of 8 per cent. interest per annum; but the said Yates failed to invest or loan the same or any part thereof, the interest due being \$73.15.

"(25) That there are no orders of the probate court authorizing the said I. H. Yates as guardian to expend any of the money belonging to the estates of his wards except the above-mentioned order allowing the guardian \$480 per year for the care, maintenance, and education of the said minors.

"Conclusions of Law.

"First. The guardian, I. H. Yates, cannot be required, in his final account, to account for more than \$2,666.66, as coming into his hands, because: (a) The inventory and appraisement show the estate of said minors to be two-thirds of the judgment rendered in their favor at Sherman, Tex., valuing their two-thirds at \$2,666.66, and bill of review will not lie to disturb the inventory and appraisement of an estate of a minor; (b) notwithstanding the evidence shows that the guardian actually collected \$3,973.62 belonging to the estate of said minors, he should not be charged with said amount, because the evidence further shows that he paid out one-third of said sum to a firm of attorneys pursuant to a valid and binding contract made with said attorneys to pay them said one-third of the said amount; and (c) notwithstanding that the evidence shows that the guardian actually collected \$3,973.62 belonging to the estate of said minors, he should not be charged with that amount, because the evidence further shows that he paid one-third of said amount to a firm of attorneys for obtaining a judgment in that sum for said minors, that the services of said attorneys were necessary, and the fee was a reasonable one, and therefore the claim of said attorneys against the estate of said minors was a just claim and could be paid by the said guardian without the order or approval of the probate court.

"Second. That the expenses of I. H. Yates in traveling from his home in Jones county to Sherman, Tex., in looking after the prosecution of the damage suit against the railway company, same amounting to the sum of \$38.20, were just and lawful expenses chargeable against the estate of said minors and were properly allowable as a credit in his final account, the same being known to the guardian to be a just claim and approved by the court in the final order.

"Third. The claim of the said I. H. Yates for an allowance for the care, support, and maintenance of said minors prior to the date of his appointment as guardian cannot be allowed to him as a credit in his final account, because: (a) He has never filed a verified account for allowance of the same by the probate court; and (b) no order of the probate court has ever been made authorizing or approving any such claim, the amount deducted is \$760.

"Fourth. That the order of the probate court of Jones county allowing the said I. H. Yates, guardian, the sum of \$480 for the care, schooling, and maintenance of said minors, is a valid and binding order, and this court cannot inquire into the justness of such order, and by virtue of said order the guardian is entitled to be credited in his final account the amount so allowed by said order from and after date of said order.

"Fifth. That the payments made by the said guardian to the mother of said minors, amounting to the sum of \$375, were made to her for and on behalf of the said minors, and the guardian should be allowed credit for same in his final report, as the law makes the mother of said children their natural guardian. That the \$488 in the report is excessive to the extent of \$113, leaving the \$375 as entire to credit.

"Sixth. That the claim of the said guardian for the funeral expenses of their deceased father is not a lawful charge against the estate of the said minors and should not be allowed as a credit in his final account. This amounts to \$131.10.

"Seventh. That it was the duty of the guardian to invest the surplus funds of his wards, and that if he failed to do so he should be charged with interest on such surplus funds at the rate which same could have been invested by use of reasonable diligence.

"Eighth. That it was lawful for the guardian to pay to the clerk of the federal court at Sherman, Tex., the sum of \$40 as a commission on the funds of said minors held in the registry of the court, same being a just and lawful claim against the estate of said minors, and he is entitled to credit therefor, \$20 deducted from report.

"Ninth. That the said I. H. Yates should be removed from the office of guardian of the estate of the minors, Guyton Ray Wilson, Ikie Avoca Wilson, and Willie Malinda Wilson, such removal to be made because the guardian has failed to make the probate court of Jones county, Tex., his annual reports of the condition of the estates of said minors as required by law, and because the said I. H. Yates has been guilty of gross neglect and mismanagement in the performance of his duties in regard to investing the funds of his wards as required by law. For errors appearing upon fact of judgment of probate court, the district court entertains this bill of review."

The appellant, in his first assignment, insists that the court was in error in revising and restating the final account of appellant as guardian of the estates of the minors, claiming that a judgment is conclusive against minors when the procedure prescribed by statute for obtaining the same has been duly complied with, the account and report formally and properly made as ordered, and the account approved and the guardian discharged. That the guardian having filed his final account with his application to be discharged, which was in legal effect a resignation of the guardianship, and the judgment approving said final account and discharging said guardian having been rendered upon due compliance with all requirements of the statute in reference to the resignation of guardians and the approval of their final accounts upon resigning and no appeal therefrom having been taken, such judgment is final and conclusive upon said minors and cannot be set aside in this proceeding.

[1] Appellees claim that, under article 4300 of the Revised Statutes of 1911, the final account of the guardian is subject to review in this proceeding. Article 4300 of the Revised Statutes reads as follows:

"Any person interested may, by a bill of review, filed in the court in which the proceedings were had, have any decision, order or judgment rendered by such court, or by the judge thereof, revised and corrected on showing error therein.

But no process or action under such decision, order or judgment, shall be stayed except by writ of injunction."

We think there can be no doubt that a bill of review, after a final report of the guardian has been made and his account approved and the guardian discharged on his application for discharge, is a proper procedure, the one provided by the law, and goes to the question of error raised in the bill as to the orders of the court in the statement and approval of the final account. *Nicholson v. Nicholson*, 59 Tex. Civ. App. 357, 125 S. W. 985, we think is directly in point and conclusive of the question presented in this assignment. The bill of review undertakes to show error in the probate court's approval of the guardian's final account, on his application for a discharge. The question presented in this assignment is directed to the power of the court to entertain the bill after entry of final order of discharge of the guardian. We have reviewed the cases to which we have been referred by appellant in the very able brief filed in this court, but have reached the conclusion that the court has the power to review the final settlement of the question at any time after entry of the order of discharge and before the bar of the statute. The language of the statute, in our opinion, does not warrant the construction placed upon it by appellant in the assignment. *De Cordova v. Rodgers*, 67 S. W. 1043; *Jones v. Parker*, 67 Tex. 76, 3 S. W. 222; *Janson v. Jacobs*, 44 Tex. 573; *Seguin v. Maverick*, 24 Tex. 526, 76 Am. Dec. 117.

Appellant's second assignment asserts error in revising and restating certain items, namely, items \$1,491 and \$423, and, deducting therefrom the sum of \$760, the said sum deducted being that portion of said two items charged by the appellant guardian for the support and maintenance of the minors prior to appellant's appointment as guardian, and covering a period of time prior to November, 1906, the uncontradicted evidence showing that from the time of the death of their father in November, 1904, until the recovery of a judgment in behalf of said minors on the 6th of June, 1906, neither the mother nor the minors had any money or other property, and that appellant, during said time, maintained and supported said minors at his own expense; that the expenses furnished were not shown to be unreasonable, but were shown to have been actually paid out by appellant.

In the third assignment, error is charged in revising and restating the item of \$1,491 contained in the final account wherein appellant charged said sum for the support, maintenance, and education of said minors from the 4th of November, 1904, to the 25th of December, 1908; the evidence not showing that said item or any part of it was erroneous, unjust, or inequitable.

The fourth assignment claims error in restating item \$423 contained in the final account, same being for the support and main-

tenance of one of said minors from its birth in June, 1905, to December, 1908, the evidence not showing the item erroneous, excessive, or unjust.

[2] The fifth assignment goes to the trial court's third conclusion of law, holding that appellant, as a matter of law, could not be allowed a credit for support and maintenance of the minors occurring prior to his appointment as guardian (the items found by the court to amount to \$760), the ground of the holding being that the guardian had not filed his verified account for said expenses for allowance and the account had not been allowed and approved by the probate court, the evidence and finding of the court showing the amount charged to be reasonable and necessary, and that same had been approved by the probate court in the final account. There are cases holding, and properly so, that expenses paid by a person before receiving letters of guardianship are just claims against the estate of the ward. *Logan v. Gay*, 90 Tex. 603, 90 S. W. 861, 92 S. W. 255. But we find none holding that such claims may be allowed where they were never filed and approved by the court, as required by the statute. To so hold would be to hold the statute for naught.

Before claims can be paid out of the principal of the estate, they must be expressly authorized. Article 4131, Revised Statutes 1911; *Blackwood v. Blackwood*, 47 S. W. 483.

The report discloses that the whole of this estate was expended and \$25 more during the time intervening between May, 1904, and December, 1908; that the guardian has made no annual account; there are no receipts or vouchers to show for what the amount was expended, and the final account sets up a lump sum without any attempt to itemize it, that the wards might have a chance to investigate. If this sort of showing were held to be sufficient to divest the minors of their inheritance, it would leave them without protection.

Assignments 6 and 7 are directed to the action of the court in not allowing portions of items \$1,491 and \$423 of appellant's account, charged by the guardian for support and maintenance of the minors after the appointment of the guardian, for the reason that the probate court by the order of September, 1906, on his application for an allowance, did order that he be allowed the sum of \$480 per annum out of the funds then in his hands, for the care, education, and maintenance of said minors.

A majority of the members of this court hold that appellant is not entitled to a credit for the item of \$760 claimed by appellant for the support and maintenance of the children prior to his appointment as guardian, which was excluded by the trial court on his final accounting in the absence of a showing that his claim for the excluded items had been presented to the court, allowed, and approved. The record discloses no account other than

the guardian's final account, for the excluded items, presented by the guardian to or allowed by the probate court. The majority are of the opinion that the item of \$760 was properly charged against the guardian for the reasons stated in the trial court's conclusion of law No. 3. The writer of this opinion thinks that, under article 4130, Revised Statutes, under which the guardian of the estate must pay over to the guardian of the person of the minor, semiannually, a sufficient amount of money, to be fixed by the court, for the education and maintenance of the ward, and under article 4131, Revised Statutes, the sum not to exceed the clear income of the ward without the order of the court, the order of the court of September, 1906, was sufficient to authorize the guardian to expend the items for the purpose of the education and maintenance of the wards. In *Freybe v. Tierman*, 76 Tex. 286, 13 S. W. 370, I understand the Supreme Court of this state to hold that, our trial courts being courts of equity as well as law, there is no reason why such claims should not be sustained in any case in the courts, when, under the evidence adduced on the trial, a court of equity would have held the claim valid.

[3] The eighth, ninth, and tenth assignments complain of the action of the trial court in striking from the claims allowed by the probate court item of \$19.85 paid by the guardian for services in burying the father of the minors, \$111.25, expenses for casket, robe, etc., used in the burial of the father of the minors. We think the court was not in error in not allowing these items to be paid out of the estate of the minors. These items were not claims against the estates of the minors.

[4] One of appellant's items of expenses for the support and maintenance of the minors, claimed to have been paid to the mother since December 25, 1908, was \$480. The trial court allowed \$375. The evidence is conflicting, and the court's finding is conclusive. The eleventh assignment, going to that item, is overruled.

[5] We think the court was not in error in charging the guardian interest on the funds of the minors in his hands, where the court found that by the exercise of due diligence he could have loaned the money at the rate of 8 per cent. per annum, but failed to do so. Judge Stayton, in *Smythe v. Lumpkin*, 62 Tex. 242, said the statute is imperative and the courts have no power to disregard its plain provisions. Assignments 12, 13, and 14 are overruled. What has already been said in disposing of other assignments is sufficient disposition of appellant's remaining assignments.

[6] Appellee filed and presents here 14 cross-assignments of error. Appellant objects to a consideration of these cross-assignments because not filed in trial court, contending that therefore we cannot consider them.

There is no other showing about the matter. The cross-assignments do not have to be copied in the transcript; so, without some other showing that they were not filed in the trial court than the assertion in appellant's supplemental brief, the motion cannot be sustained. Rule 101, District and County Courts (159 S. W. xl).

[7] The first and second cross-assignments assert error in the motion of the trial court in not requiring the guardian to account for more than \$2,666.66, as coming into his hands, as fully set out in the first conclusion of law filed by the trial court and his grounds for the court's action there fully stated. There, possibly, could be but little doubt that the entire amount of the judgment obtained in the federal court, which was paid into the registry of that court, became and was the property of the minors charged with the claim of the attorneys who secured the judgment. However that may be, we are of the opinion that inasmuch as the one-third of the amount of the judgment recovered and paid by the guardian to the attorneys was never inventoried and there is no decision, order, or judgment of the probate court in reference to said amount, the guardian could not be charged with the one-third of the amount of the judgment in this proceeding. The first and second cross-assignments are overruled.

The third and fourth cross-assignments seek to charge the guardian with 10 per cent. interest on the surplus funds in his hands, instead of 8 per cent., as allowed by the court in the seventh conclusion of law, on the evidence that 8 per cent. was the rate of interest at which the funds could have been invested by the exercise of diligence. The ma-

jority members of this court hold that these assignments should be sustained.

[8] The trial court refused to restate, but allowed the guardian \$38.20 and \$3 railroad fare and hotel bill incurred by the guardian as shown in the tenth finding of fact and judgment. The majority members hold that these items should not have been allowed because not verified, filed on the claim docket, and allowed by the probate court. Cross-assignments 5 and 6 going to these two items are sustained.

[9] The federal court clerk at Sherman retained the sum of \$40.13 as commissions due him in paying to the guardian the money due the minors in the registry of that court, as shown in the trial court's eighth finding of fact. This item the trial court allowed the guardian and refused to restate same. In this, we think there was no error, and cross-assignments 7 and 8 are overruled.

The question presented in cross-assignments 9 and 10 we have passed on. The evidence was conflicting, and the court's finding is supported by the evidence. For the same reason, we overrule cross-assignments 11, 12, 13, and 14.

Adding to the items allowed by the trial court items \$38.20 and \$3, and calculating the interest on the gross sum at 10 per cent. for the nine years, the amount now retained by the guardian is found to be \$2,024.07. Deducting therefrom the \$25.44 claimed by the guardian as owing him by the estate and allowed by the trial court, the balance due the estates of the minors by the guardian is found to be \$1,998.63.

The judgment of the court below will be reformed accordingly, and, as so reformed, is affirmed.

FARMINGTON EQUITABLE BLDG. & LOAN ASS'N v. MINERS' LUMBER CO.
(No. 14858.)

(St. Louis Court of Appeals. Missouri. July 5, 1918.)

1. MECHANICS' LIENS — 291(7) — ENFORCEMENT — PARTIES — STATUTE.

Under Rev. St. 1909, § 8221, providing that in suits to enforce mechanic's liens the parties to the contract shall, and all other parties interested in the property charged with the lien may, be made parties, and that those not made parties shall not be bound by any such proceeding, a mortgagee of lots under a deed of trust, not made a party to a subsequent lien proceeding, and having no opportunity to be heard therein, was not bound by the judgment establishing the lien with execution sale to the lienor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 607; Dec. Dig. —291(7).]

2. MORTGAGES — 589 — PRIORITY — MECHANICS' LIEN.

When a mortgage is foreclosed, whatever rights may have been acquired in respect of it under a judgment establishing a mechanics' lien is gone.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1689, 1690; Dec. Dig. —589.]

3. MORTGAGES — 132 — SALE OF PREMISES — IMPROVEMENTS.

A conveyance of lots by deed of trust and a sale thereunder carried the improvements made subsequent to the conveyance, where nothing excepting them appeared.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 259; Dec. Dig. —132.]

Appeal from Circuit Court, St. Francois County; Peter H. Huck, Judge.

"Not to be officially published."

Suit in equity by the Farmington Equitable Building & Loan Association against the Miners' Lumber Company, to enjoin the removal of buildings from lots. Judgment for plaintiff, perpetually enjoining the defendant, and defendant appeals. Affirmed.

R. C. Tucker, of Flat River, for appellant.
J. P. Cayce, of Farmington, for respondent.

REYNOLDS, P. J. This is a suit in equity to restrain appellant from removing a building off of two lots in the town of Benoist, St. Francois County. It appears by deed of date July 30th, 1907, that the two lots were conveyed to the Counts Construction Company; that on December 27th, 1910, respondent having loaned to the Counts Construction Company \$800, the latter company, to secure the payment of this loan, executed its two deeds of trust on these lots in favor of respondent. The lots at that time had no buildings upon them. These deeds of trust were filed for record and recorded February 3rd, 1911. The trustee acting under these deeds of trust, sold the lots to respondent and duly conveyed them to it by deeds of date August 8th, 1912. It was admitted that the loan to the Counts Construction Company of the \$800 above referred to, was to enable that company to erect buildings on the lots. When it commenced to erect them does not

appear, but it does appear that it was after December 27th, 1910, and that the Counts Construction Company, on February 3rd, 1911, made a contract with appellant to furnish the lumber and material to be used in the construction of two dwelling houses to be erected on these lots, and appellant, acting under that contract, began the delivery of the lumber and material for these houses on February 3rd, 1911. Afterwards, by warranty deed of February 7th, 1911, the Counts Construction Company transferred the lots to one S. P. Counts, who then was its president. Neither the Counts Construction Company nor S. P. Counts paid appellant for the lumber and material furnished under the above contract for the erection of the buildings, and appellant having in due time filed its statement of account and notice of its claim of a lien against the buildings, and of its intention to bring suit to enforce a mechanics' lien against the two buildings, did so, making S. P. Counts the sole defendant in that proceeding. Judgment was obtained before the justice establishing the lien, a transcript was duly filed in the office of the clerk of the circuit court, execution issued and was placed in the hands of the sheriff, and after due advertisement the sheriff sold the two lots to appellant to satisfy the judgment, and had conveyed the interest of S. P. Counts in them by deed of date June 10th, 1912, to the Miners' Lumber Company, appellant herein. Appellant thereupon began to make arrangements to remove, and was about to remove, the buildings off the lots, when this present action to restrain the removal of the buildings was instituted.

There is no question made as to the regularity of the proceedings under the mechanics' lien, nor to the sale under the deed of trust, the contention on part of respondent being that as the Farmington Equitable Building & Loan Association, respondent here, was not made a party to the lien proceeding, it was not bound by the judgment therein and that appellant had not acquired any title as against it by the proceedings and sale under the mechanics' lien. On the part of appellant the contention is, that it acquired title to the buildings and the right to remove them, under the proceedings, sale and purchase in the mechanics' lien action.

The circuit court found for plaintiff and perpetually enjoined defendant from tearing down or removing the two buildings situated upon the two lots and from taking away the material composing them. From this defendant has duly appealed.

[1] Our statute, section 8221, Revised Statutes 1909, a part of the mechanics' lien law, expressly provides:

"In all suits under this article the parties to the contract shall, and all other persons interested in the * * * property charged with the lien, may be made parties, but such as are not

made parties shall not be bound by any such proceedings."

In *Hicks v. Scofield*, 121 Mo. 381, 25 S. W. 755, a suit by plaintiff to restrain defendant from tearing down certain houses standing on land belonging to plaintiff and which defendant claimed a right to remove under proceedings to enforce the mechanics' lien law, the mortgagee not having been made a party to those proceedings, it was held that the interest of the mortgagee was not affected by the judgment of the lien against the land or the buildings thereon.

Construing this section 8221, supra, our Supreme Court held in *Russell v. Grant*, 122 Mo. 161, 26 S. W. 958, 43 Am. St. Rep. 563, that no one can be passed on in person or estate without an opportunity being afforded him to be heard. That, said our Supreme Court, is axiomatic and it was accordingly held that one not made a party to the proceeding for the enforcement of a mechanics' lien is a stranger to the proceedings and those proceedings have no force or effect as against him.

[2, 3] In *Missouri Fire Clay Works v. Ellison*, 30 Mo. App. 67, our court held that when the mortgage is subsequently foreclosed, the equity of redemption, and with it whatever rights may have been acquired in respect of it under the judgment establishing the mechanics' lien, is gone. See, also, *Western Brass Mfg. Co. v. Boyce*, 74 Mo. App. 343, and *McLaren v. International Real Estate & Improvement Co.*, 126 Mo. App. 254, 102 S. W. 1105. These propositions are too well settled to require further discussion. The conveyance by the deed of trust of the lots and the sale thereunder, carried the improvements, nothing excepting them appearing.

The judgment of the circuit court is affirmed.

NORTON and ALLEN, JJ., concur.

WILLIAMS v. SPRINGFIELD GAS & ELECTRIC CO. (No. 1737.)

(Springfield Court of Appeals. Missouri. May 25, 1916. Rehearing Denied and Certified to Supreme Court June 24, 1916.)

1. ELECTRICITY §14(2)—WIRES ACCESSIBLE TO BOYS—NEGLIGENCE.

An electric company must use due care to prevent injury to children apt to come in contact with its wires strung along streets and alleys.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. §14(2).]

2. ELECTRICITY §16(1)—INJURIES—LOCATION OF WIRES—PROXIMATE CAUSE.

Where an electric company's uninsulated wires were near a tree by a bungalow being built, it was not liable for injuries to a boy, attempting to go from the top of the roof of the house to the top of the tree and falling on such wires below, it being conjectural, if he had obtained a safe foothold in the tree and

climbed down as expected, whether he would have touched the wires, and such an accident not being reasonably to be anticipated.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. §16(1).]

Robertson, P. J., dissenting.

Appeal from Circuit Court, Greene County; Arch A. Johnson, Judge.

Action by Francis P. Williams, by his next friend, against the Springfield Gas & Electric Company. From judgment for plaintiff, defendant appeals. Reversed and certified to Supreme Court.

Delaney & Delaney, of Springfield, for appellant. Talma S. Heffernan and Patterson & Patterson, all of Springfield, for respondent.

STURGIS, J. The plaintiff, a minor nine years of age at the time of his injury, sues by his next friend for personal injuries received by coming in contact with defendant's high-power transmission wires defectively insulated. The two wires in question were strung along the west side of a north and south alley in Springfield, Mo., 20 feet from the ground on poles. At the place of the injury these wires passed through the top of a wild cherry tree, the poles and tree being practically in a line with each other. Opposite this cherry tree, and with its limbs brushing the east side, there was being erected a new bungalow, the outside of which was almost finished. This house fronted south, and the gable of the roof was toward the alley, the tree, and defendant's wires. The apex or comb of the roof was 26 feet from the ground, being six feet higher than the wires. A scaffold had been erected by the workmen a foot or two lower than the wires and parallel therewith. The plaintiff was injured while at play with some other boys by climbing up in the house and going from there into the cherry tree and coming in contact with defendant's uninsulated wires. These wires had been originally insulated, but the plaintiff made a clear case that for a year or more the insulation had been off more or less, and defendant does not contest this feature of the case. The serious question is whether the defendant was guilty of actionable negligence in maintaining badly insulated wires where same passed through this tree and the plaintiff came in contact therewith. Much the same proposition was stated in *Mullen v. Wilkes-Barre Gas & Electric Co.*, 229 Pa. 54, 56, 77 Atl. 1108, 1109, thus:

"The single proposition urged upon us in the able printed brief of the appellant is that, conceding the obligation of the defendant to keep its wires safe as to those lawfully using the streets and sidewalks in the ordinary and usual way, as well as to those who, in the performance of some duty or the exercise of some right, might be required to approach them, no such obligation existed as to those, although children of immature age, who, in the pursuit of pleasure or adventure, voluntarily placed

themselves in dangerous proximity to its wires, stretched 20 feet above the ground."

The plaintiff's theory of the case is that the new and only partially completed building and the tree formed an attractive place for children to play, and that defendant was bound to anticipate that children were likely to play about this building and tree, and in so doing pass from the building to the tree, as this boy did, or vice versa, and thereby come in contact with these dangerous wires. As supporting this proposition there is evidence that children of the neighborhood had been frequently playing in and around this house, especially while the workmen were not at work, as was the case when this accident occurred on Sunday evening. It was not shown that any of the children had climbed the tree or from the house to the tree during the time this house was being built. It was shown, however, that in past years during the time when wild cherries were ripe (the fall of the year) boys had been known to climb the tree for the cherries. This accident occurred in May, and the house had been in course of construction some two months or more. There is also evidence that the tree was easily climbed, having many limbs and rather low-hanging branches.

[1] Several cases are cited by plaintiff, and we think that such declare the law correctly, that electric companies stringing high-power wires along streets and alleys through or in close proximity to trees of such character and location that boys, following their natural adventuresome tendency, are apt to climb same, must use the high care imposed on them to keep such wires in a safe condition. The high degree of care required of persons handling so dangerous an agency as electricity applies, we think, to the question of anticipating that children, and especially boys, are likely to indulge in the sport of climbing trees and going into somewhat dangerous and unusual places. Curtis' Law of Electricity, § 512, states the law thus:

"An electric company, maintaining a dangerous wire through or near a tree, is bound to anticipate that persons may lawfully climb the tree, and it is required to exercise due care to prevent injury to such persons from its wire."
* * * The courts recognize that children are apt to climb trees, and impose upon electric companies the burden of using due care to keep their high-tension wires insulated in places where children when climbing a tree will come in contact with them."

The cases cited there and by the plaintiff fully sustain this proposition. Mullen v. Wilkes-Barre Gas & Electric Co., 229 Pa. 54, 77 Atl. 1106; Benton v. North Carolina Public Service Co., 165 N. C. 354, 81 S. E. 448; Philbin v. Marlborough Electric Co., 218 Mass. 394, 105 N. E. 893; Temple v. McComb City Elec. Light & Power Co., 89 Miss. 1, 42 South. 874, 11 L. R. A. (N. S.) 449, 119 Am. St. Rep. 698, 10 Ann. Cas. 924. This last case is the leading case on the question, and the doctrine stated has received the approval of the authors of the able notes to this case in 10

Ann. Cas. 924, and 11 L. R. A. (N. S.) 449, where such doctrine is fully discussed and the cases reviewed.

The above-cited cases also dispose of, adversely to it, the defendant's contention that plaintiff was a trespasser to the extent that it did not owe him the duty of keeping its wires safe in that he was playing upon the premises of another, and where he had no right to be. The defendant vigorously protests against the doctrine announced in what are termed the "turntable cases," that of structures and machinery dangerous but attractive to children, and thereby alluring them to become trespassers to their injury, under the wider name of "attractive nuisances." The able opinion of Lamm, J., in Kelly v. Benas, 217 Mo. 1, 116 S. W. 557, 20 L. R. A. (N. S.) 903, is cited as calling a halt on the unjust extension of this doctrine. This and the many cases cited deal with accidents where the place and causes of the injury are on the premises of the defendant, and much may be said in favor of restricting the liability of one for failing to keep his own premises in a safe condition against those wrongfully trespassing thereon. But as shown in the cases, supra, this principle has no application here, as the place of the injury is not on defendant's premises, but on a public thoroughfare as to its wires and poles, and on premises of a third person as to where the plaintiff was playing. As to this defendant, plaintiff was not a trespasser, and the owner of the premises was not and is not complaining. As said in Day v. Light, Power & Ice Co., 136 Mo. App. 274, 280, 117 S. W. 81, 83:

"The precise nature of the relationship of the boy to the owner of the premises is not important. It is enough to know that he and the other persons who used the roof were not trespassers. The usage being with the permission of the owner, express or implied, the child was rightfully there so far as defendant was concerned. This case differs from those where the plaintiff was a trespasser on the property or a mere licensee of the defendant." Blackburn v. Railway, 180 Mo. App. 648, 555, 167 S. W. 457.

The difference lies in the fact that the owner of premises has a right to its use, and no one else has such right without his consent, and he is under no obligation, except in exceptional circumstances, to keep his premises in a safe condition for those who are there against his will. When such person, however, has only a permissive right to use public or private property whereon to locate and operate dangerous instrumentalities or agencies, another, and not he, determines who are or who are not trespassers, and as to him none are trespassers, at least none who are there without objection of the proprietor.

If the above were all the facts in the case and the plaintiff had, in a manner natural for a boy of his age, and therefore one to be anticipated, climbed this tree or passed from the house to the tree, and in so doing came in contact with defendant's dangerous wires, we

would affirm his right to recover for his injuries. Such are the facts in all the cases cited, and in each one the act of the boy in climbing the tree and his coming in contact with the dangerous wires were in a manner and under circumstances which the court could say were reasonably to have been anticipated and guarded against. But is such the case here? The accompanying photograph of the scene of this accident is in evidence, and in many respects reveals the real facts better than the oral evidence.

to the apex and got straddle of this on his knees. Coming near the edge, he in some way "scooted" across into the top of the tree, stepping on a limb, which broke under his weight, fell into the wires, grabbing same with his hands, struggled some, and fell to the ground. Both hands were badly burned, and there were burns on his arms and in one armpit. Grasping both wires as he fell, his body evidently formed a short circuit. The plaintiff and one of his companions speak of a limb, or twig, as his companion called it.



Such photograph was taken the next morning after the accident, and every witness testifies to its accuracy. It shows the view looking southward. Another photograph, taken at the same time, shows the same view looking northward, but it need not be reproduced.

The plaintiff, with three other boys, was playing "banter-leader," a dare game in which one boy took the lead in doing difficult things and the others followed, or tried to do so. Their play led them to go upstairs in this new house by a ladder, the stairway not being completed. The leader then proposed going out on the roof, but the owner of the house, coming up at that time, called to them not to do so, as it was dangerous. The plaintiff says he did not hear, but the other boys did, and he alone went out the upper window, near the middle of which was the scaffold of the workmen. He walked along this scaffold to the edge of the roof, or cornice, which projected some 18 inches or 2 feet, and climbed onto the roof. He went up the roof

extending out over the roof over which plaintiff passed to the body of the tree, but the photographs reveal nothing more than a mere twig, extending to the roof of the house. The workmen, as the pictures indicate, had cut off the limbs above the scaffold on which they worked, so as to get them out of the way. The wires extended parallel with and a foot or so out from the scaffold and somewhat higher. The wires were 6 feet lower than the comb, or apex, of the roof, from which plaintiff "scooted" into the tree. Just how the plaintiff got from the point of the roof to the tree and just how and why he fell is not very clear. It is evident from the photograph that the tree is not more than 6 or 7 feet higher than the apex of the roof, and where the plaintiff went into it, there is nothing but small limbs. The tree is about 3 feet from the house at the ground, but is evidently further away—one witness said about 4 feet—at the apex of the roof. The

only one of plaintiff's companions, a boy a little older than he, testifying, said:

"Francis (plaintiff) started to get down, and then there was a twig over the tree, branch over the top of the house, and he put his foot on that, and was going down, and his foot slipped, and he was hanging by his hands, and the limb broke, and he just fell straddle of the wires then. * * * Q. Did you see him in the tree? A. Yes, I seen him when he got down; he was on the end of the twig and was going down. * * * He was sitting straddle at the time somewhere near the edge of house, and I told him what Mrs. Hughes said, to get down. He just walked, didn't stand up straight, set down and kind of scooted across. Kind of got on his knees and got in the tree. * * * He jumped to the tree, and there was twigs going different ways. * * * His foot slipped, and he was hanging by this—he was hanging by the other limb with his hands doubled across it like this, and his foot slipped, and then the limb broke and he fell straddle—fell across the wires."

Looking at the photograph one cannot see how plaintiff got from the roof to the tree unless he pulled the tree toward him by a small limb, and then jumped or swung over to it.

Plaintiff's petition alleges that defendant's wires were maintained dangerously near the scaffold, and that plaintiff, while playing, went from the house to the scaffold, and from the scaffold to the tree, to climb down, and thereby came in contact with the wires. All the evidence, however, unmistakably shows that plaintiff went from the scaffold onto the roof, and from the highest point of the roof, some 7 or 8 feet higher than the scaffold, attempted to get into the tree and fell into the wires, grasping them in his descent. The nearness of the wires to the scaffold, itself a mere temporary structure without any evidence as to how long it had been there, had nothing whatever to do with plaintiff's injury. Had the scaffold been on the other side of the house from the tree, or had plaintiff gone on the roof by some other method and attempted the feat of going from the point of the roof to the top of the tree, the injury would have occurred just as it did. Plaintiff's instruction covering the whole case also predicates negligence on defendant's wires being strung "so near said scaffold that persons thereon and thereabout were likely to come in contact with said wires," when, as seen, the scaffold had nothing to do with the injury, except to aid plaintiff in going upon the roof, and its nearness to the wires was wholly immaterial to this accident. This instruction is confusing and misleading, and even if the nearness of this temporary scaffold was a ground of negligence, then there is no proof of defendant's knowledge, actual or constructive, from lapse of time, of its dangerous nearness.

[2] II. Had the plaintiff been injured by going in his play from the scaffold to the tree and coming in contact with the wires, then, with proof of actual or constructive notice to defendant, a different case would be presented. Leaving the scaffold out, the case

presented is that the boy attempted to go from the top of the roof to the top of the tree and fell on defendant's wires 6 feet below. Had the plaintiff succeeded in gaining a safe foothold in the tree and climbed down it as he intended, it is purely conjectural that he would have come in contact with the wires. Nor do we have a case, as are those cited by plaintiff, of a boy climbing a tree in a natural and usual way from the ground and coming in contact with dangerous wires. The question, therefore, is whether defendant should be held to have anticipated the probable happening of such an occurrence as is here presented. Of course, plaintiff is not required to prove that defendant should have anticipated this particular accident, and it would make no difference whether plaintiff was climbing the tree from the ground or from the house into the tree, provided whichever method he did adopt was one which defendant could reasonably have foreseen was likely to be adopted by some boy and result in bringing him in contact with the dangerous wires.

The duty to insulate heavily charged electric wires is not universal. Isolation is generally more effective than insulation. The duty to insulate wires passing through trees depends on circumstances and the dangers to be apprehended, the dangers, of course, being such as resulted in the injury complained of. The defendant's duty in this respect is merely an application to particular facts of the general rule of law that electric companies are required to use the high degree of care imposed on them by reason of the highly dangerous character of electric currents to insulate their high-tension wires whenever and wherever it may reasonably be anticipated that persons pursuing business or pleasure, which includes children at play, may come in contact with same. The converse of this is equally true. *Curtis' Law of Electricity*, § 510; *Joyce on Electric Law*, § 445; *Brubaker v. Electric Co.*, 130 Mo. App. 439, 447, 110 S. W. 12; *Day v. Light, Power & Ice Co.*, 136 Mo. App. 274, 279, 117 S. W. 81; *Blackburn v. Railroad*, 180 Mo. App. 548, 560, 167 S. W. 457; *Luehrmann v. Laclede Gaslight Co.*, 127 Mo. App. 213, 218, 104 S. W. 1128. Innumerable cases might be cited from other jurisdictions. As will be seen from a reading of the cases, the reason given for nonliability for accidents resulting from noninsulation of wires, where same could not be reasonably anticipated, is that the noninsulation is not the "proximate cause" of the injury, but such term is merely a convenient one to express the idea that the injury is not the probable, and therefore not the to be expected, result of the noninsulation. In those cases relied on by plaintiff as showing the defendant's liability for maintaining noninsulated wires through trees, because the defendant should have, on the facts there presented, anticipated the injury, but which cases are readily

distinguished from this case on the facts, the courts recognize that defendant would not be liable on the different state of facts. Thus, in *Mullen v. Wilkes-Barre Gas & Electric Co.*, 229 Pa. 54, 61, 77 Atl. 1108, 1110, the court said:

"On the main question presented by this appeal, whether danger to any one was reasonably to be apprehended because of the condition of the defendant's wires, the case is admittedly close; but in the opinion of a majority of the court the judgment should be affirmed for the reasons stated in the opinion of Judge Head of the superior court."

This same court, in *Elliott v. Allegheny County Light Co.*, 204 Pa. 568, 54 Atl. 278, held that, although an electric company maintained poorly insulated wires near the side of a building (and the defendant would doubtless have been liable had a workman in the usual course or his business in painting the house come in contact therewith) yet, when a painter fell from his ladder and grasped the wire in his descent the defendant was not liable because the noninsulation was not the proximate cause of the injury.

The ground of liability in *Benton v. North Carolina Public Service Co.*, 165 N. C. 354, 357, 81 S. E. 448, 450, is that the tree was so located and children were so accustomed to play in and around it that "the company might reasonably expect small boys to climb such trees from their immemorial habit of doing so." This same court, however, in *Parker v. Charlotte Electric Ry. Co.*, 169 N. C. 68, 85 S. E. 33, held that an electric railway company maintaining feed wires 12 inches beneath a bridge is not liable for injury to a boy of 13 years, getting down on his knees on the floor of a bridge and reaching his hand between the lower railing and flooring and touching a feed wire, for that the company could not reasonably foresee the accident resulting from the boy's act. Also, because of the different facts, the Supreme Court of Georgia, in *Brown v. Light Co.*, 137 Ga. 352, 73 S. E. 580, held the defendant not liable where it strung wires 22 feet high over a sweet gum tree, cutting the branches to prevent contact with the wires, and a boy climbed the tree in search of gum and came in contact with the wires, and it was shown that children on other occasions had visited this tree to procure gum, but without defendant's knowledge of this fact. So in *Graves v. Washington Water Power Co.*, 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452, it was held that one maintaining an un-insulated electric wire near a bridge pier was not bound to anticipate that, because of the attractive character of the pier and the birds found there, children might climb the pier and come in contact with the wire, and thus be liable for failure to take precautions to guard against such contingencies. In *Sheffield Co. v. Morton*, 161 Ala. 153, 49 South. 772, recovery was denied for the death of a 10 year old boy who came in contact with un-

insulated wires out of reach of persons resorting near the wires in an ordinary rational way, and where the boy became exposed to danger only after he had climbed to a place of difficulty. The court held that:

"The defendant, in the exercise of a prudence reasonable under the circumstances, was not required to anticipate that persons would go into a place of obvious danger."

To the same effect, see *Cobb v. Richmond Cotton Oil Co.* (by this court) 181 S. W. 1196, 1198; *Geroski v. Light Co.*, 247 Pa. 304, 93 Atl. 338, L. R. A. 1915D, 580; *Keefe v. Electric Lighting Co.*, 21 R. I. 575, 43 Atl. 542; *Trout v. Philadelphia Electric Co.*, 236 Pa. 506, 84 Atl. 967, 42 L. R. A. (N. S.) 713; *Strack v. Telephone Co.*, 216 Mo. 601, 609, 116 S. W. 526; *Myer v. Union Light Co.*, 151 Ky. 332, 151 S. W. 941, 43 L. R. A. (N. S.) 136; *Johnston v. New Omaha Thomson-Houston Electric Co.*, 78 Neb. 27, 113 N. W. 526, 17 L. R. A. (N. S.) 435; *Mayfield Water & Light Co. v. Webb's Adm'r*, 129 Ky. 395, 111 S. W. 712, 18 L. R. A. (N. S.) 179, 130 Am. St. Rep. 469; *Wetherby v. Twin State Gas & Electric Co.*, 83 Vt. 169, 75 Atl. 8, 25 L. R. A. (N. S.) 1220, 21 Ann. Cas. 1092.

Applying these principles to this case, we cannot hold that defendant should have anticipated that a boy, or any one, would climb to the apex of the roof and attempt to go from there to the top of this tree, and in so doing fall on these wires. However unfortunate this accident was, and however much sympathy we have for plaintiff whose venturesome and fearless spirit arouses our admiration, and though we feel it a pity that a boy with such brave impulses should thereby, and before he had learned to control and curb the same with discretion, be rendered a cripple for life, yet we cannot otherwise hold defendant liable.

The judgment will therefore be reversed.

FARRINGTON, J., concurs. ROBERTSON, P. J., dissents.

ROBERTSON, P. J. Deeming the opinion of the majority in conflict with the decisions in the following cases: *Morgan v. Oronogo Circle Mining Co.*, 160 Mo. App. 99, 117, 141 S. W. 735; *Hoepper v. Southern Hotel Co.*, 142 Mo. 378, 388, 44 S. W. 257; *Buckner v. Stockyards Horse & Mule Co.*, 221 Mo. 700, 710, 120 S. W. 766; and other cases cited and relied upon in behalf of plaintiff—the case at bar must go to the Supreme Court for a final construction of the facts disclosed by the record, which I think requires an affirmation of the judgment; and, as I can see no reason for giving in full my views of the case, I shall refrain from writing more than is necessary for me to state in order to give respondent the benefit of the constitutional requirement concerning the certification of cases to the Supreme Court.

MODRELL v. DUNHAM, et al. (No. 12049.)
(Kansas City Court of Appeals. Missouri.
June 12, 1916. Rehearing Denied
July 8, 1916).

1. CARRIERS \S 298(1)—INJURIES TO PASSENGER—NEGLIGENCE—KNOWLEDGE OF DANGER.

If the operatives of a street car had neither knowledge that a passenger had arisen, nor reason to suppose she would arise from her seat to leave the car, it was not negligence to accelerate the speed of the car with such a jerk as would not injure a passenger who was seated, although sufficiently violent to throw one down if standing.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1205, 1206; Dec. Dig. \S 298(1).]

2. CARRIERS \S 298(1)—INJURIES TO PASSENGER—NEGLIGENCE.

Where, after a passenger had been told by the conductor of a street car that she would be let off at a street, the conductor called the street, the car slowed up, and passenger had stepped to the door, the motorman's action in causing the car, before it stopped, to give a sudden jerk, and increase speed knowledge that the passenger had arisen not being essential under such circumstances, was negligence; the question whether knowledge on the part of the operatives is necessary depending entirely upon the circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1205, 1206; Dec. Dig. \S 298(1).]

3. CARRIERS \S 333(2)—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

Where after a passenger had been told by the conductor of a street car that she would be let off at a certain street, the conductor called the street and the car slowed up, it was not negligence to arise and approach the door preparatory to leaving it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385, 1386; Dec. Dig. \S 333(2).]

4. CARRIERS \S 320(19)—INJURIES TO PASSENGERS—TRIAL—QUESTION FOR JURY.

In an action against a street railroad for personal injuries, caused by a fall, the question whether the car jerked after the motorman had been signaled to stop held for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1322; Dec. Dig. \S 320(19); Negligence, Cent. Dig. § 301.]

5. CARRIERS \S 318(4)—INJURIES TO PASSENGER—NEGLIGENCE.

In an action for personal injuries the fact that a street car increased its speed with a jerk while going up a slight incline was sufficient to prove that the operatives did it and to prove the specific negligence charged.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307, 1308; Dec. Dig. \S 318(4).]

6. TRIAL \S 140(1)—INJURY TO PASSENGER—PROVINCE OF JURY—CREDIBILITY OF TESTIMONY.

In a street car passenger's action for injuries caused by a fall, it is only where the fall is so contrary to physical facts and laws, and so at variance with common experience that it is shocking to reason, that the court can reject evidence as to the place from which she fell and the manner thereof as of no evidentiary value; credibility being for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 334; Dec. Dig. \S 140(1).]

7. DAMAGES \S 132(3)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where plaintiff, a strong vigorous woman 66 years of age, was reduced to a comatose condition, unable to speak or make a sign, sustained a wound at the back of her head near

the base of the brain, an inch and one half or two inches long, became violent, and was taken to the hospital where she remained ten days, being unconscious three or four days of the time, was subsequently in bed at home for six weeks, has been rendered nervous, has fainting spells, pains in her neck and back, and the evidence is that her present condition is permanent, a verdict for \$2,500 was not excessive or influenced by passion or prejudice.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 374; Dec. Dig. \S 132(3).]

Appeal from Circuit Court, Jackson County; Harris Robinson, Judge.

"Not to be officially published."

Action by Arena Modrell against Robert J. Dunham and another, receivers of the Metropolitan Street Railway Company. Judgment for plaintiff, and defendants appeal. Affirmed.

John H. Lucas, Mont. T. Prewitt, and Charles A. Stratton, all of Kansas City, Mo., for appellants. Justus N. Baird, of Kansas City, Kan., and Lyon & Lyon, of Kansas City, Mo., for respondent.

TRIMBLE, J. Plaintiff's suit is for damages on account of personal injuries received in a fall from a street car. Her case is based upon the charge that, when the car approached the corner of Thirteenth and Wood streets, where she desired to get off, which was known to the conductor, he having been asked, and having promised, to let her off at that point, the conductor called out the place and gave the motorman the stop signal, and the car slowed down nearly to a stop, and plaintiff, thinking it was about to stop for her to alight, arose from her seat and was standing in the door opening into the rear vestibule when the motorman, instead of stopping the car, negligently started the car forward with a violent jerk and at a rapid rate of speed, throwing plaintiff out of the door and from the car to the pavement, whereby she was greatly injured. Upon the return of a verdict of \$2,500 in her favor, she obtained judgment, and defendant appealed, and now insists that the judgment should be reversed and the cause remanded because the court should have sustained a demurrer to the evidence, because the court erred in giving plaintiff's instruction No. 1, and because the verdict is excessive and should have been set aside on account of passion and prejudice of the jury.

It is insisted that the demurrer should have been sustained because there was neither allegation nor proof that the operatives of the car knew of plaintiff's position, but that, on the contrary, the proof shows they did not know she was where she would likely be thrown down by a jerk of the car. The car was going west on Wood street. It was night and very dark. The evidence for plaintiff tends to show that there were no street lights either at Twelfth or Thirteenth. De-

defendant's evidence is to the effect that there was an arc light at Thirteenth. Plaintiff was a small woman 66 years of age, and was accompanied by a friend, Mrs. Goermar, a young woman, with a baby in her arms. It is conceded that, when the two boarded the car, they told the conductor they wanted to get off at Thirteenth and Wood streets, and the conductor said to them, "All right, ladies; I will see you get off there." The car was an old-style double truck car, having a vestibule with a controller and braking apparatus therein at each end, and was not of the pay as you enter variety. From the ground three steps led to the floor of the rear vestibule, and, in boarding a west-bound car, one would enter the vestibule from the north, facing south, and then turn to the west and enter the door of the car proper, which was north of the center of the car and near its north side. The floor of the car and the doorsill were about 4 inches higher than the floor of the vestibule. Inside of the car, on the north side, was a longitudinal seat some 5 or 6 feet long, extending from a point near the door up to where the short seats began, which were crosswise of the car. The parties differ as to the distance the east end of this seat was from the door, the defendant claiming it was 2 or 2½ feet therefrom, while the plaintiff's evidence is that it was very near the door, and that when one, sitting on the east end of the seat, arose to his feet, he would be right at or very near the door.

The evidence of plaintiff is that the two women entered the car from the rear vestibule and took seats on the longitudinal seat above mentioned, plaintiff being seated on the east end and right next to and in front of the door, and Mrs. Goermar west of and next to her.

Mrs. Goermar testified that the conductor called out Thirteenth street; that when he did this he was in the front end of the car; that when the conductor called out Thirteenth street, she rang the bell "right soon after that. After awhile it slowed up. When the car slowed up, Mrs. Modrell raised up." She then testified that the car gave "an awful jerk"; that when this occurred Mrs. Modrell, the plaintiff, was in the car proper, not in the vestibule, but standing in the doorway of the car; that when the car jerked, plaintiff "fell down on the car. She fell down from the car on pavement." She further testified that the jerk threw her (the witness) against the door, which, of course, being open, was to one side; that, having her baby in her arms, she pushed with her knee against the door, and was not thrown down nor injured.

The conductor testified that, after the car left Twelfth street, he stepped up in the car, gave the motorman the signal to stop at Thirteenth, and called out Thirteenth and Wood streets; that he stepped by the two

ladies; and that, counting the baby, there were only six passengers on the car. He says he was standing up at the time the accident happened. "I had been standing up there from the time that I came into the car to tell these ladies to get off until the accident happened." On cross-examination he said that after the car had passed Twelfth street a couple of car lengths, maybe not over a car length, he stepped into the car and called out Thirteenth and Wood; that when he did this he was right in front of the ladies; that the elderly lady was in the seat near the door; that he "stepped forward about a step, and I had my attention turned to something up in the car, and the first thing I knew somebody—they all hollered at once that a woman had fallen off the car."

Plaintiff, testifying for herself, said the conductor was up in the front end of the car, that she was in the car proper and in the doorway when the jerk occurred, and that she was thrown out and down to the pavement. Plaintiff testified that when the car was slowing down it was "pretty close" to Thirteenth and Wood, "about where the car was to stop." Plaintiff lived not far from the corner, and had been acquainted with the usual stopping place for 6 years. The defendant's evidence does not show how far the car was from Thirteenth and Wood when plaintiff fell off, though the conductor must have known precisely where she fell, as he picked her up.

After setting forth the foregoing facts we are in a position to consider the defendant's claim that plaintiff, in order to recover, must allege and prove that the car operatives had knowledge that she had arisen from her seat preparatory to getting off the car, and that, as the evidence shows they did not know this, plaintiff is not entitled to recover.

[1] Of course, if the car operatives had neither knowledge that plaintiff had arisen, nor reason to suppose that plaintiff would arise from her seat and get ready to leave the car, then it would not be negligence to accelerate the speed of the car with such a jerk as would not injure a passenger who was seated, though sufficiently violent to throw one down if she had left the seat and was standing. Consequently, under certain circumstances, it has been frequently held that a plaintiff could not recover without showing such knowledge, or at least a duty to know. *Schwanenfeldt v. Metropolitan St. Ry. Co.*, 176 S. W. 1098; *Hays v. Metropolitan St. Ry. Co.*, 182 Mo. App. 393, 170 S. W. 414; *Speaks v. Metropolitan St. Ry. Co.*, 179 Mo. App. 311, 166 S. W. 864.

[2] But the facts in this case are quite different. It was dark outside. Plaintiff could not see how near nor how far away the car was from her alighting place, but, having asked and received a promise from the conductor to be left off at Thirteenth,

she naturally and properly relied upon him to tell her when that place was being approached. If the car were a great ways off from the stopping place, at the time the motorman slowed up and then, by an acceleration of speed, caused the car to jerk, it might be that he would not be negligent in giving a jerk at that time, since he would not know nor have reason to suppose that seated passengers would then be standing. But plaintiff's evidence is that the conductor called out the place; that the motorman received a signal to stop; that the car was very near the stopping place, and slowed down as if going to stop, and then, as she arose from her seat, the car, instead of coming to a complete stop, as she had every reason to think it would do, gave a violent jerk and threw her out. In other words, after the motorman had received a signal to stop and had slowed the car down as if to obey, and while approaching the stopping place where he could reasonably expect a passenger to be in course of preparation to leave the car, he caused the car to give a sudden jerk. To do this, at that time and under such circumstances, without knowing whether passengers were standing and in danger of being thrown, was negligence. Or, to state it differently, knowledge on the part of the operatives was not essential to plaintiff's case. It was a duty to know that passengers were not in such a situation and to avoid the jerk lest they be injured. The motorman had good reason to suppose that a passenger might be up getting ready to leave the car, and therefore to increase the speed of the car with "an awful jerk" was negligence. *Moeller v. United Railways*, 242 Mo. 721, loc. cit. 726, 147 S. W. 1009. The question whether knowledge on the part of the operatives is necessary to create negligence in starting up with a jerk depends entirely upon the circumstances, and varies according to those circumstances. *Hufford v. Metropolitan St. Ry.*, 130 Mo. App. 638, 109 S. W. 1062; *Paul v. Metropolitan St. Ry.*, 179 S. W. 787; *Hays v. Metropolitan St. Ry.*, 182 Mo. App. 393, 170 S. W. 414.

[3] The conductor himself says he knew where they wanted to get off, and his testimony shows that he called out the place and gave the motorman the signal to stop, and all the evidence shows that the women got up after this was done; and the women say the car slowed down before they arose. After receiving these notices that the car was about to stop where they wanted to alight, it certainly was not negligence on the part of the ladies to arise to their feet and approach the door preparatory to leaving it. *Holland v. Metropolitan Street Ry.*, 157 Mo. App. 476, loc. cit. 483, 137 S. W. 995; *Anderson v. Metropolitan St. Ry. Co.*, 159 Mo. App. 449, 141 S. W. 461.

Defendant urges that the fact that the jerk occurred before the car stopped, and

not after it had stopped and while plaintiff was in the act of stepping from the car, as were the facts in some of the cases, makes a difference in the duty of the car operatives. The claim is that although the car operatives may have had notice that the plaintiff was going to alight when the stop was reached, they had no notice that she would arise and be standing in the car ready to leave before the stop was reached. Doubtless they had no actual notice thereof, but, as stated above, they had brought about a condition where it was very likely and reasonable to suppose that a passenger intending to alight would arise and be in course of preparation to get off, and, therefore, in the exercise of the high degree of care they owed a passenger, it was incumbent upon them not to start the car up with a jerk after having given the passenger reason to get up and be preparing to get off.

[4, 5] The defendant offered evidence tending to show that the car was not jerked, but as there was substantial evidence that it did, this was a question for the jury to settle. The evidence tends to show that while the car was slowing down, apparently coming to a stop, it suddenly gave "an awful jerk," being started up again. The evidence of the car operatives was that the car was going up a slight incline. The fact that the car suddenly increased its speed with a jerk under these circumstances is amply sufficient to show that the operatives did it; and, as above stated, to do so under the circumstances was negligent. There was therefore no failure to prove the specific negligence charged. *Baughman v. Met. St. Ry. Co.*, 177 S. W. 800; *Ilges v. St. Louis Transit Co.*, 102 Mo. App. 529, 77 S. W. 93.

[6] Neither can it be said that the physical facts conclusively preclude a recovery. This claim rests upon the view that a jerk could not have caused plaintiff to be thrown out upon the pavement from the door in which she said she was standing. But clearly, if plaintiff lost her balance by reason of the jerk, there was no physical impossibility involved in her pitching to the platform four inches below and thence into the street. There is no one who says just how she fell, or what she struck on the way to the pavement; nor can any one determine what different forces acting upon her body caused it to fall from the platform instead of stopping there. The rebound of her body striking the side of the door, the sidewise motion and momentum given to her body by one of her feet going first to the floor—any number of causes—could have brought about the result which unquestionably did follow, namely, her fall to the pavement. It is only when the fall "is so at war with the plain physical facts and laws, so at variance with the common experience of mankind that it is shocking to the reason," that we can say evidence as to the place from whence she fell, and the

manner thereof has no evidentiary value. *Scroggins v. Metropolitan St. Ry. Co.*, 138 Mo. App. 215, 120 S. W. 731. The position the conductor says he found the plaintiff in when he picked her up does not show conclusively that she did not fall the way she claims she did, even if it had been conclusively shown she was in that position when picked up. Plaintiff did not say or admit that she was in that position, and the jury were not compelled to believe that she was in such position.

The error charged against plaintiff's instruction No. 1 is that it did not contain the element of knowledge on the part of the car operatives that plaintiff had arisen from her seat; but since, as shown above, knowledge was not a necessary element to constitute negligence, the instruction did not have to require the jury to find the operatives had such knowledge. Consequently, the instruction was not erroneous.

[7] As to the verdict being excessive and the result of passion and prejudice, we cannot say that such is the case. Her fall reduced her to a comatose condition, unable to speak or make a sign. There was a wound at the back of her head near the base of the brain an inch and a half or two inches long. She suffered a great deal of pain. Toward 1 o'clock in the morning she became violent, and showed such distressing signs that she was removed to the hospital, and there a thorough examination was had to see if there was a fracture of the skull, as she did not come to her senses. She remained in the hospital ten days, being unconscious for three or four days of that time. She has been rendered nervous and unable to care for herself or to do her housework as she had formerly done. She was a strong, vigorous woman prior to that. After leaving the hospital she was in bed at home for six weeks. At times in the night she has to be cared for. She is troubled with fainting spells, pains in her neck and back, and the evidence is that her condition is permanent. If the evidence in regard to plaintiff's injuries is to be credited, and it must, since it has the sanction of the jury's verdict and the approval of the trial court, we cannot say it is so large as to shock the moral sense, or that the jury was influenced by passion or prejudice. *Waechter v. St. Louis, etc., R. Co.*, 113 Mo. App. 270, 88 S. W. 147; *Parker v. Metropolitan St. Ry. Co.*, 140 Mo. App. 703, 126 S. W. 750; *Hufford v. Metropolitan St. Ry. Co.*, 130 Mo. App. 638, 109 S. W. 1062; *Gerhart v. Metropolitan St. Ry. Co.*, 132 Mo. App. 546, 112 S. W. 12; *Stiller v. Metropolitan St. Ry. Co.*, 159 Mo. App. 452, 141 S. W. 483.

There are no grounds upon which a disturbance of the judgment can be justified, and accordingly it is affirmed. All concur.

MODRELL v. DUNHAM et al. (No. 12057.)
(Kansas City Court of Appeals. Missouri.
June 12, 1916. Rehearing Denied
July 3, 1916.)

Appeal from Circuit Court, Jackson County;
O. A. Lucas, Judge.

"Not to be officially published."

Action by Robert Modrell against Robert J. Dunham and another, receivers of the Metropolitan Street Railway Company. Judgment for the plaintiff, and defendants appeal. Affirmed.

John H. Lucas, of Kansas City, Mo., for appellants. Justus N. Baird, of Kansas City, Kan., and Lyon & Lyon, of Kansas City, Mo., for respondent.

TRIMBLE, J. In this case, a husband obtained judgment for \$2,000 for loss of services of his wife and for sums expended for medical attention, hospital bills, and nursing, rendered necessary by reason of personal injuries his wife received in a fall from a street car caused by the alleged negligence of the defendants. It is a companion case to that of *Arena Modrell v. Robert J. Dunham et al.*, Receivers, just decided, 187 S. W. 561, the plaintiff here being the husband of the plaintiff in that case. The same points, and no others, are made herein that were advanced in that case. Hence a decision in the latter covers this.

The judgment is affirmed. All concur.

TERMINAL ICE & POWER CO. v. AMERICAN FIRE INS. CO. (No. 11664.)

(Kansas City Court of Appeals. Missouri. May 1, 1916. Rehearing Denied July 3, 1916.)

1. CORPORATIONS ⇨47—NAME—CHANGE.

Change in corporation name works no change in the corporate entity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 134, 135; Dec. Dig. ⇨47.]

2. ESTATES ⇨5—"FEE SIMPLE."

The term "fee simple" is not used to distinguish between legal and equitable estates, but to define the quantity or duration of estates, to denote the largest estate in land known to the law.

[Ed. Note.—For other cases, see Estates, Cent. Dig. § 5; Dec. Dig. ⇨5.]

For other definitions, see Words and Phrases, First and Second Series, Fee Simple.]

3. MORTGAGES ⇨137—ESTATE OF MORTGAGOR.

A mortgage, being a mere lien on the land, does not affect the quality of the fee-simple estate of the mortgagor, and until the mortgagee enters for breach of the condition, the mortgagor continues to be the owner of the estate, and cannot be regarded as the owner of less than a fee-simple title.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 270-276; Dec. Dig. ⇨137.]

4. INSURANCE ⇨282(6)—AVOIDANCE—TITLE—"FEE SIMPLE."

A policy, not mentioning incumbrances, but providing for fee-simple ownership, is not breached by existence of mortgage liens.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 613, 614; Dec. Dig. ⇨282(6).]

5. INSURANCE ⇨282(6)—AVOIDANCE—TITLE—"UNCONDITIONAL AND SOLE OWNERSHIP."

Where there is no mention of incumbrances, a policy provision of "unconditional and sole

ownership" of a building is not breached by existence of incumbrances.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 613, 614; Dec. Dig. ¶3282(6).]

For other definitions, see Words and Phrases, First and Second Series, Unconditional and Sole Ownership.]

6. INSURANCE ¶329—AVOIDANCE—"CHANGE IN POSSESSION."

A tenant's going into possession of premises insured by his landlord does not breach a policy provision against "change of possession," the tenant's possession being that of the landlord.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 829-839; Dec. Dig. ¶329.]

For other definitions, see Words and Phrases, First and Second Series, Change.]

7. INSURANCE ¶328(2) — AVOIDANCE — "CHANGE IN INTEREST OR TITLE."

The giving of a mere option, not exercised, on insured property, does not breach a policy provision against "change in interest or title," since the change of interest referred to in the policy means some change which would cause the loss by fire to fall on the buyer and thus change the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 795; Dec. Dig. ¶328(2).]

For other definitions, see Words and Phrases, First and Second Series, Change.]

8. INSURANCE ¶328(14)—AVOIDANCE—FORECLOSURE PROCEEDINGS.

Foreclosure by insured himself of a mortgage he has bought in on insured property, in order to perfect title, does not avoid a policy under a provision against "foreclosure proceedings," since forfeitures of a policy are not favored and insured, after loss, cannot avail himself of a policy forfeiture provision which has not been substantially violated to the enlargement of his risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 815-817; Dec. Dig. ¶328(14).]

9. INSURANCE ¶282(6)—AVOIDANCE—INSURED'S TITLE.

A policy is not avoided by lack of title of insured, where a sheriff's deed of the property to another is not effective and is a mere cloud on insured's title.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 613, 614; Dec. Dig. ¶282(6).]

Appeal from Circuit Court, Jackson County; A. C. Southern, Judge.

Action by the Terminal Ice & Power Company against the American Fire Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Lathrop, Morrow, Fox & Moore and Boyle & Howell, all of Kansas City, for appellant. Fyke & Snider, of Kansas City, for respondent.

JOHNSON, J. This is an action on a policy of fire insurance issued to plaintiff by defendant September 20, 1912, on a two-story building and appurtenances which were a part of an ice manufactory plaintiff owned in Kansas City. The plant was in operation, but this particular building was not being used, and was insured as an unoccupied building. At the time of the fire, which wholly destroyed the property, the policy, which was issued for a term of one year, had not expired, and five other policies, issued

by different insurance companies and insuring the same building, were held by plaintiff, and were in force when it was destroyed. All of the companies refused to acknowledge liability and adjust the loss, plaintiff brought separate suits to collect the insurance, suffered defeat in the circuit court, and appealed each case to this court. The cases were submitted at the same time, have common issues, and our decision in the instant case will dispose of the controlling questions in the others.

The policy, in the standard form, contains the following conditions and agreements which are the basis of the principal defenses interposed in the answer:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the interest of the insured in the property be not truly stated herein, or if the interest of the insured by other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if with the knowledge of the insured foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy by virtue of any mortgage, or trust deed, or if any change other than by the death of the insured take place in the interest, title or possession of the subject of insurance whether by legal process or judgment, or voluntary act of the insured."

The answer alleges breaches of the foregoing provisions at the time of the loss, as follows: First, that after the policy was issued and before the loss, the property was advertised for sale under a deed of trust, with the knowledge of plaintiff and without provision therefor being indorsed on the policy, and that such advertisement was being published at the time of the loss; second, that the interest of plaintiff in the property was not truly stated in the policy; third, that the building insured was on land not owned by plaintiff in fee simple; and, fourth, that a prohibited change in the interest and title occurred in virtue of an option which plaintiff, after the policy was issued, gave to another corporation—the City Ice Company—to purchase plaintiff's interest in the property—

"and that thereafter the said contract, or option, was exercised by the said City Ice Company and whatever interest or title, if any, the said plaintiff had in said property was purchased by the City Ice Company and conveyed by the said plaintiff to it, * * * and that at the time of the fire plaintiff had no interest in the subject of insurance," etc.

The reply is a general denial and a plea of waiver. The cause was tried without the aid of a jury, and the views of the court on issues of law and fact were clearly defined in rulings on declarations of law asked by plaintiff.

The material facts of the case, chronologically stated, are as follows: The property insured was a part of a manufactory owned by W. F. Lyons, who in 1908 transferred it to a corporation known as the W. F. Lyons Ice & Power Company, of which he was the prin-

capital stockholder and moving spirit. The corporation began its business career (which was short-lived and disastrous) by issuing and selling bonds for \$100,000, which it secured by a first mortgage on all its property. Afterwards, on November 5, 1909, it further incumbered the property with a second mortgage or trust deed, executed and delivered to John H. Lynds, trustee, to secure notes for \$20,000 for money borrowed for the use of the company. These notes were owned by Howard Vanderslice, J. S. Chick, John H. Lynds, and Fred Wolferman, and in December, 1909, the control of the corporation and its property and affairs was surrendered to these four holders of the second mortgage notes, whose number was reduced to three by the withdrawal of Wolferman, who sold his interest to the others. In 1910 suit was brought to foreclose the first mortgage, and that suit was pending when the policy in question was issued. To protect their interests as second mortgagees, Vanderslice, Chick, and Lynds bought and became the owners of a large part of the bonded indebtedness, and thereby obtained control of the foreclosure suit. They also became the owners of all of the capital stock of the W. F. Lyons Ice & Power Company, and Lyons retired from the corporation and its affairs. At that time the corporation was on the verge of bankruptcy, had lost its credit, and had a bad reputation in the business world. Vanderslice, Chick, and Lynds, in an obvious effort to ward off the attacks of creditors, as well as to escape other consequences of such bad reputation, had the name of the corporation changed to the Terminal Ice & Power Company early in 1911, and incorporated another company under the name of the Sheffield Ice Company, which operated the factory under a lease from the Terminal Company for a term of two years. Both of these companies were controlled by Vanderslice, Chick, and Lynds, who owned all the stock of both, the stock of the Sheffield Company being paid by the transfer to that company of the second mortgage notes.

About the time of these changes—i. e., April 3, 1911—the Gate City Bank, a general creditor of plaintiff, was given judgment for about \$1,700 in an action against the Lyons Company as defendant, and had execution issued and levied on the factory, including the building afterwards covered by the policy in suit. The property was sold at execution sale, and bought in by the bank, which received the sheriff's deed April 5, 1912. Thereafter the bank made unsuccessful attempts in court to gain possession of the property, and did not wholly discontinue such efforts until October 6, 1913, when it compromised its demands with the attorney for Vanderslice, Chick, and Lynds for \$200 in cash, and executed a quitclaim deed as directed by the attorney.

On April 2, 1913, while the factory was being operated by the Sheffield Company, plain-

tiff gave a written option to another corporation, the City Ice Company, to purchase the plant, and in February, 1913, executed a lease to the City Ice Company, under which that company, as lessee, took possession of the property about June 1, 1913, and proceeded to operate the factory. The fire occurred June 17th, and on June 30th the City Ice Company formally notified plaintiff in writing of its decision to exercise the option, and afterwards the sale was consummated.

At about the time the City Ice Company took charge of the plant under the lease, and shortly before the fire, Vanderslice, Chick, and Lynds, acting in the name of the Sheffield Company, the book holder of the second mortgage notes, which then amounted to about \$30,000, had the trustee, in the deed of trust securing the notes, advertise the plant for sale under the terms of that trust deed. This sale was made about two weeks after the fire, and the property was sold to Vanderslice, who bid \$2,000, and a trustee's deed was executed and delivered to him by Lynds, the trustee. The attorney for Vanderslice, Chick, and Lynds testified that the advertisement and sale of the property under the second trust deed was pursuant to the request of all the parties in interest, viz., his clients and the City Ice Company, who desired "this title straightened out." We understand him to mean that the purpose of the sale was to secure the plant against the attacks of the general creditors of the old Lyons Company in order that the property might be sold and conveyed, clear of all incumbrances, to the City Ice Company. This sale could not affect the lien of the first mortgage, but since the bonds it secured were owned or controlled by Vanderslice, Chick, and Lynds, that mortgage and the suit to foreclose it did not stand in the way of the purpose to convey the property clear of incumbrances. The value of the entire plant appears from the evidence to have been approximately \$110,000, or about \$20,000 less than the total mortgage indebtedness. Consequently there was no equity in the property to which general creditors could look for the payment of their demands. This condition of insolvency resulted from the management of Lyons. The activities of Vanderslice, Chick, and Lynds, after they secured control of the corporation, appear to have been prompted by a purpose to extricate the corporation from its pecuniary difficulties without resorting to bankruptcy proceedings, to the end of preventing loss on their holdings under the second deed of trust.

Passing, for the present, the subject of the effect on the interest of plaintiff in the property of the execution sale procured by the Gate City Bank, we shall discuss and determine the issues raised by the specific defenses set forth in the answer. First we shall consider the defense that plaintiff, at the time of the issuance of the policy, was not the sole and unconditional owner of the

building insured, nor the owner in fee simple of the ground on which the building stood, and therefore that the policy was void under the provision which declared it should be void and of no effect "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple."

[1] It may be conceded for argument that the acceptance by plaintiff of a policy containing such provisions was equivalent to a declaration that plaintiff was the unconditional and sole owner of the building insured and of the fee-simple title to the ground, and that if such declaration were not true, the policy was void from the beginning. *Mers v. Insurance Co.*, 68 Mo. 127. With this concession the question to arise is this: Was plaintiff, when the policy was issued, the sole and unconditional owner of the building and the owner of the fee-simple title to the ground? The change of the corporate name of plaintiff from the W. F. Lyons Ice & Power Company to the Terminal Ice & Power Company worked no change in the entity of the corporation, which remained the same. Plaintiff was the owner both of the building and the ground, and was the sole and unconditional owner of the building and the owner of the fee-simple title to the ground, unless we shall find that the ownership of the building and the title to the ground were made conditional by the two mortgage liens.

[2, 3] The term "fee simple" has never been used to distinguish between legal and equitable estates, but to define the quantity or duration of estates, to denote the largest estate in land known to the law. A mortgage, being a mere lien on the land, does not affect the quality of the fee-simple estate of the mortgagor, and until the mortgagee enters for breach of the condition, the mortgagor continues to be the owner of the estate, and cannot be regarded as the owner of less than a fee-simple title. *Leather Co. v. Insurance Co.*, 181 Mo. App. 701, 111 S. W. 631; *Kinkele v. Wilson*, 9 Misc. Rep. 139, 29 N. Y. Supp. 27; *Loventhal v. Insurance Co.*, 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17; *Conn. Fire Ins. Co. v. Colo., etc., Co.*, 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597; *Ark. Ins. Co. v. McManus*, 86 Ark. 115, 110 S. W. 797.

[4, 5] Since the policy did not mention liens and incumbrances, the proviso that plaintiff must be the owner of the ground in fee simple was not breached by the existence of the two mortgage liens. The same rule controls the definition of the term "unconditional and sole ownership" of the building. That provision did not refer to incumbrances or liens, but to the character and quality of the title. As is said in *Assurance Co. v. Nalls*, 101 Va. 613, 44 S. E. 896, 99 Am. St. Rep. 923:

"The authorities are practically unanimous to the effect that an incumbrance is not an estate in or title to property, within the meaning of the

provision that, if the interest of the assured be other than an unconditional or sole ownership, the policy shall be void."

See, also, *Leather Co. v. Insurance Co.*, supra; 2 Cooley's Briefs on Insurance, 1878; 19 Cyc. 694; *Insurance Co. v. Colo., etc., Co.*, supra.

[6] Although Vanderslice, Chick, and Lynds were holders of the second mortgage notes, they controlled plaintiff and its property, not as mortgagees in possession after condition broken, but as stockholders of the corporation. At no time prior to the fire was plaintiff out of the possession of the plant, either itself or by tenants. For two years it was in possession by its lessee, the Sheffield Company, and that tenancy was succeeded by the tenancy of the City Company under the lease executed in February, 1913. The latter company was in possession as such lessee at the time of the loss, and so it appears that plaintiff was a mortgagor in possession of the building insured and the ground it occupied when the policy was issued, and that no change in title or possession occurred between that date and the date of the fire.

[7] This brings us to the defense that a change other than by the death of the insured took place in the interest and title of the subject of insurance "because of the option plaintiff gave the City Company to purchase the property." That option was not exercised until after the fire, and, as stated, the City Company on and prior to that date, was in possession only as lessee. The change of interest referred to in the policy, in view of the rules which frown upon forfeitures and require that insurance policies shall be strictly construed against the insurers, means some change which would cause the loss by fire to fall on the buyer, and does not relate to a grant by the insured of some right which does not change the risk nor give the grantee more than a mere option to purchase the property. *Mackintosh v. Insurance Co.*, 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234; *House v. Insurance Co.*, 145 Iowa, 462, 121 N. W. 509. If the City Company after the fire had declined the option, there can be no question that the loss would have fallen on plaintiff, the insured, and therefore plaintiff was carrying the risk and had not changed its interest in the property within the meaning of the proviso.

[8] The last defense we shall consider is that predicated on an alleged violation of the provision that the policy shall be void "if with the knowledge of the insured foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy by virtue of any mortgage, or trust deed." The validity of such a stipulation was sustained by the Supreme Court in *Springfield S. L. Co. v. Ins. Co.*, 151 Mo. 99, 52 S. W. 238, 74 Am. St. Rep. 521, on the ground that the defendant might have been willing for the premium charged to insure

mortgaged property, but not to continue the insurance if the risk were enhanced by proceedings to foreclose the mortgage, and that the parties had the right to contract against the assumption by the insurer of the greater risk. The reason of this rule discloses its lack of applicability to the present case. The defense is based on the advertisement and sale under the second deed of trust. Instead of increasing the risk which defendant, for the premium paid, had agreed to assume, these proceedings tended to lessen that risk. The foreclosure was not prosecuted by a hostile lienholder for the extinguishment of the equity of the insured in the property, but by the insured for the purpose of improving his interest in the property. There were creditors whose demands could not be satisfied in whole or in part out of any equity in the property, since there was no equity of any value; but it was necessary, in order to sell the property to the City Company, to remove it from the likelihood of attacks from such creditors, made for the purpose of forcing compromises and avoiding the annoyance and expense of litigation. There is no appearance of fraud against the creditors in the proceeding, since they could not be defrauded if the foreclosure touched no property or interest that could be subjected to the payment of their demands. But if plaintiff had been actuated by a fraudulent motive against its creditors, such motive could not afford an excuse to defendant, who was not a creditor, but an insurer, to avoid a risk it had assumed for an agreed consideration which had not been increased, but diminished, by the foreclosure proceedings conducted for the sole benefit of the insured. We repeat that forfeitures are not favored, and an insurer who is paid the price he fixes for assuming a risk cannot avail himself, after the loss has occurred, of a provision in the policy for forfeiture which has not been substantially violated to the enlargement of his risk.

[9] The defense that plaintiff had no title, interest, or ownership in the property when the policy was issued, because of the sale under the Gate City Bank execution, may be disposed of on the ground that under the facts disclosed in the record it appears that the interest acquired by the bank under the sheriff's deed was not a substantial interest, or anything more than a mere cloud on the title which the bank was using to force a compromise out of Vanderslice, Chick, and Lynds. The fact that the bank accepted a settlement of \$200 for a quitclaim deed and consequent release of its demand for over \$1,700 at a time when plaintiff was compelled to remove all clouds from the title in order to convey the property to the City Company indicates the real nature and substance of that cloud.

The real situation of the parties is that plaintiff was a mortgagor in possession of the subject of insurance when the policy was is-

sued; that defendant insured the property for a consideration; that no change in plaintiff's interest occurred while the policy was in force; and that the risk assumed by defendant was not increased by the notice of sale under the second deed of trust. With the case in such posture, the learned trial judge erred in rendering judgment for defendant.

The judgment is reversed, and the cause remanded. All concur.

TERMINAL ICE & POWER CO. v. SECURITY INS. CO. (No. 11666.)

(Kansas City Court of Appeals. Missouri. May 1, 1916. Rehearing Denied July 3, 1916.)

Appeal from Circuit Court, Jackson County; A. C. Southern, Judge.

"Not to be officially published."

Action by the Terminal Ice & Power Company against the Security Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Lathrop, Morrow, Fox & Moore and Boyle & Howell, all of Kansas City, for appellant. Bruce Barnett and Dayle C. McDonough, both of Kansas City, for respondent.

JOHNSON, J. This is a companion case to Terminal Ice & Power Co. v. American Fire Insurance Co., 187 S. W. 564, decided at this term. Some points are made in the present case about the sufficiency of the abstract of the record which we have examined and pronounce to be not well founded. For the reasons appearing in the opinion filed in the companion case, the judgment is reversed, and the cause remanded. All concur.

TERMINAL ICE & POWER CO. v. LUMBERMEN'S INS. CO. (No. 11660.)

(Kansas City Court of Appeals. Missouri. May 1, 1916. Rehearing Denied July 3, 1916.)

Appeal from Circuit Court, Jackson County; A. C. Southern, Judge.

"Not to be officially published."

Action by the Terminal Ice & Power Company against the Lumbermen's Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Lathrop, Morrow, Fox & Moore and Boyle & Howell, all of Kansas City, for appellant. Fyke & Snider, of Kansas City, for respondent.

JOHNSON, J. This is a companion case to Terminal Ice & Power Co. v. American Fire Insurance Co., 187 S. W. 564, decided at this term. For the reasons appearing in the opinion filed in that case, the judgment is reversed, and the cause remanded. All concur.

TERMINAL ICE & POWER CO. v. HOME INS. CO. (No. 11662.)

(Kansas City Court of Appeals. Missouri. May 1, 1916. Rehearing Denied July 3, 1916.)

Appeal from Circuit Court, Jackson County; A. C. Southern, Judge.

"Not to be officially published."

Action by the Terminal Ice & Power Company against the Home Insurance Company.

From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Lathrop, Morrow, Fox & Moore and Boyle & Howell, all of Kansas City, for appellant. Fyke & Snider, of Kansas City, for respondent.

JOHNSON, J. This is a companion case to Terminal Ice & Power Co. v. American Fire Insurance Co., 187 S. W. 564, decided at this term. For the reasons appearing in the opinion filed in that case, the judgment is reversed, and the cause remanded. All concur.

TERMINAL ICE & POWER CO. v. STUYVESANT INS. CO. (No. 11663.)

(Kansas City Court of Appeals, Missouri. May 1, 1916. Rehearing Denied July 3, 1916.)

Appeal from Circuit Court, Jackson County; A. C. Southern, Judge.

"Not to be officially published."

Action by the Terminal Ice & Power Company against the Stuyvesant Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Lathrop, Morrow, Fox & Moore and Boyle & Howell, all of Kansas City, for appellant. Fyke & Snider, of Kansas City, for respondent.

JOHNSON, J. This is a companion case to the Terminal Ice & Power Co. v. American Fire Insurance Co., 187 S. W. 564, decided at this term. For the reasons appearing in the opinion filed in that case the judgment is reversed, and the cause remanded. All concur.

TERMINAL ICE & POWER CO. v. COMMERCIAL FIRE INS. CO. (No. 11667.)

(Kansas City Court of Appeals, Missouri. May 1, 1916. Rehearing Denied July 3, 1916.)

Appeal from Circuit Court, Jackson County; Allen C. Southern, Judge.

"Not to be officially published."

Action by the Terminal Ice & Power Company against the Commercial Fire Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Lathrop, Morrow, Fox & Moore and Boyle & Howell, all of Kansas City, for appellant. Fyke & Snider, of Kansas City, for respondent.

JOHNSON, J. This is a companion case to Terminal Ice & Power Co. v. American Fire Insurance Co., 187 S. W. 564, decided at this term. The issues in the two cases are exactly the same, with a slight exception, which has been sufficiently covered in what we have said in the opinion just filed.

For the reasons stated in that opinion, the judgment is reversed, and the cause remanded. All concur.

MAGGARD et al. v. PACIFIC FIRE INS. CO. OF CITY OF NEW YORK.

(No. 14309.)

(St. Louis Court of Appeals, Missouri. July 5, 1916. Rehearing Denied July 18, 1916.)

1. APPEAL AND ERROR \S 1170(9)—**HARMLESS ERROR—INSTRUCTIONS—CURE BY VERDICT.** Under Rev. St. 1909, \S 2082, authorizing reversals for substantial errors only, the failure of an insurance trial charge to require the value of certain unburned tools to be deducted from

the total insured value is not reversible error, where the pleadings admit that the burned goods, were worth over \$2,000 and the present verdict and one on a concurrent policy were each for \$950.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4068, 4543; Dec. Dig. \S 1170(9).]

2. PLEADING \S 433(7)—**AIDER BY VERDICT—DEFECTIVE PETITION.**

A petition's failure to allege that certain tools, when burned, were in the same shed as when defendant issued its policy insuring them, is cured by a verdict for the plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1464; Dec. Dig. \S 433(7).]

3. EVIDENCE \S 213(2)—**ADMISSIONS—COMPROMISE—WHAT CONSTITUTES.**

A letter from defendant insurance company to plaintiff, stating that its agent had been authorized to compromise the claim but had not reported any settlement, held not inadmissible as dealing with compromise negotiations.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 746; Dec. Dig. \S 213(2).]

4. TRIAL \S 83(2)—**NECESSITY OF SPECIFIC OBJECTIONS—EVIDENCE.**

The point that a letter deals with compromise negotiations between the parties is not raised by the objection that it is immaterial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 199; Dec. Dig. \S 83(2).]

Appeal from Circuit Court, Clark County; N. M. Pettingill, Judge.

"Not to be officially published."

Action by Charles Maggard and Lafe Barnett against the Pacific Fire Insurance Company of the City of New York. Judgment for plaintiffs, and defendant appeals. Affirmed.

Bruce Barnett and Dayle C. McDonough, both of Kansas City, for appellant. O. C. Clay, of Canton, for respondents.

NORTONI, J. This is a suit on a policy of fire insurance. Plaintiffs recovered and defendant prosecutes the appeal.

The policy covers in the amount of \$1,000 on plaintiffs' frame icehouse building and a frame boiler and engine house building and a frame toolhouse building, including all permanent internal and external fixtures, runways, hoisting apparatus, boiler, engine, apparatus, tools, implements, and utensils therein situate, etc. While the policy was in force the property insured, save the toolhouse building and its contents, was destroyed by fire on the 14th day of March, 1913. Besides the policy in suit, plaintiffs carried an additional \$1,000 concurrent insurance on the same property with the consent of defendant company; the entire insurance amounting to \$2,000. There is evidence tending to prove that the property insured and destroyed by fire was worth considerably more than the amount of the insurance. It is conceded that the small toolhouse building was not destroyed by the fire, and there is some evidence tending to prove that the tools insured were in that building at the time.

[1] It is argued the judgment should be

reversed because of an error in plaintiffs' instruction No. 2, relating to the measure of damages. This instruction treated with the presumptive value of the property, under the valued policy statutes, as if it was the amount of \$2,666.66 on the date of the issue of the policy. The jury were instructed to deduct from this valuation such depreciation as the property had suffered after the issuance of the policy and also the value of the toolhouse, which it is conceded was not destroyed by fire, and that one-half of this amount should be the measure of recovery on this policy, if any, but not to exceed \$1,000. In view of a bit of evidence in the record, tending to prove that some tools were in the toolhouse at the time of the fire, and therefore not destroyed, it is argued this instruction is erroneous, for that it does not also direct the attention of the jury to the matter of deducting the value of such tools from the amount of recovery. But obviously this is immaterial in the circumstances of the case, for it appears to be confessed that the value of the property destroyed by fire and covered by the two policies, each for \$1,000, exceeded in value \$2,000 at the time of the fire. The petition avers pointedly and in direct terms that the value of the property at the time of the fire so destroyed by it exceeded \$2,000. There is no general denial in the answer and neither is there a specific denial of this averment. There can be no doubt that the averment in the petition of the value of property destroyed by the fire is a material one. See *Sappington v. St. Joseph, etc., Ins. Co.*, 72 Mo. App. 74; *Story v. American Central Ins. Co.*, 61 Mo. App. 534. The statute (section 1830, R. S. 1909) provides that:

"Every material allegation in the petition not controverted by the answer * * * shall, for the purposes of the action, be taken as true."

It appears, therefore, to be admitted on the record before us that the property insured and destroyed by fire possessed a value at that time exceeding \$2,000. The insurance vouchsafed thereon under the policy in suit was \$1,000, while under the concurrent policy with defendant's consent was an additional \$1,000. The jury awarded plaintiffs a recovery of \$950 under the policy in suit and also the same amount, it is said, under the concurrent policy on the same property. This being true, the matter complained of in plaintiffs' instruction No. 2 should be treated as immaterial. We are commanded by the statute (section 2082, R. S. 1909) that no judgment shall be reversed except for error, materially affecting the merits of the action and that, too, detrimental to the cause of appellant. The statute requires us to pass matters of this character, unless we believe the error complained of was a substantial one affecting the merits of the case against the interests of the appellant. See *Shinn v. United Rys. Co.*, 248 Mo. 173, 154 S. W. 103. In view of the admissions in the pleading,

there is no substance in the argument directed against this instruction.

[2] It is argued the petition is fatally defective in that it does not allege that the personal property insured under the policy was, at the time of the fire, in the same building or buildings as at the time of the issuance of the policy. There is no merit in this contention, when the objection to it is to be considered after verdict as here. A like objection to a similar petition was considered by this court and overruled in *Thomasson v. Ins. Co.*, 114 Mo. App. 109, 89 S. W. 564, 1135; *Id.*, 217 Mo. 485, 116 S. W. 1092. The Supreme Court said in that case:

"At most, all that can be urged against the petition is that it was a defective statement of a good cause of action and not an entire failure to state a cause of action. It does not follow that, because a petition is defective and subject to a general demurrer, it would be insufficient to sustain a verdict. On the contrary, the well-settled rule, both at common law and under our Code, is that if a material matter be not expressly averred in the petition, but the same is necessarily implied by what is stated in the context, the defect is cured after verdict; the doctrine resting on the presumption that plaintiff proved on the trial the facts imperfectly alleged, the existence of which was essential to his recovery. *People's Bank v. Scalzo*, 127 Mo. loc. cit. 189 [29 S. W. 1032], and cases there cited; section 672, R. S. 1899; *Salmon Falls Bank v. Leyser*, 116 Mo. 51, loc. cit. 73 [22 S. W. 504]. The defendant did not demur to the petition in this case, and every presumption will be indulged that the evidence supplied the defective allegation, and showed that the grain and hay and farming utensils were in the barn at the time it was burned." *Thomasson v. Ins. Co.*, 217 Mo. 485, 497, 116 S. W. 1092.

[3, 4] It is argued the court erred in permitting plaintiffs to show that appellant made offers and conducted negotiations of compromise of the demand sued for, but we are unable to discover evidence of this character in the record. The only reference to compromise is found in a letter of defendant company to plaintiff, written long before the suit was instituted, in which the defendant company says:

"We have not yet received from the Western Adjustment Company any statement of settlement with you, although we had authorized them to effect a compromise."

There is certainly neither an offer nor a negotiation of compromise in this. It amounts to no more than an explanation made by the company to plaintiffs as to the reasons of delay in settlement, that is, because the Western Adjustment Company, who represented defendant, had not reported to it. See *Lehmann v. Hartford Fire Ins. Co.*, 183 Mo. App. 696, 167 S. W. 1047. Moreover, the objection made by defendant to this letter, when introduced in evidence, did not direct the attention of the court to the point now made with reference to a compromise. The objection made to this letter is as follows:

"By Mr. Trimble: We object to the introduction of Exhibit U because it has no bearing on this case. It is merely a statement to show that they were not ready to pass upon the matter."

An objection, to be available, should be specific so as to call the court's attention to the particular ground invoked against the introduction of the evidence. See *Clark v. People's Collateral Loan Co.*, 48 Mo. App. 248. It is obvious no such objection was made to the slight reference to the matter of a proposal of compromise now argued before us.

There seems to be no substantial merit in the appeal, and the judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

MAGGARD et al. v. STUYVESANT INS. CO. (No. 14310.)

(St. Louis Court of Appeals. Missouri. July 5, 1916. Rehearing Denied July 18, 1916.)

Appeal from Circuit Court, Clark County; N. M. Pettingill, Judge.

"Not to be officially published."

Action by Charles Maggard and Lafe Barnett against the Stuyvesant Insurance Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Bruce Barnett and Dayle C. McDonough, both of Kansas City, for appellant. O. C. Clay, of Canton, for respondents.

NORTONI, J. This is a suit on a policy of fire insurance in the amount of \$1,000, covering an icehouse and other property owned by plaintiffs at the time of its destruction by fire. It is a companion case to that of *Charles Maggard and Lafe Barnett v. Pacific Fire Insurance Company, etc.*, 187 S. W. 569, decided today. The record is in all respects identical, and so, too, are the matters put forward here for a reversal of the judgment, with that in the case above referred to.

For the reasons stated in *Charles Maggard and Lafe Barnett v. Pacific Fire Insurance Company, etc.*, the judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

STATE v. HESSE. (No. 14378.)

(St. Louis Court of Appeals. Missouri. July 5, 1916.)

1. POISONS — SALE OF COCAINE—STATUTE.

Rev. St. 1909, § 5786, prior to its amendment in 1915, making it unlawful for any druggist or other person to retail or sell or give away any cocaine, except on the written prescription of a licensed physician or dentist, was not intended to cover cases of a physician selling and delivering cocaine in the course of his practice and in his treatment of a patient.

[Ed. Note.—For other cases, see *Poisons*, Cent. Dig. § 2; Dec. Dig. —4.]

2. CRIMINAL LAW — 1159(2)—APPEAL—VERDICT—CONCLUSIVENESS.

The weight of conflicting evidence is for the jury, and where a conviction was warranted by positive and affirmative testimony, the Court of Appeals will not interfere.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3075; Dec. Dig. —1159(2).]

3. POISONS — SUFFICIENCY OF INDICTMENT.

An indictment under Rev. St. 1909, § 5786, as it stood before its amendment in 1915, charging

that defendant willfully and unlawfully retailed, sold, and gave away to a named person, a quantity of cocaine without a written prescription from a legally authorized physician, and that it was not sold by defendant at wholesale, was sufficient.

[Ed. Note.—For other cases, see *Poisons*, Cent. Dig. § 6; Dec. Dig. —9.]

4. POISONS — SALE OF COCAINE—VERDICT—LOCAL PREJUDICE.

In a prosecution under Rev. St. 1909, § 5786, as it stood prior to its amendment in 1915, for selling cocaine, where the evidence for the state, if believed, warranted a conviction, and where the punishment inflicted was only a fine of \$35, there was nothing to show that the conviction was the result of local feeling in a county in which the local option law was in force.

[Ed. Note.—For other cases, see *Poisons*, Cent. Dig. § 6; Dec. Dig. —9.]

Appeal from Circuit Court, Scotland County; N. M. Pettingill, Judge.

R. R. Hesse was convicted of selling cocaine in violation of law, and he appeals. Affirmed.

Lewis Myers, of Memphis, for appellant. H. V. Smoot, of Memphis, for the State.

REYNOLDS, P. J. The prosecuting attorney of Scotland county, on March 5, 1913, and during the vacation of the court, exhibited an information against one R. R. Hesse for violation of section 5786, Revised Statutes 1909, as that statute stood prior to the amendment of 1915, charging that Hesse, on or about January 1, 1913, at and in the county of Scotland, State of Missouri, "did willfully and unlawfully retail, sell and give away to one Silas Forrester two grains of cocaine, hydro chlorate of cocaine and salt of cocaine, commonly called cocaine, without then and there having a written prescription from a legally authorized physician or dentist, said cocaine being not then and there sold at wholesale by the said R. R. Hesse as a wholesale merchant, manufacturer or wholesale dealer, against the peace and dignity of the state." The cause was returnable to the May term, 1913, of the court but was passed to the November term and the defendant was arraigned and pleaded not guilty. A jury being impaneled and duly sworn the evidence was heard and the jury returned a verdict of guilty, imposing a fine of \$35. From this, interposing a motion for new trial as well as one in arrest, defendant has duly appealed to our court.

These are three assignments of error.

[1, 2] The first is to the action of the court in not giving defendant's instruction to the jury to find defendant not guilty. That instruction was properly refused. It appears by the evidence that defendant was a licensed and practicing physician, keeping his office in his residence at Memphis, Scotland County, this state, and keeping the drug there in quantities and supplying Forrester out of his own stock, delivering it to him at his house or on the street, or at other places.

Forrester, a young man of about twenty, testified that he had become addicted to the use of cocaine—had become what is commonly called a "dope fiend." He testified that on several occasions he had bought the drug from defendant in quantities of two or more grains at a time in the form of powder or capsules, it is not clear which, and had pulverized it and snuffed it up; that he had been cured of his disease some time before, was not then suffering from it and did not buy or take the drug for the cure of any disease but to gratify his passion for the drug; was not now using the drug.

The defendant testified very positively that he had only sold or given the drug to Forrester in good faith in the treatment of a disease with which he claimed Forrester was afflicted. Two or more physicians testified that cocaine was a known remedy for the disease for which defendant claimed he had prescribed and furnished it to Forrester.

While it is true that section 5786 makes it unlawful for a druggist or other person to retail or sell or give away any cocaine, etc., except upon the written prescription of a licensed physician or licensed dentist, physicians or dentists prescribing, using and selling and delivering cocaine in the course of their practice and treatment of a patient, are not, in terms, excepted from the provision of the law. It cannot be questioned, however, that this section was not intended to cover any case of that kind. It was in the light of this interpretation of the law that the learned trial court very properly admitted testimony offered on the part of defendant, tending to show that the cocaine which he admitted he had given or sold Forrester, was prescribed by him as a physician in the course of his treatment of Forrester and that having the drug on hand he, prescribing it and delivering it, charged for it, sold it. As touching this defense the court told the jury that if they found from the evidence that the defendant as a legally registered practitioner of medicine was treating Forrester and that the cocaine he gave Forrester was in good faith prescribed for him by defendant as a medicine, then it would find defendant not guilty. It further instructed the jury that it being admitted that defendant is legally registered and authorized to practice medicine, if the jury believed from the evidence that Forrester applied to defendant for treatment for a disease named, and that defendant did treat him for that disease and used cocaine in his treatment for the disease, and that cocaine was a proper medicine in treating that disease, the jury are instructed that it was not necessary for defendant to procure a prescription from any physician or dentist before he could furnish Forrester with the cocaine. Both these instructions were given at the instance of defendant, those for the State embodying the same idea although not as fully. With the evidence before it and under the law as giv-

en to it by the court, the question as to the character in which defendant was acting when he gave or sold this cocaine to Forrester and his good faith in the matter, it being admitted by defendant that he had given cocaine to Forrester, left it as a matter of fact for the determination of the jury. The verdict arrived at by them in finding the defendant guilty was therefore warranted by positive, affirmative, testimony in the case; that testimony contradicted, it is true, but its effect—the conclusion on it—being for the jury with whose verdict, we, as an appellate court, cannot interfere.

[3] It is next assigned that the information failed to state any offense against defendant. The principal case relied on for this is *State v. Renkard*, 150 Mo. App. 570, 131 S. W. 168. Comparing the information before us with the one which was before our court in the *Renkard* Case, it is apparent that the information here is not subject to the objection made and sustained to the one before our court in the *Renkard* Case. In point of fact, it complies with exactly what our court held in that case was necessary to constitute a good information.

It is next assigned as error and argued that the verdict should be set aside and defendant granted a new trial on the ground of prejudice and passion. We find no ground to sustain this. As previously remarked, there is ample evidence in the case on which the jury could arrive at its verdict. In point of fact, if the jury believed the prosecuting witness, as it evidently did, it is difficult to see how it could have arrived at any other verdict.

This disposes of the next assignment of error to the effect that the verdict was against the law and the evidence and that the evidence was overwhelmingly in favor of defendant. We do not find either of these assignments to be maintainable. The weight of the evidence was for the jury and the trial court.

[4] It is urged that the verdict is the result of prejudice and was brought about by local feeling in a county in which the local option law was in force. We see no evidence of any such prejudice in the verdict. The evidence for the State of a violation of the law against the sale of cocaine is close. No offense is more subversive of good morals and health than the indiscriminate sale, especially to young men, of this drug. If the jury believed this, as they surely did, the verdict is fully warranted, and the punishment inflicted very mild, giving no evidence of prejudice or passion.

Finally, it is asserted that the State failed to prove that the offense was committed in this state. Counsel is in error as to this. That fact was proven.

The judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

RISSMILLER v. ST. LOUIS & H. RY. CO.
(No. 14394.)

(St. Louis Court of Appeals. Missouri. July 5, 1916. Rehearing Denied July 18, 1916.)

1. TRIAL \Leftrightarrow 253(6)—INSTRUCTION—OMISSION OF ELEMENT OF RECOVERY.

An instruction, purporting to cover plaintiff's whole case, which omits an essential element necessary to recovery, is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 618; Dec. Dig. \Leftrightarrow 253(6).]

2. CARRIERS \Leftrightarrow 280(5)—CARRIAGE OF PASSENGERS—MIXED TRAIN.

While passengers carried in a mixed train are not to expect all the conveniences and comforts that are furnished those riding in regularly made up passenger trains, they are entitled to be carried with as high a degree of safety as is compatible with the management of a mixed train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1098; Dec. Dig. \Leftrightarrow 280(5).]

3. CARRIERS \Leftrightarrow 298(2)—CARRIAGE OF PASSENGERS—MIXED TRAIN.

A railroad company is liable for damages suffered by a passenger on a mixed train only when the injury received results from an unusual or extraordinary jerk, jolt, jar, or sudden movement.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1192, 1205, 1206; Dec. Dig. \Leftrightarrow 298(2).]

4. TRIAL \Leftrightarrow 296(1) — CONFLICTING INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

Where plaintiff's instruction purports to cover the whole case, and authorizes verdict for plaintiff on an erroneous theory of law, a proper instruction for defendant, touching the same matter, will not supply the deficiency in plaintiff's instruction; it being impossible to determine which instruction the jury followed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-707; Dec. Dig. \Leftrightarrow 296(1).]

Appeal from Hannibal Court of Common Pleas; Wm. T. Ragland, Judge.

"Not to be officially published."

Action by Ida E. Rissmiller against the St. Louis & Hannibal Railway Company. From a judgment for plaintiff, defendant appeals. Judgment reversed, and cause remanded.

J. D. Hostetter, of Bowling Green, and Mahan, Smith & Mahan, of Hannibal, for appellant. Eby & Hulse, of Hannibal, for respondent.

REYNOLDS, P. J. This is an action for damages for personal injuries alleged to have been sustained by respondent, while a passenger on a train operated by appellant, on its road. The train was known as the "Perry train." The accident is said to have occurred on the morning of September 21st, 1912.

It is averred in the petition that the train upon which plaintiff was a passenger consisted of a locomotive engine, a passenger coach, baggage and mail car and other cars, and that after plaintiff had been received as a passenger, having paid her fare, and when the train had proceeded to a point near the platform of defendant's station in the city of Hannibal, and before it had reached the station platform, the agents of defendant in

charge of the train uncoupled the cars making up the train, taking away from and out of it the locomotive engine and all the other cars except the passenger coach and the baggage and mail car, leaving the passenger coach and this baggage and mail car standing on the line of the railroad track at a point near the station platform; that after defendant had taken away from and out of the train the locomotive engine and the other cars, which appear to have been freight cars, and while the plaintiff as a passenger was seated in the passenger coach, and while it was standing near the station platform, and before it had reached the platform, the defendant, through its agents and servants, "so carelessly and negligently ran and moved one of its locomotive engines into, against and upon said passenger coach as to and did cause and produce a sudden movement, jerk, jolt and jar of said passenger coach in which the plaintiff was then and there seated as aforesaid, and that said sudden movement, jerk, jolt and jar of said passenger coach as aforesaid was caused and produced by the carelessness and negligence of defendant, its agents and servants in running, managing and operating said engine and said passenger coach as aforesaid; and that as the direct and proximate result of said sudden movement, jerk, jolt and jar of said passenger coach and of said carelessness and negligence of defendant as aforesaid, the plaintiff was then and there and thereby thrown against the seats and backs and arms of the seats and other portions of said passenger coach and the contents thereof in such a manner and with such force that plaintiff was then and there and thereby greatly injured, bruised, lacerated and crippled, both internally and externally." Describing the injuries and averring that she has not yet recovered from them, and is wholly disabled and incapacitated for work or labor of any kind, and has been so disabled and incapacitated since the date of the accident, and that her injuries are permanent, plaintiff avers that the before mentioned "sudden movement, jerk, jolt and jar of said passenger coach and said injuries to plaintiff aforesaid were caused by and were the direct and proximate result of the negligence and carelessness of the defendant, its agents and servants in the running, handling, management and operation of said locomotive engine and cars as aforesaid." Averring that she had expended large sums of money and incurred great expense for medical attendance, medicine, etc., and had been subjected to and suffered great bodily pain and suffering and mental anguish, plaintiff demands judgment in the sum of \$15,000.

The answer was a general denial.

The case was tried before the court and a jury and resulted in a verdict for plaintiff in the sum of \$5,500. Judgment followed accordingly, from which defendant, interposing a motion for new trial, the latter accom-

panied by affidavits of newly discovered evidence, and excepting to the action of the court in overruling it, defendant has duly perfected its appeal to our court.

[1-3] There are four errors assigned here to the action of the court. It will be necessary, for the disposition of this appeal, to notice at length only one of them, which attacks the first instruction given at the instance of respondent. That instruction, so far as pertinent to the attack upon it, told the jury that if they found and believed from the evidence that while plaintiff, as a passenger, was seated in the passenger coach, and while it was standing near the station platform, "the agents and servants of defendant, in charge of said train and said passenger coach at the time, so carelessly and negligently ran and moved one of defendant's locomotive engines, in charge of defendant's servants and agents at the time, into and against said passenger coach as to, and that did, produce a sudden movement, jerk, jar and jolt of said passenger coach in which plaintiff was seated as aforesaid; and * * * did, in moving said engine into and against said passenger coach as aforesaid, fail to exercise the highest practical care and caution which reasonably cautious persons engaged in the railroad business would exercise under the same or similar circumstances; and if the jury further believe from the evidence that as a direct result of the carelessness and negligence, if any, of defendant's agents and servants as aforesaid, and of the failure, if any, of defendant's agents and servants to exercise the degree of care aforesaid, said passenger coach in which plaintiff was seated as aforesaid, *was suddenly moved, jarred or jolted*; and if you further believe that as a direct and proximate result of said passenger coach being put in motion in the manner aforesaid, and of said negligence, if any, on the part of said servants and agents, the plaintiff was thereby injured in her back, shoulders, body or limbs, or that her spine or spinal cord was injured, or that her nervous system was shocked or injured, or that one of her kidneys was injured, then the jury will find for the plaintiff." The italicized clause is the one attacked.

It will be observed that this instruction purports to cover the whole case. We are obliged to hold that it was error in that it omitted the very essential element as necessary to recovery, that the jerk or jolt which would entitle plaintiff to recover must have been an unusual or extraordinary movement, jerk, jar or jolt. This train upon which plaintiff was a passenger was a mixed train, made up of freight cars, a baggage car and a passenger car. While passengers carried in a mixed train are not to expect all the conveniences and comforts that are furnished those riding in regularly made up passenger trains, they are entitled to be carried with as high a degree of safety as is compatible

with the management of a mixed train. *Hedrick v. Missouri Pac. Ry. Co.*, 195 Mo. 104, loc. cit. 117, 93 S. W. 268, 6 Ann. Cas. 793; *Leach v. St. Louis & S. F. R. R. Co.*, 137 Mo. App. 300, loc. cit. 303, 118 S. W. 510; *Tickell v. St. L., I. Mt. & S. R. Co.*, 149 Mo. App. 648, loc. cit. 652, 129 S. W. 727; *Farmer v. St. Louis, I. Mt. & S. Ry. Co.*, 178 Mo. App. 579, loc. cit. 586, and cases there cited (161 S. W. 327). But a railroad company is only liable for damages suffered by a passenger on such a train when the injury received results from an unusual or extraordinary jerk, jolt, jar, or sudden movement. Our court has considered and discussed this proposition very thoroughly in *Farmer v. St. Louis, I. Mt. & S. Ry. Co.*, supra, 178 Mo. App. loc. cit. 592, 161 S. W. 327, and following. On the authority of these cases, particularly the case last cited, and the authorities there cited, this instruction is erroneous in a very vital manner and necessitates a reversal of the judgment.

As the cause is to be remanded it is as well to call attention to the fact that this same defect appears in the petition, which, if it had been attacked as failing to state a cause of action in that it omitted to charge that this was an unusual and extraordinary jerk, jolt, etc., it fails to state a cause of action. As no point is made before us by learned counsel for appellant on the petition, we notice it now out of caution, in order that if the cause is further prosecuted this defect in the petition may, if counsel are so advised, be corrected.

It is argued by counsel for respondent that this defect in this instruction is cured by the second instruction given at the instance of defendant, appellant here. That instruction told the jury that the accident must have been suffered in consequence of "an unusual jar, jerk, jolt or sudden movement" of the train, and it is argued by the learned counsel for respondent that this cures the defect in plaintiff's instruction.

[4] In *Traylor v. White*, 185 Mo. App. 325, loc. cit. 331, 170 S. W. 412, this same proposition was advanced and on the authority of many cases there referred to, our court held that "the rule is, that where plaintiff's instruction covers the whole case and authorizes a verdict for plaintiff on an erroneous theory of the law, one on the part of defendant touching the same matter will not supply a deficiency in plaintiff's instruction which omits to require the finding of facts essential to sustain the cause of action." Many authorities are cited in support of this. The reason of the rule is that it is impossible for the court, where there are two instructions which conflict, as here, or which are inconsistent, as here, and which place the case before the jury on two fundamentally different propositions, it is impossible for the appellate court to say which instruction influenced or controlled the jury in arriving at its verdict. This same rule was again re-

peated by our court in *Walker v. White et al.*, not yet officially reported, but see 178 S. W. 254, loc. cit. 256. This in no manner overlooks the other rule, that all the instructions are to be read and considered together; that is, one may supply an element not covered by others; but in such a case, the instructions must not conflict. *Craig v. United Rys. Co.*, 175 Mo. App. 616, loc. cit. 628, 158 S. W. 390.

Other assignments of error cover the admission of testimony, chiefly over its admissibility as part of *res gestæ*, and also as to opinion evidence given by experts. The rulings as to these might in themselves call for a reversal of the judgment. But as these questions over this line of testimony may not occur at a retrial, we do not think it necessary to discuss or decide them.

For the error we have pointed out in the instruction, the judgment of the circuit court is reversed and the cause remanded.

NORTONI and ALLEN, JJ., concur.

STATE v. BARR. (No. 14351.)
(St. Louis Court of Appeals. Missouri. July 5, 1916.)

INTOXICATING LIQUORS \S 236(11)—OFFENSES
—SALE—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for a sale of whiskey in violation of the local option law held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. \S 313-315; Dec. Dig. \S 236(11).]

Appeal from Circuit Court, Clark County; N. M. Pettingill, Judge.

"Not to be officially published."

Oscar Barr was convicted of a violation of the local option law, and he appeals. Affirmed.

James H. Talbott, of Kahoka, for appellant.

REYNOLDS, P. J. Defendant was proceeded against by information filed by the prosecuting attorney of Clark county before a justice of the peace of that county for that, on or about the 23rd of January, 1913, he had unlawfully sold a pint of whiskey to one Heath for the price and sum of one dollar, without then and there having authority to make such sale, it being averred that the local option law was then in force in the county and township in which the sale was made. We are not advised of what transpired before the justice but the case reached the circuit court where, on a trial before the court and a jury, defendant was found guilty and his punishment assessed at six months imprisonment in the county jail. Judgment following, defendant duly appealed to our court.

The case is here on a full transcript but without assignment of error or brief on part of appellant and without briefs on the part

of the state. We have, as required by the statute, examined the transcript, which includes the record proper and bill of exceptions.

It appeared, in fact was practically admitted, that the local option law had been adopted in the county and was in force there and in the township when and where the sale was said to have been made. There was testimony to the effect that Heath, the party named in the information, met defendant in a livery barn in Kahoka, in Clark county, and asked him if he could not get him a pint of whiskey. Defendant said he could, whereupon Heath asked him to go and get it. The defendant went off and returned with a pint of whiskey, which he gave to Heath, the latter paying him money for it; as near as he could remember, a dollar. Defendant had been gone about fifteen or twenty minutes after being requested to get the whiskey, and was seen to go from the livery barn to his own home, where he lived with his father and mother, and then return to the barn and meet Heath, handing over to him the flask of whiskey. The city marshal of Kahoka had followed defendant into the barn and saw defendant deliver the whiskey. The marshal asked defendant if he did not know he would get into trouble by doing that. To this defendant, admitting he had delivered the bottle of whiskey to Heath, said to the marshal that he (defendant) had another bottle of whiskey and would sell it to the marshal, "if he had the price."

The express agent at Kahoka testified to receiving by express from Warsaw, Illinois, by way of Alexandria, Mo., a consignment of whiskey weighing twelve pounds, on January 23rd, and in that month another weighing something more, both consignments paid for to the express agent by defendant and delivered to the defendant.

The defendant himself not testifying, the testimony in his behalf from his mother and father was to the effect that he was subject to "spells," which appear to have been a kind of nightmare, and when he drank whiskey he did not have these spells. Defendant was in no regular business, beyond engaging in day labor of different kinds, and was about 25 years old.

The first instruction given at the instance of the state is attacked as error in the motion for a new trial. A consideration of it discloses no error. It is in the usual form.

A motion in arrest of judgment, which was filed, attacks the information, but we find no reason to criticize that. It is in the usual form applicable to like cases.

The court gave a number of instructions at the instance of defendant which were exceedingly favorable to him. Among other instructions so given, one told the jury that if they believed from the evidence that defendant merely took the money of the prose-

cutting witness Heath and used it for purchasing whiskey which he delivered to Heath, then the relation of defendant to the transaction was that of agent for Heath, and if the jury so found, they should acquit the defendant. With this instruction and on the evidence, the jury was entirely warranted in arriving at its conclusion that the defendant had unlawfully engaged in the business of selling whiskey, and that he got the whiskey from his own stock and made the sale of the pint of whiskey to the person and at the time charged.

Finding no reversible error, the judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

KELLER v. YZABAL et al. (No. 14412.)

(St. Louis Court of Appeals. Missouri. June 6, 1916. Rehearing Denied July 10, 1916.)

1. PLEADING \S 34(6)—SUFFICIENCY—AIDER BY VERDICT.

An answer, after verdict, must receive a liberal interpretation in favor of the judgment, and such matters as may be reasonably inferred therefrom are regarded as sufficiently pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 72, 73; Dec. Dig. \S 34(6).]

2. BILLS AND NOTES \S 484 — PLEADING — ANSWER—CONSTRUCTION.

In an action on a note, an answer, averring that it was not to be paid by the maker when due, but was to be held by the plaintiff and ultimately repaid out of the money to be received by the maker from a mining company in which plaintiff was interested under a contract, and that plaintiff failed to carry out his plans for its reorganization, or to pay plaintiff the sums which he had undertaken to pay, and failed to bring about the payment of the amount to be paid by such mining company, sufficiently alleged that plaintiff undertook to raise the money out of which the mining company should pay the maker, and from which the maker would repay plaintiff the amount advanced and represented by the note in suit.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1535-1538, 1563; Dec. Dig. \S 484.]

3. TRIAL \S 252(3) — EVIDENCE — INSTRUCTIONS.

In such case, where the evidence tending to prove that plaintiff agreed to raise the money and failed to do so went into the case without objection, it was competent for the court to submit it to the jury by instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 598; Dec. Dig. \S 252(3).]

4. BILLS AND NOTES \S 132 — ACTION — DEFENSE.

Where money was advanced by plaintiff to defendant under an agreement between them that it was advanced for defendant's expense in coming to and remaining in a certain place to enable plaintiff to obtain a greater control of a mining company which had contracted to purchase defendant's mining property, and was only to be repaid by deduction from money raised by plaintiff for the reorganization of the company and paid to the defendant, and where

the plaintiff failed to raise such money, the defendant would not be liable on his note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 316-324; Dec. Dig. \S 132.]

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

"Not to be officially published."

Suit by Kent E. Keller against Juan B. Yzabal and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Holland, Rutledge & Lashly, of St. Louis, for appellant. Joseph Wheelless, of St. Louis, for respondents.

NORTONI, J. This is a suit on a promissory note. The finding and judgment were for defendant, and plaintiff prosecutes the appeal. The answer is an extended document and somewhat vague, but, after admitting the execution of the note, it seems to plead a failure of consideration therefor.

It appears that plaintiff and defendant were interested in some mining ventures in Mexico. Defendant owned, it is said, a valuable silver mine, and plaintiff was interested in a corporation known as Bolanos Mining Company, which had purchased defendant's mining properties under some sort of an arrangement. The details of this do not appear, but it is abundantly shown that both mining properties were tied up at the time; that is to say, defendant's interests were awaiting the fulfillment of the contract on the part of the Bolanos Mining Company, and the Bolanos Mining Company was probably awaiting the procurement of capital to move forward. While things were in this situation, plaintiff, who was a director in the Bolanos Mining Company, induced defendant to come to St. Louis and use his influence with other directors of the Bolanos Mining Company so as to have adopted such measures as would reduce the number of the directors of the Bolanos Mining Company and reorganize the voting trust to the end that plaintiff could more fully control the company.

The evidence tends to prove that plaintiff agreed to pay defendant \$250 expense money for his trip to St. Louis and \$300 per month during the time employed in such venture and upon the adoption of the contemplated amendment of the by-laws of the Bolanos Mining Company plaintiff would pay defendant \$5,000 and a further sum of \$5,000 within six months thereafter, but all of these in the meantime were to be repaid by defendant to plaintiff upon the final consummation of the deal between the Bolanos Mining Company and defendant, whereby defendant was to receive \$75,000 in cash from the Bolanos Mining Company in payment on his contract. It is said defendant came on to St. Louis and remained here probably some nine months, and during the time procured the changes or amendments to the by

laws in the Bolanos Mining Company referred to. Plaintiff paid defendant different amounts under this contract, but exacted separate promissory notes therefor, it is said, to use them as collateral with a view of turning over all of them to defendant to be liquidated in their final settlement. Finally, defendant executed to plaintiff the \$1,500 note in suit in lieu of several smaller notes theretofore taken, and this note, it is said, was to be paid only in event plaintiff succeeded in raising the money for the Bolanos Mining Company in which he was interested, and then out of money paid by the Bolanos Mining Company to defendant on the purchase of his mining interests in the other mine above referred to. The evidence tends to prove that plaintiff failed to raise the money contemplated, and also failed to pay plaintiff the two \$5,000 sums agreed. Therefore the Bolanos Mining Company failed to pay defendant the \$75,000 contemplated out of which he was to reimburse plaintiff the amount represented by the note in suit, and also the two \$5,000 payments if such amounts had been paid to defendant according to the contract.

The jury found the issue for defendant, to the effect that the consideration of the note had failed because plaintiff failed to raise the money for the Bolanos Mining Company out of which the note was to be paid after the moneys were paid by the Bolanos Mining Company to defendant.

The only instruction given in the case was that on the part of defendant as follows:

"The court instructs the jury that if you find and believe from the evidence that the moneys advanced by plaintiff to defendant were made under an agreement between them that such moneys were advanced for the expenses of Yzabal in coming to and remaining in St. Louis, under the circumstances as shown in the evidence, and were only to be reimbursed by deduction from money raised by plaintiff for the reorganization of the Bolanos Company, and that plaintiff failed to raise said money, your verdict will be for defendant."

It is argued that the court erred in giving this instruction, for the reason that it is neither warranted by the averments of the answer nor the evidence. On reading the record, we find an abundance of evidence tending to prove the contract as above stated, and also that plaintiff undertook to raise the money for the Bolanos Mining Company out of which the defendant was to have \$75,000 on his contract for the sale of his property and from which sum he was to reimburse plaintiff. Some of this evidence, it is true, is not pointed and direct, but the entire record affords a strong inference supporting the defense submitted to the jury by the instruction. It is unnecessary to quote this evidence. As we read the record, there is an abundance of it.

Putting this aside, the more important question in the case relates to the defense tendered by the answer. The first portion of the answer recites a lot of inducement,

and the portion which is relevant to the inquiry at hand is as follows:

"In March, 1908, the defendant Yzabal, being at his home in the city of Guadalajara, Mexico, received a request from the said Keller to meet him in Mexico City for the purpose of entering into an arrangement to settle the difficulties existing in regard to the said mining company, and on April 23, 1908, the defendant Yzabal went to Mexico City, and entered into an arrangement with the said plaintiff, Kent E. Keller, in substance as follows:

"The said plaintiff, Keller, proposed and agreed that if the defendant Yzabal would go to St. Louis, Mo., and there take part in a meeting of the board of directors of the said mining company and of the said voting trustees, and would consent to adopt certain modifications of the by-laws of said company, and reduce the number of directors, in order to give the said Keller a greater control of the affairs of said company, and would grant to said company an extension of one year within which to comply with the obligations of its original contract with the said defendant Yzabal, that he, the plaintiff Keller, would in consideration thereof make payments to the defendant Yzabal as follows: First. That he would give this defendant the sum of \$250 in cash to defray the expenses of his trip to St. Louis. Second. That he would pay him the sum of \$300 per month during the time that the defendant should remain in St. Louis for the purpose of carrying out the aforesaid plan. Third. That plaintiff would further pay the defendant Yzabal the sum of \$5,000 in cash immediately upon the said amendments being made in the by-laws of the said Bolanos Mining Company, and would also pay him the further sum of \$5,000 within six months thereafter, making a total of \$10,000; all these amounts to be reimbursed to the said Keller upon the receipt by the defendant Yzabal of the amounts due him under his contract with the Bolanos Mining Company as aforesaid.

"Defendant Yzabal further states that he accepted and agreed to said proposition so made by the plaintiff Keller, and that on the 30th of April, 1908, he came to St. Louis for the purpose of carrying out the plans; that on the 12th day of May, 1908, the said meeting of the board of directors and voting trustees was held, and the by-laws of said company were amended according to the proposals of the plaintiff Keller. Defendant further states that, although the plaintiff had agreed and promised to come to St. Louis to attend said meeting and to carrying out his agreement with defendant Yzabal, the said Keller did not come to St. Louis, and he failed to send to defendant the several amounts which he had agreed and promised to pay him monthly as aforesaid; so that it was necessary for defendant to frequently telegraph plaintiff, urging him to remit money as agreed and of which amounts defendant was in great need while in St. Louis.

"Defendant Yzabal further states that from time to time, by dint of constant telegrams to the plaintiff requesting payment of the amounts agreed, he received sundry amounts, but much less than the amounts agreed to be paid by the plaintiff; that on one or two occasions plaintiff refused to make any further payments unless defendant would execute him a note, covering several amounts to be paid, which plaintiff could use as collateral in some of his affairs, but with the distinct understanding and agreement between plaintiff and defendant that the said notes were not to be paid by defendant; that the note herein sued on was issued under the same circumstances, upon the insistence of the plaintiff, and was in lieu of the note previously given as above, which was canceled, and the present note was given for no new or other consideration, but simply covered and represented the sum or total of the several amounts

paid as above stated by plaintiff to this defendant on account of the contract aforesaid, and with the distinct agreement, renewed at the time, that the same should not be paid by the defendant Yzabal when due, but should be held by the plaintiff and ultimately reimbursed out of the money to be received by the defendant Yzabal from the said Bolanos Mining Company under his contract as aforesaid, through the carrying out of the plans above referred to on the part of the plaintiff Keller. And defendant avers that said plaintiff Keller entirely failed to carry out his plans as agreed for the reorganization of the said Bolanos Mining Company and failed to pay the defendant Yzabal the said sum of \$5,000 each which he had contracted to pay defendant Yzabal, and failed to bring about the payment to this defendant of the said sum of \$75,000 to be paid him by the said Bolanos Mining Company, no part of which amount this defendant has ever received.

"And defendant avers that, by reason of the failure of the said plaintiff Keller to carry out his contract and agreement with him, this defendant has been greatly damaged and caused to sustain great loss; that defendant was kept waiting in St. Louis for nine months, away from his home and business, during all of which time he did not earn any money and lost all the money which he would have otherwise made in his business.

"Wherefore defendant avers that by reason of the failure of said plaintiff Keller to comply with his said contracts, and by reason of the entire failure of consideration for the said note herein sued on, and because of the above agreement that said note should be paid except out of the money to be received from the said Bolanos Mining Company, no part of which this defendant has received, the said note is not subject to recovery in this action.

"Wherefore, having fully answered, defendant Yzabal prays to be hence dismissed with his costs."

[1, 2] It is true we find no pointed and direct averment in the answer to the effect that plaintiff agreed to raise the money for the Bolanos Mining Company out of which defendant should be paid \$75,000 and with which funds he agreed to repay plaintiff the amount advanced represented by the note in suit. However, the answer after verdict must receive a liberal interpretation in favor of the judgment, and such matters as may be reasonably inferred therefrom are regarded as sufficiently pleaded. The answer avers:

"That the same should not be paid by the defendant Yzabal when due, but should be held by the plaintiff and ultimately reimbursed out of the money to be received by the defendant Yzabal from the said Bolanos Mining Company under his contract as aforesaid through the carrying out of the plans above referred to on the part of the plaintiff Keller, and the defendant avers that the said Keller entirely failed to carry out his plans as agreed for the reorganization of the Bolanos Mining Company, and failed to pay defendant Yzabal the sum of \$5,000 each which he had contracted to pay defendant Yzabal, and failed to bring about the payment to this defendant of the sum of \$75,000 to be paid to him by the said Bolanos Mining Company, no part of which this defendant has ever received."

[3] We believe it to be a fair inference on this portion of the answer, when construed together with all of the recitals above copied, that plaintiff undertook to raise the money out of which the Bolanos Mining Company

should pay defendant and from which defendant should reimburse plaintiff. At any rate, the evidence tending to prove that plaintiff agreed to raise the money and failed to do so came into the case without objection, and it was therefore competent for the court to submit it to the jury by instructions. See *Chamlee v. Planters' Hotel Co.*, 155 Mo. App. 144, 134 S. W. 123; *Litton v. Chicago, B. & Q. R. Co.*, 111 Mo. App. 140, 85 S. W. 978; *Mellor v. Missouri Pac. Ry. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 38.

[4] Looking at the real issue tried in the case, the instruction seems to be well enough. Other objections to the instruction seem to be refined and unsubstantial.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

KNOCH v. PRATT. (No. 12071.)

(Kansas City Court of Appeals. Missouri.
June 12, 1916. Rehearing Denied
July 3, 1916.)

1. MASTER AND SERVANT §330(1)—LIABILITY FOR TORTS OF SERVANT—INDEPENDENT CONTRACTOR—EVIDENCE.

Where a building contractor excavated on defendant's lot and in so doing excavated into plaintiff's lot and caused her building to collapse, the facts that the work was for his benefit, was paid for by his check, and that defendant's agent sought permission to excavate on plaintiff's lot were sufficient to raise the presumption that the work was done by defendant's servants and to charge him for damages resulting.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1270; Dec. Dig. § 330(1).]

2. MASTER AND SERVANT §329—LIABILITY FOR TORTS OF SERVANT—INDEPENDENT CONTRACTOR—BURDEN OF PROOF—PLEADING.

One who seeks to avoid liability for a tort on the ground that it was the act of an independent contractor has the burden of proving the relationship as well as of pleading it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 329.]

3. TRIAL §156(1)—REMARK OF COURT—EFFECT.

Remarks of court on overruling final demurrer to the evidence as to what it should have done as to an earlier demurrer are of no effect, only what was actually done being material.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 354; Dec. Dig. § 156(1).]

4. TRIAL §156(3)—DEMURRER TO EVIDENCE—EFFECT.

Although plaintiff's evidence might have been insufficient on the first demurrer, which was overruled, where defendant then introduced his evidence, plaintiff, on a second demurrer, was entitled to every reasonable inference of fact from the whole record.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 356; Dec. Dig. § 156(3).]

5. EVIDENCE \S 208(1) — ANSWER — ADMISSIONS—ADMISSIBILITY.

Admission in answer that defendant notified plaintiff he was excavating next her lot is admissible for what it is worth, to show that he knew of the excavation which actually extended into her lot, and that at least the part of it on his lot was done by his authority.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 718; Dec. Dig. \S 208(1).]

6. ADJOINING LANDOWNERS \S 6—RIGHT TO LATERAL SUPPORT—NOTICE OF EXCAVATION—EFFECT.

While notice to adjoining owner of intended excavation on defendant's land would be defense to suit for damage resulting, it is no defense where defendant negligently carried the excavation over into the adjoining land.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. $\S\S$ 13, 28, 29, 32, 33; Dec. Dig. \S 6.]

7. PRINCIPAL AND AGENT \S 148(1)—POWERS OF AGENT—NOTICE OF LIMITATIONS.

Where defendant saw a landowner's brother and asked permission to excavate into the owner's land, and the brother replied that he would have to see the owner, but later said he had not seen the owner, but guessed it would be all right, defendant had notice that the brother had no power as agent to give the permission.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. $\S\S$ 534, 552; Dec. Dig. \S 148(1).]

8. LICENSES \S 64 — PERMISSION TO EXCAVATE—EVIDENCE.

Evidence held insufficient to show that the consent of the landowner or his agents was obtained to make an excavation in the land.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. \S 127; Dec. Dig. \S 64.]

9. LICENSES \S 48—VALIDITY—FRAUD.

Consent of agent to make excavation on principal's land, obtained and induced by the false statement that the principal had already consented, is of no effect even if the agent had power to give such privilege.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. \S 104; Dec. Dig. \S 48.]

10. TRESPASS \S 67 — ACTIONS — QUESTIONS FOR JURY.

It is a question for the jury as to what caused a wall to fall, where defendant excavated on plaintiff's property to within two feet of the wall.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. \S 150; Dec. Dig. \S 67.]

11. ADJOINING LANDOWNERS \S 6—LATERAL SUPPORT—ACTIONS—QUESTIONS FOR JURY.

If a landowner without permission excavated into adjoining land, he is liable for damage when a wall fell into the excavation.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. $\S\S$ 13, 28, 29, 32, 33; Dec. Dig. \S 6.]

12. DAMAGES \S 111—INJURIES TO PROPERTY—MEASURE.

In a landowner's action for causing his wall to fall, the measure of damages being the cost of constructing a new wall, it cannot be complained that the new wall was better than the old; the only difference being in use of cement mortar instead of lime.

[Ed. Note.—For other cases, see Damages, Cent. Dig. $\S\S$ 274-278; Dec. Dig. \S 111.]

13. DAMAGES \S 182 — EVIDENCE — ADMISSIBILITY.

In a landowner's action for damages for causing his wall to fall, evidence that he was going to change the building to a business

house, and that it had not paid as an apartment house, was properly excluded as immaterial.

[Ed. Note.—For other cases, see Damages, Cent. Dig. $\S\S$ 473, 500; Dec. Dig. \S 182.]

Appeal from Circuit Court, Jackson County; Joseph A. Guthrie, Judge.

"To be officially published."

Action by Rosa A. Knoche against Edward P. Pratt. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles L. Dort and Edward C. Wright, both of Kansas City, for appellant. Harding, Murphy & Harris, of Kansas City, for respondent.

TRIMBLE, J. The second count of the third amended petition, being the count upon which the case was submitted, charged defendant with a trespass upon plaintiff's real estate, in that defendant, while excavating upon his own lot for the foundation of a building, entered upon plaintiff's property and wrongfully excavated and removed large quantities of dirt therefrom, thereby weakening the lateral support of plaintiff's building so that the west wall thereof fell, and plaintiff was damaged to the extent of the amount for which judgment was prayed. The answer was a general denial, together with the charge that if defendant, or any one for him, entered upon plaintiff's property and excavated as alleged in plaintiff's petition, it was with plaintiff's consent. The answer also set up, as a further and separate defense, that defendant duly notified plaintiff that excavating would be done along the dividing line between the two properties, and plaintiff had knowledge of such excavating sufficiently long before the wall fell to enable her to protect her building, but negligently failed to do so. As this would constitute no defense whatever to the trespass charged, we take it that it was intended as a defense to the first count of plaintiff's petition, which defendant construed as charging a negligent excavation upon defendant's own property along said dividing line. But, at the close of plaintiff's case, she dismissed the first count, and stood solely upon the second count, charging trespass. The answer also charged that the wall fell by reason of its own faulty construction, "and not through any negligent act or omission of this defendant, or any one acting for him." At the close of plaintiff's case defendant offered a demurrer to the evidence, which was overruled. Then, after defendant's evidence was in and both sides had rested, the defendant again offered a demurrer. This was also overruled. The case was thereupon submitted to the jury, which returned a verdict for plaintiff in the sum of \$950. Judgment was rendered thereon, and defendant has appealed.

Plaintiff owned a lot on which stood a two-story brick building used as a flat. Defendant owned a vacant lot west of and ad-

joining plaintiff's lot. The west wall of plaintiff's building was located 4 feet from the west line of her lot, so that between defendant's east line and plaintiff's wall was a strip of ground belonging to plaintiff which was 4 feet in width. Desiring to erect a building upon his property, defendant made an excavation on his lot for a foundation and basement. This excavation was about 11 feet deep, and extended from the north or sidewalk line of the lot south to a point about even with the south or rear end of plaintiff's building; and the east line of said excavation coincided with the division line between the two lots. As thus made, the excavation was wholly on defendant's property, and was 4 feet from the west wall of plaintiff's building, but in depth it went several feet below the footings of the plaintiff's foundation; and the west side of plaintiff's lot was a perpendicular wall of dirt. Defendant was going to erect his east foundation wall alongside of and against this division line. He desired to cement the outside of this foundation wall to keep out the moisture, and, in order to have room to do so, it was necessary for him to excavate about 2 feet beyond his line and over on plaintiff's down to the depth of his foundation. He therefore entered upon plaintiff's land and excavated about 2 feet on her lot down to the depth of his excavation. This excavation on plaintiff's lot, some of the witnesses say went down almost, if not quite, perpendicular, while others say it slanted toward the property line as it went down. The effect of this excavation on plaintiff's lot was to remove 2 of the 4 feet of earth between her building and the property line. As a result of this the rest of the dirt caved away from plaintiff's foundation, and the west wall of her building fell. Plaintiff's evidence was that the trespass upon and excavation of her property was without her knowledge or consent.

[1, 2] The ground, or at least one of the grounds, upon which defendant rests his demurrer is that the record fails to show any connection of defendant with the trespass. This claim is untenable. It is conceded that the defendant owned the lot west of plaintiff's lot, and that the excavation first made was on defendant's lot. There is ample evidence in the record tending to show, not only that the excavation upon defendant's lot, but also the excavation on plaintiff's lot was done by defendant through his agents and servants. The same individuals who made the one excavation also made the other. The excavation on plaintiff's property which, if done without her consent, constituted a trespass, was done in order to properly protect defendant's foundation from moisture, and was therefore for defendant's benefit. The evidence shows that the defendant paid for the work by giving a check on his firm's account. It also appears as evidence that the man who sought to ob-

tain plaintiff's permission to excavate on her lot was acting for the defendant. These facts were clearly sufficient to raise the presumption that the excavation was made by the servants of defendant. *Perry v. Ford*, 17 Mo. App. 212, loc. cit. 220; 26 Cyc. 1573. There was neither pleading nor proof that the excavating was done by an independent contractor, and even if the duty of the defendant owner, in making the excavation in question, be one that can be delegated to an independent contractor (which we do not decide nor pass upon), yet, if defendant claims he is not liable because the work was being done by an independent contractor, and he, defendant, did not know that he, the contractor, would commit a trespass and excavate upon plaintiff's land, still the burden was on defendant to show that the work was done by an independent contractor. 26 Cyc. 1573; *Slayton v. West End St. Ry.*, 174 Mass. 55, loc. cit. 63, 54 N. E. 351. It was a matter peculiarly within defendant's knowledge, and since there is enough in the record to make a prima facie case for plaintiff, the burden of going forward with the evidence to show the relations between defendant and those doing the excavating was upon defendant. *Schneider v. Maney*, 242 Mo. 36, loc. cit. 43, 145 S. W. 823. This he not only failed to do, but, after being given an opportunity by the court to introduce the evidence showing that relation, he declined to do so. If any real doubt existed as to that relation, proof that it was that of owner and independent contractor was peculiarly within the power of defendant. *Davenport v. King Electric Co.*, 242 Mo. 111, loc. cit. 121, 145 S. W. 454.

[3, 4] Defendant attaches much importance to the remarks of the court made at the time the final demurrer was overruled as to what the court should have done when the first demurrer was offered. The case is not affected by those remarks, but only by what the court did. *Griffith v. Griffith*, 180 S. W. 411. Even if it be true that plaintiff failed to make a case by the evidence in chief, yet defendant went on and put in his evidence, and, in a consideration of the final demurrer, the plaintiff is entitled to the benefit of every reasonable inference of fact arising out of the whole record. *Stauffer v. Metropolitan St. Ry. Co.*, 243 Mo. 305, 147 S. W. 1032.

[5] In addition to the facts shown by the evidence in the case, the plaintiff introduced in evidence and read to the jury defendant's answer, stating that he notified plaintiff of the excavation he was about to make. This was introduced as an admission upon defendant's part that he was having the excavation done, at least that part thereof which was on his own land, and as the excavation which was on plaintiff's land was for the purpose of enabling defendant to properly protect his foundation, the jury could lawfully infer that the excavation upon plaintiff's land was also done by defendant, his servants and agents. *Walters v.*

Hamilton, 75 Mo. App. 237, 243. There was no error in allowing the answer to be read. It was admissible for whatever it was worth as an admission.

[6] Defendant says the trial court, in admitting the answer, erroneously shifted the burden of proof. This view is upon the theory that no case whatever was made for the plaintiff unless the answer be regarded as supplying the lacking, but necessary, connection of defendant with the excavation; and, as there is no inconsistency in joining with the denial of a trespass an averment of facts which, if true, controverts the trespass (Ewen v. Hart, 183 Mo. App. 107, 111, 166 S. W. 315), defendant says it was error to thus depend upon the answer to save plaintiff's case. We have seen, however, that a case was made for plaintiff without relying upon defendant's answer. Besides, the answer was not introduced for the purpose of showing an admission of the trespass. It was introduced to show that the excavation was defendant's act. If the excavation upon defendant's lot was his act, then the excavation on plaintiff's ground, being necessary to accomplish the purpose for which the first excavation was done and in furtherance of that purpose, could reasonably be inferred to be defendant's act also. Whether such last excavation was a trespass or not would depend upon whether or not plaintiff consented to it. So that the principle relied upon in Ewen v. Hart, supra, has no application here. In addition to all this, the first count of the petition, against which the portion of the answer now under consideration was aimed, although appearing to be based upon a negligent excavation upon defendant's own land, did, in fact, also charge an excavation upon plaintiff's land. Now, while notice to plaintiff would be a defense, if the excavation were solely on defendant's own land (Carpenter v. Reliance Realty Co., 103 Mo. App. 480, 77 S. W. 1004), yet such notice constitutes no defense whatever for a negligent excavation upon plaintiff's land or for a wrongful one thereon. The allegation of notice in the answer did not, therefore, partake of the nature of a plea in confession and avoidance. So that, under any view that may be taken of the matter, the trial court did not err nor change the burden of proof by admitting the answer.

[7, 8] Another ground claimed as a reason why the demurrer should have been sustained, and as an objection to plaintiff's instruction, is that the evidence fails to show that the excavation on plaintiff's land was without authority. Stated in an affirmative form, defendant's claim is that the evidence shows plaintiff's permission was obtained. This is not sustained by the record. Plaintiff testified that she did not know of any excavation until told of the fall of her wall, and that she gave no permission to any one. This is undisputed. But it is claimed per-

mission was granted by her agent, who collected the rents and looked after the building, and by plaintiff's brother. The evidence is, however, that the agent, when he saw the excavation being made on plaintiff's lot, ordered the excavation to cease, and was informed that permission had been obtained from the owner. The evidence is that when the one in charge of the excavation asked plaintiff's brother for permission to excavate on her land, he replied he would see his sister and let them know her answer. He was unable to see her, she being away or sick, and perhaps both; and, when the brother was again asked concerning the matter, he told them he had not seen his sister, but he "guessed" it would be all right. There was no proof that either the rental agent or the brother had any authority whatever to grant permission to excavate on plaintiff's land, nor could their authority to grant such permission be inferred from their relation to plaintiff. Indeed the very fact that the brother was to see the plaintiff about the matter was notice to those doing the excavation that he did not himself have such authority.

[9] We do not find any point made in the brief that the court erred in excluding defendant's offer to show that the rental agent gave permission to excavate; but if such point was intended to be made, we answer same now by saying that there was no showing that the agent had authority to grant permission. Besides, if he granted permission under the belief that the owner had consented, which belief was induced by the statement made to him that permission had been obtained, such consent from the agent would amount to nothing even if he had authority to grant consent.

[10, 11] It is further contended that plaintiff's evidence failed to show that the excavation on plaintiff's land, and the consequent caving away of the dirt from her foundation, caused her wall to fall. The point is without merit. The cause of the wall's falling was for the jury, and the evidence was ample to justify them in finding that the excavation did it. The excavation that caused the wall to fall was not the lawful excavation upon defendant's own property, but the wrongful excavation made upon plaintiff's lot. The building stood safe and unaffected for two weeks after the excavation made on defendant's lot, but when the excavation was made on plaintiff's lot the wall fell. If such excavation was wrongful, because without plaintiff's permission, then defendant is liable for the results that followed directly from such wrongful invasion of plaintiff's rights.

[12] It was conceded at the trial that the measure of plaintiff's damages was the reasonable cost of restoring plaintiff's building to substantially the same condition it was in before the wall fell. Plaintiff's evidence tended to show that it would cost \$1,034.70 to

do this. The point that this estimate contemplated a much better wall than the one that fell cannot be sustained. The evidence is that the wall contemplated in the estimate was the same, the only difference being that now the mortar used is cement instead of lime, while it was lime that was used when the original wall was built. The jury's verdict of \$950 was well within the evidence as to the expense of restoring the building to its former state.

[13] Evidence offered by the defendant, but excluded, as to what sort of building plaintiff was going to erect and the change from an apartment house to a business house, and that the house as an apartment house did not pay, was all wholly immaterial, and the court committed no error in excluding it.

The judgment of the trial court should be, and is, affirmed. The other Judges concur.

AMICK v. KANSAS CITY. (No. 12045.)

(Kansas City Court of Appeals. Missouri.
June 12, 1916. Rehearing Denied
July 3, 1916.)

1. MASTER AND SERVANT §265(3)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE.

A servant cannot recover where the evidence merely shows that his injury was caused by any one of two or more causes, for only one of which his master is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 879, 897; Dec. Dig. § 265(3).]

2. MASTER AND SERVANT §276(4)—INJURIES TO SERVANT — SUFFICIENCY OF EVIDENCE — CAUSE OF INJURY.

Evidence held to sustain a verdict that plaintiff's injury by the explosion of an asphalt boiler was proximately due to his master's failure to provide a safety valve.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959; Dec. Dig. § 276(4).]

3. MASTER AND SERVANT §201(3)—INJURIES TO SERVANT—FELLOW-SERVANT RULE.

The fact that a fellow servant, by negligently overheating the boiler, contributed to the injury does not bar recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 518-523; Dec. Dig. § 201(3).]

4. MASTER AND SERVANT §103(1)—INJURIES TO SERVANT—SAFE PLACE TO WORK—DELEGATION OF DUTY.

A master's duty to furnish a reasonably safe working place cannot be delegated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103(1).]

5. EVIDENCE §128 — COMPETENCY — STATEMENTS TO PHYSICIAN.

A patient's statements to his physician concerning his present, as distinguished from past, symptoms are admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 383-387; Dec. Dig. § 128.]

Appeal from Circuit Court, Jackson County; Harris Robinson, Judge.

"Not to be officially published."

Action by James O. Amick against Kansas

City, Mo. From a judgment for plaintiff, defendant appeals. Affirmed.

A. F. Evans and F. M. Hayward, both of Kansas City, for appellant. Chapman & Hanger, of Kansas City, for respondent.

JOHNSON, J. Plaintiff, employed as a laborer at the municipal asphalt plant operated by defendant, was injured by the explosion of a kettle, or vat, containing melted asphalt, and sued to recover his damages on the ground that they were caused by the negligent failure of defendant to furnish him a reasonably safe place in which to work. The original petition did not allege the precise cause of the explosion, but the amended petition, on which the case was tried, alleged negligence in operating the kettle without a safety valve. The answer, in addition to a general denial, pleaded a compromise and release of the cause of action, but the latter defense is not of present moment, and the principal question for our determination is the sufficiency of plaintiff's evidence to support his specification of negligence. The court held the evidence sufficient, submitted issues of fact to the jury, and the cause is here on the appeal of defendant from a judgment rendered on a verdict for plaintiff.

Three large kettles, made of sheets, or plates, of boiler iron riveted together, stood in a row on the first floor of the building with their tops projecting eight or ten inches above the second floor. They were numbered, respectively, one, two, and three, were connected by iron pipes and were used in the process of melting and mixing asphalt. There was a coal oil heater under each kettle, and a compressed air pump for forcing melted asphalt from one kettle to the next through the connecting pipe, which had a valve, or cock, for opening and closing the pipe. At the top of each kettle was an opening 2½ feet square, and before beginning the operation of forcing the melted asphalt from a kettle, its opening was covered by a cast-iron lid three-fourths of an inch in thickness, adjusted to seal the kettle and make it air tight, so that the air pressure from the pump would be exerted against the fluid to be forced out through the connecting pipe. Each kettle had been equipped with a safety valve, the obvious function of which was to prevent a dangerous overpressure of air and gas in the sealed kettle. If the melted asphalt were allowed to become too hot, it would emit a highly inflammatory and explosive gas, and the evidence shows that it was not safe to increase the heat in the kettle while it was sealed and the fluid was being forced into the adjoining kettle. The evidence of plaintiff tends to show that the safety valve not only would keep the air pressure within safe bounds, but also would afford a vent for gas and prevent it from ac-

cumulating in the kettle and becoming a dangerous explosive.

Plaintiff was injured by an explosion of kettle No. 3 while he was near that kettle in the discharge of a duty of his service which was not connected with the operation of the kettles. The pump had been forcing melted asphalt from that kettle and was still pumping air into it, but nearly all of the fluid had been forced out and the connection with the adjoining kettle had been closed. Witnesses for plaintiff testified there was no safety valve on the kettle, and that some days before, the hole for the valve had been plugged. Nor was there any gauge to register the air pressure, and in the absence of a safety valve or gauge, the operators had no accurate means of knowing when the pressure would reach the danger point. The theory of defendant is that the explosion was caused solely by the ignition of gas which had accumulated in the kettle, and this theory has the support of the facts that the fire under that kettle had been negligently allowed to burn during the emptying process, and that the explosion was accompanied by a flash and a loud detonation. At first plaintiff thought such was the cause, and in a signed statement he gave defendant two hours after the injury, he said: "I think Gibbons' failure to turn off fire was the sole cause of the explosion." Gibbons was the workman who attended to the fire under the kettle, and plaintiff concedes he was a fellow servant, and that defendant would not be liable in this action if his neglect to discontinue the fire at the proper time was the cause of the explosion. But there is substantial evidence tending to show that the explosion would not have occurred if the kettle had been equipped with a safety valve. The explosion blew off and broke the cast-iron cover and injured plaintiff. Other damage to the kettle was slight. An expert witness for plaintiff testified that an explosion by ignition of a kettle full of gas in a proper mixture to explode would have wrecked the kettle and the building. As we understand his testimony, his opinion as an expert is that the overheating caused by the negligence of the fellow servant was an important factor in the production of the explosion, since by expanding the inclosed air and gas it increased the pressure to a point beyond the resisting strength of the kettle, the weakest part of which was the cast-iron cover, but that the pressure would have been kept within safe bound by the safety valve if it had been in operation.

[1] Counsel for defendant argue: First, that all the evidence shows that a cause for which defendant would not be liable, i. e., the overheating of the kettle, was the proximate cause of the explosion; and, second, that at any rate the most that could be said of plaintiff's evidence is that it discloses two equally probable and reasonable alternative

causes, for only one of which defendant would be liable, and therefore that the verdict was the product of a mere arbitrary and speculative choice of the alleged cause. The latter argument proceeds from the application by counsel of the well-settled rule that where the evidence, in its phase most friendly to the pleaded cause, goes no further than to show that the injury resulted from one of two or more causes, for only one of which defendant would be liable, the plaintiff must be held to have failed in his proof, since to hold otherwise would be to change the burden of proof relating to the proximate cause from the plaintiff, where it belongs, to the defendant. *Byerly v. Light Co.*, 130 Mo. App. 593, 109 S. W. 1065; *Fowler v. Elevator Co.*, 143 Mo. App. 422, 127 S. W. 616; *Rogers v. Packing Co.*, 167 Mo. App. 49, 150 S. W. 556; *Kane v. Railroad*, 251 Mo. 13, 157 S. W. 644; *Mullery v. Tel. Co.*, 180 Mo. App. 128, 168 S. W. 213.

[2, 3] We think the proof adduced by plaintiff escapes the operation of this rule, and points with reasonable certainty to negligence of defendant in operating the kettle without a safety valve as an indispensable factor in the production of the injury. Such negligence was a breach of defendant's duty as a master to exercise reasonable care to furnish plaintiff, its servant, with a reasonably safe working place, and the mere fact that it co-operated with negligence of a fellow servant to produce the injury which would not have occurred in the absence of either factor will not absolve defendant from liability. A master is responsible for an injury to his servant where his negligent breach of duty was a proximate cause, though the injury would not have occurred without the co-operation of negligence of a fellow servant. *Hendrickson v. City*, 182 S. W. 108.

The jury were entitled to infer that the explosion was caused by an overpressure of air and gas which would have been relieved by a safety valve, and that the ignition of the gas in the kettle, because of the comparative mildness of the explosion, was a result, not a cause thereof. The demurrer to the evidence was properly overruled.

[4] We have sufficiently answered the point that the verdict "was contrary to instruction No. 4, given at the request of defendant," since, as we have found, there is substantial evidence tending to show that negligence of the fellow servant was not the sole cause of the explosion. The objection to the modification of defendant's third instruction is without merit. The instruction as modified was too favorable to defendant, in view of the rule that the duty of a master to exercise reasonable care to furnish his servant a reasonably safe working place is non-delegable. *Scheidler v. Iron Works*, 172 Mo. App. 688, 155 S. W. 897; *Van Verth v. Cracker Co.*, 155 Mo. App. 299, 136 S. W. 724; *Toma v. Union Sand Co.*, 175 S. W. 865.

[5] A physician who examined and treated plaintiff testified:

"His nerve centers are exaggerated. He is sensitive to noise and to any excitement, and his concentration of memory is not good; his locomotion is not good; he does not take hold of things good. He says he sees all right. He cannot read any length of time, so he says; he says that."

These were the statements of present symptoms, not of past history and the testimony was properly received. The rule in this state is that a physician may testify about the present symptoms of his patient and repeat the statements of the patient to him relating to such symptoms, but should not be allowed to repeat the history of the case nor of past symptoms given by the patient during the examination. *Poumeroule v. Cable Co.*, 167 Mo. App. loc. cit. 539, 152 S. W. 114, and cases cited; *Holloway v. Kansas City*, 184 Mo. 19, 82 S. W. 89. There is no prejudicial error in the record.

The judgment is affirmed. All concur.

JULIAN v. KANSAS CITY GRANITE & MONUMENT CO. (No. 12023.)

(Kansas City Court of Appeals. Missouri. June 12, 1916. Rehearing Denied July 3, 1916.)

1. LANDLORD AND TENANT — 199½ — RENT — LIABILITY — EVICTION.

Where defendant rented office space under a year's lease and installed its agent, and, on discharging him, he refused to vacate the office, it was not the landlord's duty to eject him, but defendant was liable for the rent for the term in the absence of act of eviction by the landlord.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 761; Dec. Dig. ¶ 199½.]

2. JUDGMENT — 713(2) — CONCLUSIVENESS — MATTERS CONCLUDED.

Where the lessor secures judgments for rent in justice courts, and they are allowed to become final, all matters involved in such litigation, such as validity of lease, sufficiency of description, and obligation to pay, and all matters that might have been raised therein, are res adjudicata as to the lessee.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1063, 1066, 1099, 1241; Dec. Dig. ¶ 713(2).]

3. JUDGMENT — 683 — CONCLUSIVENESS — PERSONS CONCLUDED.

In such case, such matters are res judicata as to defendant, which assumed all debts and obligations of lessee.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1206; Dec. Dig. ¶ 683.]

4. JUDGMENT — 739 — RES JUDICATA.

Where lease required lessee to pay one-third of the light bills, and lessor took judgment before expiration of term, the amount of light cost due was not res judicata, but was for the jury in subsequent suit against lessee's assignee of business.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1105, 1267; Dec. Dig. ¶ 739.]

Appeal from Circuit Court, Jackson County; Joseph A. Guthrie, Judge.

"Not to be officially published."

Action by H. S. Julian against the Kansas City Granite & Monument Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with proviso for affirmance on filing remittitur.

S. M. Carmean and C. L. Dort, both of Kansas City, for appellant. Hughes & Whitsett, of Kansas City, for respondent.

TRIMBLE, J. The respondent, Julian, under a written lease, rented to the Guidici Monument Company office space in room No. 333 Scarritt building, in Kansas City. The lessee agreed to pay \$25 per month during the term, and also one-third of the light bill for each month. The Guidici Monument Company and the Kansas City Granite & Monument Company afterwards consolidated their business, and it was conducted by the Kansas City Granite & Monument Company; the latter agreeing, in the written instrument of consolidation, that it "shall assume and hereby agrees to pay the outstanding obligations and debts of the Guidici Company."

This suit was instituted by respondent against the Kansas City Granite & Monument Company, by virtue of said assumption and agreement, for eight months' rent at \$25 per month, and for one-third of the light bill for said months, they being the months from October, 1913, to May, 1914, both inclusive, and within the term of the written lease. The defendant filed an answer which consisted of a general denial, and then set up several defenses going to the validity of the lease and the right to claim rent thereunder. Plaintiff filed a reply, setting up that two final judgments in a justice court had been obtained against the Guidici Company for rent of these premises under the same lease, and that all the issues set up in defendant's answer were therein adjudicated and settled adversely to the contention raised by defendant.

The written lease was introduced, and so also was the written agreement of the defendant to pay the obligations and debts of the lessee. This written lease provided that the rent should be \$25 per month, but did not fix the amount to be paid for light, merely specifying that the lessee should pay one-third of the light bill for each month. Plaintiff introduced evidence that the Guidici Company had taken possession under said lease; had voluntarily paid the rent for several months; had failed to pay for other months, and had been sued and final judgment obtained against it therefor; that the rent for the months now sued for was unpaid, and that one-third of the electric light bill was "about \$6," and was also due. Defendant in its testimony admitted the execution of the two written instruments, admitted that the Guidici Company had taken possession under the lease, and admitted that the two judgments

had been rendered against the Guidici Company.

[1] It appears from defendant's evidence that the Guidici Monument Company took possession under said lease by putting its secretary with his desk in the room; that, about two months after thus taking possession, the company demanded and received of the secretary his resignation. The secretary, however, did not give up the desk space he occupied in the room, but continued therein. The Guidici Monument Company, after paying rent for a month or two, refused to pay further unless plaintiff, its lessor, would put it in possession of the particular space occupied by the former secretary. Said company seemed to think it was plaintiff's duty to put the former secretary out. But, if the Guidici Monument Company's secretary severed his connection therewith, and thereafter refused to get out of the place rented by the company, it was not plaintiff's duty to oust him, but the duty of the company. And, after having leased desk space in said room 333 for a definite term, and having taken possession thereunder, it was the company's duty to pay rent during that term whether it continued to occupy under the lease or not, unless the ceasing of such occupation was caused by eviction on the part of the lessor.

[2] When the Guidici Monument Company refused to pay further two judgments were obtained in justice court for various months' rent, as the rent for those months became due. These judgments became final; and all matters involved in that litigation, such as the validity of the lease, the sufficiency of the description, the obligation to pay rent under the lease, etc., became *res adjudicata* as to the Guidici Monument Company. It became *res adjudicata*, not only as to all issues actually raised, but also as to all that might properly have been raised in said suits. *Jones v. Silver*, 97 Mo. App. 231, 70 S. W. 1109; *Donnell v. Wright*, 147 Mo. 639, loc. cit. 647, 49 S. W. 874.

[3] The Kansas City Granite & Monument Company, having voluntarily stepped into the place of the Guidici Monument Company and assuming all its debts and obligations, was a voluntary grantee, so to speak, of the Guidici Monument Company, and became privy in estate thereto. And any litigation between plaintiff and the Guidici Monument Company, rendering certain matters *res adjudicata* as to them, made the same matters *res adjudicata* as between plaintiff and the Kansas City Granite & Monument Company, in the suit herein. *Henry v. Woods*, 77 Mo. 277, loc. cit. 280, 281; *Taylor v. Sartorius*, 130 Mo. App. 23, 108 S. W. 1089; *Mason v. Summers*, 24 Mo. App. 174.

For this reason, the defenses sought to be set up by the defendant herein were unavailing, since the defendant was estopped to deny or to call in question any such defenses. Of course, if the alleged eviction occurred after the rendition of the two former judgments,

they would not be *res adjudicata* as to it, but it appears from the record that the matters relied upon to constitute eviction occurred before the suits were brought, on which final judgments were obtained, and therefore the question of eviction was therein settled and determined. As will appear, however, from what we have said as to its being no part of plaintiff's duty, as lessor, to oust the Guidici Company's former secretary, the evidence relied upon to constitute eviction wholly fails to establish it. So far as the rent is concerned, therefore, the plaintiff's right to recover was conclusively established by the written instruments introduced, and the admissions of the defendant. And the court did not err in excluding evidence offered to contest that right. Neither was there any issue to submit to the jury on that feature of the case.

The court gave a peremptory instruction to find for plaintiff in the sum of \$206. A verdict for that sum was accordingly returned, and defendant appealed.

[4] We have already shown that the court did not err in the exclusion of the defenses offered by defendant, and that the right of plaintiff to recover the rent was conclusively established. Therefore, so far as the rent is concerned, the court had a right to instruct the jury to return a verdict for plaintiff. But, as hereinbefore stated, the written instruments did not fix the amount of the monthly light bill, but only said that the Guidici Monument Company should pay one-third thereof, whatever it was. The amount plaintiff was entitled to recover for light was dependent, therefore upon his oral testimony as to what that amount was. It was the province of the jury, and not of the court, to weigh the oral testimony. The court could not tell the jury they must believe the plaintiff's testimony that one-third of the light bill was "about \$6" and direct a verdict for that amount and the rent. The amount of the light bill was denied in the general denial and was not admitted in the evidence. It could not have been rendered *res adjudicata* in the two former judgments, since the amount of the light bill would certainly vary with the months. The fact that defendant offered no evidence to contradict the plaintiff's parol evidence as to the amount of the light bill makes no difference. As to the light feature, plaintiff's case rests on parol testimony, and, though there is no contradictory evidence as to it, still the court had no right to tell the jury they must believe plaintiff's testimony. *Wolff v. Campbell*, 110 Mo. 114, 19 S. W. 622; *McDonald v. Mossman*, 181 Mo. App. 475, 168 S. W. 816.

This error, however, can be corrected by remittitur, since the amount of the rent is conclusively fixed at \$200 and the error affects only the excess above that sum. If, therefore, the plaintiff will, within 10 days from the date of the announcement of this opinion, enter a remittitur of \$6 with all interest

thereon from January 19, 1915, the date of the rendition of the verdict and judgment, the case will be affirmed; otherwise the judgment will be reversed and remanded. So ordered. The other Judges concur.

STARKS v. LUSK et al. (No. 1714.)

(Springfield Court of Appeals. Missouri. June 17, 1916. On Motion for Rehearing and Order of Transfer, July 17, 1916.)

1. RAILROADS \S 398(2)—INJURIES ON TRACKS—EVIDENCE—SUFFICIENCY.

In an action for death alleged to have been caused by defendant railroad train in backing upon a trestle, evidence held sufficient to justify a jury finding that deceased had passed the caboose and gone upon the trestle before the train backed up, and that no trainman was then at the rear end of the train who could or did look for a clear track or take steps to avert danger.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1358; Dec. Dig. \S 398(2).]

2. RAILROADS \S 370—INJURIES ON TRACKS—COMMON USE OF TRACK—DUTY OF TRAINMEN.

Though a railroad trestle had "Keep off" signals at each end and there were no side tracks, it was the duty of trainmen to anticipate persons thereon where many people, including school children, used it regularly, to such extent that the ties were worn so as to show a distinct pathway.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1263-1265; Dec. Dig. \S 370.]

3. RAILROADS \S 390—INJURIES ON TRACKS—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Where deceased passed the caboose of defendant's train and went upon the trestle before the train backed up and no trainman was then at the rear end of the train to look for a clear track or to avoid danger, the deceased being "seeable" by the trainmen while in peril and in time to have averted his injury, the humanitarian doctrine applied.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1324, 1325; Dec. Dig. \S 390.]

4. RAILROADS \S 369(1)—INJURIES ON TRACKS—NEGLIGENCE.

Under these facts, it is immaterial, so far as the defendant's duty to him is concerned, whether deceased was drunk or sober, standing up or lying down.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1259; Dec. Dig. \S 369(1).]

5. DEATH \S 99(4)—DAMAGES.

Where deceased was 27 years of age, in good health, a farmer, and left a wife, plaintiff, and three children, a recovery of \$5,000 was warranted.

[Ed. Note.—For other cases, see Death, Cent. Dig. \S 125, 126, 129; Dec. Dig. \S 99(4).]

6. TRIAL \S 256(13)—REQUESTS FOR INSTRUCTIONS.

In an action for death on a railroad track, where specific instruction was desired as to what should be taken into consideration in determining the amount of the verdict, it should have been requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 640; Dec. Dig. \S 256(13).]

Farrington, J., dissenting in part.

Appeal from Circuit Court, Stoddard County; W. S. O. Walker, Judge.

Action by Henry Louisa Starks against

James W. Lusk and others, receivers of St. Louis & San Francisco Railroad. Judgment for plaintiff, and defendants appeal. Affirmed and certified to the Supreme Court.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellants. K. C. Spence, of Bloomfield, for respondent.

STURGIS, J. Plaintiff sued and recovered for the death of her husband by being run over and killed by defendants' freight train while backing over a trestle southwest of the station of Delta. The train in question passed over this trestle, about 425 feet long, going north as it approached the station and, after stopping there, backed up in doing some switching, so that the caboose again reached the south end of the trestle, furthest from the depot. The defendants' track runs northeast and southwest, but we speak of the directions as north and south, as did the witnesses. It was during this retrograde movement that plaintiff claims her husband was run down and killed near the south end of the trestle. Defendants' liability is based on the humanitarian doctrine, in that defendants failed to have any person at the rear end of the train while backing to keep a lookout for or to warn persons of danger, or cause the train to stop after seeing a person in peril.

No one saw the accident, as deceased's body was found a corpse on the trestle some hours after this train had gone northward to Cape Girardeau. The trainmen deny any knowledge whatever of a man being killed till the same was reported to them after their arrival at such destination. The deceased was killed about 7 or 7:30 o'clock in the afternoon of June 23, 1914, and in broad daylight. The track is straight from this trestle, and beyond, to the depot to the north and beyond. The depot is at the crossing at right angles of defendants' railroad and the Iron Mountain Railroad. The Cotton Belt Railroad parallels the Frisco, and crosses the Iron Mountain a short distance to the east. Between these railroads and south of the depot is a camping ground, at and near which deceased was last seen alive. He went to this camp with his father and a number of friends who were to stay there during the night. According to plaintiff's evidence, the deceased shortly left this camp, going to the railroad and then south toward the trestle along the east side of the train while it was standing on the track opposite the camp, intending to cross over the trestle and visit a friend who lived somewhere beyond. This was the last time his father and friends at the camp saw him alive, and his body was found some two hours later, badly mangled, on and near the south end of the trestle. The exact distance of the defendants' depot from the trestle is not given, but it must be

near a thousand feet, as the conductor said that his train contained 20 to 23 freight cars, and when the engine stopped just beyond the depot the caboose was then past the trestle two or three car lengths. Other witnesses put the distance further. The camping place being nearer the depot than the length of the trestle, the deceased must have walked, in going from the camp to where he was found dead, some 1,200 to 1,500 feet. This is important as determining the correctness of the trainmen's story that the backing up movement of this train took place within a minute or two after the engine stopped at the depot, and while the conductor was yet at the rear end of the train. More accuracy in respect to these distances would be helpful in solving this case. All of plaintiff's witnesses agree that the train came in while they were at the camp, and came to a standstill at or before the deceased left the camp and started southward along the side of the train.

[1] The plaintiff's theory is that the deceased, after going out of sight of his friends at the camp (being seen by them till he passed behind some cars standing on a connecting track between the defendant Frisco and the Cotton Belt Roads and then going south along the side of defendants' train) continued south past the caboose, and thence onto the trestle; that defendants' train then backed up without warning, and with no one at the caboose on the lookout, and that it caught deceased on the trestle when he was three-fourths of the way across. The conductor's version of the matter is that the train stopped with the engine at the depot and the caboose near the trestle; that it stayed there only a minute or two, unloading a little freight; that he started at once to leave the caboose to go forward to the depot, but had gotten not over a car length when the engineer whistled the backing-up signal; that he ran back to the caboose step, gave the engineer the response signal to back up, and then rode on this step to the beginning of the trestle, and then stepped off, after looking across the trestle and seeing that it was clear; that the brakeman had already gone forward over the train; that the conductor then went forward to the depot and the train continued backing till the caboose reached about the far end of the trestle; that the engine then cut loose from the train, did some switching, and then coupled to the train and pulled out for Cape Girardeau, he and the brakeman catching the caboose as it went by the depot. In this the conductor is corroborated by the engineer. All the witnesses agree that there was but one backing up of the caboose and train across the trestle. The plaintiff's theory further is that the train stood still when the engine stopped at the depot and before backing up a considerable longer time than thus indicated by the trainmen, and that the conductor, as well as

the brakemen, went to the depot before the train began backing up, leaving no trainman at the caboose at the beginning or during the retrograde movement.

There is much evidence in plaintiff's favor on this point. A stockman remained in the caboose, and testified strongly that the conductor and brakeman both left as soon as the train stopped, and considerably before it backed up, and that no trainman was in or about the caboose thereafter until the caboose passed the depot, as it was leaving that station. He admits, of course, the possibility of the conductor standing beside the car or getting on the lower step without his having seen him. The deceased went down along the train on the same side that the conductor says he was on, and the conductor did not see him pass the caboose, nor meet him further up. The conductor says that if deceased had passed beyond the caboose, he would have seen him on the track or trestle, as the view was plain and open. The distance from where the deceased was last seen at the side of the train to the caboose or beyond was too great to be covered by deceased in the short time indicated by the conductor before it backed up. Other witnesses, including one of defendants' witnesses, said the train did considerable switching before it backed up, and one of plaintiff's witnesses says he ate a lunch during this interval. Another witness testified to seeing a young man answering the description of the deceased, though he had never seen deceased before, nor did he see his body after his death, sitting on the end of a tie and leaning over the rail at a point between the caboose and the trestle. He said this man was much intoxicated and he caused him to get up and go down the dump for fear of his being run over by a train, but that the last he saw of him he was again going back on the railroad. The conductor was evidently then gone, and says this incident must have happened after the train had backed up. It evidently was after he had left the caboose. The deceased had been drinking considerably during the day, but as to the extent to which his intoxication impaired his ability to care for himself varied considerably in the opinions of the different witnesses. According to his companions at the camp, he had been drinking beer only, and had not drank any for more than two hours; that deceased helped to take care of a team at the camp, and walked around about as usual. Under the foregoing evidence we think the jury was warranted in finding that the deceased had passed the caboose and gone upon the trestle before the train backed up, and that no trainman was then at the rear end of the train who could or did look out for a clear track or take steps to avert danger.

[2] That deceased was killed by the train in question admits of little doubt, and is

practically conceded. When found, deceased was lying on his back east of the east rail, and between it and the string of timbers fastened to the ends of the ties, known as the guard rail. This was a space of about 16 inches. His right shoulder was against the rail, his right arm cut off at the shoulder, and again at the wrist, and these parts were 3 or 4 feet from the body. A deep wound or hole was cut in the back of the head, and other bruises were about the head and shoulders. No other train had passed over this trestle from the time this one had backed thereon till the body was found.

The defendant insists that it was entitled to a clear track at this point, and that it owed deceased no duty whatever, since none of the trainmen saw him in a place of danger. On this point it is shown that much switching has to be done at this meeting point of three railroads, and that this trestle is within the designated yard and switch limits. There were, however, no side tracks along this part of defendants' road. It was also shown that warning or "Keep off" signals were maintained at each end of this trestle. On the other hand, it is alleged and shown that this part of defendants' track was much in use, and had been for a long time by pedestrians going to and from the station of Delta. Many people used it regularly, including school children. One witness estimated that 25 to 30 people passed over it every day, and it was especially used in wet weather. So much had it been used as a footpath that the ties had been worn so as to show a distinct pathway. For a considerable number of people this was practically the only way to town, and many others used it for greater convenience. The facts, we think, are sufficient to warrant the finding that defendants' trainmen were bound to anticipate, and to look out for, persons on the track at this point. *Murphy v. Railroad*, 228 Mo. 56, 76, 84, 128 S. W. 481; *Ahnefeld v. Railroad*, 212 Mo. 280, 111 S. W. 95; *Morgan v. Railroad*, 159 Mo. 262, 60 S. W. 195; *Fiedler v. Railway*, 107 Mo. 645, 18 S. W. 847; *Eppstein v. Railroad*, 197 Mo. 720, 736, 94 S. W. 867. Moreover, the defendants' conductor said that the rules of the company required that in backing a train, as this one was, some employé be at the rear and on the lookout. Whether it would have been sufficient to discharge defendants' full duty in anticipating and looking out for the safety of persons who might be on this trestle, had the conductor stayed on the caboose, as he says he did, only till it was entering upon the trestle, from which point he could see that the track was apparently clear, and then leaving the caboose, is not before us, since the jury was justified in finding that he did not even do this.

[3] The defendants' main insistence is that there is no proof whatever that the deceased was, at the time and place of his

death, in a position of peril such that he and his peril could, by the use of due care, have been seen by those operating the train in time to have averted this accident. It is asserted, and properly so, that in order to invoke the humanitarian doctrine, it must be proven that the person in peril was seeable by the trainmen while in peril, and in time to avert his injury by the use of the means at hand. This phase of the case is most strongly illustrated in *Hamilton v. Railroad*, 250 Mo. 714, 722, 157 S. W. 622, and *Whitesides v. Railroad*, 186 Mo. App. 608, 619, 172 S. W. 467. In each of those cases a person was found dead on or so near the railroad track, and with such injuries as to warrant a finding that such deceased was struck by a train. In each case it was shown that there was a clear track for such distance beyond the point of injury that the person killed could, if he was then in the position where killed, have been seen in time to have averted the killing. The proof was lacking, however, in those cases, that the person killed was in fact at and in the danger zone when the train was far enough away to be stopped. In the *Hamilton Case*, the court said:

"In order to bring the case within the theory of the last clear chance doctrine, it is necessary that there should be evidence, positive or inferential, that the deceased was upon the track, lying, standing, or sitting, for a time prior to the injury sufficiently long for actual or constructive sight by the persons in charge of the train, and when it was at a distance sufficiently great to permit it to be stopped before striking him."

And in the *Whitesides Case*, this appears:

"It therefore reckons with the negligent or other unfortunate situation of the party in peril as remote in the chain of causation, and treats with the duty and its breach on the part of the person in charge of the dangerous instrumentality as the proximate cause of the injury, in those cases where it sufficiently appears the position of peril was ascertained or ascertainable through due care on the part of those who ran upon him, in time to have prevented the injury through utilizing the means at command for that purpose in such a manner as not to injure others. This being true, it must appear, not only that decedent was upon the track in a position of peril for a sufficient length of time when run upon, but that he was observable there by the engineer, while exercising due care to that end, for a sufficient length of time and at such distance to have enabled him to avert the injury through prompt action with the means at hand for that purpose, and at the same time allowing for the safety of those on the train."

In those cases the difficulty lay in the fact that all that was proved was that deceased was, at the time he was injured, in the position of peril, but there was nothing to prove how long he had been in that position. Although the place where he was injured was visible for a sufficient distance to allow a stop to be made or other precautions taken, yet there was no proof that the deceased was in that place, and therefore seeable there, long enough before the actual injury to have been seen by one looking at such place. In the instant case, however, we think such proof is supplied by the facts. This case dif-

fers in several respects from the two just cited. In both those cases the injury occurred at night, when the range and clearness of vision was more restricted. Here the train was backing slowly, and the conductor says it could have been stopped by him by applying the air brake within a few feet. This was an open trestle, with nothing whatever to prevent the seeing of a man, or any object, at a considerable distance, whether he be walking, standing, sitting, or lying down. What is more important here is that deceased was necessarily in peril from the time the train entered on that trestle until it struck him, whether he was walking, standing, sitting, or lying down, and regardless of what part of the trestle he was on. He could have come onto the trestle nowhere but at the north end, and, wherever he was between those points, and whatever doing, he was in peril. He was killed about 280 feet from where he entered into the place of peril, and while the train was going that distance, at least, the deceased was seeable, and was in a position of danger, whatever he was doing or wherever he was. The train could have been stopped in much less distance. The place where this deceased was killed, and for some distance on either side thereof, was not like the open roadbed in the Hamilton and Whitesides Cases, where only a step or two in space and a moment of time separated the place of safety from the place of danger. The conductor says that the deceased was not on the trestle when he stepped off the caboose as it entered thereon, because if he had been, he could and would have seen him. The trouble with this is that he was there, for how else could he get to the place where the train struck him? And that the conductor did not see him is due to the fact, as the jury found, that he was not at the caboose looking, but was up at the depot. In *Frick v. Railroad*, 5 Mo. App. 435, 441, where no one was on the lookout at the rear of a backing train, where persons might be expected on the track, and the contributory negligence of the parents of a minor child killed thereby was pleaded, the court said:

"It is immaterial, so far as the duty of a railway company to adopt precautions demanded by ordinary prudence is concerned, how the persons come there. The well-settled rule as to contributory negligence is that though the plaintiff has been guilty of negligence, and though such negligence may have contributed to the injury, yet if, by the exercise of ordinary care, the defendant could have avoided the result, the plaintiff's negligence is immaterial. This doctrine rests upon the basis that he whose act is the efficient cause of the injury should be held liable, and that, even as against wrongdoers, ordinary care is a primary duty."

[4] Under these facts, it is apparent that it would make little difference, so far as defendants' duty to him is concerned, whether deceased was drunk or sober, walking upright or with weaving tread, or, as is probable, was sitting or lying down in a drunken

stupor. *Murphy v. Railroad*, 228 Mo. 56, 82, 128 S. W. 481; *Bunyan v. Railroad*, 127 Mo. 12, 29 S. W. 842; *Riggs v. Railroad*, 120 Mo. App. 335, 96 S. W. 707; *Werner v. Railway*, 81 Mo. 368. As said in the *Murphy Case*, supra:

"For us to hold there is no duty on railroad companies to look for any persons except for those walking upright upon the track, at places where there is a duty to * * * see, would be stumbingly narrow and sour exposition."

[5] The plaintiff's principal instruction, the only one given as to the amount of damages recoverable, merely states that if the jury found the facts warranting a recovery, to "find a verdict for plaintiff in a sum not less than \$2,000 nor more than \$10,000." The court refused to instruct on defendants' behalf "If you find the issues for plaintiff, you cannot assess her damages at more than the sum of \$2,000." The evidence showed that deceased was 27 years of age, in good health, a farmer, and leaving a wife, plaintiff, and three children. These facts warranted a recovery for the amount of the verdict, \$5,000.

[6] Had either party desired a more specific instruction as to what should be taken into consideration in determining the amount of the verdict, such as we held to be proper in the case of *Foster v. West*, 184 S. W. 165 (not yet officially reported), the same should have been requested. That case and others there cited are authority for refusing the instruction asked by defendants.

Finding no material error in the trial of this case, the judgment is affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

On Motion for Rehearing.

FARRINGTON, J. Since the filing of a motion for rehearing by the appellants I have become convinced that the judgment in this case should not be affirmed, and that the opinion heretofore rendered is in conflict with decisions of the Supreme Court and the St. Louis and Kansas City Courts of Appeals. That opinion contains a statement which I do not think the record will bear out, which statement is as follows:

"According to plaintiff's evidence, the deceased shortly left this camp, going to the railroad and then south toward the trestle along the east side of the train while it was standing on the track opposite the camp, *intending to cross over the trestle and visit a friend who lived somewhere beyond.*"

That portion of the above excerpt from the statement of facts which I have italicized is the part that I think is not warranted by the record. The only evidence in the record bearing on the question as to where Starks was going is found in the testimony of James Willis, as follows:

"When he left the camp the train was standing on the track and something like 100 feet from where the camp was. When he got to the train he went down the railroad track by the

train. He told me that morning that he was going to a neighbor's that lived on the railroad down there; he said he was going to go down there to see them, and that he had met them somewhere, and he was going back to see them, and I supposed that that was where he was going. When he left us I never noticed him very far down the track, and never paid any attention to his reeling. I saw him going down the side of the track, and he walked off 20 or 30 steps down there, and I never paid any more attention to him. He was going down by the side of the train. The next time I saw him was on the stretcher at the depot."

The evidence of all the witnesses shows that Starks left the camp, where he had assisted his father in unhitching the team, and started toward the defendants' railroad track, and that when he reached the track he started down toward the rear of the train and was seen to walk for only a short distance in that direction by any of the witnesses, other cars obstructing the view. We next hear of him through plaintiff's witness who swore that while the caboose of the freight train was standing some 300 feet north and east of the trestle, he saw a young man answering the description of Starks, sitting on the railroad ties, with his arm and head resting on the rail at a point about two rail lengths back of the standing caboose. This witness aroused him, called attention to the danger, and got him off the track and down the railroad embankment and left him. The witness says that the man then started staggering back up the embankment toward the track. No more is heard of Starks until several hours after this, when his dead body is found on the far side of the trestle from where he was last seen, which, under the evidence, was some 600 feet from where he had been found sitting on the ties with his arm and head on the rail.

Under the evidence it is clearly and reasonably inferable that Starks started down the side of defendants' track toward the caboose; that the man sitting or lying on the track about two rails length from the standing caboose was Starks; that he was killed by a collision with a railroad train on the trestle; and that it was the freight train along which he had walked, between 6 and 7 o'clock in the evening, that struck and killed him. All the witnesses for plaintiff agree that defendants' train stopped for some little time, switching and backing the cars at this station, and that it had pulled in and stopped for some time before Starks was seen leaving the camp and going toward the train. He was never seen by any witness walking on the railroad track. After he was aroused and gotten off the track by the witness who found him there, he was never seen going toward the trestle by any of the witnesses. He may have walked out on the trestle before the train backed, but there is not a scintilla of evidence in the record that he did so other than that his body was found on the trestle several hours afterward. He may have caught the train as it was

backing and attempted to ride, and thus reached the point on the trestle where his body was found, but there is no testimony in the record to sustain this conjecture. To make my position clear, it is purely conjectural under this record to say that Starks walked on the trestle to the point where his dead body was found, or to say that he rode there.

The whole theory of the plaintiff's case is that there should be a recovery on the humanitarian doctrine. Plaintiff has shown with reasonable certainty that it was the defendants' freight train which was standing at Delta between 6 and 7 o'clock in the evening that struck and killed Starks. This, however, is an inference to be drawn from the circumstances of the case rather than direct evidence of the fact. Plaintiff, in order to recover under the humanitarian doctrine, must also establish that Starks was on the trestle at or near the place where he was killed for a sufficient length of time that, had a proper lookout been stationed on the rear of the train as it backed, he would and should have been seen, and the train stopped in time to save his life; and it is on this proposition that I think there is an utter dearth of evidence on which to base a finding that could be said to have any foundation whatever. If Starks did walk on the trestle to the point of the collision, then I agree with the opinion heretofore rendered that he was at all times in peril where it was the duty of the defendants to see and save him; but where I differ with that opinion is that there is no evidence on which it can be legitimately found that Starks was ever at any time walking on this trestle, and this leads me to now dissent from the following sentence in the opinion:

"Under the foregoing evidence we think the jury was warranted in finding that the deceased had passed the caboose and gone upon the trestle before the train backed up, and that no trainman was then at the rear end of the train who could or did look out for a clear track or take steps to avert danger."

To so reason seems to me to base the finding, first, on an inference (and it is wholly inferential) that Starks was killed where he was found by defendants' freight train, and then, having established that fact by an inference, to further infer from that that he was walking on the trestle. This is basing an inference on an inference, which, as I construe the decisions in this state, is not permissible. The only theory for a recovery advanced here is on a finding that Starks was walking on the trestle. I find no evidence in the record to justify a conclusion that he was walking on the trestle any more than to justify a conclusion that he caught the train as it backed, after he staggered up the embankment toward the track, and rode to the point on the trestle where his dead body was found.

Therefore, the opinion heretofore rendered in my judgment is in conflict with the rule

announced in *Warner v. Railroad*, 178 Mo. 123, loc. cit. 134, 77 S. W. 67, and with the principle declared in *Smart v. Kansas City*, 91 Mo. App. 586, loc. cit. 593, and *Smillie v. St. Bernard Dollar Store*, 47 Mo. App. loc. cit. 406; and that it is also in conflict with *Hamilton v. Railway Co.*, 250 Mo. 714, 157 S. W. 622, and *Whitesides v. Railroad*, 186 Mo. App. 608, 172 S. W. 467, in that to make the defendants liable the finding that Starks was walking on the trestle as the freight train was backing is basing an inference on an inference. The failure to make a liability in the cases of *Hamilton v. Railway Co.* and *Whitesides v. Railroad*, supra, and in *Wilkerson v. Railroad*, 140 Mo. App. 306, 124 S. W. 543, was because of the absence of evidence showing when the injured person got into the danger zone; and it seems to me that in our case it is just as important to sustain a verdict in plaintiff's favor, that the evidence be not speculative or conjectural as to how Starks got to the place on the trestle where his dead body was found. The reasoning in the cases last above referred to, on the failure to show *when*, seems to me to be pertinent to the question before us. I am in favor of granting a rehearing, and, if this be denied, ask that the case be certified to the Supreme Court, for the reason that I deem the opinion rendered in conflict with the cases herein cited.

Order of Transfer.

PER CURIAM. An order having this day been entered overruling appellants' motion for a rehearing, pursuant to the request of *FARRINGTON, J.*, in a separate opinion filed, wherein he deems the controlling opinion in conflict with certain enumerated decisions of the Supreme Court and St. Louis and Kansas City Courts of Appeals, this cause is certified to the Supreme Court for final determination, under the provisions of section 6 of the amendment of 1884 to article 6 of the Constitution.

DAVIDSON v. GOULD. (No. 14428.)

(St. Louis Court of Appeals. Missouri.
July 5, 1916.)

1. PLEADING \Leftrightarrow 96—EQUITABLE DEFENSES—REQUIREMENTS.

An equitable defense in the answer must satisfy all the requirements of a good bill in equity.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 195; Dec. Dig. \Leftrightarrow 96.]

2. CANCELLATION OF INSTRUMENTS \Leftrightarrow 35(1)—PARTIES.

All parties to a written instrument, which one party seeks to have canceled, are necessary parties to the suit, either as plaintiffs or defendants.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. § 55; Dec. Dig. \Leftrightarrow 35(1).]

3. CANCELLATION OF INSTRUMENTS \Leftrightarrow 24(1)—DUTIES OF PLAINTIFF.

One who seeks cancellation of an instrument must tender back what he received under it, or offer to do so.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. § 33; Dec. Dig. \Leftrightarrow 24(1).]

4. CONTRACTS \Leftrightarrow 270(2)—RESCISSION—LACHES.

Where a party claiming fraud in his contract waited over two years after discovery of the alleged fraud, without effort at rescission, the delay was unwarrantable, and he could not have the contract canceled.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1189; Dec. Dig. \Leftrightarrow 270(2).]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

"Not to be officially published."

Action by Emma A. Davidson against Edward M. Gould. Judgment for plaintiff, on defendant's refusal to plead further after demurrer to the answer was sustained, and defendant appeals. Affirmed.

Joseph Dickson, Jr., of St. Louis, for appellant. Loren H. Knox, of Chicago, Ill., and Taylor & Chasnoff, of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff, Emma A. Davidson, respondent here, instituted her action on June 17th, 1912, on two promissory notes executed by defendant to her. The petition is in two counts, the first on a note for \$1,000, dated June 1st, 1909, payable May 1st, 1911, the second of like date, payable May 1st, also for the sum of \$1,000, each note bearing interest at the rate of 6 per cent. per annum, interest to be compounded semi-annually. Averring that the notes were past due and unpaid, judgment is asked for the amount of each.

The amended answer, filed October 31st, 1913, admits the execution of the notes and that they had long since matured and that no part thereof has been paid, but denies that anything is due plaintiff on either of them. As a further defense it is averred that one David B. Gould died October 21st, 1901, leaving surviving him his widow, now Emma A. Davidson, plaintiff below, and her three children, namely, the defendant Edward M., and a daughter Grace, now Mrs. Grady, and a daughter Emma, now Mrs. Black, all of whom he named as legatees in his last will, which was duly probated on October 29th, 1901. It is further averred that by the terms of this will David B. Gould gave to his wife Emma a life interest "in and to the Cottage property in lots 3 to 8 inclusive, in block 5 of Gould & Ewing's subdivision in Clearwater, Fla., in all of his real estate in Tampa, Fla., in 279 shares of the capital stock of the Gould Building Company and in one-quarter of the residue of his estate, with the provision that at her remarriage the aforesaid property should vest in his children in equal shares." It is then charged that be-

fore July 24th, 1903, and at a date unknown to defendant, plaintiff was secretly married to one Davidson and from the time of her marriage she had never disclosed to defendant when and where this marriage took place, defendant averring that he was kept in ignorance by plaintiff that the marriage had taken place before July 24th, 1903, until on or about May 1st, 1911, when he was informed of that fact by others. It is further averred that on July 24th, 1903, plaintiff "not then known by this defendant to be the wife of James Z. Davidson, and wilfully and purposely concealing her remarriage from him, and wilfully and fraudulently representing to him that she was still rightfully possessed of a life interest in the estate of her late husband, David B. Gould, induced the defendant and his two sisters to enter into a contract, in writing, for the division and distribution of the estate of David B. Gould, by the terms whereof her children, believing her to be still the widow of their father and unmarried, consented and agreed that she should take from said estate for her absolute property, in lieu of the life estate granted to her by the will of her former husband, * * * certain real estate known as the Cottage property in Clearwater, Fla., 106 shares of the capital stock of the Gould Directory Company, and two notes of Edward M. Gould (the defendant), each in the sum of \$1,166, certain of the rents of the Tampa, Fla., real estate, and a child's part, being a one-fourth interest, in the residue of the estate."

It is further averred that on June 1st, 1909, plaintiff "still wilfully and fraudulent concealing from the defendant that she had remarried, on, to-wit, the ——— day of ———, 19—, prior to the execution of the aforesaid agreement of July 24th, 1903, and the defendant, being in ignorance of her said remarriage, induced defendant to buy the 106 shares of the capital stock of the Gould Directory Company received by her under and by virtue of the agreement last aforesaid, and to give in payment therefor his one-fourth interest in certain real estate (not the Cottage property) in Clearwater, Fla., and his three promissory notes, all payable to plaintiff and all dated June 1st, 1909," one of them in the sum of \$2,000, payable May 1st, 1910, the other two, the notes here in suit, for \$1,000 each.

It is further averred in this answer that defendant was induced to enter into the agreements of July 24th, 1903, and June 1st, 1909, to make and execute the conveyances to plaintiff therein set forth and to execute and deliver to plaintiff the notes described in the petition, "by the wilful concealment by plaintiff that she had forfeited her life estate in and to the estate of her late husband, David B. Gould, by her remarriage before the execution of the agreement made and entered into the 24th day of July, 1903; that she was never the lawful owner of the 106 shares of

the capital stock of the Gould Directory Company, and that the notes of defendant" (including the notes set forth in the first and second counts of the petition) "were executed by him without valid consideration and are not binding upon him."

Judgment is prayed by defendant upon the notes sued upon with his costs and for a decree cancelling the agreements of July 24th, 1903, and June 1st, 1909, the cancellation and surrender of the three notes given by defendant to plaintiff and the reconveyance to him of the one-fourth interest in the certain real estate, "(not the Cottage property) in Clearwater, Fla., conveyed by defendant to plaintiff under date of June 1st, 1909, and for such other and further relief as to this court seems meet and just."

A demurrer was interposed to this answer which was sustained, and defendant declining to plead further, judgment was rendered against him for the amount of the two notes and interest and costs, from which he has appealed.

The assignment of error is to the action of the trial court in sustaining the demurrer to the amended answer.

Our conclusion, on consideration of this answer is, that the demurrer was properly sustained.

[1] It is a well-settled rule of pleading in our state that an equitable defense attempted to be set up by answer must satisfy all the requirements of a good bill in equity. So our Supreme Court held in *Nichols v. Stevens*, 123 Mo. 96, loc. cit. 117, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514, and again in *Barber Asphalt Paving Co. v. Field*, 188 Mo. 182, loc. cit. 205, 86 S. W. 860. Tested by this rule there are several essentials lacking in the averments of this answer.

[2] In the first place, it is manifest, on the face of it, that the contract alleged to have been entered into in 1903, and which is sought to be attacked here, was between plaintiff, as widow, and the defendant and the two sisters of defendant, the latter three being the only children and heirs of David B. Gould and of his wife Emma A. Gould, now Emma A. Davidson, plaintiff here. The two sisters are not parties plaintiff or defendant. Certainly they are necessary parties to secure a cancellation of the agreement of 1903.

[3] Furthermore, one who seeks equity must do or offer to do equity. Defendant here does not do either; that is, he neither tenders back what he has received from his mother as a result of the agreement of 1903, nor does he offer to return any of it. Beyond all doubt, according to plaintiff's own pleading, the legal title to the shares of stock which defendant bought of her was then in her.

[4] The defense attempted to be set up in the answer is unavailable for another reason. In effect, it is an attempt to rescind and attack collaterally the agreement of July 24th, 1903. According to the defendant's own

avertment, he discovered the fact of the remarriage of his mother on or about May 1st, 1911. He made no effort at rescission, so far as appears from anything in his answer, until he filed that answer on October 31st, 1913. That was an unwarrantable delay. In *Manley v. Crescent Novelty Mfg. Co.*, 103 Mo. App. 135, 77 S. W. 489, our court held that while the right of rescission of a sale of personalty made upon express warranty is firmly established in this state, the enforcement of it, however, is conditioned upon its exercise seasonably and the restoration of the opposite party to statu quo by surrender of all obtained by the vendee under the contract, and it is said in that case (103 Mo. App. loc. cit. 140, 77 S. W. 489):

"The established rule deduced from the many decisions upon the subject is, that what will be a reasonable time is usually a question of fact for the jury, and not a question of law for the court; where fair-minded men may reasonably differ in opinion upon the question, whether the vendee had exercised his right of rescission and made return of the personalty sold with reasonable promptness, the issue is one of fact for the jury, but where the period of time, suffered to elapse between the delivery and the effort to rescind, is so long that no such question can arise, the issue is not one of fact for the determination of the jury, but it becomes the duty of the court to pronounce the delay unreasonable as a matter of law. In other words, the time may be so short that the court may declare it reasonable or so long that the court may declare it unreasonable."

In that case the time was held to be unreasonable, although the delay in rescission was but five months.

In *Sterling Silver Mfg. Co. v. Worrell*, 172 Mo. App. 90, 154 S. W. 866, there was a delay in attempted rescission of not quite two months, and we held, as a matter of law, that it was an unreasonable delay.

Here the delay is over two and a half years after the defendant, according to his own averments, learned of his alleged ground for rescission.

On these several grounds we think that the action of the trial court in sustaining the demurrer to the amended answer was correct. Its judgment is affirmed.

NORTONI and ALLEN, JJ., concur.

TOBERMAN, MACKAY & CO. v. GIDLEY.
(No. 14361.)

(St. Louis Court of Appeals. Missouri. July 5, 1916.)

1. APPEAL AND ERROR \S 1002 — VERDICT — CONFLICTING EVIDENCE.

The Court of Appeals cannot reverse on the ground that the verdict was against the weight of the evidence, in that the jury accepted the negative testimony of the defendant against all the positive testimony of the plaintiff, since the weight of the evidence was for the determination of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. \S 1002.]

2. APPEAL AND ERROR \S 671(5) — ASSIGNMENTS OF ERROR—ADMISSION OF EVIDENCE—DEPOSITION.

An exception that a deposition did not show that it had been taken before an authenticated notary public, that no seal of the notary appeared, and that there was no statement as required by law as to when his notary's commission expired, could not be sustained, where the caption and certificate attached to the deposition were not brought to the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2871; Dec. Dig. \S 671(5).]

3. EVIDENCE \S 83(5)—PRESUMPTIONS—OFFICIAL ACTION—DEPOSITION.

Where the certificate of a notary attached to a deposition does not appear in the record, the presumption arises that it met all the requirements of the statute.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 103; Dec. Dig. \S 83(5).]

4. SALES \S 364(1) — ACTION FOR PRICE — INSTRUCTIONS.

In an action for a balance due on a car of feed consigned to the defendant, an instruction for defendant that if plaintiff consigned the car, and failed to furnish defendant with an invoice of his individual order, and that he did not know and had no means of knowing the amount in the car, and that he distributed what was in the car according to the invoices received by him, and took the remainder as his own, and delivered all of it, and paid for it as charged, he was not liable, was not reversible error.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065, 1069, 1076; Dec. Dig. \S 364(1).]

Appeal from Circuit Court, St. Francois County.

"Not to be officially published."

Action by Toberman, Mackey & Co. against A. Gidley. Judgment for defendant, and plaintiff appeals. Affirmed.

Pipkin & Story, of Farmington, for appellant. J. H. Malugen, of Bonne Terre, for respondent.

REYNOLDS, P. J. This action was commenced before a justice of the peace on an account by which the sum of \$159.86 appears to have been claimed, but after the institution of the action, and by an amended petition, apparently filed in the circuit court, a credit of \$138.62 was given, leaving a balance of \$21.84 claimed to be due, for which judgment was prayed. The case apparently was appealed from the justice to the circuit court, by whom does not appear, and there, on a trial before the court and jury, resulted in a verdict in favor of defendant. Judgment followed, from which plaintiff has appealed, interposing a motion for new trial and excepting to it being overruled.

[1] A point made for reversal, is that the verdict is against the weight of the evidence, it being contended that the jury had accepted the testimony of defendant himself, which it is claimed is negative, against all the positive testimony introduced by plaintiff. This was for the determination of the jury and we cannot interfere on that ground.

It is further contended that the court erred in admitting the testimony of a witness, which, it is claimed, was wholly hear-

say. Reading that and the objections made to it, we do not think the testimony was hearsay. The court committed no error in overruling the objection.

[2] It is also contended that the court erred in excluding the deposition of one Clark. It appears that on objections made by counsel for defendant that the deposition did not show that it had been taken before an authenticated notary public; that no seal of the notary appears; that there is no statement, as required by law, as to when his commission as a notary expires, the court excluded it. We cannot sustain this assignment, for the reason that the caption and certificates that were evidently attached to the deposition are not brought before us.

[3] In *Sullivan v. Missouri Pacific Ry. Co.*, 97 Mo. 113, loc. cit. 121, and following, 10 S. W. 852, our Supreme Court held that the certificate of the officer taking the deposition not being preserved in the record before it, the appellate court must indulge in the presumption that the certificate met the requirements of the statute. So we held in *Klages v. Mueller*, 186 Mo. App. 540, loc. cit. 543, 544, 149 S. W. 327. From this record before us it is impossible for us to tell on what kind of a certificate the learned trial judge acted. The presumption is always in favor of right action.

[4] Complaint is made of an instruction given at the instance of defendant. The instruction complained of told the jury that if they found and believed from the evidence that plaintiff consigned to defendant the car of feed in evidence, and that it failed and neglected to furnish defendant with an invoice of his individual order, and that he did not know and had no means of knowing the amount in the car, and that defendant distributed what was in the car according to the invoices received by him, and took the remainder of feed in the car as his own, and delivered all of it, and paid for it as charged, their verdict should be for defendant. This instruction is not very artificially drawn, but we see no reversible error in it, as it was warranted by the evidence.

The judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

GILBERT v. HILLIARD. (No. 14326.)

(St. Louis Court of Appeals. Missouri. May 2, 1916. On Motion to Modify Judgment, July 14, 1916.)

1. TRIAL \S 253(4) — INSTRUCTIONS — PLEADING SPECIFIC ACTS.

Where the servant's petition counts upon specific acts of negligence on the part of the master, it is essential that an instruction purporting to cover the entire case shall require the jury to find the specific acts charged prerequisite to recovery.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613, 616; Dec. Dig. \S 253(4).]

2. TRIAL \S 253(4) — INSTRUCTIONS — PLEADING SPECIFIC ACTS.

Where the servant alleged the master's negligence in ordering him to stand upon a load of shingles, an instruction, purporting to cover the entire case and permitting recovery if the master ordered the servant to drive from the load, is erroneous, since he might have sat; the injury possibly resulting from the act of standing.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613, 616; Dec. Dig. \S 253(4).]

On Motion to Modify Judgment.

3. MASTER AND SERVANT \S 238(6) — INJURIES TO SERVANT — PLACE OF WORK — ORDERS.

Where the master ordered the servant to drive from the top of a load of shingles, and the servant voluntarily stood on the load, when he was free to sit or stand, his injury, resulting from his standing position, is referable to his own act, and not the master's order.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 748; Dec. Dig. \S 238(6).]

4. APPEAL AND ERROR \S 1178(8) — REMAND — VARIANCE.

Where plaintiff failed to prove a specific act of negligence alleged, but proved another act which may have been negligent, judgment in his favor will be reversed, and the cause remanded, on the theory that he could amend on the cause for negligence in the act proved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4616-4619; Dec. Dig. \S 1178(8).]

Reynolds, P. J., dissenting in part.

Appeal from St. Louis Circuit Court; George C. Hitchcock, Judge.

"Not to be officially published."

Action by Charles F. Gilbert against George Hilliard. Judgment for plaintiff, and defendant appeals. Reversed. On motion to modify judgment. Motion granted, and judgment reversed and cause remanded.

George W. Lubke and George W. Lubke, Jr., both of St. Louis, for appellant. Lehmann & Lehmann, of St. Louis, for respondent.

NORTONI, J. This is a suit for damages accrued to plaintiff on account of personal injuries received through the alleged negligence of defendant. Plaintiff recovered, and defendant prosecutes the appeal.

It appears that plaintiff was in the employ of defendant, a farmer, as a workhand on the place and came to his injury through being precipitated from a load of shingles under the horses in front of a wagon so that the wagon wheel ran over him and broke his leg. Defendant had a considerable quantity of old shingles in his barnyard, and plaintiff, in company with the manager of the farm, was engaged in loading and transporting them elsewhere. Defendant's son, Charles Hilliard, the manager of the farm, directed the loading of the wagon, and he, together with plaintiff, not only filled the wagon bed full of shingles, but by setting them edgewise piled a load, it is said, 18 inches above the top of the bed. The evidence on the part

of plaintiff tends to prove that after this was done plaintiff intended to drive the team while walking on the ground, but the manager directed him to get upon the load and do so. It is said the horses attached to the wagon were rather fractious, and defendant's foreman knew this, also that there was a depression or a small ditch to cross in the barnyard. Plaintiff demurred as to going upon the load, saying the shingles were slippery and likely to fall off; but defendant's manager instructed him to do so with the suggestion that it would tend to hold the shingles on the wagon. Thereupon plaintiff mounted the wagon and stood upon the forward end of the load driving the team across the barnyard, when in crossing the gully the team lunged forward in fright, the shingles slipped from under plaintiff's feet, and precipitated him forward upon the horses, whence he fell beneath and received his injuries through the wagon wheel passing over his hip and limb.

The petition recites the relevant facts by way of inducement, and then proceeds to charge defendant with the specific acts of negligence relied upon for a recovery. The negligent acts relied upon are thus specified in the petition:

"That the defendant, George Hilliard, through his foreman, negligently ordered the plaintiff to stand upon the wagon overloaded with wet shingles on which his footing was insecure, as was known to defendant, and drive a team known to be vicious and liable to run away, over rough ground, when it was known to defendant that said team could have safely been driven from the ground."

There is evidence tending to prove that there was no seat provided on the wagon, but there is none whatever to the effect that plaintiff was ordered by defendant's foreman to stand upon the load while driving. Concerning this plaintiff says that the foreman ordered him to "get upon the wagon." The evidence of defendant's foreman is substantially the same; but no one says that plaintiff was ordered to stand upon the shingles while driving the team, though it appears plaintiff suggested that he would walk beside the wagon and drive, when the foreman directed him to get upon the wagon, as it would aid in holding the shingles on. It appears from the petition that the gravamen of plaintiff's charge against defendant is that the foreman ordered him to stand upon the wagon, which was overloaded with wet shingles on which his footing was insecure and drive a fractious team over rough ground. I am not prepared to say that there was a total failure of proof of the cause of action relied upon from the mere fact that the evidence fails to expressly show the foreman ordered plaintiff to stand upon the load, for it might be inferred, from all the facts and circumstances together, that such an order was given if the matter were squarely put by instructions. I regard the case, too, as one for the jury both on the question of

defendant's negligence and that of plaintiff's contributory negligence.

However, from the instructions given at the instance of plaintiff, it appears the real gist of the negligence charged—that is, the order to plaintiff to stand upon the wagon while driving—was not submitted to the jury at all. Plaintiff's principal instruction which hypothesizes the facts and authorizes a verdict for him, as therein indicated, is as follows:

"The court instructs you that if you believe from the evidence that at the time that plaintiff was injured he was in the employ of the defendant as a hand on defendant's farm, and he was in charge of and under the direction and control of one Charles Hilliard as foreman or manager of said farm, and that said Charles Hilliard was employed by the defendant to act as such foreman or manager, and if you further believe from the evidence that as such foreman or manager said Charles Hilliard had authority, and that it was his duty to have charge of and direct the work and the manner in which the plaintiff was engaged at the time he was injured, and that it was the duty of plaintiff to obey the orders and directions of said foreman or manager as to the manner of doing his work on said farm at the time that plaintiff was injured, and if the jury believe that at the time that plaintiff was injured he was engaged under the direction of said Charles Hilliard as aforesaid in driving a load of shingles for the defendant in the defendant's barnyard, and that said shingles were wet and slippery, and that owing to the load on the wagon it was necessary for plaintiff to stand on said shingles if he drove said team from the wagon, and that the team of defendant was dangerous and liable to run away, and that there was a rough place on the ground which it was necessary to drive over, and that owing to these facts it was dangerous for plaintiff to get upon the wagon and drive said team, and that all these facts and this danger were, or should have been, known to the said Charles Hilliard in the exercise of ordinary care on his part, and that the said Charles Hilliard nevertheless, as such foreman or manager of the defendant, negligently ordered the plaintiff to get upon the said wagon and drive it, and that plaintiff, in obedience to said order, got upon the said wagon to drive said horses, and that as a direct result of obeying said order and in driving said horses from upon said load of shingles the plaintiff was thrown from the wagon and run over and injured, and that at the time the plaintiff was in the exercise of ordinary care for his own safety, then the plaintiff is entitled to recover, and your verdict should be for the plaintiff."

[1, 2] No one can doubt the established rule that, where the petition counts upon a specific act or acts of negligence on the part of defendant, it is essential the instruction shall require the jury to find such act or acts of negligence specified, or at least sufficient of them to establish a dereliction of duty in respect of the matter charged. See *Strode v. Box Co.*, 250 Mo. 695, 158 S. W. 22; *Miller v. United Rys. Co.*, 155 Mo. App. 528, 134 S. W. 1045; *Perry v. Mining Co.*, 188 Mo. App. 315, 175 S. W. 140. Here the instruction, although purporting to cover the whole case and authorize a recovery for plaintiff, omits to require the jury to find that defendant's foreman ordered plaintiff to stand upon the wagon and drive the team, and it appears

such is the crux of the matter, for though the ground was rough, the shingles slippery, the wagon overloaded, and the team fractious, it may be that no injury would have befallen plaintiff had he not chosen to stand upon the load while driving. According to the evidence for defendant, no order to stand upon the load while driving was given, though it would seem the foreman ordered plaintiff to get upon the wagon as this course might aid in holding the shingles on. Then, too, defendant's foreman testifies that it was not usual to furnish a seat on such a load, and the driver either stands or sits thereon as he pleases. This being true, it would seem that if no order to stand upon the load were given, and plaintiff voluntarily chose to do so, then he would not be entitled to recover on account of that particular matter which, indeed, is the central fact of his charge against defendant. The instruction, instead of requiring the jury to find that in view of all of the facts plaintiff was ordered by the foreman to stand upon the load and drive the team, proceeds on a hypothesis that owing to the load on the wagon it was necessary for plaintiff to stand on the shingles. The instruction departs entirely from the specific act of negligence charged; that is, that defendant's foreman ordered plaintiff to stand upon the wagon and around which all of the other specifications converge. In view of the specific averment in the petition, the instruction calling for a finding that it was necessary for plaintiff to stand on the shingles, and that owing to the facts recited it was dangerous for plaintiff to get upon the wagon and drive the team, will not suffice to hold defendant for a negligent order to stand on the shingles while driving the overloaded wagon and team over the rough ground, for the important matter is not made clear to the jury in respect of the particular charge—the alleged order.

Because the instruction omits to require the jury to find the negligent order relied upon, it is my view the judgment should be reversed and the cause remanded for further proceedings. But my Associates do not concur in what is said touching the reasonable inferences which the evidence affords. While they agree to the view expressed concerning the instruction, they deem the case one of a total failure of proof. They adhere to the view that the record is devoid of substantial evidence tending to prove the negligent order was given to stand upon the wagon, and that this averment of a negligent order is the gravamen of the charge against defendant; while it is my view that, although there is no direct evidence tending to prove such a negligent order to stand on the load was given, such may be inferred—that is, that an order to get upon the wagon implied an order to stand thereon and drive in view of all of the facts and circumstances in evidence when it is remembered the load was built 18 inches above the wagon box and no

seat was provided. But my Associates reject this and hold that something more definite should appear in order to render the question one for the jury.

The judgment is therefore, by order of a majority of the court, reversed without remanding the cause, from which judgment I respectfully dissent.

On Motion to Modify Judgment.

ALLEN, J. Respondent's learned counsel earnestly contends that in any event the judgment herein should be one reversing and remanding, and not one of outright reversal. It is argued that conceding plaintiff's failure to establish the negligent order alleged, i. e., the order to stand upon the wagon, nevertheless plaintiff's evidence goes to show an order on the part of defendant's manager to get upon the wagon, which may be found to be a negligent order under the circumstances; that plaintiff has a cause of action for personal injuries resulting from defendant's negligence (though not the precise negligence alleged), and should therefore be given an opportunity to amend his petition and try his case accordingly.

[3] In passing upon the case in the first instance, we were not unmindful of the doctrine invoked by appellant's motion. A majority of the court, however, were of the opinion that the evidence contained in this record did not bring the case within the purview thereof. The evidence for plaintiff does show an order to get upon the wagon, but it is doubtful whether this can be said to have been *prima facie* a negligent order. A court may well hesitate to say that an order to an experienced "farm hand" to get upon a load of this general character can be found to be actionable negligence; and, aside from this, plaintiff's own testimony seems to suggest that his fall from the wagon was due to the fact that he was standing on the load, rather than sitting upon it, when he was not told to stand. According to his own testimony, he was ordered to get upon the wagon in order to assist in holding the shingles on; and it would seem that this could not so well be accomplished by standing upon the load as by sitting thereupon; and, in any event, if he was entirely free in all respects to choose his own method of driving after getting upon the wagon, i. e., whether to stand or sit, and his injury came about by reason of the fact that he voluntarily assumed a standing position, dangerous under the circumstances, his injury must be referred to his own act, rather than to the alleged order of defendant's manager to get upon the wagon. If such be the case, the proximate cause of his injury would appear not to have been the order of defendant's manager to get upon the wagon, but his own act in standing, whereas he might have sat upon the load in safety.

[4] However, there is evidence that the

shingles had been in manure and were wet and muddy. The evidence does not show fully the condition of the upper part of the load in this respect. The load extended about 18 inches above the sideboards, shingles having been inserted about the sides of the upper part of the load to serve to hold it on. It is contended that the circumstances as a whole were such as to make it reasonably necessary to stand when driving from the wagon, that an order to get upon the wagon was tantamount to an order to stand upon it, and that defendant's manager must have so understood and must have known that plaintiff would so understand and interpret such order.

Without committing myself to the proposition that plaintiff has shown himself entitled to go to the jury upon the theory suggested—leaving that question to be determined upon the facts of the record brought here on another appeal, should the case again reach this court—I vote to remand the cause, in order that plaintiff may have an opportunity to amend his petition and present his case upon the theory that the order, though not one in terms directing plaintiff to stand upon the wagon, was nevertheless a negligent order under the circumstances. This course, I think, may be pursued with propriety (see *Rutledge v. Railway Co.*, 123 Mo. loc. cit. 140, 24 S. W. 1053, 27 S. W. 327), and may perhaps prevent a miscarriage of justice.

Respondent's motion to modify the judgment is therefore sustained; and our final order is that the judgment herein be reversed, and the cause remanded. In this order NORTONI, J., concurs. REYNOLDS, P. J., dissents.

STATE ex rel. HADLEY, Attorney General, v. GREENVILLE BANK et al. (No. 13941.)

(St. Louis Court of Appeals. Missouri. July 5, 1916.)

1. **BILLS AND NOTES** \S 317 — **ASSIGNMENT — DEFENSES AGAINST ASSIGNEE — TRANSFER AFTER MATURITY.**

A negotiable certificate of deposit, assigned after maturity, is taken subject to all defenses available against the payee.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. \S 763½; Dec. Dig. \S 317.]

2. **BILLS AND NOTES** \S 342 — **RIGHTS ON TRANSFER—BONA FIDE PURCHASER—ACTUAL NOTICE.**

Under Negotiable Instruments Law 1909 (Rev. St. 1909, \S 10022), one who takes a negotiable certificate of deposit with the words "payment refused" stamped thereon is not a holder in due course.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. \S 830-841; Dec. Dig. \S 342.]

3. **BILLS AND NOTES** \S 452(3) — **ASSIGNMENT — DEFENSES AGAINST ASSIGNEE — PAYMENT OF CONSIDERATION.**

Under Negotiable Instruments Law 1909 (Rev. St. 1909, \S 9999), lack or failure of con-

sideration for the execution of negotiable paper is a defense against all but holders in due course.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. \S 1367-1376; Dec. Dig. \S 452(3).]

4. **BILLS AND NOTES** \S 362 — **RIGHTS ON TRANSFER — BONA FIDE PURCHASER — PURCHASE FROM HOLDER IN DUE COURSE.**

Under Negotiable Instruments Law 1909 (Rev. St. 1909, \S 10028), giving one who holds under a holder in due course all his transferor's rights, a transferee after maturity from a holder in due course is himself a holder in due course if not guilty of any fraud in its procurement.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. \S 937-943; Dec. Dig. \S 362.]

Appeal from Circuit Court, Wayne County; E. M. Dearing, Judge.

"Not to be officially published."

Insolvency proceedings by the state of Missouri, on relation of Herbert S. Hadley, Attorney General, against the Greenville Bank, in which John T. Wilson intervenes. From a judgment denying intervenor's right to recover, he appeals. Reversed and remanded, with directions.

Munger & Lindsay, of Piedmont, J. H. Raney, of Patterson, and Orchard & Cunningham, of Eminence, for appellant. J. F. Meador, of Greenville, for respondent.

NORTONI, J. This is an appeal on the part of the intervenor from a judgment denying his right to recover on three separate certificates of deposit issued by the defendant Greenville Bank. The original proceeding was instituted by Hon. Herbert S. Hadley, Attorney General, ex officio, for the appointment of the receiver of defendant bank on account of its insolvency. The application for a receiver on the part of the Attorney General was sustained and a receiver duly appointed.

It appears that the bank had issued several certificates of deposit without consideration and in fraud. Subsequently, proceedings were had at the instance of the receiver of the bank looking to the cancellation of the several certificates of deposit involved here. Thereupon John T. Wilson intervened, asserting that he was the holder of the three certificates of deposit involved and sought a recovery thereon and allowance against the funds of the bank in the hands of the receiver.

[1] The petition of the intervenor is in three counts declaring separately on each of the three certificates of deposit. The first certificate appears to have been issued by defendant bank on September 20, 1906, for \$1,000, payable to the order of H. N. Barkers, and by its terms became due six months after date. The second certificate was issued by the bank on October 13, 1906, in the amount of \$575, to the order of John S. Guhman, and by its terms is due and payable one year after its date. The third certificate of deposit was issued by the bank November 14, 1906, for \$600, to John S. Guhman, and by its

terms payable nine months after date. All of the certificates of deposit possess the characteristics of a negotiable promissory note, and this is conceded throughout the case. The case was tried before the court without a jury, and no instructions were asked or given. The receiver asserted in defense that the several certificates were issued in fraud and without consideration, and that the intervenor either knew of these facts, or at least became the holder of each and all of the certificates after the maturity so as to render the defense as set forth available against him. It appears from the evidence that the bank was conceived in iniquity and born in fraud. John S. Guhman organized the institution in August, 1906, apparently as a convenience through which he might "kite" checks. As before said, there is an abundance of evidence that all of the certificates involved here were issued in the first instance in fraud of the bank through the co-operation of John S. Guhman, who organized the institution, the president of the bank, and its cashier. The first certificate declared upon—that is, the one of date September 20, 1906, for \$1,000, due six months after date—is payable to H. N. Barckers. The evidence is that Barckers and Guhman were friends, and they together procured the issuance of the certificate to Barckers, and Barckers assigned it to Guhman, who, it is said, subsequently assigned it to Wilson, the intervenor. However, there is substantial evidence in the record given by the receiver of the bank tending to prove that Barckers still held the certificate on April 8, 1907—that is, after it was due—and presented it for payment to the receiver. In view of this, it is clear that the judgment of the court denying the intervenor's right of recovery on this certificate is to be sustained, for that it appears the certificate was negotiated to him by the payee after it was due and is therefore subject to the equities which existed between the bank in the first instance and the payee, Barckers, to the effect that it was issued to him in fraud and without consideration.

[2, 3] The second certificate—that is, the one of date October 13, 1906, for \$575, payable one year after date—was issued to John S. Guhman in person, and the intervenor asserts title through him. This certificate, too, was issued by the officers of the bank conspiring with Guhman and in fraud of the institution. But the intervenor, Wilson, asserts he is an innocent holder thereof in due course. The evidence touching this certificate is to the effect that Guhman assigned it to one Dobermann, who worked at a restaurant in St. Louis, and Dobermann caused it to be presented for payment to the Greenville Bank, which issued it about the time it was due. But the bank declined to pay it; that is, the paper was dishonored, and this fact was stamped upon it; that is, the words "payment refused" were stamped upon it. Subsequently, after the certificate was thus

dishonored and indorsed, it was negotiated to the intervenor, Wilson. Obviously the intervenor is not an innocent holder in due course in so far as this certificate is concerned, for it is conceded that it was dishonored when due and it was then in the hands of Dobermann who owned it. Thereafter the intervenor, Wilson, says he purchased it, and it is conceded that it carried the insignia of dishonor stamped upon it. Absence or failure of consideration is a matter of defense as against any person not a holder in due course. See section 9999, R. S. 1909. A "holder in due course" is not only one who has taken an instrument which is complete and regular upon its face, but moreover one that has become the holder of it before it was overdue and without notice that it was previously dishonored. See section 10022, R. S. 1909. The court very properly found the issue in respect of this matter and denied the intervenor's right of recovery on this certificate.

[4] Touching the certificate of date November 14, 1906, payable nine months after date to the order of John S. Guhman, it is to be conceded that the evidence shows this certificate was negotiated for value to Emil Witte, a farmer near Ferguson, Mo., in the month of November, in which it was issued and more than eight months before it was due. It is to be conceded, too, that Witte thus acquired good title to the paper, for he was wholly without knowledge of any infirmity therein and paid value for it. After acquiring the certificate in November, 1906, Emil Witte presented it for payment to the Greenville Bank, when due, and was refused. Nothing is indorsed on the certificate itself touching this matter, however. Witte continued to hold the certificate after its dishonor for about four years until August, 1911, when the evidence shows he sold it to the intervenor, Wilson. There can be no doubt that Witte was a holder in due course and in good faith, as it is clear he paid value for the certificate and purchased it eight months before it was due. There is nothing in the case tending to prove that Wilson, the intervenor, was a party to the fraud in procuring the issue of the certificate originally, or that he had any knowledge concerning it whatever. He succeeded to the title of Witte, a holder in due course, several years after the paper was due. However this may be the statute (section 10028, R. S. 1909) provides:

"But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

The rule of law thus declared is the same as that which prevailed before the adoption of the statute, as will appear by reference to *First National Bank of Cameron v. Stanley*, 46 Mo. App. 440, 449. It is clear Witte was a holder in due course and possessed good and unimpeachable title to this certificate,

and Wilson, the intervener, succeeded to the same.

The court erred in denying the right of Wilson to recover on this certificate of date November 14, 1906, for \$600 and interest. The judgment should therefore be reversed, and the cause remanded, with directions to the trial court to enter judgment in favor of defendant bank on the finding for it as to the certificate for \$1,000, dated September 20, 1906, and also on the certificate for \$575, of date October 13, 1906, and in favor of Wilson, the intervener, on the certificate for \$600, of date November 14, 1906, with interest thereon. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

AUSTIN v. ENNIS, Public Administrator.
(No. 14254.)

(St. Louis Court of Appeals. Missouri. July 5, 1916.)

1. JUDGMENT \S 126(1) — DEFAULT — SUFFICIENCY OF PLEADING.

Where a petition states a cause of action against a defendant, who duly appears, but does not answer, judgment against such defendant without evidence to support the petition is proper; the petition being clearly confessed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 223, 224, 228; Dec. Dig. \S 126(1).]

2. TRUSTS \S 257—SUIT FOR POSSESSION OF TRUST FUNDS—DEFECT IN PARTIES.

Where the title to shares in trust fund has been adjudicated, one to whom for temporary convenience possession of the fund has been intrusted cannot complain that in suit to have certain shares of the fund transferred to guardian for certain cestuis another cestui, whose share remains in possession of defendant, is not joined.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. \S 363-368; Dec. Dig. \S 257; Parties, Cent. Dig. \S 52.]

3. TRUSTS \S 296—EXECUTION OF TRUST BY THE COURT—PROTECTION OF TRUSTEE.

A trustee, paying and distributing a trust fund under the decree of a court, is indemnified by the order itself, and needs no release.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. \S 415; Dec. Dig. \S 296.]

Appeal from Circuit Court, Knox County; Charles D. Stewart, Judge.

"Not to be officially published."

Suit by Charles H. Austin, guardian, against John W. Ennis, public administrator. From a judgment for complainant, respondent appeals. Affirmed.

F. H. McCullough, of Edina, for appellant.
O. D. Jones, of Edina, for respondent.

NORTONI, J. This is an appeal from an order of the court, directing a trustee theretofore appointed to pay over certain funds to the plaintiff's cestuis que trustent.

[1] It appears that as a result of a partition suit in the circuit court of Knox county a fund of \$1,500 arose under sale of the land

partitioned, and that this fund belonged in equal parts to the three plaintiffs, who were minors, that is, Dewey Austin, Noble Austin, and Frank Austin, and their brother Harry Austin and a half-brother, Matt Lingenfelter. In the final decree entered in the partition suit, the court ordered defendant, John W. Ennis, to hold this fund of \$1,500 as trustee for the several parties mentioned until the minors should become 21 years of age, but, by its decree, adjudicated the rights of each of the parties mentioned; that is, it decreed each to be the owner of a one-fifth part of the fund. Subsequently Harry Austin, one of the minors, departed this life. At a subsequent term of the court the three minors, acting through Charles H. Austin, their guardian and curator, filed the petition involved here, praying the court to order the trustee to pay their several portions of the fund over to the curator for their benefit. The trustee, John W. Ennis, was duly served and appeared, but no notice whatever of the proceeding was given to Matt Lingenfelter who owned the title to one-fifth of the fund. On a hearing the court ordered the appellant, the trustee, to pay the several portions of the fund as theretofore adjudicated in the partition suit to the plaintiff as curator of each of the minors, Dewey, Noble, and Frank Austin. At the same time, the court ordered defendant to hold the share of the fund belonging to Harry Austin, deceased, and likewise the share of the fund belonging to Matt Lingenfelter until further order of the court respecting each. Defendant urges on appeal that there was no evidence introduced in aid of the petition, but obviously there is no merit in this. No answer or other pleading to the petition was filed, and though the appellant trustee appeared, he made no effort to contradict any of the averments therein. Under all of the authorities, the petition is clearly confessed and, of course, this argument avails nothing.

[2, 3] It is argued, second, that the court should not have distributed the fund in the absence of Matt Lingenfelter. It is to be said in answer to this that the rights of the parties in the fund were adjudicated some time before in the partition suit; that is, the court found and declared that each one of the minors owned one-fifth of the entire fund. Why the fund was ordered into the hands of Ennis as trustee for the time being does not appear, except there was no duly qualified curator to take it. It is clear that the three minors here own each one-fifth part of the fund, and Charles H. Austin, their guardian and curator, applies to be given possession of their several portions, which is well enough. The court by its order merely turned over to the guardian and curator the portions of the fund long before adjudicated to belong to them, and ordered that that portion which belonged to Harry Austin, the deceased, and

Matt Lingenfelter, who was not a party to the proceedings, should remain in the hands of appellant until a further order disposing of it. What valid grounds of complaint the appellant has as to this is more than we can understand, for in any view he is fully protected by the order of the court. This is not a trust fund created by deed, nor a fund in which the several parties were jointly interested, for the rights of each had been severed and adjudicated long before in the partition proceeding, and it only remained for the distribution to be had. The portion of the fund belonging to Harry Austin, deceased, and also that of Lingenfelter, remains in the hands of appellant until a proper party appears to claim for each respectively. The guardian and curator of the three minors here is the proper party to have possession of the three separate parts adjudicated to them, and the appellant trustee is amply protected in paying it out under an order of the court which created the trust a few months before merely for the sake of convenience. It is said where the trustee pays and distributes the trust fund under the direction and decree of the court he is indemnified by the order itself, and needs no release. "It would be impossible to hold any trustee responsible for obeying the orders of the court," says Mr. Perry in his work on Trusts and Trustees, vol. 2 (6th Ed.) § 924.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

FITZGERRELL v. FEDERAL TRUST CO. (No. 14419.)

(St. Louis Court of Appeals. Missouri. July 5, 1916.)

1. APPEAL AND ERROR ⇨586(1)—RECORD—SUFFICIENCY OF ABSTRACT.

An abstract of the record proper was fatally defective, where it failed to show that any motion for a new trial was filed, or that the bill of exceptions was signed and filed and made a part of the record, so that nothing was properly before the Court of Appeals but the pleadings and the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2595, 2601, 2603, 2604; Dec. Dig. ⇨586(1).]

2. APPEAL AND ERROR ⇨639(1)—RECORD—DEFECT.

Such defect, though not pointed out by the respondent, might be noticed by the Court of Appeals *ex meru motu*.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2829; Dec. Dig. ⇨639(1).]

3. JUDGMENT ⇨594—SPLITTING CAUSES OF ACTION.

While plaintiff, suing to recover his monthly salary as the representative of defendant trust company, was bound to include in the claim sued upon all installments of salary then due, his prior action for salary then alleged to be due

and payable did not prevent the bringing of his action for salary subsequently accruing.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1100; Dec. Dig. ⇨594.]

4. APPEAL AND ERROR ⇨707(1)—RECORD—PLEADING—EVIDENCE.

Where the record did not show that the bill of exceptions was ever signed, filed, and made a part of the record, and the former judgment set up as *res judicata* was not in evidence, nothing could be predicated upon the former judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2942; Dec. Dig. ⇨707(1).]

5. ESTOPPEL ⇨3(2)—BY RECORD—PLEADING.

The fact that plaintiff's petition in his former suit against a trust company to recover his monthly salary for acting as its representative averred that defendant had canceled and terminated the contract and prayed a recovery of the amount therein stipulated as liquidated damages, in view of the showing that plaintiff recovered only part of the salary payable by defendant under the contract, did not estop plaintiff from recovering the remainder thereof.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 3; Dec. Dig. ⇨3(2).]

6. ELECTION OF REMEDIES ⇨11 — DISTINCTION FROM MISTAKE OF REMEDIES.

There must be two remedies available before one can be bound as by an "election of remedies," and there is a difference between an election of remedies and a mistake of remedies.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 14; Dec. Dig. ⇨11.]

For other definitions, see Words and Phrases, First and Second Series, Election.]

Appeal from Circuit Court, Pike County; Edgar B. Woolfolk, Judge.

Action by John S. Fitzgerald against the Federal Trust Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jamison & Thomas, of St. Louis, and Robt. A. May, of Louisiana, Mo., for appellant. Tom B. McGinnis and John S. Fitzgerald, both of Bowling Green, for respondent.

ALLEN, J. This is an action to recover the sum of \$137.50 alleged to be due plaintiff upon a written contract entered into between plaintiff and defendant on December 29, 1908. By the terms of the contract pleaded the plaintiff agreed to purchase one share of the capital stock of the defendant, Federal Trust Company (the price thereof being \$300), and to retain the same so long as the contract remained in force, and the defendant thereby appointed plaintiff as its "special and confidential correspondent" in and for Pike county, Mo. The contract made provision respecting the duties to be performed by plaintiff in the capacity aforesaid, to wit, to furnish certain confidential information to defendant and keep it informed concerning persons who might require or need the services of a trust company, and to secure its appointment as administrator or executor where possible. In consideration of the purchase and retention of the stock by plaintiff, and the performance of the services mentioned, defendant agreed to pay plaintiff \$150 per year, payable in install-

ments of \$12.50 per month, for a period of three years; plaintiff also to receive "the regular fees and commissions on the business transacted through his office." It was further provided that defendant might at any time cancel the contract, in which event it was obligated to pay to plaintiff \$300 as liquidated damages, together with such salary and commissions as might then be due him—plaintiff to thereupon assign and transfer to defendant the share of stock acquired by him as aforesaid.

From what purports to be a bill of exceptions in appellant's abstract it appears that defendant did not succeed in putting itself in position to transact the business contemplated by the contract in question. Plaintiff's testimony goes to show that during the entire life of the contract he held himself ready to perform any services required of him thereunder, but that he did no business for defendant for the reason that after the execution of the contract he was notified by defendant company that it was not in condition to do business of the character contemplated, and that defendant never succeeded in putting itself in position to transact such business. The evidence shows that plaintiff paid for the share of stock agreed to be purchased by him; that is to say, plaintiff paid a note given by him to defendant therefor, with interest, less one month's salary, viz., \$12.50. Thereafter defendant paid plaintiff the further sum of \$12.50 as salary, but discontinued further payments.

This is the second suit prosecuted by plaintiff to recover salary due and unpaid under the contract. The first suit was instituted on April 12, 1911. The petition in that suit, which was introduced in evidence by defendant in the present action, proceeded for the recovery of \$287.50, alleged to be the amount of salary which had then accrued under the contract, less the sum of \$25 paid on account thereof in the manner above mentioned. In that petition plaintiff also set up that defendant had "refused to carry out the terms and provisions of said contract," and "by its action in the premises," had "canceled, terminated, and repudiated said contract." It is said that the judgment in the former action was in plaintiff's favor for \$287.50, but the judgment did not come into evidence in the present case and is not before us. When it was offered by defendant plaintiff objected to its introduction. The court thereupon stated that he deemed neither the judgment nor the verdict in the former case material in the present action. A colloquy ensued between court and counsel, and plaintiff's counsel admitted that a judgment was rendered in the former suit and that an appeal was taken by defendant to this court, which appeal defendant afterwards dismissed. But, as said, the judgment was not admitted in evidence,

neither was any exception saved to the action of the court in the premises.

At the trial of this cause below plaintiff sought to show that in the former action the court instructed the jury that plaintiff was not entitled to recover the liquidated damages mentioned in the contract, for the reason that there was no evidence that defendant had canceled and terminated the contract; that the court, in the former action, further instructed the jury that if they found for plaintiff they should assess his damages "at not to exceed the sum of \$287.50 on account of salary earned, if any"; and that the verdict and judgment in that suit was for the sum of \$287.50. This evidence the trial court excluded. The instructions in the present case need not be noticed. There was a verdict and judgment in plaintiff's favor for \$137.50, being the entire balance alleged to be due and payable to plaintiff as salary under the contract, after crediting defendant with the amount previously paid to or recovered by plaintiff as mentioned above.

[1, 2] I. At the outset it should be stated that appellants' abstract before us is fatally defective, in that the record proper as abstracted fails to show that any motion for a new trial was filed, or that the bill of exceptions was ever signed, filed, and made a part of the record. In truth, nothing is properly before us, but the pleadings and the judgment. Respondent makes no point of this, but we may properly notice it *ex meru motu*. However, as the appeal must be held to be without merit upon a consideration of the bill of exceptions, we shall briefly dispose of the questions raised by appellant, as though the entire proceedings below were before us.

II. There is but one assignment of error before us, and that pertains to the action of the trial court in overruling defendant's demurrer to the evidence, offered at the close of plaintiff's case, and likewise at the close of all the evidence in the case. The points made by learned counsel for appellant in support of this assignment of error are: (1) That the action is barred by the former judgment; (2) that plaintiff is estopped to prosecute this action because of his election in the former case to treat the contract as canceled and terminated; (3) that plaintiff split his cause of action; (4) that the contract sued on was *ultra vires* as to defendant corporation, and not executed by one having authority to bind defendant.

[3] As to the last-mentioned point, viz., that the contract was *ultra vires* and its execution unauthorized, nothing more need be said than that the evidence fails to show anything to support either contention. Neither is there any merit in the contention that plaintiff has split an entire, indivisible cause of action. Plaintiff was bound to include in the claim sued upon in each instance all in-

stallments of salary due at the time; but his prior action for salary then alleged to be due and payable did not prevent the bringing of the present action for salary accruing thereafter. See *Rundelman v. Boiler Works Company*, 178 Mo. App. loc. cit. 650, 651, and cases cited, 161 S. W. 609.

[4] As to the question of *res adjudicata*, it is to be borne in mind that the former judgment was not in evidence. It follows that, even if we were to consider appellant's bill of exceptions, we could not judicially determine the effect of the former judgment upon plaintiff's present cause of action. If we were to treat as in evidence the instructions and verdict in the former case offered by plaintiff at the trial of this action below, it would be made to appear that the former judgment in itself concluded nothing except the right of recovery by plaintiff of the salary then due him under the contract. That this would not preclude a recovery thereafter for future installments accruing under the contract cannot be doubted. But in the state of the record before us we can predicate nothing upon the former judgment.

[5, 6] It is argued (assuming that we are to consider appellant's bill of exceptions) that the plaintiff is estopped to prosecute this action by reason of the fact that his petition in the former suit averred that defendant had canceled and terminated the contract, and prayed a recovery of \$300 as liquidated damages therefor. It is contended that plaintiff, having elected to pursue the remedy mentioned, is barred by the election and cannot now pursue another and different remedy. But upon a showing merely of what was contained in the petition in the former case we could not uphold this contention of appellant. If it be a fact that the court, in the former action, judicially determined that plaintiff had no remedy on the theory that the contract had been canceled and terminated, it merely shows a mistake on plaintiff's part respecting his remedy, which would not preclude him from suing for a further breach of the contract. There must be in fact two remedies available before one can be bound as by an election of remedies. "There is a difference between an election of remedies and a mistake of remedies." See *Hartwig v. Insurance Co.*, 167 Mo. App. loc. cit. 131, 133, 151 S. W. 477; *Hill v. Combs*, 92 Mo. App. 242; *McLaughlin v. Austin*, 104 Mich. 489, 62 N. W. 719.

So far as appears even by the bill of exceptions, plaintiff has recovered merely a portion of the salary provided to be paid him by the contract. He is not thereby estopped to recover the remainder thereof.

It follows that the judgment should be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

DIEHR v. DEAN et al. (Nos. 14290, 14291.) (St. Louis Court of Appeals. Missouri. July 5, 1916.)

1. FORCIBLE ENTRY AND DETAINER §29(4)—GUILT—SUFFICIENCY OF EVIDENCE.

In actions of unlawful entry and detainer, evidence as to the time defendants took possession held sufficient to warrant findings of guilt in each case.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 140; Dec. Dig. §29(4).]

2. APPEAL AND ERROR §1011(1)—REVIEW—FINDING.

A finding of the trial court on conflicting evidence is conclusive in the Court of Appeals.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3988; Dec. Dig. § 1011(1).]

3. EXECUTORS AND ADMINISTRATORS §426—AUTHORITY OF ADMINISTRATOR PENDENTE LITE—STATUTES.

Under Rev. St. 1909, §§ 7687, 7688, providing what remedies heirs, devisees, etc., are entitled to against persons guilty of forcible entry and detainer, etc., an administrator pendente lite was invested with authority, when acting under order of the probate court requiring him to take possession of decedent's realty and rent the same, to bring actions of unlawful entry and detainer against occupants thereof.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1663, 1665; Dec. Dig. §426.]

4. JUDGMENT §475—COLLATERAL ATTACK.

An order of the probate court, directing an administrator pendente lite to take charge of decedent's realty, cannot be collaterally assailed, in actions of unlawful entry and detainer instituted by such administrator, by defendants' argument that he failed to make proper application and showing to the probate court for the order.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 910; Dec. Dig. §475.]

5. EXECUTORS AND ADMINISTRATORS §31—ADMINISTRATOR PENDENTE LITE—TERMINATION OF AUTHORITY.

The authority of an administrator pendente lite, appointed by the probate court to act as such, continued until the final result of the will contest was duly certified to the probate court, and did not "die a natural death" upon termination of the will contest, and the mere transcript of the record of the will contest in the circuit court availed defendants nothing, as showing termination of the administrator's authority, in his actions of unlawful entry and detainer.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 186-190; Dec. Dig. §31.]

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

"Not to be officially published."

Actions by J. George Diehr, administrator pendente lite of the estate of Louis Breker, deceased, against James Dean and others. From a judgment for plaintiff, defendants appeal. Judgment affirmed.

Chas. A. Smith and William Coblick, both of St. Louis, and A. E. L. Gardner, of Clayton, for appellants. Theo. C. Bruere and C. W. Wilson, both of St. Charles, for respondents.

ALLEN, J. These are two actions of unlawful entry and detainer instituted by re-

spondent on August 7, 1912, before a justice of the peace of St. Louis county. One of them, No. 14290 in this court, is against appellants James Dean and Dock Dean, while the other, No. 14291 in this court, is against appellant Frank Fortune. The suits are for the possession of two parcels of land, being a part of lot 13 of "St. Charles Island," in St. Louis county. The causes reached the circuit court on appeal where, by agreement of the parties, they were tried together as one action, resulting in a judgment in plaintiff's favor against all of the defendants, who have appealed to this court. The appeals have been briefed and submitted together on one record.

Respondent instituted the actions as administrator pendente lite of the estate of one Louis Breker, deceased. It appears that Breker, a resident of St. Charles county, died in 1910, leaving a will in which Dora J. Breker was named as executrix. Thereafter a suit was filed to contest his will, and pending such contest respondent was, by the probate court of St. Charles county, on November 10, 1910, appointed administrator pendente lite of his estate. On December 29, 1910, said probate court, upon respondent's application, made an order of record, requiring respondent, as administrator pendente lite, to take possession of the real estate of the deceased and rent the same. It does not appear that respondent's authority to act as such administrator ever terminated. At the trial of the cause below defendants offered in evidence the record in the suit to contest the will, which, it is said, showed that the will contest had been terminated by a verdict and judgment overturning the will, from which judgment no appeal was taken. But it was not shown, nor was there any offer to show, that the result of the will contest, if finally terminated had ever been certified to the probate court of St. Charles county, or that any proceedings were had in the latter court to terminate respondent's authority. Upon respondent's objection the record thus offered was excluded. The cause was tried before the court, without a jury, and upon hearing the evidence the court made the following finding, viz.:

"Finding of guilty in each case. Damages assessed against defendants James Dean and Wilson Dean at \$50 and the monthly rents and profits at \$6. Judgment for possession and \$100 damages, with monthly rents and profits at \$12 until restitution and costs. Damages assessed against defendant Frank Fortune at \$21.33, and the monthly rents and profits at \$2.50. Judgment for possession and \$42.66 damages, with monthly rents and profits at \$5 until restitution and costs. Memorandum of court filed. Declarations of law filed."

Judgment was entered accordingly. Though this finding recites that declarations of law were filed, the record does not show what, if any, declarations of law were given. It does appear that defendants requested a declaration of law in the nature of a demurrer to the evidence, which was refused.

[1, 2] It is argued that the evidence con-

clusively shows that defendants had been in possession of the property in question for a period of more than three years prior to the institution of these suits. But an examination of the evidence in the record reveals that it by no means sustains this contention. The evidence for plaintiff tends to show that Breker was in continuous possession of the premises in question, either in person or by his tenants, from about 1884 to his death in 1910, and that these defendants, claiming under other parties, entered upon the premises some time in 1911. If plaintiff's evidence be true, this was an invasion of plaintiff's possession as administrator in charge of the property under order of the probate court. Whatever conflict may be said to exist in the evidence adduced, there is ample evidence in behalf of plaintiff to warrant the finding of the trial court. And in the state of the record before us this finding concludes the matter here.

[3, 4] Appellant further contends that respondent was without authority to institute this action as administrator pendente lite. But this contention is manifestly without merit. As administrator pendente lite he was invested with such authority, when acting under an order of the probate court, by virtue of sections 7687 and 7688, Rev. Stat. 1909. And see *Union Trust Co. v. Soderer*, 171 Mo. loc. cit. 679, 72 S. W. 499. The argument that respondent failed to make a proper application and showing to the probate court to obtain the order to take charge of the realty of the deceased avails nothing here. Appellants cannot thus collaterally assail the order of the probate court. See *Green v. Tittman*, 124 Mo. 372, 27 S. W. 391.

[5] It is argued that the order of the probate court of St. Charles county appointing respondent administrator pendente lite "died a natural death" upon the termination of the will contest, and that the trial court erred in excluding the record in that suit, which, it is said, showed that the will contest came to an end by a verdict and judgment on December 23, 1910. But this assignment of error must be ruled against appellant. Respondent's authority to act as administrator continued until the final result of the will contest was duly certified to the probate court. See *State ex rel. v. Guinotte*, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787. The mere transcript of the record in the circuit court, in the will contest case, availed appellant nothing. Though it be that the writing purporting to be the will of the deceased was found not to be his will, there is nothing to show that the result properly, or in any way, reached the probate court (see *State ex rel. v. Guinotte*, supra), and no showing whatsoever of anything to terminate respondent's authority, and that he continued to act as administrator appears from the record of the probate court introduced in evidence below.

We perceive no reversible error in the rec-

ord. The judgment should therefore be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

SEMMES et al. v. RUEDIGER et al.
(No. 14371.)

(St. Louis Court of Appeals. Missouri. July 5, 1916.)

1. CHATTEL MORTGAGES §186 — BULK SALES ACT—VALIDITY.

A chattel mortgage to a brewing company of all a saloon keeper's stock of merchandise, fixtures, etc., for a stated money consideration claimed to be then due the brewing company, and purporting to secure a note, was fraudulent and void as to creditors of the mortgagor, where the brewing company did not receive, prior to the transfer, a verified written statement containing the names and addresses of all creditors, and did not notify the creditors before taking possession of the stock or paying the consideration, as required by the Bulk Sales Law (Laws 1913, pp. 163-165).

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 868; Dec. Dig. §186.]

2. CHATTEL MORTGAGES §202—BULK SALES LAW—LIABILITY OF PURCHASER—RECEIVER.

And under section 2 of the Bulk Sales Law (Laws 1913, pp. 163-165), providing that if the purchaser fraudulently fails to comply with the law he shall, on application of any of the seller's creditors, become a receiver accountable to such creditors for all the merchandise received on the sale, and that no creditor shall have a lien on any merchandise except the goods sold and delivered by him, a decree for a creditor should constitute the fraudulent purchaser a receiver, accountable to the seller's creditors, the court to take such steps in the receivership as may appear proper to protect the rights of the parties and the creditors.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 360, 391, 392, 403, 404, 416; Dec. Dig. §202.]

Appeal from Cape Girardeau Court of Common Pleas; R. G. Ranney, Judge.

Bill in equity by Joseph M. Semmes and Raphael E. Semmes, doing business as B. J. Semmes & Co., against Oscar F. Ruediger and the Rudolph Stecher Brewing Company. Judgment confessed as to defendant Ruediger, and judgment for plaintiff against defendant Rudolph Stecher Brewing Company, and it appeals. Reversed, and cause remanded, with directions.

J. H. Doris, of Cape Girardeau, for appellant. Thos. F. Lane, of Cape Girardeau, for respondents.

ALLEN, J. Prior to August 26, 1913, Oscar F. Ruediger, one of the defendants herein, was engaged in the saloon business in Cape Girardeau, Mo., at which time he was indebted to plaintiffs for liquors sold and delivered to him. On said August 26, 1913, defendant Ruediger executed a certain instrument in the nature of a chattel mortgage by which he attempted to convey to the defendant brewing company all of his stock of merchandise, saloon fixtures, equip-

ment, etc. The consideration named therein was \$956.28, which, it is claimed, Ruediger then owed the brewing company; and the instrument purported to secure a promissory note for said sum, of even date therewith, payable one day after date. Among other things, it provided that Ruediger was to thereafter act as manager of the saloon, run and operate it and sell the stock on hand, and at the end of each week make weekly settlements with the brewing company, deducting from his weekly sales the current expenses of conducting the business and \$15 per week for hired help, the balance to be paid on the alleged debt. On October 15, 1913, plaintiffs filed their petition herein, in the nature of a bill in equity, against both Ruediger and the brewing company, setting up that defendant Ruediger was indebted to plaintiffs in the sum of \$261.24, and was so indebted on said August 26, 1913, and that on said day he fraudulently assigned and transferred to his codefendant, the brewing company, the merchandise and fixtures mentioned, then owned by him and in his possession. And the petition avers that defendant brewing company did not—

"as required by law, demand nor receive from the said Ruediger, prior to the alleged sale and transfer of the stock of merchandise and fixtures above described, a written statement, containing the names and addresses of all the creditors of said Ruediger, together with the amount of indebtedness due or owing by the said Ruediger to each of his said creditors, and verified by the oath of the said Ruediger as required by law, and certified to be a full, accurate, and complete list of his creditors and the amount owing to each, to the best of his knowledge and belief; and the said brewing company did not, as required by law, notify, or cause to be notified, by telegraph, or registered mail properly stamped and deposited in the mail, these plaintiffs, or other creditors of the said Ruediger, seven days before taking possession of the said stock of merchandise and said fixtures and equipment aforesaid, or before paying the purchase price thereof or the consideration of the transfer to the said Ruediger of the proposed sale, trade, or other disposition of said stock of merchandise or fixtures, nor a general statement of the general character of the merchandise, fixtures, and equipment to be disposed of, and the terms and conditions of the purchase, and the parties thereto, the date when and the place where the sale, trade, or other disposition of said stock of merchandise, fixtures, and equipment was to be finally made, as required by law in such case."

And the petition alleges that since August 26, 1913, defendant brewing company, by its agents and servants, has been in possession of and conducting Ruediger's said business, disposing of the goods and receiving the proceeds of the sales therefor. The prayer of the petition is that judgment be rendered against Ruediger for the amount of his said indebtedness to plaintiffs, and that the court adjudge and decree the said conveyance to defendant brewing company to be fraudulent and void as to plaintiffs and other creditors; that the brewing company be declared as to these plaintiffs a receiver for the said mer-

chandise, fixtures, etc., and of all sales made thereof since the 26th day of August, 1913; and that said defendant "be required to pay into court sufficient of the proceeds of said merchandise stock and the sales thereof to satisfy the debt of plaintiffs herein, and the cost of this action," and for general relief. Defendant Ruediger filed an answer, admitting his indebtedness to plaintiffs in the sum of \$261.24, and confessing judgment therefor, and denying the other allegations of the petition. The separate answer of defendant brewing company, aside from formal admissions, is a general denial. The cause was tried before the court as in equity, resulting in a decree in plaintiffs' favor. The court found the facts in plaintiffs' favor, and found the conveyance aforesaid by Ruediger to his codefendant to be fraudulent and void as to plaintiffs and other creditors of Ruediger, because of the failure to comply with the act of March 25, 1913, known as the Bulk Sales Law. See Laws 1913, pp. 163-165. The court thereupon ordered, adjudged, and decreed:

"That the plaintiffs have and recover of the defendants the sum of \$269.85, being the sum of \$261.24, together with six per cent. interest thereon from the last day of June, 1913, to the date of this judgment; and for their costs in this behalf expended and have thereof execution."

From this judgment the defendant brewing company prosecutes this appeal.

[1] It is unnecessary to rehearse the evidence adduced at the trial below. It is sufficient to say that it clearly appears that the court's findings as to the facts are fully warranted by the evidence adduced, and that the court was right in holding that the conveyance in question to the appellant brewing company was fraudulent and void under the "Bulk Sales Law." In view of the character of the instrument and the evidence adduced respecting the transaction, it sufficiently appears that it was sought to transfer to appellant all of the stock and fixtures mentioned, in fraud of the right of plaintiffs and other creditors, and contrary to the express terms of the statute invoked by plaintiffs.

[2] Appellant's learned counsel, however, contends that the judgment entered is one which the court was not authorized to enter under the law, in view of the nature of the suit, and the remedy invoked. This contention appears to be sound. The petition prays judgment against Ruediger, to which plaintiffs are entitled, but it is sought to hold appellant brewing company as a receiver for the property in question, under and in accordance with the terms of the act of March 25, 1913, supra. While other relief is asked, under the theory of plaintiffs' case a general judgment should not have been entered against appellant, upon this petition. Plaintiffs' right to proceed by attachment, on the ground of a fraudulent

transfer by Ruediger of his property, or to invoke other remedy afforded by the law under the circumstances, is a matter here not drawn in question. See Joplin Supply Co. v. Smith, 182 Mo. App. 212, 167 S. W. 649. Plaintiffs' petition invokes the particular remedy afforded by the act of 1913, supra. Section 2 of that act provides that if the vendee fraudulently fails or refuses to comply with its provisions he—

"shall upon application of any of the creditors of the vendor become a receiver and be held accountable to such creditors for all the merchandise, or merchandise, fixtures, and equipment or equipment that have come into his possession by virtue of said sale, trade or other disposition thereof: Provided, however, that nothing in this act shall be so construed as to give any creditor, manufacturer, wholesale merchant or jobber any right to, or lien on any merchandise or article in any stock of goods, except the goods sold and delivered by such creditor, manufacturer, wholesale merchant or jobber."

The decree below should therefore be such as to constitute the appellant brewing company a receiver, within the terms of the act aforesaid; and as such receiver appellant should then be held accountable to the vendor's creditors as the act contemplates, the court taking such steps in the receivership as may appear to be proper to conserve and protect the rights of defendants and other creditors.

The judgment is therefore reversed, and the cause remanded, with directions to the trial court to enter a decree for plaintiffs in accordance with the views expressed above, and that such steps be taken in the receivership as may appear to be proper.

REYNOLDS, P. J., and NORTONI, J., concur.

PRIEBE v. CRANDALL. (No. 14,251.)
(St. Louis Court of Appeals. Missouri. July 5, 1916.)

1. EVIDENCE \Leftrightarrow 535—COMPETENCY.

Testimony that an automobile was going "fast" is inadmissible, where it does not appear that the witness was qualified to testify as to speed.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. \Leftrightarrow 535.]

2. HIGHWAYS \Leftrightarrow 183 — COLLISION — PROXIMATE CAUSE.

Defendant's failure to sound his automobile horn did not proximately cause the collision, where plaintiff knew of his approach when 600 feet distant and turned out of the road in ample time.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 470; Dec. Dig. \Leftrightarrow 183.]

3. HIGHWAYS \Leftrightarrow 184(3) — COLLISION — ACTIONS—NEGLIGENCE.

Evidence held sufficient to take to the jury the question of defendant's negligence in not decreasing the speed of his automobile while passing plaintiff's pony, in view of Laws 1911, p. 330, § 12, subd. 9, imposing a high degree of care upon motorcar drivers.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 473, 473½; Dec. Dig. \Leftrightarrow 184(3).]

4. APPEAL AND ERROR ¶1066—HIGHWAYS ¶184(4)—INSTRUCTIONS.

An instruction regarding defendant's duty to slow up when he saw plaintiff's pony in the way of his automobile *held* prejudicial error, where plaintiff claimed the pony was at the side of the road and backed into the automobile while it was passing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ¶1066; Highways, Cent. Dig. § 474; Dec. Dig. ¶184(4).]

5. TRIAL ¶191(6)—INSTRUCTIONS—ASSUMPTION OF FACT.

An instruction authorizing recovery, if defendant failed to slacken the speed of his automobile and sound a warning, is improper, since it does not require a finding of negligence, but assumes that certain omissions constitute negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 429; Dec. Dig. ¶191(6).]

6. TRIAL ¶251(8)—INSTRUCTIONS—APPLICATION TO PLEADING.

An instruction authorizing recovery for any negligence of defendant or his chauffeur is reversible error, where the petition alleges specific acts of negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 593; Dec. Dig. ¶251(8).]

7. WITNESSES ¶219(5)—COMPETENCY—PRIVILEGE—WAIVER—PHYSICIAN.

Where plaintiff introduced a deposition of a physician who treated her, and testified herself regarding her treatment, etc., *held*, that she waived her privilege to object to the testimony of another physician who treated her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 781, 782; Dec. Dig. ¶219(5).]

Appeal from Circuit Court, Clark County; N. M. Pettingill, Judge.

"Not to be officially published."

Action by Laura O. Priebe, a minor, by her next friend, Samuel W. Priebe, against Edgar A. Crandall. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

T. L. Montgomery, of Kahoka, and James P. Gilmore, of Tulsa, Okl., for appellant. W. L. Berkheimer and J. A. Whiteside, both of Kahoka, for respondent.

ALLEN, J. Plaintiff, a minor, sues by next friend to recover for personal injuries alleged to have been inflicted upon her by and through the negligent operation of defendant's automobile on a public highway in Clark county, Mo. The trial below resulted in a verdict in plaintiff's favor, returned by nine jurors, for \$1,000, and from a judgment entered accordingly defendant prosecutes this appeal.

The petition charges that on May 16, 1913, while plaintiff was returning to her home from school, riding upon a pony along one of the frequently traveled public roads of the county mentioned, defendant, while operating his automobile along such road at a rate of speed in excess of 25 miles per hour for a distance of more than half a mile, negligently struck said pony therewith, throwing plaintiff and the pony to the ground in such manner that plaintiff fell in front of

one of the front wheels of defendant's automobile, which passed over her leg, by reason whereof she was severely injured. It is charged that, though the road along which defendant's automobile passed in approaching plaintiff was, for a long distance, straight, and the view unobstructed, defendant negligently failed to slacken the speed of his automobile, or to give any signal or warning, but negligently and recklessly drove the vehicle, at the aforesaid rate of speed, upon plaintiff, wounding and injuring her. The answer is a general denial, coupled with a plea of contributory negligence.

Plaintiff was a girl 12 years of age at the time of her injury. She was returning from school, riding a pony, upon which were seated, also, her younger sister and another little girl; plaintiff being seated behind the other girls. These girls were accompanied by their teacher, Miss Lebew, who was riding a horse. The automobile, owned by defendant, was driven by one Morgan, and in it were the defendant, his daughter, and Morgan's daughter. It approached plaintiff and her companions from the rear, overtaking them.

The evidence is that Miss Lebew observed the automobile when it was about 600 feet distant, and warned the girls of its approach, and that she thereupon turned her horse to the right of the traveled portion of the roadway, while the girls turned the pony to the left thereof. The driver of defendant's automobile was proceeding to pass between the pony and Miss Lebew's horse, when the pony in some way fell in front of the automobile. The evidence is conflicting as to how this occurred. Plaintiff testified that the automobile struck the pony and threw it to the ground, throwing her in front of one of the wheels of the vehicle, which ran over her leg, breaking it. Such is likewise the testimony of plaintiff's little sister, 9 years of age. But this appears to be the only testimony of any eyewitness to the casualty to the effect that the automobile ran over plaintiff. Miss Lebew testified that the automobile struck the pony, and that plaintiff was thrown in front of one of the wheels thereof; but she did not say that the automobile ran over plaintiff's leg, causing the injury for which plaintiff sues.

On the other hand, the testimony of all of the occupants of defendant's automobile is that the machine did not strike the pony and cause it to fall, and did not run over plaintiff's leg; that as the automobile approached the place where the injury occurred the pony was entirely out of the traveled portion of the road, to the left thereof; that the speed of the automobile was slackened, and it was proceeding very slowly, when the pony began to back into the road in front of the machine; that upon observing this the driver of

the automobile at once brought it to a stop; that the pony continued to back, and fell upon its haunches immediately in front of the automobile, which was then stationary; that the pony, struggling to rise, struck the front part of the automobile and fell over; and that in falling with the pony plaintiff suffered the injury for which she sues. All of these witnesses, excepting Miss Morgan, testified that they saw plaintiff reach forward and grasp the bridle rein, whereupon the pony backed into the roadway, reared, and began to fall. Miss Morgan testified that she saw plaintiff reach around the two girls in front of her on the pony, but could not say whether or not she grasped the bridle rein. In addition to this, a witness for plaintiff, who was looking from the window of a nearby house, testified that, as the automobile approached plaintiff and her companions, the pony was entirely out of the traveled portion of the roadway, and that the witness then saw it back into the road in front of the automobile; also there is testimony of witnesses to the effect that plaintiff stated to others that she was injured by reason of the pony falling upon her, and that the machine did not run over her leg, though plaintiff, on the witness stand, denied that she made such statements.

[1] There is no evidence whatsoever that defendant's machine was being driven at a speed in excess of 25 miles per hour (see Laws Mo. 1911, p. 327, § 9), and the court withdrew this assignment of negligence from the jury. There is testimony of some witnesses, admitted over defendant's objections, to the effect that the automobile was going "fast," "pretty fast," "awful fast," etc. It was not shown that these witnesses had any idea of the rate of speed of an automobile, or were in any way qualified to speak thereof, and furthermore such testimony was nothing more than the conclusions of the witnesses, and ought not to have been admitted.

[2] Nor does it appear that a recovery may be had upon the theory of negligence on the part of the driver of defendant's automobile in failing to seasonably sound his horn, or give other warning of the approach of the machine. The evidence is conflicting as to whether or not such signal was given. The evidence preponderates in defendant's favor on this issue of fact; but there is some evidence contra, of such character, at least, as would make the question one for the jury, were it not for the fact that the undisputed evidence is that plaintiff and her companions knew that the machine was approaching when it was approximately 600 feet from them. As they were aware of the approach of the automobile, and turned out of the road in ample time, according to their own testimony, as well as that for defendant, the proximate cause of the injury could not have been the failure, if any, to sound the horn.

[3] It is argued by appellant's learned

counsel that, in view of the fact that a recovery cannot be had upon either of the two assignments of negligence mentioned, the evidence failed to support the specific negligence charged in the petition, and that consequently the trial court erred in refusing to peremptorily direct a verdict for defendant. It is true that plaintiff has alleged specific acts of negligence, and must recover, if at all, upon proof of one or more of such alleged specific negligent acts. See *Beave v. Transit Co.*, 212 Mo. 331, 111 S. W. 52; *Crone v. Oil Co.*, 176 Mo. App. loc. cit. 349, 158 S. W. 417; *Feldewerth v. Railroad*, 181 Mo. App. loc. cit. 640, 641, 164 S. W. 711, and authorities to which these cases refer. But the petition, among other things, charges negligence on the part of defendant, or his driver, in failing to slacken the speed of the car in approaching the point of the alleged collision with the pony; and there is some evidence in plaintiff's behalf that the speed thereof was not slackened until after the automobile—as plaintiff and some of her witnesses say—struck the pony. At any rate, plaintiff so testified, whatever may be said of other testimony for plaintiff touching that matter. While there is much positive and persuasive evidence opposed to this, plaintiff's evidence appears to be sufficient to take the case to the jury on this assignment of negligence, particularly in view of the high degree of care required of the driver of a motor vehicle upon a public highway by the provisions of section 12, subd. 9, Laws Mo. 1911, p. 330. Under the circumstances, it was the duty of the driver of defendant's automobile to exercise a high degree of care to have the machine so under control as to be able to stop quickly, when attempting to pass the pony near the edge of the traveled portion of the roadway. Defendant's evidence tends strongly to show no negligence in this respect; but, in view of plaintiff's evidence touching the matter, we could not well declare that plaintiff wholly failed to make out a case for the consideration of a jury. We therefore rule this assignment of error against appellant.

Reversible error, however, was committed in giving certain instructions for plaintiff, and in the court's rulings respecting the admission of testimony.

[4, 5] Plaintiff's first instruction authorizes a recovery if the jury find that defendant's driver "failed to sound any warning, and failed to slacken his speed when approaching the plaintiff, or failed to stop the automobile, if he could do so, when he saw that the pony on which plaintiff was riding was not out of the way of the automobile," and that by reason thereof plaintiff was run upon and injured. For the reason mentioned above, the instruction should not have predicated a right of recovery upon the failure to sound the horn or give other signal of warning. But as this part of the instruction is in

the conjunctive, it may be that the error alone would not be fatal, were the instruction otherwise in proper form, though this we do not decide. The instruction is faulty, in that it assumes that defendant or his driver saw that the pony "was not out of the way of the automobile." In view of the evidence this was an assumption wholly unwarranted, and highly prejudicial to defendant. The instruction is otherwise bad, in that it does not in terms require the jury to find any negligence on the part of defendant or the driver of his machine, but assumes that the failure to do certain things constituted negligence.

[8] Plaintiff's second instruction is objectionable for the reason that it authorizes a recovery upon the finding of negligence generally on the part of defendant or his driver. Though the petition counts upon specific acts of negligence, this instruction permits a recovery upon any theory of negligence whatsoever that the jurors might evolve, whether within the issues in the case or not, and whether supported or unsupported by the evidence. Manifestly the giving of this instruction constituted reversible error. See authorities supra.

Other instructions given for plaintiff are likewise subject to criticism, but it is unnecessary to prolong this opinion in order to discuss them. The errors appearing upon this record will doubtless be avoided upon another trial, if one be had. Under the pleadings and evidence now before us, the issues are confined within a very narrow compass. It required but few and simple instructions to present the case to the jury; but 22 instructions in all were given—9 for plaintiff and 13 for defendant. They could have served but to confuse the jury.

[7] One further assignment of error should be noticed. The trial court, upon plaintiff's objection, excluded the testimony of a physician, Dr. Swearingen, whom defendant called as a witness. Dr. Swearingen had treated plaintiff shortly after she received her injury. She was then taken to Keokuk, Iowa, where she was placed under the care of a Dr. Dorsey. Plaintiff took the deposition of Dr. Dorsey, and it was introduced in evidence. By this, and her own testimony respecting her treatment and what took place in the sick chamber, plaintiff waived the right to invoke the privilege upon which the objection in question was predicated. See *Epstein v. Railroad*, 250 Mo. loc. cit. 19, 156 S. W. 699, 48 L. R. A. (N. S.) 394, Ann. Cas. 1915A, 423; *State v. Long*, 257 Mo. 199, 165 S. W. 748; *Michaels v. Harvey*, 179 S. W. 735; *McPherson v. Harvey*, 183 S. W. 653.

The judgment is reversed, and the cause remanded.

REYNOLDS, P. J., and NORTONI, J., concur.

HILDRITH v. WALKER et al. (No. 1763.)*
(Springfield Court of Appeals. Missouri. June 17, 1916.)

1. MORTGAGES ⇨283(1)—TRANSFER OF MORTGAGED PROPERTY—PURCHASER AS PRINCIPAL DEBTOR.

A purchaser of mortgaged land, who assumes the mortgage becomes the principal debtor, and the vendor a surety only, and the mortgagees must so treat them after notice of the arrangement.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 756; Dec. Dig. ⇨283(1).]

2. PRINCIPAL AND SURETY ⇨177—SURETY'S RIGHTS AGAINST PRINCIPAL—BEFORE PAYMENT.

A surety cannot sue the principal debtor for an unpaid portion of the debt until the surety has paid it.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 510, 511; Dec. Dig. ⇨177.]

3. MORTGAGES ⇨292(3)—TRANSFER OF MORTGAGED PROPERTY — RIGHTS OF VENDOR AGAINST PURCHASER.

The vendor of mortgaged land cannot sue his purchaser for failure to pay a mortgage assumed as part of the purchase price until the vendor himself has paid it.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 790; Dec. Dig. ⇨292(3).]

Robertson, P. J., dissenting.

Appeal from Circuit Court, Jasper County; D. E. Blair, Judge.

Action by George B. Hildrith against N. V. Walker and Mary Walker. From a judgment dismissing the complaint, and establishing a lien on plaintiff's property, he appeals. Reversed and remanded, with directions.

Oscar B. Elam, of Aurora, for appellant.
H. H. Bloss, of Aurora, for respondents.

ROBERTSON, P. J. The petition in this case names, besides the respondents here, the Aurora Lumber & Manufacturing Company, Aurora Home Building & Loan Association, and Donzella F. Stewart as defendant. It is alleged that plaintiff purchased of respondents two town lots for \$5,000. In payment of part of the consideration plaintiff surrendered a note he held against respondents for \$1,040. The remainder of the purchase price he alleges was not to be paid until respondents paid certain indebtednesses respondents owed the other defendants, one of which was a lien in favor of said lumber company on the lots, amounting to \$650.48 and the others secured by a deed of trust on the lots. The prayer of the petition is that defendants holding these demands be required to come into court, have their claims adjudicated, and plaintiff be permitted to pay same into court according to his agreement with respondents, and thereby relieve his property of said several incumbrances, and discharge himself of his obligation to respondents; that the costs and expenses of the suit and an attorney's fee for plaintiff

be adjudged a lien against said fund and satisfied therefrom; and for general relief.

The respondents here filed an answer alleging that the real consideration for the conveyance by them to plaintiff of said lots was the payment by him of all the incumbrances thereon and the surrender of their note to plaintiff. It is further alleged that the lien of the lumber company extended to another lot owned by respondents, and that plaintiff by paying only \$400 of that debt obtained a release of the lots conveyed to him by respondents therefrom, and allowed the balance, \$250.48, to remain as a lien against the lot retained by respondents. To this answer the plaintiff filed a reply, admitting the payment to and release of lien by the lumber company as alleged by respondents, and alleging that he was induced to buy the lots conveyed to him by respondents by the fraudulent representations of respondents that they would repurchase them; that after the suit was brought he learned that respondents were insolvent, and he then paid off certain of said incumbrances amounting to over \$2,000, and that it would require \$2,244 more to discharge all of them, and concludes with a prayer for a judgment for damages against respondents on account of the failure of respondents to repurchase.

The case proceeded to trial without any of the defendants, except respondents, being brought in, and at the close of the testimony the court rendered judgment against plaintiff on his claim, and also adjudged that the unpaid balance of the amount due the lumber company be a lien on the lots plaintiff purchased of the respondents. The plaintiff has appealed, and in the briefs filed here in his behalf there are 63 points submitted—33 in the original, and 30 in the reply. It is said in the reply brief that:

"The storm center of controversy in the case at bar is the question whose duty it is in the first instance to discharge the incumbrances against the real estate described in the petition."

The deed to plaintiff from respondents recites that it is made subject to the incumbrances, naming the parties, and giving the separate amounts, and then provides:

"The portion of the consideration of \$5,000 necessary to discharge the said incumbrances on the property shall be withheld until said debts are paid."

It will be noticed that the so-called "storm center" is not involved in the issues made by the pleadings; but, even so, we are unable to understand what difference there would be in the plaintiff paying these indebtednesses than in the respondents paying them and then the plaintiff paying respondents. We have read the record and briefs submitted in behalf of plaintiff, and we can see no reason for disturbing the judgment on plaintiff's claim. Overlooking all violations of the rules of good pleading, it is clear to us that after plaintiff has paid all of the debts secured by deeds of trust on this land, including the amount due the lumber company, he

will have paid no more for the lots than he agreed to pay.

The judgment of the trial court, in my opinion, should be affirmed as it stands, because, as I think, the lien which was established is no more than just in view of the manner in which plaintiff obtained the release of the lot conveyed to them, allowing it to stand as against the other property owed by the defendants, when primarily the whole duty to pay this debt rests upon the plaintiff. Since this suit is pending, and in order to protect the defendant against the necessity of further litigation and annoyance, I think the trial court properly established this lien, which can do no harm to the plaintiff if he discharges the obligation to the lumber company. Since, however, the other members of the court are of the opposite opinion, the judgment will be reversed, and the cause remanded, with directions to the trial court to dismiss plaintiff's petition, and to set aside the judgment establishing the lien.

FARRINGTON and STURGIS, JJ., concur, except as above stated, and file a separate opinion.

STURGIS and FARRINGTON, JJ. We agree that the trial court was correct in dismissing plaintiff's cause and refusing him any relief. The record shows that plaintiff practically abandoned his cause of action, in the nature of a bill requiring the lien creditors to come into court and adjust their claims, and allowing plaintiff to pay the amount due them. Such creditors were not brought into court, and no such relief could be granted. The defendant, however, assumed the initiative in trying the case, and introduced evidence on the issue raised in the answer asking for affirmative relief in having the unpaid balance due the Aurora Lumber & Manufacturing Company declared a lien on plaintiff's land conveyed to him by defendant under an agreement, as the court found, that plaintiff would pay all the liens against it. This agreement included the payment by plaintiff of the whole amount due the Aurora Company, this being one of the lien claims. But the Aurora Company had, for some reason, released their mortgage lien on plaintiff's land by payment of a part only, leaving the balance a lien, as defendant claims, on other lands owned by him. The court, by its judgment, restored this lien in favor of the Aurora Company, though it was not a party to the suit, nor asking for any such relief.

[1] We may grant that, if defendant had paid the Aurora Company the balance of this claim in order to protect his own property, he would be entitled to such relief; but he had not paid it. Under the settled law, when the mortgagor conveys the mortgaged land to a third person, who assumes the mortgage indebtedness as part of the consideration, the purchaser of such land becomes

the principal debtor, and the mortgagor and maker of the note becomes a surety only. This is true, not only as between the vendor and purchaser, but the holder of the secured debt, having notice, must regard and treat the vendee as the principal debtor, and the vendor and original mortgagor as a surety. *Nelson v. Brown*, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755; *Regan v. Williams*, 185 Mo. 620, 84 S. W. 959, 105 Am. St. Rep. 600; *Bank of Senath v. Douglass*, 178 Mo. App. 664, 682, 161 S. W. 601, and cases cited.

[2, 3] The defendant, therefore, occupied the position of a surety only for the unpaid portion of the debt due the Aurora Company, and it is equally well settled that a surety can maintain no action looking to the enforcement of the debt for which he is surety until he has paid the same. *Hearne v. Keath*, 63 Mo. 84; *Huse v. Ames*, 104 Mo. 91, 15 S. W. 965; *McCormick v. Obanion*, 168 Mo. App. 606, 619, 153 S. W. 267. A case very similar to this, and holding as we do, is that of *Clossner v. Chaplin* (Tex. Civ. App.) 168 S. W. 370.

The defendant, who really occupied the position of a plaintiff as to the relief granted, cites *Eubank v. Finnell*, 118 Mo. App. 535, 94 S. W. 591, *Johnson v. Burks*, 103 Mo. App. 221, 77 S. W. 133, and *Majors v. Maxwell*, 120 Mo. App. 281, 96 S. W. 731, as sustaining his right to have this lien declared. But in none of these cases did the party seeking the relief hold the position of surety without having discharged the debt, the lien of which he was seeking to establish.

That part of the judgment, therefore, establishing the lien of the Aurora Company, is erroneous, and should be omitted from the new judgment to be entered.

PITTS v. METZGER et al. (No. 14424.)

(St. Louis Court of Appeals. Missouri. July 10, 1916.)

1. DESCENT AND DISTRIBUTION ¶117—ADVANCEMENTS—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a finding that deceased advanced his daughter \$1,500 to be deducted from her share of his estate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 428; Dec. Dig. ¶117.]

2. APPEAL AND ERROR ¶1009(2)—REVIEW—FINDINGS—CONCLUSIVENESS.

Finding in partition suit as to advances made by deceased to his daughter cannot be reviewed, if supported by substantial evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3971; Dec. Dig. ¶1009(2).]

3. DESCENT AND DISTRIBUTION ¶115—ADVANCEMENTS—BURDEN OF PROOF.

Decedent's payments to his daughter were presumably advancements, chargeable to her upon settling the estate, and she has the burden of proving that they were gifts.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 426; Dec. Dig. ¶115.]

4. DESCENT AND DISTRIBUTION ¶109—ADVANCEMENTS—BRINGING PROPERTY INTO HOTCHPOT.

In partitioning a farm of deceased, who had advanced money to two of his five heirs, the value of the farm and the advancements should be brought into hotchpot, the sum divided into five equal parts, and from two of such parts the amounts advanced should be deducted.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 416, 419, 420; Dec. Dig. ¶109.]

Appeal from Circuit Court, Knox County; N. M. Pettingill, Judge.

Partition suit by Mary A. Pitts against Adrain E. Metzger and others. From a decree charging certain advancements against the interests of plaintiff and defendant Elstertz, plaintiff appeals. Reversed and remanded, with directions.

L. F. Cottey, of Edina, for appellant. D. A. Rouner, J. C. Dorian, and F. H. McCullough, all of Edina, for respondents.

NORTONI, J. This is a suit under our statute for the partition of certain real estate. The court decreed the partition prayed, but charged the interests of plaintiff, Mary A. Pitts, also that of her sister, Jennie M. Elstertz, with certain advancements, and plaintiff prosecutes the appeal from this judgment.

Martin Metzger died intestate, owning 240 acres of land in Knox county, on January 9, 1914. He left surviving him as his sole heirs his daughter, the plaintiff, Mary A. Pitts, also defendants, his daughter Jennie M. Elstertz, and his sons, Adrain R. Metzger and Frederick Metzger, and his grandson, defendant Martin P. Metzger, the sole child of a deceased son. Plaintiff, Mrs. Pitts instituted this suit to partition the 240 acres of real estate, and in their answer defendants pleaded that Martin Metzger, in his lifetime, had made an advancement of \$1,500 to plaintiff, which, it is said, should be deducted from her interest in the real estate; also the remaining defendants set forth in their answer that Martin Metzger, in his lifetime, made an advancement of \$1,300 to his daughter, defendant Jennie M. Elstertz, which should be deducted from her interest in the real estate.

The evidence is abundantly clear touching the advancement made by the decedent to his daughter, defendant Mrs. Elstertz, and there seems to be no controversy in respect of that matter. Indeed, her receipt for the amount of \$1,300 as an advancement is in evidence, and that such an advancement was made appears to be conceded. The court found an advancement of \$1,500 in favor of plaintiff, and also \$1,300 in favor of Mrs. Elstertz.

[1, 2] It is argued the court erred in the finding of an advancement of \$1,500 to plaintiff, Mrs. Pitts; but we are not so persuaded. There appears to be an abundance of evidence tending to prove the fact of this ad-

vancement. It is in evidence that the decedent took a receipt from plaintiff for the amount in 1909; but this receipt is not in evidence. The scrivener who drew it, and also his wife, gave pointed and direct testimony to the effect that both Martin Metzger and his daughter, Mary A. Pitts, called at his house and requested him to draw the receipt for \$1,500, which decedent had paid to plaintiff by way of advancement, it is said, out of his personal estate. But in this conversation plaintiff inquired of her father if this was to come out of the real estate, and he said, "No." There is evidence, too, that at least three, if not four, checks of \$500 each, given by Martin Metzger on the bank to plaintiff, were paid to her. Two of these checks, it is said, passed through the Citizens' Bank at Knox City, Mo., in August, 1909, and one of them in November, 1913. Indeed, this much was practically admitted by plaintiff's counsel at the trial. The bank cashier testified, concerning these facts, substantially that plaintiff used those three \$500 checks to her credit. It is conceded, without quibble or question, that plaintiff received two \$500 checks from her father, and in view of the evidence of Judge Rhodes and his wife concerning the receipt, together with that of the cashier of the bank, there is at least substantial evidence that she received an additional \$500 as well. Indeed, there is some evidence tending to prove that plaintiff received \$2,000 from her father, and an abundance to support the finding of the trial court that Martin Metzger paid plaintiff by check during his lifetime \$1,500, which she used, as the bank cashier says, to her credit. The finding and judgment as to these advancements, at least in this statutory proceeding for partition of real estate, are to be regarded as a finding and judgment in a suit at law. Therefore, if substantial evidence appears, as it does, in support of them, the matter is not open for further review here. See *Dobbins v. Humphreys*, 171 Mo. 198, 202, 70 S. W. 815.

[3] Moreover, it appearing, as it does, that plaintiff received these several amounts from her father during his lifetime, the burden was on her to show by substantial evidence that they were intended as gifts, and not as advancements, to be taken into account thereafter. The presumption in such circumstances obtains to the effect that such substantial payments by a parent to his child are advancements, chargeable to the child in the distribution of the donor's estate, and the burden of showing the contrary rests accordingly on the party denying the advancement. See 14 Cyc. 167; *Ray v. Loper*, 65 Mo. 470; *Stephens v. Smith*, 127 Mo. App. 18, 106 S. W. 533. When the facts in the record are considered in connection with this presumption, no one can doubt that the finding and judgment to the effect that plaintiff received

advancements amounting to \$1,500 from her father is amply supported.

[4] But, though such be true, the judgment must be reversed, for that the court erred in defining the rights of the respective parties in the decree. Touching this the decree proceeds as follows:

"The court doth further find: That during the lifetime of said Martin Metzger, deceased, he advanced his daughter, plaintiff, Mary A. Pitts, the sum of \$1,500 as an advancement against her interest in his estate. That during the lifetime of said Martin Metzger, deceased, he advanced to the defendant Jennie M. Eistertz the sum of \$1,300 as an advancement against her interest in his estate. That the plaintiff and defendants are entitled to partition and division of the above-described real estate among them as follows: To plaintiff, Mary A. Pitts, one-fifth of all said real estate, after first deducting said advancement of \$1,500 from her share. To defendant Jennie M. Eistertz, one-fifth of all of said real estate, after first deducting said advancement of \$1,300 from her share. To Frederick Metzger, one-third of all said real estate remaining, after deducting said interest of plaintiff, Mary A. Pitts, and after deducting said interest of said defendant Jennie M. Eistertz therein. To defendant Martin P. Metzger one-third of all said real estate remaining after first deducting said interest of plaintiff, Mary A. Pitts, and after deducting said interest of the defendant Jennie M. Eistertz, therein. To defendant Adrain R. Metzger, one-third of all said real estate remaining after first deducting said interest of plaintiff, Mary A. Pitts, and after deducting said interest of defendant Jennie M. Eistertz therein. That is to say, the interest of the plaintiff Mary A. Pitts in all said real estate shall be worth \$1,500 less than the respective interests of defendants Frederick Metzger, Martin P. Metzger, and Adrain R. Metzger. And the interest of defendant Jennie M. Eistertz, therein, shall be worth \$1,300 less than each interest of defendants Frederick Metzger, Martin P. Metzger, and Adrain R. Metzger."

Both plaintiff and defendants assume in their briefs that the land is of the value and on sale will yield \$15,000, and treat with the subject-matter on that basis. We shall proceed in the same view in our comment on the decree and the rights of the parties thereunder. According to the decree, if the 240 acres of land to be sold is of the value of \$15,000, each one of the five heirs should be entitled to \$3,000 in money, as their portion, of the fund. By the decree, there is deducted from plaintiff's \$3,000 the \$1,500 advancement, and she would receive but \$1,500; also by the decree there is \$1,300 deducted from the share of Mrs. Eistertz, and she would receive but \$1,700; when both of these ladies are entitled to a larger sum, for that the advancements should be brought into hotchpot with the lands and the division accordingly made, after deducting from the shares of each of those receiving advancements the amount of such advancements. The statute (section 337, R. S. 1909) provides that, when any of the children of an intestate who shall have received in his lifetime advancements shall come into partition with the other parceners, such advancements shall

be brought into hotchpot with the estate descending. Hotchpot, it is said, is the blending and mixing of property belonging to different persons in order to divide it equally. Bouvier's Law Dictionary. The decree ignores this entirely, as it does the rule in respect of advancements. Assuming the land to be of the value of \$15,000, the two advancements should be brought into hotchpot with this—that is to say, the advancement to plaintiff of \$1,500 and the advancement to Mrs. Elstertz of \$1,300—so that the estate in judgment would amount to \$17,800. Of this estate in hotchpot, consisting of \$17,800, each one of the five parties is entitled in the first instance to one-fifth portion—that is to say, \$3,560; but plaintiff, having received \$1,500 theretofore as an advancement out of the estate, is to be charged therewith, and such amount deducted from her portion of \$3,560. This entails as a result a right on her part to participate to the extent of \$2,060 in the common fund in hotchpot. Defendant Mrs. Jennie M. Elstertz is entitled likewise in the first instance to have a portion amounting to \$3,560 in the common fund. But this portion is to be charged with an advancement of \$1,300 paid to her by her father out of his estate, so as to entail the result that she shall participate only to the amount of \$2,260 in the hotchpot. Each of the other three heirs is entitled to have of the estate in hotchpot the full one-fifth portion thereof—that is to say, \$3,560, respectively—for they have heretofore received naught.

But the land has not been sold, and we are unadvised as to what the amount realized from it will be. It should be said, however, that from this fund there is first to be deducted the costs of the partition and expense of sale. To the net amount of the proceeds of the real estate should be added the sum, as above indicated, of the advancements to plaintiff and Mrs. Elstertz (that is, \$2,800), and the amount of this fund should be divided into five equal parts and each of the defendants, that is, the two sons, Adrain R. Metzger and Frederick Metzger, and the grandson, Martin P. Metzger, should receive one of such parts; that is, a full one-fifth of the entire fund after deducting the costs and expense of sale. Plaintiff should receive one of such parts, less the advancement of \$1,500 to her, and defendant Mrs. Elstertz should receive one of such parts less the advancement of \$1,300 to her.

The error in the decree is an obvious one and of course prejudicial. The judgment should be reversed, and the cause remanded, with directions to the trial court to bring the advancements and the fund from the sale of the land into hotchpot and enter a decree as above indicated. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

McGUIRE v. WILSON, Mayor, et al.
(No. 14395.)

(St. Louis Court of Appeals. Missouri. July 5, 1916. Rehearing Denied July 18, 1916.)

1. PLEADING ~~§~~237(8) — AMENDMENT — NEW CAUSE OF ACTION.

Under Rev. St. 1909, § 1848, providing for amendment of pleadings, where the amendment does not substantially change the claim or defense by conforming the pleading to the facts proved in a suit to enjoin proposed change of grade, where the bill originally proceeded on the theory that the improvement was proposed according to a false line, and that the action taken was wrongful and without authority at law, an amendment, to conform to proof, specifying in what respects the ordinances under which the improvement was undertaken were void, was proper.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603, 608; Dec. Dig. ~~§~~237(8).]

2. MUNICIPAL CORPORATIONS ~~§~~111(1)—ORDINANCES—CHANGE OF GRADE—VALIDITY.

An ordinance, purporting to establish a new street grade, not showing whether the elevations given were above or below the directrix, was without meaning and void, although there were profile maps on file in the city clerk's office showing more particular data in reference to the grade.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 245; Dec. Dig. ~~§~~111(1).]

Appeal from Cape Girardeau Court of Common Pleas; R. G. Ranney, Judge.

"Not to be officially published."

Suit by F. A. McGuire against R. K. Wilson, Mayor, and others. From a decree for complainant, respondents appeal. Affirmed.

Wilson Cramer and Albert M. Spradling, both of Jackson, for appellants. Edw. D. Hays, of Cape Girardeau, for respondent.

NORTONI, J. This is a suit in equity for injunctive relief. The finding and decree were for plaintiff, and defendants prosecute the appeal.

Defendants are the mayor, the several members of the board of aldermen, and the street commissioner of the city of Jackson. Jackson is a fourth class city organized and existing under the general statutes. The controversy arises over the proposed change of grade and certain improvements to be made in a portion of First South street of the city. Plaintiff owns a lot abutting on First South street of the city and owns, too, five shade trees along the curb of the street. The city passed an ordinance No. 363 with a view of changing the grade of the street and another Ordinance No. 371 providing for the assessment of benefits against the adjacent property and the letting of a contract to carry into effect Ordinance No. 363. On the commencement of the work under these ordinances, plaintiff instituted this suit in equity to restrain the city authorities from destroying his shade trees along the curb and otherwise injuring his property.

The bill proceeds, generally speaking, in the view that the city authorities had rec

ognized a false line and were about to make the improvements accordingly, to plaintiff's disadvantage, but the bill, as originally filed, charged, too, that defendants were proceeding wrongfully and without authority of law in the premises. The case came on for trial, and after all of the evidence was introduced and the cause taken under advisement by the court, the submission was set aside and plaintiff was permitted by the court to amend his bill by inserting therein averments to the effect that Ordinance No. 363 is void because it is unreasonable and meaningless and provides for impossible elevations at its intersection with cross streets; also that ordinance No. 371 is void because it does not define a grade as described by any valid ordinance and, furthermore, because it provides for a method of assessing benefits and damages repugnant to the laws of the state. Defendants objected and excepted to the amendment thus permitted, but filed no motion thereafter to strike it out, nor did they ask leave to plead further or introduce other or additional evidence touching the matter. The court, after having considered the case for a considerable time, awarded the injunction in the view that the ordinances are void as specified in the bill.

[1] It is argued that the court erred in permitting the amendment of the bill for the reason, it is said, it constituted a departure, in that it added a new cause of action; but we are not so persuaded. The rule touching the matter of allowing amendments in the interests of justice is much relaxed from that which obtained in early days, and this, we believe, is in keeping with the spirit of the Code. The statute (section 1848, R. S. 1909) provides:

"The court may at any time before a final judgment, in furtherance of justice, * * * amend any * * * pleading * * * by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

Here the evidence was all in; the ordinances were before the court, and the matter of their validity open to view. Indeed, though the bill originally proceeded in the main on the theory that the city authorities were commencing the improvements according to a false line so as to entail undue damage upon plaintiff, it charged as well, in its twentieth paragraph, in general terms, that the action so being taken was also wrongful and without authority at law. By the amendment, plaintiff was permitted merely to insert immediately after this paragraph 21 of the bill, which specifies more particularly why such action was wrongful and without authority of law, in that it avers the two ordinances are void, and sets forth in what respect they are deficient. Amendments are allowed in circumstances such as those involved here when they do not change substantially the claim or defense, and the better authorities go to the effect that they

will be permitted as long as the general identity of the original grievance affording the ground of complaint is maintained and adhered to. In other words, as long as the gist of the action remains the same in the proposed amendment, although the alleged incidents are different, it is regarded as the same cause of action and not the substitution of another. But the proposed amendment, it is said, must not only relate to the same transaction or grievance complained of, but should adhere as well to the original injury declared upon, sufficient at least to maintain, in a general way, the identity of the cause of action first stated, so that the character of the proof will remain about the same. See *Ingwersen v. Chicago & A. R. Co.*, 150 Mo. App. 374, 130 S. W. 411. Touching this, the Supreme Court says, quoting from the Vermont court:

"As long as the plaintiff adheres to the contract or injury originally declared upon, an alternation of the modes in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action."

Then the court continues:

"If the amendment is merely the same matter more fully or differently laid to meet the possible scope of the testimony it is not a change of the cause of action."

See *Rippe v. Kansas City, Ft. S. & M. Ry. Co.*, 154 Mo. 358, 364, 365, 55 S. W. 438. Here the amendment was introduced after the evidence was all in, including the ordinance, and it went only to specify more particularly why defendants were proceeding "wrongfully and without authority of law." It did not change the cause of action, for the cause of action as contemplated in the Code is said to signify plaintiff's primary right and the defendant's wrongful violation of that right. See *Litton v. Chicago, B. & Q. R. Co.*, 111 Mo. App. 140, 149, 85 S. W. 978; *Meller v. Missouri Pac. Ry. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36. The cause of action involved here and as revealed in the original bill before the amendment was plaintiff's right to resist a wrongful and unlawful invasion of his property on the part of the city authorities and claim redress on that score, and the amendment in no way changed this or departed from it, but rather merely more particularly specified, not the grievance, but rather grounds of his complaint. See, also, *Jackson v. Van Horn*, 91 Mo. App. 647; *State ex rel. First Nat. Bk. v. Bourne*, 151 Mo. App. 104, 117, 131 S. W. 896.

[2] The city Ordinance No. 363 which purports to establish the grade of First South street declared void is as follows:

"Ordinance No. 363.

"An ordinance establishing a grade on First South street, from the west line of the right of way of the St. Louis, Iron Mountain Railway to the Third West street.

"Be it ordained by the board of aldermen of the city of Jackson, Missouri, as follows:

"Section 1. That the grade on First South street at the intersection of the center line shall be above or below directrix, as follows: At the intersection of High street 98.7 feet; at the

intersection of First East street 86.5 feet; at the intersection of Second East street 77 feet; at the intersection of Third East street 60 feet; and at the intersection with the west line of the right of way of the St. Louis, Iron Mountain & Southern Railway 40 feet. At the intersection of First West street 71 feet; at the intersection of Second West street 65 feet; and at the intersection of Third West street 54 feet.

"Sec. 2. This ordinance shall take effect and be in force from and after its passage.

"Passed and approved this the 23d day of May, 1913."

This ordinance is certainly insufficient and of no avail as an expression of legislative authority on the subject-matter involved, for that it is not only ambiguous, but without meaning whatever. Section 1 says that the grade on First South street at the intersection of the center line shall be above or below the directrix as follows. It then proceeds to specify the feet and inches at different points, but nowhere does the ordinance say whether the grade shall be so many feet above the directrix or so many feet below it. The ordinance reads at the intersection of High street 98.7 feet (but it does not say as to whether the grade is to be 98.7 feet above the directrix or below it); at the intersection of First East street 86.5 feet (but it does not say as to whether the grade is to be 86.5 feet above the directrix or below it). The same is true as to this and all other provisions in the ordinance in respect of the grade, for none of them recite as to whether it is to be so many feet above or so many feet below the directrix at the given point. Obviously this ordinance is without meaning, and amounts to naught in defining a basis for the improvement sought to be made and charged against plaintiff's property.

Ordinance No. 371, also declared void by the court, is insufficient in that by section 1 it calls into it the provisions of Ordinance No. 363 above copied as defining the established grade to which the change was to be made. Moreover, this ordinance is to be read in connection with Ordinance 363, for it relates to the same subject-matter. And section 2 provides that the reconstructing and grading of the street is to be compensated for in special assessments against the owners of the property fronting thereon. Plaintiff's lot fronted on the street, and it is therefore intended to entail the expense of an improvement of which he was in no wise advised by the ordinance. Obviously a property owner is entitled to know the grade sought to be established in the street abutting his property if his property is to be charged with the expense of construction as through special assessments. The mere fact that there were profile maps on file in the office of the city clerk, showing more particular data in reference to the grade, avails nothing, where the ordinance is without meaning whatever as here in fixing and defining such grade.

By section 3 of Ordinance 371 the mayor is authorized to appoint five disinterested free-

holders of the city of Jackson to assess the benefits or damages in favor of or against adjacent property along First South street. This section of the ordinance is in keeping with section 9415, R. S. 1909. But the statute referred to was expressly repealed before the passage of this ordinance. The ordinance was passed and approved July 14, 1913, and the statute authorizing the mayor to appoint a board of five freeholders as therein provided was expressly repealed, as will appear by section 13 of an act of the Legislature, approved April 3, 1911. See Laws of Missouri, 1911, pp. 342-346. The former statute on the subject was superseded by the more recent act of the Legislature referred to, wherein the power of appointment of such commissioners to assess damages and apportion benefits is lodged in the circuit court of the county rather than in the mayor, as theretofore under the prior statute. See Laws of Missouri 1911, pages, 342, 343, 344.

The ordinances are clearly void, in that they are indefinite, meaningless, and, in part, contrary to existing law; that is, superseded by more recent statutes. The court very properly so declared, and awarded the injunction accordingly. The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

PICKARD v. WILLIAM J. BURNS DETECTIVE AGENCY.

(Kansas City Court of Appeals, Missouri.
June 12, 1916. Rehearing Denied
July 3, 1916.)

1. CONTRACTS \S 337(2)—ACTIONS—PETITION—BREACH.

The petition averred that plaintiff was engaged to assist in discovering and bringing to justice certain corrupt persons or combination of persons in the city of Omaha; that the defendant detective agency advised him of the exceptional hazard of the work, that probably fake charges would be made against him, and that in consideration of the extraordinary risk defendant would protect him with money and counsel; that plaintiff might, if falsely charged with crime, employ such counsel as he deemed necessary, for which defendant would pay; that bail would be furnished; that his salary would be paid while incarcerated, or while disabled from assaults; and that plaintiff was arrested on a fictitious charge, whereupon defendant furnished counsel, who was unsatisfactory, but refused to pay the fees for other counsel engaged by plaintiff. Held, that the petition charged a breach of defendant's contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1683, 1684, 1687-1689; Dec. Dig. \S 337(2).]

2. APPEAL AND ERROR \S 1050(3)—REVIEW—HARMLESS ERROR.

An erroneous admission of incompetent evidence as to a matter concerning which there was no dispute is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4155; Dec. Dig. \S 1050(3).]

3. PLEADING ~~246~~(2)—AMENDMENT—ALLOWANCE.

In an action against defendant for its breach of an agreement to furnish counsel and funds to protect plaintiff in case, as the result of his detective work, fictitious charges should be made against him, plaintiff, at the close of the evidence, was allowed to strike from his petition setting forth the breaches of the contract the words "while he should be conducting such work," which referred to the contract of protection. Defendant's counsel made no showing that they relied on the particular averment as limiting the contract to the time while plaintiff was actually engaged in his detective work, and not extending to a charge made very shortly after his work ceased, though they did object to the introduction of any evidence on the ground that the petition failed to state a cause of action, but did not specify any grounds. *Held*, that the amendment was properly allowed, this being particularly true, as the contract would probably not be construed as extending only to the time plaintiff was actually at work.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 678½, 679; Dec. Dig. ~~246~~(2).]

4. CONTRACTS ~~349~~(1)—BREACH—EVIDENCE.

In such case it was proper to permit plaintiff to testify as to the particulars concerning his arrest and incarceration; it bearing on the question of whether he was justified in employing counsel other than the one furnished by defendant.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1781; Dec. Dig. ~~349~~(1).]

5. CONTRACTS ~~147~~(1)—CONSTRUCTION—INTENT.

In construing a contract, the intent of the parties, rather than its letter, governs.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 730; Dec. Dig. ~~147~~(1).]

6. APPEAL AND ERROR ~~882~~(12) — INVITED ERROR—INCONSISTENT INSTRUCTIONS.

Where plaintiff's instruction correctly declared the law, and defendant's instruction was more favorable than it was entitled to, defendant cannot complain of an inconsistency between the instructions; it having invited the error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. ~~882~~(12).]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

"Not to be officially published."

Action by Frank M. Pickard against the William J. Burns Detective Agency. From a judgment for plaintiff, defendant appeals. Affirmed.

Griffin & Orr, of Kansas City, for appellant. T. J. Madden and E. A. Scholer, both of Kansas City, for respondent.

ELLISON, P. J. Defendant is a corporation engaged in operating a detective agency throughout the United States. It has branch headquarters established in various cities, and one of these is located at Kansas City. Plaintiff was one of its employes, operating from Kansas City in general detective work. The following is the substance of a petition filed by plaintiff:

Defendant was engaged to assist in discovering and bringing to justice certain corrupt persons or combination of persons in the city

of Omaha, Neb., some of whom were charged to be county and city officers. Defendant's manager at Kansas City, with the approval of its chief officer, concluded to assign plaintiff to that work, but before consummating arrangements to that end they advised him, and he knew, of the extraordinary personal hazard in which he would likely be placed if these conspirators against the law and public interests should become aware of his being in pursuit of them, as well as of the probability of such persons instituting, or instigating, criminal prosecutions against him on fake charges, to be sustained by perjured testimony. They advised him, and he knew, of the danger of such action, and that it might result in his incarceration in prison, or at least in a necessity being put upon him of defending himself, at great annoyance and expense. In consideration of the extraordinary nature and risk of this particular work, they agreed with plaintiff that, if he would undertake it, the defendant would protect him with money and means; that, if necessary, these were to be placed at his disposal, and that he might himself employ such counsel as he deemed necessary for his protection in the event he was charged with any offense, or arrested or prosecuted therefor. It was further agreed that, if necessary, defendant would see that he was furnished bail; that he would be compensated, if harmed by assault; that his family would be cared for; that his wages should continue while under such charges, etc. In consideration of this undertaking by defendant, plaintiff accepted the work and entered upon its performance by going to Omaha and engaging in the service for near four months, when he was ordered by defendant's manager at Kansas City to suspend operations.

About a month afterwards he was falsely charged at Omaha with an attempt to bribe an officer while engaged in such service, and a warrant sent from there to Kansas City, where, on requisition from the Governor, he was arrested and taken to the former city and placed in jail. Defendant, in recognition of its obligation, secured bail for him and engaged its attorney in Omaha to defend and protect him. Plaintiff became dissatisfied with such attorney on account of his having connection with other clients whose interests were such as to jeopardize plaintiff's safety. Defendant insisted that he should be accepted, and it would furnish no other, nor would it be responsible for any other. In consequence, plaintiff was compelled to employ lawyers of his own choosing to protect himself from false charges and save himself from further imprisonment; that these lawyers soon secured his release and discharge; that by reason of these things he was put to large outlay in lawyers' fees and other necessary expenses, aggregating \$2,984, which, after de-

ducting \$100 advanced by defendant, left \$2,884 due.

After a demurrer, on the ground that no cause of action was stated, was overruled, defendant filed an answer, consisting of a general denial. On trial the judgment was for plaintiff in the sum of \$2,500.

It is not necessary that we set forth in detail the ramifications of the factional strife, with the charges and countercharges of thievery, bribery, and corruption generally, said to have existed in Omaha. It is only necessary to know whether there was evidence heard in this cause which tends to prove the allegations made in plaintiff's petition. The evidence in plaintiff's behalf establishes the contract and plaintiff's service under it. It further shows plaintiff to have had the undoubted right, in the circumstances shown, to select his own counsel, and it shows the charges made were reasonable, when their important and valuable service is considered.

The objections made by defendant to the action of the trial court are largely technical, and are without substantial merit. In the first place, it is said that the contract was one for labor. The contract in part was for labor of a certain kind, but it was also for protection in the respect we have set out.

[1] It is next objected that a cause of action was not stated, in that the allegation was that "if in the event he were charged with any offense, or arrested or prosecuted therefor, *while he should be conducting said work*" (defendant's italics), and the evidence was that the prosecution was not begun until about a month after he left Omaha. Those words were stricken out of the petition by amendment at the close of the evidence, so as to conform to the evidence. Though plaintiff was not arrested until after he was ordered by defendant to quit Omaha, the arrest was based on a charge of bribery *while he was at Omaha*.

Then it is objected that no breach of the contract is alleged. The word "breach" is not used, but a breach is clearly stated.

[2] It seems that the trial court admitted a deposition of one Britt, who incorporated, or read therein, the proceedings had before him as a justice of the peace, who heard the complaint against plaintiff on which he was arrested, and who discharged him. This was said not to be an authentication of Britt's court record, as is required by law, and objection was made thereto. The objection need not be noticed, further than to say the matter thus proven was not a subject of dispute. The face of the record shows that that was a matter conceded by the defendant.

[3] We think there is no ground for complaint that the court permitted the amendment, at the close of the evidence, to which we have referred, wherein he allowed plaintiff to strike, from that part of the petition alleging that plaintiff could himself employ such counsel as he deemed necessary and

adequate for his defense or protection in the event he were charged with any offense, or arrested or prosecuted therefor *"while he should be conducting such work,"* the words in italics. The point defendant seems to make is that, since plaintiff was not arrested until *after* he quit work (though it was on a charge alleged to have been committed at a time before he quit), the amendment vitally affected its rights. In the first place, it is allowing a great deal to suppose that, with those words left in, a court would have ruled that the mere fact that an arrest say an hour, or a day, after he quit work would not fall within the evident intent and spirit of the contract. But, putting aside that suggestion, we can see no possible harm to defendant in allowing the words to be stricken out.

It is stated in the affidavit of one of defendant's counsel that they were taken by surprise; that they had tried the case in reliance upon their being able to defeat it on account of that allegation. If they had such idea, they carefully concealed the point, and for that reason alone should now be denied a right to raise it. But it is also said in the affidavit that they made the point at the opening of the evidence by objecting to any evidence being received. It is true such an objection was made at that time, but no specification of the nature now urged was mentioned. The objection, among others, was that the petition "shows upon its face that the plaintiff has no right to recover," and that, without a specification, is no objection at all.

What we have said covers in part the complaint that the court erred in refusing defendant's demurrer to the evidence. But it is said that the evidence shows that the agreement was that plaintiff was only to have authority to employ counsel himself, in an emergency when he could not communicate with defendant's chief officers. This statement is made out by selecting separate parts of plaintiff's testimony, for he did expressly testify that it was agreed he "could hire the best lawyers in the country, and he could have such funds as he required for his personal disposal and defense"; that defendant's manager at Kansas City "told him he could hire counsel at any time he desired"; and that Burns himself told him that he "might hire the best attorneys in the United States in case he got into trouble," and that was agreed to with "no qualification whatever."

[4] Complaint is made that the court erred in permitting plaintiff to testify as to the circumstances of his arrest and incarceration. This was manifestly proper evidence for many reasons. It was necessary that the jury should know the character of difficulty, the extent of the prosecution, and the necessities he was placed under by reason of his arrest. It had direct bearing on the question whether the situation in which he found

himself authorized him to employ attorneys, and what sort of case such attorneys would meet.

[5, 6] Nor do we find that there is any substance to the criticism of plaintiff's first instruction. It is of some length, it is true; but that was rendered necessary largely by the character of case and the defense thereto. It is said to be inconsistent with instruction No. 3, for defendant. Judging from italics used in copying the latter, we suppose the inconsistency relates to limiting defendant's indemnity to prosecutions "while he should be conducting said work." If those words are to be construed as meaning that a prosecution begun after the work, but based on an offense charged to have been committed during the work, we would hesitate to say, as already intimated, that such limitation was within the spirit and meaning of the contract. In the case of Union Depot Co. v. Railway, 118 Mo. 218, on page 225, 20 S. W. 792, on page 796, where a written contract was being construed, the court said:

"We do not question or controvert the proposition that the real intention of the parties to a contract should control the letter, and the strict letter may be abridged or enlarged so as to give effect to the intention of the parties as gathered from the whole instrument, and the contract may be read in the light of the circumstances under which it was executed. So, too, the law often implies duties and obligations from those which are express, and the implied duties and obligations are as much a part of the contract as those which are expressed."

See, also, Bishop on Contracts (Enlarged Ed.) § 241, and State ex rel. v. Gaslight Co., 102 Mo. loc. cit. 485, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789.

But we do not need to dwell upon that, for those words were stricken from the petition, so that, in any way the matter is viewed, it was an error in defendant's favor. The inconsistency was brought about by defendant's invitation, and not from anything wrong in plaintiff's instruction. Defendant has gone through the instruction, picking out parts here and there, and urging objections. We have examined these, and find them not substantial. The instruction, as a whole, properly presented the issues.

Objection is made to an instruction given by the court of its own motion. It is a very liberal instruction in behalf of defendant. It submits every hypothesis of defense, even to submitting whether it was shown by the evidence that it was agreed that plaintiff's prosecution must have been commenced while he was yet engaged in the work he went to Omaha to perform. Running through the entire case there appears defendant's theory, or suggestion, that defendant's offer to protect plaintiff was not intended as a binding agreement to do so, but only a gratuity extended to an employé. This hypothesis was duly submitted to the jury, and they were told that, if such was

the fact, defendant had a right to withdraw from plaintiff's defense, and the latter had no right to employ counsel at defendant's expense.

We find it impossible, within the bounds of reason, to specifically answer the various suggestions of defendant running through a brief of 56 pages. We have examined them, and have concluded that nothing has been advanced which would justify us in overturning the verdict, and hence we affirm the judgment. All concur.

ROARING FORK POTATO GROWERS v. C. C. CLEMONS PRODUCE CO.

(No. 12021.)

(Kansas City Court of Appeals. Missouri. May 22, 1916. Rehearing Denied July 3, 1916.)

1. SALES \S 201(4)—DELIVERY THROUGH CARRIER—WHAT CONSTITUTES.

Where plaintiff consigned cars to its order at Kansas City, with directions to notify defendant and allow inspection, and sent the bill of lading with draft attached to a Kansas City bank, held, there was no delivery at Carbondale, Colo., where some of the cars were loaded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 535, 536; Dec. Dig. \S 201(4).]

2. SALES \S 202(5) — TRANSFER OF TITLE — PAYMENT OF PRICE.

Where freight was consigned to the consignor's order, notify another and allow inspection, and the bill of lading sent to a bank for delivery to the party to be notified upon his paying an attached draft, held, that title did not pass until the purchase price was paid or tendered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 546; Dec. Dig. \S 202(5).]

3. SALES \S 202(6) — TRANSFER OF TITLE — PAYMENT OF DRAFT.

Where a bill of lading is used to even secure the purchase price the title does not pass until payment has been made or tendered.

[Ed. Note.—For other cases see Sales, Cent. Dig. § 547; Dec. Dig. \S 202(6).]

4. SALES \S 355(3)—ACTION FOR PRICE—VARIANCE.

Where a petition alleges that plaintiff, pursuant to a contract, delivered goods to defendant at a particular place, the proof must show delivery at that place.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1036; Dec. Dig. \S 355(3).]

5. SALES \S 355(1) — ACTION FOR PRICE — ISSUES—WAIVER—PLEADING.

Where plaintiff did not prove a delivery at the locality alleged, he cannot assert that plaintiff waived the place of delivery by absolutely refusing the goods, when such waiver has not been pleaded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1025, 1027-1035; Dec. Dig. \S 355(1).]

6. CONTRACTS \S 333(8)—ACTIONS—PLEADING—RATIFICATION OF CONTRACT BY WAIVER.

Where contracts are modified by waiver, the waiver must be alleged except in the case of insurance policies.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1650, 1654; Dec. Dig. \S 333(8).]

7. APPEAL AND ERROR \S 1009(7)—RULES OF DECISION—PREVIOUS DECISION.

Where the evidence in the second trial, for failure to accept produce shipments, shows a state of facts different from that on which the

case was first decided, the doctrine of res adjudicata is inapplicable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4376; Dec. Dig. ¶ 1099(7).]

8. APPEAL AND ERROR ¶ 665—ABSTRACT OF RECORD—PARTIES AND FUNCTIONS.

A statement in defendant's abstract, that a general denial was filed to an amended petition during the trial, will be accepted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2860; Dec. Dig. ¶ 665.]

9. PLEADING ¶ 434—AIDED BY JUDGMENT—WANT OF ANSWER.

After trial, the case will be treated as though an answer were on file, irrespective of the true situation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1478-1480; Dec. Dig. ¶ 434.]

Appeal from Circuit Court, Jackson County; Joseph A. Guthrie, Judge.

Action by the Roaring Fork Potato Growers against the C. C. Clemons Produce Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

E. M. Colvin and Smart & Strother, all of Kansas City, for appellant. Sebree, Conrad & Wendorf, of Kansas City, and Charles W. Taylor, of Glenwood Springs, Colo., for respondent.

ELLISON, P. J. Plaintiff is a resident of Colorado and defendant of Kansas City, Mo. Plaintiff brought this action for the price of six carloads of potatoes. It had judgment in the trial court. The case was before this court on a former occasion and will be found reported in 185 Mo. App. 1, 171 S. W. 584, where it will be seen that a new trial was ordered.

The second trial was had on an amended petition and on oral evidence. The first trial was on the original petition and an agreed statement of facts specifically restricted to that trial. The evidence at the second trial presented some vitally distinctive features not appearing in the agreed statement. It is pleaded in the amended petition that defendant bought of plaintiff 25 carloads of potatoes, agreeing "to pay \$1.05 per hundredweight for the same when delivered on board the cars, at Carbondale, Colo. That defendant received and paid for 19 of said cars of potatoes but refused and failed to receive and pay for the remaining six cars. Plaintiff alleges that it delivered said six cars of potatoes on board the cars at Carbondale, Colo., to defendant on the dates and in the amounts following, to wit (here follows six dates of six separate cars). Plaintiff alleges, by reason of the premises aforesaid, defendant is indebted to it in the sum of \$1,044.26, together with interest," etc.

[1] It was shown in evidence that plaintiff did not have the potatoes on hand when it contracted them to defendant, and that it expected to fill its contract by purchases to be thereafter made. The evidence showed that it purchased the 19 cars paid for by

defendant, when the latter ordered that no more be shipped. But before plaintiff received the order it had bought the remaining six cars now in dispute. That, if other conditions had been right, would have changed the executory character of the contract of sale into an executed contract. See opinion on former appeal. But, as already stated, the contract pleaded, and the performance pleaded, was, specifically, that the potatoes were to be delivered and were, in fact, delivered to defendant on board the cars at Carbondale, Colo. The evidence which plaintiff insists shows such delivery was to this effect: Plaintiff, after loading a car, would ship it to defendant by railroad, taking a bill of lading to its own order and attaching a draft drawn on defendant for the price of the carload. These bills of lading and attached drafts would be sent through banks to a bank at Kansas City and, when defendant paid the draft, it would receive the bill of lading from the bank and then get possession of the potatoes from the railroad. Defendant never paid for, nor received the six cars, and it does not appear what became of them. The bills of lading were indorsed. "Notify C. C. Clemons Produce Co. * * * Allow inspection."

This was a total failure of proof. Plaintiff's theory is that the potatoes were set apart and appropriated to defendant, and the title passed to it when the potatoes were loaded at Carbondale, notwithstanding that it, for security, retained possession by taking the bill of lading in its own name and drawing draft on defendant for the price, the potatoes to be delivered on payment of the draft. But it was alleged in the petition that the contract was that the delivery was to be at Carbondale and that, in compliance with the contract, the delivery was at that place; while the evidence showed that none of the potatoes were delivered at Carbondale. In fact, three of the six cars were never at that place. Three cars were loaded there, but shipped by plaintiff to Kansas City, Mo., as just stated, under a bill of lading to its own order, with drafts attached and allowing inspection by defendant before paying the drafts.

[2] But, besides this, plaintiff's theory is erroneous, for, in such circumstances, the title to the property does not pass to the vendee. *Sharff v. Meyer*, 133 Mo. 428, 445, 34 S. W. 858, 54 Am. St. Rep. 672; *Milling Co. v. Stanley*, 132 Mo. App. 308, 111 S. W. 869; *Gifford v. Willman*, 187 Mo. App. 29, 33, 37, 173 S. W. 53; *Cold Storage Co. v. Commission Co.*, 178 Mo. App. 225, 165 S. W. 1102; *People's Bank v. Railroad*, 158 Mo. App. 519, 138 S. W. 915; *Dickson v. Merchants' Elevator Co.*, 44 Mo. App. 498, 503. Such is the law elsewhere. *Kentucky Refining Co. v. Globe Co.*, 104 Ky. 559, 47 S. W. 602, 42 L. R. A. 353, 84 Am. St. Rep. 468; *Thick v. Railroad*, 137 Mich. 708, 101 N. W. 64, 109

Am. St. Rep. 694; Dows v. Nat. Exchange Bank, 91 U. S. 618, 23 L. Ed. 214.

[3] Even where the bill of lading is dealt with only to secure the contract price, the title to the property does not pass to the vendee until payment or tender by him of the contract price. *Mirabita v. Imperial Ottoman Bank*, 3 Ex. Div. 164, 173 (opinion of Cotton, L. J., concurred in by the entire Court of Appeal); *Benjamin on Sales*, "eighthly" division, page 373, and *American note* on same page. So, under no view of the evidence, was there a completed sale, and plaintiff's action should have been along other lines. It is brought on a state of alleged facts which did not exist.

The authorities relied upon by plaintiff are not opposed to those cited by us. They are to the effect that, in an ordinary sale of personality for cash, title to the property may pass to the vendee and yet the vendor retain possession until the purchase price is paid. That is, payment of price and delivery are contemporaneous acts, and one cannot be required without the other. But that is not the case pleaded, nor is it the case proven. When the vendor delivers goods to a carrier consigned to the vendee, it is a delivery to the vendee and title passes. But if he delivers to the carrier, taking a bill of lading to himself as consignee, he retains the title until the purchase price is paid or tendered. *Sharff v. Meyer*; *Milling Co. v. Stanley*, and other cases *supra*.

[4] Recurring again to the petition, it alleges a contract to deliver at Cardondale, Colo., and that the delivery was made there. The evidence shows that, under the contract, there was not to be a delivery of possession at that place, but at Kansas City, Mo., and it shows, in point of fact, that there was no delivery there, or anywhere else. It shows that defendant refused to pay the drafts and delivery was therefore not made. In short, the petition is at entire cross purposes with the evidence. In *Cole of Armour*, 154 Mo. 333, 350, 351, 55 S. W. 476, 481, Judge Marshall said:

"The plaintiff sued on a special contract, and therefore he must recover upon that or not at all in this action. * * * This is true, notwithstanding the evidence may show that the plaintiff had a perfectly good cause of action which was not sued on. The defendant is only required to meet the case stated in the pleadings, and, if a right of action not stated in the petition is developed by the evidence, still the defendant is not called on to rebut or refute such testimony or to contest such unpleaded rights. It is enough for him to fight the case brought, and it will be time enough to defend against any other cause of action than that stated in the pleadings, when he is charged therewith, has pleaded thereto, and prepared for the trial thereof."

This rule is again stated in *Ingwerson v. Railroad*, 205 Mo. 328, 335, 103 S. W. 1143. And if a petition alleges a contract of sale for delivery at a certain place, the proof

must show a delivery at that place. *Southern Lbr. Co. v. Lumber Supply Co.*, 89 Mo. App. 141; *Fairbanks Co. v. Mining Co.*, 105 Mo. App. 644, 652, 80 S. W. 13; *Woldert v. Pillman*, 191 Mo. App. 15, 176 S. W. 457; *Clark v. Cuson*, 3 Head (Tenn.) 55.

[5, 6] Plaintiff seeks to obviate the difficulty in its way by the suggestion that defendant waived the terms of the contract as "to the delivery and place thereof," by refusing to accept the potatoes. This cannot be allowed. A waiver must be pleaded.

"It is well-settled law in this state that all contracts modified by waivers, except policies of insurance, can only be recovered upon by alleging and proving such waivers." *Lanitz v. King*, 93 Mo. 513, 6 S. W. 263; *Mohney v. Reed*, 40 Mo. App. 99, 109; *St. Louis Trust Co. v. American Real Estate Co.*, 82 Mo. App. 260, 263.

[7] Again, plaintiff denies defendant's right to make the defense it has on the ground that the case is bound, under the rule of res adjudicata, by the law laid down in the opinion on the first appeal. The law stated in the first opinion was based on an agreed statement of facts, agreed to for that trial only. But there was no such statement at the second trial. Oral evidence was heard and facts vital to the legal rights of the parties were shown, which were entirely absent from the agreed statement of facts. The face of the present record shows that the title to the property (not alone the possession) was retained by plaintiff until the potatoes were paid for, and that was also the express testimony of its chief officer. No such stipulation appears in the agreed statement. Again, the evidence now shows that there was indorsed on the bill of lading that defendant should have the right of inspection before accepting the property. And it also appeared in evidence at the last trial that three of the cars of potatoes were never in Cardondale. In short, the case decided on the first appeal was on one branch of the law of sales, while the evidence on the second trial makes a case on a different branch.

[8, 9] We may add that plaintiff filed an amended petition during the second trial to which defendant filed an amended answer consisting of a general denial. Plaintiff seems to question that defendant filed a general denial to the petition as amended. The abstract so states. An additional abstract for defendant shows an answer filed two months before the trial, but that is not the answer filed to the amended petition, and we must accept defendant's abstract. Besides, though an answer should not be actually on file, the case after trial had will be treated as though it were. *Henlee v. Cannefax*, 49 Mo. 295.

We agree that a case must not be disposed of on appeal on some new theory. But manifestly this one has not.

The judgment should be reversed. All concur.

DE WOLFF v. MORINO. (No. 12031.)

(Kansas City Court of Appeals. Missouri. May 22, 1916. Rehearing Denied July 3, 1916.)

1. APPEAL AND ERROR §987(1)—REVIEW—WEIGHT OF EVIDENCE.

On appeal, the court will not examine the weight of conflicting testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893, 3894; Dec. Dig. § 987(1).]

2. REPLEVIN §10—MANUAL POSSESSION BY DEFENDANT—POSSESSION BY AGENT.

Where defendant in replevin, anticipating trouble, had delivered the possession of diamond to his clerk to be sold, *held* defendant, through his agent or servant, had such possession as would support a writ of replevin.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 69-82; Dec. Dig. § 10.]

3. REPLEVIN §93—FINDINGS OF FACT—POSSESSION.

In replevin, the omission of the findings of fact to find that defendant was in possession of the property when the action was instituted is ordinarily fatal.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 360-368, 371-375; Dec. Dig. § 93.]

4. APPEAL AND ERROR §1071(6)—HARMLESS ERROR—FINDINGS OF FACT—OMISSION CURED BY EVIDENCE.

But the testimony of the defendant, admitting that possession was in his agent or servant at the time, renders the error harmless, for which a reversal is forbidden, under Rev. St. 1909, § 2082.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4239; Dec. Dig. § 1071(6); Trial, Cent. Dig. § 940.]

5. REPLEVIN §69(5)—PROOF—VARIANCE.

Where petition in replevin alleged the weight of the diamond to be two and eleven-sixteenths carats, while the proof showed that it weighed two and ten-sixteenths, a sixteenth, a thirty-second, and maybe a sixty-fourth, *held* not a fatal variance.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 278, 279; Dec. Dig. § 69(5).]

Appeal from Circuit Court, Jackson County; T. J. Seehorn, Judge.

Replevin by Charles De Wolff against Joseph Morino. Judgment for plaintiff, and defendant appeals. Affirmed.

C. B. Leavel, of Kansas City, for appellant. G. L. Walls, of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action is replevin to recover possession of a diamond of two and eleven-sixteenths carat weight, of the value of \$900. The judgment in the trial court was in his favor.

[1] There was evidence in plaintiff's behalf which tended to show that he was the owner of the stone, was entitled to the possession, and that it was in defendant's possession when the action was instituted. It is of no consequence that there was evidence to the contrary, for this court does not determine the weight of testimony.

[2] But defendant (who kept jewels and loaned money) insists that all the evidence shows he was not in possession at the time the action was brought. There was evidence which showed that plaintiff had a diamond stolen from his house; that some time afterwards he secured the aid of two policemen and went to defendant's place, where he found the stone and claimed it; that defendant denied his claim; that they all took it to a jeweler, who identified it as plaintiff's; that plaintiff desiring to institute a replevin suit, the stone was put in an envelope, sealed, the signature of himself, defendant, and the two policemen written thereon, and placed in defendant's safe. Next day the sheriff was unable to find it. Defendant testified that, seeing he was going to have trouble, he resolved to dispose of it; that his clerk told him he thought that he had a customer for it, and that he let him take it to sell; that the clerk failed on the sale, and afterwards returned the stone to him. If we allow that the trial court believed this story, it would not aid defendant, since it shows the manual possession was in his agent, servant, and clerk, which is possession in himself, sufficient to support an action in replevin. *Talbot v. Magee*, 59 Mo. App. 352; *Cobbey on Replevin*, § 431.

[3, 4] But defendant points out a defect in the finding of the court, in that it omits to find that defendant was in possession of the stone when the action was instituted. This would ordinarily be a vital defect, and so we decided in *Thresher Co. v. Speak*, 167 Mo. App. 470, 151 S. W. 235. But the evidence for defendant in this case relieves the defect of its fatal character. Defendant conceded at the trial—testified—that when he saw that plaintiff was going to undertake to recover the ring, he called up his attorney and resolved to "dispose of it"; that he turned it over to Mills, his clerk, to sell to a customer; that Mills failed to sell, and afterwards returned the ring. This manual holding by the clerk, as we have said, was defendant's possession; and the matter ceased to be an issue and became an admission. The error became merely formal and harmless; a character of error for which we are forbidden to reverse a judgment. Section 2082, R. S. 1909.

[5] Defendant suggests that, since plaintiff's petition alleged the stone weighed "two and eleven-sixteenths carats," and the proof showed it weighed "two and ten-sixteenths, a sixteenth, a thirty-second, and maybe a sixty-fourth," the variance was fatal. We think not. There is no merit in the claim that no right existed to assert a cause of action in replevin. We have examined other points made by defendant, and find them not well taken.

The judgment, being manifestly for the right party, is affirmed. All concur.

WELLS et al. v. VALLO. (No. 14352.)
(St. Louis Court of Appeals. Missouri. July 5, 1916.)

1. SALES \S 359(1)—ACTION FOR PRICE—EVIDENCE.

In account for ice sold and delivered to a saloon, evidence that, although another person was in charge, the saloon was run in defendant's name and under a license issued to him, and that he sold the place, and at the time of sale, on demand of payment of plaintiff's account, said, "The bill will be taken care of," held sufficient to sustain finding that defendant was either owner or partner in the business, or that the person in charge was his agent.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1056, 1057; Dec. Dig. \S 359(1).]

2. APPEAL AND ERROR \S 1066 — HARMLESS ERROR—INSTRUCTIONS.

In an instruction submitting the issue of relation of defendant to the saloon business, stating that he was liable if plaintiffs sold and delivered the ice to defendant or his agent or "partner," the use of the word "partner" is immaterial; it appearing that in any event the person in charge was his agent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4220; Dec. Dig. \S 1066.]

Appeal from Circuit Court, St. Francois County; Peter H. Huck, Judge.

"Not to be officially published."

Action by William Wells and others against Mike Vallo. From a judgment for plaintiffs, defendant appeals. Affirmed.

B. H. Boyer, of Farmington, for appellant.
J. H. Malugen, of Bonne Terre, for respondents.

NORTONI, J. [1] This is a suit on an account for \$71.90, the value of ice sold and delivered. Plaintiff recovered, and defendant prosecutes the appeal. The ice sued for was delivered to a saloon known as the Rock Saloon at Bonne Terre. Defendant Vallo had formerly run the place, but during the time the account accrued was engaged in running another saloon called the "Hill Top." At that time George Parsons had charge of the Rock Saloon, either as owner, partner, or agent of Vallo. The ice was delivered to the Rock Saloon, and Parsons was in charge. There is no positive and direct evidence that Parsons was either the owner, partner, or agent of Vallo, and it is therefore argued a recovery against Vallo should not be sustained. But it appears in evidence that the Rock Saloon, to which the ice was delivered, was being conducted in the name of defendant, Vallo, and under a license issued to him. The evidence is also that defendant Vallo, as owner, sold the place to one O'Farrell. Moreover, it appears that at the time of the sale of the saloon to O'Farrell, plaintiffs demanded of Vallo the amount of their account as if he owed the indebtedness. To this demand defendant, Vallo, answered, "Don't bother yourself about that," also, "It is all right; that bill will be taken care of; don't worry; it will be paid."

[2] Defendant introduced no evidence whatever, and insists that given on the part of plaintiffs is insufficient to sustain the finding that defendant, Vallo, was either proprietor or a partner in the business, or that Parsons, who was in charge of the place, was his agent. Obviously there is an abundance in the facts and circumstances tending to prove that the Rock Saloon, at the time the ice was purchased for use therein, was owned by defendant and conducted for him in the immediate charge of Parsons, under some sort of an arrangement between them. Defendant, Vallo, acted as the owner in selling the place to O'Farrell, as the evidence abundantly shows, and also that it was at the time conducted in his name under a license issued to him. It appears the ice was delivered and used in the saloon, and that it has not been paid for. The court submitted the matter to the jury under an instruction to the effect that defendant was liable if plaintiffs sold and delivered the ice to defendant, Vallo, or his agent or partner, and we think this is well enough. It is not denied that the ice was delivered to the Rock Saloon, that is, to Parsons, who, in any view of the case, was his agent; and the mere fact that the instruction employed the word "partner" in connection with the direction to find for plaintiffs if it was delivered to "Vallo, his agent, or partner," for use in the saloon, should be treated as immaterial.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

STATE ex rel. WAGENER v. COOK, Probate Judge. (No. 15235.)

(St. Louis Court of Appeals. Missouri. July 5, 1916. Rehearing Denied July 18, 1916.)

JUDGMENT \S 589(1)—RES JUDICATA—PROHIBITION.

A judgment of the Supreme Court on relator's application to it for a writ of certiorari against the judge of the probate court, who had adjudicated relator insane, on the ground that such adjudication was without due statutory notice, and had been made without a jury trial or a formal waiver of a right thereto, denying the writ, awarding the respondent costs, and overruling relator's motion for a rehearing, was res judicata on relator's subsequent original proceeding in prohibition, attacking the probate judge's jurisdiction on the same grounds.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1062-1065, 1100; Dec. Dig. \S 589(1).]

"Not to be officially published."

Original proceeding in prohibition by the State of Missouri, on the relation of F. L. Wagener, against W. B. M. Cook, Judge of the Probate Court of Montgomery County. Preliminary rule in prohibition vacated, and writ denied.

Ball & Ball, of Montgomery, for relator.
Emil Rosenberger, of Montgomery, for respondent.

NORTONI, J. This is an original proceeding in prohibition. Relator is a resident of Montgomery county, and respondent, W. B. M. Cook, is judge of the probate court of the same county. The preliminary writ of prohibition was issued on the application of relator in the view that the probate court, over which respondent, Judge Cook, presides, exceeded its authority in declaring relator insane and appointing A. J. Henton guardian of his person and curator of his estate. The theory pursued in the application for the writ is that relator was adjudicated insane without due statutory notice of the proceeding, and, furthermore, that the probate court assumed to try the issue without a jury, and it is said without the formal waiver of a jury trial. In the return respondent pleads that the questions brought forward here are res adjudicata.

It appears relator applied to the Supreme Court for a writ of certiorari against the probate court of Montgomery county, and Judge Cook, the respondent, on the precise grounds invoked here. The respondent was duly notified in that proceeding, and filed a return thereto. The record of that proceeding, including a copy of the petition for the writ of certiorari, together with respondent's showing in opposition to the application, and the judgment of the Supreme Court thereon, are set forth in the return before us in this prohibition proceeding, and confessed by motion for judgment thereon.

It appears beyond question that relator in the certiorari proceeding in the Supreme Court sought to quash the judgment of the probate court whereby he was declared insane, and Henton appointed his guardian and curator, on the same grounds precisely as those invoked in aid of the prohibition here; also the petition presented to the Supreme Court revealed that certain constitutional grounds were set forth therein, which, of course, conferred jurisdiction on that tribunal over the subject-matter.

The Supreme Court denied the writ of certiorari, with all of the parties thus before it, and entered the following judgment thereon:

"In the Supreme Court of Missouri,
October Term, 1915. In Banc.

"Wednesday, Dec. 8, 1915.

"State of Missouri, at the Relation of F. L. Wagener, Relator, v. W. B. M. Cook, Judge of the Probate Court of Montgomery County, Missouri, Respondent. Certiorari.

"Now at this day the court, having considered and fully understood the petition of the said relator for a writ of certiorari herein, doth order that said writ be and same is hereby denied, and that the said respondent recover against the said relator his costs and charges herein expended, and have execution therefor.

"Wednesday, Dec. 22, 1915.

"State ex rel. F. L. Wagener, Rel., v. W. B. M. Cook, Probate Judge, Resp.

"Now at this day the court, having considered and fully understood the motion for a rehearing heretofore filed herein by the said relator, doth order that said motion be and the same is hereby overruled."

It appears from this that the Supreme Court, possessing full jurisdiction, not only adjudicated the subject-matter involved, but that relator filed a motion for rehearing therein, and such was overruled. Obviously this judgment of the Supreme Court concludes the matter so far as we are concerned. Indeed, such would be true if that judgment were one of an inferior tribunal rather than that of the superior court of the state. See *Coleman v. Dalton*, 71 Mo. App. 14; *State ex rel. v. Mills*, 231 Mo. 493, 133 S. W. 22.

It appearing that the Supreme Court considered the jurisdiction of the probate court of Montgomery county on the same grounds as those brought into judgment in this proceeding in respect of the same subject-matter and between the same parties, the questions made must be regarded as res adjudicata and not open to further inquiry. The preliminary rule in prohibition should be vacated, and the writ denied. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

CORNET v. MECKEL REALTY & INVESTMENT CO. (No. 14315.)

(St. Louis Court of Appeals. Missouri. July 5, 1916.)

MUNICIPAL CORPORATIONS \Leftrightarrow 835 — SURFACE WATER—CULVERT.

The maintenance of a sewer pipe under a street which was in fact a culvert constructed in a reasonable manner, not interfering with or changing the flow of water otherwise than would an ordinary culvert, except that it retarded the flow more and caused the water to be spread out at the discharge rather than to wash out a channel, was not a violation of rights of owner of land overflowed thereby.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1785; Dec. Dig. \Leftrightarrow 835.]

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

"Not to be officially published."

Suit by Henry A. Cornet against the Meckel Realty & Investment Company. From decree for respondent, complainant appeals. Affirmed.

A. E. L. Gardner, of Clayton, and Rodgers & Koerner, of St. Louis, for appellant. Robert E. Collins and Edward D'Arcy, both of St. Louis, and C. J. Harrison, of Clayton, for respondent.

NORTONI, J. This is a suit in equity for injunctive relief against the maintenance of a sewer pipe under a street. The court

found the issue for defendant and dismissed the bill. From this judgment plaintiff prosecutes the appeal.

The suit proceeds in the view that defendant collected surface water on its property and discharged it through a sewer pipe under Cornelia avenue on other property owned by defendant so as to interfere with its natural flow, to the damage of plaintiff's property situate 270 feet beyond. The facts in the record are succinctly and clearly stated in the opinion of the trial court. We concur in the view expressed by the court touching the matter, and adopt the opinion referred to as the statement of facts and the opinion of the court. The statement and opinion as prepared by Judge McElhinney are as follows:

"The lands affected by the flow of water here in dispute are situated in three blocks of about 300 feet in width from north to south, and nearly 1,300 feet from east to west. We may, for convenience, designate these blocks as the southern, the middle, and the northern blocks, respectively. Lots 36 and 45 are owned by defendant. Lot 36 is in the southern block, and fronts north on the south side of Cornelia avenue, which separates said block from the middle block. Lot 45 is in the middle block, and fronts south on the north side of said avenue. Plaintiff owns the northern block, situated north of a proposed Beverly avenue, which has not been opened or improved. Plaintiff's land is inclosed about the center line of this proposed Beverly avenue. A natural depression or valley extends across these blocks from south to north. This begins in the southern block some 300 feet south of Cornelia avenue, and widens rapidly before it reaches the avenue, and is there 500 to 800 feet wide. The slopes are gradual, not abrupt. At Cornelia avenue this valley continues northwardly across the middle block with very little increase in width, but with more rapid fall from south to north to Beverly avenue, and along the east and west sides towards the center of the valley, but not continuing to such center line. The center of the valley is a broad, flat basin, some 50 or more feet wide, covered with weeds and grass, without any ravine or gully except a slight ditch of 1 to 1½ or 2 feet in depth, and about the same width and 15 or 20 feet long next to the center line of Beverly avenue. This ditch extends into plaintiff's land, and there becomes much less marked, with scarcely any depth after it crosses the avenue. The valley extends into and across the northern block, being plaintiff's land, where it is broader and more flat and slopes considerably less, although it does slope slightly towards the north. There is a slight depression in this block, extending from said ditch at Beverly avenue towards the north. But the land there is so level and flat that the water running onto it from the middle block in any considerable quantity will spread and stand for a time to a width of 30 or 40 feet.

"The waters flowing in said valley from the southern and middle blocks onto the northern block are surface waters which would flow in the same way in the course of nature, without the sewer or pipe maintained under Cornelia avenue. The question presented is whether the effect of the sewer is to gather the surface waters and throw them in a volume on the north block, in a different manner from that in which they would flow by nature. The place where the sewer pipe is placed under Cornelia avenue is at the lowest point in that avenue in its course from east to west. The surface waters on the southern block all tend to run to and gath-

er at that point. If it were not for the sewer, they would flow across the avenue there. The sewer is a pipe of about 15 inches in diameter, extending from just south of the sidewalk on the south side of the avenue, under the avenue, to a discharge on the surface of the ground about 30 feet north of the north sidewalk. It is, in fact, a culvert for the protection of the avenue from overflow, constructed in a reasonable manner, and does not interfere with or change the flow of the water otherwise than would an ordinary culvert, except that it retards the flow more and causes the water at the discharge to be spread rather than to wash out a channel. The effect is to carry the water under the avenue, rather than to let it run in an irregular and somewhat wider stream over and across the avenue. If the waters were permitted to run over and across the avenue they would spread some 30 feet south of where they spread in passing out of the culvert, but not to any greater extent. As they pass out of the culvert now, they are spread over the flat space in the middle block 270 feet before they reach plaintiff's land. There is no ravine or gully to keep or carry them in a volume and so discharge them on his land. In fact, they are dissipated and spread over defendant's lands before flowing over Beverly avenue onto plaintiff's land. It does not appear that any additional waters are discharged on plaintiff's land, or that the surface waters are so discharged in any different manner or greater volume by reason of the pipe culvert under Cornelia avenue than if such culvert were not there maintained. The culvert is so remote from plaintiff's property and so wholly disconnected from it by any ravine or ditch across the middle block that it cannot and does not affect the flow of water at or north of Beverly avenue in any way.

"Finding and decree for defendant, dismissing the petition with costs."

The judgment should be affirmed for the reasons stated in the foregoing opinion; and it is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

HODGES v. BRYANT et al. (No. 14398.)

(St. Louis Court of Appeals. Missouri. July 5, 1916.)

1. VENDOR AND PURCHASER ⇐281(3)—LIEN—PRIORITY—EVIDENCE.

In partition, wherein the appealing defendant sought to have a vendor's lien enforced against the proceeds of the sale, and where another defendant had a prior lien by virtue of a trust deed, evidence held to sustain a judgment awarding a vendor's lien against the proceeds subject to the deed of trust lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 794; Dec. Dig. ⇐281(3).]

2. APPEAL AND ERROR ⇐1173(2) — DISPOSITION—JUDGMENT.

Where the plaintiff did not appeal, and the only appeal was that of the defendant who sought to enforce a vendor's lien against the proceeds of the sale, the Court of Appeals will not comply with the plaintiff's request to enter such judgment as plaintiff claimed the trial court should have entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4568, 4656; Dec. Dig. ⇐1173(2).]

Appeal from Circuit Court, Pike County; Edgar B. Woolfolk, Judge.

"Not to be officially published."

Action for partition by Archie Hodges against George Bryant and others, in which Emma Fisher, Henry Blackwell, and another were made parties defendant. Judgment for defendant Fisher, awarding her a vendor's lien subject to a deed of trust to defendant Blackwell, and defendant Fisher appeals. Judgment affirmed.

J. E. Thompson, of Bowling Green, for appellant. Jones & Corwine, of Frankford, for respondent.

REYNOLDS, P. J. This was an action for partition of twenty acres of land, plaintiff claiming seven-ninths interest and alleging that the defendants George Bryant and Pauline Mitchell, formerly Pauline Bryant, the son and daughter of one Jack Bryant, who died seized and possessed of twenty acres of land, are the owners of the other two-ninths. On their own application Emma Fisher, the widow of Jack Bryant, who subsequently married one Fisher and is now his widow, and Henry Blackwell and Squire Blackwell entered their voluntary appearance and were made defendants, Mrs. Fisher claiming that George Bryant and Pauline Mitchell, formerly Bryant, had subsequently deeded their interest to her, and that she had a vendor's lien for \$250, which she asked to have enforced out of the proceeds of the sale of the land, it being agreed that the land could not be partitioned in kind but would have to be sold for the purposes of making partition. Henry Blackwell claimed a lien on the land or its proceeds to the extent of \$600 by virtue of a deed of trust given to him by plaintiff, Archie Hodges, in which deed of trust Squire Blackwell is trustee.

The points at issue were as to the right of Mrs. Fisher to a vendor's lien for the \$250 and the right of Henry Blackwell to a lien prior to this vendor's lien in the amount of his deed of trust. It was claimed by Emma Fisher that Blackwell had loaned the \$600 to Hodges with knowledge of the prior claim of Mrs. Fisher to her vendor's lien for the \$250. The court heard the testimony in the case and at its conclusion awarded Mrs. Fisher a vendor's lien for the \$250, to be paid out

of the proceeds of the sale of the land when sold, subject, however, to the payment to Blackwell of the \$600 and interest thereon, evidenced by note and secured by the deed of trust before referred to. From this Emma Fisher has appealed.

[1, 2] We have read all the testimony presented to us in the abstract and can only say of it that it is conflicting on the question of knowledge of Blackwell of the claim of Mrs. Fisher to the \$250 when he made the loan to Hodges. Blackwell testified in the most positive and unequivocal manner that he made this loan and then had no such knowledge. Two witnesses produced by Mrs. Fisher undertook to testify that he did have such knowledge prior to making the loan to Hodges. But it must be said of this testimony of these two witnesses that it is very vacillating, nor are the witnesses altogether consistent with each other as to when Blackwell had this knowledge. Under this condition of the evidence we are not disposed, reading it, to overturn the conclusion arrived at by the learned trial court. There is no contention here as to the law applicable, in fact, no points of law are made, except that the respondent Hodges contends that as the lien of Mrs. Fisher arose on parol contract for the sale of the land, it cannot be enforced. It appears, however, that deeds were subsequently executed by two of the heirs who were minors when she sold the land, to their mother, Mrs. Fisher. Furthermore, the respondent Hodges has not appealed from the decision of the circuit court, the only appeal before us being that on the part of Mrs. Fisher against the action of the court in giving the claim of Blackwell, under his deed of trust, priority to her claim. In this state of the record we are not disposed to comply with the request of the respondent that we enter here such judgment as it is claimed by respondent the trial court should have entered.

Our conclusion is that the judgment rendered by the learned trial judge is correct. That judgment is affirmed.

NORTONI and ALLEN, JJ., concur.

SCHNEIDER v. BUNN. (No. 81.)

(Supreme Court of Arkansas. June 26, 1916.)

TRUSTS \Leftrightarrow 89(2)—RESULTING TRUST—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a finding that no resulting trust arose from defendant's purchase, in her own name, of certain lots with money furnished by plaintiff, but that the money was advanced as a loan.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 135; Dec. Dig. \Leftrightarrow 89(2).]

Appeal from Boone Chancery Court; T. H. Humphreys, Chancellor.

Action by F. Schneider against Daisy S. Bunn. From a judgment for defendant, plaintiff appeals. Affirmed.

C. M. Cooke and J. Lloyd Shouse, both of Harrison, for appellant. Troy Pace and T. D. Crawford, both of Little Rock, for appellee.

MCCULLOCH, C. J. The defendant, Daisy S. Bunn, purchased two lots in the town of Harrison, Ark., from one Buterbaugh, and paid therefor the sum of \$400, including an item of \$50 for the expense of obtaining confirmation of the title. In paying for the price of the property, she used money which she had received from plaintiff, F. Schneider, and Buterbaugh executed to her a deed conveying the lots in fee simple.

Schneider instituted this action, alleging in his complaint that he had furnished the money to Mrs. Bunn pursuant to an agreement that she was to purchase the lots and take the title in his name, and that she violated the trust by taking the title in her own name. He asked that a resulting trust be declared in his favor. Defendant filed an answer denying the allegations of the complaint with respect to any agreement about the title to be taken in plaintiff's name, and upon the issue thus raised considerable testimony was taken by deposition and submitted to the court. The chancellor found that the sum of money named was furnished to defendant by plaintiff merely as a loan, and awarded a decree in plaintiff's favor for the recovery of said amount, but held that there was no resulting trust and dismissed the complaint as to that feature of the case.

There is no dispute concerning the facts that defendant, Mrs. Bunn, purchased the lots from Buterbaugh, and that she paid for the same with money which she had obtained from the plaintiff; but there is a sharp conflict as to the circumstances under which the money was obtained, or rather as to the agreement between the parties concerning the furnishing of the money. Plaintiff testified that he and the defendant were friends, and that she applied to him to furnish her money sufficient to buy the lots, stating that she thought it would be a good investment, and, besides, the lots were adjoining her dwelling house and were about to be used as a loca-

tion for a barn which would be objectionable to her; that they entered into an agreement to the effect that he was to furnish the money and she was to purchase the lots in his name; and that he did not ascertain until some time after the transaction that she had taken the title in her own name. Plaintiff also adduced testimony tending to show that he repeatedly applied to her to either make him a deed to the lots or give him a mortgage to secure the amount of money which he had advanced. He testified, also, that before the purchase was made he offered to lend the money to the defendant if she would give him a mortgage on other property, but she declined to execute the mortgage and stated that she preferred to take the title in his name.

The plaintiff fails to give any definite account as to what was to become of the property eventually; whether it was to be held by him as his own property, or whether the title was merely to be taken in his name as security for the money advanced. The fair inference from the testimony is that he merely intended to exact security either by way of a mortgage on other property or by taking the title in his own name. He says that when he applied to defendant for security, after she had purchased the lots, she declined to give security on the ground that she was about to sell the property to another person and would be able to make settlement with him.

The defendant testified that at the time of the transaction she and plaintiff were engaged to be married, but that when he furnished her the money it was understood that she was to have the privilege of taking the title in her own name, or in the name of both of them jointly, in view of their approaching marriage; but afterwards plaintiff wrote her a letter proposing to release her from the obligation if she would release him from the engagement to marry, and that she accepted that proposition. The chancellor rejected the defendant's theory as to release, but sustained her in the contention that it was only a loan of money, and that the circumstances were not such as would justify the court in declaring that there was a resulting trust.

We are of the opinion that the finding of the chancellor is in accordance with the preponderance of the testimony. Plaintiff's own testimony does not, as before stated, give any very clear idea that the property was purchased for his benefit, and, when all the testimony is considered together, it is evident that the furnishing of the money was only intended as a loan, and that the negotiations between them related to security for payment of the money thus loaned. The preponderance of the testimony is that the parties were engaged to be married at the time, and that that was one of the considerations that induced the plaintiff to advance the money.

But, whatever the motive may have been, it appears to us that the chancellor was correct in holding that the transaction constituted only a loan of money, and that all the plaintiff is entitled to is a judgment for the recovery of the amount.

The decree is therefore affirmed.

RANDLEMAN v. JOHNSON. (No. 95.)

(Supreme Court of Arkansas. June 26, 1916.)

1. MALICIOUS PROSECUTION ⚡22—DEFENSES—ADVICE OF COUNSEL.

One cannot make a false statement as to another's alleged offense, to the prosecuting attorney, and defeat the action for malicious prosecution on the ground that the officer brought the prosecution, or that he acted on advice of counsel.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 45-48; Dec. Dig. ⚡22.]

2. MALICIOUS PROSECUTION ⚡69—EXCESSIVE DAMAGES.

Verdict of \$2,000 for compensatory and punitive damages to minor in action for malicious prosecution in charging him with buggery held not excessive in view of defendant's wealth.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 158; Dec. Dig. ⚡69.]

Appeal from Circuit Court, Clay County; J. F. Gautney, Judge.

Action by Johnnie Johnson, by his next friend, G. W. Johnson, against R. R. Randleman. Judgment for plaintiff, and defendant appeals. Affirmed.

L. Hunter, of Piggott, for appellant. Spence & Dudley, of Piggott, for appellee.

SMITH, J. Appellee recovered judgment against appellant for the sum of \$2,000 as damages in an action for malicious prosecution, and the judgment is questioned upon two grounds: First, that it is contrary to the law and the evidence; and, second, that it is excessive. The charge preferred upon which the prosecution was had was that of buggery, alleged to have been committed with a mule, and upon the evidence of appellant and other witnesses appellee was ordered held by a justice of the peace, sitting as an examining court, to await the action of the grand jury. The charge was investigated by the grand jury and dismissed, whereupon this suit was brought. Appellant defended upon the grounds that he did not institute the proceeding, but had merely furnished the deputy prosecuting attorney the names of witnesses who were familiar with the facts in the case, and these names were furnished that officer to enable him to take such action as he deemed proper upon the investigation to be made by him. The second defense was that the charge was true.

The evidence is in irreconcilable conflict. Appellant testified that he had twice seen appellee commit the crime charged, and he was

corroborated by his father-in-law and his brother-in-law and by another witness. But other matters were testified to by these witnesses, in which there were such conflicts in their own evidence and such contradictions of the other evidence that the jury no doubt entirely disregarded this evidence, and we cannot say they were not warranted in so doing.

Appellee was a witness against appellant in a trial for malicious mischief wherein appellant was charged with shooting a dog. Appellant admitted that he went to Piggott to have appellee arrested for carrying a pistol, and there he met the deputy prosecuting attorney, and, instead of preferring that charge, he told that officer about the circumstances of the alleged crime of buggery. The deputy prosecuting attorney testified that appellant was the only man he talked with before filing the information, and that it was filed at appellant's request; that he met appellant on the street, when appellant called him aside and said he had some business with him, and this was the business he had; that appellant was present and testified in the justice trial and, among other things, stated that appellee had kissed appellant's wife. A witness named Hays, who was also a witness at the trial of appellant upon the charge of killing the dog, stated that appellant had said to him that the Johnsons, of whom appellee was one, were bad people, and that appellant proposed that a scheme be gotten up to run the Johnsons out of the neighborhood. Appellee indignantly denied the charge and made a statement which evidently carried conviction to the minds of the jury, and it would serve no useful purpose here to set out the evidence tending to corroborate him and to contradict the evidence offered against him.

[1] Appellant insists that because the proof shows that he consulted with the prosecuting officer of that county, and that this officer put the machinery of the law in motion, he should not therefore be held liable for the prosecution. He cites the recent case of Redman v. Hudson, 186 S. W. 312, as sustaining that view. The writer did not concur in the majority opinion in that case, but the chief ground of difference there was that the majority treated as undisputed the allegation that the appellant there, who was the defendant below, had in good faith made a full and fair statement of the facts to the attorney with whom he advised. The minority took the view that this was a question of fact which should have been passed upon by the jury. We are all agreed, however, that no one can defend as having acted upon the advice of counsel when he does not in good faith give to the attorney a fair and full statement of the facts as he understands them to be. Certainly he cannot make a false statement and defend upon the ground

that he acted upon advice which was predicated upon this false statement. Here the jury might well have found that, although appellant did advise with the deputy prosecuting attorney, he made a false statement to that officer, and if he did so he can claim no protection from any action of that officer which was prompted by the false statement.

[2] We cannot say the verdict was excessive. Appellant was shown to be a man of considerable wealth by his own admissions, and the jury might have found that he gave a very low estimate of the value of his property.

No complaint is made against any of the instructions.

The charge was disgustingly infamous, and, in addition to the compensatory damages, the evidence on the part of appellee tends to show that it was made under circumstances which would justify the award of punitive damages, and this question was submitted to the jury, although there was no request made to find the compensatory and punitive damages separately.

Finding no error, the judgment of the court below is affirmed.

HORTON v. THOMPSON. (No. 96.)

(Supreme Court of Arkansas. June 26, 1916.)

CHattel MORTGAGES \Leftrightarrow 244—TRUST DEEDS
—RELEASE—CONSIDERATION.

It was a sufficient consideration for release of a team and wagon from the lien of a trust deed also covering other property, for the mortgagor to borrow money on the team and pay it to the trustee, although the entire debt was due and the payment equalled only one-half of it.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 496, 508; Dec. Dig. \Leftrightarrow 244.]

Appeal from Circuit Court, Independence County; Dene H. Coleman, Judge.

Replevin by D. G. Horton against W. N. Thompson. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuel M. Bone, of Batesville, for appellant. W. K. Ruddell, of Batesville, for appellee.

SMITH, J. This is an action in replevin by a substituted trustee to recover the possession of two horses and a wagon named in a deed of trust which was executed by appellee, for the purpose of subjecting them to sale in satisfaction of the debt there secured. The defense offered was that in November, 1913, which was eleven months after the indebtedness there secured became due, Morris, the payee of the note and the beneficiary of the deed of trust, had released the horses and wagon from the deed of trust. In support of this contention, appellee, who was the defendant below, testified that his indebtedness was due and he was unable to pay, whereupon Morris agreed that the deed of trust should be released upon the wagon and team

to enable him to borrow \$200 from one Slayden, to be applied on the indebtedness, and that pursuant to this agreement the lien was released verbally, and appellee executed a new deed of trust to Slayden on the wagon and team to secure the loan of \$200 then made; that the loan then made was in the form of a check which appellee indorsed and delivered to Morris, who accepted the same and credited it on the note. Appellant admitted receiving the check, but denied that he had released his lien, but admitted that he told appellee he could give a second mortgage on the property if he liked. A witness named Huddleston, however, testified that appellant told him he had given permission to appellee to execute the new mortgage provided the money thus obtained was paid to him. Two other witnesses corroborated this statement.

Over appellant's objections and exceptions, the court told the jury that:

"There is but one question for this jury to determine, and that is purely a question of fact; that is, whether or not the mortgagee, Jeff Morris, agreed at the time to let the mortgagor, Thompson, give a second mortgage on the mules and get the money, or whether at the time of the alleged trade that he agreed to release them entirely from the first mortgage. That is the whole point in the case."

Inasmuch as the evidence is clearly sufficient to support the jury's finding on the question of fact, the only question for decision is the correctness of this instruction.

Appellant insists that the payment made cannot, and does not, afford a sufficient consideration for the release of the lien of the deed of trust, although he admits that for a sufficient consideration a parol lease would be valid. *Fincher v. Bennett*, 94 Ark. 165, 126 S. W. 392. He insists this is true because the undisputed proof shows the entire debt was due and unpaid and the payment which was made was only about one-half of the debt. The team said to have been released was only a part of the property described in the deed of trust.

It is true the sum paid was due in any event; but we think it cannot be said on that account the transaction had did not constitute a sufficient consideration to support the agreement by which the sum paid was raised to be applied to that purpose. While appellee was obligated to pay this sum in any event, he was under no obligation to negotiate a new loan as was done here, and this action must be held to constitute a sufficient consideration to support appellant's agreement to release his lien pro tanto. *Dreyfus v. Roberts*, 75 Ark. 364, 87 S. W. 641, 69 L. R. A. 823, 112 Am. St. Rep. 67, 5 Ann. Cas. 521; *Lamberton v. Harris*, 112 Ark. 503, 166 S. W. 554; *Feldman v. Fox*, 112 Ark. 223, 164 S. W. 766.

No error was committed in giving the instruction set out, and the judgment is therefore affirmed.

J. W. YORK & SONS v. POWELL et al.
(No. 85.)

(Supreme Court of Arkansas. June 26, 1916.)

1. APPEAL AND ERROR §524—REVIEW—ADMISSION OF EVIDENCE—BILL OF EXCEPTION.

Bill of exception, showing statement of defendant's counsel consenting to the use of a copy of a contract in evidence following testimony that the original had been lost, held to sufficiently show the proper reception of such copy in evidence, where the transcript of the record contained copies of the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2371, 2375; Dec. Dig. § 524.]

2. GUARANTY §91—BREACH OF ORIGINAL CONTRACT—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to show a breach of contract of sale by the buyer, performance of which had been guaranteed by the defendants.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 104; Dec. Dig. § 91.]

3. GUARANTY §7(1)—NECESSITY OF NOTICE OF ACCEPTANCE.

Where guarantors indorsed a guaranty of the buyer's performance of a contract of sale on the back of such contract, the transaction was not merely an offer of guaranty, requiring notice of acceptance, but all that was necessary to make it binding on the guarantor was that the seller should act upon it.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 9; Dec. Dig. § 7(1).]

Appeal from Circuit Court, Prairie County; Thos. C. Trimble, Judge.

Action by J. W. York & Sons against O. R. Powell and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

This is a suit by appellants against appellee on a written contract and guaranty. The contract specified that appellants agreed to sell to appellee C. R. Powell certain musical instruments for the sum of \$31, to be paid \$7 cash and \$4 per month until paid. The appellants retained title until the purchase money was paid. The purchaser was immediately to return the property, if payments were not promptly made. Contract to be forfeited at option of appellants. Time of payment was of the essence of the contract. A written guaranty was indorsed on the contract, by which appellees McGuin and Castleberry, for value received, guaranteed that C. R. Powell would faithfully perform the contract according to its terms. The contract was credited with \$7 cash payment; \$4 August 20, 1913, and \$4 October 8, 1913. The contract was dated July 29, 1913, and was verified by affidavit of secretary of the corporation. On the last day of May, 1915, suit was commenced by appellants filing the contract with a justice of the peace, and having summons issued and served on appellees. There were no written pleadings filed by the appellees in the justice or circuit courts. Appellees each entered oral pleas denying liability. The bill of exceptions shows that J. M. McClintock testified that he represented appellants in the collection of the claim.

"Q. They sent the original note to collect with? A. Yes, sir. Q. The original contract has been lost?

"Mr. Leach: We consent that a copy may be used, and we consent that you have a copy of the contract there."

The witness then proceeds to testify that he notified Powell that he had the claim for collection, and asked him to let witness know at once if he had any defense to make, and he got no reply and went to see Powell, and he promised to pay. The witness continues:

"I called upon Mr. Powell to get the money, and he told me he was going to pay me in a little while. He did not pay me, and I saw Mr. McGuin and Mr. Castleberry, and they told me that the instruments were there, and I told them if I could get the instruments, I would take them and close the account right now, but I did not get them, and the thing dragged along, and I have forgotten now why I sent the claim back. I told them I could not do anything with it."

The witness then proceeds to testify that he spoke to Mr. McGuin, "he recognized his liability," and wanted witness to "squeeze" Powell. Witness talked to both McGuin and Castleberry with a view of getting the instruments returned. He says:

"I talked with them both about it. Of course they were anxious to get relieved of any liability, and I was very much disposed to help them, and I tried to get hold of the instruments," etc.

At the conclusion of the evidence, appellees asked an instructed verdict. The court remarked:

"Before the guarantors would be bound by the contract, the plaintiff would have to notify them that they had been accepted as guarantors."

The court thereupon directed a verdict for appellees, and from the judgment in their favor this appeal is prosecuted.

Emmet Vaughan, of Des Arc, for appellant. W. A. Leach, of Lonoke, for appellees.

WOOD, J. (after stating the facts as above). [1, 2] It appears from the bill of exceptions that a witness for the appellant testified that the original contract had been lost, whereupon the attorney for the appellees consented that a copy might be used, and that the paper that witness had was a copy of the contract. This was sufficient to show that the appellees consented that a copy of the contract was being used by the witness in giving his testimony, and this statement in the bill of exceptions, together with the fact that the contract was copied in the transcripts, was sufficient to show that a copy of the contract was introduced in evidence. The contract itself, being part of the evidence, showed on its face that there was still due on the contract the sum of \$16. This, taken in connection with the testimony of a witness on behalf of the appellant, tending to show that he had notified Powell, the principal in the contract, that he had the claim against him for collection, and that Powell promised to pay the same, was suf-

sufficient to warrant a jury in finding that Powell had failed to perform his contract, and that there was a balance due thereon. There was also testimony on behalf of the appellant that would warrant a finding to the effect that the musical instruments had had not been returned to the appellant as provided in the contract.

[3] The contract of guaranty which was introduced and made a part of the record itself shows that it was not a mere offer to guarantee the payment of the money, but was a direct promise that Powell would perform the obligations of his contract. Such being the character of the instrument, it was not necessary that the appellant, as the promisee, should notify appellees of its acceptance of their guaranty, and the court erred in holding that the appellees McCuin and Castleberry would not be bound unless the appellant had notified them that they had been accepted as guarantors. The case is ruled on this point by *Falls City Construction Co. v. Boardman*, 111 Ark. 415, 163 S. W. 1134. There we said:

"Where the transaction is not merely an offer to guaranty the payment of debts and amounts to a direct promise of guaranty, all that is necessary to make the promise binding is that promisee should act upon it; he need not notify the promisor of his acceptance."

In the instant case the evidence shows that the appellant did act upon the contract of guaranty, by selling appellee Powell the musical instruments upon the terms prescribed in such contract.

The court erred in directing a verdict for the appellee, and for this error the judgment must be reversed, and the cause will be remanded for a new trial.

LITTLE v. ARKANSAS TRUST & BANKING CO. (Nos. 75, 143.)

(Supreme Court of Arkansas, June 19, 1916.
On Rehearing, July 10, 1916.)

1. EXECUTORS AND ADMINISTRATORS 225(2)—CLAIMS AGAINST ESTATE—LIMITATIONS—COMPUTATION OF PERIOD.

Where a will authorized trustees to pass upon claims against the estate, but creditors procured the appointment of an administratrix and a notice to creditors was published, the statute of nonclaim was thereby set in motion and continued to run against claims not probated as required by law, and was not tolled by any proceedings before the trustees for settlement under the powers granted them.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 796; Dec. Dig. 225(2).]

2. EXECUTORS AND ADMINISTRATORS 225(1)—CLAIMS AGAINST ESTATE—LIMITATIONS—EVIDENCE.

Under Kirby's Dig. § 113, providing that any person may exhibit his claim against any estate on a note or written contract by delivering to the executor or administrator a copy of the instrument, exhibiting the original, and section 114, providing for verification, evidence that the president of a company, within the period allowed by law after the appointment of

an administratrix, exhibited notes of the decedent and had a duly verified claim therefor presented to a trustee of the estate who acted as friendly counselor for the administratrix, and the administratrix discussed the claim with the counselor, saw it listed among other claims, and had the claim at hand, though she may not have seen it personally, was sufficient to sustain a finding that the claim was not barred by the statute of nonclaim.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 789; Dec. Dig. 225(1).]

3. EXECUTORS AND ADMINISTRATORS 225(1)—CLAIMS AGAINST ESTATE—LIMITATIONS—FILING CLAIM.

It is not essential, to support a finding that a claim against the estate of a decedent was not barred, to show that the claim was filed within a year from the date of the publication of notice to creditors, but it is sufficient if presentation is made to the administrator within one year of the date of his letters.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 789, 793½, 795, 799, 803, 805; Dec. Dig. 225(1).]

On Rehearing.

4. EXECUTORS AND ADMINISTRATORS 451(4)—ACTIONS—FINDINGS.

In an action on a claim against a decedent's estate, findings that the claim was never exhibited to the administratrix, nor allowed by her, nor filed in the probate court, are insufficient to prevent a recovery where the facts found show a presentation to the administratrix sufficient in law.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 906, 1181, 1182; Dec. Dig. 451(4).]

Appeal from Circuit Court, Miller County; Geo. R. Haynie, Judge.

Action by the Arkansas Trust & Banking Company against A. B. Little, administrator of the estate of L. A. Byrne. From a judgment for plaintiff, defendant appeals. Affirmed.

Webber & Webber, of Texarkana, for appellant. A. D. DuLaney, of Ashdown, for appellee.

SMITH, J. Judge L. A. Byrne died on March 4, 1914, leaving a will in which he designated W. H. Arnold, W. R. Grim, and the Arkansas Trust & Banking Company as trustees with authority and instructions to discharge his debts and distribute his estate to the various devisees and legatees therein named. The will was admitted to probate a few days after his death, but no letters testamentary issued at the time. The will devised the property to the trustees named and invested them with plenary power to adjust and audit claims against the estate and to make settlement of them and to finally distribute the residuum.

The language of the will was such that the court was fully warranted in a finding of fact which was made that the will created an express trust and authorized the trustees to allow and pay any claim which they regarded as just against the said estate.

After the will had been duly probated and

the trustees had entered upon the discharge of their duties, it was found that, although the estate was valuable, the indebtedness was large, and that there were 40 or 50 persons who had claims against the estate. The trustees made up a statement of the assets and liabilities, and then decided to have the widow take out letters of administration on the estate for the purpose of examining and allowing claims against the estate. The petition for the letters of administration recited the fact that the trustees had agreed to accept the trust and would have the control and management of the estate, but it recited that the petitioner would diligently inquire into and examine into the merits of all claims presented and would allow or disallow them according to their respective merits and would follow the requirements of the law in relation thereto if letters were issued. The petitioner prayed that, inasmuch as she would have no duty or responsibility in connection with the estate except to pass upon the claims, she be not required to give bond, and it was further recited that the creditors had assented to this arrangement. Pursuant to this petition, letters of administration issued to Mrs. Byrne on April 21, 1914, and she caused a creditor's notice to be published on May 4, 1914.

A meeting of the trustees was held before the issuance of letters, at which meeting a Mr. Johnson, who was the president of the trust company, was present. Under the will he was named a trustee, as president of the trust company. Judge Byrne was a large stockholder in the trust company at the time of his death, and this company was his largest creditor, and the principal part of the indebtedness was represented by his notes payable to its order.

At one of the first meetings of the trustees, Mr. Johnson produced and exhibited to his associates the originals of these notes for allowance, when Mr. Arnold stated to him, "You will have to prove up your claim." Thereafter Mr. Johnson caused the secretary and treasurer of the trust company to make out and authenticate a statement of the claim. This was delivered to Mr. Johnson and by him personally mailed to Mr. Arnold. Mr. Johnson testified that lists of these claims were made out and the trust company's claim was included in the list and was on the desk with the others, and that he discussed the claim with Mrs. Byrne in 1914, and its justness was not questioned. He further testified that in July or August of that year Mrs. Byrne applied to his bank for a loan and explained to him that she had been unable to get any money out of the estate; but, when he explained that he already had a large claim against the estate upon which nothing had been paid, she said:

"That is true, but your claim has been allowed. You will get your money, because the claim has been allowed."

Mrs. Byrne denied that this conversation occurred.

A Mr. Barney testified that he was employed in Mr. Arnold's office, and that a list of the claims was prepared, and that this list was checked from the claims in the office, and the list so checked included appellee's claim, and that on several occasions Mrs. Byrne had gone over the claims presented to Mr. Arnold in his presence; and this witness also testified that, when it was discovered that the appellee's claim did not appear on the records in the probate clerk's office, he called Mrs. Byrne over the telephone and asked her if the claim had not been recognized by her, and was told that it had been.

The trustees finally found that it would be impossible to execute the mandates of the will, whereupon they prepared an elaborate report of their proceedings and filed it with the clerk of the probate court on the 15th day of September, 1914. This report contained the list of all claims which had been approved by them, and included that of appellee. The trustees resigned on the day their report was filed, and Mrs. Byrne resigned as administratrix at the same time, whereupon appellant, Little, was appointed administrator, and has since continued to act in that capacity. Thereafter letters were written by Little to appellee on March 23 and April 9, 1915, in which appellee's demand was recognized as a valid one.

There is an agreed statement in the record to the effect that none of the claims filed and allowed in the probate court bear any indorsement showing that they were exhibited to and allowed by the trustees, but that all claims filed in the court prior to the resignation of said trustees bore the following indorsement: "Presented, examined and allowed by Lullie H. Byrne, as administratrix of the estate."

Mrs. Byrne denied that the claim had been presented to or allowed by her. She admitted, however, that she had conferred with Mr. Arnold about the claims and had gone over them with him at his office, and she admitted that she saw the claim of appellee on the list.

Mr. Arnold testified that he and the testator had long been friends, and that Mr. Byrne had spoken to him about the will before his death. Mr. Arnold further testified that, although he was not employed as Mrs. Byrne's attorney, he had advised with her about the estate, and the evidence makes it plain that, while he was not acting as attorney for the administratrix in the sense that he would have had the right to charge a fee for his services, it also appears that he was acting in this capacity as a friend in connection with his duties as trustee. He testified that Mrs. Byrne, as administratrix, passed upon and allowed or disallowed all of the claims which were filed in the probate court, and, while he does not testify specifically

that she allowed appellee's claim, he does testify that this claim appeared on all the lists of claims which were ever prepared, and that he thought this claim had been filed with the probate court, and that he would have declared it to be a positive fact that it had been so filed but for the fact that it was not on the clerk's docket with the other claims. All of the claims, however, were docketed except that of appellee and the claim of a Dr. Webster.

[1] The court made a number of findings of fact and declarations of law, all of which were favorable to appellee's contention, and these various findings are discussed in the briefs, and counsel for appellee insists the judgment of the court below should be affirmed upon each of these findings. Among other findings made by the court is one that the claim was not barred by the statute of nonclaim, and, as we think the evidence supports this finding, we do not discuss the other questions raised in the briefs.

It is true that creditors might have proceeded under the will for the satisfaction of their debts, but they were not required to do so. They were entitled, upon a proper showing, to have the estate administered upon, whereby their demands might be probated in the manner required by law. Here it is admitted letters of administration issued and a notice to creditors was published. Thereupon the statute of nonclaim was set in motion, and, having been set in motion, it continued to run against claims not probated as required by law, and the running of the statute would not be tolled by any proceedings before the trustees for settlement under the powers granted them. Does the evidence support the finding that appellee's claim was not thereafter barred by this statute?

[2] Section 113 of Kirby's Digest provides the manner in which a claim may be exhibited to an administrator. It reads as follows:

"Sec. 113. Any person may exhibit his claim against any estate as follows: If the demand be founded on a judgment, note or written contract, by delivering to the executor or administrator a copy of such instrument, with the assignment and credits thereon, if any, exhibiting the original, and if the demand be founded on an account, by delivering a copy thereof, setting forth each item distinctly and the credits thereon, if any."

Section 114 provides for the verification of the demand. And the provisions of these sections have been held to be mandatory.

A late case in which this subject was discussed is that of *Davenport v. Davenport*, 110 Ark. 222, 161 S. W. 189, and, while it was again said in that case that the provisions of the statute in regard to the probate of claims against an estate were mandatory, yet it was said that a substantial compliance with their requirements was sufficient.

Here the proof shows without question that this demand was authenticated and was sent by Mr. Johnson to Mr. Arnold, and was received by Mr. Arnold long before the statute

of nonclaim had run. But does the evidence also show its presentation to the administratrix? We think the evidence warrants the finding that it was. It would put form above substance to hold otherwise. The claim was in the hands of Mr. Arnold, who was, not only a trustee of the estate, but was, in fact, the attorney for the administratrix, and, while she may never have had manual possession of this demand, it was there in her presence. It was among the other demands which had been exhibited to her and which bore an indorsement complying fully with the requirements of the statute. The demand was listed along with other demands, and these lists were checked with the demands themselves, and Mrs. Byrne admits that she saw these lists; and we are constrained to hold that this proof is sufficient to show the exhibition of the claim to her.

We are not called upon to decide that the provisions of section 113 of Kirby's Digest may be complied with by the presentation of a claim to the attorney for an administrator. Such service may not be sufficient. But we think this proof shows a delivery in fact to her.

[3] It may be said that the proof does not show that the claim was filed with the clerk. But it is not essential to support the finding of the court below that it should be so found. The statute does not require the filing of the claim with the clerk of the probate court within a year from the date of the publication of the notice to creditors. It is sufficient if the presentation is made to the administrator within one year of the date of his letters, and, that having been done in this case, the judgment of the court below will be affirmed.

On Rehearing.

[4] It is urged by appellant in her motion for a rehearing that the opinion in this case is predicated upon a state of facts not found by the court below. It is pointed out that at appellant's request the court found the fact to be that the claim of appellee was never exhibited to her as administratrix nor allowed by her and was not filed in the probate court of Miller county at any time up to the filing of the petition of appellee asking that its claim be reinstated and allowed.

As has been said, the court made numerous findings, and from a study of them we are constrained to believe that the court found that there had been no presentation to the administratrix, because in his view of the law the facts set out did not constitute a presentation to the administratrix. It is not contended that the proof shows that the claim was filed with the clerk of the probate court, nor that it was allowed by her. It is only insisted that there was a presentation to her within the time allowed by law. The statute of nonclaim was arrested upon its presentation to her, and we think the recitals in the court's findings of fact and dec-

larations of law indicate that the court found a state of facts which constituted a presentation to the administratrix. The court expressly refused to make the following finding:

"(5) That the said Arkansas Trust & Banking Company failed to exhibit its claim in the manner prescribed by law to either Mrs. Lulie H. Byrne, as administratrix, or A. B. Little, as administrator, within one year from the date that letters of administration issued on said estate, and for that reason its claim is barred by the statute of nonclaim."

The court also made the following finding:

"(5) That said claim so presented (to Grimm, Arnold, and the president of the trust company, as executors) has been lost or mislaid and should be restored, filed, and allowed; that the amount thereof on September 14, 1915, the date of the filing of the petition in the probate court, was \$5,487.03, which should be allowed, with interest on the same at the rate of 10 per cent. per annum from that date and marshaled in the fourth class; and that a copy of the judgment herein should be certified to the probate court of Miller county, Ark., in accordance with law."

The court further found that these executors had advised and procured the appointment of Mrs. Byrne as administratrix of said estate for the purpose of examining and allowing claims against the estate. There is no intimation of any conflict of authority, or of decision, upon any claim between the executors and the administratrix. They co-operated in every respect. This claim was admittedly in the hands of the executors and was checked off as being in the allowed claims, of which fact the administratrix was advised, and, although the court found the claim had not been manually presented to her, yet the facts set out constitute a presentation, and the motion for a rehearing will be overruled.

HOLLAND BANKING CO. v. HAYNES et al. (No. 91.)

(Supreme Court of Arkansas. June 28, 1916.)

1. BILLS AND NOTES ⚡497(2)—BONA FIDE PURCHASER—BURDEN OF PROOF.

The holder of a negotiable note, showing that he purchased it in the usual course for value, makes a prima facie case of bona fide purchaser, and the burden shifts to defendant to show notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1876, 1877, 1886, 1887; Dec. Dig. ⚡497(2).]

2. SALES ⚡426 — GUARANTY — REMEDY FOR BREACH.

The contract of sale of a stallion with a guaranty of him, and privilege of returning him, within a certain time, if not as guaranteed, and receiving another, furnishes the only remedy if not as guaranteed, so that, having failed to complain within the time limited, or to offer to return him, his failure to comply with the guaranty furnishes no defense to action on the purchase-money note.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1209; Dec. Dig. ⚡426.]

3. BILLS AND NOTES ⚡537(1)—ACTIONS—DIRECTING VERDICT.

Plaintiff in an action on a note making a prima facie case, and the testimony disclosing no legal defense, verdict should be directed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862, 1871-1875, 1891-1893; Dec. Dig. ⚡537(1).]

Appeal from Circuit Court, Franklin County; Jas. Cochran, Judge.

Action by the Holland Banking Company against Wallace Haynes and others. From an adverse judgment, plaintiff appeals. Reversed and rendered.

This suit was instituted by the appellant to recover on three certain promissory notes aggregating \$2,800, the amount thereof less credits of \$200. The notes are dated June 10, 1910, and due and payable in equal amounts on the 1st day of September, 1912, 1913, and 1914. They were given for the purchase money of a Percheron stallion, sold and delivered by the Holland Stock Farm of Springfield, Mo., to Wallace Haynes et al. The appellant banking company purchased the notes on September 17, 1910. At the time of the sale of the stallion, the seller and the makers of the notes entered into a written contract, in which the seller guaranteed the horse to be a satisfactory sure breeder, and gave the buyers the privilege of returning him to the seller at Springfield, Mo., within a certain specified time, provided the horse with proper care and treatment failed to fulfill the warranty as to being a satisfactory sure breeder, in which event the buyers were to select another horse of like kind and price from the seller, without expense to themselves, and it was also agreed that if the buyers would have the horse insured for one year for the sum of \$1,000, the seller would, in the event of his death within the time, replace him with another horse of like kind. The purchasers made no complaint whatever to the seller of dissatisfaction with the stallion until after September 1, 1912, the due date of the first note and when it was sent for collection, and they did not return, nor offer to return, and deliver to the seller the horse at Springfield, Mo., in accordance with the contract. The notes are ordinary joint and several promissory notes, agreeing to pay the specified amount to the order of the Holland Stock Farm at the bank of Charleston, in Charleston, Ark., with 6 per cent. interest, payable annually, from date until paid, signed by Wallace Haynes and 12 others. The undisputed testimony shows that the appellant bank purchased the notes for a valuable consideration and before maturity, and the seller and purchaser thereof both testified that neither had any notice of any defect or infirmity in the paper at the time of the sale nor of any defense thereto. There was some testimony, however, of certain facts and circumstances from which an inference of notice might have been chargeable to the

purchaser. The undisputed testimony also shows that no complaint was ever made to the seller of the stallion, nor any claim that he had failed in any respect to come up to the warranty until after the time specified therein for his return and exchange in case he did not prove satisfactory, had expired. Appellees introduced certain testimony tending to show the horse was in fact of very little value as compared with the price agreed to be paid therefor. The court instructed the jury, giving over appellant's objection certain instructions, telling it the burden was on the plaintiff to show by a preponderance of the testimony that it was a purchaser of the notes in good faith, for a valuable consideration, in the usual course of business before maturity, without any knowledge of existing defenses thereto, and told the jury that if they found the amount already paid on the notes was the fair market value of the horse at the time he was purchased, they would find for the defendants unless they found plaintiff was an innocent purchaser of the notes. It also refused to instruct a verdict for plaintiff. From the judgment on the verdict against it, the banking company prosecutes this appeal.

Appellant, pro se. T. A. Pettigrew, of Charleston, and Holland & Holland, of Ft. Smith, for appellees.

KIRBY, J. (after stating the facts as above). [1] The court erred in giving said instructions. When the holder of a negotiable instrument shows that he purchased it before maturity in the usual course of business for a valuable consideration, a prima facie case is made, and the burden of proof shifts to the defendant who alleges it to prove that the purchaser had notice or knowledge of such facts as required him to take notice of the defense existing in favor of the makers. *White v. Moffett*, 108 Ark. 490, 158 S. W. 505; *Keatley v. Holland Banking Co.*, 112 Ark. 608, 166 S. W. 953.

[2] The purchasers of the horse could not have defended against the payment of the notes in the hands of the seller on the ground that the horse was of a less market value than the price agreed to be paid therefor in the notes, or failed to come up in performance to the terms of the guaranty, since the contract of guaranty provided the exclusive method of settlement if the stallion should not prove as warranted. *Highsmith v. Hammonds*, 99 Ark. 403, 138 S. W. 635.

The undisputed testimony shows that no notice of dissatisfaction as to the condition or performance of the stallion was given to the seller until long after the time designated in the contract for his return in accordance with the terms of the contract, if he should prove unsatisfactory and not as warranted, nor was any attempt made to return him and receive another in his place in accordance

with the terms of the contract. It was likewise undisputed that the purchasers did not insure the stallion in accordance with the agreement that they might do so in the contract of guaranty and had no claim against the seller on that account.

[3] Since the testimony does not disclose that the makers of the note had any legal defense thereto, the court likewise erred in not directing a verdict for appellant.

The judgment is reversed, and judgment will be entered here in appellant's favor for the amount of the notes sued on. It is so ordered.

MORGAN v. MAHONY et al. (No. 72.)

(Supreme Court of Arkansas. June 19, 1916.)

1. MORTGAGES \S 199(3), 202, 203—RIGHTS OF PARTIES—POSSESSION BY MORTGAGEE—IMPROVEMENTS AND REPAIRS.

Where a mortgagee went into possession of land, he could not recover for permanent improvements placed upon the property by him, but was entitled to the costs of any ordinary repairs while he had possession, and he was chargeable with rents and profits in excess of the mortgaged debt.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 517-519, 522, 537, 538, 539-543; Dec. Dig. \S 199(3), 202, 203.]

2. MORTGAGES \S 211—RIGHTS OF PARTIES—POSSESSION BY MORTGAGEE—LIENS.

A mortgagee in possession is not entitled to a lien on the land for any amount due him by the mortgagor for the board of the mortgagor's sons during such possession.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 465; Dec. Dig. \S 211.]

3. INJUNCTION \S 128—ACTIONS—EVIDENCE.

In a suit to enjoin the foreclosure of a mortgage, evidence held to sustain a contention of the plaintiff that the value of repairs placed upon the property by the mortgagee in possession did not exceed \$25, and not to sustain the claim of the mortgagee and the judgment of the trial court for \$68, for such repairs.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. \S 278; Dec. Dig. \S 128.]

4. INJUNCTION \S 128—ACTIONS—EVIDENCE.

In a suit to enjoin the foreclosure of a mortgage, the preponderance of the evidence held to be against the claim of the defendant mortgagee for a sum due him for board of the mortgagor's sons while the mortgagee was in possession of the land.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. \S 278; Dec. Dig. \S 128.]

Appeal from Union Chancery Court; Jas. M. Barker, Chancellor.

Action by J. E. Morgan against J. K. Mahony, trustee, and another. From a decree for defendants, plaintiff appeals. Reversed and remanded, with directions.

Geo. M. LeCroy, Aylmer Flenniken, and Nell C. Marsh, all of El Dorado, for appellant. Mahony & Mahony, of El Dorado, for appellees.

HART, J. On January 4, 1913, J. E. Morgan instituted this action in the chancery court against J. K. Mahony, trustee, and Jas. Young, to cancel a certain mortgage on real

estate executed by him and to restrain J. K. Mahony, as substituted trustee, from proceeding further in the foreclosure of said mortgage or deed of trust. The material facts are as follows: J. E. Morgan owned 40 acres of land in Union county, Ark., and on the 4th day of January, 1907, executed to B. W. Reeves a deed of trust conveying said land to W. G. Pendleton as trustee to secure an indebtedness of \$200 due Reeves on November 1, 1907. Morgan made payments from time to time until on the 4th day of January, 1909, the balance due amounted to \$41, and on that date Jas. Young purchased said note and mortgage from B. W. Reeves and had the same assigned to him. Young went into possession of the land and collected rents therefor in the sum of \$87. He claims that he paid \$70 of this to make needed improvements on the place. Morgan and Young were brothers-in-law. Young claims that Morgan left his two minor sons with him to be boarded by him for the sum of \$.50 each per day; that their father told him to take possession of the 40-acre tract in question, collect the rents, and apply the same toward the board of the boys. Young states that he did this, and that, after deducting the necessary repairs, there was only left the sum of \$17, which he applied toward the payment of the board of the boys; that after deducting this amount, and the amount paid him by the boys themselves, Morgan owed him a balance of about \$334 on their board. Young claimed that he had a lien on the land for this amount, and in 1911 he appointed J. K. Mahony, as substituted trustee, to foreclose the mortgage under the power of sale contained therein to satisfy this sum and the \$41 due on the mortgage debt. Mahony duly advertised the land for sale under the power contained in the mortgage, and Young became the purchaser at the sale. As before stated, Morgan instituted this action to cancel the mortgage or deed of trust executed by himself to Reeves, and to restrain Mahony from executing a deed to Young in the foreclosure proceeding under the power of sale contained in the mortgage. He introduced evidence tending to show that the repairs made by Young on the place were worth only about \$15 and at most \$25. He denied that he had made any contract with Young to board his sons, and denied that he had authorized him to take possession of the rents of the mortgaged premises for the purpose of paying their board.

The chancellor found that Morgan owed \$61 on the mortgage debt, that he owed Young for improvements on the land \$68, and board bill for his sons, not barred by the statute of limitations, of \$120, making a total of \$249; that Morgan is entitled to a credit of \$87 for rents collected by Young, leaving him owing Young a balance of \$162, for which judgment was rendered in favor

of Young on his cross-complaint. The chancellor found that Young had a lien upon the land described in the mortgage to secure the \$61 balance found to be due on the mortgage debt, and that he was also entitled to a lien on the land to secure the payment of \$101 with the accrued interest, being the amount found to be due for repairs and the board bill. A decree was entered in favor of Young in accordance with the finding of the chancellor, and the plaintiff, Morgan, has appealed.

[1, 2] The principles of law governing the case are simple. Of course, Young had a lien on the land by virtue of the mortgage for whatever remained due on the mortgage debt. When he went into possession of the land as mortgagee, he could not recover for permanent improvements placed upon the property by him, but was entitled to the costs of any ordinary repairs made by him while he had possession, and he was chargeable with rents and profits in excess of the mortgage debt. *Green v. Maddox*, 97 Ark. 397, 134 S. W. 981. He was not entitled to any lien on the land for any amount that might be owed him by Morgan for the board of his sons. It is contended by Young that Morgan placed his sons to board with him and told him to take his pay out of the rents of the land. Even if the testimony of Young, in this regard, be considered as true, he would not have any lien on the land for the payment of the board of the sons of Morgan. The most he could claim would be the right to apply the rents while he was in possession of the land toward the payment of the board of the boys. Hence it will be seen that the chancellor's decree was based upon the wrong idea of the law as applied to the facts found by him. In other words, assuming the facts found by him to be correct, Young was only entitled to a foreclosure for the balance due him on the mortgage.

[3] We are also of the opinion that the chancellor's finding of facts was against the clear preponderance of the evidence. Young admits that he collected rents to the amount of \$87. He also testified that he made needed repairs costing him \$70. Other witnesses, who lived in the neighborhood, testified that the only repairs made by him was to fix the fences. Several of the witnesses testified that these repairs were not worth more than \$15, and the others placed them at \$25 at the most. We think the sum of \$25 was the highest amount which the chancellor should have allowed for repairs. This left a balance of \$62, which was more than the amount of principal and interest due on the mortgage debt.

[4] In regard to the board bill claimed by Young, we think the clear preponderance of the evidence is against him. He testified that he purchased the mortgage from Reeves in January, 1909, and took possession the next year after that. He said that Claude Morgan began to board with him on August

15, 1908, and remained until August 15, 1910; that Tom came to board with him June 20, 1909, and boarded until October, 1910; that he sent the boys to school a little over four months, or maybe not so much; that there is a balance due on the board bill of about \$334.70. His daughter and son corroborated him in his statement that Morgan made a contract with their father to pay the board of his children and agreed to pay therefor \$50 a day for each one. On the other hand, Morgan flatly contradicted this testimony and is corroborated by one of his sons. He said that he left there in 1907 and went to another county. In this respect he is not contradicted. He denied that he made any agreement whatever with Young to board his boys. He said that his boys were working for themselves and paid their own board; that he permitted them to collect their wages and did not interfere with them in the management of their own affairs. In this respect he is corroborated by the testimony of both of his sons. They testified that, for the most of the time they boarded at their uncle's, they worked at mills in the neighborhood and received as wages \$1.25 per day each. They said they paid their uncle \$3 a week for their board out of their wages, and that they did not owe him anything, either for board or for anything else. They said they knew their uncle had charge of the land and collected the rents during a part of the time they boarded with him, but stated that he told them that he had bought the land from their father, and they believed him.

It will be noted that Morgan left the county in 1907, and left his sons there. They began to board around at different places and named the people they boarded with after the father left. They gave the names of the persons for whom they worked and the wages they received. It would have been very easy for Young to have contradicted their testimony had it not been true. Several witnesses testified that both Morgan and Young had a bad reputation for truth and morality in the neighborhood where they lived.

Young exhibited an account book made out with a pencil, which he claimed that he kept during the time his nephews boarded with him. The original book is exhibited to us. It is torn in many places and shows that the accounts of the two boys were kept separately. It is the contention of Young that Morgan made a contract with him to board both his sons, yet the account book showed that he kept separate accounts. This in itself tends to corroborate the testimony of the boys to the effect that each made his own contract for board and paid it. Young himself admits that one of the boys did not begin to board with him until the 15th of January, 1908, and that the other did not

come until June 20, 1909. Morgan left the county in 1907, and it is not likely that he would have made a contract so far in advance for the board of his sons. When Morgan left the county, his sons went to board with other persons and paid their own board. It was more than a year before they went to board with their uncle. This tends to show that the boys earned their own living and it was not necessary for their father to have made a contract for their board.

We have not attempted to set out all the testimony in detail, but we have considered it carefully and are of the opinion that a clear preponderance of the evidence shows that the boys paid their own board and that Morgan did not owe Young anything on that account.

From the views we have expressed it results that the chancellor erred in not granting the relief prayed for by the plaintiff, Morgan, and for that error the decree will be reversed, and the cause remanded, with directions to the chancellor to enter a decree in accordance with this opinion.

ST. LOUIS SOUTHWESTERN RY. CO. v. CARMACK. (No. 80.)

(Supreme Court of Arkansas. June 26, 1916.)

1. NEGLIGENCE \S 103½ — ACTIONS — WHAT LAW GOVERNS.

Where plaintiff was injured in Texas, her right of action is governed by the law of that state.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 170; Dec. Dig. \S 103½.]

2. RAILROADS \S 348(4) — INJURIES TO PERSON NEAR TRACK — SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a verdict that defendant railway was negligent in not giving proper signals and keeping a lookout for plaintiff, who was standing near the track in a street.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1142; Dec. Dig. \S 348(4).]

3. RAILROADS \S 350(16) — INJURIES TO PERSON NEAR TRACK — CONTRIBUTORY NEGLIGENCE.

While failure to look and listen when near a railroad track is negligence per se according to the Arkansas rule, such failure is not negligence per se according to the Texas rule, but requires submission to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1169, 1171, 1174; Dec. Dig. \S 350(16).]

4. RAILROADS \S 348(6) — INJURIES NEAR TRACK — SUFFICIENCY OF EVIDENCE — CONTRIBUTORY NEGLIGENCE.

Evidence held to sustain a verdict that plaintiff was not guilty of contributory negligence, when run down by a railway train while standing on a street crossing and absorbed in watching a frightened horse.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1144, 1149; Dec. Dig. \S 348(6).]

5. DAMAGES \S 208(3) — EXTENT OF INJURY — EVIDENCE.

Submitting the question of plaintiff's permanent injury and deformity to the jury is not error, where there was evidence that a hip fracture

had shortened her leg, and that a physician considered the injury permanent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 533, 534; Dec. Dig. § 208(3).]

Appeal from Circuit Court, Miller County; Geo. R. Haynle, Judge.

Action by Mrs. B. J. Carmack against the St. Louis Southwestern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Perkins, of Dallas, Tex., Glass, Estes, King & Burford, of Texarkana, Tex., and Gaughan & Sifford, of Camden, for appellant. James D. Head, of Texarkana, for appellee.

McCULLOCH, C. J. [1] Mrs. B. J. Carmack, an elderly lady, received personal injuries by being struck by one of the defendant's moving trains, and she instituted this action to recover compensation for said injuries. The occurrence which resulted in plaintiff's injuries was on the Texas side of the city of Texarkana, and plaintiff's right of action is governed by the laws of the state of Texas. *St. L., I. M. & S. Ry. Co. v. Brown*, 67 Ark. 295, 54 S. W. 865.

[2] Plaintiff went to Texarkana with her husband for the purpose of meeting her son, who was expected to arrive on the train. They drove in from the country in a two-horse wagon, and the wagon was stopped in the street along which the railroad track ran. When the train came in, Mrs. Carmack crossed the track and went over to the station to meet her son and his wife and children, and when they debarked from the train she accompanied them back across the railroad track to the wagon where her husband had remained to look after the team. There was a light shower of rain falling at the time, and Mrs. Carmack suggested to her husband that he raise an umbrella to keep the things in the wagon from getting wet, and when the umbrella was raised the team took fright and started to run. Mrs. Carmack was standing near enough to the track to be hit by the pilot beam when the engine approached. Her contention is that she was standing there watching her husband handle the frightened team, and that she did not move until she was struck by the pilot beam of the engine. The testimony of other witnesses which she introduced tends to support her statement. On the other hand, it is contended by the defendant that Mrs. Carmack suddenly moved or staggered back in order to get out of the way of the wagon, and threw herself against the passing engine or in front of it as it approached, too late for any effort to be made to prevent injuring her. The principal contention is that the evidence is not sufficient to sustain the verdict, but it seems clear to us that there was sufficient evidence to justify a submission of the issues to the jury. The evidence was sufficient

to warrant a finding that the men in charge of the moving engine were not keeping a proper look out, and gave no signals by bell or whistle, and that if they were keeping a look out, they discovered the presence of Mrs. Carmack in a perilous position near the track and could have taken some steps to have averted the injury. There is no lookout statute in the state of Texas similar to the one that is in force in this state, but it was a question for the determination of the jury whether, under all the circumstances, the servants of the company were guilty of negligence in failing to discover the presence of Mrs. Carmack in a position of peril. The track ran along the public street in the city of Texarkana, and it was therefore the duty of the railroad company to exercise ordinary care to avoid injuring pedestrians rightfully occupying the street.

[3] It is also insisted that plaintiff was guilty of contributory negligence which prevents recovery. It seems, too, that the rule of law established by decisions of this court, making it negligence per se for a traveler to fail to look and listen for approaching trains when near to or about to cross a track, does not obtain in the state of Texas; but the law as established by numerous decisions of courts of Texas is that it becomes a question of fact for the determination of the jury whether or not a traveler, under the circumstances of a case, is guilty of contributory negligence in failing to look or listen.

[4] The evidence in this case, putting it in the strongest light favorable to the plaintiff, is to the effect that she was standing close to the track and was absorbed in watching her husband handle the frightened team. She was standing in the middle of the public highway, and had the right to some extent to assume that signals of the approach of trains would be given, and there is evidence to the effect that no signal was given at all. Our conclusion is therefore that there is sufficient evidence to sustain the verdict.

[5] The only other assignment of error concerns an instruction on the measure of damages. The principal objection here to the instruction is that it erroneously directed a consideration of the questions of permanent injury and deformity of the person of the plaintiff. There is evidence which warrants the submission of both of those issues to the jury. Plaintiff sustained a fracture of the hip joint, and an X-ray examination disclosed the fact that the limb had been shortened an inch and a half, and the physician introduced as an expert gave it as his opinion that the injury was permanent. Plaintiff testified herself that her limb had been considerably shortened by the injury, and that she had to limp when she walked, and that she suffered considerable pain. The jury assessed damages at the sum of \$1,000 and it may fairly be assumed

that that did not include permanent injuries. The testimony is abundant to support a recovery for that amount.

Judgment affirmed.

NEELY et al. v. WILMORE. (No. 74.)

(Supreme Court of Arkansas. June 19, 1916.)

1. APPEAL AND ERROR §927(7)—DIRECTION OF VERDICT—EFFECT.

On appeal from a direction of the verdict, the evidence must be viewed in the light most favorable to appellants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8748; Dec. Dig. §927(7).]

2. EXCEPTIONS, BILL OF §22—CONTENTS—PAPERS OFFERED TO BE PROVED.

Where offered evidence is excluded as not proving a proper subject of counterclaim, papers whose form is immaterial, constituting part of such evidence, need not be copied into the bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 12-15, 19, 29; Dec. Dig. §22.]

3. PRINCIPAL AND AGENT §84—COMPENSATION—DEDUCTION AND FORFEITURE.

Where an agent is guilty of fraud, dishonesty, and unfaithfulness in the transaction of his agency, such conduct is a bar to his recovery of compensation.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 221; Dec. Dig. §84.]

4. SET-OFF AND COUNTERCLAIM §29(1) — SUBJECT-MATTER—TORT—DAMAGES IN CONTRACT ACTION—"COUNTERCLAIM."

In action by agent for compensation, loss alleged to have been sustained by the principal from agent's unfaithful discharge of the contract on which he sues is a proper subject of counterclaim under Kirby's Dig. § 6099, providing that a "counterclaim" must be a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, whether such acts are considered as torts or breaches of contract duties.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 49; Dec. Dig. §29(1).]

For other definitions, see Words and Phrases, First and Second Series, Counterclaim.]

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Action by William Wilmore against J. C. Neely and others. From a judgment for plaintiff, defendants appeal. Reversed.

S. M. Neely, of Memphis, Tenn., and Bevens & Mundt, of Helena, for appellants. Fink & Dinning and Andrews & Burke, all of Helena, for appellee.

SMITH, J. Appellee sued for a sum of money alleged to be due him as wages as plantation manager on a farm owned by appellants for the years 1912, 1913, and 1914 under an express contract. Appellants filed a counterclaim, in which they alleged that appellee had wrongfully and without authority overpaid one R. E. Harrison for services as bookkeeper. The proof was that appel-

lants themselves employed Harrison, who was their kinsman, and fixed his salary, and appellee testified that he did not know the amount of the salary. It was shown, however, that the salary was paid with drafts signed by appellee payable to the order of Harrison and drawn on Sternberg, Mallory & Co., of Memphis, Tenn., and cashed at a bank at Friars Point, Miss., pursuant to an arrangement for appellee to thus procure money for plantation uses. Appellants offered evidence in support of their counterclaim, whereupon appellee's counsel objected and stated to the court:

"Your honor, they allege that Mr. Wilmore has been negligent in his duties as manager, and they are setting up a counterclaim in tort, as a counterclaim in a suit on a contract, and it is my idea that that cannot be done. They charge that he was guilty of negligence in the management of the affairs, and that is a tort, and we will therefore resist any testimony going to the jury showing, or tending to show, the character of any claims arising out of a tort committed by Mr. Wilmore. This is a suit on contract, and the counterclaim, if considered in this case, should arise out of the contract sued on in this case, and they come into court and bring suit on a tort, an action for a tort, and attempt to set same up as a counterclaim to this action on contract."

The court adopted this view and excluded the evidence, whereupon the appellants offered to prove that;

"Appellee drew drafts signed by himself, payable to the order of R. E. Harrison, on the Sternberg, Mallory & Co., at various times and on various dates as alleged in the answer in this case, said drafts showing on their face that they were for the purpose of paying the salary of R. E. Harrison, and that by reason of said overdrafts drawn by this plaintiff R. E. Harrison overdraw his salary account in the sum of \$1,938, and offer the drafts in evidence. We also offer to introduce in evidence other drafts of the same description showing the amount of \$4,200 paid to Mr. Harrison for which there was no accounting. We offer this evidence: First, for the purpose of showing that the plaintiff was unfaithful in the discharge of his duties connected with his agency; and, second, for the purpose of showing that by reason of such conduct on the part of the plaintiff the defendant suffered a loss in the figures just named, and this loss grew out of the same transaction upon which this suit is brought."

Exceptions were duly saved to the action of the court in refusing appellants permission to make this proof. Thereupon, there being no dispute as to the amount of salary due appellee, the court directed a verdict for that amount, and this appeal questions the correctness of that action.

Appellee argues that the action of the court was correct, because he testified, and there was no contradiction of his evidence, that he did not know what the amount of salary due Harrison was, and he could not, therefore, have known whether his salary account was overdrawn, and that appellants should not have paid, nor permitted to be paid, any drafts which would result in making the account overdrawn.

[1] A verdict having been directed against

appellants, we must view the evidence in the light most favorable to them, and must therefore assume that appellee exceeded his authority in this respect; and it can be no answer for appellee to say that he did not know the amount due. Unless he had this information, he should not have drawn the drafts.

[2] Appellee argues that, inasmuch as the drafts have not been copied into the bill of exceptions, the judgment must be affirmed. But we cannot agree with him in this contention. The form of the drafts is immaterial, and no question was made on that account. They merely evidenced the extent or amount to which appellee had permitted Harrison to overdraw his account, and the court excluded this evidence on the ground that it was not a proper subject of a counterclaim, and the correctness of this view presents the controlling question in the case.

[3] In the case of *Doss v. Long Prairie Levee District*, 96 Ark. 451, 132 S. W. 443, a suit was brought by the assignee of a certificate of indebtedness issued by the levee district, which answered and admitted the execution of the certificate, but alleged that its agent to whom it was issued had been guilty of fraud in the transaction of his agency. It was there said:

"The rule is well settled, both by the text-writers and the adjudicated cases, that where the agent is guilty of fraud, dishonesty, or unfaithfulness in the transaction of his agency, such conduct is a bar to the recovery by him of wages or compensation. (Citing cases.)"

[4] In that case, as in this, the point was made that the defendant sought to set off unliquidated damages flowing from a tort by way of counterclaim; but, while it was not expressly decided, the opinion shows the view of the court to have been that such damages were the subject of a counterclaim.

Our statute on the subject of counterclaim is as follows:

"Sec. 6099. The counterclaim mentioned in this chapter must be a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action."

This section has frequently been before the court for construction, and one of the leading cases on the subject is that of *Dale v. Hall*, 64 Ark. 221, 41 S. W. 761. The syllabus in that case is as follows:

"Counterclaim—Connection with Subject of Action.—Where a tenant in common, having control of the renting of the premises held in common, is sued by his cotenant for his share of the rents, he may counterclaim against the cotenant damages sustained by him because the latter wrongfully induced lessees of such premises to leave before their leases expired, and thereby caused him to lose his share of the rents which would have accrued but for such interference."

As illustrative of the causes of action which may be set up in a counterclaim, see,

also, *Ramsey v. Capshaw*, 71 Ark. 408, 75 S. W. 479; *Daniel v. Gordy*, 84 Ark. 218, 105 S. W. 256; *Stevens v. Whalen*, 95 Ark. 488, 129 S. W. 1081; *Smith v. Price*, 102 Ark. 367, 144 S. W. 206; *Epstein v. Buckeye Cotton Oil Co.*, 106 Ark. 247, 153 S. W. 587; *Brunson v. Teague*, 186 S. W. 78.

Section 6099 of Kirby's Digest (which was section 5034 of Mansfield's Digest) was construed by the Court of Appeals of Indian Territory in the case of *Patterson v. Bradley*, 4 Ind. T. 124, 69 S. W. 821; the syllabus of that case being as follows:

"1. Under Mansf. Dig. § 5034 (Ind. T. Ann. St. 1899, § 3239), providing that a counterclaim must be a cause of action in favor of the defendant against the plaintiff arising out of the contract or transaction set forth in the complaint, in an action to recover for threshing defendant's grain, his claim against plaintiff for damages for negligently setting fire to and burning other grain while doing such threshing may be set out in the answer as a counterclaim."

Appellants allege the loss they sustained grew out of appellee's unfaithful discharge of the contract on which he sues, and, whether the loss thus sustained is considered as a tort or as a breach of the reciprocal and implied duties under the contract, the cause of action arises out of transactions had under the contract sued on, and are therefore the proper subject of counterclaim.

It follows, therefore, that the court erroneously excluded this evidence, and consequently erred in directing a verdict, and the judgment of the court below must therefore be reversed.

SOUTHERN WOODMEN v. DAVIS. (No. 66.)

(Supreme Court of Arkansas. June 19, 1916.)

1. INSURANCE — 789(1) — FRATERNAL INSURANCE—PROOF OF DISABILITY—FALSE DIAGNOSIS.

Where a member of a fraternal insurance society furnished proof of disability upon blank forms prescribed by the home office of the society, which proofs tended to show he was permanently and totally disabled, his right to recover was not defeated because his physician erroneously diagnosed his affliction as tuberculosis while the disease in fact was interstitial nephritis, the cause of the disability being merely incidental, and the fact being the substantial matter.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1963, 1964; Dec. Dig. — 784(1).]

2. APPEAL AND ERROR — 882(12) — INSTRUCTION—ACQUIESCENCE.

The act of defendant in requesting an instruction substantially the same as one given plaintiff was an acquiescence in the latter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. — 882(12).]

3. INSURANCE — 787—FRATERNAL DISABILITY INSURANCE—OCCUPATION OF INSURED.

The terms of a fraternal insurance society's policy, providing for payment of a benefit upon total disability, do not apply solely to the particular occupation named in the member's application, unless the language thereof is sufficient

to constitute the statement regarding his occupation a warranty, not only that the plaintiff is engaged in such work, but will continue so engaged.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1955, 1957-1959; Dec. Dig. § 787.]

4. TRIAL §343—REVIEW—VERDICT.

Where there is evidence to sustain plaintiff's cause of action, a material issue must be treated as settled by the verdict of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809-812; Dec. Dig. §343.]

Appeal from Circuit Court, Grant County; W. H. Evans, Judge.

Action by E. Garner Davis against the Southern Woodmen. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

N. A. McDaniel, of Benton, for appellant. Thos. E. Toler, of Sheridan, and W. D. Brouse, of Benton, for appellee.

MCCULLOCH, C. J. The plaintiff, E. G. Davis, instituted this action against the Southern Woodmen, a fraternal insurance society, to recover on a benefit certificate which provides for the payment of a benefit in the case of death of a member or "guest," as he is termed in the contract, and also that:

"On satisfactory proof of total and permanent disability at any age, this guest shall receive the value of this covenant at the time of such disability."

The amount to be recovered was, under the terms of the contract, graduated according to the length of continuous membership, and in this instance the amount to be recovered in case of total disability was the sum of \$1,700. On trial of the case below, the plaintiff recovered judgment for the sum named, and the defendant has appealed to this court.

The evidence shows that the plaintiff is 55 years of age, and was a farmer in Grant county, Ark., and was sometimes engaged in the logging business. He was entirely uneducated, being unable to read or write. He became ill, and subsequently made application to the society, through the officers of the local organization of which he was a member, for the payment provided in case of total and permanent disability. Blanks were sent from the home office at Birmingham for proof of loss, and those blanks were filled out in due form and forwarded to the home office. The proof tended to show a total and permanent disability, but the ailment disclosed in the examination of the physician was shown in the affidavit of the physician to be tuberculosis. The society caused an examination to be made by another physician, who failed to find any indications of the disease named, and refused payment, whereupon this suit

was commenced to recover the amount. The proof adduced by the plaintiff tends to show not a case of tuberculosis, but of interstitial nephritis or Bright's disease. The evidence was sufficient to establish the fact that the plaintiff is incurably afflicted with that disease, and that he is totally and permanently incapacitated from any kind of manual labor such as is necessary to carry on his business of farming or logging. Plaintiff introduced several physicians, who examined him and testified in support of his claim of total disability. The evidence does not show that plaintiff is absolutely helpless, but it does show that he is unable to perform any manual labor pertaining to the duties of his occupation, or of any other occupation as for that matter.

[1] The first and principal contention of the defendant is, on this appeal, that the plaintiff was not entitled to recover because he did not furnish satisfactory proof of loss. The contention is that plaintiff's case must fail because he sent in proof of disability on account of tuberculosis, and that he subsequently abandoned that and undertook to prove that he was suffering from another disease which caused his alleged total disability. We do not think there is any merit in defendant's contention, for it simply comes down to the point whether or not the plaintiff is bound by the diagnosis of the physician as to the cause of his disability. He furnished proof upon blank forms prescribed by the home office of the society, and those proofs tended to show that he was permanently and totally disabled, and his right to recover is not defeated because there was an error made by the physicians in the diagnosis of his case. The point sought to be established by the proof of loss furnished was that he was disabled, and the cause of the disability was merely an incident, and if there was an error in that respect, it did not prevent recovery of the amount which the proof in the trial of the case shows that the plaintiff was entitled to. He was not, in other words, limited to the testimony set forth in the proof of loss in establishing the cause of his disability. Eminent Household of Columbian Woodmen v. Hewitt, 184 S. W. 52.

Defendant's erroneous contention runs through the instructions which were asked concerning the proof of loss, and what we have said disposes of the assignments of error in that regard.

It is further contended that the court erred in giving plaintiff's instruction No. 3, which reads as follows:

"You are instructed that if you find from a preponderance of the evidence that the plaintiff was totally and permanently disabled at the time of the institution of this suit, he is entitled to recover in this action; and if he was unable to do any substantial portion of the occupation or occupations which he had been accustomed to following, and that such inability is permanent, then he was totally and permanently disabled

under the policy upon which this suit was instituted."

[2] The court gave, at the request of the defendant, an instruction which we think is substantially the same as the instruction just quoted, and we scarcely deem it necessary to discuss the correctness of those instructions, for the reason that the giving of substantially the same instruction at defendant's request was an acquiescence in the one given by the plaintiff. There seems to be a conflict in the authorities as to whether or not, under a policy providing for payment in case of total disability without reference to any particular occupation, it is sufficient merely to show disability concerning the particular occupation in which the disabled party was then engaged. We have several decisions of this court which throw some light on the question, but they are not entirely decisive of the particular question now suggested. *Maryland Casualty Co. v. Chew*, 92 Ark. 276, 122 S. W. 642; *Industrial Mutual Indemnity Co. v. Hawkins*, 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635, 21 Ann. Cas. 1029; *Brotherhood of L. F. & E. v. Aday*, 97 Ark. 425, 134 S. W. 928, 34 L. R. A. (N. S.) 126.

[3] Defendant specifically objected to the instruction No. 3 on the ground that it referred to the occupations which the plaintiff was accustomed to engaging in, instead of "the occupations named in plaintiff's application." Counsel for defendant have not abstracted the application, if, indeed, the application appears at all in the record, but we assume from the argument that the application stated the occupation of the plaintiff to be that of a farmer. We do not think, however, that the terms of the policy apply entirely to the particular occupation named in the application, unless the language is sufficient to constitute the statement as a warranty, not only that the plaintiff is engaged in that work, but will continue to do so. However, there is nothing in the instruction which excludes the idea that it covered the occupation mentioned in the application, for the instruction uses a broader term in referring to "occupation or occupations which he had been accustomed to following." The proof, if sufficient to establish a total and permanent disability at all, shows that plaintiff was disabled, not only from the occupation mentioned, but from all other pursuits.

[4] The evidence adduced in the case, when considered as a whole, makes it very doubtful whether plaintiff was in fact permanently and totally disabled within the meaning of the policy, but there was evidence to sustain the plaintiff's cause of action, and the issue must be treated as settled by the verdict of the jury. We are of the opinion that the case was submitted to the jury upon correct instructions. That being true, it follows that the judgment must be affirmed. It is so ordered.

MORGAN CO. et al. v. BUENA VISTA VENEER CO. et al. (No. 41.)

(Supreme Court of Arkansas. June 5, 1916.)

1. FRAUDULENT CONVEYANCES \S 159(2)—INSOLVENCY OF GRANTOR — KNOWLEDGE OF GRANTEE.

The grantee of a corporation which transferred to him every vestige of its property was bound to know that the transfer rendered the company insolvent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. \S 507, 508; Dec. Dig. \S 159(2).]

2. FRAUDULENT CONVEYANCES \S 57(3)—CONVEYANCE TENDING TO DECEIVE CREDITORS.

A corporation's conveyance of its property to its creditor under several unrecorded agreements, providing that if the property sold for more than the indebtedness mentioned the surplus should be returned to the company's president without requiring it paid upon the company's other indebtedness, expressly stipulating that it should not be considered as a mortgage, was calculated to deceive creditors of the corporation and to lead them to believe that no part of the property was subject to their demand, and voidable, since the right to redeem is an interest of value, and to reserve it in such a way as leaves it altogether in confidence between the parties, tends to delay, hinder, and defraud the latter.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. \S 148; Dec. Dig. \S 57(3).]

3. CORPORATIONS \S 544(1) — INSOLVENCY — PREFERENCE—STATUTE.

By Kirby's Dig. \S 949, insolvent corporations cannot prefer their creditors, and a conveyance that has such effect is fraudulent and void as to the latter.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. \S 2167-2169; Dec. Dig. \S 544(1).]

Appeal from Prairie Chancery Court; Jno. M. Elliott, Chancellor.

Suits by the Morgan Company and the S. H. Smith Company against the Buena Vista Veneer Company and Charles W. Elmes, and by Charles W. Elmes against Herman Romunder, the Buena Vista Veneer Company, the Morgan Company, the S. H. Smith Company, and others. From a decree for the Buena Vista Veneer Company and Charles W. Elmes the Morgan Company and the S. H. Smith Company appeal. Decree reversed, and cause remanded, with directions to enter a decree in favor of each appellant.

Appellant Morgan Company brought suit on June 30, 1914, against appellees upon a note of the Buena Vista Veneer Company, dated January 5, 1914, and caused an attachment to be issued against certain property transferred by said company to Charles W. Elmes, which transfers were alleged to be fraudulent and prayed to be set aside as made in fraud of creditors. On September 29, 1915, the S. H. Smith Company, appellant, brought suit against the same parties for \$66,500 due on account by the Veneer Company, and alleged that the transfers of the property from the Veneer Company to Elmes were fraudulent, and caused an attachment

to be levied upon the mill site of the Veneer Company that had been included in said transfers to Elmes. Afterwards Charles W. Elmes brought suit against Herman Romunder, who was president of the Veneer Company, the Buena Vista Veneer Company, the appellant companies, and several others, alleging that the two sets of transfers of property from the Veneer Company to himself were to secure valid debts due him, and constituted an equitable mortgage, and prayed a foreclosure thereof. He answered the complaints of appellants, denying the allegations thereof, and filed a copy of his complaint in the foreclosure suit as a cross-complaint, in each of their suits. Appellants answered, denying the allegations of the complaint in the foreclosure suit, which were confessed by Romunder and the Veneer Company, and also the cross-complaints, and all the suits were consolidated and heard together. The Veneer Company on the 21st day of March, 1914, after receiving \$2,500 from the Morgan Company as an advance for the purchase of veneer lumber stock, for which the Buena Vista Veneer Company executed its note, a deed, and bill of sale, absolute in terms, of its manufacturing plant to Charles W. Elmes, appellee, who leased the plant back to the company, which continued to operate it for a short while, and shipped one car of veneer upon the contract with Morgan & Co., the proceeds of which was credited on the note, leaving a balance due of \$2,002.54.

Prior to the 26th day of May, 1914, the Veneer Company ceased operating the manufacturing plant, and on that day executed a supplementary agreement, contract, and bill of sale, by which it conveyed in absolute terms all of the property it owned not transferred in the March bill of sale to said Charles W. Elmes, forfeited and surrendered its lease, and all the stockholders of the Veneer Company, who had previously indorsed, transferred, and delivered to said Charles W. Elmes every share of stock of the corporation allowed their time to redeem to lapse. Upon the first information Morgan Company had of these transfers, it diligently took the matter up, and wrote to Mr. Elmes that it had been informed by a commercial agency of his purchase of the Buena Vista plant at Des Arc, asked a confirmation of the report, and explained its interest in the matter by informing of the \$2,500 advance to and due from the company. Elmes replied to this letter on the 29th of May evasively, saying he did not buy the business, and was not interested in the manufacturing part of the company, and not in a position to give the desired information. His attorney, E. C. Ferguson, on June 2d, answering a letter of the Morgan Company to C. W. Elmes, stated it was referred to him, calling attention to the debt of \$2,500, and said they were not responsible in any way for the Veneer Company, but naturally interested in keeping

track of its doings. He also mentioned receiving a letter from Des Arc, informing that Morgan Company had sent an order to be filled, saying:

"He had advised them that the shipper of the material must have its dealings direct with you as they are going to turn the order over to another mill to fill, and he was giving the information in advance that the shipment would not be the property of the Buena Vista Company, nor credited on its account."

Appellant also wrote to the Buena Vista Veneer Company at South Bend, Ind., to Herman Romunder, the president of the company, at the same address, and received from him on July 1st a letter, stating he had received on his return from an extensive trip their letters and telegrams, which had not been answered because he was out of town, and—

"after disposing of my holdings in the Buena Vista Veneer Company to Mr. C. W. Elmes of Chicago, I have been attending to other business." "Regretted that the condition at the plant, which he had formerly controlled, had required him to give it up and thought that the plant would be operated again very shortly and be able to take care of all the business that came to it."

A written agreement was made between Herman Romunder and Charles W. Elmes on the 21st day of March, 1914, reciting an indebtedness from Romunder to Elmes "due and owing by Romunder," and that he desired to procure further money and additional advances from Elmes to induce him to perform certain conditions set out and to secure the payment of the indebtedness of the first party, Romunder, and expend further money in his behalf and provide for the payment of moneys now due and other moneys to be advanced. In consideration of \$1 the first party, Herman Romunder, agreed to deed 761 acres of land in Woodruff county and 160 in Prairie, and that the corporation, the Veneer Company, would execute a deed to the mill site, "and for the further consideration of the cancellation of the following indebtedness due and owing by Herman Romunder to Elmes, approximating \$21,000 and also to the State National Bank and others, etc.," reciting an agreement as to the payment of certain other debts, and that Elmes was to furnish the money to pay certain creditors in order that Romunder might be released. He (Romunder) agreed to procure the consent of the Buena Vista Veneer Company to continue its liability on certain paper, and through the corporation to pay said indebtedness himself, but if it could not be done, Elmes was to pay it; to procure a deed from the company to Elmes of the mill site and a bill of sale of all the corporate assets, except the manufactured veneer, logs, notes, and accounts receivable and a transfer of the insurance policies. He agreed—

"as an inducement to the execution of the contract, that the moneys obtained from said Elmes, the banks, and Daley were used by and for the benefit and purchase of property and conduct of

business of the company, although it appears that some of said indebtedness is represented by notes executed by Herman Romunder individually"; "that the notes due the banks and Daley may be assigned to Elmes without recourse, Elmes to protect Romunder from any liability of payment of same, it being the intention to continue the liability of the Veneer Company on said notes in order to evidence the liability of said company for the moneys received, either by the corporation or said Romunder at the time the moneys were procured."

He was also to procure the indorsement of his own and all the other stockholders' stock in the Veneer Company and transfer and deliver same to Elmes as additional security, and if the contract expired by limitation, the stock was to become the absolute property of Elmes at his election, but if Romunder paid the \$40,000 when due, the stock was to be surrendered to him. Elmes agreed to surrender to the first party a note due June 1, 1913, for \$20,500 and interest, and accept the deeds and conveyances in payment and satisfaction of the \$40,000 due and owing by the said Herman Romunder and the Buena Vista Veneer Company to him. It was also stipulated:

"It is mutually agreed between the parties that this agreement shall not in any wise be construed as a mortgage."

Elmes agreed that if the debt was paid within the year, to transfer the property back to Herman Romunder or to whomsoever he may direct, and if payment was not made within the year from date, the contract was to be void, and Romunder's rights canceled. It was mutually agreed that Romunder was to lease the plant in his name or in the name of the company and operate it for one year, but if it was closed down for 30 days, beginning five months after the date of the instrument, Elmes was to take possession of the plant and Romunder released all claims under the contract. The agreement was made binding upon the heirs and executors of both parties, and signed by "Herman Romunder, President," and by Charles W. Elmes. Below the signatures follows the indorsement:

"For one dollar and other valuable considerations the Buena Vista Veneer Co. hereby consents to become a party to the agreement and agrees to execute deeds and other papers as may be necessary to make the same effective.

"[Signed] Herman Romunder, President.
"Cannie W. Jones, Secretary."

* This instrument was not acknowledged. Romunder and wife conveyed the lands to Elmes, and the Veneer Company conveyed the mill site and the plant. On the 26th day of May, another agreement was entered into between Herman Romunder, party of the first part, and Charles W. Elmes, reciting the making of the agreement of the 21st of March, relating to the conveyance of the property and payment of the debt, and privileges of Romunder in regard to the sale of the mill site, etc.—

"and for the purpose of creating a supplemental agreement affecting a part of said contract, and

except in so far as modified hereby, the original agreement stands."

One dollar and other considerations are recited, and "it is agreed that the plant has been closed down more than 30 days;" that it is desirable to sell said plant and property at the earliest possible time, and Romunder waived his right under the agreement of March 21st in this regard, and agreed to assist in converting the property into cash, waived the right to further time, and gave the second party the right to sell the property at any time before September 21st, for a sum not less than \$40,000, "and if said sale is for a greater sum, the surplus shall be refunded to Herman Romunder," fixed the date for the sale of the timber lands and continued:

"But it is specially agreed that this agreement and the agreement of March 21, 1914, shall not in any manner be construed to in any way create a trust holding of said property by said Elmes or to in any way restrict his right of giving an absolute deed thereto."

This agreement was signed by Romunder and Elmes and by the Veneer Company. Another contract was made on May 26th about advances of money for payment of certain debts of the Veneer Company, from which were excluded the account of Robt. Romunder, the Morgan Company, and others, which recited that it did not affect the agreement of the 21st of March, to which reference was made. On the same day the Buena Vista Veneer Company executed a bill of sale to Charles W. Elmes of all of its right, title, and interest in all its personal property not already conveyed, and all its bills and accounts receivable, and all property of every other kind, and of its insurance policies, reciting that it was mutually agreed that an inventory was to be made and attached to the bill of sale and become a part of it. All the money in the bank, all checks in transit, and all the indebtedness due said company was transferred to said Elmes. The Morgan and Smith Companies, appellants, recovered judgments for the amount of their claims against the Veneer Company, but the court decreed the conveyance executed to Elmes to be an equitable mortgage, and not made in fraud of creditors, that the lien of same was superior to any claim of appellee companies, and ordered the property sold free of their claim, from which decree this appeal is prosecuted.

Emmet Vaughan, of Des Arc, for appellants. J. G., C. B. & Cooper Thweatt, of De Vall's Bluff, for appellees.

KIRBY, J. (after stating the facts as above). The undisputed testimony shows that the Veneer Company was indebted for money advanced to it by the Morgan Company at the time of the first transfers; that a statement of its business made to Elmes showed such indebtedness, which statement did not show an indebtedness of the company to him for \$20,500, later claimed to be the

company's debt for money furnished it, the renewal note being executed by Herman Romunder individually instead of for the company. The company was insolvent at the time of the execution of the first and all subsequent agreements between Romunder and Elmes, and by these agreements and conveyances all its property of every kind was transferred to appellee Elmes, to secure the payment, it is true, of said sum already claimed to have been advanced to the company, as well as the advances thereafter made in accordance with the agreements.

[1] If appellee Elmes did not know that the company was insolvent when the first agreement and transfer was made, he was bound to know it was thereby rendered so, and to have known it when the later contracts and transfers, stripping it of every vestige of its property, were made, all of which recited that they were but supplemental to the first agreement of March 21st referred to, which was not, nor was any of the other agreements, recorded. This first agreement provided that if the property sold for more than the indebtedness mentioned therein, the surplus should be returned to Romunder, without requiring it paid upon the company's other indebtedness. The agreement also expressly stipulated that it should not be considered as a mortgage, and it was construed by Elmes' attorney as an absolute conveyance of the property.

[2] Taking such a conveyance in accordance with said agreements was calculated to deceive creditors and lead them to believe that no part of the property was subject to their demand, when in fact such was not the case. "The right to redeem is an interest of value, and to reserve it in such a way as leaves it altogether in confidence between the parties, enabling them to form a trust between themselves, and at their pleasure to deny its existence, and refuse its execution for the benefit of creditors, is plainly deceptive, and tends to delay, hinder, and defraud creditors." 3 Bump on Fraudulent Conveyances, p. 41; Davis v. Jones, 67 Ark. 122, 53 S. W. 301; Waite on Fraudulent Conveyances, § 272.

The parties reiterated in the last agreement that neither of the agreements should, in any manner, be construed to in any way create a trust holding of said property by said Elmes, or in any way restrict his right of giving absolute deeds thereto, while the complaint for a foreclosure and the cross-complaint allege that the instruments were but equitable mortgages for the security of debts, and all the answers of the parties thereto admitted that such was the case. Appellee admits that it requires all the said agreements, contracts, bills of sale, and con-

veyances to constitute what it now claims to be an equitable mortgage, contrary to the express terms of said instruments, saying in his brief:

"The first mortgage consists of a deed from Romunder to lands in Woodruff county, a deed from Romunder to lands in Prairie county, a deed from the company to the mill site, 17 acres, and a bill of sale from the company to the machinery and some other personal property and a contract signed by Elmes, Romunder, and the company, which provides that Elmes was to advance to the company certain money, which, with a note of Romunder already due and owing to Elmes, would aggregate in all \$40,000," etc.

"The second mortgage, consisting of a bill of sale from the company to Elmes to all of its personal property and a contract which provided that said bill of sale was to secure Elmes for certain advances to be made to the company for the purpose of paying off certain specified debts, * * * was not an agreement of Elmes to pay the company's debts generally."

Conceding that the proof is sufficient to sustain the chancellor's finding that the indebtedness shown by the individual note of Herman Romunder for the payment of which the property was conveyed on the 21st of March was a debt of the corporation for the payment of which its property was liable, it does not follow that the creditor, in order to secure his own debt, could advance other money to be used by the corporation, and for the payment of certain of its debts, excluding the claim of appellant creditor, and thereafter consume all the property of the said corporation in the payment of his said debt, leaving the corporation without any assets whatever out of which said creditors could make their debts.

[3] Insolvent corporations are not allowed to prefer their creditors, and a conveyance that has effect to do so is fraudulent and void as to them. Section 949, Kirby's Digest; Dozier v. Arkadelphia Cotton Mills, 67 Ark. 11, 53 S. W. 403. And since it requires all of said agreements, contracts, and conveyances, the ones first made as well as the last, and all must be considered together to constitute the mortgage appellee is attempting to foreclose, and were in effect but one transaction, effecting the purpose and intention of appellee and the insolvent Veneer Company to transfer all its assets for the payment of appellees' debt and of the other creditors preferred, appellants, whose claims were attempted thereby to be defeated, were in time, in the filing of their suits, to protect themselves against said fraudulent transfers.

The court erred in not so holding, and the decree is reversed, and the cause remanded, with directions to enter a decree in favor of each of appellants for its pro rata of the fund realized from the sale of the assets of the corporation in proportion as their debts bear relation to the claim of Elmes and the proceeds realized therefrom. It is so ordered.

HUFFMAN et al. v. FUDGE et al. (No. 17.)
(Supreme Court of Arkansas. May 29, 1916.)

1. SPECIFIC PERFORMANCE \Leftrightarrow 94—CONTRACTS
ENFORCEABLE — CONTRACTS RELATING TO
REAL PROPERTY.

Where defendants contracted to sell their equities in mortgaged lands to a bank in consideration of the release of the bank's judgment against them on a contract, a deed of the property reciting a prior mortgage and that the bank as a part of the consideration assumed payment of the mortgage not being a compliance with their contract, by refusing to execute a deed in any other form they broke the contract and are not in a position to seek specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 249-256; Dec. Dig. \Leftrightarrow 94.]

2. MORTGAGES \Leftrightarrow 278—LIABILITY OF MORTGAGOR ON TRANSFER.

Where a bank purchased the equities in a portion of mortgaged lands in consideration of release of its judgment against the grantors, the mortgage was not extinguished, and upon purchase of the mortgage the bank had the legal right to treat the mortgage lien as superior to its own equities and enforce it against all of the mortgaged lands, since the purchase of an equity of redemption or of land subject to a prior mortgage does not imply a promise by the grantee or any obligation of either of the parties inter se to pay the mortgage debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 729-736; Dec. Dig. \Leftrightarrow 278.]

Appeal from White Chancery Court; Jno. E. Martineau, Chancellor.

Action by Charles S. Huffman and others against John T. Fudge and another, in which the defendants filed a cross-complaint. From a decree for defendants on the cross-complaint, plaintiffs appeal. Reversed and remanded, with directions.

Brundidge & Neelly, of Searcy, for appellants. Eugene Cypert and John E. Miller, both of Searcy, for appellees.

MCCULLOCH, C. J. This is an action instituted in the chancery court of White county by appellant C. S. Huffman against the appellees, J. T. Fudge and W. H. Thomas, to foreclose a mortgage executed by appellees to Frank D. Thomas, of Camp Point, Ill., on certain real estate in White county to secure the payment of a note for the sum of \$4,000, with interest, dated February 15, 1909, and due and payable on February 14, 1914, which said note and mortgage had been assigned by Frank D. Thomas to appellant. Appellees answered, denying the allegation that Huffman was the owner of the mortgage by assignment from Frank D. Thomas or otherwise, but alleged that, on the contrary, the mortgage had been paid by the Columbus State Bank of Columbus, Kan., pursuant to an agreement with appellees to assume the obligation. Appellees filed a cross-complaint, as well as an answer, in which they alleged that they were indebted on contract to the Columbus State Bank in the sum of \$3,000, for which judgment had been rendered

against them in favor of said bank by the circuit court of White county, and that the bank had entered into an agreement with them to accept in full satisfaction of said judgment a conveyance of a portion of the lands conveyed by said mortgage, and agreed further, in consideration of said conveyance, to assume and pay off said mortgage debt. They alleged further, in the cross-complaint, that they had offered to comply with said agreement, but that the bank had refused to perform the same, and that the bank had procured an assignment of the mortgage to Huffman to hold for the benefit of the bank, and that the bank was really the owner of the mortgage. The prayer of the cross-complaint was that the Columbus State Bank be made a party to the suit, that appellant Huffman be declared a trustee holding the note and deed of trust for the use of the bank, and that the note and deed of trust be canceled and treated as satisfied on account of said agreement of the bank to assume the payment thereof. The Columbus State Bank was made defendant to the cross-complaint and entered its appearance, and on final hearing of the cause the court entered a decree in accordance with the prayer of the cross-complaint, and an appeal has been duly prosecuted to this court.

The property in controversy comprises 300 acres of land near the city of Searcy, and several small lots inside of the city limits. Fifteen acres of the land constitutes the homestead of appellees. The alleged agreement set forth in the cross-complaint is evidenced by correspondence, beginning with a letter from appellee Thomas to appellant Huffman, dated April 27, 1914, proposing to "deed to the bank our equity in 285 acres for their judgment." The letter proceeds with a statement that:

"Our equity is worth at least \$2,000.00 more than your judgment, but we are not in position to hold so as to realize the real value of the land."

The letter contains the further statement that:

"The mortgage is now due and something must be done or they will foreclose, and in case they do, the only way we would ever pay our obligation with the bank would be as we have suggested."

The bank replied to the letter, under date of May 12, 1914, as follows:

"Replying to your letter of recent date wherein you propose to deed to the Columbus State Bank your equity in 285 acres of land near to the city of Searcy, Arkansas, in consideration of the release of the judgment the Columbus State Bank holds against you, I will say that we accept your proposition, and ask that you execute deed for same and forward to the Cherokee County State Bank, for examination, and if satisfactory we will forward release of our judgment against you."

Huffman was a stockholder and director in the Columbus State Bank, and had been its president, but was not president at the time this transaction occurred, having been

succeeded by W. S. Norton. Appellees executed a deed conveying the land to the Columbus State Bank, reciting in the face of the deed the prior mortgage executed to Frank D. Thomas, and also containing a recital that the Columbus State Bank, as a part of the consideration, assumed the payment of the mortgage. This deed was forwarded to the Cherokee County State Bank for delivery to the Columbus State Bank; but the latter refused to accept the deed because of the recital therein concerning the assumption of the mortgage debt by the grantees, and for other reasons unnecessary to mention in this connection.

On May 18, 1914, the Columbus State Bank forwarded to Frank D. Thomas the amount of the note, with accumulated interest, aggregating, principal and interest, the sum of \$5,069.55, and directed that the note and mortgage be transferred to Huffman, and Thomas accepted the money and executed a written assignment transferring the mortgage and note to Huffman. The letter from the bank to Thomas showed that the transaction was to be for the benefit of the bank, and that the assignment was to be to Huffman merely for the accommodation of the bank, for the reason that under the laws of Kansas the bank was restricted in its holdings of real estate. The letter further contains the statement that:

"We have accepted the proposition made by Messrs. Fudge & Thomas, whereby we become the owners of the fee in this real estate."

Mr. Norton, the president of the Columbus State Bank, subsequently visited Searcy and had some conference with appellees, but it does not appear that there was any additional agreement made different than that expressed in the correspondence.

[1, 2] It will be noted from the correspondence set forth above that the proposition made by appellees was to sell to Huffman their "equity in 285 acres," and the acceptance by the bank was couched in the same language. The contract thus established by the correspondence contained no obligation on the part of appellant or the bank to assume the payment of the mortgage debt; therefore the bank was justified in refusing to accept the offered conveyance reciting an assumption on the part of the bank of the mortgage debt. The conveyance was not in accordance with the terms of the contract, and appellees did not comply with their contract in tendering this deed, and, on the contrary, broke the contract by refusing to execute a deed in any other form. For that reason, if for no other, they are not in an attitude to seek specific performance of the contract. But in addition to that, under the terms of the contract, neither Huffman nor the Columbus State Bank agreed to assume the payment of the mortgage debt and cannot be compelled to do so. Some of the authorities seem to make a distinction between the purchase of real estate "subject to" a

prior mortgage and the purchase of the equity therein; a few of the courts holding that a purchase subject to a prior mortgage implies the obligation to pay it, while the mere purchase of an equity does not amount to an obligation to pay. Other courts hold that there is no distinction between the two, and that the purchase subject to a mortgage is equivalent merely to a purchase of the equity. Such is the express holding of the Massachusetts court in the case of Fiske v. Tolman, 124 Mass. 254, 28 Am. Rep. 659, where it is said:

"It is settled in this commonwealth that, where land is conveyed in terms subject to a mortgage, the grantee does not undertake, or become bound by the mere acceptance of the deed, to pay the mortgage debt. In the absence of other evidence, the deed shows that he merely purchased the equity of redemption."

That case was cited with approval by this court in Patton v. Adkins, 42 Ark. 197, where it was held that:

"The acceptance of a deed subject to a specified mortgage does not imply a promise by the grantee to pay the mortgage debt."

That doctrine has been adhered to by this court in later cases. *J. H. Magill Lumber Co. v. Lane-White Lumber Co.*, 90 Ark. 426, 119 S. W. 822; *Mott v. American Trust Co.*, 186 S. W. 631.

While the authorities are not altogether in harmony on this subject, our position on the question seems to be in accord with the weight of authority. "If the purchaser buys a mere equity of redemption," says Mr. Jones, in his work on Mortgages (volume 2, § 738), "he is not personally liable for the mortgage debt; or liable either legally or equitably to indemnify his grantor against the mortgage. He may give up the property at any time in satisfaction of the lien." Now, according to this doctrine, the mere purchase of the equity imposes no obligation upon either of the parties inter se to pay the mortgage debt, but constitutes merely a recognition that the debt is a lien on the land and that neither party is to look to the other for indemnity. It necessarily follows that, under those circumstances, the grantee, having no obligation to pay the debt, is at liberty to deal with it as he pleases, and has a legal right to treat the lien as superior to his own equities and to purchase the mortgage debt and enforce the lien against the land.

According to the undisputed evidence in this case, the contract of Columbus State Bank was merely to purchase the equity in a certain portion of the mortgaged lands in consideration of a release of its judgment against the appellees, and, if that contract had been consummated, it would not have constituted an extinguishment of the mortgage, nor would it have prevented appellant from purchasing the mortgage and enforcing the lien thereof against all of the lands described in the mortgage.

The chancellor was therefore in error in

sustaining the prayer of the cross-complaint, and the decree is reversed, and the cause remanded, with directions to dismiss the cross-complaint and enter a decree foreclosing the mortgage in accordance with the prayer of appellant's complaint.

SIMMONS v. STATE. (No. 88.)

(Supreme Court of Arkansas. June 26, 1916.)

1. RAPE \S 52(1)—EVIDENCE—SUFFICIENCY.

In a prosecution for carnally knowing a female person under the age of 16 years, evidence held sufficient to warrant a verdict of guilty.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71, 72, 76; Dec. Dig. \S 52(1).]

2. CRIMINAL LAW \S 1159(2)—APPEAL—REVIEW—VERDICT.

Where the verdict is warranted by the evidence, the court is not at liberty to disturb it on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. \S 1159(2).]

3. CRIMINAL LAW \S 1120(3)—APPEAL AND ERROR.

Where error is assigned in the refusal of the trial court to hear the testimony of a witness, the record must disclose the substance of the offered testimony, so that it may be determined whether or not its rejection was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931, 2932; Dec. Dig. \S 1120(3).]

4. CRIMINAL LAW \S 670—TRIAL—OFFER OF PROOF.

In a prosecution for carnally knowing a female under the age of 16 years, where an objection was sustained to a question, asked a witness, if prosecuting witness had not stated to her that she loved some man, statement of defendant's counsel that he thought it was a material question, because the prosecuting witness might have a lover and try to shield him, was not a sufficient statement to the court of what the answer of the witness would have been.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 757, 1593-1596; Dec. Dig. \S 670.]

5. WITNESSES \S 352—CREDIBILITY.

In a prosecution for carnally knowing a female under the age of 16 years, statement by a witness that prosecuting witness had told her that she loved some man would have been of a matter of such general character that it would not have affected the credibility of prosecutrix as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1152; Dec. Dig. \S 352.]

6. CRIMINAL LAW \S 786(3) — TRIAL — INSTRUCTIONS.

In a prosecution for carnally knowing a female person under the age of 16 years, an instruction, on the accused's credibility as a witness, that the jury might consider that a conviction would mean incarceration in the penitentiary to accused, although argumentative, was not error, since the accused is already singled out by the indictment, and the court must necessarily tell the jury what the punishment was, if they should find accused guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1960, 1984; Dec. Dig. \S 786(3).]

Appeal from Circuit Court, Pike County; Jeff. T. Cowling, Judge.

Columbus Simmons was convicted of carnally knowing a female person under the age of 16 years, and he appeals. Affirmed.

W. S. Coblenz, of Murfreesboro, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

HART, J. Columbus Simmons was indicted under section 2008 of Kirby's Digest for carnally knowing a female person under the age of 16 years. It was shown that the prosecuting witness was a female under the age of 16 years at the time she testified that the crime was committed. She testified that the defendant had sexual intercourse with her on the night of November 22, 1915, in Pike county, Ark. She was unmarried at the time, and said that a child was born unto her as the result of such intercourse. Several other witnesses testified that the defendant admitted to them that he had had intercourse with a young girl on the night testified to by her. The defendant testified in his own behalf, and in positive terms denied his guilt. Other circumstances were introduced tending to corroborate his testimony. The jury returned a verdict of guilty, and from the judgment of conviction, the defendant has appealed.

[1, 2] The principal witnesses in the case were the prosecuting witness and the defendant himself. Other evidence was introduced tending to corroborate the testimony of the principal witness on each side. The jury by its verdict has said that it believed the testimony of the witnesses for the state. The verdict was warranted by the evidence, and we are not at liberty to disturb it on appeal.

[3, 4] Counsel for the defendant assigns as error the action of the court in refusing to admit certain testimony. A young companion of the prosecuting witness was asked if, about the time the crime is charged to have been committed, she did not have a conversation with the prosecuting witness with regard to a lover. She first stated she did not understand the question, and the prosecuting attorney also objected to it. The court permitted the question to be repeated to her, and she answered, "No." Again she was asked if the prosecuting witness had not stated that she loved some man. The court sustained an objection of the prosecuting attorney to this question, and the witness was not permitted to answer it.

Where error is assigned in the refusal of the trial court to hear testimony of a witness, the record must disclose the substance of the offered testimony, so that it may be determined whether or not its rejection was prejudicial. *Latourette v. State*, 91 Ark. 65.

120 S. W. 417; Jones v. State, 101 Ark. 439, 142 S. W. 838. In urging that the question was a proper one to ask the witness, counsel for the defendant stated to the court that he thought it was a material question because the prosecuting witness might have a lover and try to shield him. This falls short of stating to the court what the answer of the witness would have been. So far as the record discloses, the witness might have answered "No." She probably would have so answered, because she had already answered "No" to a question as to whether or not she had had a conversation with the prosecuting witness with regard to a lover.

[5] Moreover, if the witness had answered "Yes," the question and answer would have been of a matter of such general character that it would not even have shed any light on the credibility of the prosecutrix as a witness. Peters v. State, 103 Ark. 123, 146 S. W. 491.

[6] It is next insisted that the court erred in an instruction as to the accused's credibility as a witness. It is unnecessary to set out this instruction. The court first instructed the jury as to the credibility and weight to be given to the testimony of the witnesses generally, and then instructed the jury as to the credibility to be given to the testimony of the defendant in substantially the same language as the instruction on that subject in Jones v. State, 61 Ark. 88, 32 S. W. 81. See, also, Hamilton v. State, 62 Ark. 543, 36 S. W. 1054; Weatherford v. State, 78 Ark. 36, 93 S. W. 61. The particular language objected to in the instruction is that the court told the jury that they might consider, among other things, the fact that a conviction in the case would mean incarceration in the penitentiary to the defendant. They claim that this is open to the objection of singling out the defendant, and also singling out facts to be called to the attention of the jury. As said in Hamilton v. State, supra, a defendant on trial is already singled out by the indictment, and the fact that he is on trial and directly interested in the result. Moreover, the court in its instructions would necessarily tell the jury what the punishment was if they should find the defendant guilty. Hence the jury was bound to know that a verdict of guilty would mean confinement in the penitentiary to the defendant. While we do not think the clause in question in the instruction is erroneous, we think that the giving of the instruction in the language of that given on the subject in Jones v. State, 61 Ark. 88, 32 S. W. 81, was sufficient to call the attention of the jury to the manner in which the defendant would be affected by a verdict of guilty, and the court might have well left out the clause objected to as tending to be argumentative.

We find no prejudicial error in the record, and the judgment will be affirmed.

HAMPTON STAVE CO. v. ELLIOTT.

(No. 90.)

(Supreme Court of Arkansas. June 26, 1916.)

1. LOGS AND LOGGING ~~2~~—RESERVATION IN DEED OF LAND—TIME FOR REMOVAL.

Reservation in a deed of lands of standing timber, with right of way privileges to remove it, without specifying time for removal, gives only a reasonable time therefor.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 1-5; Dec. Dig. ~~2~~.]

2. LOGS AND LOGGING ~~2~~—RESERVATION OF STANDING TIMBER—TIME FOR REMOVAL.

When plaintiff cut over land for the third time, two years after its second cutting, when it was thought by those doing the work that all was taken that could be profitably used, its reasonable time for removing the timber, reserved in its deed given seven years before, had expired.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 1-5; Dec. Dig. ~~2~~.]

3. DAMAGES ~~112~~—MEASURE—CUTTING TIMBER.

Only the actual and not the enhanced value of timber wrongfully cut can be recovered, where cut under belief of right to remove it under a reservation in a deed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281-283; Dec. Dig. ~~112~~.]

Appeal from Cleveland Chancery Court; Jno. M. Elliott, Chancellor.

Suit by the Hampton Stave Company against C. K. Elliott. From an adverse decree, plaintiff appeals. Modified and affirmed.

This controversy arose over the right to cut timber from certain lands in Cleveland county. Appellant brought suit, claiming to be the owner of the white and cow oak on the lands, suitable for stave bolts, and prayed an injunction against the defendant to prevent his further cutting timber therefrom. The defendant answered denying the ownership of plaintiff of the timber, and alleged that he was the owner thereof, having purchased the land; prayed judgment against the plaintiff for the value of timber cut by it and an injunction to prevent its further cutting timber from the lands. The appellant was the owner of the lands from which the timber was taken, having purchased same on May 17, 1905, in order to supply its plant with stave bolts, and its policy in the operation of its plant was to buy all the timber that could be purchased, and only to cut its timber from its own land when it was necessary to do so in order to continue operations. On August 13, 1907, the stave company sold and conveyed the lands from which the timber was taken to one McCartney, reciting in its deed of conveyance a reservation of the timber as follows:

"In conveying this land, the Hampton Stave Company reserves the white oak and cow oak stave bolt timber on all the above lands, with necessary right of way privileges to remove same."

He immediately conveyed the lands to the Grant Lumber Company, which by a war-

ranty deed on March 31, 1914, conveyed them to appellee.* The appellant cut stave bolt timber from the lands in controversy in 1910 and again in 1912, some of the witnesses stating that it cut all the timber therefrom suitable for stave bolts in that year. They also said that they worked it close, and a great deal of the timber cut in 1912 was too small to be used for stave bolts in 1907. One witness stated that Mr. Hampton, the manager of appellant company, told him in 1912 that when the timber was cut he wanted it all worked over, so that they could quit the land and turn it back to the purchasers. This witness stated that he finished the cutting in the latter part of that year, and wrote to the stave company that he had cut it just as close as it could be cut. Some of the timber cut in 1912 was good timber that had been left in the sloughs and creeks at the former cuttings, because of the difficulty in getting to it. The appellant company went on the lands again in the fall of 1914, after they had been purchased by appellee, and cut, according to its admission, 91 cords of stave bolts, which the testimony showed were of the value of \$3 per cord. There was some testimony on appellee's part tending to show that a great deal of the timber cut was suitable for manufacture into lumber and some for manufacture into veneers, the value of which would have been from \$20 to \$30 per thousand feet. This witness made an estimate of the timber cut and the kinds of trees from the stumps and the tree tops upon the lands. The chancellor found that appellant had no right to the timber on account of not having taken it from the lands within a reasonable time and rendered a decree for the highest value the testimony showed the timber could have been worth, from which this appeal is prosecuted.

Crawford & Hooker, of Pine Bluff, and T. D. Wynne, of Fordyce, for appellant. Danaher & Danaher, of Pine Bluff, for appellee.

KIRBY, J. (after stating the facts as above). [1] Appellant contends that the clause in its deed to McCartney, reserving the oak timber upon the lands conveyed, with the right to remove same, was in effect an exception thereof from the grant entitling it to remove said timber at any time thereafter. There was no time fixed for the removal of the timber, nor any testimony showing the intention of the parties in that regard, except the stave company's president's statement of its policy of preserving its timber on its own lands as long as possible and supplying it for the operation of its plant only when other timber could not be purchased therefor, and that he declined to fix a limit for its removal in the making of the deed of conveyance upon the suggestion of the grantee that it should be done. The court is of opinion that, under said clause of reservation in the deed, the stave bolt company was entitled to no more than a reasonable time for

the removal of the standing timber, and had no more right to remove same than would have resulted had it conveyed the lands without such reservation and the grantee conveyed the timber back to it without mention of any time for its removal. In *Liston v. Chapman & Dewey Land Co.*, 77 Ark. 116, 91 S. W. 27, it was held, under a deed conveying the merchantable standing timber of a certain description which specified no time for its removal, that the right to remove existed only for a reasonable time, in the absence of anything in the conveyance or in the proof aliunde showing a contrary intention. *Earl v. Harris*, 99 Ark. 112, 137 S. W. 806; *Hall v. Wellman Lumber Co.*, 78 Ark. 408, 94 S. W. 43; *Fletcher v. Lyon*, 93 Ark. 11, 123 S. W. 801; *Burbridge v. Ark. Lumber Co.*, 178 S. W. 304; *Newtop v. Warren Vehicle Stock Co.*, 116 Ark. 393, 173 S. W. 819. We see no reason why such a reservation of timber from a grant of the land, fixing and indicating no time for its removal, should be construed to give the grantor a longer time for the removal thereof than it would have had had it purchased the standing timber conveyed to it by a deed in which no time was fixed for the removal, and hold, under the circumstances of this case, that appellant had no more than a reasonable time for the removal of the timber, under the terms of its deed conveying the lands, within the doctrine already announced by former decisions of this court. See, also, *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776; *Adkins v. Huff*, 58 W. Va. 645, 52 S. E. 773, 3 L. R. A. (N. S.) 649, 6 Ann. Cas. 246; *Morris v. Sanders* (Ky.) 43 S. W. 733.

[2] The lands were twice cut over by appellant company after their grant to McCartney, the last time before the cutting complained about herein, in the year 1912, when it was thought by those who cut the timber that all was taken that could be profitably used for the purpose for which the timber was required. There was no reason shown why the timber could not have been sooner cut and removed and unquestionably it could have been during the more than seven years from the reservation of the title thereto in the deed to McCartney in August, 1907, to the last cutting in September, 1914, the land having been cut over twice during such time, as already stated.

No error was committed in the chancellor's holding that appellant's right to remove the timber had ceased at the time of the cutting thereof, and that it should respond in damages for its value.

[3] We are of the opinion, however, that the chancellor's finding as to the amount of damages is not supported by the testimony, being clearly against the preponderance of it, and that the judgment should not have been for a greater amount than \$3 per cord for the 91 cords of stave bolts taken by appellant company, since it acted under the belief that it had the right to remove the timber by

reason of the reservation in its said conveyance of the lands. *Bunch v. Pittman*, 184 S. W. 850.

The decree is accordingly modified and, as modified, will be affirmed. It is so ordered.

ASHLEY, D. & N. RY. CO. v. BAGGOTT & BOYD. (No. 87.)

(Supreme Court of Arkansas. June 28, 1916.)

CONTRACTS §9(2)—REQUISITES—CERTAINTY.

Where a contract for the repair work of the defendant railroad did not bind the railroad company to give plaintiff its repair work for any length of time, did not fix a price for the work, and it did not appear who was to furnish materials, the contract was too indefinite to be enforceable.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 16; Dec. Dig. §9(2).]

Appeal from Circuit Court, Drew County; Turner Butler, Judge.

Action by Baggott & Boyd against the Ashley, Drew & Northern Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed and dismissed.

Henry & Harris, of Monticello, for appellant. R. W. Wilson and C. H. Moses, both of Monticello, for appellees.

HART, J. Baggott & Boyd sued Ashley, Drew & Northern Railway Company to recover damages for an alleged breach of contract. The railway company operated a line of road from Crossett to Monticello, in Arkansas, and R. O. Roy was its president and general manager. Baggott & Boyd formed a partnership to do automobile repairing, and located their shop near the terminal of the defendant's railroad in Monticello. F. T. Boyd testified that:

Soon after Mr. Baggott and himself formed a partnership to do automobile repairing in the town of Monticello, and soon after defendant's line of road was completed to that point, R. O. Roy, the president of the road, approached them on the question of doing repair work for the railroad. "He made detailed suggestions to us as to the equipment necessary for that work. At his suggestion I rented another building, and purchased a larger forge and anvil, and also other machinery which would be needed in repairing engines and cars for a railroad, but would not be needed in repairing automobiles. The defendant railway company constructed a spur track on the lots on which was located the new building leased by us. The spur track was extended to another railroad company's tracks and was used as a transfer track. Our firm equipped itself to do the repair work, but the railroad never gave us any work, except to repair one engine."

The witness stated in detail the expenses his firm had been out preparatory to doing the repair work for the railroad, but the view which we shall hereinafter express renders it unnecessary to further abstract that testimony. On the part of the defendant it was shown that it never made any definite contract with the plaintiffs to do repair work on

the engines and cars of the railway company. The jury returned a verdict for the plaintiffs in the sum of \$464, and from the judgment rendered the defendant has appealed.

It is contended by counsel for the defendant that the contract was too indefinite to be enforceable, and that no breach of the contract could be assigned which could be measured by any test of damages from the contract itself. On this point we quote from the testimony of F. A. Boyd as follows:

"Q. State what this contract entered into in the Allen Hotel was. A. We went over to the Allen Hotel, and discussed what we would need, and decided what we would need; and Mr. Roy said that, if we would go ahead and put them in the shop, he would give us work, until he could get a shop or fix things more to his liking. Q. Did he say how long that would be? A. No, sir. Q. Did he say anything about the length it would probably be? A. No, sir."

Again he was asked what price his firm was to get for work, and answered, "a reasonable price," saying no certain price was set. He stated that he does not remember whether there was anything said as to who was to furnish the materials, but that he supposed his firm was to furnish them. Again he stated that no agreement was reached as to the length of time the contract was to run, or the price to be paid for the work. Boyd had purchased the interest of Baggott before this suit was instituted. Baggott and Roy both testified that no contract was entered into, and that the firm of the plaintiffs was not equipped to do railway repair work.

The verdict of the jury, however, must be tested by the evidence of the plaintiffs. According to the testimony of Boyd, when given its strongest probative force, the terms of the contract were not sufficiently definite to enable the court to render it enforceable. Under the testimony of Boyd, Roy did not bind the railroad company to give the plaintiffs his repair work for any particular length of time, and it could not be shown that he would ever call upon them to do any repair work. The railroad company could do so or not as it pleased. Nor could it be shown that the parties would ever agree upon the price to be paid for the work. The testimony of Boyd himself brings the case squarely within the principles decided in *Sommers v. Musolf*, 80 Ark. 97, 109 S. W. 1173. The contract is so indefinite that it is incapable of being enforced. It is evident that courts neither specifically enforce contracts nor award substantial damages for their breach when they are wanting in certainty. Damages cannot be measured for the breach of an obligation when the nature and extent of the obligation is unknown, being neither certain nor capable of being made certain. 6 R. C. L. 644; Page on *Contracts*, vol. 1, § 28.

It follows that the judgment must be reversed, and, the plaintiffs' case having been fully developed, their cause of action will be dismissed.

MERCHANTS' & FARMERS' BANK et al. v. CITIZENS' BANK et al. (No. 102.)

(Supreme Court of Arkansas. July 8, 1916.)

1. CORPORATIONS — 123(3) — STOCK MORTGAGE OR PLEDGE — DELIVERY.

Where one party transferred as security for a loan corporate stock already pledged, giving the lender the right to redeem from the prior pledge, the transaction was a chattel mortgage, and not a pledge, since delivery is an essential of a valid pledge.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. 123(3); Pledges, Cent. Dig. §§ 11, 30.]

2. CHATTEL MORTGAGES — 152 — LIEN — PRIORITY — RECORDATION.

Under Kirby's Dig. § 5396, as to recording chattel mortgages, an instrument creates no lien and is not effective against third persons until duly acknowledged and recorded.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 254, 266; Dec. Dig. 152.]

3. CHATTEL MORTGAGES — 155 — LIEN — PRIORITY — NOTICE.

The mere fact that the mortgagor of bank stock informed the bank, which under Kirby's Dig. § 853, had a lien on such stock for his debts to it, of the giving of a mortgage thereon to plaintiff and the bank did not object, would not estop it to assert its lien on the stock for money thereafter loaned by it to the mortgagor, if the mortgage was never recorded.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 264, 270; Dec. Dig. 155.]

Appeal from Union Chancery Court; Jas. M. Barker, Chancellor.

Suit by the Citizens' Bank and others against the Merchants' & Farmers' Bank and others. Decree for plaintiffs, and defendants appeal. Reversed and remanded, with directions.

R. G. Harper and W. E. Patterson, both of El Dorado, for appellants. Mahony & Mahony, of El Dorado, and H. S. Powell, of Camden, for appellees.

McCULLOCH, C. J. Appellant Merchants' & Farmers' Bank is a banking corporation doing business at Junction City, Ark., and A. B. Henderson was its president at the time the transactions took place which are brought under review in this litigation. On January 3, 1912, C. A. Harris became indebted to A. B. Henderson in the sum of \$5,500, and executed his note to Henderson for that amount, due and payable one year after date, with interest, and to secure the payment of the note, Harris executed to Henderson a mortgage conveying certain lands. Harris was the holder of certain shares of the capital stock of appellant corporation of the par value of \$3,000, which he also pledged to Henderson as security for said note, and he delivered the certificates of shares to Henderson to hold. On that date, Harris entered into a contract with appellant to guarantee payment of a certain note, previously executed by the Harris Lumber Company (of which corporation Harris was the principal stock-

holder), for the sum of \$1,000, and one of the issues of fact in the present case is whether or not Harris pledged the stock as security for that debt, as well for the debt to Henderson. Harris also transferred to Henderson certain other collaterals which are unnecessary to mention in detail in disposing of the present controversy. The debt of Harris to Henderson had been paid down to the sum of \$3,499.05 at the time of the beginning of the present litigation, and, in the meantime, Harris had become indebted to appellant in the sum of \$2,644.93, for the payment of which debt appellant asserts its statutory lien on the Harris shares of stock. This indebtedness was incurred in the year 1913, and was subsequently evidenced by a note executed by Harris to appellant. On July 3, 1912, Harris became indebted to appellee Citizens' Bank of Junction City upon two promissory notes, each for the sum of \$3,500, and he executed to appellee a second mortgage on the lands embraced in the prior mortgage to Henderson, as well as upon certain other lands. He also executed to appellee an instrument, whereby he transferred said shares of stock in appellant's bank to appellee, as security for said debt, with authority to redeem said shares of stock from the prior pledge to Henderson. That instrument was neither acknowledged nor recorded, but the evidence adduced by appellee tends to show that its existence was brought to the attention of appellant's president and cashier, and that the latter offered no objections to the transaction. There is a conflict upon that issue; but, in view of the conclusions which we have reached decisive of the controversy, it is unnecessary to determine on which side of that issue the preponderance of the evidence lies. On December 14, 1914, Henderson assigned the Harris note to appellant bank, and delivered all the collaterals which Harris had placed in his hands to secure the debt. The present suit was instituted by appellee for the purpose of having the securities marshaled, and to compel appellant to resort, for the satisfaction of the original debt of Harris to Henderson, to securities other than the bank stock. The contention of appellee is that its lien on the stock is superior to the statutory lien asserted by appellant. On the final hearing of the case, the chancellor decided in favor of appellee as to the priority of the asserted liens on the stock. There are other questions presented here; but, since we reached a conclusion favorable to appellant on the question of priority of liens on the stock, all other questions are eliminated from the case.

[1] The lien of the appellant corporation upon the shares of its own stock is declared in the following statute (section 853, Kirby's Digest):

"The stock of every such corporation shall be deemed personal property, and be transferred only on the books of such corporation in such

form as the directors shall prescribe; and such corporation shall at all times have a lien upon all the stock or property of its members invested therein for all debts due from them to such corporation."

Whether this lien has priority over a pledge to a third party, with notice to the officers of a corporation, we need not decide. The cases cited by counsel for appellee on the brief tend to support their contention that the statutory lien of a corporation is subordinate to a lien of a prior pledge of the stock. It was so decided by the United States Circuit Court of Appeals of this circuit in an opinion by Judge Thayer, in the case of *Curtice v. Crawford County Bank*, 118 Fed. 390, 56 C. C. A. 174, adjudicating the effect of a transaction which arose in Arkansas under the statute. The question has never been decided by this court, but was mentioned by Judge Riddick in delivering the opinion in *Springfield Wagon Co. v. Bank of Batesville*, 68 Ark. 234, 57 S. W. 257, the decision on that question, however, being expressly pretermitted. Nor was that question decided in the recent case of *Young Coal Co. v. Hill*, 112 Ark. 180, 165 S. W. 292. The transaction between Harris and appellee did not constitute a pledge of the stock, for there was lacking one of the essential elements of a pledge; i. e., manual delivery of the certificates of stock. "Possession of the property is of the very essence of a pledge," said this court in *Lee Wilson & Co. v. Crittenden County Bank*, 98 Ark. 384, 135 S. W. 835, "and without such possession in the pledgee, there can be no privilege thereunder as against third persons."

[2] The instrument executed by Harris to appellee amounted to nothing more than a mortgage, which was not recorded, and was therefore only good between the parties. 31 Cyc. 807. It did not affect the rights of third parties, and therefore the statutory lien of appellant which arose when the debt was subsequently incurred cannot be subordinated to it. The statute itself declares that a mortgage shall not become a lien until it has been duly acknowledged and filed for record. Kirby's Digest, § 5396. This court has repeatedly held that an unrecorded mortgage is without any effect against strangers to it, and is only good between the parties.

[3] It is contended that appellant waived its lien, but we find in the record no evidence of conduct on the part of the bank which would constitute a waiver. All that is shown with reference to appellant's connection with the transaction between appellee and Harris was that Harris called attention of the cashier and the president of the appellant bank to the fact that he was going to give the Citizens' Bank a second pledge of the stock, and those officers made no objection thereto. This was far from constituting a waiver by estoppel. If an actual pledge of the stock was effectual against the lien of the bank, it

was unnecessary to obtain the consent of the officials of the corporation. Notice of the pledge would alone have been sufficient. Mere knowledge on the part of appellant's officers that there had been an effort to create a lien on the stock in favor of appellee was not sufficient to work an estoppel, and unless appellee's lien was made complete by manual delivery of the stock, or by acknowledgment and recording of the mortgage, so as to comply with the registration laws, it had no force against appellant when its statutory lien subsequently attached.

We are of the opinion, therefore, that the chancellor erred in declaring appellee's lien on the stock to be prior to that of appellant. The decree is reversed, and the cause is remanded, with directions to enter a decree in appellant's favor in accordance with this opinion.

CHICAGO, R. I. & P. RY. CO. v. REDDING. (No. 60.)

(Supreme Court of Arkansas. June 12, 1916.)

1. RAILROADS § 95(5) — "STREET" — "SIDEWALK."

The streets of a city or town extend to and include that part thereof occupied and used for sidewalks (citing Words and Phrases, Sidewalks).

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 278; Dec. Dig. § 95(5).]

2. RAILROADS § 95(5) — STREET CROSSING — SIDEWALK—NEGLIGENCE.

At the crossing of its track by a street 50 feet wide used by from 75 to 90 per cent. of the pedestrians in a town of from 1,000 to 1,500 inhabitants, the railway was required to leave more than the 16 or 20 foot crossing used for teams, and to construct a footway across its track from the end of a sidewalk running beside the street to the end of the sidewalk on the opposite side.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 278; Dec. Dig. § 95(5).]

Appeal from Circuit Court, Logan County; Jas. Cochran, Judge.

Action by Dennie Redding against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Thos. S. Buzbee and Geo. B. Pugh, both of Little Rock, for appellant. Robt. J. White, of Paris, for appellee.

SMITH, J. Appellee undertook to cross appellant's railroad track at the principal street crossing in Bigelow, Ark., a town of 1,000 or 1,500 inhabitants. It was alleged in the complaint that appellant had failed to make the crossing safe for pedestrians. There was proof to the effect that appellee's fall and injury were attributable to the condition of the track at the point where she crossed. The evidence shows there was a safe crossing in the middle of the street, about 16 feet wide; but the proof also shows that while this space could be used by pedestrians in crossing the track, it was ordi-

narily used only by vehicles, and that pedestrians crossed the track generally on the edge of the street by walking straight across from the end of the sidewalk which reached to the right of way on one side and the end of the sidewalk which reached to the right of way on the opposite side.

[1, 2] Appellant concedes that there is no substantial conflict in the testimony, and states the question at issue as follows:

"The question involved in this case is whether or not a railway company is required to construct a footway across its roadbed and railroad tracks between the ends of a sidewalk which runs along beside the street up to within 15 or 20 feet of the ends of the cross-ties on each side of the roadbed where the street crosses the railroad, and is liable for an injury to a pedestrian for its failure to do so."

The proof shows this street was largely used in the travel from one side of the town to the other and that 75 to 90 per cent. of the pedestrians walked along the sidewalk until they reached the end of it near the railroad track and then continued straight across the roadbed to the end of the sidewalk on the other side.

Instructions were given at the request of appellee which told the jury, in effect, that it was appellant's duty to use ordinary care and diligence to put and maintain the crossing in a reasonably safe condition for pedestrians in crossing the track at the point at which appellee crossed; while instructions were refused, which appellant requested, which told the jury that appellant's duty was discharged if it maintained in the center of the street a crossing which was safe for pedestrians, and that the fact that people walked along the side of the street and had thereby made a pathway across the roadbed did not impose upon appellant the duty to keep the pathway safe for pedestrians. In one of the instructions the court told the jury that:

"The sidewalk and walkway for pedestrians along the public streets are parts of the public street."

Appellant insists that this was an issue of fact which was in dispute, and that the court should not have eliminated this question from the consideration of the jury. But we think no error was committed here in so charging the jury. The streets of a city or town extend to and include that portion thereof occupied and used for sidewalks. *City of Bloomington v. Bay*, 42 Ill. 503; *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117; 7 Words and Phrases, title, Sidewalks, p. 6506. The language above quoted was contained in instruction numbered 2, and that entire instruction reads as follows:

"(2) The sidewalks and walkways for pedestrians along the public streets are parts of the public streets, and the defendant is under the same obligation to keep crossings of such sidewalks and walkways over its track in proper condition for the use of pedestrians that it is to keep the middle and other parts of the streets in proper condition for the use of vehicles and persons on horseback; that is, it must use the care and diligence of ordinary and

reasonable persons under such circumstances, considering the dangers and perils to be encountered by persons crossing its track along a public highway; to keep its entire crossing, including the walkway for pedestrians, in a safe condition for the public travel."

The correctness of the remaining portion of the instruction presents the real question in the case. In the case of *St. Louis, Iron Mountain & Sou. Ry. Co. v. Smith*, 118 Ark. 72, 175 S. W. 415, we quoted from 8 Am. & Eng. Enc. of Law (2d Ed.) p. 363, as follows:

"It is the duty of every railroad company to properly construct and maintain crossings over all public highways on the line of its road in such manner that the same shall be safe and convenient to travelers, so far as it can do so without interfering with the safe operation of the road."

And we held in the case cited that the railroad company was responsible in damages for any injury proximately resulting from the failure to perform this duty.

Appellant concedes it would be liable if the injury had been occasioned by a failure to observe this duty; but it says it had discharged this duty by installing a safe crossing in the center of the street of a width of from 15 to 20 feet, and that, having made a safe crossing in the center of the street, it was under no duty to provide a safe crossing in other parts of the street. The duty of railroads at highway crossings is stated in 3 Elliott on Railroads as follows:

"Sec. 1007. *What is Included in Highway Crossing.*—Strictly speaking, a highway crossing may be defined as the space included within the boundaries of the right of way and the boundaries of the highway. * * * And where a railway company is required to construct good and sufficient crossings it is held that it is not necessary to construct a crossing the full width of the highway. This, perhaps, would be the rule only where a limited portion of the highway was used for the actual purpose of travel. In cities where the entire width of the highway is used for travel we are of the opinion that a crossing would, ordinarily at least, be required for the entire width of the highway. And under certain circumstances barriers and guard rails may be such a necessary part of a railway crossing that the company will be bound to maintain them."

"Sec. 1107. * * * Approaches and embankments need not, as a rule, be constructed over the entire width of the highway. The company has performed its duty in this respect when it has properly constructed approaches and embankments for the width of the portion of the highway available and actually in use. An additional use of the highway for an increased width will, however, necessitate an increased width in the approaches and embankments. * * * It is impossible to lay down any rule defining just what kind of structures shall be used in any particular case. Each particular crossing presents different conditions, but the general rule governing all is the same, and that rule is that the company must erect whatever structures are reasonably necessary to the safety and convenience of the travelers using the crossing."

"Sec. 1114e. *Width of Crossings to be Maintained.*—The question is sometimes important as to the width of the highway crossing to be maintained by a railroad company. Here it seems a sensible rule that the railroad company must construct and maintain crossings and approaches for the entire width of the street in populous and busy cities where great numbers of vehicles

and people use them. But where few people and vehicles use the crossings, the width to be constructed and maintained is to be determined largely by what is reasonably required to accommodate the public travel over such crossings and it has been observed that this 'is fixed, for the time being at least, by the actual crossings and approaches which are made by the railroad companies with the acquiescence of the public and the public authorities.'

In the case of *Ellis, Respondent, v. Wabash Railway Company*, 17 Mo. App. 126, a statute of that state was reviewed which required railroads to construct and maintain good and sufficient crossings where its railroad crosses public roads. The court said the statute did not mean that railroad companies are to construct crossings the whole width of the public highways; but the court also said that the streets of a crowded town or city would doubtless be an exception to this rule. A similar statute of the state of Illinois was reviewed by the Supreme Court of that state in the case of *City of Bloomington v. I. C. R. R. Co.*, 154 Ill. 539, 89 N. E. 478. It was there said:

"It would be absurd to suppose that the Legislature intended by the act of 1869 to require of railroad companies, in all cases where they crossed public highways outside of the limits of cities and villages, that they should erect, construct, and maintain approaches of the entire width of each and all of said highways, and reaching from the natural surface of the ground to the railroad tracks at the crossings. In most, if not all, of such rural localities, the travel on such roads and highways did not and does not demand or require more than a fraction of such width of approach. And it cannot be imputed to the Legislature that it was intended to impose so heavy and so useless an expense and burden upon the railroad corporations of the state."

But the court also said:

"What would be regarded as the approaches to the crossing would largely depend upon the demands of the traveling public, upon the action of the local authorities, and upon what would be reasonable under the circumstances and local situation in each case. It is manifest that they do not and should not in all cases include all that part of the right of way that is covered by the street or highway, and is not immediately at the crossing."

In the case of *Wabash Railroad Co. v. De Hart*, 32 Ind. App. 62, 65 N. E. 192, Mr. Justice Black, speaking for the Supreme Court of Indiana, said:

"The appellant was under legal obligation to maintain the crossing so as not to interfere with the free use thereof by the public, and in such manner as to afford security to life and property thereat. It was its duty to erect and maintain such structures as to make the crossing reasonably safe for persons lawfully and properly using the way. Such obligation and duty rested upon the railroad company by statute, and also without regard to any express statutory requirement."

The manner of discharging this duty is a proper subject of statutory regulation; but the duty is not created by the statute. It exists independently of it. Our Legislature has seen proper to exercise its authority in this respect only by prescribing the elevation of crossings by designating the ratio of hori-

zontal to perpendicular feet; but the duty exists to adapt the width of the crossing to the demands of the public. We are not called upon to say, and do not decide, that the railroad company must, in all cases, make its crossings coextensive with the roads and streets over which they are placed, but they must anticipate the reasonable demands of the public, and where the traffic requires it, the crossing must be made available for the entire width of the road or street. Here was a crossing only 15 to 20 feet in width, whereas the street itself was 50 feet, or more, in width. And the crossing was in the center of the street, whereas the sidewalks used by pedestrians were on the side of the street. There was an intervening space between the edge of the street and the crossing which the railroad company had not prepared for the public use. The walk was used by nearly all of the pedestrians, and the proof shows there was a large amount of such travel. The sidewalk running to the edge of the right of way on each side of the track was, of itself, a constant notice to the railroad company of the route pedestrians would take if they continued directly across the track, and we think it was the duty of the railroad company, under these circumstances, to make this part of the crossing reasonably safe for the accommodation of this travel.

Appellant argues that inasmuch as the town of Bigelow had passed no ordinance to avail itself of the benefits of Act No. 301 of the Acts of 1907, page 726, the railroad company was under no duty to make this part of the crossing safe. We think, however, that counsel mistake the purpose and effect of this act. Its title is "An act to empower councils of cities and incorporated towns to require railroad companies to construct and maintain footwalks to their passenger depots in certain cases."

From a perusal of the act it is seen that it has no application to the facts of this case.

We think no prejudicial error was committed in this case, and the judgment of the court below is therefore affirmed.

J. R. WATKINS MEDICAL CO. v. WILLIAMS et al. (No. 94.)

(Supreme Court of Arkansas. June 26, 1916.)

1. CONTRACTS \S 170(1) — CONSTRUCTION — CONSTRUCTION BY PARTIES.

An ambiguous written contract may be interpreted according to the construction given it by the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. \S 758; Dec. Dig. \S 170(1).]

2. COMMERCE \S 40(3) — INTRASTATE COMMERCE—SALES OF GOODS—DISTRIBUTION BY LOCAL DEALER.

Where goods were shipped from another state to a point within the state, where defendant secured them, broke the original packages,

and peddled the contents from house to house, his distribution constituted intrastate business.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40(3).]

3. SALES § 52(5)—NATURE OF TRANSACTION—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a verdict that the parties were principal and agent, rather than seller and buyer, especially since any unsold goods could be returned without liability for the purchase price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 136, 137, 139; Dec. Dig. § 52(5).]

4. PRINCIPAL AND AGENT § 23(1) — EXISTENCE OF RELATION—EVIDENCE.

The fact that the parties labeled the relationship existing between them as one of agency was not controlling.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23(1).]

5. CORPORATIONS § 861(3)—FOREIGN CORPORATIONS—RIGHT TO SUE.

Under Laws 1907, p. 744, a foreign corporation, which has not filed its articles of incorporation, cannot sue one of its agents engaged in peddling its wares from point to point within this state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2539, 2542-2544, 2564; Dec. Dig. § 861(3).]

Appeal from Circuit Court, Greene County; W. J. Driver, Judge.

Action by the J. R. Watkins Medical Company against C. E. Williams and others. Judgment for defendants, and plaintiff appeals. Affirmed.

R. P. Taylor, of Paragould, and Tawney, Smith & Tawney, of Winona, Minn., for appellant. Burr, Stewart & Burr, of Paragould, for appellees.

SMITH, J. The parties to this litigation concede that the case presents substantially the same questions as those involved in the case of Clark v. J. R. Watkins Medical Co., 115 Ark. 166, 171 S. W. 136. The appellant here was the appellee there, and the cause of action in both cases was founded upon the same agency contract. Appellant advertises itself as the largest medicine house in the world and does its business chiefly through persons who represent it in the same capacity appellee did. The proof shows that at one time it had as many as 80 such representatives in this state and something like 2,000 in the United States and Canada, and apparently all of them operate under a contract similar to the one existing between the parties here. The court below, at its own instance, gave a number of instructions which submitted to the jury for their decision the controlling question of fact; that is, the nature of the relationship between the parties. Other instructions which appellant requested were refused, some of which might very well have been given. Others were properly refused. But without setting out these instructions it may be said that the ones given substantially declared the law as appellant requested in so far as its instruc-

tions were correct declarations of the law. The court told the jury, in effect, to find for appellant for the amount sued for by it provided they found it had the right to maintain the suit; and the jury was further told, in substance, that appellant had this right unless appellee, who was the defendant there, was its agent in selling and delivering its products in the years 1910, 1911, and 1912, and that the contract sued on was made in this state. And the correctness of this instruction presents the real question in the case.

[1] It is contended here, as it was on the appeal of the former case, cited above, that the contract between the parties was in writing, and that it was the duty of the court below to interpret it, and that in the performance of this duty the court should have declared that appellant was not engaged in business in this state, but that all transactions between the parties contemplated under the contract was interstate commerce, and that appellant therefore had the right to sue in the courts of this state without complying with the laws of this state regulating the manner in which foreign corporations may do business in this state. The trial court took this view of the case on the former appeal and directed a verdict in favor of the plaintiff there; but we reversed that judgment for the reasons there stated, and in doing so we announced the principles which in our judgment are controlling. We said there that in construing a contract we might take into consideration the construction which the parties themselves had placed upon it and the action which they had taken in executing its provisions, but that these rules of construction were not available where the contract was unambiguous, in which event it was the duty of the court to construe the contract and to declare its purport. We said, however, that the contract was ambiguous, and that, when it was considered in connection with the correspondence between the parties and their respective conduct in the performance of its terms, the facts were such that it could not be said, as a matter of law, that the contract was one for the sale of goods, and not one for the creation of the relation of principal and agent.

[2] Under the instructions of the court, which conform to the law as announced in the opinion on the appeal of the former case, the jury has found that appellee was appellant's agent in the business which he did in this state, and there can be no question as to the character of the business which appellee was doing. The undisputed proof is, and from the very nature of appellee's business must have been, that appellee was engaged in intrastate business. The wares which the contract contemplated he should sell to the consumer were shipped to him at

Marmaduke, Ark., from Memphis, Tenn. The original packages were broken up at Marmaduke, and such portions of the various packages as appellee thought he might be able to sell on any particular trip were loaded into his wagon and conveyed from house to house until a purchaser was found, when a delivery would be made.

[3-5] The former opinion set out the contracts and the correspondence between the parties, and we have substantially the same evidence, and we refer to the former opinion for a statement of the provisions of the contracts. Counsel for appellee summarize these provisions and the evidence here in the trial below as follows:

"These contracts required C. E. Williams to devote all his time and attention to selling Watkins' products; to canvass every farmhouse in his territory at least three times a year; to sell these goods at retail prices fixed by the company; to confine his canvassing to his own territory; to observe such instructions in regard to the conduct of the business as the company might give; to have no other occupation whatever and to sell and handle no other goods whatsoever; to work continuously at the business so far as weather and health will permit; to furnish team, wagon, and outfit for the business; to pay freight on goods; to make regular and satisfactory weekly reports to the company; to pay for goods in one or the other ways provided therein; to return all goods by prepaid freight to the company when he quits business for credit on his account; to sell said goods at every farmhouse in his territory; to make written reports to the company when required to do so of all sales, collections, goods on hand, and outstanding accounts; to sell only to actual consumers; and to keep a complete record of all goods disposed of in said territory. He was to pay for the goods by giving the company half the cash the agency produced each week, or by paying cash for goods in 10 days with 3 per cent. discount; when he quit work, the company agreed to receive all undisposed of goods on hand (to be returned freight prepaid) and give him credit on his account at the original price it charged him for them, and when a balance was struck the party who owed the other should pay such balance due on demand."

We think this evidence presents sufficient indicia of agency to support the finding that this was the relationship which in fact existed.

We recognize the fact that one may sell his goods to whom he pleases, and that the relation of the parties as vendor and vendee is not changed by restrictions as to the class of persons to whom sales will be made, nor by the exaction that fixed prices shall be charged, or that other exactions shall be complied with, without changing the character of the transaction as a sale. The vendor may exact in advance an agreement covering these matters and may refuse to sell to any except those who will agree so to be bound without changing the character of the transaction as a sale, and compliance with these terms by the vendee will not support

a finding that the vendor who imposed them is engaged in business in the state where the conditions are performed. But we think the jury here was warranted in finding something more. These findings might have been made: That the consignee was not definitely and absolutely bound, at all events, to pay for the goods. That the consignee could fulfill his contract by accounting to the consignor for all goods sold and by returning to the consignor the unsold goods. That the consignee had the right, under any circumstances, to return any of the consigned goods. That no part of the purchase price for the goods became due the consignor except upon a sale made by the consignee. That the goods were not to be paid for as upon a sale to the consignee, but only upon a sale by the consignee. That the consignee was to render regular accounts and reports of the business, showing the amounts and prices of goods sold, whether sold for cash or credit, the amount of goods on hand, and outstanding accounts. That there was no stipulation either to sell or to pay for the goods in a fixed time. That all unsold goods were to be returned to the consignor when the contract was terminated by either party.

Appellant was constantly endeavoring to increase the number of its agents or representatives, and in the literature which was furnished the acting representatives inducements were held out to secure others. In this literature it was said:

"No experience is necessary, and no investment is required. We furnish you the goods and teach you the business. Address: Agency Department the J. R. Watkins Medical Company, Winona, Minnesota."

In a great many places in the contracts, correspondence, and advertising matter, appellee and others similarly employed are referred to as agents; yet, of course, that designation is not controlling. This was made plain to the jury in an instruction in which they were told that, if it was the intention of the medical company and appellee that the property in the goods delivered to appellee was to pass to him for the price to be paid by him, the transaction was a sale, and their verdict should be for the medical company, and this would be true without regard to the name used by either of the parties in describing the transaction.

We think the evidence summarized above is legally sufficient to support the finding that the business out of which this litigation arose was appellant's and that appellee was but its agent. And inasmuch as appellant concedes it has not complied with Act No. 313 of the Acts of 1907, p. 744, authorizing it to do business in this state, the judgment of the court below will be affirmed.

YAZOO & M. V. R. CO. v. ALTMAN.
(No. 73.)

(Supreme Court of Arkansas. June 19, 1918.)

1. CARRIERS \S 114—GOODS—DELIVERY—LIABILITY.

The liability of a carrier ceases upon delivery of the goods at the point of destination in accordance with the direction of the shipper, or according to the usage and custom of the trade.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608-620; Dec. Dig. \S 114.]

2. CARRIERS \S 88—GOODS—"DELIVERY."

An actual "delivery" is made when the possession is turned over to the consignee or his duly authorized agent and a reasonable time given him to remove the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 280-289½, 319-321; Dec. Dig. \S 88.]

For other definitions, see Words and Phrases, First and Second Series, Delivery.]

3. CARRIERS \S 89—GOODS—REFUSAL BY CONSIGNEE.

The consignee's refusal to accept a shipment from the carrier does not discharge it from all liability, but it owes a duty to take care of the goods and cannot abandon them or convert them to its own use.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 324-330; Dec. Dig. \S 89.]

4. CARRIERS \S 94(5)—GOODS—QUESTION FOR JURY—DELIVERY.

In a suit to recover the value of goods which a carrier had failed to deliver, evidence held to make the delivery a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 386, 387; Dec. Dig. \S 94(5).]

5. TRIAL \S 140(2)—QUESTION FOR JURY—CREDIBILITY OF WITNESS—PARTY.

The inference from an uncontradicted statement of one of the parties directly interested in the result of the suit is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 335; Dec. Dig. \S 140(2).]

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Action by J. L. Altman against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and cause remanded for a new trial.

Appellee brought this suit to recover the value of two cases of shoes which it was alleged the carrier failed to deliver. From the judgment against it in the justice court, the railroad company appealed, and upon trial the circuit court directed a verdict against it, and, from the judgment thereon, this appeal is prosecuted.

It appears from the testimony that appellee ordered by telegraph two cases of shoes from Geo. E. Keith & Co. of St. Louis; that they did not arrive as soon as he expected them, and he stated that he told the agent of appellant if they did come to notify him and keep them until he could take the matter up with the house. "I told the agent to keep the goods, that I would take the matter up with the company." The transfer company, which was the agent of appellee, received the

goods from the carrier and took them to the store of appellee, who refused to receive them and directed that they be taken back. Appellee stated that the agent afterwards told him that the goods were at the warehouse and asked what he was going to do about it, and he again told him to hold them until he could make arrangements with the consignor about it. After some little correspondence with the seller, he concluded that he would have to take the goods and notified the agent and the transfer company that he would take them and to send them up. The shipment could not be found and was not thereafter delivered to him.

Appellant had written instructions from appellee to deliver all shipments of goods for him to the transfer company, which was employed to deliver them to his store. The manager of the transfer company stated that, after the shoes were returned to the station, he saw them in the warehouse, and asked the agent why they were there and had not been delivered, and was told they had been refused and returned by Mr. Altman. Said he did not make the delivery, and knew nothing about it, and:

"I saw the shoes after they were returned, and was told by Mr. Davis that they had been refused and returned to the depot. We had been in the habit of returning refused shipments to the depot, but I had no contract with the railroad company to that effect, and they had been accepting them upon their return."

The receipt for the goods executed by the transfer company was introduced in evidence by the appellant, and the manager stated that they neglected to take it up when the shipment was returned; that it was the custom when a shipment was returned to erase the name of the agent on the receipt, but it had not been done in this case. He did not know whether his agent who returned the goods to the railroad company notified it that he had delivered the goods back to them, but he did know that the railroad agent saw the goods in the warehouse after they were returned; that they were in a place in the warehouse where goods were frequently placed near the door. Admitted that Mr. Straub's name was over the place where he saw the goods. It was the practice of the transfer company to pay the railroad company the freight charges and execute a receipt for the goods upon delivery to it and this was done in this case.

The warehouse foreman stated that he had nothing to do with the delivery of goods to the consignee, but only checked them from the cars into the warehouse; that, if this shipment was returned by the transfer company to the warehouse, it did not come under his notice; that, if they were returned, it would come to the notice of the agent or others.

The court refused all the instructions ask-

ed by appellant and directed the jury to find for appellee the value of the claim.

Fink & Dinning, of Helena, for appellant.
Bevens & Mundt, of Helena, for appellee.

KIRBY, J. (after stating the facts as above). The undisputed testimony shows that the consignment of goods was delivered by the railway company to the transfer company, the agent of appellee, who was duly authorized to receive and receipt for all shipments to appellee, and also that, upon their being taken to the store of appellee, he refused to take the goods from the transfer company, thinking he had the right to refuse to accept them from the seller because of their not arriving sooner. Appellee stated, however, that, upon the failure of the goods to arrive within two or three days after they were ordered, he directed the agent of appellant not to deliver them, but to hold the shipment until he could take the matter up with the consignor; that later, when the goods were brought to his store by the transfer company, he refused to take them and directed that they be returned to the railway company. He likewise stated that the agent afterwards called him up and asked him what was to be done about it, and he told him to hold them until he could make some adjustment with the seller.

The manager of the transfer company stated that he had seen the consignment in the warehouse after they had been returned by direction of appellee, and, not knowing that they had ever been taken out, asked why they were there, and was told that they had been refused and returned by appellee. This witness also stated that he knew the goods were in the warehouse, and that the agent had taken charge of them, because the agent told him that they should not have accepted them, to which witness replied:

"I told him I would not bother, so long as the goods were worth the amount of the freight he had paid on them."

[1, 2] There is no question but that the liability of the carrier ceases upon delivery of the goods at the point of destination in accordance with the directions of the shipper or according to the usage and custom of the trade, nor that an actual "delivery" is made when the possession is turned over to the consignee or his duly authorized agent and a reasonable time given him in which to remove the goods. *Arkadelphia Milling Co. v. Smoker Merchandise Co.*, 100 Ark. 37, 139 S. W. 680; *Hill v. St. L. S. W. Ry. Co.*, 67 Ark. 402, 55 S. W. 216; *Arkansas Midland Ry. Co. v. Moody*, 90 Ark. 70, 117 S. W. 757.

[3] It is equally true that the refusal of the consignee to accept a shipment from the carrier does not discharge it from all liability, and that it owes a duty to take care of, and cannot abandon the goods or convert them to its own use. *C. R. I. & P. Ry.*

Co. v. Pfeiffer, 90 Ark. 524, 119 S. W. 642, 22 L. R. A. (N. S.) 1107; *Railway Co. v. Glidewell*, 39 Ark. 487; 2 *Hutchinson on Carriers*, § 685.

[4, 5] In this instance, although the possession of the goods was in fact turned over by the railroad company to the transfer company, which was appellee's agent generally authorized to receive all shipments, it cannot be said that it constituted a delivery thereof, since appellee stated that he told the agent of the railroad company before the shipment arrived that he would not receive it because of the delay and to hold the goods until he could adjust the matter with the consignor, and refused to take the goods when they were brought to his store and directed that they be returned to the railroad company. The testimony also shows that the goods were in fact returned to the depot or warehouse of appellant company with the consent or knowledge of its agent in charge.

Neither can it be said that the undisputed testimony shows there was not a delivery of the shipment, since it is shown there was but for appellee's statement that he directed the railroad agent before its arrival to hold and not deliver it. Although this statement was not contradicted, it was made by one of the parties directly interested in the result of the suit, and the inferences arising from the other testimony are not altogether in accord with it. *Skillern v. Baker*, 82 Ark. 89, 100 S. W. 764, 118 Am. St. Rep. 52, 12 Ann. Cas. 243. It was a question for the jury under the circumstances of the case, and the court erred in directing the verdict.

The judgment is reversed, and the cause remanded for a new trial.

ETNA INS. CO. et al. v. SHORT. (No. 70.)
(Supreme Court of Arkansas. June 19, 1916.)

1. INSURANCE §131(1)—FIRE INSURANCE—
VALIDITY OF ORAL CONTRACT.

In the absence of any statutory prohibition, a parol contract of insurance is valid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 203-205, 207, 208; Dec. Dig. § 131(1).]

2. INSURANCE §131(2)—AGENTS—SCOPE AND
EXTENT OF AGENCY.

Where the agent of a fire insurance company authorized to issue policies and to make renewals was not required to receive the premium in advance as a condition precedent to making parol contracts to renew the policy, but had authority to make renewal on credit, he was authorized to make a preliminary contract binding upon the company, to be consummated by filling out and delivering the policy pursuant thereto.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 206; Dec. Dig. § 131(2).]

3. EVIDENCE §596(1)—DEGREE OF PROOF—
ORAL INSURANCE CONTRACT.

In an action on an alleged oral contract to renew a policy of fire insurance, although the burden is on the plaintiff to establish a parol

contract to renew, a preponderance of the evidence is sufficient, and clear and convincing proof is not necessary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2446; Dec. Dig. ¶596(1).]

4. INSURANCE ¶145(1)—RENEWAL OF POLICY—EFFECT ON CONTRACT.

The terms of a fire policy are neither enlarged, restricted, nor changed by a renewal, but the rights of both parties, no matter how often a policy of insurance may have been renewed, are bound by the provisions of the policy as originally issued.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 276, 278-283, 287-291; Dec. Dig. ¶145(1).]

5. INSURANCE ¶602—FIRE INSURANCE—ACTIONS—COSTS AND ATTORNEY'S FEES.

Under Acts 1905, p. 307, providing that where an insurance company, liable for a loss, fails to pay within the time specified in the policy, a reasonable attorney's fee, together with 12 per cent. damages upon the amount of the loss, shall be taxed as a part of the costs in an action upon an alleged oral contract to renew a policy of fire insurance, which had not been consummated by delivering a policy to plaintiff, the allowance of an attorney's fee and the penalty provided by the statute was error.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. ¶602.]

Appeal from Circuit Court, Cleburne County; J. I. Worthington, Judge.

Action by W. J. Short against the Aetna Insurance Company and others. Judgment for plaintiff, and defendants appeal. Affirmed in part. Reversed and dismissed in part.

W. J. Short sued the Aetna Insurance Company to recover upon a policy of fire insurance issued by it upon a stock of goods. The material facts are as follows:

W. J. Short was a merchant at Heber Springs, Ark., dealing in hardware, queensware, furniture, farming implements, wagons, and machinery. Originally he had something like \$8,000 insurance on his stock, including the policy in question. J. B. Higgason was the agent of the Aetna Insurance Company at Heber Springs, and was authorized to issue policies of insurance for it. On October 7, 1912, he issued and delivered to Short a policy of insurance for \$2,000 on his stock of goods. The policy was on the printed form of the company, and was in the usual form of a standard insurance policy. On October 7, 1913, the policy was renewed to October 7, 1914, by J. B. Higgason. It is the contention of the insurance company that the policy was not again renewed. Short, however, claims that the policy was again renewed by Higgason in October, 1914, and he based his right to recover on that ground.

The original policy insured Short on his stock of merchandise, consisting principally of furniture, hardware, queensware, farming implements, and machinery, and such other merchandise not more hazardous than is usually kept for sale in a general store. Permission was granted for \$8,000 other concur-

rent insurance. The policy was countersigned by J. B. Higgason, agent.

W. J. Short testified substantially as follows:

In January, 1914, I sold my stock of goods except farming implements, wagons, and machinery. Higgason told me it was not necessary to make any change in my policies on that account. At that time I had about \$8,000 insurance on my stock. Some of these policies would expire in the spring, and I told Higgason he need not rewrite them. I reminded him about my \$2,000 policy, which ran until fall, and told him I would keep that up. In October, 1914, this was the only policy I had left on my stock of goods. It was the custom of Higgason to issue policies and to collect for them at the end of the next month. Sometimes, when he issued a renewal policy, he would bring it right over, but sometimes he would wait until the end of the month. Somewhere from the 4th to the 6th of October, 1914, Higgason came into my store to collect the premium on a policy which he had issued on my storehouse. I paid the premium, and he asked me to let him write some more insurance on my stock. I told him that I would not need any until my stock policy expired, and requested him to be sure and not forget to renew it. He promised to renew it. We talked about a raise in the rate because of a stable which was situated near the rear of my store. It was agreed between us that I should pay the increased rate, and that later on I could obtain a deduction if the stable was removed.

W. F. Haywood testified that he was a brother-in-law of Short, and heard the agent agree to renew the policy as stated by Mr. Short.

On the 20th of October, 1914, the storehouse of Short caught fire, and his stock of goods was burned. It is agreed that Short, if entitled to recover at all, is entitled to recover the full amount of the policy sued on.

For the insurance company J. B. Higgason testified substantially as follows:

On October 7, 1912, I issued to W. J. Short a policy of insurance for \$2,000 on his stock of goods in the Aetna Insurance Company. On October 7, 1913, I renewed the policy for one year. A short time before the policy expired, in 1914, I asked Mr. Short to again have the policy renewed. He declined to renew the policy, and it expired on October 7, 1914. I had a book in which I kept the date of the expirations of insurance policies issued by me for companies represented by me. The book showed that W. J. Short had a policy of insurance with the Aetna Insurance Company, and that it expired on October 7, 1914. When Short declined to renew the policy I ran my pencil through the date of expiration on the book. This was done to show that he declined to renew the policy.

W. D. Raywinkle purchased the insurance business of Higgason in the fall of 1914, and had charge of his books on the night of the fire. He testified that on that night he went into his office and took out the books to find out whether or not a policy on another customer had expired. In doing this he noticed a pencil mark had been run through the date of the expiration of the policy in question.

The jury returned a verdict for the plaintiff, Short, for the amount of the policy, less the unpaid premium, and the insurance company has appealed.

Cockrill & Armistead, of Little Rock, for appellants. M. E. Vinson, of Heber Springs, and Gus Seawel, of Yellville, for appellee.

HART, J. (after stating the facts as above). [1-3] At common law contracts of insurance were not required to be in writing originally, and in the absence of any statutory prohibition, a parol contract of that character will be valid. This is conceded to be the law by counsel for the defendant. The record, however, shows that, if any verbal agreement was made, it was entered into between the parties a few days before the old policy expired. It is the contention of counsel for defendant that a parol contract of insurance, in order to be enforceable, must not be executory, but must take effect immediately on the making of the agreement. We do not deem it necessary to decide this question. The agent of the insurance company was authorized to issue policies, and to take renewals thereof. He was not required to receive the premium in advance as a condition precedent to making a parol contract to renew the policy, but had the authority to make the renewal on a credit. Under our own decisions this authorized him to make a preliminary contract, binding upon the defendant, to be consummated by filling out and delivering a policy pursuant thereto. *King v. Cox*, 63 Ark. 204, 37 S. W. 877; *Phoenix Ins. Co. v. Hale*, 67 Ark. 433, 55 S. W. 486; *Cooksey v. Mut. L. Ins. Co.*, 73 Ark. 117, 83 S. W. 317, 108 Am. St. Rep. 26; *Brickley v. Continental Gin Co.*, 113 Ark. 15, 166 S. W. 744.

In the case of *King v. Cox*, supra, the court said:

"An oral contract for insurance is not within the statute of frauds, and if supported by a valuable consideration, and free from fraud, and made by competent parties, is binding, though the premium be not paid at the time, if credit be given, or it appears from the circumstances and the situation of the parties that payment of the premium at the time was not exacted."

In the case of *McCabe v. Ætna Insurance Co.*, 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641, the court said:

"That it is well settled that an insurance company can, by a preliminary parol contract, bind itself to issue or to renew a policy in the future, and further held that prepayment of the premium for a renewal is not essential to the validity of such preliminary agreement to renew."

Many cases are cited which sustain the opinion, and among them is the case of *King v. Cox*, 63 Ark. 204, 37 S. W. 877.

It is next contended that the court erred in refusing to instruct the jury that the burden of proving that its agent renewed the insurance was upon the plaintiff, and that before the jury could find for the plaintiff on that issue the evidence must be clear and convincing. The court did instruct the jury that the burden was upon the plaintiff to establish the parol contract of renewal, and

that the plaintiff must establish that by a preponderance of the evidence.

[4] Counsel for the defendant contended, however, that because such contracts are rarely made, the proof of such oral contract must be clear and convincing. We do not agree with them in that contention however. As we have already seen, there is a distinction between an oral contract to renew a policy and an oral contract of insurance to take effect in the future. The alleged agreement in the instant case was not for new or original insurance, beginning then for the first time, but it was for a renewal of the old policy to take effect from the date of its expiration. A renewal of a policy is, unless otherwise expressed, on the same terms and conditions as were contained in the original policy. *King v. Cox*, 63 Ark. 204, 37 S. W. 877. The renewal of the policy in question seems to have been fully authorized according to the testimony of the plaintiff, which was believed by the jury. The agent does not appear to have required any new warranty or representation other than those which were made when the policy was issued. The agent must have acted upon this, unless he acted upon the knowledge which he acquired from a personal view of the stock of goods at the time he agreed to the renewal. It will be remembered that the agent was in the store when the agreement was made. The terms of the policy are neither enlarged, restricted, or changed by the renewal, but the rights of both parties, no matter how often a policy of insurance may have been renewed, are still bound by the provisions of the policy as originally issued. *Witherell v. Maine Insurance Co.*, 49 Me. 200; *Aurora Fire & Marine Ins. Co. v. Kranich*, 36 Mich. 289; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115. Therefore the court did not err in refusing to instruct the jury that the renewal contract must be established by clear and convincing testimony, and that the burden was upon the plaintiff to establish that fact by clear preponderance of the evidence.

[5] The court allowed an attorney's fee of \$200 and the 12 per cent. penalty provided by the statute, and the action of the court in this respect is assigned as error by counsel for the defendant. We agree with them in this contention. The act in question provides that in all cases where loss occurs, and the insurance company liable therefor shall fail to pay the same within the time specified in the policy, etc., that a reasonable attorney's fee, together with 12 per cent. damages upon the amount of the loss, shall be taxed as part of the costs. Acts 1905, pp. 307, 308. The statute in terms provides that a written policy must be issued before the attorney's fee, and 12 per cent. penalty, can be taxed as costs against the insurance company. Here no policy of insurance was issued by the company. There was only a preliminary

contract for renewal, which had not been consummated by filing out and delivering a policy to the plaintiff. Therefore the facts do not bring the plaintiff within the terms of the statute, and he cannot avail himself of its provisions.

The judgment for the amount of the insurance sued for will be affirmed, and the judgment for the 12 per cent. penalty and attorney's fees will be reversed and dismissed.

BREITZKE et al. v. BANK OF GRAND PRAIRIE. (No. 69.)

(Supreme Court of Arkansas. June 19, 1916.)

1. CORPORATIONS §340(3) — REGULATION — REPORTS OF OFFICERS—LIABILITY.

Under Acts 1909, p. 643, requiring corporation officers to make statements to the county clerk of financial condition of the corporation and making them civilly and criminally liable for debts on failure to do so, the duty imposed is official and ceases when the individual ceases to be an officer, and the civil liability of such officers includes only debts contracted while they are in office.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1477; Dec. Dig. §340(3).]

2. CORPORATIONS §340(3) — REGULATION — REPORTS OF OFFICERS—LIABILITY.

Under such statute, new officers must acquaint themselves with corporation affairs, and, if the required report has not been made, must make it within a reasonable time, and if they do not the civil and criminal liability attaches to them, and the outgoing officers continue to be liable only for debts of their administration, and not for those contracted after their term.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1477; Dec. Dig. §340(3).]

3. CORPORATIONS §340(3)—REGULATION—REPORTS OF OFFICERS—LIABILITY—EVIDENCE.

Where newly elected officers of a corporation failed for one year to file the report required by Acts 1909, p. 643, which makes them liable for the corporation debts and criminally liable for failure to report within a reasonable time, they could not escape liability on the ground that the debt was that contracted under former officers, where it was represented by an overdraft which was frequently during their terms reduced to practically nothing and later increased.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1477; Dec. Dig. §340(3).]

4. CORPORATIONS §344—OFFICERS—FAILURE TO MAKE REPORT—LIABILITY—ESTOPPEL.

Although corporation officers on giving their note for a corporation debt secured the promise of the payee that it would not hold them personally liable thereon, the payee was not estopped to claim the statutory liability imposed by Acts 1909, p. 643, for failure to make required financial reports.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1485; Dec. Dig. §344.]

Kirby, J., dissenting.

Appeal from Prairie Chancery Court; Jno. M. Elliott, Chancellor.

Action by the Bank of Grand Prairie against Gus Breitcke and others. Judgment for plaintiff, and defendants appeal. Affirmed.

This suit was instituted by the appellee against the Hazen Creamery Company, a

corporation, and appellants, the president and secretary, respectively, of such corporation, to foreclose certain mortgages and to obtain a personal judgment against the appellants for certain sums amounting in the aggregate to \$5,000, evidenced by a promissory note for that sum dated March 10, 1914. After setting out the different items of indebtedness that constituted the aggregate sum of \$5,000, for which the note was executed by the creamery company to the appellee, giving the dates and amounts, it was alleged in the complaint that the appellants, as president and secretary of the corporation, neglected to comply with the statute requiring them to file a certificate showing the financial standing of the corporation of which they were officers in the years 1913 and 1914, and that the indebtedness sued on accrued during the period of such neglect.

Appellants denied that they had failed to comply with the statute as alleged, and denied that the indebtedness to the appellee was contracted during the period of any neglect or refusal on their part, and denied that they were indebted to the appellee in the sum sued for. They further set up that the note sued on was for indebtedness of the creamery company to the appellee that existed before appellants became officers of the creamery company, and that said indebtedness was not contracted during any period of default on their part to file the certificate showing the condition of the financial affairs of the corporation of which they were officers. They further set up that the note in suit was executed by the appellants as president and secretary of the corporation only after the appellee had agreed with the appellants that it would not hold them personally liable for the debt or any part thereof; that but for such agreement they would not have signed the note sued on. They further set up that the creamery company was incorporated in April, 1912, and that default was made in filing the statement as required by the statute in August, 1913, by the then president and secretary of the company; that appellants were elected to their respective offices October 8, 1913, and that they were not required by law to file any certificate with the county clerk of Prairie county until August 15, 1914; that the debt for which the note was given was contracted prior to August 15, 1914. They further alleged that prior to February 15, 1914, the sum of \$1,000 was already due the plaintiff, evidenced by a promissory note executed long prior to the time when the appellants became officers of the creamery company; that prior to February 15, 1914, the sum of \$8,051.38 of the indebtedness evidenced by the note sued on was due the appellee in the form of an overdraft; and that only \$948.62 of the note in suit was contracted after February 15, 1914. They alleged therefore that, if they were li-

ble at all under the law, their liability would only be for the sum of \$948.62. They further set up that appellee was estopped by representations made by its officers at the time of the execution of the note in suit to the effect that they would not hold appellants liable as officers for the indebtedness sued on.

The testimony shows that appellants Breitzke and Kumpe were elected president and secretary, respectively, of the creamery company October 8, 1913. At that time the company owed the bank the sum of \$1,000, evidenced by a note, and the further sum of \$1,476.06 in overdraft. After appellants became officers of the company, its overdrafts on the bank varied, increasing and diminishing from time to time. Kumpe, the secretary, testified that:

"At lots of times the overdraft was cut down to practically nothing, but they made a new overdraft each month. The 20th of the month was pay day. On that day they would have the overdraft taken up—everything covered—and they would issue checks which would cause another overdraft. The checks would be issued for the pay roll of the month preceding the 20th. At times they would pay out on the 20th, and there would be times that there would be no overdraft until the pay roll came in, and they would make a new overdraft. That occurred between October 8, 1913, and March, 1914."

It was shown that as early as October 20, 1913, after appellants became officers of the company, the overdrafts were reduced to as low a sum as \$140.38. On February 15, 1914, the company owed the bank a note in the sum of \$1,000 and an overdraft in the sum of \$3,051.38, making a total indebtedness of \$4,051.38, and interest, which had been contracted prior to that date. The sum of \$491.03 was contracted after February 15, 1914, and prior to March 10, 1914, the date when the note in suit was executed. The note, as stated, covered all prior indebtedness of the company to the bank, with accrued interest as of that date. It was admitted that the note represented a valid indebtedness of the company to the appellee.

The court rendered judgment against the creamery company for the amount sued for, and also rendered a judgment against the appellants for the sum of \$4,360, amount of principal and interest from March 1, 1914, to date of decree. Appellants seek by this appeal to reverse the judgment.

Richard M. Mann and Price Shofner, both of Little Rock, for appellants. Trimble & Williams, of Lonoke, for appellee.

WOOD, J. (after stating the facts as above). The Hazen Creamery Company (hereafter, for convenience, called "company") was incorporated March 16, 1912, under the provisions of chapter 31 of Kirby's Digest. Under the law it is the duty of the president and secretary of every business corporation, annually on or before the 15th day of the months of February or August, to file with the county clerk of the county

in which the company transacts its business a certificate showing the condition of the financial affairs of the corporation on the 1st day of January or July next preceding, in the particulars specified in section 848 of Kirby's Digest. A failure or refusal upon the part of the president or secretary of a corporation to comply with the above provisions renders them jointly and severally liable for all debts of the corporation contracted during the period of any such neglect or refusal, and they are also guilty of a misdemeanor, punishable by a fine of \$500, for each and every day that they neglect to comply with the above provisions. Act 222, Acts of 1909, p. 648.

In *Griffin v. Long*, 96 Ark. 268-273, 131 S. W. 672, 674 (35 L. R. A. [N. S.] 855, Ann. Cas. 1912B, 622), concerning this statute, we said:

"The reason of the statute is to require corporations to make such a public showing of their affairs as will enable those dealing with them to determine whether they can safely give them credit."

And in *Beekman Lumber Co. v. Ahern*, 75 Ark. 111, 86 S. W. 842, speaking of this act, we said:

"There is nothing in the act that requires an officer who has neglected to file such statement within the time named in the act to wait until after the 1st day of the next succeeding July or January before filing the statement. On the contrary, as the act declares that, upon the failure to file the statement within the time named, the officer becomes liable for all debts of the corporation contracted during the period of such neglect, we are of the opinion that it was the intention of the law to make it to the interest of the officer to file the statement at as early a date as possible, when he discovers the oversight, and when he does file such statement, even though it be after the dates named in the act, that he is not liable for debts thereafter contracted by the corporation until he makes another default in the filing of another statement."

[1] While the president and secretary are made individually liable, both civilly and criminally, for a failure to comply with the provisions of the above statute, yet the duty which the statute imposes attaches to them as officials of the corporation, and not as individuals. It is an official duty which these officers of corporations owe to those of the public who may have dealings with such corporations. The duty attaches to the individual only by virtue of the office he holds in the corporation. When there is a failure to comply with the statute, the dereliction continues on the part of the individual only so long as he is an officer of the corporation. When his relation as such is severed, he has no longer any duty to make and file the certificate required by the statute, and he has no power to do so. The civil liability imposed upon these officers "for all debts of such corporation contracted during the period of any such neglect or refusal" therefore includes only those debts which were contracted while the individuals were officers of the corporation. When the last of the optional dates for making the report specified in the statute has expired, these officers are also

liable criminally for each day thereafter that they fail to make such report until they go out of office, but no longer.

[2] The duties and responsibilities of the newly elected president and secretary begin when they take the place of the old. One of these duties would be to acquaint themselves with the financial affairs of the corporation and to know whether or not the statute requiring the filing of the annual certificate had been complied with by their predecessors. If it had not, then it would be the duty of the new officers to file the same as soon as they ascertained that fact, after a reasonable time has elapsed for making an investigation of the financial affairs of the corporation. The newly elected officers from that time, so to speak, step into the shoes of their predecessors, in office, and their liability, both civil and criminal, for dereliction in failing to make the certificate, is the same as their predecessors would have been had they continued in office. The dereliction, as we have seen, attaches to the ones who hold the offices of president and secretary, and is a continuing dereliction so long as the statute is not complied with.

Unless the newly elected officers, succeeding old ones, were required to make the certificate within a reasonable time after assuming the duties of their offices, there might be a long interval in which the financial standing of business corporations would not be made known to the public. To illustrate, if the first elected president and secretary of such corporation should let the 15th day of February or the 15th day of August go by without filing the certificate, and thus fail to comply with the statute, and if they then were immediately displaced by new officers, these newly elected officers could wait until the next annual period before making the certificate required by law, and there would be an interval of a year wherein no certificate was filed, and debts could be contracted by the corporation, and neither the old nor the new officers liable therefor. This would frustrate the salutary purpose of the law, which is to require business corporations, through their president and secretary, to advise the public by these annual certificates of their financial standing.

But counsel for appellants contend that the outgoing president and secretary, having failed to comply with the statute while in office, would continue liable for debts of the corporation contracted until the next annual date for filing the certificate; that the period of "such neglect or refusal" continues till that time. To support this contention, they cite and quote at length from *Providence Steam Engine Co. v. Chas. Hubbard*, 101 U. S. 188, 25 L. Ed. 786. In that case it was held that where an outgoing president (under a statute fixing the same dates as ours for filing the certificate) failed to file the certificate while he was in office on the 15th of February, and retired

without doing so, the incoming president, who was elected "less than two months prior" to the 15th of August (the next annual date), would not be liable for a debt of the corporation contracted before he took his office, nor during the short period of less than two months between the date of his election and August 15th (the date when he had to file his certificate) that he was not liable for such debt even though his default continued after that date, because he was not in default during the period when the debt was contracted. While the statute under review in that case is similar to ours, the facts are quite different. Much that is said in the opinion is in harmony with the views we have expressed, and we do not regard the case as authority to support the contention of counsel. But even if it were, we could not follow it, for we could never hold, under our statute, that the retiring president and secretary who had failed to file the certificate would be liable for debts contracted by the corporation after they went out of office. They would be liable and could be sued after they went out of office for the debts contracted during the period of their default, which would continue until their retirement if they neglected till that time to file the certificate. If the civil liability could be continued for debts created thereafter, then the criminal liability would also continue, and thus individuals could be civilly liable for debts they did not contract, and had no power to prevent and could be severely punished criminally for an act they did not and could not do.

Corporations can only perform their duties to the public through their officers and agents, and as shown in *Griffin v. Long*, and *Beekman Lumber Co. v. Ahern*, supra, the intention of the Legislature was to impose a duty upon corporations to make these certificates showing the financial standing of the corporation, through their president and secretary; and to make sure that the duty was discharged the Legislature made these officers individually liable for failing to perform such duty. Primarily, the duty under the statute is one which the corporation owes the public, and one which the Legislature has designated must be performed by the president and secretary of such corporation. If it is a duty that inheres in the offices under the statute, then it is one which these officers, upon assuming their offices, must perform as soon as they can reasonably do so where it has been neglected by their predecessors.

In this view of the statute, there is no difference in principle between this case and that of *Boughton v. Otis*, 21 N. Y. 261-264, where the court said:

"A board of trustees guilty of default in January, and retiring from office, is liable for all antecedent debts and for those only; and that the successors, if they continue the default until the next January and no longer, are liable

for the debts afterwards contracted during that year, and for no other. If the persons succeeding to office promptly obey the requirement of the act, they will escape all liability, and it is plainly just that they should, because there is no failure of duty on their part. If they do not, they very properly incur the hazard of the debts which they themselves as trustees contract. This hazard they may be quite willing to incur; but there is neither principle nor policy in making them responsible for the acts and defaults of their predecessors. The general policy of the act is immunity from personal liability, but this is attended by certain conditions demanding the personal observance of the trustees."

[3] Applying the above doctrine to the facts of this record, it appears that the company was incorporated March 16, 1912; that its then president and secretary did not file any certificate as long as they were in office. The appellants were elected October 8, 1913; they filed no certificate until October, 1914. Thus it will be seen that appellants allowed about a year to elapse before filing the certificate. They contend that under the statute it was optional with them to file either on the 15th of February or the 15th of August succeeding their election, and that their period of delinquency therefore did not begin until August 15, 1914. But, as we have shown, this was not a correct view of the statute. It was the duty of appellants to file the certificate within a reasonable time after they assumed the duties of their offices, and the finding of the chancellor that the amount of the debts for which the decree was rendered was incurred during the period of their delinquency is not against the preponderance of the evidence. A clear preponderance of the evidence showed that the indebtedness for which the decree was rendered was in the shape of overdrafts on the bank which, with interest from March 1, 1914, up to the date of the decree, amounted to the sum of \$4,360, for which the decree was entered. Appellants waited too long to file the certificate, and these overdrafts represented an indebtedness that accrued during the period of their default, for there is undisputed testimony in the record to the effect that at times when the pay rolls were completed on the 20th of each month the overdrafts would amount to practically nothing.

[4] There is nothing in the record to estop appellee from claiming judgment against the appellants. It is conceded that, at the time appellee's cashier told appellants that they would not be held personally liable on the note of \$5,000, the parties did not have in mind the statutory liability of appellants. This is the correct view of the evidence, and appellee was therefore not estopped from maintaining this suit for the statutory liability.

The decree is affirmed.

KIRBY, J., dissenting.

ELKINS et al. v. HENRY VOGT MACH. CO.
(No. 93.)

(Supreme Court of Arkansas. June 26, 1916.)

1. NOVATION \S 11—PLEADING.

The defense of novation is sufficiently alleged by the answer, in an action on a note given by defendants for machinery bought by them of plaintiff, that they sold the machinery to D., with the understanding that they were to be relieved from payment of the note, and that for a valuable consideration, consisting of the execution of a mortgage by D. to plaintiff to secure payment of the indebtedness, plaintiff had released them from all liability.

[Ed. Note.—For other cases, see Novation, Cent. Dig. \S 11; Dec. Dig. \S 11.]

2. NOVATION \S 12—BURDEN OF PROOF.

Defendant has the burden of proof on the defense of novation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. \S 12; Dec. Dig. \S 12.]

3. NOVATION \S 1—NATURE.

Novation is the substitution by mutual consent of one debtor for another, or a new debt for an old one, whereby the old debt is extinguished.

[Ed. Note.—For other cases, see Novation, Cent. Dig. \S 1; Dec. Dig. \S 1.]

For other definitions, see Words and Phrases, First and Second Series, Novation.]

4. NOVATION \S 12—EVIDENCE.

Novation need not be shown by express words to that effect, but may be implied from the facts and circumstances and the subsequent conduct of the parties.

[Ed. Note.—For other cases, see Novation, Cent. Dig. \S 12; Dec. Dig. \S 12.]

5. NOVATION \S 11—EVIDENCE.

Defendants under their defense of novation may introduce any correspondence, transactions, conduct, or admissions of plaintiff or its authorized agent tending to support it.

[Ed. Note.—For other cases, see Novation, Cent. Dig. \S 11; Dec. Dig. \S 11.]

6. DEPOSITIONS \S 101—INTRODUCTION BY OTHER PARTY.

Defendants may introduce the deposition of plaintiff's secretary taken by it in the case, its attorneys consenting thereto.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. \S 237-241; Dec. Dig. \S 101.]

7. NOVATION \S 13—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to go to the jury on the defense of novation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. \S 13; Dec. Dig. \S 13.]

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Action by the Henry Vogt Machine Company against Joseph Elkins and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded for new trial.

Appellee machine company brought suit upon three promissory notes, signed by James Elkins, W. D. Raywinkle, C. C. Edwards, and H. E. Watson, for the aggregate amount thereof. The notes were given for machinery to be used for the erection of an ice plant by a partnership known as the Kensett Ice & Gin Company, composed of said individuals. Only the defendants Elkins and Raywinkle answered, denying the plaintiff's

right to recover against them, and alleged that they had sold their interest in the machinery to C. C. Edwards, J. M. Devlin, and T. E. Devlin, with the understanding that they were to be relieved from the payment of the note, and that for a valuable consideration, consisting of the execution of a mortgage by Devlin and others to it to secure the payment of the said indebtedness, plaintiff had released them from all liability. The notes were introduced in evidence and read to the jury, with the statement by appellee's counsel that there was a balance due of twenty-three hundred and some odd dollars.

Appellants introduced J. M. Devlin, who testified that he had been connected with the Kensett Ice & Gin Company, and bought Messrs. Raywinkle's and Elkins' interest therein some time in March, 1912; that he wrote the machine company several letters about it, to ascertain if his purchase would be satisfactory; that he received from them the following telegram:

"Louisville, Ky., 3-21-12.

"James M. Devlin, Kensett, Ark.:

"Will await payments you mention, July and November, provided Elkins, Raywinkle, all will have satisfactory agreement among yourselves without changing notes, etc. Its useless for the short time. Adam Vogt, our Secretary, will be Gayoso Hotel, Memphis, tomorrow. If you want to see him, notify him exact time at Hotel.

"[Signed] Henry Vogt Machine Company."

They offered to show by this witness that appellee company had written certain letters to him indicating a willingness to accept the new debtors upon the giving of satisfactory security, and that certain mortgages had been executed by said purchasers of the Raywinkle-Elkins interest to the machine company and foreclosed by it. The mortgages were also offered in evidence, but excluded by the court, which likewise refused to permit appellants to show that the mortgages had been foreclosed and what money had been realized therefrom. Certain agreements between the machine company, as to the sale of the plant, and H. E. Watson, C. C. Edwards, J. M. Devlin, and T. E. Devlin, were also offered in evidence, and likewise the deposition of Adam Vogt, the secretary of the machine company, containing statements tending to show its knowledge of the proposed transaction and consent thereto upon the execution of certain security by the purchasers of the Raywinkle-Elkins interest. The introduction of the depositions was consented to by appellee's attorneys, but the deposition was excluded by the court as incompetent. It thereupon directed a verdict against appellants, and from the judgment thereon this appeal is prosecuted.

Jno. E. Miller and Rachels & Yarnell, all of Searcy, for appellants. Brundidge & Neely, of Searcy, for appellee.

KIRBY, J. (after stating the facts as above). [1, 2] The answer sufficiently alleged a defense to the suit; but the burden of proof was upon the defendants, appellants, to establish the truth thereof.

[3] "Novation is the substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished." 29 Cyc. 1130.

[4] "It is not essential that the assent to and acceptance of the terms of the novation be shown by express words to that effect, but the same may be implied from the facts and circumstances attending the transaction and in the conduct of the parties thereafter. Such consent is not implied merely from the performance of the contract by the substitute, for that might well consist with the continued liability of the original party; the substitute acting for that purpose in the capacity of agent for the original obligor." 29 Cyc. 1132, 1133; Logan v. Williamson, 3 Ark. 220; Brewer & Son v. Winston, 46 Ark. 166. See, also, Union Cent. Life Ins. Co. v. Hoyer, 66 Ohio St. 344, 64 N. E. 435; Walker v. Wood, 170 Ill. 463, 43 N. E. 919; Dewitt v. Monjo, 46 App. Div. 533, 61 N. Y. Supp. 1046.

[5-7] They had the right to introduce testimony in support of the allegations of their answer, and any correspondence, transactions, conduct, or admissions of appellee company or its authorized agent tending to prove it, and also the deposition of its said secretary taken in the case by appellee, its attorneys having consented thereto, and the court erred in the exclusion of such testimony from the jury. It was substantial testimony, which would have supported a verdict in favor of appellee under proper instructions, had the jury seen fit to give it credit, and the court erred in its rulings excluding the testimony and in directing the verdict. Williams v. St. L. & S. F. Ry. Co., 103 Ark. 401, 147 S. W. 93; Brigham v. Dardanelle, etc., Ry. Co., 104 Ark. 267, 149 S. W. 90.

The judgment is therefore reversed, and the cause remanded for a new trial.

MILLER v. SUMMERS. (No. 407.)

(Supreme Court of Arkansas. May 15, 1916.)

1. EXECUTORS AND ADMINISTRATORS vs. 256(4) — CLAIM AGAINST ESTATE — APPEAL — PROCEEDINGS IN CIRCUIT COURT — MOTIONS.

Where no motion to require that the claim against an estate be made definite and certain, as required by Kirby's Dig. § 113, was made in the probate court upon the hearing thereof, there was no abuse of discretion in the denial of the motion made upon the calling of the case for trial in the circuit court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 252, 912; Dec. Dig. § 256(4).]

2. EXECUTORS AND ADMINISTRATORS ¶227(1)
—CLAIM AGAINST ESTATE—FORM.

Under Kirby's Dig. § 113, requiring a demand against an estate founded upon an account to set forth each item distinctly and the credits, if any, an account for services rendered in keeping house for and in nursing and caring for the deceased during his last illness, was sufficiently definite to invoke the jurisdiction of the court; as it indicated the kind of evidence that could be used in the establishment thereof.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 811, 812, 842; Dec. Dig. ¶227(1).]

3. EXECUTORS AND ADMINISTRATORS ¶221(5)
—CLAIM AGAINST ESTATE—SUFFICIENCY OF EVIDENCE—IMPLIED CONTRACT.

Evidence held sufficient to show that the claimant's services in keeping house for and caring for the deceased were not intended or expected to be gratuitous, and that there was an implied contract for payment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 903½, 1874, 1876; Dec. Dig. ¶221(5).]

4. EXECUTORS AND ADMINISTRATORS ¶206(2)
—CLAIM AGAINST ESTATE—IMPLIED CONTRACT—AMOUNT OF RECOVERY.

An implied contract to pay for services in keeping house, nursing, etc., would permit a recovery for what the services were reasonably worth or their reasonable value.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 733; Dec. Dig. ¶206(2).]

5. APPEAL AND ERROR ¶302(4) — **MOTION FOR NEW TRIAL—ASSIGNMENT OF ERROR.**

It is the purpose of the motion for a new trial to point out and define with reasonable certainty the particular objection urged, that the court's attention may be definitely directed to it, and an assignment of error "in each ruling of law" was not sufficient to require a review of any of the instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1748; Dec. Dig. ¶302(4).]

6. TRIAL ¶260(1) — **REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.**

The refusal of requested instructions was proper, when covered by the instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ¶260(1).]

7. EXECUTORS AND ADMINISTRATORS ¶225(1)
—CLAIM AGAINST ESTATE—LIMITATION.

All the items of an account against an estate accruing more than three years before the death of the deceased were barred by the statute of limitations, and could not be recovered on.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 789, 793½, 795, 799, 803, 805; Dec. Dig. ¶225(1).]

8. APPEAL AND ERROR ¶302(3)—**EVIDENCE—EXCEPTIONS.**

Where the exception to the introduction of evidence is not preserved in the motion for a new trial, it cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1747; Dec. Dig. ¶302(3).]

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Claim by Frank Summers against F. H. Miller, administrator of the estate of Thos. C. Miller, deceased. From the judgment of the circuit court affirming the allowance of the claim by the probate court, defendant appeals. Affirmed.

This appeal comes from the judgment of allowance by the circuit court of a claim against the estate of Thos. C. Miller, deceased, upon appeal from the judgment of allowance by the probate court. The claim was set out as follows:

"May 22, 1914.

"Estate of Thos. C. Miller, Deceased, to Frank M. Summers and A. D. Summers, Debtor.

"To services rendered him in keeping house and nursing and caring for him during his last illness, \$800.00."

Following the affidavit to the claim is the indorsement thereon:

"Presented and disallowed June 1, 1914, F. H. Miller, administrator." "Filed this 11th day of June, 1914, by the clerk. Examined and allowed October 5, 1914, Fourth Class. Ezra Hester, Probate Judge."

The defendant filed a motion in the circuit court to dismiss and to require plaintiff to make the claim more definite and certain, which was overruled, and exception saved.

It appears from the testimony that Dr. T. C. Miller, who had been estranged from his wife and part of his family for some years, moved to Dayton and purchased there a small place of the value of about \$800; that Frank Summers and his wife moved to the place at his request and kept house and did the cooking, washing, and nursing and taking care of the doctor when ill from that time until his death. He was subject to heart disease, and frequently fell when going about, and had to be carried to his house. He continued practicing medicine until shortly before his death, and Mrs. Summers frequently mixed the prescriptions or medicines for him when he was unable to do so, and towards the last she attended and assisted him in his obstetrical cases. His illness and weakness was such as caused the loss of control of his bladder and bowels and necessitated a great deal of washing and attention to keep the bedding and house in sanitary condition. He was ill and confined to his bed about a month and a half before his death. He frequently stated to different friends and neighbors that Summers and his wife were taking the best of care of him and giving the most considerate attention to his needs, and that he intended that they should have the place when he was dead as compensation for their services; that his family had neglected and most all of them had refused to visit or have anything to do with him.

W. J. Miller, a son, testified about the services rendered by appellee and the care and attention bestowed, and stated that his father had told him when he visited him shortly before his last illness of the service of Summers and his wife, who were there in the house, and said if anything should happen to him that he wanted Summers and his wife to have the place. He also said that the heirs at a meeting after the death

of his father decided that the place ought to go to Summers and wife. One other relative testified to the same effect, but others denied any such decision. Numerous witnesses stated that they had heard Dr. Miller remark about the excellent service rendered by appellee in taking care of him, and that he intended to compensate them with the place where he lived upon his death.

There was other testimony showing that Dr. Miller paid the grocery bills, and appellee stated that it was the understanding that he should do so, and that he would take care of the expenses of the barn, and that himself and wife paid no board. There was some testimony relative to the value of the services of a trained nurse, and a great deal of testimony as to the continuous disagreeable and exacting service rendered during the last illness of deceased.

The court instructed the jury refusing to give all of the instructions requested by appellant but one.

Jo Johnson, of Ft. Smith, for appellant.
A. A. McDonald, of Ft. Smith, for appellee.

KIRBY, J. (after stating the facts as above). [1, 2] It is insisted that the court erred in denying the motion to require the claim of appellee made more definite and certain. The statute, it is true, provides that the claim may be exhibited against the estate, "and if the demand be founded on an account, by serving a copy thereof, setting forth each item distinctly and the credits thereon, if any." Section 113, Kirby's Digest. But no motion to require the claim made more definite and certain was made in the probate court upon the hearing thereof, and no abuse of discretion was shown in the denial of the motion therefor made upon the calling of the case for trial in the circuit court. The account specifies that the claim was for keeping house, nursing, and caring for deceased during the certain time "and during his last illness," and is sufficiently definite to invoke the jurisdiction of the court and indicate the kind of evidence that could be used in the establishment thereof.

[3, 4] The testimony is sufficient to show that the services were rendered, and were not intended by the claimant, nor expected by the beneficiary, the deceased, to be rendered gratuitously, and there was an implied contract for payment that would permit a recovery for what they were reasonably worth, or their reasonable value. Lewis v. Lewis, 75 Ark. 191, 87 S. W. 134.

[5] It is next complained that the court erred in the giving and refusing of instructions. The assignment in the motion for a new trial reads:

"Erred separately and severally in each ruling of law to which objection made at the time and exception saved by defendant as shown by the stenographer's transcript," etc.

It cannot be expected that the court will go into an examination of the transcript to ascertain what rulings were made, for necessarily all rulings made on any point were of law applicable to the particular fact or condition requiring it, and it is the purpose of the motion for a new trial to point out or to define with reasonable certainty the particular objection urged, that the court's attention may be definitely directed to it. The error alleged in the motion for a new trial for the giving and refusing of instructions is a little more definite and specific than the one set out, and it is doubtful if it is sufficient to require a review of any of said instructions here.

[6, 7] The instructions given by the court, upon the whole, appear to declare the law correctly, however, and any that were properly asked and refused are covered by those given. The court instructed the jury that all items of appellee's account accruing more than three years before the death of the deceased were barred by the statute of limitations and could not be recovered on.

[8] Complaint is made in the brief about the introduction of certain testimony, but the exceptions thereto were not preserved in the motion for a new trial and cannot be considered here.

Upon the whole case we find the testimony is sufficient to sustain the judgment, and, there being no prejudicial error in the record, the judgment is affirmed.

CABELL v. BOARD OF IMPROVEMENT OF IMPROVEMENT DIST. NO. 10 OF TEXARKANA.

ROBERTS et al. v. SAME.

(Nos. 405, 78.)

(Supreme Court of Arkansas. May 15, 1916.)

1. MUNICIPAL CORPORATIONS ~~§~~578 — AS- SESSMENT—SETTING ASIDE SALE.

Where plaintiffs' real estate was advertised for sale as "owner unknown," and sold without their knowledge in a statutory proceeding in rem to collect delinquent assessments on the property by an improvement district, the decree of sale will not be set aside for fraud in that the owner was actually known at time of sale, since a decree of sale of real estate for nonpayment of taxes may only be impeached for fraud, where such fraud is extrinsic of the matter tried in the cause.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1291; Dec. Dig. ~~§~~578.]

2. MUNICIPAL CORPORATIONS ~~§~~575 — AS- SESSMENT—SETTING ASIDE SALE.

Under Kirby's Dig. §§ 5691-5696, providing that improvement districts may file a complaint in equity for the sale of delinquent property for the payment of assessments, and that the owner of the property shall be made defendant if known, but, if not known, that fact shall be stated in the complaint, and the suit shall proceed as a proceeding in rem against the property, where plaintiffs' real estate was advertised for sale under "owner unknown," and at

the public sale was bid in by an attorney for the improvement district commission, the sale was invalid, and will be avoided, since the board, deriving its powers directly from the Legislature, in exercising them is under a duty to the property owner, as well as to the city, to ascertain his identity.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1288; Dec. Dig. § 575.]

McCulloch, C. J., and Kirby, J., dissenting.

Appeal from Milker Chancery Court; Jas. D. Shaver, Chancellor.

Suits by J. B. Cabell and by Mary J. Roberts and another against the Board of Improvement of Improvement District No. 10 of Texarkana, which were consolidated for trial. From a decree for defendant in each case, plaintiffs appeal. Reversed and remanded, with directions.

The issues involved in the appeal in each of these cases is the same, and on that account one opinion may serve in both cases. Each case was begun in the chancery court by the owner of property in an improvement district in the city of Texarkana, Ark., to set aside the statutory foreclosure sale made by the board of commissioners of the improvement district and to quiet their title. The material facts are as follows:

In 1911 improvement district No. 10 was created out of part of the city of Texarkana, Ark., for the purpose of laying and maintaining a sewer system. Texarkana is a city lying partly in the states of Arkansas and Texas. At the time the improvement district in question was organized, J. B. Cabell, was the owner of a lot which had on it two frame buildings, one a dwelling house, and the other a storehouse. At the time of the creation of the district, and since that time, Cabell has resided at New Boston, Bowie county, Tex., where he is principal of the colored schools. Cabell had a deed to his property which was duly recorded on February 18, 1911, before the improvement district was created. At the time the improvement district was organized Mary J. Roberts and her sister, Mrs. E. A. Blankenship, owned two lots within the boundaries of the improvement district on which was situated tenement houses. Miss Roberts, her sister and brother, John P. Roberts, moved to the city of Texarkana, Tex., many years before the improvement district in question was organized. With their joint means they purchased the property, the title to which was taken in the name of their brother. They had a written agreement by which the property went to the sisters after the death of the brother. The brother died before the creation of the improvement district. After the creation of the improvement district the commissioners thereof instituted a suit under sections 5691-5696 of Kirby's Digest against W. G. Cook and certain unknown owners to collect the assessments, penalties, and costs, which it was alleged the property owners had not paid within the time required by

law. The property of Miss Roberts and her sister and of Cabell was included in the suit as that of unknown owners. A sale was had under the foreclosure suit, and the property was bid in by one of the attorneys for the improvement district commissioners, who had brought the suit and had had charge of the subsequent proceedings thereunder.

A decree was rendered in the suit on April 3, 1912, and all the property was sold under the decree on June 15, 1912, each piece for the taxes, penalties, and costs assessed against it. This amounted to \$19.60 on the property of Cabell, and his property was worth \$2,000. The property of Miss Roberts and her sister was sold for \$13.70, being the taxes, penalties, and costs. The property was worth \$1,500. Miss Roberts and her sister exhibited tax receipts showing that they had paid the state and county taxes on the property in 1909, 1910, 1911, 1912, 1913, and 1914 in the name of J. P. Roberts. Miss Roberts went to the courthouse on April 5, 1915, to pay the 1914 taxes on the lots in controversy, and was informed by the collector that the taxes had been paid on the lots by one of the attorneys of the improvement district commissioners. This was the first time that either of the sisters had knowledge of the organization of improvement district No. 10 of Texarkana, Ark., or of the suit to collect the delinquent taxes. There were three houses on one lot and one on the other, which had been there for 12 or 14 years. During the years 1911 and 1912, and since that time, negro tenants have been living in these houses. It was shown on the part of appellee that a copy of the summons in the foreclosure cases was affixed to one of the houses on the property in controversy, but the tenants testified that no such notice was posted there. Neither Miss Roberts nor her sister saw the notices posted there.

Cabell admitted that he knew that the district had been organized, and supposed that he would be assessed to pay for the improvement, but said that he also thought that notice would be given him to pay his assessment, and that no notice was ever given him. He further stated that he had no knowledge that suit had been brought against his property to collect unpaid assessments. He did not know that his property had been sold until he was served in April, 1915, with summons in action of ejectment brought against him to recover the property. He had been in possession of his property through his tenant since he had purchased the property, which was before the district was organized.

The attorney for the board of improvement commissioners testified that he did not purchase the property until he had sought advice of the chancellor, and the chancellor told him that he had a right to purchase it. There were no other bidders at the sale, and, as before stated, the attorney purchased each piece of property for the penalties and costs assessed against it.

Miss Roberts and her sister offered to pay

the purchaser at the sale the sum of taxes, penalties, and costs that he had paid on the lands and all other sums that he was out thereon, with lawful interest, and offered to pay that amount into the registry of the court without delay if appellee would state the amount. The prayer of their complaint was that the decree, deed, and other proceedings under the foreclosure suit be held null and void, and that they have a decree setting aside the same upon the payment of the sum aforesaid.

Cabell instituted an action in the chancery court to vacate the decree rendered in the foreclosure proceedings and to set aside the sale. He also filed an answer in the ejectment suit, and asked that it be transferred to equity and this was done without objection, and the two causes were consolidated.

The chancellor found the issues against the appellants in each case, and was of the opinion that the sale under the foreclosure proceedings in each case was valid. A decree in accordance with his findings was entered in each case, and to reverse that decree appellants in each case have prosecuted an appeal.

Webber & Webber, of Texarkana, for appellants. Paul J. Cella and Jas. D. Head, both of Texarkana, for appellee. John N. Cook, of Texarkana, amicus curiae.

HART, J. (after stating the facts as above).

[1] It is contended by counsel for appellants that the decree was procured by fraud because the complaint in the statutory proceeding to collect the delinquent assessments alleged that the owners of the lots in controversy were unknown when it was well known to the commissioners that appellants were the owners of the lots. This contention was settled adversely to appellants in the case of *Cassady v. Norris*, 177 S. W. 10. There *Cassady*, who was a nonresident of the state of Arkansas, owned property in Mena, Ark. His property was placed in an improvement district, but he had no knowledge of that fact, and on that account did not pay any assessments against it. A complaint was filed against the unknown owners of lots on which the special assessments had not been paid. *Cassady's* lot was included in the complaint, and the same was proceeded against as the land of an unknown owner. It was sold, and *Norris* became the purchaser of it. He waited until the time for redemption had expired before notifying *Cassady* of his purchase. In this case the facts are in all essential respects the same, and have been stated, and need not be repeated. In regard to a precisely similar contention in the case of *Cassady v. Norris* the court said:

"But these allegations were not sufficient to constitute a fraud practiced by the successful party in obtaining the judgment. The allegation in the complaint in the suit to condemn that the owner was unknown was sufficient to give the court jurisdiction to proceed against the property. It was not a fraud on the court to make this allegation, although it was un-

true; for the court had the power to inquire into its jurisdiction and to determine whether or not it was true. The recitals of the decree condemning the lot in controversy to be sold were, in effect, that the owners of the lots were designated as unknown, and that they were unknown to the board of improvement. We must presume, in the face of these allegations, that the court did make inquiry as to its jurisdiction to proceed against the property, and found that it had jurisdiction; in other words, that the complaint alleged that the owners of the lots were unknown, and that such was the fact."

The court held that, since a decree of sale of real estate for nonpayment of taxes may be impeached for fraud only where such fraud is extrinsic of the matter tried in the cause, such decree may not be set aside because the owner of the lot was proceeded against as an unknown owner, when, in fact, he was known to the plaintiff.

Counsel for appellants have asked us to overrule *Cassady v. Norris*, upon the authority of the following cases from the state of Texas: *Hollywood v. Wellhausen*, 28 Tex. Civ. App. 541, 68 S. W. 329; *Sellers v. Simpson*, 53 Tex. Civ. App. 205, 115 S. W. 888; *Wren v. Scales*, 55 Tex. Civ. App. 62, 119 S. W. 879, affirmed by the Supreme Court, and opinion reported in *Scales v. Wren*, 103 Tex. 304, 127 S. W. 164. In *Hollywood v. Wellhausen* the court avoided the sale where the owner was sued as an "unknown owner," saying:

"* * * Appellants were in possession of the land when the suit for taxes was instituted, and had been for ten years, and the state of Texas was charged with knowledge of such possession, and the officers representing the state had no basis for the affidavit that the owner was unknown. If no one had been in possession of the land, the judgment against the unknown owner might bind the owner, but we cannot subscribe to the doctrine that a man in possession of his homestead can be deprived of his title by a suit against an unknown owner. If the rule should prevail that a man occupying his homestead can be dispossessed of the same through a suit against an unknown owner, of which he has no actual notice, no citizen could feel secure in the title to his property."

These decisions were not before us when we decided the case of *Cassady v. Norris*, but the principles decided in them were fully considered and discussed by the court in that case. The majority of the court think that the principles decided in *Cassady v. Norris* are sound, and adhere to the opinion for the reasons expressed therein. It is not necessary to repeat the reasoning of the court here. Mr. Justice Smith and myself thought the opinion in *Cassady v. Norris* was unsound at the time it was written and dissented. We have not changed our opinion, and because we did not express in writing our dissent in that case it may not be amiss if we should briefly express our views here.

The principles governing the sale of land for taxes are clearly stated in *Cooley on Taxation*, vol. 2 (3d Ed.), § 912, as follows:

"Tax sales are made exclusively under a statutory power. The officer who makes them sells something he does not own, and which he

can have no authority to sell, except as he is made the agent of the law for the purpose. But he is made such agent only by certain steps which are to precede his action, and which, under the law, are conditions to his authority. If these fail, the power is never created. If one of them fails, it is as fatal as if all failed. Defects in the conditions to a statutory authority cannot be aided by the courts. If they have not been observed, the courts cannot dispense with them, and thus bring into existence a power which the statute only permits when the conditions have been fully complied with. Neither, as a general rule, can the courts aid the defective execution of a statutory power. They may do this when the power has been created by the owner himself, and when such action would presumptively be in furtherance of his purpose in creating it; but a statutory power must be executed according to the statutory directions, and, presumptively, any other execution is opposed to the legislative will, instead of in furtherance of it. It is therefore accepted as an axiom when tax sales are under consideration that a fundamental condition to their validity is that there should have been a substantial compliance with the law in all the proceedings of which the sale was the culmination. This would be the general rule in all cases in which a man is to be divested of his freehold by adversary proceedings; special reasons make it peculiarly applicable to the case of tax sales."

Our statutes on improvement districts provide that the board may file a complaint in equity for the sale of delinquent property for the payment of assessments, penalties, and costs of suit. The statute provides that such suits may be brought against one or more owners. It provides that the owner of the property assessed shall be made a defendant if known. If he is not known, that fact shall be stated in the complaint, and the suit shall proceed as a proceeding in rem against the property assessed. Kirby's Digest, §§ 5691-5696. This court has repeatedly held that possession or occupation is sufficient to put on inquiry every person seeking an adversary interest in the property, and is therefore constructive notice of such title as the possessor or occupant has. *Hamilton v. Fowlkes*, 16 Ark. 340; *Hughes Bros. v. Redus*, 90 Ark. 149, 118 S. W. 414, and cases cited. The ordinance creating an improvement district definitely defines its boundaries. It is usually only a part of a city or town. So, when the owner or his tenant is in the actual possession of the property, the board of commissioners and its attorneys are without excuse in stating that the owner is not known. In the state of Alabama there is a statute requiring the assessor to make out a complete list of all the land in his county subject to taxation, and set opposite each division or subdivision of section the name of the reputed owner thereof, and, when the owner is not known, these words, "owner unknown." In the case of *Oliver v. Robinson*, 58 Ala. 46, the court said:

"It is manifest that proper inquiry and search were not made to ascertain who was the owner of these lands. Lands cannot be lawfully assessed to 'owner unknown' when the owner is known; and, if the assessor or collector who makes assessment has at the time the means of

ascertaining who the owner is, such as open possession by the owner, this is equivalent to actual knowledge, and will avoid a sale made under such assessment."

Even if it be held that this is a collateral attack, and that every question that could have been determined in the foreclosure case is presumed to have been determined in the former judgment, and has become *res adjudicata*, still we think the conclusion of the majority of the court is wrong. Section 4431 of Kirby's Digest provides that the court in which a judgment has been rendered shall have power after the expiration of the term to vacate it, among other things, for fraud practiced by the successful party in obtaining the judgment. It is true we have repeatedly held that the fraud which entitles a party to impeach a judgment must not consist of any false or fraudulent act or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment that is thus assailed, but that it must be a fraud practiced upon the court in the procurement of the judgment. *Bank of Pine Bluff v. Levi*, 90 Ark. 166, 118 S. W. 250, and cases cited.

In the application of this rule in the case of *Moore v. Price*, 101 Ark. 142, 141 S. W. 501, the court held that, where the sheriff made a false return of service, and a decree was had on such return, reciting service, the record and return may be impeached on the petition to set aside the decree for want of service and notice. So, too, in *Corney v. Corney*, 79 Ark. 289, 95 S. W. 135, 116 Am. St. Rep. 80, a decree of divorce was set aside. Under our statutes suits for divorce must be brought in the county where the plaintiff resides. In that case the plaintiff for the purpose of procuring the issuance of a warning order made affidavit that his wife was not a resident of the state of Arkansas, when he knew that she was in the state, and he fraudulently induced her to leave the state immediately thereafter, without disclosing his purpose of suing for a divorce. The court vacated the decree on the ground of fraud in its procurement. In the present case the known owner is entitled to his day in court and to be heard in defense of his rights. The owners were in possession of their lands by their tenants, and under such circumstances for the commissioners or their attorneys to state in the complaint that the owners were unknown was to practice a fraud upon the court in the very act of obtaining the judgment itself. Their conduct deceived or misled the court as to a material fact and constituted an abuse of the process of the court which resulted in the rendition of a judgment which would not have been given if the conduct of the whole of the case had been fair.

As we have already stated however, the majority of the court is of the opinion that the decision in *Cassady v. Norris* is sound and adhere to it, both on that account and

because it has become a rule of property. Therefore the decision in that case has become the settled law of this state.

[2] It is earnestly insisted by counsel for appellants that the sale should be set aside because the attorneys for the board of improvement commissioners bid the property in at the sale. In this contention a majority of the court agree with counsel. In the case of *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272, the Supreme Court of the state of Washington, in discussing a similar principle, held:

"A city attorney who becomes a purchaser at a foreclosure sale for the nonpayment of a special assessment owes to the city and to the owner of the property a duty to exercise due care in locating the owner and to pursue such sources of inquiry as are open to him leading to the means of giving notice to the owner, and where the city attorney violates this duty the sale may be avoided at the suit of the injured party."

There, as here, counsel sought to uphold the sale upon the well-known rule that any person can purchase at a judicial sale who has no duty to perform in reference thereto inconsistent with the character of a purchaser. The court held, however, that in that case the attorney was confronted with a twofold duty, with a duty to the city and a duty to the owner. The court indorsed the utterance of this court in speaking of the right of an attorney for an administrator to purchase at his own sale. In *West v. Waddill*, 33 Ark. 575, the court said:

"The doctrine has been extended to all persons intrusted with the management and direction of sales, in such manner as to impose upon them the duty of taking care that the property may be sold to the best advantage for all concerned. They cannot purchase at all, however fair their intentions. As purchasers, their interests would conflict with their duties, and the courts of equity, regarding the weakness of ordinary men, takes from them all temptations by rendering them incapable of purchasing at all."

We think the principles announced in that case apply with equal force here. In *Fitzgerald v. Walker*, 55 Ark. 148, 17 S. W. 702, in discussing the power of improvement districts, the court said that its powers are derived directly from the Legislature, and in exercising them the board acts as the agent of the property owners whose interests are affected by the duties it performs. In *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184, the court said that the board is a distinct agency for accomplishing the purposes of the statute. It is true that in foreclosure suits to collect delinquent assessments the actual sale is made by a commissioner appointed by the court for that purpose; but it by no means follows that the board of commissioners and its attorney have no duties to perform relating thereto. As we have already seen section 5694 provides that the owner of the property assessed shall be made a defendant if known. If he is not known, that fact shall be stated in the complaint, and the suit shall proceed as a proceeding in rem against the

property assessed. The property owner is entitled to his day in court. The duty then devolves upon the board and its attorney to ascertain who owns the property. Under the decision of the majority of the court the question of whether the owner of the property is known becomes *res judicata* when it has been passed upon by the chancellor in the foreclosure sale. The act requires that the owner be made a party if known, and, if he is not known, that fact shall be stated in the complaint. So the act imposes a very delicate and very important duty upon the board and its officers. The means of effectuating a wrongful purpose are very simple and would readily suggest themselves to any one who desired to profit thereby. At least the board would be exposed to the temptation of a dereliction of duty in order that its members and attorney might earn a profit by purchasing at the sale. Hence it will be seen that a very important trust has been imposed upon the board by the Legislature in the accomplishment of the purposes of the statute. Hardly any public agency exists which possesses to an equal extent the power of wrongdoing. It is true no wrong motive or intentional wrongdoing can be imputed to the purchasers in the present case because they asked the chancellor if it would be proper for them to purchase at the sale and received his assent thereto before they became purchasers.

The policy of the law, however, must be preserved in all cases in order to effectuate its beneficent purposes. As said in *Clute v. Barron*, 2 Mich. 192:

"This object can be best effected by declaring their incapacity to become purchasers at tax sales, and by treating as void any purchase made by them, or by any person for them, or, in the language of Mr. Justice Story, to treat all such sales as if there had been no sale, and the ownership of the property as never having been legally divested. This is the only remedy for the mischief; this is striking at the root of the evil."

It is true this language was used in regard to a sale under the statute by the county treasurer for the nonpayment of taxes, but, if we are correct in holding that the statute contemplates that the board and its attorneys have duties to perform relative to the sale, the language quoted applies with equal force here.

Therefore the decree in this case will be reversed, and the cause remanded, with directions to the chancellor to render a decree in accordance with the prayer of the complaint, and not inconsistent with this opinion.

McCULLOCH, C. J. (dissenting). The question of the right of an attorney to purchase at a judicial sale as against the interests of his client must not be confused with the question involved on this appeal. It is too well settled for further controversy that an attorney owes the highest duty to his client, and cannot, as against the interests of his client, purchase at a judicial sale in which his

client is interested. In the present case the client of the attorney who purchased does not complain, and we have only the question of the right of the adversary to object to the sale on account of the purchase by the attorney who represented the plaintiff in the foreclosure proceedings.

The writer asserts with the utmost confidence that no case can be found sustaining the views of the majority except the one case of *Rogers v. Whitman*, decided by the Supreme Court of Washington. That decision is entirely without harmony with the settled principles which should control, and it should not be followed. The opinion in the case cites a number of cases which did not in the slightest degree support it. Among others it cites decisions of this court which merely hold that the attorney of a party who has a duty to discharge with respect to a judicial sale cannot become the purchaser. There is another case cited as sustaining this view (*Busey v. Hardin*, 2 B. Mon. [Ky.] 407), but an examination of the opinion in that case shows that it has little bearing upon the question now before us, or which was before the Washington court. In that case there had been a judicial sale, at which the solicitor for the plaintiff purchased the property, and there was an objection to confirmation on numerous grounds, among others that the price at which the property was sold was grossly inadequate. The objection was made by the original owner, who tendered to the purchaser the amount of his bid, which was sufficient to discharge the lien against the property, and the court decided that, in consideration of all the circumstances, the inadequacy of the price, the conduct of the solicitor, and other circumstances pertaining to the sale, confirmation should be denied. All that was said in the opinion in that case which appears to sustain the view of the majority is that the fact that the purchase was made by the attorney had been, in some quarters, deemed sufficient to vitiate a sale as being "against the policy of justice." The learned court doubtless had in mind the English and Canadian rule, which is that an attorney for either party may not purchase without permission of the court. That rule has, however, never obtained in this court, or in any other of the American courts.

"In the United States the rule is that property offered at judicial sale may be purchased by either party to the suit in which such sale was ordered, or by the attorney for either party. But in England and Canada there are numerous cases holding that neither the parties nor their attorneys can become purchasers without having previously obtained permission of the court to bid at such sale. This rule is, however, probably due to the fact that at one time it was customary to give the conduct of the sale to one of the parties, or to his attorney, in which case it would be eminently improper for one person to combine the two characters of buyer and seller." 17 Am. & Eng. Ency. of Law, 963.

The rule stated above is the one that is recognized in all of the American decisions with regard to judicial sales under foreclosure of lien. All of the authorities are to the effect that, where the sale is made by order of the court, the lienor or his attorney may purchase. 1 *Wiltzie on Mortgage Foreclosure*, §§ 609, 610; *Freeman on Void Judicial Sales*, § 33.

The test as to the right of a litigant or attorney to purchase at a judicial sale is whether or not he has any duty to discharge with respect to the sale itself. Now, the statutes of this state may be examined without finding the slightest imposition of a duty upon an attorney for an improvement district concerning the sale of the property upon foreclosure of the lien for assessment. The proceedings are like other chancery proceedings in rem, and the court, ordering a foreclosure, appoints a commissioner to make the sale. The attorney has no duty to discharge with respect thereto. Whatever may be the duty of the attorney in instituting the action for the improvement district, the proceeding is an adversary one, and the attorney does not act in any fiduciary capacity towards the defendants in the proceedings, who are like other persons that are sued, and must look after their own interests.

In addition to that, it affirmatively appears that the permission of the court for the purchase to be made by the attorney was obtained, and, when these facts were brought to the attention of the court, the sale was confirmed. The loss by appellants of their property works a hardship on them, but it resulted from their own failure to pay the assessments, and I am unwilling to wreck the settled principles of law for the purpose of protecting them.

KIRBY, J., concurs in the views here expressed.

PEEPLS v. AYDELOTT. (No. 64.)

(Supreme Court of Arkansas. June 19, 1916.)

1. HIGHWAYS — 155 — OBSTRUCTIONS — INJUNCTIVE RELIEF — RIGHT OF PARTY.

The owner of a ginhouse, in rightful possession of the land occupied by it through permission of the owners thereof, a railroad and a private individual, was entitled to injunctive relief against the individual to prevent her from building a fence across a dirt road which was the only means of access the public had to the gin.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 432-436; Dec. Dig. § 155.]

2. HUSBAND AND WIFE — 69½ — DISABILITIES — ADVERSE POSSESSION.

Where the period of coverture of a married woman owning land extended back beyond the beginning of another's adverse occupancy of part thereof, her suit against such other was not barred by the statute of limitations.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 294, 300; Dec. Dig. § 69½.]

3. EQUITY §71(3)—LACHES—PERMISSIVE OCCUPANCY.

The cross-action of a landowner against an adverse occupant of part thereof in his suit against her to enjoin erection of a fence obstructing public access to his cotton gin is not barred by laches, where such other's occupancy was by the landowner's permission.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204, 208; Dec. Dig. §71(3).]

Appeal from Prairie Chancery Court; Jno. M. Elliott, Chancellor.

Suit by A. L. Aydelott against Bettie H. Peebles. From a decree for plaintiff, defendant appeals. Decree affirmed.

J. L. Ingram, of Stuttgart, and W. A. Leach, of Lonoke, for appellant. J. G., C. B. & Cooper Thweatt, of De Valls Bluff, for appellee.

McCULLOCH, C. J. Appellee, A. L. Aydelott, instituted this suit against the appellant, alleging that the appellant was the owner of a certain tract of land; that the Chicago, Rock Island & Pacific Railway runs diagonally across the southeast corner of the land, the right of way of the railroad being 100 feet wide on each side of the track; that the railroad had a freight depot, cotton platform, and other buildings on its right of way north of the track; that appellee has erected and maintains on the north side of the railroad track a seedhouse and cotton gin; that the storehouse of appellee is situated in the town of Biscoe, east and adjacent to the track of the railroad; that running west from the town of Biscoe and on the north side of the railroad and parallel with it is a wagon road which was the only way the public had to travel from Biscoe to appellee's gin and seedhouse and the freight depot and other buildings on the north side of the railroad; that the appellee had secured from the railroad company a lease of the lands on which he had erected his cotton gin; that on the 2d day of February, 1914, appellant constructed a fence across said dirt road, preventing its use by the appellee and the general public; that the fence constituted a public nuisance and worked an irreparable injury to the appellee, rendering his gin worthless. The appellant answered and made her answer a cross-complaint, in which she admitted that she was the owner of the land described in the complaint; alleged that appellee had erected a ginhouse on a portion of said land and was in possession of same. Appellee answered the cross-complaint; denied that appellant was the owner of that part of the land upon which appellee's ginhouse was situated; and set up that he had been in the peaceable and uninterrupted possession of same for more than seven years, and had thereby acquired title to the same. He also embodied in his answer a demurrer to the cross-complaint, which set up that same did not state facts sufficient to constitute a cause of action, and the court had no jurisdiction to

grant the relief sought, and that if she had a remedy it was adequate and complete at law. Wherefore appellee asked that the cross-complaint be dismissed.

The decree recites, among other things, that:

"This cause is submitted to the court upon the duly verified complaint of the plaintiff and the exhibits thereto, the answer and cross-bill of Bettie H. Peebles, the reply and demurrer of the plaintiff thereto, and depositions of witnesses; * * * and, after due consideration of said cause upon the pleadings and depositions of witnesses, * * * the court doth find for the plaintiff, and holds that the restraining order heretofore issued in this cause should be made perpetual."

Then follows the decree enjoining the appellant from interfering with or obstructing the public highway, describing the same, and dismissing the cross-complaint of the appellant for want of equity. Appellee died since the appeal was perfected, and the cause has been revived in the name of his administrator and heirs.

Appellant's attempt to obstruct the public road was wrongful, and the evidence adduced by appellee establishes the fact that he was rightfully in possession of the gin property, and was therefore entitled to seek the aid of a court of equity to restrain the appellant from obstructing the road. The ground covered by the gin was a part of a tract of land originally owned by appellant's ancestor, William R. Harris, who died in the year 1856. She inherited an interest in the land and purchased the interests of the other heirs. The railroad company obtained a right of way 100 feet in width from W. R. Harris in the year 1854; that is to say, the predecessor of the present company obtained the right of way, and it has been continuously occupied as a railroad right of way.

[1] The ginhouse is situated partly on the right of way and partly on the land of appellant, and it was built there by express permission of appellant and the railroad company. The ginhouse was destroyed by fire in the year 1906, and was rebuilt by appellee by express permission of appellant and the railroad company. Thus it was that appellee acquired possession of the land covered by the ginhouse and has rightfully continued to occupy it, and this entitles him to prevent an obstruction to the road which affords the only approach to it. The special injury resulting to appellee, aside from that suffered by the public generally, is what gives him the right to sue. It follows, therefore, that the chancery court was correct in enjoining appellant from obstructing the road.

The decree dismissing the cross-complaint being in appellee's favor, he had no cause to complain as to the action of the court in proceeding to trial without transferring it to a court of law. The court did not dismiss the cross-complaint because it was a cause of action cognizable at law, but, on the contrary, heard the cause upon its merits and dismiss-

ed the complaint for want of equity. We are of the opinion that the decree was correct, not because appellant failed to establish ownership of the land, but because the testimony which she adduced showed affirmatively that she is not entitled to oust appellee from the possession at this time. Her own proof shows that she consented to the rebuilding of the ginhouse, and she has not proved any facts which entitled her to revoke that consent and deprive appellee of the enjoyment of his gin plant, which he was thus induced to erect.

[2, 3] Appellant is a married woman, and the period of coverture extends back beyond the beginning of appellee's occupancy of the land. Therefore she is not barred by the statute of limitations. Nor is she barred by laches, for the reason that appellee's occupancy is by her permission. The decree should not therefore be treated as adjudicating the title to the land against her, but leaves it open for her to assert her title whenever she proves that the appellee has forfeited his right to further occupy the land. Having expressly consented for appellee to erect the gin plant on the land, she must first show that something has occurred to bring to an end the right of occupancy under that permission.

The decree is therefore affirmed.

STATE NAT. BANK et al. v. FIRST NAT. BANK OF ATCHISON.

DARRAGH et al. v. GOODMAN.

(No. 92.)

(Supreme Court of Arkansas. June 26, 1916.)

1. BANKS AND BANKING \S 119—DEPOSITS—TITLE.

A general deposit of money in a bank passes the title immediately to the bank, and establishes the relation of debtor and creditor between the bank and depositor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 289-292; Dec. Dig. \S 119.]

2. BANKS AND BANKING \S 159—COLLECTION OF DRAFT—TITLE.

A bank receiving a draft for collection merely is the agent of the remitter, drawer, or forwarding bank, and takes no title to the paper or the proceeds when collected, but holds the same in trust for remitter.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 547-553; Dec. Dig. \S 159.]

3. BANKS AND BANKING \S 166(1)—INSOLVENCY OF COLLECTING BANK—PREFERENCE.

A bank, to which a draft was sent for collection, having failed before its check, by which it remitted, was paid or presented in due course for payment, the drawer is entitled to the proceeds of the drafts out of the bank's cash going into its receiver's hands, in preference to general creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 575, 577; Dec. Dig. \S 166(1).]

4. BANKS AND BANKING \S 159—COLLECTION OF DRAFT—RELATION—INSTRUCTIONS.

That the drawer of a draft, living in Little Rock, instructs the bank, to which he sends it for collection, to remit the proceeds by Little Rock exchange, indicates no intention that the bank shall take the title to the proceeds, or consent that the relation of debtor and creditor shall arise.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 547-553; Dec. Dig. \S 159.]

5. BANKS AND BANKING \S 161(3)—AGENCY FOR COLLECTION.

The rule that an agent, having for collection obligations due his principal, can receive only money in payment, unless otherwise instructed, applies to a bank holding drafts for collection.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 556, 557; Dec. Dig. \S 161(3).]

6. BANKS AND BANKING \S 166(1)—COLLECTIONS—PAYMENT BY CHECK.

Relative to right to follow the proceeds into the hands of the collecting bank's receiver, payment to the bank of a draft drawn on one of its depositors is to all intents and purposes in cash, where he delivers to it his check on it, and it charges the amount against his account.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 575, 577; Dec. Dig. \S 166(1).]

7. BANKS AND BANKING \S 166(1)—INSOLVENCY OF COLLECTING BANK—IDENTIFYING PROCEEDS.

It is sufficient identification of the proceeds of a draft, and tracing thereof to the possession of the receiver of the collecting bank, to show that thereafter it always had on hand, and there went into the hands of the receiver, money in excess of the amount of the draft.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 575, 577; Dec. Dig. \S 166(1).]

Appeals from Grant and Pulaski Chancery Courts.

Two suits, one by the First National Bank of Atchison, Kan., against the State National Bank and its receiver, and the other by F. J. Darragh and others, partners as the Darragh Company, against L. S. Goodman, Special Deputy Bank Commissioner, in charge of the Bank of Leola. From adverse decrees, defendants in the first suit and plaintiffs in the second suit appeal. Affirmed in first suit, and reversed and remanded in the second suit.

These appeals involve the correctness of the decrees of the Pulaski and Grant chancery courts, the one requiring the receiver of an insolvent bank to pay from the moneys on hand at the time of its failure the full amount of certain drafts collected by it shortly before its failure to the drawer bank to the exclusion of the general creditors, and the other denying the drawer of the draft such right to the payment of the amount collected out of the cash assets of the failed bank, and have been consolidated for hearing.

It appears from the agreed statement of facts that the First National Bank of Atchison, Kan., sent drafts with bills of lading

attached on F. J. Darragh Company, of Little Rock, to the State National Bank for collection. This bank, of which the Darragh Company were customers, presented the drafts on June 15, 1914, and they were paid by said company's check on the collecting bank, which charged the checks against the account of the payer and sent its draft on the National Bank of Commerce of St. Louis to cover the collection. Immediately upon receipt of the exchange, the Kansas bank forwarded it to St. Louis for collection, but before it reached there the State National Bank had suspended business, and payment of the draft was refused by the St. Louis bank because of the failure of the drawer. During the day and at the close of business of said June 15, 1914, the State National Bank had on hand the sum of \$32,429.54 in cash. When it closed its doors on June 19th, it had cash on hand only to the amount of \$7,052.77, which went into the hands of the receiver, who took charge of the assets of the bank. Said sum was the lowest amount of cash the failed bank had on hand at any time after the collection of the drafts. It continued business regularly to the time of closing its doors on June 19, 1914. The court held the collection constituted a trust fund, and ordered it paid out of the cash going into the hands of the receiver, to the exclusion of the general creditors of the bank.

In No. 4200, the Darragh Company, of Little Rock, on June 8, 1915, sent its draft on M. A. Davis, of Leola, Ark., to the Bank of Leola for collection, with the direction contained in its circular letter:

"Please collect this item for us on arrival of goods and remit proceeds in Little Rock exchange, with your usual promptness."

On the 13th day of January the Bank of Leola collected the draft and issued its "cashier's check," payable to the order of the Darragh Company, for the amount, and mailed it to said company. On the next day the Darragh Company deposited the said cashier's check in the England National Bank of Little Rock for collection, but the Leola Bank failed, and its affairs were taken charge of by John M. Davis, state bank examiner, on June 15th, before said cashier's check could in due course be collected. The failed bank had more cash on hand at the time it was taken charge of by the examiner than the amount collected on the draft, and had not had a less amount since the collection.

G. F. Williams and Grover T. Owens, both of Little Rock, for appellants Darragh and others. Coleman & Lewis, of Little Rock (H. M. Trieber, of Little Rock, of counsel), for appellants State Nat. Bank and its receiver. Hinton & Rogers and Comer & Clayton, all of Little Rock, for appellee First Nat. Bank of Atchison, Kan. Moore, Smith, Moore & Trieber, of Little Rock (Coleman & Lewis, of Little Rock, of counsel), for appellee Goodman.

KIRBY, J. (after stating the facts as above). It is contended, on the one hand, that only the relation of principal and agent existed between the collecting bank and the drawer of the drafts collected, and that the amount collected remained the property of the drawer, a trust fund which the receiver could be required to account for to the exclusion of the general creditors, and, on the other, that only the relation of debtor and creditor was created by the transactions, and the drawers of the drafts were not entitled to any preference payment out of the cash assets of the failed bank.

[1] No principle of law is better established than that a general deposit of money in a bank passes the title immediately to the bank, and establishes the relation of debtor and creditor between the bank and its customer, the depositor. *Covey v. Cannon*, 104 Ark. 550, 149 S. W. 514, 518; *Warren v. Nix*, 97 Ark. 374, 135 S. W. 896; *Steelman v. Atchley*, 98 Ark. 294, 135 S. W. 902, 32 L. R. A. (N. S.) 1060; 3 R. C. L. 261; *Merchants' & Planters' Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406; *Plano Mfg. Co. v. Auld*, 14 S. D. 512, 86 N. W. 21, 86 Am. St. Rep. 769, and note; *Carroll County Bank v. Rhodes*, 69 Ark. 43, 63 S. W. 68.

[2] It is likewise well established that a bank, receiving a draft for collection merely, is the agent of the remitter, drawer, or forwarding bank, and takes no title to the paper, or the proceeds, when collected, but holds same in trust for remitting. *Second National Bank v. Bank of Alma*, 99 Ark. 386, 138 S. W. 472; *Okla. State Bank v. Bank of Central Arkansas*, 179 S. W. 509; 3 R. C. L. p. 633; 3 Am. Enc. of L. p. 815; 5 Cyc. p. 514; *Macy v. Roedenbeck*, 227 Fed. 346, 353, 142 C. C. A. 42; and other authorities cited on appellees' brief.

[3] There is no question in either of these cases but that the drafts were sent for collection only, with the expectation that the proceeds should be remitted immediately upon the receipt thereof by the collecting bank, and nothing indicating that the parties intended that the drafts or proceeds should not remain the property of the owner. Such being the case, we hold that the deposit by the State National Bank of the funds collected from the Darragh Company upon the drafts of the Kansas bank did not become the property of the collecting bank, nor establish the relation of debtor and creditor for the amount thereof between it and the drawer bank, and that the relation of principal and agent continued, and the bank, having failed before the payment of its check or the presentation thereof in due course of business for payment, the drawer was entitled to the proceeds of the collected drafts out of the failed bank's cash going into the hands of the receiver in preference to the general creditors.

[4] It is true, as contended, that the collecting bank was instructed by the drawer

of the draft in No. 4200 to remit the proceeds in Little Rock exchange; but we do not think this indicated an intention upon its part that the bank should take the title to the proceeds, nor consent that the relation of debtor and creditor should arise, but the intention rather that no such relation should be created. The bank was making the collection merely, and the direction to remit immediately in Little Rock exchange shows unmistakably that the draft was sent for collection, and that there was no intention of the drawer to receive credit from the bank, but an expectation that the proceeds would be immediately forwarded, and the suggestion, remit in Little Rock exchange, was only to facilitate the receipt of the money, the drawer of the draft living in the city where such exchange would be payable, and relieve the necessity for forwarding the check or draft used as a medium of payment for collection.

[6, 6] It is contended, further, by appellant, even if it shall be held that the relation of debtor and creditor did not arise between the collecting bank and the owner sending the drafts for collection, since the collections were made in fact by the receipt of a check from the drawee against its account in the collecting bank and the charge of the amount thereof against same, that no money in fact was received, nor the cash assets of the bank thereby increased, and that therefore the funds of the bank coming into the hands of the receiver could not be impressed with the trust for the payment of the proceeds of the draft collected. We do not agree to this contention. It is uniformly held that an agent, having for collection obligations due to his principal, can receive only money in payment unless otherwise directed, and these principles, of course, apply to banks holding drafts for collection. 1 Am. Ency. of L. 1087; 3 Am. Ency. of L. 804; 3 R. C. L. 616, 635, 640; Ward v. Smith, 7 Wall. 447, 19 L. Ed. 207; Fretz v. Stover, 22 Wall. 208, 22 L. Ed. 769; Briggs v. Collins, 113 Ark. 190, 167 S. W. 1114, L. R. A. 1915A, 686; Grooms v. Neff Harness Co., 79 Ark. 401, 96 S. W. 135; Bradley Lbr. Co. v. Bradley County Bank, 206 Fed. 41, 124 C. C. A. 175.

Our court has held, in its construction of the law prescribing a penalty against the officers of insolvent banks for receiving moneys on deposit when the bank is known to be insolvent, that the receipt by the officer of a check drawn by a customer against his

account in the bank and depositing it to the credit of the account of the payee, another customer, was receiving money within the meaning of the law. Cunningham v. State, 115 Ark. 392, 171 S. W. 885; Skard v. State, 118 Ark. 176, 175 S. W. 1190. In Daniel v. St. Louis National Bank, 67 Ark. 223, 54 S. W. 214, the court held that where a bank had sent a note to a correspondent bank for collection, and the latter, which had the maker's money on deposit with instructions to pay it on the note, charged the amount thereof to the maker and credited it to the sender of the note in the regular course of business, it constituted a payment of the note, notwithstanding the bank failed the next day, and returned the note without indorsement or accounting for the collection. In 3 R. C. L. 641, it is said:

"And a collecting bank may, as between the payor and holder of paper, receive a check of the payor upon the bank or a certificate of deposit held by him in payment, since the payor should not be required to go through the idle ceremony of withdrawing the money from the bank and paying it back to the bank."

The payment of the drawee of the draft of the amount thereof, by the delivery of its check therefor against his account in the collecting bank and the charging of the amount against his account, constituted to all intents and purposes a payment in cash of the drafts; the check being merely the vehicle of transfer of the cash. Certainly there is no necessity for the drawee of the drafts to take its check to its bank, the collector, and present it and receive the money, and hand it back to the bank in payment of the draft.

[7] The testimony shows that the bank had more money on hand each day it continued business after the collection of the drafts than the amount thereof, and that the lowest amount it had on hand thereafter, and which went into the hands of the receiver, was more than \$7,000, and under the rule announced by this court in Covey v. Cannon, 104 Ark. 550, 149 S. W. 514, this showing is a sufficient identification of the proceeds of the collected draft and tracing them to the possession of the receiver.

It follows that the decree of the Pulaski chancery court is correct, and is affirmed, and of the Grant chancery court is erroneous, and the same is reversed, and the cause remanded, with direction to enter a decree for the amount of the draft claimed by appellant.

JACKSON v. WALLS. (No. 991.)

(Court of Civil Appeals of Texas. Amarillo.
May 10, 1916. Rehearing Denied
June 28, 1916.)

1. JUDGMENT \S 256(2)—CONFORMITY TO SPECIAL VERDICT.

Judgment must conform to the jury's findings on special issues, though the court can afterwards set it aside, as contrary to the evidence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 447; Dec. Dig. \S 256(2).]

2. HUSBAND AND WIFE \S 235(2)—SEPARATE PROPERTY — AGENCY OF HUSBAND — EVIDENCE.

Evidence held sufficient to go to the jury on the question of a husband being his wife's agent to rent her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 589, 850, 982; Dec. Dig. \S 235(2).]

3. VENDOR AND PURCHASER \S 232(9)—BONA FIDE PURCHASER—NOTICE OF LEASE.

Possession of a tenant, though under a lease for the year, is notice to a purchaser, putting him on inquiry as to his having an oral lease for the next year.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. \S 556-558; Dec. Dig. \S 232(9).]

On Rehearing.**4. PRINCIPAL AND AGENT \S 23(3)—PROOF OF AGENCY—COURSE OF DEALING.**

Agency may be proved by acquiescence of the principal in other similar acts of the agent, so connected with that in question as to constitute a course of dealing.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 41; Dec. Dig. \S 23(3).]

5. PRINCIPAL AND AGENT \S 23(2)—AGENCY—CIRCUMSTANTIAL EVIDENCE.

The fact or extent of agency may be established by circumstantial evidence.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 41; Dec. Dig. \S 23(2).]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by James D. Jackson against J. S. Walls. Judgment for defendant, and plaintiff appeals. Affirmed.

Senter & Synnott, of Dallas, for appellant. George, Hancock & Hardwicke, of Dallas, for appellee.

HENDRICKS, J. Mrs. Augusta Hamm, wife of Frank Hamm, owned a farm in Dallas county, and by written lease executed by her husband, Frank Hamm, rented the same to J. S. Walls, for the year 1912, to be cultivated on shares by said tenant. Walls also occupied the place for the year 1913, without any further written lease, but evidently upon the same terms and stipulations in the previous written lease executed by Frank Hamm, as agent for his wife. In December, 1913, Mrs. Hamm conveyed the property to the appellant, Jackson, her husband negotiating the sale and representing to Jackson that the farm was not rented for the year 1914, and that Jackson could have possession of same on January 1, 1914. After

Jackson purchased the land, through his agent, he demanded possession of Walls, the tenant, the latter refusing to yield his possession of the property, claiming that he had it rented for the year 1914. This suit was brought in formal trespass to try title, and upon a sequestration affidavit and bond. Walls was dispossessed under a writ of sequestration about February 5, 1914. He did not replevy, and the verdict of the jury and the judgment of the court in his favor for damages, both actual and exemplary, constitute the basis of litigation in this appeal.

Walls alleged that in the fall of 1913 he was in possession of the premises under lease from Hamm, and in October of that year entered into another contract with him as the agent of Mrs. Augusta Hamm, by the terms of which he was to cultivate and remain in possession of the land for the year 1914, and to plant 30 acres of cotton and 20 acres of corn, for one-fourth of the cotton and one-third of the corn, as rent, and was to have half the fruit in the orchard on the premises for that year; that plaintiff, Jackson, bought the land from Hamm, knowing of his (Walls') possession and rights for the succeeding year. The answers of the jury found the following facts, quoting from appellant's brief:

"That Walls did have a contract to occupy the land for 1914; that plaintiff, when he sued out the writ, knew of this contract; that Walls was to pay one-fourth of the cotton and one-third of the corn as rent; that if Walls had occupied the place for 1914, he would have made \$750 worth of cotton and corn, net; that he and his son did make for said year \$370; that when plaintiff sued out the writ of sequestration, he knew, or should have known, that Walls was entitled to possession; that defendant was entitled to \$175 as exemplary damages."

A motion was made by the plaintiff for judgment, which was overruled. The trial court, however, required Walls to remit \$223 of the actual damages, and thereupon rendered judgment for the plaintiff for the land, and for the defendant on his cross-action for \$125 actual damages, and \$175 exemplary damages.

[1] There are several assignments of error, reproduced from the motion for a new trial, which challenge the trial court's action on account of overruling different paragraphs of its amended motion for judgment on the special issues, and in not rendering judgment for the plaintiff and against defendant's cross-action. Without specifically identifying and enumerating the particular assignments, we overrule the same. It is true, of course, that before the submission of a cause to the jury on special issues, a trial court may, if the evidence is deemed insufficient to sustain a cause of action, or defense, peremptorily instruct a jury, but it has long been the settled rule in this state that when issues of fact, or supposed facts, have been submitted to the jury, and the latter have found there-

upon, the trial court is required to conform his judgment to the jury's findings. The court then has the right to set aside the judgment because it is contrary to the evidence, or for the want of evidence to support it, but it has no authority, under our procedure, to disregard the verdict of the jury and enter a judgment contrary thereto. *Armstrong v. Hix*, 175 S. W. 430, the last case by the Supreme Court on this subject; *McLemore v. Bickerstaff*, 179 S. W. 537, wherein the authorities on this subject are cited. Hence, when the appellant bases his assignments upon a motion, or upon paragraphs in his motion, on the theory that the trial court erred in failing to render judgment in his favor, after the verdict has been found, the assignments are inappropriate to raise the question, however correct in the abstract the propositions may be. The trial court could not have done otherwise under the decisions cited than to have rendered the judgment that he did upon the verdict.

[2] It is assigned that the verdict and the judgment are contrary to the evidence and against the great preponderance thereof, and without any sufficient evidence to support them, for the reason that there is no proof that Frank Hamm, the husband, was the agent of Mrs. Augusta Hamm, the owner of the property, and that the affirmative evidence shows that he was not such agent, and without authority from her to make the contract to the tenant, Walls, for the year 1914. In the case of *Dority v. Dority*, 98 Tex. 215, 71 S. W. 953, 60 L. R. A. 941, it was decided by the Supreme Court that "the sole management" of the wife's property during marriage, given to the husband by article 2967, does not authorize him to lease her real estate for a term longer than one year, without her signature to the lease. It was not decided "whether or not a lease for a year or less by the husband of his wife's land would be valid." The case of *Chandler v. Jost*, 81 Ala. 411, 2 South. 82, was cited by Justice Williams, wherein it was held that such leases for a year were valid, under a statute with reference to the husband's control, similar to ours, while those for a longer term were void. The question is not necessary to decide, for the reason that article 2967 (now 4621) was amended by the Legislature of 1911, by providing that during marriage the wife shall have the sole management and control of her separate property, both real and personal.

As to the question of authority, by Frank Hamm, as the agent of his wife, the facts are that Walls, the tenant, rented the land for the year 1912 by written contract, made by him as agent for his wife, and that at the expiration of that year, Walls remained upon the land for the year 1913, and paid Frank Hamm the rent for that year. It is shown that all of the transactions in reference to the leasing of the land were with the husband. Walls testified that in September,

1913, Hamm told him he wanted to stay on the place for the year 1914, and again repeated his request in October, and in this last conversation Walls agreed to take the place for the year 1914. One Miller, a banker at Irving, Dallas county, testified that in October, 1913, Frank Hamm was in the bank, and that he (Miller) stated to Hamm that he understood "you have sold your place." Miller said that he asked Hamm if Walls would have to move, and that Hamm replied that he would not. He said the previous rent paid by Walls for the land was deposited in his bank to the credit of Hamm, and checked out by him without the signature of his wife to the checks. After the introduction of Miller by the defendant, at a stage of the proceeding before defendant closed his case, he placed Hamm upon the stand as his own witness, who testified:

"I am the husband of Augusta Hamm. I heard the testimony of the witness Miller in reference to my taking the money of my wife out of the bank. As her husband, I represented her in the business transactions with reference to this farm in question."

Thereafter Hamm, on resuming the stand, having been recalled to testify, said that he acted as agent for Mrs. Hamm as to the farm whenever she asked him to do so, and testified that she never asked nor authorized him to lease the property for the year 1914, and had no authority from her to lease it for that year. He, however, further said:

"I have been married to her during all these transactions and have looked after the farm for her as her husband, and collected the rent. She never objected to that, and has never objected to me managing the farm."

If Walls' testimony is to be believed, which the jury resolved against Hamm, that the latter actually made the contract with him for the year 1914, we think the testimony raised the issue to the jury as to Hamm's authority to make an oral lease for that year.

[3] It is also assigned as error that the plaintiff Jackson, when he bought the land, had no notice of the alleged agreement for lease, or the right of Walls to the land for the year 1914, nor was he charged with any notice upon the doctrine of inquiry. Of course we recognize the authorities cited by appellant that, where the possession of one is inconsistent with the record as to a right in the land, such possession will not afford notice on the theory of inquiry. In this case Walls testified that he made the renewal contract with Hamm, in October. The trade by Hamm, as agent of Mrs. Hamm, for the sale of the land, was made with Jackson about the 1st of December. Walls said after he made the trade he began the fertilization and cultivation of the land as preparation for the crop of 1914. Before the final deeds passed, transferring the title, Jackson did have actual notice of Walls' claim as a tenant of the property for 1914. The argument is that Walls was not in possession by vir-

tue of the alleged 1914 contract, but was in possession under a 1913 agreement; that Jackson asked Hamm, and Hamm told him that Walls had a 1913 agreement only; that this answer was consistent with Walls' possession for 1913; and that the inquiry at this point properly ended. We do not think the authorities are applicable nor the reasoning sound as applied to the condition in this record, if we are correct that the jury had the right, upon the facts, to find that the agreement between Hamm and Walls had been made previous to Hamm's negotiations with Jackson for the sale of the land. We know that some tenants and landlords make their renewal contracts for succeeding years, as this one was made, as to time and conditions. An oral contract of tenancy for one year is just as valid as a written contract. Jackson was necessarily charged with Walls' possession of the land; the point, however, was made that such possession does not charge him with notice of Walls' right for the succeeding year. If we concede, argumentatively, that the knowledge acquired by Jackson, or his agent, of Walls' interest in the land for 1914, after the contract was made for the land, but before the conveyance by Hamm, would not charge Jackson with liability, we think, however, simply stated, that Jackson was charged by the possession of Walls with notice of the interest of Walls as a tenant, whether for the year 1913 or for the year 1914, before he made such contract with Hamm.

These are the only two assignments which properly raise the questions subject to discussion. All other assignments coming within the purview of our preliminary ruling, all assignments are overruled, and the judgment of the trial court is affirmed.

On Motion for Rehearing.

[4, 5] Agency may be proven where the principal has acquiesced in, recognized, or adopted similar acts done on other occasions by the alleged agent, and so closely connected as to constitute a course of dealing. *Mechem on Agency*, vol. 1 (2d Ed.) § 263. Circumstantial evidence is competent to establish the fact or extent of an agency as any other fact. *Sargent v. Barnes*, 159 S. W. 366. The lease of Mrs. Jackson's land by her husband, to Walls, for the year 1912, was under an express contract; the lease for 1913 is based upon implied contract, on account of the tenant, Walls, holding over. *Bateman & Bro. v. Maddox*, 86 Tex. 554, 26 S. W. 51. All the previous rent money was paid by Walls for the land to the husband, and that which was deposited in the bank was to the credit of the husband, and checked out by him. The husband testified that in regard to all the transactions connected with the farm, the wife had never objected, nor to his management of said farm. We think

the record sustains the contract of tenancy made by the husband for the year 1914.

The issue raised in the second ground of appellant's motion for rehearing was not raised upon the trial of this cause, nor upon the original submission of this case in this court.

The motion for rehearing is overruled.

BRADY et al. v. COPE et al. (No. 595).*

(Court of Civil Appeals of Texas. El Paso. May 25, 1916. Rehearing Denied June 29, 1916.)

1. CONTINUANCE \S 11—WITHDRAWAL OF ANNOUNCEMENT OF READY—DEFECT OF PARTIES.

In a consolidated suit to quiet title, the request of defendants, made after various dismissals and an interlocutory judgment against them, for permission to withdraw their announcement of ready for trial and continue the case that they might make again parties to the suit parties as to whom they had dismissed, was properly refused, where defendants had had ample opportunity by appropriate pleadings to raise all issues with respect to title existing between themselves and the parties sought to be made parties to the suit; defendants having filed no cross-action.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 19-24; Dec. Dig. \S 11.]

2. EVIDENCE \S 183(7)—RECORD EVIDENCE—PREDICATE FOR INTRODUCTION OF SECONDARY EVIDENCE.

In suit to quiet title, proof of the destruction by fire of justice court records of a precinct in a county laid a proper predicate for the introduction of secondary evidence to prove the existence of such a judgment and execution issued thereon under which the land was sold.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 618; Dec. Dig. \S 183(7).]

3. PRINCIPAL AND AGENT \S 56—PERFORMANCE BY AGENT.

Where a divorced wife appointed an agent and attorney to recover land which had been community property, such agent and attorney carried out his contract by employing an attorney to prosecute suit against adverse claimants, who did file suit.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 91; Dec. Dig. \S 56.]

4. QUIETING TITLE \S 10(2)—TITLE OF PLAINTIFF.

In suit to quiet title, a party to whom a one-half interest in the land was conveyed in consideration of his acting as agent and attorney for an owner to recover it, though he failed to perform the services he had undertaken, could recover against the grantees of the purchaser at judicial sale of the property under a judgment of which satisfactory proof was not made.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 37, 40, 42; Dec. Dig. \S 10(2).]

5. DEEDS \S 19—RESCISSION—FAILURE OF CONSIDERATION.

Where a party who undertook, in consideration of a conveyance of a half interest in land sold under judicial sale, to act as agent and attorney for an owner in recovering it failed to perform the agreed services, the owner or those in privity with her could rescind the conveyance of the half interest.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 38; Dec. Dig. \S 19.]

6. APPEAL AND ERROR \S 742(1) — ASSIGNMENT OF ERROR—PROPOSITION—CONSIDERATION.

A proposition subjoined to an assignment of error, but not germane thereto, cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3000; Dec. Dig. \S 742(1).]

7. NEW TRIAL \S 102(1)—GROUND—NEWLY DISCOVERED EVIDENCE.

New trial will not be granted for newly discovered evidence except upon showing of good reason why the evidence was not discovered prior to trial and produced thereon.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 210; Dec. Dig. \S 102(1).]

8. NEW TRIAL \S 108(1)—GROUND—NEWLY DISCOVERED EVIDENCE.

New trial will not be granted for newly discovered evidence unless it is likely that the evidence would produce a different result upon a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 226; Dec. Dig. \S 108(1).]

Appeal from District Court, Leon County; S. W. Dean, Judge.

Suit by J. C. Cope and others against Sadie B. Brady and others, wherein, after E. E. Weaver and others sued J. C. Cope and another, and after various dismissals were entered, J. C. Cope finally sued Sadie Brady and others. From a judgment for plaintiffs defendants appeal. Affirmed.

P. W. Brown, of Ft. Worth, for appellants. Campbell & Sewell, of Palestine, Joe H. Seale, of Centerville, and Davis & Davis, of Center, for appellees.

HIGGINS, J. J. C. Cope, Paralee Weaver and L. H. Weaver filed suit in trespass to try title against W. B. Brady, John M. Brady, Sadie Brady, Nora Brady, and Perry Smith to recover a portion of the Joseph Beaty survey in Leon county. Subsequently E. E. Weaver, Walter Weaver, and Joe Weaver filed suit in trespass to try title against J. C. Cope and P. I. Smith to recover the same tract of land. Various dismissals were entered as hereinafter indicated, leaving J. C. Cope suing John M. Brady, Sadie Brady, and Nora Brady for the land. Upon trial before the court, Cope recovered an undivided one-half interest in the land. John M. Brady, Sadie Brady, and Nora Brady prosecute this appeal.

The court filed findings of fact and conclusions of law as follows:

"(1) L. H. Weaver is common source of title, through whom all parties plaintiff and defendant herein claim.

"(2) On the 29th day of April, 1892, in cause No. 460, L. H. Weaver v. Paralee Weaver, in the district court of Shelby county, Tex., plaintiff was granted a divorce.

"(3) On January 22, 1892, L. H. Weaver and Paralee Weaver executed a deed to F. P. Brewer, conveying the land in controversy in the suit for the use and benefit of Mrs. Paralee Weaver, her heirs and assigns, the consideration in said deed of trust being that they could not live together again as husband and wife, and to rightfully and equitably adjust the property rights between them.

"(4) On April 5, 1893, S. W. Robinson, sheriff of Leon county, Tex., executed a deed to S. A. King, conveying all the rights of Paralee and J. F. Weaver as fully and completely as he could do so as sheriff of Leon county, in and to the land in controversy in this suit. Said deed recites that the same was made by virtue of a certain execution issued out of the justice court of precinct No. 7, Shelby county, Tex., on a certain judgment in favor of W. M. Wilson against Paralee Weaver and J. F. Weaver, rendered on January 16, 1893, and directed and delivered to me as sheriff of Leon county, commanding me, of the goods and chattels, lands and tenements, of said J. F. and Paralee Weaver, to make certain moneys in said writ mentioned and recited, and recites legal notice of sale and levy; that on the first Tuesday in April, 1893, within the hours prescribed by law, said premises were sold at public vendue in the county of Leon at the door of the courthouse thereof, to S. A. King for the sum of \$100, he being the highest bidder therefor.

"(5) The justice court records of precinct No. 7, Shelby county, Tex., have been burned.

"(6) W. M. Wilson, who lived at Timpson in Shelby county, Tex., had a claim for \$100 against John S. Briarly, an attorney of the Timpson bar, and the said Briarly represented to him that he had a judgment against the Weavers, and asked Wilson if he would take said judgment in satisfaction of his claim, and informed Wilson that the Weavers had some land in Leon county, and that the judgment could be collected. Wilson came down to see about the sale of the land and got here a week before the day of sale and got Dr. S. A. King to look after the land for him, and asked Dr. King to see that the land brought \$100.

"(7) No proof was made, other than above, of the existence of any judgment against Paralee Weaver and J. F. Weaver, or Paralee Weaver and L. H. Weaver, or any of the Weavers, and no proof was made as to whether Briarly was living or dead, nor as to whether the justice of the peace of precinct No. 7, Shelby county, Tex., was living or dead, nor as to the name of said justice of the peace at the time.

"(8) On April 22, 1893, S. A. King executed a deed to W. B. Brady, conveying the land in controversy in this suit, and on July 1, 1896, executed to said Brady a deed making corrections in the deed first executed.

"(9) It was admitted that the defendants Sadie Bell Brady, Nora Brady, and John M. Brady are the sole heirs at law of W. B. Brady and his wife, and it was further admitted that E. E. Weaver, Walter Weaver, and Joe Weaver are the sole heirs at law of Paralee Weaver and J. F. Weaver.

"(10) On February 23, 1909, Paralee Weaver executed a power of attorney to J. C. Cope, conveying to said Cope an undivided one-half interest in the land in controversy in the suit.

"(11) J. C. Cope, in carrying out his contract with the grantors in said power of attorney, coupled with an interest to him, employed Joe H. Seale, as attorney, to prosecute suit against adverse claimants, and the said Seale had some correspondence with parties, called in person on P. I. Smith, an adverse claimant, and did file the suit of J. C. Cope et al. v. W. B. Brady et al. herein.

"(12) After the submission of the case, and after I had announced to counsel and made an order on the docket for an interlocutory judgment against the claim of the Brady heirs, and while I had under consideration the controversy between J. C. Cope and the Weavers, with regard to claim of Cope for a half interest in the land in controversy under the power of attorney, coupled with an interest introduced in evidence and set out above herein, counsel for the Weavers in open court announced that

they would waive their right to a judgment at this term, and ask leave of the court to take a nonsuit, which was granted by the court, and judgment is now rendered for J. C. Cope for a half interest in the land conveyed to him in the power of attorney introduced in evidence.

Conclusions of law:

"1. The proof as to the existence of a judgment in favor of W. M. Wilson against J. F. and Paralee Weaver is not sufficient to authorize me to conclude that such judgment existed, and there are no facts and circumstances in evidence that would authorize me to presume that such judgment did in fact exist.

"2. The plaintiff J. C. Cope is entitled to recover a one-half interest in the land in controversy herein, under the power of attorney, coupled with an interest, which was introduced in evidence."

[1] On March 1, 1915, the consolidated cause was called for trial, and all parties appeared and announced ready for trial, whereupon the suit by L. H. and Paralee Weaver was dismissed, they having died, and the suit against W. B. Brady and Smith was also dismissed. The testimony of the parties was then introduced, whereupon the court announced that he would render judgment in favor of Cope against John M., Sadie, and Nora Brady for an undivided one-half interest in the land. Thereafter, on March 11, 1915, the cause came on for further hearing, and thereupon the plaintiffs El. El. Weaver, Walter Weaver, and Joe Weaver took a nonsuit and dismissed their suit as indicated above. Whereupon the defendants, John M., Sadie, and Nora Brady requested the court to set aside the interlocutory judgment rendered against them theretofore, and permit them to withdraw their announcement of ready for trial and continue the case, in order that they might again make the Weavers parties to the suit, so that the issues between the Bradys and Weavers might be adjudicated, and all questions respecting the title adjudicated. This request the court refused, and such refusal is made the basis of the first assignment. In so doing the court did not err. Its action was eminently proper. The Bradys had had ample opportunity, by appropriate pleadings, to raise all issues existing between themselves and the Weavers with respect to the title. They had filed no cross-action, and at that late stage of the proceedings, they certainly could not insist upon the action which they requested, in order that they might again bring the Weavers into the suit and have the issues between them adjudicated. Their rights could be adequately enforced and protected by an independent suit.

[2] Error is assigned to the court's conclusion of law that the evidence was insufficient to establish the existence of a judgment in favor of W. M. Wilson against J. F. and Paralee Weaver, and that there are no facts and circumstances in evidence that would authorize him to presume that such a judgment in fact existed. The validity of the sheriff's deed under which appellants claim depended upon the existence of such a judgment.

Proof of the destruction by fire of the justice court records of precinct 7 in Shelby county laid a proper predicate for the introduction of secondary evidence to prove the existence of such judgment, and an execution issued thereon, under which the land was sold. Aside from the recitals in the sheriff's deed, no evidence thereof was offered, and this was insufficient. *Howard v. North*, 5 Tex. 311, 51 Am. Dec. 769; *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53; *Leland v. Wilson*, 34 Tex. 79. Under certain circumstances the existence thereof might be presumed (*Walker v. Emerson*, 20 Tex. 707, 73 Am. Dec. 207), but there are no facts found by the court in the case at bar, nor in the evidence adduced, which would raise such a presumption, and the court properly so held. The findings of fact state all the evidence adduced of any probative force which was in any wise pertinent to the issue.

It is next complained that the court erred in his sixth finding of fact that Briarly represented to Wilson that he had a judgment against the Weavers, and asked Wilson if he would take the judgment in satisfaction of his claim, whereas the testimony of Wilson was that:

"Briarly came to him, and asked if he would take a judgment against Paralee and J. F. Weaver for \$100 in satisfaction of the \$100 that he (Briarly) was due Wilson, stating that the judgment would be good, and that Paralee and J. F. Weaver owned land in Leon county, and that the execution could be issued on said land, also stating, as well as he could remember, this conversation with Briarly was before the judgment was rendered, and that perhaps the judgment was rendered in his (Wilson's) name."

This inaccuracy in the finding is of no consequence. If the court had found precisely as Wilson testified, it would not have affected the legal aspect of the case.

[3] The power of attorney from Paralee Weaver to Cope, under which Cope derails his title, appointed Cope her agent and attorney to recover the land, and in consideration of his services conveyed to him a one-half interest in the land. Cope was to be responsible for and to pay all expenses connected with the recovery of the land. The fourth, fifth, and sixth assignments assail the correctness of the court's action in adjudging to Cope a one-half interest in the land, upon the ground that it was not shown that Cope had performed any service under his attorneyship prior to the death of Paralee Weaver sufficient to invest him with any title. The court's eleventh finding of fact, the correctness of which is not assailed, shows sufficient performance by Cope. And an examination of the evidence abundantly supports these findings, and shows a substantial performance by Cope prior to the death of Paralee Weaver.

[4, 5] But if it be conceded that Cope had failed to perform the services which he had undertaken to perform in the power of attorney, this could not affect his right to recover against the Bradys. The power of

attorney conveyed a one-half interest to him. The contract of conveyance was executed and not executory. Had he failed to perform the services which he agreed to perform, it would have afforded ground for rescission of the conveyance by Paralee Weaver or those in privity with her. But the Bradys are strangers to the power of attorney, and could not raise the question had there been a failure upon Cope's part to perform the obligations which he assumed in the power of attorney.

[6] The second proposition subjoined to the sixth assignment is not germane thereto, for which reason it cannot be considered. However, it may be said that it is without merit, for the reason that the evidence fails to show a valid judgment and execution to support the sheriff's deed under which the defendants Brady claim title.

[7, 8] The last assignment complains of the refusal of a new trial on account of newly discovered evidence. It is overruled because there is a complete failure to show any good reason why the evidence was not discovered prior to trial and produced thereon. Furthermore, it is not likely the same would produce a different result upon a retrial.

Affirmed.

COMMONWEALTH BONDING & CASUALTY INS. CO. et al. v. MEEKS. (No. 935.)*

(Court of Civil Appeals of Texas. Amarillo. March 8, 1916. On Motion for Rehearing, April 26, 1916. Second Motion for Rehearing Denied June 28, 1916.)

1. CORPORATIONS §80(10)—STOCK SUBSCRIPTION—SUIT TO CANCEL—LACHES.

In a suit to cancel notes given upon a stock subscription, to recover vendor's lien notes given to the defendant as collateral to such notes, and to recover money paid to defendant company, evidence held to sustain a finding that plaintiff was not guilty of laches in not instituting his suit earlier.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 262; Dec. Dig. §80(10).]

2. ESTOPPEL §96—GROUNDS—NEGLIGENCE—INJURY.

Where negligence is relied upon as a ground of estoppel, it must not only influence the action of some other person to his injury, but it must appear that it might reasonably have been expected that it would have such effect, though the other person exercised ordinary care.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 288; Dec. Dig. §96.]

3. CORPORATIONS §80(2)—STOCK SUBSCRIPTION—FRAUD OF AGENT—NOTICE.

Where the agreement between plaintiff subscribing to the stock of defendant company and the agent of the company, that when organized plaintiff would be appointed its representative in loaning money in certain territory, was attached to the subscription contract and passed into the hands of the company after its organization, it was not thereby charged with notice of alleged misrepresentation of its promoter with reference to the amount of capital stock paid in and its readiness to lend money, and the plaintiff could not rescind his subscription without showing that, before it was accepted, the com-

pany had notice of the fraudulent misrepresentations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 246, 247; Dec. Dig. §80(2).]

4. PARTNERSHIP §216(3)—ACTION AGAINST PARTNERSHIP—LIABILITY OF INDIVIDUALS—VARIANCE.

In a suit to rescind a stock subscription and to recover of the company's promoter, the petition alleging that two named individuals acting under two different firm names undertook to organize a corporation, that another party was their duly authorized agent in soliciting plaintiff to purchase stock, that such individuals knew and approved his representations, that they falsely and fraudulently made such representations to induce plaintiff to subscribe for stock and deceive plaintiff, that a certain amount of cash was paid to one of such individuals and to one of his firms, and that they fraudulently and wrongfully retained it, over the objection that while such promoters were sued as individuals the proof showed a cause of action against their firm, gave jurisdiction as to the individual retaining the cash payment.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 418; Dec. Dig. §216(3).]

5. APPEAL AND ERROR §253—OBJECTION TO PLEADING—TIME.

Where the trial court's attention was not called to the conflicting allegations of the petition by exception thereto, the question could not be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1485, 1488, 1491-1493; Dec. Dig. §253.]

6. PARTNERSHIP §197—SUIT AGAINST—PARTIES.

Partnerships are not recognized either by the common or statutory law as constituting separate and distinct legal entities, and there is no right to sue or be sued in the partnership name; but litigation by or against partnerships must be conducted in the name of the individual members and not in the partnership name.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 360; Dec. Dig. §197.]

7. COURTS §122—JURISDICTION—AMOUNT—ALLEGATION—PROOF.

The fact that the evidence showed that plaintiff was entitled to recover less than the jurisdictional amount would not defeat the jurisdiction once acquired, in the absence of a pleading and proof that the jurisdictional allegation was fraudulently made.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413, 427; Dec. Dig. §122.]

8. PRINCIPAL AND AGENT §106 — AGENT'S MISREPRESENTATION — LIABILITY OF PRINCIPAL.

Plaintiff, the subscriber to the stock of a corporation, suing to recover from an individual promoter a share which he and his partnership received, was not required to show that such individual promoter actually received the money, as payment to his agent acting within the apparent scope of his authority, when making the misrepresentations relied on, was payment to him.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 311, 312; Dec. Dig. §106.]

9. BILLS AND NOTES §342—BONA FIDE PURCHASER — STOCK SUBSCRIPTION NOTES — IN GENERAL.

Where a subscription contract for the stock of a corporation to be organized and the notes in payment thereof were executed at the same time as parts of the same transaction, naming the corporation as payee, and on payment of which it was intended that certificates of stock

should issue, the contract and the notes were to be construed together; and, when the corporation accepted the contract and notes, it took them with notice only of the conditions contained in them, but was not a bona fide holder of the notes, as they were not taken for value because the stock was not issued or if issued was void, or a holder in due course of business, because no value was paid for them.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 830-841; Dec. Dig. ¶ 342.]

10. CORPORATIONS ¶80(2) — SUBSCRIPTION NOTES—FRAUD—NOTICE.

In such case, the company accepting the subscription contract and notes was not affected by fraud inducing the subscription of which it had no actual notice.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 246, 247; Dec. Dig. ¶80(2).]

On Motion for Rehearing.

11. CORPORATIONS ¶76 — STOCK SUBSCRIPTION — CANCELLATION — INSTRUMENTS GIVEN IN PAYMENT.

Where a corporation was organized under the laws of Arizona instead of under the laws of Texas, as represented by the company's agent and its subscription contract, so that the subscriber believed he was subscribing for stock in a domestic corporation in which the rights of the stockholder would be more carefully protected, and in which the broad and general provision as to its rights to borrow and loan money would not be embodied, because prohibited by Vernon's Sayles' Ann. Civ. St. 1914, art. 1121, there was no meeting of minds on a material part of the contract, and hence no contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 197-209, 213-218; Dec. Dig. ¶76.]

12. CORPORATIONS ¶80(10) — SUBSCRIPTION CONTRACT—PLACE OF ORGANIZATION—RATIFICATION.

In such case, the subscriber by executing a proxy authorizing certain officers of the company to vote his stock at a meeting to be held either in Texas or Arizona, reciting that he owned shares of the capital stock of the corporation "of Phoenix, Ariz.," did not estop him from cancellation of his contract by reason of the organization of the corporation in Arizona.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 262; Dec. Dig. ¶80(10).]

13. CORPORATIONS ¶77 — SUBSCRIPTION TO STOCK—LEGISLATIVE PROVISIONS.

Conditions prescribed by the Legislature, under which charters of corporations may be granted, must be noticed by the subscribers, and they are conclusively presumed to contract with reference thereto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 210-212, 219-243, 455; Dec. Dig. ¶77.]

14. CORPORATIONS ¶82 — SUBSCRIPTION TO STOCK—CONSIDERATION—RESCISSION.

The promise on the part of a corporation, that when organized it would establish a loan agency and appoint plaintiff as its representative in charge, alleged as part of the consideration upon which plaintiffs subscribed for stock, which promise was attached to the subscription contract and made a part thereof, where such contract and agreement were dated prior to the incorporation of the company and the issue of its stock, would be presumed to be accepted after the corporation became a going concern, so that the company would not be permitted to accept the benefits of the contract without assuming its burden, and could not hold the plaintiff on his

subscription contract without appointing him its agent to make loans.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285-295; Dec. Dig. ¶82.]

Appeal from District Court, Hemphill County; Frank Willis, Judge.

Action by M. M. Meeks against the Commonwealth Bonding & Casualty Insurance Company, R. T. Stuart and Coke W. Harkrider, as individuals, acting under the firm names of Stuart, Harkrider & Co., and the Commonwealth Organization Company, and others, with cross-action by the Commonwealth Bonding & Casualty Insurance Company. Judgment for plaintiff against the Commonwealth Bonding & Casualty Insurance Company and R. T. Stuart, and the company appeals, and Stuart brings writ of error. Affirmed.

Speer & Brown and H. A. Turner, all of Ft. Worth, and Hoover & Dial, of Canadian, for appellants. J. W. Sanders and Newton P. Willis, both of Canadian, for appellee.

HALL, J. Appellee, as plaintiff in the court below, sued appellant company, Coke W. Harkrider, R. T. Stuart, John Scharbauer, H. P. Brenham, J. H. Carmichael, F. E. Couch, Perry McFadden, M. H. Miles, W. B. Harrison, J. D. Hagler, L. T. Lester, W. B. Slaughter, and C. H. Boedecker. Stuart and Harkrider were sued as individuals, acting under the firm name of Stuart, Harkrider & Co., and also under the firm name of the Commonwealth Organization Company. The object of the suit was to cancel four promissory notes, dated March 14, 1911, for the sum of \$437.50, \$500, \$500, and \$562.50, respectively; the first due January 1, 1912, and one annually thereafter. Plaintiff further sought to recover certain vendor's lien notes held by the defendant company as collateral to his notes described above, and to recover a certain sum of money alleged to have been paid defendant company.

The substance of the amended petition is correctly stated in appellee's brief, as follows:

"That the promoters, Stuart and Harkrider, by their agent, while soliciting the appellee to subscribe for stock, exhibited to appellee certain blank contracts which they represented were being executed by the promoters and would be executed by the corporation when organized, said blank contracts providing for the loaning of money to stockholders by the corporation when organized; that the agent of appellants represented to appellee that the company, when organized, would establish an agency in Hemphill county, to make loans as provided in the blank contract, and that appellee should be appointed the agent of the Commonwealth Bonding & Casualty Insurance Company, to make loans of money in Hemphill county; that the agent of appellant signed a written agreement, providing for the appointment of appellee as agent to represent the company in making loans for the company in Hemphill county. That the written agreement appointing appellee loan agent for Hemphill county was attached to and made a part of appellee's subscription contract. That

appellants, by a certain prospectus which was used and delivered to appellee, by the terms of the written contract, and by other representations, represented to appellee that said Commonwealth Bonding & Casualty Insurance Company should be incorporated under the laws of the state of Texas; should be a Texas corporation, with \$300,000 capital stock, \$200,000 of which should be paid up and free from organization expenses, before the corporation was incorporated. That said company should have a capital stock of \$300,000 and surplus of \$900,000, and that \$200,000 had already been paid in, and the company was ready to begin business as soon as the charter could be taken out under the laws of the state of Texas; that the president of the company to be organized was in the East at that time and had perfected arrangements to secure all the eastern money that would be needed to carry on a loan business at rates of interest not to exceed 6 per cent. That the agent of appellant represented to appellee that he could secure the appointment to make loans for such company if he would subscribe for as much as \$2,500 worth of stock; that appellee never did subscribe for stock in an Arizona corporation but subscribed for stock in a Texas corporation; that he never did subscribe for stock in a corporation having only \$20,000 capital paid up, but subscribed for stock in a corporation to have \$200,000 capital paid up, and that appellant company was not the corporation for whose stock he subscribed, and that he never accepted stock in said corporation."

Appropriate allegations were also made in the pleading, charging the falsity of said representations, notice to appellant company of their falsity, failure of the minds of the parties to meet on the contract of subscription, and the injury resulting.

The Commonwealth Bonding & Casualty Insurance Company answered by special exceptions and denied generally the allegations of fraud and misrepresentation, and that the representations, if made, were not representations of the corporation or any other person representing it or authorized by it to make such representations or to bind it; and further that the plaintiff's cause of action, if any he ever had, was stale in that he had delayed for an unreasonable time to institute his suit after knowing of his cause of action, or after he could or should, in the exercise of ordinary care, have discovered the alleged fraud. It answered, also, by appropriate pleas of waiver, acquiescence, and estoppel, denying plaintiff's right to rescission and cancellation. It further sets up that it is an innocent purchaser of the notes and collateral in controversy; the notes having been executed and delivered by plaintiff to the Commonwealth Organization Company and by said company, for value in due course of trade, without notice of any infirmity when so transferred and delivered to defendant. By way of cross-action, the company declared upon the notes sought to be canceled and prayed for judgment thereon and for a foreclosure of its lien upon the collateral securities.

Upon a trial before the court without the intervention of a jury, judgment was rendered, overruling all of the Commonwealth Bonding & Casualty Insurance Company's

exceptions; and final judgment was entered in favor of the plaintiff for the cancellation of the notes executed by him, for the surrender of the collateral pledged to secure the payment of the notes, and for the recovery of \$237, with interest from September 1, 1915, and against R. T. Stuart for \$395.

[1] The first assignment is that the court erred in holding that plaintiff had instituted this suit within a reasonable time after discovering the fraud, or after the time when, in the exercise of reasonable care, he could have discovered the fraud upon which he relies, and in holding that plaintiff was not now barred by an unreasonable delay, by laches, and by acquiescence to have and maintain the suit, and in holding that plaintiff had instituted this suit within a reasonable time after the actual discovery of his cause of action herein, or after such time as he ought reasonably to have acquired a knowledge thereof. The testimony in the record relating to this assignment is voluminous, and we will not undertake to do more than summarize it here. The appellee testified that he did not remember the date when he first acquired knowledge of the falsity of the representations and that the company was not incorporated in Texas; that it was after he turned the matter over to his attorney for investigation and not very long before filing the suit; that about the same time he learned that the company had not made arrangements to get money in the East, and did not have a capital of \$200,000 paid in and \$900,000 surplus; that, while he was dissatisfied with the company, excuses had been made to him for not making loans as late as September, 1912. They told him that strife amongst the officers and stockholders had prevented them from doing business as represented. He further testified that one of the directors and acting secretary of the company explained to him the condition of the company and told him that all he had to do to realize the truth of the representations was to give the company time, and it would come around all right,—that it was getting in better shape all the time and that the reason the company was not in better shape was on account of trouble between Stuart and the other officers. Appellee further testified that he had conversations with Scharbauer, the president, and Harkrider, the vice president of the company, along the same line as with the acting secretary; that they were pleading for time and if time was granted they would make good, and that on account of strife amongst the officers the company had been retarded but would come out all right in a little while. The charter was filed March 23, 1911. This suit was instituted January 9, 1914. The testimony of appellee is contradicted to a considerable extent, but it is sufficient to sustain the finding of the court

that he was not guilty of laches in not instituting his suit earlier.

[2] If negligence and indifference is relied upon as ground of estoppel, such conduct must not only influence the action of some other person to his injury, but it must further appear that it might reasonably have been expected that it would have such effect while such other person was exercising ordinary prudence. It does not appear from the pleadings or evidence of either party that the rights of any one connected with the corporation have been injured to any extent. The rule announced in *Park et ux. v. Kribs, Receiver*, 24 Tex. Civ. App. 650, 60 S. W. 905, is:

If others were not led to become members of the corporation on the faith of plaintiff's subscription, mere delay will not defeat rescission. Delay which does not injure the opposite party nor innocent third parties, even though no diligence is shown in discovering the fraud, will not defeat an action for rescission, unless the statute of limitations interferes. *G., H. & S. A. Ry. Co. v. Cade*, 93 S. W. 124; 1 Cook on Corporations (6th Ed.) §§ 161, 162.

The fraud alleged by plaintiff consists (1) in a promise to lend money to plaintiff when the corporation became a going concern; (2) to establish a loan agency in Hemphill county, and to appoint plaintiff as its representative in charge thereof; (3) that the company would be incorporated under the laws of Texas; (4) that \$200,000 of the capital stock had already been paid in; and (5) that the president of the company had perfected arrangements in the eastern money market for all the money the company would need. There is no allegation of a failure of consideration, and the last three statements are the only ones alleged upon which a judgment for rescission could be based. The agreement made between plaintiff and the agent of appellant company that he would be its representative in Hemphill county, when the business of lending money in that territory was entered into, was a conditional promise of something to be done in the future and was not a misrepresentation of an existing fact and is not shown to have been fraudulently made.

[3] Because this agreement was attached to the subscription contract and passed into the hands of the company after its organization, the company was not thereby served with notice of the alleged misrepresentations with reference to the amount of capital stock paid in, and the readiness of the company to lend money secured in the East. It is undisputed that these statements were made by the agent McCowan, and that he was representing the Organization Company at that time. If it be true that McCowan did represent that the company had \$200,000 capital stock paid up, and that the president had arranged to secure the money in the East, sufficient to conduct the affairs of the company, and that such representations were fraudulently made while he was representing

the Organization Company, and not the Bonding Company, the appellee cannot sustain a judgment for rescission without showing that before his subscription was accepted the latter had notice of the fraud. It is not shown that the company had any such notice. Whether the statement in the prospectus and subscription contract, to the effect that the company would be incorporated in Texas, is a material statement depends upon circumstances. There is no evidence in the record to show that stock in a company organized under the laws of Texas is more desirable or valuable than if it were organized under the laws of Arizona. Without some proof to show the materiality of this statement, appellee should not be permitted to rescind, even though the recital in the proxy be held to be notice. It appears that prior to March 11, 1913, appellee executed and sent certain officials of the company a proxy authorizing them to vote his stock at a stockholders' meeting to be held in Ft. Worth on the last-named date, and at any other meeting to be held in Texas or Arizona; and the proxy recites the fact that he owned 62½ shares "of the capital stock in the Commonwealth Bonding & Casualty Insurance Company of Phoenix, Ariz." We held, in the case of *Commonwealth Bonding & Casualty Ins. Co. v. Cator*, 175 S. W. 1077, that the act of organizing the company under the laws of Arizona, in violation of the subscription contract and of the representation made in the prospectus that it would be a Texas corporation, was sufficient cause for canceling the subscription; but in that case it appeared from the record that the stock in a Texas corporation was more desirable and valuable than it would have been if the corporation had been organized under the laws of Arizona. No such state of facts appears here. For the reasons stated, we think the appellants' fourth assignment of error should be sustained.

[4-6] R. T. Stuart, against whom judgment was rendered, is here by writ of error, and in his brief insists, first, that there is a material variance between the facts alleged and the facts established by the proof as against him, in this: That he and Harkrider are sued as individuals, whereas the proof shows the cause of action against the Commonwealth Organization Company, a partnership composed of R. T. Stuart and C. W. Harkrider. The allegations bearing upon this assignment are as follows:

"That R. T. Stuart and Coke W. Harkrider, as individuals, acting under the firm name of Stuart, Harkrider & Co., and also under the firm name of the Commonwealth Organization Company, in the fall of 1910 and spring of 1911, undertook as individuals and as promoters to organize a corporation with said Stuart and Harkrider and their agents so acting as promoters," etc.

"Plaintiff says that one H. S. McCowan, a duly authorized agent of R. T. Stuart and Coke W. Harkrider, and of the Commonwealth Bonding & Casualty Insurance Company, was

in Canadian in March, 1911, and solicited plaintiff to purchase stock," etc.

"And plaintiff charges that said R. T. Stuart and Coke W. Harkrider, composing the firm of the Commonwealth Organization Company, knew about and approved of all such representations as are hereinabove set out," etc.

"Plaintiff further charges that said Stuart & Harkrider, acting as promoters, falsely and fraudulently made said representations, for the purpose of inducing plaintiff to subscribe for stock, and did deceive plaintiff," etc.

"That the truth is that the Commonwealth Organization Company, or Stuart, Harkrider & Co., were to receive 12½ per cent. of the purchase price of said stock as compensation for organizing a Texas corporation, which in plaintiff's case would be the sum of \$312.50, which plaintiff paid to said H. S. McCowan for the said Organization Company, and the remainder of the \$500 cash," etc.

The prayer is for judgment against all of the defendants. The suit was dismissed as to Harkrider and judgment taken against Stuart individually. Stuart did not allege that the allegations were fraudulently made, for the purpose of conferring jurisdiction on the district court, as was done in the case of *Stewart v. Gordon*, 65 Tex. 347. No exception was urged upon the ground that there was a variance between the several allegations quoted above, as was done in the case of *Smith v. Briggs-Weaver Machinery Co.*, 132 S. W. 954. The rule is that partnerships are not recognized by law, either common or Texas statutory, as constituting separate and distinct legal entities; and therefore the right to sue or be sued in the partnership name is not conceded to them in our courts, and litigation by or against partnerships must be conducted in the names of the individual members of the firm, and not in the firm name. *Townes Texas Pleading*, p. 251; *Western Gro. Co. v. K. Jata Co.*, 173 S. W. 518; *Style v. Lantrip*, 171 S. W. 786; *Law Reporting Co. v. Texas Grain & Elevator Co.*, 168 S. W. 1001. It appears from the above quotations from the petition that plaintiff was in doubt as to the agency of McCowan, and that the statements are for this reason in a sense conflicting. Not having called the attention of the trial court to this condition by exceptions to the pleadings, the question cannot be raised here. The petition variously charges that the sum of \$50 cash was paid to Stuart, to the Organization Company, and to the Bonding Company; that they each fraudulently and wrongfully retained the same. This gives the court jurisdiction of the amount as to Stuart.

[7] The fact that the evidence disclosed that appellee is entitled to recover less than the jurisdictional amount would not defeat the jurisdiction once acquired, in the absence of a plea and proof that this allegation was fraudulently made. *Nashville, C. & St. L. Ry. Co. v. Grayson Co. Nat. Bank*, 100 Tex. 17, 93 S. W. 481; *Levy v. Lupton*, 156 S. W. 362.

[8] In order for appellee to recover from Stuart the share of \$500 which, it is charged, Stuart and his partnership received, it is

not necessary for him to prove that Stuart actually received the money which it appears was paid to his agent, McCowan. Payment to McCowan was payment to Stuart. McCowan was acting within the apparent scope of his authority when he made the misrepresentations. The fraud of McCowan is the fraud of Stuart.

In addition to the assignments considered, plaintiff in error presents questions which have already been disposed of in the discussion of appellant's brief.

[9] Appellant company insists that it is entitled to the protection afforded a bona fide holder of negotiable paper, and should therefore recover the amount of the notes delivered to it by the promoters. The subscription contract and notes were executed at the same time, are parts of the same transaction, and must be construed together. The notes are executed in compliance with the terms of the contract, and the Bonding Company is named as payee. It was intended that when the notes were paid the certificates of stock should issue. When the Bonding Company accepted the contract and notes, it took them with notice only of the conditions contained in them; but one having notice of the conditions named in the subscription contract cannot be a bona fide holder of the notes. The notes were not taken for value because the stock was not issued, or, if issued, is void under the Constitution. They were not acquired in due course of business as that term is used in relation to negotiable paper, because no value was paid for them. It is our opinion that the rights of the Bonding Company do not rest upon the principles governing the rights of a bona fide holder, but if it is entitled to recover it must be upon the principle of estoppel. *Vander Ploeg v. Van Zuuk*, 13 L. R. A. (N. S.) 493, note; *Andrews v. Robertson*, 111 Wis. 334, 87 N. W. 190, 54 L. R. A. 673, 87 Am. St. Rep. 870.

[10] While the Bonding Company is not a bona fide holder for value, according to the law merchant, yet when it accepted the notes and contract it was not affected by fraud inducing the subscription of which it had no actual notice. *Commonwealth Bonding & Casualty Insurance Co. v. Cator*, 175 S. W. 1074.

In so far as the judgment decrees a recovery against R. T. Stuart, it is affirmed; in all other respects it is reversed and remanded. Affirmed in part, reversed and remanded in part.

On Motion for Rehearing.

[11-13] In the original opinion we held that there was no evidence in the record tending to show that stock in a corporation, organized under the laws of Texas, would be more desirable or valuable than stock in a corporation organized under the laws of Arizona. In motion for rehearing, appellee has

called to our attention his own testimony from the statement of facts, as follows:

"He (McCowan, the stock salesman) said this was to be a Texas corporation, and we went into details about the Texas corporation laws, about the advantage Texas laws had over other states. I would not have subscribed for stock if I had known that this corporation was to be organized under the laws of Arizona, for the reason I did not know anything about Arizona or Arizona laws, and I believe in incorporating under Texas laws. I do not know anything about Arizona laws. I was informed in reference to Texas laws protecting stockholders. I believed that I was subscribing for stock in a Texas corporation, where the subscribers would be better protected; that it would be incorporated in the state of Texas, because it was to be a home company for Texas and the rights of stockholder could be more carefully protected under the Texas laws."

We think this evidence brings the case within the rule announced by us in *Commonwealth Bonding & Casualty Insurance Co. v. Cator*, 175 S. W. 1074 (5, 6). The trial judge was justified in holding that appellee was not estopped and had not ratified the act of the company in procuring its charter under the laws of Arizona.

"Any amendment which entails new responsibilities or hazards will release dissenting subscribers, as by adding to the power of a railroad company the power to purchase steam boats." 10 Cyc. 406, and note 64.

The articles of incorporation, taken out under the laws of Arizona, provide that the company could not only transact a general casualty and bonding business, as was provided in the subscription contract and the prospectus to which this contract referred, but it further provides that the company may "borrow and loan money and in general do and perform such acts and things and transact such business not inconsistent with the law of any part of the world as the board of directors may deem to the advantage of the corporation." A provision as general and broad as the one quoted would not be embodied in the charter of a Texas corporation. *Vernon's Sayles' Civil Statutes*, art. 1121.

The rule is announced in 10 Cyc. 411b, that conditions prescribed by the Legislature, under which charters of corporations may be granted, must be noticed by the subscribers and that subscribers are conclusively presumed to contract with reference to such conditions. The stipulation that the company would be incorporated under the laws of Texas was, in the light of appellee's testimony, a material part of the subscription contract, and he cannot be held bound under a contract where the incorporation was perfected under the laws of another state; for to do so would be to hold him to something to which he did not agree, and there would be no meeting of the minds and no contract. 10 Cyc. 412d; *Baker v. Ft. Worth Board of Trade*, 8 Tex. Civ. App. 560, 28 S. W. 403; *Collinson v. Jefferies*, 21 Tex. Civ. App. 653, 54 S. W. 28.

[14] In the original opinion we stated that the promise on the part of the company to establish a loan agency in Hemphill county, and to appoint plaintiff as its representative in charge thereof, could not form, in the event of its breach, a basis for rescission. Appellee has called to our attention the fact that this agreement was alleged to be part of the consideration upon which he subscribed for stock, and that his pleadings allege a failure of this consideration; that the agreement was attached to the subscription contract and made a part thereof; that the contract and agreement were dated prior to the incorporation of the company but were not mailed until after the company was incorporated on March 25, 1911; that his stock was issued June 20, 1911. We must therefore presume that the contract of subscription was accepted after the corporation became a going concern, and the company will not be permitted to accept the benefits of the contract without at the same time assuming its burdens. It cannot hold appellee upon the subscription contract without complying with the condition requiring it to appoint him its agent in Hemphill county. The record shows that this was a condition precedent, by which the company was bound when they accepted the subscription.

Appellee's motion for rehearing is granted; the motion of R. T. Stuart for rehearing is overruled. The judgment of the lower court is in all things affirmed.

GREAT EASTERN CASUALTY CO. v. BOLI. (No. 994.)

(Court of Civil Appeals of Texas, Amarillo.
May 17, 1916. Rehearing Denied
June 14, 1916.)

INSURANCE — 425 — LARCENY — INSURANCE — PROOF OF THEFT — "MERE DISAPPEARANCE."

Within a policy against loss by theft, though providing that mere disappearance of property shall not be deemed sufficient evidence of theft, insured's testimony that on a certain night, according to his custom, he took his diamond stud out of his tie, placed it on the dresser in his room, and the next morning discovered its loss, on search, and that for stated reasons he remembered distinctly such disposition thereof by him, is sufficient evidence to go to the jury; the facts testified to constituting more than "mere disappearance."

[Ed. Note.—For other cases, see Insurance. Cent. Dig. §§ 1129, 1135, 1143; Dec. Dig. 425.]

Appeal from Dallas County Court at Law; T. A. Work, Judge.

Action by L. O. Boli, Jr., against the Great Eastern Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Saner, Saner, Kimbrough & Turner and Chas. D. Turner, all of Dallas, for appellant. Martin A. Seward and O. F. Wencker, both of Dallas, for appellee.

HENDRICKS, J. The appellee, Boli, sued the appellant, Casualty Company, in the county court of Dallas county, at law, to recover the sum of \$425, for the value of a diamond stud, alleged to have been stolen, and the loss covered by a policy of insurance, issued by the appellant, protecting the appellee against loss from burglary, theft, or larceny. The jury returned a verdict, finding that the stud in question was stolen and was of the value alleged, upon which judgment was rendered for said sum.

We think appellee's petition sufficiently exhibits an insurable interest in the property at the time of the issuance of the policy and at the time of the loss, and without discussion overrule the assignments based upon exceptions raising that question.

The real question is whether the appellee sufficiently proved, as a jury question, the loss of the diamond within the purview of the clause of the policy. The policy of insurance sued upon provided that the Casualty Company should insure the appellee "against loss from burglary, theft, or larceny," and clause D of a rider attached thereto provided that:

"Mere disappearance of property shall not be deemed sufficient evidence of burglary, theft, or larceny."

The appellee testified that on Saturday night, May 9, 1914, according to his custom, he took the diamond stud out of his necktie, placed the same on the chiffonier in his room, and the next morning he discovered the loss of the same, upon search. He said he remembered distinctly taking the stud from the tie and examining it under the electric light in his room to see if the prongs were intact, and if the diamond needed cleaning, as he intended to clean the same the next morning, Sunday. The next morning, as he went to place his collar and cuff buttons in his shirt, he noticed that the stud was gone.

Appellant insists that its peremptory instruction, considering the clauses of the policy, should have been given, alleging the insufficiency of the testimony. Appellant cites and copiously quotes from the following New York case, *Duschenes v. National Surety Co.*, 79 Misc. Rep. 232, 139 N. Y. Supp. 881, as one, among others from the same court, as persuasive of this case in its favor. The case of *Duschenes v. National Surety Co.*, supra, was decided by one of the Supreme Courts of New York, and discloses that the plaintiff occupied rooms in a hotel; that she wore the particular piece of jewelry alleged to have been stolen the day before the alleged theft, and after placing the jewelry in a plush case deposited the case in a jewelry box on her bureau. The next morning, after returning from breakfast, she found the jewelry missing from the jewelry box. The defendant had insured the plaintiff against "direct" loss "by burglary, theft, or larceny," and the court said, among other things:

"At most, the plaintiff has submitted evidence which shows that the piece of jewelry has disappeared under circumstances that might perhaps permit an inference that it was stolen."

The particular policy in that case further provided:

"The assured shall also produce direct and affirmative evidence that the loss of the article or articles for which claim is made was due to the commission of a burglary, theft, or larceny; the disappearance of such article or articles not to be deemed such evidence."

This last provision was particularly stressed as an actuating reason for the denial of plaintiff's cause of action; the court further saying:

"That the insured must produce, not circumstantial, but direct and affirmative, evidence of the wrong."

The further comment was:

"Parties may be mistaken in their recollection of where they placed a piece of jewelry, but they are not apt to be mistaken in recollection as to matters directly and affirmatively showing a felony, and the defendant could reasonably provide that there could be no recovery unless, in addition to the testimony of the disappearance of the jewelry, the insured should produce testimony of a direct and affirmative kind that there has been a felony."

The present policy and the one quoted from in the case cited, as will be readily seen, present a marked difference as to the quantum of proof necessary to establish theft, and, unless the clause, "Mere disappearance of property shall not be deemed sufficient evidence," negatives the sufficiency of the proof, we think, upon the evidence, the cause was subject to submission to the jury.

By process of elimination, the New York case, supra, could be considered an authority against the contention of appellant. It is noted that the court said:

"At most, the plaintiff has submitted evidence which shows that the piece of jewelry has disappeared under circumstances that might perhaps permit an inference that it was stolen."

If that be true, the controlling point in that case must have been influenced by the clause requiring that the assured should produce direct and affirmative evidence that the loss of the article was due to the commission of a crime.

We think the clause in this particular policy, that mere disappearance should not be deemed sufficient evidence, is merely the statement of a general legal truth; however, disappearance of the diamond under the conditions stated by appellee, after having been placed upon the chiffonier by him in the evening, and missing therefrom the morning thereafter, would not constitute a "mere disappearance," exempting the insurer from liability. If appellee's testimony is to be believed, and the jury resolved it, the inference is reasonably deducible, as we think the New York court really admitted, that the property disappeared under circumstances exhibiting loss by a criminal act, sufficiently proven as at common law, though

in the New York case not sufficiently established, measured by the quantum of proof contracted for in that policy.

The judgment of the trial court is affirmed.

BALL v. MILLER. (No. 1003.)

(Court of Civil Appeals of Texas. Amarillo. May 24, 1916.)

1. CONTINUANCE \S 51(4) — DISCRETION OF TRIAL COURT—REFUSAL OF CONTINUANCE.

In an action on a note where the defense was that plaintiff was only a surety for defendant and had not paid the note and that it was without consideration and was not intended to be paid, and where one continuance had been granted on account of the defendant's illness, the denial of a second continuance on a ground of the illness of his wife and a physician's advice that it was best for him to remain at home, and where, if defendant had been present and his testimony had sustained his defenses, there would have been a conflict of evidence upon the issues, and where there was evidence in the record entitling plaintiff to recover, the denial of the continuance was not an abuse of the trial court's discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. \S 147; Dec. Dig. \S 51(4).]

2. PRINCIPAL AND SURETY \S 184—ACTION BY SURETY AGAINST PRINCIPAL—PAYMENT.

The general rule that a surety cannot recover against his principal until the former has paid the debt does not apply where the surety has satisfied the debt of the principal by the execution of his negotiable note.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. $\S\S$ 545-548; Dec. Dig. \S 184.]

3. PRINCIPAL AND SURETY \S 184—ACTION BY SURETY—NOTE.

Where defendant's note to plaintiff was given in consideration of plaintiff's execution of his note to a bank, to reduce defendant's indebtedness thereto and the bank accepted the note, plaintiff could sue defendant on his note.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. $\S\S$ 545-548; Dec. Dig. \S 184.]

Appeal from District Court, Collin County; W. H. Garnett, Judge.

Suit by L. L. Miller against T. E. Ball. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. P. Brown and L. C. Clifton, both of McKinney, for appellant. R. C. Merritt and H. C. Miller, both of McKinney, for appellee.

HALL, J. Appellee, Miller, sued appellant, Ball, on the 4th day of August, 1914, upon a promissory note, executed by appellant to appellee, in the sum of \$2,500, stipulating for 10 per cent. interest and 10 per cent. attorney's fees, and bearing a credit of \$500 of date April 14, 1914. At the February term, 1915, appellant answered and, in addition to general demurrer and general denial, alleged that at the time of the execution of the note sued on it was agreed and understood that the same was not to be paid; that appellant, at the date of its execution, was indebted to the Farmers' & Merchants'

National Bank of Farmersville, Tex., in a sum in excess of the amount allowed by the national banking laws, and that said bank was insisting that appellant should reduce his indebtedness; that, for the purpose of making the books of the bank show that appellant was not indebted in excess of the lawful amount, appellant executed to appellee the note sued on and appellee executed his note to said bank in the sum of \$2,500; that appellee was only a surety to said bank for appellant and has not paid the note executed by him to the bank, and that the note in suit is without consideration; that it was understood at the time and by all parties that appellee was not to pay the note executed by him to the bank, and that appellant was not to pay the note in suit. The case was called for trial at the May term, 1915, and appellant announced not ready and filed his second motion for a continuance, which was overruled. The case was then tried by the court, without a jury, resulting in a judgment in appellee's favor against appellant, in the sum of \$2,533.80 and costs of suit.

[1-3] The first assignment is predicated upon the court's action in overruling appellant's motion for continuance. The substance of the motion is that appellant could not attend the trial on account of the serious illness of his wife. The condition of his wife is shown by the affidavit of a physician attached to and made a part thereof, in which it is stated that the wife of appellant is suffering from severe hemorrhages from the womb and that he believes it is best for Mr. Ball to remain at home with his wife during this condition. The court qualified the bill of exception, stating in substance that the case was continued at the former term on account of the sickness of appellant himself; that, if the defendant had been present and testified to every fact stated in the application, it could not have been material as a defense to the plaintiff's suit in any way; that the court did not believe if defendant had been present he would have testified as stated that Miller was only his surety, and, if he had done so, this was shown by the entire testimony in the case not to be true; further, that the affidavit of the physician does not state that the defendant's presence was necessary, but merely that he thinks it best for the defendant to be there; that the distance between Farmersville and McKinney is 16 miles, the two places being connected by rail, and defendant could have left Farmersville for McKinney and returned to Farmersville in the space of four hours, as trains were running regularly each way every day; or he could have left Farmersville by auto and reached McKinney for the trial, if he had so desired, and attended the trial and returned to his home within the space of three hours. The court then states as a conclusion that appellant

did not want to attend the court, but simply made it a pretext to continue the case.

In the condition we find the record, the facts stated in the qualification to the bill must be accepted by us as true. If appellant had attended the trial and his testimony had sustained the defenses alleged, the result would have been a sharp conflict of evidence upon the issues presented.

This being appellant's second motion for a continuance, the disposition to be made of it was a matter within the discretion of the trial court, and, unless an abuse of such discretion is shown, we are not authorized to reverse the judgment. Only one witness testified with reference to the transaction and agreement, concerning which appellant insists he should have been permitted to testify. The evidence of this witness, Aston, who was the cashier of the bank, is to the effect that appellant was indebted some \$2,400 over and above an amount permissible under the banking laws; that witness informed appellant he must, by some method, reduce the amount of the debt; that appellant sent his son Walter Ball to see witness, saying he had made an arrangement with appellee Miller to take up the excess, to which arrangement witness, representing the bank, assented; that the bank accepted appellee Miller's note, for the amount of \$2,500, as a payment of that much of Ball's indebtedness and credited Ball's account with the amount of the Miller note; that the bank claimed no interest whatever in the note sued upon, as it was given by Ball to Miller to indemnify him against loss.

On cross-examination, appellant's attorneys propounded certain questions by which it appears they expected to prove that Ball, Miller, and H. M. Rollins, the president of the bank, had an agreement or understanding by which the note sued upon was not to be paid at all; but no effort was made to establish this fact, either by Miller or Rollins, nor was appellant's son Walter called as a witness to contradict the statement made by the cashier as to the substance of the message delivered by him. The purport of this witness' testimony is not assailed in the motion for new trial. In this state of the record we must conclude that no abuse of discretion has been shown.

Appellant contends that Miller was simply his surety to the bank to the extent of \$2,500, and that, since the evidence fails to disclose that Miller had paid off the debt, he was not entitled to recover against appellant, and that there was no consideration for the note sued upon. The general rule that a surety cannot recover against his principal, until the former has paid the debt, does not apply where the surety has satisfied the debt of the principal by the execution of his negotiable promissory note.

In *Boulware v. Robinson*, 8 Tex. 329, 58 Am. Dec. 117, it is said:

"This distinction between the giving by the plaintiff of a bill of exchange or negotiable note, which has been accepted by the creditor in satisfaction of the defendant's debt, and the giving of a bond or other security, not negotiable, which has been in like manner accepted, seems to have been maintained by the English and American courts, and must be received as the settled law."

The rule is further discussed and clearly announced by Cobbs, Justice, in *Yndo v. Rivas et al.*, 142 S. W. 920, and the holding approved by the Supreme Court.

We take it that the appellant, if present, could not have controverted the fact as stated by the bank cashier that Miller's note had been accepted as a payment to that extent on appellant's debt. Under the decisions cited, this clearly entitles appellee to maintain his action. Since we are not authorized to revise the ruling of the court upon the application for continuance, and because the evidence in the record which the presence of appellant at the trial could not have changed, or even modified, entitled appellee to a recovery, the judgment must be affirmed.

MARTIN v. GOODMAN. (No. 7568.)*

(Court of Civil Appeals of Texas. Dallas.
May 27, 1916. Rehearing Denied
July 1, 1916.)

1. FRAUD \S 59(3) — ACTION — DAMAGES — FRAUDULENT REPRESENTATIONS IN SALE OF LAND.

Where a vendee is induced by false representations as to the value, condition, or quality of lands to enter into a contract to purchase to his loss, the measure of his damages in an action for fraud is the difference between the sum paid and the value of the land received.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 62; Dec. Dig. \S 59(3).]

2. COURTS \S 122 — LIMITED JURISDICTION — AMOUNT IN CONTROVERSY.

When it appears from specific allegations of pleading that the amount recoverable is below the jurisdiction invoked, general allegations of a greater sum not supported by the very nature of the case made are unavailing to confer jurisdiction.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 413, 427; Dec. Dig. \S 122.]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by Anna Goodman against J. B. Martin and others. From judgment for plaintiff, the named defendant appeals. Reversed and dismissed.

L. R. Callaway, of Dallas, for appellant.
J. M. Terrell and Harry P. Lawther, both of Dallas, for appellee.

RASBURY, J. Appellee sued appellant and Crotty & Miller in the court below for damages grounded upon the fraud of appellant in the sale of a lot of land in the city of Dallas to appellee. The pleadings upon which appellee went to trial alleged, in substance, that appellant, who was the owner of a certain city lot in Dallas, in collusion

with Crotty & Miller, real estate agents, and acting through one Holland, pointed out and offered to appellee for sale another and more valuable lot, falsely representing same to be appellant's lot, which appellee, who was ignorant of the deception, and who relied upon the representations so made, purchased, paying therefor \$850. It was also alleged that appellant, in consummating said sale, conveyed appellee, not the lot pointed out, but the one he really owned, which was only of the value of \$450, while the lot pointed out to her and represented to be the one conveyed was of the value of \$1,750. It was further alleged that by the false representations in the sale and purchase of said lot appellee had been damaged "in a large sum of money, to wit, in the sum of \$1,500, for which sum appellee prayed judgment." The original and amended answer of appellant, so far as it is necessary to state, consisted of a general demurrer and a special exception challenging the jurisdiction of the court on the ground that the amount in controversy, exclusive of interest, as shown by appellee's pleading, was a sum less than \$500. There was trial by jury to whom the court, after overruling the general demurrer and special exception noted, referred certain special issues of fact. Upon the findings of the jury judgment was entered by the court for appellee against appellant and Crotty & Miller for \$432.48, from which entry appellee alone prosecutes this appeal.

[1] The first assignment of error complains of the action of the court in overruling the general demurrer and the special exception challenging the jurisdiction of the court referred to in our statement of the case. The proposition urged in support of the claimed error is that the measure of appellee's damages as pleaded was the difference in value of the lot she received and the amount she paid therefor; and, it appearing from the pleading that such amount was \$450, the district court was without jurisdiction to determine the controversy. The first inquiry then is: What sum was appellee entitled to recover as damages under the facts urged in her petition? There was at one time some confusion and perhaps some difference in the adjudicated cases in the Supreme Court on the issue presented; but there has, as we understand the cases now, been no controversy about the rule since the holding in *George v. Hesse*, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772, 15 Ann. Cas. 456. In that case the holding is that where a vendee is induced by false representations as to the value, condition or quality of lands, as distinguished from quantity, title, or incumbrances, to enter into a contract of purchase to his loss, the measure of his damages, in a suit for that purpose, "is the difference between the value of that which he has parted with and the value of that which he has received."

The rule stated is also that of the Supreme Court of the United States. *Sigafus v. Porter*, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113. The rule, however, is not general in all the states. See notes to *George v. Hesse*, 8 L. R. A. (N. S.) 804.

[2] The measure of appellee's damages as disclosed by her pleading being that stated, and it appearing therefrom that such amount was not cognizable in the district court, should the trial court have sustained the general demurrer or the special exception by authority of both of which the issue was presented? Appellee declares that the demurrer and exception were properly overruled for the reason that the jurisdiction of the district court was to be determined by the amount declared in the petition to be the damages suffered, unless it was alleged and proven by appellant that such amount was claimed for the fraudulent purpose of conferring jurisdiction upon the trial court. The pleadings did, as we have shown, declare that appellee had been damaged \$1,500 by the false representations concerning appellant's ownership of the lot pointed out, and sought recovery for that amount. The pleadings also disclosed that appellee paid \$850 for the lot, and that its actual value was \$450. The Supreme Court was at one time also in disagreement on the issue thus presented; but, as in the case of the issue just discussed, the decisions have been uniform since the case of *W. U. Tel. Co. v. Arnold*, 97 Tex. 365, 77 S. W. 249, 79 S. W. 8. In that case it was held, in substance, that courts generally, when jurisdiction of the case is obtained, will retain it for the purpose of rendering complete justice upon the whole case, but that it does not follow from that rule, when it is disclosed by the pleadings that the plaintiff has no cause of action, except one which he should have asserted in another tribunal, that such cause of action will be entertained because another claim is asserted for which the plaintiff may in no event recover. By the rule controlling appellee's measure of damages she was entitled to recover the difference between the actual value of the lot and the amount he paid for it, which was \$450. By the rule of pleading announced in *W. U. Tel. Co. v. Arnold*, supra, the only effect of the allegation that she was damaged \$1,500 was to assert a claim upon which she was not entitled to recover, and which may not be considered for that reason in determining the jurisdiction of the court. To put the rule in another way, whenever it appears from specific allegations of pleading that the amount recoverable is below the jurisdiction invoked, general allegations of a greater sum not supported by the very nature of the case made is unavailing to confer jurisdiction, "as where to a declaration upon a promissory note the plaintiff adds the general *ad damnum* clause." *Foster v. Roseberry*, 98 Tex.

138, 81 S. W. 521; Carswell & Co. v. Habberzett, etc., 99 Tex. 1, 86 S. W. 738, 122 Am. St. Rep. 597.

Accordingly, it becomes our duty to reverse the judgment and dismiss the case; for as said in Pecos & North Tex. Ry. Co. v. Canyon Coal Co., 102 Tex. 478, 119 S. W. 291:

"The defendant had a right to have the issue involved * * * tried in a court of competent jurisdiction, and he cannot be deprived of that right by an act of his opponent to which he does not consent."

Reversed and dismissed.

FIREMAN'S INS. CO. v. JESSE FRENCH PIANO & ORGAN CO. et al. (No. 998.)

(Court of Civil Appeals of Texas, Amarillo.
May 31, 1916. Rehearing Denied
June 28, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 499(4) — RECORD — PRESENTATION OF GROUNDS OF REVIEW — INSTRUCTIONS.

Under the express provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 1971, assignments of error in the court's charge could not be considered, where the record did not show either objection or exception in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2298; Dec. Dig. \Leftrightarrow 499(4).]

2. APPEAL AND ERROR \Leftrightarrow 692(3) — RECORD — EXCLUSION OF EVIDENCE.

In a suit upon a fire insurance policy covering a piano in the possession of a buyer from the plaintiff, an assignment of error in sustaining an objection to the testimony of plaintiff's manager and in refusing to permit defendant to show by him that the piano did not cost the plaintiff over \$300, and that plaintiff's profit on it as a wholesale dealer was 40 per cent., could not be considered, where the bill of exceptions showed that the manager did not know what the plaintiff gave for the piano, and did not show that he could or would have stated the percentage of profit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2908, 2909; Dec. Dig. \Leftrightarrow 692(3).]

3. INSURANCE \Leftrightarrow 668(3) — QUESTION FOR COURT — CONSTRUCTION OF CONTRACT.

The construction of a written provision of a policy as to the extent of the insurer's liability was a question for the court, and not for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1734, 1755; Dec. Dig. \Leftrightarrow 668(3).]

4. JUDGMENT \Leftrightarrow 199(1) — SPECIAL VERDICT — STATUTE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1980, providing that where a special verdict is rendered the court, unless it be set aside and a new trial granted, shall render judgment thereon, the court could not enter judgment for defendant notwithstanding the jury's verdict for the plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 867, 874, 875; Dec. Dig. \Leftrightarrow 199(1).]

5. INSURANCE \Leftrightarrow 495(1) — AMOUNT OF RISK — "COINSURER" — STATUTE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4893, providing that no company may issue any policy covering property in the state containing any provision that the insured shall be liable as a coinsurer for any part of the loss or damage to the property by fire, a provision in

a fire insurance policy, covering a piano valued therein at \$500, on which amount the company collected a premium, that in the event of loss or damage the company should not be liable for more than three-fourths of its cash value immediately preceding any loss or damage, and that in the event of other insurance it should be liable only for its proportion of three-fourths of such cash value at the time of the fire, in the absence of showing of concurrent insurance, was void, though there can be no "coinsurer" where the insured does not bear a proportion of the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1270-1272; Dec. Dig. \Leftrightarrow 495(1),

For other definitions, see Words and Phrases, Coinsurer.]

Error from Dallas County Court, at Law; W. F. Whitehurst, Judge.

Suit by the Jesse French Piano & Organ Company and another against the Fireman's Insurance Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Senter & Synnott, of Dallas, for plaintiff in error. Short & Feld, of Dallas, for defendants in error.

HALL, J. This suit is based upon a fire insurance policy covering a piano. Defendant in error Jesse French Piano & Organ Company instituted the suit, alleging, in substance, that it sold a player piano to W. S. Levan, who executed 40 notes in part payment therefor, aggregating \$475, said notes being secured by a chattel mortgage on the piano; that Levan agreed to take out an insurance policy for \$500, payable to defendant in error, as its interests should appear; that said policy was duly issued, and while the same was in force, and while Levan owed it more than \$500, the piano was destroyed by fire. Notice was given to produce the policy. Levan was also made a party, but, being a nonresident, and not having been served in the state, defaulted. Plaintiff in error answered, setting up specially a provision of the policy, to the effect that in case of loss by fire the measure of the recovery should be three-fourths the actual value of the property destroyed, and that the property was worth only \$300 at that time. It pleaded a further provision of the policy, to the effect that in case there should be additional insurance upon the property, the liability of the company should be limited to such an actual value of the property as the amount of its policy was of the total insurance; that there was other insurance to the amount of \$800, aggregating \$1,300 insurance, and therefore its liability, if anything, was only $\frac{1}{13}$ of \$300; that after the destruction of the piano it issued its draft, payable to the plaintiff and Levan, for \$300; that plaintiff accepted and retained possession thereof, and was therefore estopped to claim more than said amount. By supplemental petition the defendant in error denied that it retained the \$300 check; that it was estopped; that the piano was only

\$300, but alleged that it was worth \$500; and that the defendant insurance company, by issuing its check for \$300, was estopped to claim that it was liable for less.

[1] The first three assignments complain of the court's charge, but since the record shows neither objection nor exceptions in the court below, we cannot, under article 1971, Vernon's Sayles' Civil Statutes, consider them.

[2] The fourth assignment is that the court erred in sustaining plaintiff's objection to the testimony of plaintiff's manager, Phelps, and in refusing to permit the defendant to show by Phelps, as it would have done, that the piano did not cost the plaintiff exceeding \$300, and in refusing to permit the defendant to prove by Phelps that the profit of the plaintiff upon the piano, as a wholesale dealer, was 40 per cent. A bill of exception is reserved in the statement of facts, which shows that Phelps did not know what the plaintiff gave for the piano, nor is it shown that he could or would have stated that there was a profit to plaintiff in the sale of 40 per cent. So if this evidence could be held admissible, the condition of the record is not such that we can consider the assignment.

The finding of the jury that the check was not accepted in payment of the claim is sufficiently sustained by the evidence.

[3] It is insisted that the court erred in refusing to submit to the jury the question as to whether the policy sued on contained a provision making the defendant liable, if at all, only for a pro rata part of three-fourths of the cash value of the property destroyed, other insurance included. This being a question for the court, there was no error in refusing to submit to the jury. The contract of insurance was in writing, and the duty of construing it was not a proper matter for the jury.

[4] By the seventh assignment it is insisted that the court should have entered judgment for the defendant, notwithstanding the verdict of the jury. Such a proceeding is not permissible under the statute of this state. Vernon's Sayles' Civil Statutes, art. 1990.

[5] Appellant insurance company insists that in no event should judgment have been rendered for more than three-fourths of the established value of the piano at the time of its loss. This contention is based upon the following clause attached to the policy:

"Three-fourths value and other insurance clause. In consideration of the rate of premium at which this policy is written, it is a condition of this insurance that in event of loss or damage by fire to the property described herein, this company shall not be liable for an amount greater than three-fourths of the cash value of each item of the same—not exceeding the amount of said policy—at the time immediately preceding such loss or damage; and in the event of other insurance on the property described herein, then this company shall be liable only for its proportion of three-fourths of such cash

value at the time of the fire. Other concurrent insurance permitted but total insurance shall, at no time exceed three-fourths of the cash value of each item of the property described therein."

In the policy the piano is valued at \$500. The evidence shows \$500 to have been its value at the time of the fire, since it had been in use only about 30 days. The appellant company collected a premium upon it, based upon such value. Five hundred dollars is also shown by the record to have been the price at which the instrument was sold to Levan. It therefore appears that appellant has collected a premium based upon the valuation of \$500, the price paid by the purchaser for the instrument, and under the clause above quoted is seeking to avoid liability to the extent of one-fourth of the amount upon which it has collected its premium. The record does not show any concurrent insurance. To sustain this contention would be to make the owner of the instrument a coinsurer to the extent of one-fourth of its value after having paid a premium upon its full value to the appellant. If, for any reason, appellant did not think it advisable to insure the instrument for its full value, and did not intend to become liable for more than three-fourths of its value in the event of loss, the premium should have been collected upon only such three-fourths' value. Article 4893, Vernon's Sayles' Civil Statutes, was enacted to meet this condition. This article provides that no company subject to the provision of this act may issue any policy or contract of insurance covering property in this state which shall contain any clause or provision in any way providing that the assured shall be liable as coinsurer with the company issuing the policy for any part of the loss or damage which may be caused by fire to the property described in such policy, and any such clause or provision shall be void and of no effect. It is provided, however, by the article that coinsurance clauses may be inserted in policies covering cotton, grain, or other products in process of marketing, shipping, and storing or manufacturing. There can be no coinsurance where the insured does not bear a proportion of the risk. *Oppenheim v. Firemen's Fund Insurance Co.*, 119 Minn. 417, 138 N. W. 777.

Finding no reversible error, the judgment is affirmed.

O'HANLON et al. v. MORRISON. (No. 1002.)
(Court of Civil Appeals of Texas. Amarillo.
May 24, 1916.)

1. ADVERSE POSSESSION. §71(2)—COLOR OF TITLE—VOID DEED.

A void deed does not constitute color of title required by the three-year statute of limitations.

[Ed. Nota.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 417-421, 424-426, 428; Dec. Dig. §71(2).]

2. TAXATION \Leftrightarrow 789(3)—TAX DEEDS—VALIDITY.

A tax deed is not evidence of title unless the authority of the maker of the deed is shown by proof of compliance with the requirements of law conferring authority to make the sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1558; Dec. Dig. \Leftrightarrow 789(3).]

3. ADVERSE POSSESSION \Leftrightarrow 60(4)—REQUISITES—HOSTILE CHARACTER OF POSSESSION.

Under Rev. St. art. 5681, defining adverse possession as an actual and visible appropriation of the land commenced and continued under a claim of right inconsistent with and hostile to the claim of another, where the defendant used a vacant lot for tying stock in common with others, and storing lumber and wire in a manner consistent with subordination to the title of the owner, and first used it under a claim of right in 1904 under a tax deed made to another, and gave no notice of his change of intention to a hostile possession until a year or so before he fenced the land three years before the beginning of the action, his holding until three years before the action was not inconsistent with or hostile to the owner or an actual visible appropriation as to indicate unmistakably an assertion of claim of exclusive ownership sufficient to give him title under the ten-year statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 288-293; Dec. Dig. \Leftrightarrow 60(4).]

For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

4. ADVERSE POSSESSION \Leftrightarrow 79(4) — HOSTILE CHARACTER OF POSSESSION—TAX DEED.

Possession in a tax deed is not adverse to the title of the owner, and cannot be used as a basis for possession under the statute of limitation until after the period of two years allowed for redemption.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 462; Dec. Dig. \Leftrightarrow 79(4).]

5. ADVERSE POSSESSION \Leftrightarrow 36—REQUISITES—CONTINUOUS OWNERSHIP.

The facts were not sufficient to show a continuous or exclusive use of the property.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 139-143; Dec. Dig. \Leftrightarrow 36.]

6. ADVERSE POSSESSION \Leftrightarrow 29—REQUISITES—APPROPRIATION.

To constitute adverse possession, the person occupying the land must appropriate it to some purpose for which it is adapted, since mere occupancy of the land, without evidence showing an intention to appropriate it, will not support the statute.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 124, 125; Dec. Dig. \Leftrightarrow 29.]

Appeal from District Court, Grayson County; W. M. Peck, Judge.

Action by F. L. O'Hanlon against W. A. Morrison and others. From a judgment for the named defendant, the plaintiff and other defendants appeal. Reversed and remanded.

J. W. Finley, of Sherman, for appellants.
Cox & Cox, of Sherman, for appellee.

HUFF, C. J. O'Hanlon instituted an action of trespass to try title against W. A. Morrison, J. H. Hollingsworth, Van Dyke Todd, and B. W. Gulick, to recover lot, No. 3, in block No. 41 of College Park addition to Sherman. The petition sought a recovery

against Gulick, the vendor of appellant, under a warranty for the purchase money paid should he fail to recover the land. W. A. Morrison answered among other things the three, five, and ten year statute of limitation, also alleging a purchase from Hollingsworth, who purchased at tax sale, and the failure of appellant to redeem in two years. Hollingsworth, Todd, and Gulick did not answer. The case was submitted to a jury, who found for Morrison upon his plea of three and ten year limitation, and in favor of O'Hanlon against Gulick, for \$125, and judgment was accordingly so rendered.

The appellant showed title in himself and the trial court so instructed the jury, unless defeated by the statutes of limitation pleaded by Morrison. Morrison claims under a tax deed sold for taxes, due the city, by the collector of that city. The deed itself is not in the record, but apparently the witnesses who testified to it had it before them, and referred to it as being dated March 1, 1904. It appears J. H. Hollingsworth purchased at the tax sale and did so for Morrison. The tax deed was made to Hollingsworth, and he and Morrison testified that he conveyed the lot by deed to Morrison. This deed appears to have been lost, and thereafter a substitution deed was executed, which was placed of record some time in 1914. There was nothing showing assessment or levy of taxes. No judgment was offered foreclosing the tax lien; in fact, nothing was shown except the tax deed, if indeed that can be said to have been in evidence. The suit for the lot was filed August 27, 1914, and the trial was had February 2, 1915. The evidence shows the lot in question was vacant, without any improvements on it of any kind until a little less, as stated by the witness, than three years before the trial; or something like two years before the suit was filed, when Morrison fenced the lot. Morrison testified:

"In March, 1904, I was tax collector of Grayson county. At that time I had Mr. Hollingsworth to do something in reference to lot 3, block 41, College Park addition to the city of Sherman. I had him to buy it at a tax sale. My recollection is I had to leave town on the day it was to be sold; is why I had him to buy it. I bought it because I needed it as a kind of store place for things that I would have around that I couldn't keep on my other lot. I had been using the lot before that. It must have been four or five years that I had been using it. In fact, I was using it all the time since I moved over there. I moved over there in the winter of 1897, I think it was, 1896 or 1897, I don't remember how long it was after I moved there before I began to use this lot. It wasn't but a short time. Probably the next spring. I used it for various purposes. I have used it for pasturing; that is, lariatting on it and pasturing. I mean I tied my cow and horse on it. I used it also for standing my wagons on, and have had some mowers on it, or one mower I remember; piled lumber on it sometimes, right often I have used it nearly all the time since I moved there, quite all the time for various purposes; not for any one thing all the time. I will say that I have used it about all the

time, for the purposes which I have stated to the jury, stored lumber, mowing machines, farming implements and wagons, buggies; sometimes put some wire on it a time or two, wire that I wasn't using. I started using that lot in that manner, I think, within a year after I moved there. I think a year would cover it. Don't think it was that long. That would be since about 1897 or 1898. I have continued to use the lot up to the present time in the manner in which I started to use it. No one has interfered with my peaceable use of the lot. No one has done anything to prevent me from using the lot, not until this suit was brought. I don't remember the date when the suit was brought. I fenced the lot, and put up some feed troughs on it. I think that was three years ago this coming spring. When I first started using this lot there was a house on lot 4. This lot 8 was a vacant lot; nothing on it at all. There was some little brush on it; this black locust, I believe. I frequently made inquiry along about that time about who owned the lot. I never could find out who owned it. I was using it before I started to find out who owned it. I wanted the lot; needed it; and couldn't find out who owned it, and that caused me to take the course I did toward using this lot. I went to the records down stairs in the county clerk's office to try to find out who owned it. I didn't find out much of anything there. No one ever approached me at any time that I remember of with reference to signing a lease on the lot. Mr. O'Hanlon has spoken to me a time or two about the ownership of the lot in the last 12 months. No one spoke to me about it before the last 12 months that I remember of. Mr. Finley has spoken to me once about it, I believe, but not before 12 months ago. It might have been Mr. O'Hanlon spoke to me about it longer ago than that, but I don't think it has been longer than 12 months. Mr. Hollingsworth executed me a warranty deed to the lot. The first deed was executed some time during the summer of 1904. I haven't got that first deed that was executed. I do not know where it is. It got misplaced. I am positive that that deed was executed and delivered to me somewhere along about 1904, during that summer. It was after March 6th. That first deed was never placed of record. I don't know as I ever made a diligent search for the first deed until about a year ago or a little longer. I had a locker down in the county clerk's office that I kept some of my papers in, and I kept some of them out at the house. During the time I was collector I kept them down here in the office. I know from memory that there was a former deed executed by Mr. Hollingsworth to me to this lot 3, block 41. I had Mr. Hollingsworth to buy this in for me. Some time after that time Mrs. Carr put up some kind of a claim to the lot, and went to Mr. Hollingsworth about it, and he told me about it, and then I had him give me a deed. The agreement between Mr. Hollingsworth and me at the time he bought this in was that he was to execute a deed to me at any time that I would ask him for it. I paid taxes on this lot. I paid state and county and city taxes. (Witness is handed some papers.) These are tax receipts.

"Mr. Cox: We offer these receipts in evidence.

"The Witness: Some of the receipts show that I paid taxes on lot 4, block 41. That was caused by an error in rendition. I found out two or three years ago that there was an error in the rendition. As soon as I found out about it, I changed it from '4' to '3.' I didn't change the receipts. I changed the rendition. I first laid claim to the lot in 1904. I had been using it prior to that time. I used it for the purpose of rather a store place for things that I wasn't using. That is what I did with reference to claiming it. I asserted my claim of ownership by storing things on the lot. I took actual possession of it. I stored lumber on it and wire,

and lariatied my horse and cow on it; put some machinery on it; put my wagon and buggies on it. I stated that I used it in that way. I used it that way to the exclusion of others. I had possession of it. I first asserted that possession about 1897 or 1898. I first started to using and occupying the place about that time, about 1897 or 1898; somewhere along there. No one else used or occupied that lot from then on. During that time no other person ever occupied the lot."

Cross-examination by Mr. Finley:

"I made inquiries of several about the ownership of that lot. I don't know but what I asked you (Mr. Finley) about it one time down in the county courtroom or in the county clerk's office. And I asked Mr. Tuck. I don't remember that you turned to the books and showed me whose name it stood in. I have asked Mr. Tuck. I have talked about it frequently. I don't know who that first deed was acknowledged before, only just from the party that did my notary work usually. I did not go to the notaries and have them examine the books and see if there had been any acknowledgment made. I didn't make any such effort to find out whether there had been a deed acknowledged or not. I don't know as a matter of fact that there never was one executed until this last one. I know that there was. I got up this other instrument in 1914 because I couldn't find my other deed. I don't think I knew the date of the other one. I fixed the date of this instrument from recollection and memory. I didn't go to the notaries that did work to find out whether or not there was a record. I don't know that the law requires notaries to keep a record of those acknowledgments, public documents. It is not a fact that the reason I didn't go to them was because there never was one executed back there. I think it was three years ago this coming spring that I fenced this lot. I think it is a little bit short of three years now. Prior to that time I lariatied my stock on the lot. I lariatied calves on it and milch cows and a horse and colt. I did that during the spring, summer, and fall. I didn't do it through the winter. I may have put something out there in the late fall for exercise. I don't know. I don't mean to say that I didn't or did. I put lumber on it. I didn't run as large a lumber yard as they run here in town. Oftentimes I would buy lumber to repair things around the place, or probably secondhand lumber, generally. I didn't buy any new lumber and store it out there. I would sometimes leave my buggy standing on the property and sometimes my wagon or machinery. The machinery didn't stay there from year to year. I didn't keep it there all the time. I don't remember when I first put lumber there; I couldn't give you the date. To come right down to it, I expect there has been some lumber there all the time; some lumber or wire that has been rolled up, or something of the kind. * * *

"In tying my animals there I tied them at different places. The lot is inclosed now. Prior to the time I put the fence there a little less than three years ago there was no inclosure, and never had been so far as I know from the time I moved out there. There are no buildings on it. It was an open lot, except that it was fenced on two sides, north and south sides. That left the east and west ends open. It wasn't fenced at all until the men north and south fenced their lots. It is not a fact that I put the first fence on the south there. My recollection is there was a fence on the north and south and this house burned. There was a house on the north side of the lot. That wasn't before I moved out there. It burned by back fence down and barn. There was no fence across either end of the lot, and other people had the same access to it if they wanted it, and hitched their cattle there if they wanted to. I don't know whether Mr. O'Hanlon put up a sign there on that lot or not some years ago. I know there is a sign

there, but I don't know who put it there. I didn't see him. It has his name on it. I think it has been two or three or four years ago that that was put there. I don't know how long. I didn't pay much attention to it. I don't think it was five or six years ago."

The testimony in this case shows that vacant lots in the city of Sherman are frequently used by the residents for larding out their cows or stock upon them to graze, and the very lot in question was used by appellee and others when he did not claim to own or have a right thereto. The appellee did not pay the taxes on this lot until about 1910, or 1911. This was caused by an error on his part in supposing that lot 3 was lot 4, and he paid on lot 4.

Assignments of error are based on the admission of the testimony to the effect it did not show possession exclusive and continuous and to the refusal of the court to instruct a verdict for appellant and to grant a new trial, all asserting the insufficiency of the testimony to support the three and ten year statute of limitation.

[1-3] We think the trial court should have instructed the jury, as requested by the third specially requested charge, to the effect that there was no testimony to support the three-year statute of limitation. A void deed does not constitute "title or color of title" required by the statute to support the three years. A tax deed does not constitute title unless the authority of the maker of the deed is shown by proof of performance of all the preceding requisites. *Latimer v. Logwood*, 27 S. W. 960; *Telfener v. Dillard*, 70 Tex. 139, 7 S. W. 847; *Gillaspie v. Murray*, 27 Tex. Civ. App. 530, 66 S. W. 252; *Allen v. Courtney*, 24 Tex. Civ. App. 86, 58 S. W. 200. The deed of a tax collector, without proof of compliance with the requirements of the law conferring authority to make the sale, is no evidence of title in the party claiming under it. This is not an open question in this state. *Clayton v. Rehm*, 67 Tex. 52, 2 S. W. 45, and authorities cited; *Dawson v. Ward*, 71 Tex. 72, 9 S. W. 106. The deed was properly introduced in evidence on the question of limitation, but in order to prescribe, under the three-year statute, it must show title or color of title, and this is not shown, under the authorities of this state, until the necessary precedent requirements of the law are shown, authorizing its execution. There was no title shown under the three-year statute.

"Adverse possession is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another." Art. 5681, R. C. S. Under the testimony of Morrison, no "claim of right" was set up until 1904. Previous thereto he was looking for the owner and making inquiries for him. His use of the lot up to that time was not "inconsistent with and hostile to" the owner. Just at what time Morrison's

acts were sufficient to notify the owner that he was using the lot no longer as the property of the owner, but under a "claim of right," is difficult to determine from the evidence. The tax deed was not to himself. There was nothing of record to show a claim set up by him. In so far as external circumstances show, he was then, as he had been previously, a mere casual trespasser, or on the lot by permission of the owner. He paid no taxes on this lot, but he says he intended to, but by mistake paid on lot 4, a lot immediately back of him. So far as this record shows, appellee never notified any one he claimed this lot until a year or so before he fenced it, about the time a Mr. Brown built on lot 4, when he thought lot 4 was the one he bought at the city tax sale. He thought 4 occupied the position in the block that 3 occupied. This lot was not only used by appellee to tie his stock on to graze, but was used by others for the same purpose. This was a permissive user by the owner, and was not under a claim adverse to the owner at the inception of the entry. This permission may be presumed we think.

"So long as the possessor declares that he holds in subordination to the better title, the possession will be regarded as held by consent; nor will a continued possession after such declaration avail to mature title under the statute of limitation until the party has changed the character of his possession, either by express declaration or by the acts of ownership inconsistent with a subordinate character." *Satterwhite v. Rosser*, 61 Tex. 166; *Chance v. Branch*, 53 Tex. 490; *Buford v. Wasson*, 49 Tex. Civ. App. 454, 109 S. W. 275; *Meurin v. Kopplin*, 100 S. W. 984; *Surghenor v. Talliaferro*, 98 S. W. 648.

"It follows, therefore, that where the possession of the claimant was in its inception taken with permission of the owner and in subordination to his title, it cannot become adverse without a distinct and open disavowal of the title of the owner brought home to the owner." *Corpus Juris*, vol. 2, page 124, § 210, and authorities above cited.

When the appellee changed his acknowledged recognition of the rights of the owner, there was no act on his part or thing done on the land different to that previously done. The deed was not in his name, and notice was not given of his claim under it. The whole matter was kept secret from the owner.

"His claim, so far as the evidence discloses, was a mere mental process, known only to himself. There was no 'external circumstances discovering that inward intention.' It would seem that when one proposes to hold the land of another, which he has neither occupied nor inclosed, by virtue of the statute of limitations it should appear that he has exercised some act of ownership over some definite part thereof calculated to apprise the owner that he is asserting 'a claim of right.'" *Titel v. Garland*, 99 Tex. 201, 87 S. W. 1152.

[4] Appellee's claim of right was under a tax deed from the city, dated March 1, 1904, and until this deed appellee asserted no right to the lot. He asserted no other claim. This suit was filed August 27, 1914. The appellee, in his brief, cites section 116 of the

charter of the city of Sherman, passed by the Twenty-Fourth Legislature, 1895, page 61, to the effect that the owner shall have the right to redeem his real estate sold for taxes at any time within two years. Deducting the time allowed for redemption after such claim under the deed, the period of time before filing of the suit would be less than ten years. Assuming that the purchase was sufficient notice to the owner of an adverse claim under the tax deed, he had only such notice of the claim as the deed would authorize or the law would permit. It gave notice under what claim possession was held by appellee. It has been established in this state that possession under a tax deed is not adverse to the title of the owner until after the period of redemption expired. The tax deed cannot be used as a basis for possession under the statute of limitation until after the period for redemption. *Davis v. Hurst*, 14 S. W. 610; *Beatty v. O'Harrow*, 49 Tex. Civ. App. 404, 109 S. W. 414; *Bledsoe v. Haney*, 57 Tex. Civ. App. 285, 122 S. W. 455; *Porter v. Brooks*, 170 S. W. 103; *Davis v. Howe*, 176 S. W. 759 (writ of error was granted in the last case but evidently not on this question); *Turner v. Smith*, 56 Tex. Civ. App. 1, 119 S. W. 922; *Bente v. Sullivan*, 52 Tex. Civ. App. 454, 115 S. W. 350; *Masterson v. State*, 17 Tex. Civ. App. 91, 42 S. W. 1003.

The authorities above cited were cases under the five-year statute, where the purchaser at tax sale relied upon a duly registered tax deed for five years, but we see no reason why one in possession under a claim of title through a tax deed should not be governed by the same principle under the ten-year statute. Adverse possession under a claim of title is the same in both instances. Where one claims title through the owner, by virtue of a tax deed, adverse possession is the same, and until after the period of redemption the deed under the law confers no right of possession in the purchaser, but the right of possession under the deed is in the owner. One so holding land under the deed must therefore recognize the right of the owner, and hence there is no adverse possession "inconsistent with and hostile to" the owner. We, therefore, think during the two years which appellant had the right to redeem appellee's possession could not be said to be adverse or hostile or inconsistent with the rights of appellant. The "actual, visible appropriation" was not such under the facts of this case, in our judgment, and of "such a character as to indicate unmistakably an assertion of claim of exclusive ownership in the occupant." *Mhoon v. Cain*, 77 Tex. 316, 14 S. W. 24; *Richards v. Smith*, 67 Tex. 610, 4 S. W. 571; *Gillespie v. Jones*, 26 Tex. 346; *Bender v. Brooks*, 103 Tex. 329, 127 S. W. 168, Ann. Cas. 1913A, 559; *Raley v. Sullivan*, 159 S. W. 99.

[5] Neither do we think the facts sufficient

to show a "continuous" or exclusive use of the property. *Pendleton v. Snyder*, 5 Tex. Civ. App. 427, 24 S. W. 363. It has been repeatedly held in this state that going upon land and cutting timber and the like is not alone evidence sufficient to show adverse holding under a claim of right (*Sellman v. Hardin*, 58 Tex. 86; *Murphy v. Welder*, 58 Tex. 235; *Soape v. Doss*, 18 Tex. Civ. App. 649, 45 S. W. 387; *Perry v. Stevens*, 44 Tex. Civ. App. 108, 97 S. W. 1075), or the grazing of stock on the land (*De Las Fuentes v. McDonald*, 85 Tex. 132, 20 S. W. 43; *Haynes v. Ry. Co.*, 51 Tex. Civ. App. 49, 111 S. W. 427).

[6] To constitute adverse possession the party occupying the land must appropriate it to some purpose, for which it is adapted. Mere occupancy of land, without evidence showing an intention to appropriate it, will not support the statute. *Nona Mills Co. v. Wright*, 101 Tex. 14, 102 S. W. 1118.

It is urged by appellee in this case, because the cattle were tied on the land to graze, that this will evidence an appropriation; that it is distinguishable from that class of cases where cattle are herded on land or held on land for grazing purposes. The evidence shows in this case they were only kept on the land during the grass season. In the winter and the months when there was no grass, the cattle were not held or tied on the lot. Others used the land for the same purpose as did appellee, and no attempt is shown on the part of appellee to exclude others so using the land. This, from the evidence, appears to have been the custom over that city; that is, to tie cattle upon vacant lots to graze, whether the lot was owned by the one so grazing. It was what the appellee did on this lot for more than seven years before he made any pretense of claim to it. He placed his buggy, wagon, and mower on the lot; piled some lumber on it. He does not pretend to say how much or what part of the lot was used. It is shown by other evidence in the case that there was a black locust tree across the alley from the lot on which appellee resided, near the line of the lot in question, and that he used this as a shade for his buggy and horse. Mr. Brown, who purchased lot 4, testified there was some lumber on the line of his lot and 3 when he purchased it. It occurs to us these acts of the appellee are too casual, not of sufficient continuity, and are shown to be such as are usual by the people of that city and by the appellee, when he asserted no claim to the lot. They are not of a character sufficient to notify the true owner of an intent to hold the property adverse to him. *Guinn v. Sumpter Valley Ry. Co.*, 63 Or. 368, 127 Pac. 987.

We do not believe the evidence sufficient to support the verdict of three and ten years, and most assuredly not of five years.

The case will be reversed and remanded.

KALMANS v. BAUMBUSH et al. (No. 598.)
(Court of Civil Appeals of Texas. El Paso.
June 29, 1916.)

1. JUDGMENT ~~§ 423~~—CONCLUSIVENESS—ERRONEOUS JUDGMENT—CHARACTER OF RELIEF. Although judgment under Rev. St. § 1999, in suit to recover a cow, erroneously required delivery of the cow, instead of payment of her value, which was under \$50, so that the case was not appealable from the county court, it was not void and subject to direct attack in a proceeding to enjoin its enforcement.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 797-801; Dec. Dig. ~~§ 423~~.]

2. JUDGMENT ~~§ 423~~—CONCLUSIVENESS—ERRONEOUS JUDGMENT—CHARACTER OF RELIEF.

If judgment is rendered by a court of competent jurisdiction, error therein does not render it void, or subject to be set aside, except for fraud, accident, or mistake, though the amount in controversy is so small as to prevent appeal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 797-801; Dec. Dig. ~~§ 423~~.]

Appeal from Harris County Court; Clark C. Wren, Judge.

Suit for injunction by L. Kalmans against Gus Baumbush and another. From an order refusing temporary injunction, plaintiff appeals. Affirmed.

Sam, Bradley & Fogle, of Houston, for appellant. Atkinson, Graham & Atkinson and J. E. Garrett, all of Houston, for appellees.

HIGGINS, J. Baumbush filed suit in a justice court of Harris county against Kalmans to recover a cow, of the alleged value of \$50. Judgment was there rendered in favor of Baumbush, and Kalmans appealed to the county court. Upon trial in the latter court a verdict was returned in favor of Baumbush, and judgment rendered in his favor for the cow and costs of suit. The judgment directed that a writ of possession for the cow be issued. Motion for new trial was filed by Kalmans, which was overruled by the court, and the judgment became final. A writ of sequestration was issued in the cause at its commencement, and the cow was taken into the possession of the sheriff thereunder. Kalmans replevied the same.

The present suit was filed by Kalmans against Baumbush and M. F. Hammond, sheriff of Harris county, alleging that a writ of possession for the cow and execution for costs had been issued in the cause and placed in the hands of Hammond, who was about to execute the same, and a temporary injunction was asked, restraining the enforcement of such writs, and that upon final hearing the injunction be made final. This appeal is prosecuted from an order refusing the temporary injunction.

It is contended that the judgment entered in the original suit was unauthorized and improper for various reasons, which may be briefly summarized as follows: (1) Because it was a suit for personal property, and in such case under article 1999, Revised Stat-

utes, a judgment for restitution of the specific property was improper and unauthorized, because the pleadings, evidence, and verdict did not show that the cow had an especial value to plaintiff. (2) That the judgment should have been for the value of the cow under the provisions of article 7106, Revised Statutes.

[1] From the statement made, it is manifest that in effect this is a proceeding to set aside the judgment entered in the original suit and to stay the process which was therein ordered issued. It may be conceded that the judgment which was entered in the cause was erroneous, in view of the provisions of the statutes quoted. But such error could be reviewed and corrected upon appeal or writ of error only. The failure to observe such provisions did not render the judgment void, nor was it sufficient ground to set the same aside in a direct proceeding such as this. Its status in this respect is not altered by the fact that the amount in controversy was so small that an appeal did not lie from the judgment of the county court. *Railway Co. v. Flow*, 149 S. W. 1081.

[2] It frequently happens that erroneous judgments are rendered, from which an appeal will not lie; but if they are rendered by courts of competent jurisdiction, such error does not render the same void, nor can they be set aside in a direct proceeding, except for fraud, accident, or mistake. In the instant case, the court had jurisdiction, and there is no allegation that the judgment was founded upon fraud, accident, or mistake. The injunction, therefore, was properly refused.

Affirmed.

TYLER v. SMITH. (No. 916.)

(Court of Civil Appeals of Texas. El Paso.
June 15, 1916.)

APPEAL AND ERROR ~~§ 627(3)~~ — TRANSCRIPT OF RECORD—FAILURE TO FILE IN TIME.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1608, providing for filing of transcript in Court of Civil Appeals within 90 days from the performance of appeal, providing for filing thereafter for good cause shown, and article 1610, providing that on failure to file transcript, upon the filing by the appellee of a certificate of affirmance, the Court of Appeals shall affirm judgment, unless good cause be shown why such transcript is not filed, where judgment was entered for appellee on December 16, 1915, motion for new trial was overruled on December 28th, and notice of appeal and appeal bond were filed January 18, 1916, but the transcript was not filed in the Court of Civil Appeals within 90 days, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2747, 2749; Dec. Dig. ~~§ 627(3)~~.]

Appeal from District Court, Reeves County; S. J. Isaacks, Judge.

Action between J. L. Tyler and Brooke Smith. From the judgment, J. L. Tyler ap-

peals. On motion to affirm on certificate. Motion granted, and cause affirmed.

Culp & Culp, of Gainesville, and Jno. B. Howard, of Pecos, for appellant. Wilkinson & McGaugh, of Brownwood, for appellee.

HARPER, C. J. This is a motion to affirm on certificate. It shows that the term of the district court of Reeves county convened on the 19th day of November, 1915, and adjourned on the 29th day of December, 1915; that a judgment was entered in the cause in favor of appellee on the 16th day of December, 1915, for \$2,572.41, and motion for new trial was overruled December 28, 1915, and appellant gave notice of appeal; that the appeal bond was filed January 18, 1916. The transcript was not filed in this court within 90 days, as provided by article 1608, Vernon's Sayles' Statutes of Texas, and, in accordance with article 1610 of said statutes, appellee moves this court to affirm.

The motion is granted, and cause affirmed.

COMMONWEALTH BONDING & CASUALTY INS. CO. v. HENDRICKS. (No. 7598.)

(Court of Civil Appeals of Texas. Dallas.
June 17, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 756—BRIEFS—SUFFICIENCY.

Where appellant's brief contains no statement of the nature and result of the suit, nor any assignment of error, proposition of law, or statement of fact, no issue is presented for consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3091; Dec. Dig. \Leftrightarrow 756.]

2. TRIAL \Leftrightarrow 350(4)—SPECIAL INTERROGATORIES—APPLICABILITY.

In action on policy insuring against death "from the effect of bodily injury sustained solely through external, violent and accidental means," where the sole issue of fact was whether insured's death resulted from the effects of sticking a nail in his foot, it was proper to refuse to submit an issue whether insured died because "he stuck a nail in his foot and was said injury the sole cause of his death," in lieu of an issue actually submitted whether it was "caused solely through external, violent and accidental means," since the jury may have believed that his death did not result from sticking the nail in his foot, but from the "effects" therefrom; and the evidence being undisputed that insured stuck the nail in his foot by external, violent, and accidental means, the use of the exact words of the policy, instead of the term employed in the refused charge, was immaterial, since both conveyed the same meaning.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 829; Dec. Dig. \Leftrightarrow 350(4).]

3. COSTS \Leftrightarrow 260(4)—DAMAGES FOR DELAY—GROUNDS.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1629, allowing appellee 10 per cent. additional on the amount in dispute as damages upon affirmance, where appeal is taken for delay by defendant, damages will not be allowed unless it appears that the grounds of alleged error are so frivolous that there could have

been no reasonable expectation that the judgment would be reversed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 986-991, 996; Dec. Dig. \Leftrightarrow 260(4).]

Appeal from District Court, Dallas County; Kenneth Force, Judge.

Action by Pallie L. Hendricks against the Commonwealth Bonding & Casualty Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 168 S. W. 1007.

W. W. Nelms and El J. Gibson, both of Dallas, for appellant. John W. Pope and M. L. Morris, both of Dallas, for appellee.

RASBURY, J. [1] At the time appellee filed her brief in this case, which was but one day prior to submission, appellant had not filed brief, though the appeal in other respects had been perfected in accordance with law. As a consequence and in compliance with rule 42 of this court (142 S. W. xiv), appellee briefed the case so as to show the correctness of the judgment. In addition and by appropriate proposition, appellee suggested that the appeal was taken for delay and sought an affirmance of the judgment with 10 per cent. additional on the amount in dispute as damages under authority of article 1629, Vernon's Sayles' Civ. Stats. Preceding submission, but on submission day, appellant filed its brief. The brief so filed does not contain a statement of the nature and result of the suit, any assignment of error, proposition of law, or statement of fact. The brief being thus defective, no issue is presented for consideration.

However, the suggestion by appellee that the appeal was taken for delay, and that as a consequence she is entitled to the statutory 10 per cent. damages, requires this court, even in the absence of briefs for appellant, to examine the record and ascertain that the substantial merits of the controversy have been attained. Rule 43 (142 S. W. xiv).

The suit was upon an accident insurance policy, which insured W. Price Hendricks, appellee's husband, among other things, against death from the effect of bodily injury sustained, while the policy was in force, solely through external, violent, and accidental means. In case of death \$1,200 was agreed to be paid to appellee, who, in event of death, was the beneficiary. While the policy was in force, Hendricks, who was employed in a grocery store, while lifting a box into a delivery wagon, stepped upon an exposed nail driven through a board. The nail entered the bottom of the foot and nearly penetrated it upwards. Later he died. Suit was commenced upon the policy and judgment recovered in the lower court, which, upon appeal, was reversed by this court. Commonwealth Bonding & Casualty Co. v. Hendricks, 168 S. W. 1007. After reversal the case was again tried, resulting also in

verdict for appellee, from which the present appeal is taken.

We have examined the record and conclude that the substantial merits of the controversy have been attained. It is contended by appellant as is disclosed by its motion for new trial in the lower court, in effect, that the verdict of the jury is not supported by the evidence, and, if there is supporting evidence, then that the verdict of the jury is against the great weight and preponderance thereof. The only issue of fact in the court below was whether Hendricks' death resulted from sticking the nail in his foot or from other and independent causes. The evidence on that issue consisted largely of the opinions of physicians testifying as experts. Their opinions conflicted radically. It was the exclusive duty of the jury to reconcile that conflict, and, having done so, we are without authority to disturb it.

[2] The case was submitted to the jury upon special issues, one of which inquired of the jury whether Hendricks' death was "caused solely through external, violent, and accidental means." In lieu of the issue so submitted, appellant requested the court to submit to the jury whether Hendricks died because "he stuck a nail in his foot and was said injury the sole cause of his death?" The requested issue was refused, and such refusal was assigned as error in the motion for new trial. As we have said, the sole issue of fact was whether Hendricks' death resulted from the effects of sticking the nail in his foot, or as provided by the policy from the effects of "external, violent or accidental means." By the refused charge appellee could have recovered only if her husband's death resulted from sticking the nail in his foot, while by the policy she was entitled to recover if death resulted from the "effects" of sticking the nail in his foot. We think the charge was properly refused as not correctly presenting the real issue, since the jury may have believed that his death did not result from sticking the nail in his foot, but from the "effects resulting" therefrom. All the evidence of the experts was in support of the latter theory.

We also conclude, the evidence being undisputed that appellee's husband stuck the nail in his foot by external, violent, and accidental means, that the use of the exact words of the policy in submitting the means by which the injury was received, instead of the term employed in the refused charge, was immaterial, since both conveyed the same meaning.

[3] On the issue of statutory damages, we conclude, notwithstanding our examination of the record, including all the evidence adduced, shows that none of appellant's issues presented in its motion for new trial should be sustained, that they are not so clearly without merit as to justify the conclusion

that the appeal was not taken in good faith and that appellant had no reasonable ground to believe that the judgment would be reversed. The rule in such cases is that damages will not be allowed unless it appears that the grounds of alleged error "are so frivolous that there could have been no reasonable expectation . . . that the judgment would be reversed." *Texas Furniture & Trading Co. v. Melott*, 136 S. W. 541.

The judgment is affirmed.

CAMDEN FIRE INS. ASS'N v. BAIRD et al. (No. 7556.)

(Court of Civil Appeals of Texas, Dallas. May 20, 1916. Rehearing Denied July 1, 1916.)

1. ACCORD AND SATISFACTION §17 — EVIDENCE—SUFFICIENCY.

Where the insurer offered to pay \$385 on a policy loss of \$500, and the insured agreed to accept it, but on tender of such sum refused it, there was at most an accord without satisfaction, and such facts were not a defense to the suit on the policy.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. § 123; Dec. Dig. § 17.]

2. ACCORD AND SATISFACTION §17 — EVIDENCE—SUFFICIENCY.

The general rule is that action on the original claim may be maintained, where it appears there was an accord, but no satisfaction, unless the agreement to execute the accord was accepted in lieu of performance.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. § 123; Dec. Dig. § 17.]

3. INSURANCE §582—LIABILITY—CLAIMS.

Where the trustee, to whom an insurance policy was payable as his interest might appear, in suit on the policy by the owner, answered, disclaiming interest, the owner's right to recover the full amount due under the policy, was established, and not cut off by his disclaimer.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1443-1451, 1453, 1454, 1485; Dec. Dig. § 582.]

Appeal from Dallas County Court; T. A. Work, Judge.

Action by Emma C. Baird against the Camden Fire Insurance Association and another. Judgment on directed verdict for plaintiff, and for C. H. Verschoyle, defendant, for costs, and defendant Insurance Company appeals. Affirmed.

Senter & Synnott, of Dallas, for appellant. Short & Feld, of Dallas, for appellees.

RASBURY, J. Appellees sued appellant upon a policy of insurance issued by appellant, insuring Martha Beaupre against all direct loss or damage by fire to the two-story frame building at 901 West Ninth street, Dallas, Tex., in an amount not to exceed \$500. Appellees alleged that while the policy was in force the insured premises were totally destroyed by fire, and that at the time of the fire they were the owners of the insured premises and the beneficiaries in the policy,

by assignment with appellant's consent, and that after the fire they observed and performed all things required of them by the policy, and that appellant, after investigation, offered them a sum of money less than the face of the policy, which they refused. Appellees also alleged that, while any loss under the policy was payable to C. H. Verschoyle, trustee, as his interest might appear, who was made a party defendant, he in fact had no interest in the loss.

Appellant did not deny the issuance of the policy, but pleaded accord and satisfaction thereunder, alleging in that connection that the parties, after investigating the loss, and after appellees had made formal proof thereof, adjusted same and agreed upon the sum of \$385.71 as appellees' damages, which amount was thereafter tendered appellees, which they refused, and which tender was repeated on trial. There were other defenses pleaded by appellant, which were, upon presentation of demurrers, held insufficient to constitute a defense to the suit. Exceptions to that action will be noted when considering appellant's assignments bringing same into review.

C. H. Verschoyle, trustee, appeared and answered that he was interested in the loss only as trustee, but in that respect made no claim to same, nor asked any affirmative relief against either appellant or appellees.

At trial the following undisputed facts were proven: Appellees tendered in evidence the policy issued originally to Martha Beaupre, but which by successive assignments, consented to by appellant and following the mutations of the insured premises, named appellees as beneficiaries, with the loss payable to C. H. Verschoyle, trustee, as his interest might appear. Mrs. Emma C. Baird testified that she was the owner of the premises described in the policy of insurance, that they were completely destroyed by fire prior to suit, and that nothing had been paid on the loss. On cross-examination she testified that at the time of the fire there was another policy of insurance on the premises in the sum of \$3,000 in the New Jersey Fire Insurance Company. Counsel for appellant tendered her a proof of loss, the signature to which she identified as hers, and which was the proof of loss mentioned in that portion of appellant's pleading held insufficient, and which will herein be referred to. Appellant, declining to amend its pleading, was not permitted to offer further testimony, whereupon the court instructed the jury to, and they did, return verdict for appellees for the amount of the policy, and in favor of Verschoyle, trustee, for costs. Judgment was in accordance with the verdict, from which entry this appeal is prosecuted.

[1, 2] The first assignment of error challenges the court's action in sustaining what was in substance a general demurrer to the second paragraph of appellant's answer. The proposition advanced is that the facts

therein alleged, if true, presented the defense of accord and satisfaction, and hence should have been submitted to the jury for determination. The facts so alleged were in substance that after the fire appellant agreed to pay, and appellees agreed to accept, \$385.71 in full of all claims under the policy; the consideration being that appellant had a good defense to appellees' claim under the policy. Thereafter, and in accordance with said agreement, appellant tendered appellees the amount agreed upon, which was refused. By the pleading such tender was repeated.

The facts related do not in law constitute a defense to appellees' right to recover upon the policy of insurance, since they at most show an accord without satisfaction. The general rule is that action on the original claim may be maintained, where it appears there was an accord, but no satisfaction, unless the agreement to execute the accord was accepted in lieu of performance. 1 C. J. 530, § 17; 1 R. C. L. 199, §§ 35, 36. The facts recited in that portion of appellant's answer, to which we have referred show an unexecuted or unsatisfied accord, which is not enforceable, and fail to show that appellant's promise to satisfy or execute the accord was accepted in lieu of performance or satisfaction, which would have made the accord enforceable. The rule stated is long settled and uniformly applied in this state. *McGehee v. Shafer*, 15 Tex. 198; *Overton v. Conner*, 50 Tex. 113; *Gulf, etc., Ry. Co. v. Gordon*, 70 Tex. 80, 7 S. W. 695; *Gulf, etc., Ry. Co. v. Harriett*, 80 Tex. 73, 15 S. W. 556; *Miller v. Consolidated Elec. St. Ry. Co.*, 104 Tex. 57, 133 S. W. 566. The rule is, in our opinion, conclusive of all other issues arising under said assignment, as well as appellant's second assignment, and for that reason we pretermitt further discussion of the same.

[3] The third assignment of error complains of the court's action in sustaining what was also in substance a general demurrer to the third paragraph of appellant's answer. The contention is that the facts recited in said paragraph presented a good defense to the suit. Those facts, which are accepted as true on demurrer, were in substance that, while the policy was issued to appellees, the loss was payable to C. H. Verschoyle, trustee, to secure the National Surety Company against loss on an indemnity bond written by it in favor of Mrs. Beaupre, to whom the policy was originally issued, and that neither Verschoyle nor the National Surety Company claimed or asserted any liability against appellant under the same.

Conceding the facts related to be true, yet they tend rather to establish than disprove appellees' right to maintain the suit. The policy attached to appellees' petition, the issuance and delivery of which was not denied by appellant in its answer, insured the building for the benefit of Mrs. Beaupre, with the loss payable to Verschoyle, trustee, as his interest might appear. Based upon transfers

of the property, appellees by successive assignments of the policy, consented to by appellant, through its agent, C. H. Verschoyle, became subrogated to the rights of Mrs. Beaupre, and entitled to recover thereon for the full amount, unless it was made to appear that Verschoyle had some interest in same. *Andrews v. Union Central Life Ins. Co.*, 92 Tex. 584, 50 S. W. 572. He was made a party to the suit and claimed no interest whatever in the proceeds.

The contention that appellees could not recover, because Verschoyle, or the National Surety Company, had no interest in the policy, is without support in the contract (the policy) or in law. Appellant insured the property, and agreed to pay any damage thereto by fire to appellees, after having first satisfied any claim of Verschoyle, trustee. Verschoyle might or might not have had an interest therein. Hence it was necessary for him, when made a party, to assert his interest. He in effect disclaimed any interest at all. Both appellant and appellees also denied that he had any interest in same. Thereupon the full amount was due appellees, in the absence of other available defenses. Such was the holding in *Andrews v. Insurance Co.*, supra.

Finding no reversible error in the record, the judgment is affirmed.

HARRIS COUNTY v. SMITH. (No. 7172.)
(Court of Civil Appeals of Texas. Galveston.
May 23, 1916. Rehearing Denied
June 8, 1916.)

1. SHERIFFS AND CONSTABLES §28—COMPENSATION—"NEXT PRECEDING CITY ELECTION"—STATUTORY PROVISIONS.

In Acts 25th Leg. Sp. Sess. c. 15 (10 Gam-mel's Laws, pp. 1482-1484), amending 10 Gam-mel's Laws, pp. 1445-1453, § 10, limiting fees to be retained as compensation by constables to \$1,200 per annum in cities of more than 15,000 inhabitants, "to be determined by the next preceding city election on the basis of five inhabitants for each vote cast," the words "next preceding city election" do not mean the election next preceding the passage of the law, but the election next preceding the date upon which the constable assumed the duties of his office; the purpose of the Legislature being to provide a flexible test from election to election following the changes in population of cities.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 45, 49, 51, 54-56, 58; Dec. Dig. §28.]

For other definitions, see *Words and Phrases*, Second Series, Next Preceding.]

2. SHERIFFS AND CONSTABLES §28—COMPENSATION—"NEXT PRECEDING CITY ELECTION"—STATUTORY PROVISIONS.

Such words refer to regular or general elections for the election of city officers, held at fixed intervals, and not to special elections.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 45, 49, 51, 54-56, 58; Dec. Dig. §28.]

3. SHERIFFS AND CONSTABLES §28 — COMPENSATION—STATUTORY PROVISIONS.

The power of the Legislature to fix fees or compensation of constables, or methods of as-

certaining fees, is not limited by the Constitution.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 45, 49, 51, 54-56, 58; Dec. Dig. §28.]

4. STATUTES §188 — CONSTRUCTION — LANGUAGE USED.

The intention of the Legislature as to a law is to be determined primarily from the plain and ordinary import of the language used.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 266, 267, 276; Dec. Dig. §188.]

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by the County of Harris against F. S. Smith. From a judgment for defendant, plaintiff appeals. Affirmed.

Sewall Myer and John H. Freeman, both of Houston, for appellant. John H. Crooker, E. T. Branch, and Gill, Jones & Tyler, all of Houston, for appellee.

McMEANS, J. The county of Harris brought this suit against F. S. Smith and the sureties on his official bond to recover alleged excess fees collected and retained by Smith from November 8, 1908, to November 30, 1910, during which period he was constable of precinct No. 1 of Harris county.

The petition alleged that during the period mentioned there were two justices of the peace in precinct No. 1, Harris county, and that from 1907 through 1911, which included the time when said Smith was constable, the city of Houston, in Harris county, had a population in excess of 15,000; that at the election in 1896, which was the next preceding city election before the passage of chapter 15, General Laws, Special Session of the Twenty-fifth Legislature: 1897, there were cast more than 3,000 votes, but that at no time since the passage of the act had there been cast in any city election held in said city as many as 3,000 votes; that nevertheless during all said time the city of Houston actually contained more than 15,000 inhabitants, which fact was shown by the United States census of 1890, 1900, and 1910; that during his tenure of office the said Smith had collected \$7,013.48 as fees, and had failed and refused to account to the county for the same or any portion thereof.

A general demurrer urged by the defendant to the plaintiff's petition was sustained, and, the plaintiff declining to amend, its suit was dismissed by the court, and from the judgment of the court sustaining the demurrer and dismissing its suit, the plaintiff has appealed.

Appellant's only assignment of error is based upon the action of the court in sustaining the general demurrer to its petition. The real question presented is whether the facts alleged brought the constable's office within the operation of the fee law. The law in question was passed at the Special Session of the Twenty-Fifth Legislature in 1897, being

chapter 15 of the Acts of that Legislature, and may be found in volume 10 of Gammel's Laws of Texas, pp. 1482 to 1484, and in the Session Acts on pages 42 to 44, which act is amendatory of section 10 of an act passed by the same Legislature found in volume 10, Gammel's Laws of Texas, pp. 1445 to 1453.

Section 10 of the act as amended provides the maximum amount of fees that certain county officers may retain as compensation for their services, and further provides:

"Justices of the peace, an amount not exceeding \$1,500 per annum; constables, an amount not exceeding \$1,200 per annum: * * * Provided, that this act shall not apply to justices of the peace and constables, except those holding offices in cities of more than 15,000 inhabitants, to be determined by the next preceding city election on the basis of five inhabitants for each vote cast at such election."

It is alleged in the petition that the city of Houston during the period in which appellee held the office of constable actually contained more than 15,000 inhabitants, and that this fact was shown by the United States census for 1890, 1900, and 1910. The effect of the demurrer was to admit the truth of these allegations. The contest therefore arises on whether the test prescribed by the Legislature by which the population of the city of Houston is to be determined shall stand as the only means of ascertaining the number of inhabitants of said city in fixing the compensation or fees of justice of the peace and constable, or whether resort may be had to other means to establish the number of its inhabitants for such purpose.

[1] The first proposition advanced by appellant is that, where the petition disclosed on its face that at the city election in 1896 more than 3,000 votes were cast, and that such election was the election next preceding the passage of the law in question, a constable holding office in a precinct containing such city thereby became subject to the terms of such law, and his fees of office are governed thereby.

We cannot agree to this contention. Clearly, we think, the words "next preceding city election" do not mean the election next preceding the passage of the law, but the election next preceding the date upon which the constable assumed the duties and functions of his office; in other words, the election next preceding the occasion which gives rise to its application. *State v. District Court*, 84 Minn. 377, 87 N. W. 942. We think the purpose of the Legislature was to adopt a flexible test which would, from election to election, disclose approximately the population of the city as it might be affected by the growth and vicissitudes of cities in this state, and that this purpose is sufficiently reflected from the language employed.

[2] The second contention is that the proviso in the act in question is indefinite and uncertain, and therefore void and inoperative, in that it does not provide what char-

acter of city election is meant, that is, whether an election to vote on bonds, or to vote on referendum and recall, or charter amendments, or for election of mayor and commissioners, or for special election, regular election, or general election, and, further, because it does not state what event or thing the election referred to shall precede.

We think the language of the proviso admits only of the construction that the election referred to was the regular or general elections in the city for the election of city officers which are required to be held at fixed intervals, and not such other elections which, although the city might have the authority to order and hold them, might never be held, because the contingency upon which the holding of them depends might never arise. We think, as before stated, that the event or thing the election referred to shall next precede is the assumption of the officer of the duties of his office after he shall have been clothed with the authority to perform them.

The next contention is that the proviso in question is inoperative and void because the rule prescribed therein for determining population is unreasonable, arbitrary, fictitious, and faulty, and defeats the purpose of the act and the intent of the Legislature in passing the act.

The language of appellee's counsel in combating this contention is so apt, and so well meets the views of this court, that we adopt the same as our reasons for ruling adversely upon this contention of appellant:

"In the first place, the body of the fee bill did not apply and was not intended to apply to justices of the peace and constables. Those justices of the peace and constables who came within the provisions of the body of the bill under the language used by the Legislature were only those who held an office in a city of more than 15,000 inhabitants, as determined by the next preceding city election on a basis of five inhabitants for each vote. Now, there can be no question that the Legislature had the power to either include or exclude justices of the peace or constables, taking into consideration the varying and changing populations of cities in this new and growing country. They had the right to adopt such a test of population as would change with the changing population of cities, and to refuse to adopt a test which was applied only every ten years, as is the federal census, and which, as a matter of common knowledge, was not only the source of much difference of opinion and discontent, but the result was not usually officially announced until a long time after the count was made. The Legislature knew what was then and is now a matter of common knowledge, that on account of the dominance of the Democratic party in Texas the real voting strength appeared in the primaries, and not in the general election for state officers, but they also knew what was a matter of common knowledge at that time, that in city affairs it was not usual for the vote to be divided along party lines. * * * It followed that in city elections the vote was more nearly a full vote than in state elections, and so as to state and county officers they prescribed a different test, to wit: In this case the national census and a vote at a fixed time, and after that fixed time as to counties containing cities having a population of 25,000 or more, the general blanket provision that the federal census should control was applicable, but it affected only

county and state officers, inasmuch as it applied to a situation not in which the officer held his office in the confines of the city, but in which a county or state officer held office in a county having a city of 25,000 population or more. So it appears clearly that the Legislature purposely and deliberately chose its words and made its meaning very plain. It intentionally chose that as to the population of cities in which constables and justices of the peace resided and held office that there should be a test which should vary from time to time, but that in those cases in which the population of entire counties was involved the federal census, which is taken every ten years, should be the basis of calculation. That such was the legislative intent is further emphasized by the manner in which section 10 is separated into articles in the Revised Statutes of 1911 (article 3881 et seq.). The Legislature could not have made its meaning more clear, or its purpose more plain, if it had foreseen this lawsuit and this contention, and the brief of appellant concedes to the Legislature the power to choose this or any other test. Appellant seeks to present the question that the Legislature acted improvidently and without due consideration, and that the provision in this case defeats the general purpose of the law. It may in this case defeat the general purpose of the law as applied to the last city election. So also if they had adopted the state election, or an election conducted by the Democratic party, for the reason that it might so happen that the contest was of such small importance or involved so little feeling that a full vote would not be brought out. It will be borne in mind that the only census of population official in its nature that is taken is the federal census. States and cities take no such census. They do keep an official list of votes at elections prescribed by law. They do take a scholastic census of the school population of cities and counties, but the actual enumeration of inhabitants, as stated above, is taken only by the federal authorities, and that once every ten years, and the only other basis that we know of would be the private census taken by those who make city directories, and even in that case it is not an actual count of population, but furnished a mere basis for calculation, as the vote was intended to do in the law under consideration."

[3] The authorities cited by the appellant in this connection do not sustain its contention. In *Brooke v. Dulaney*, 100 Tex. 86, 93 S. W. 997, the law there under construction presented the question as to whether the statute did not impair the mandate of the Constitution. The Legislature undertook to say that in counties having more than a certain population the district clerk should perform the duties of the county clerk, and there should be no county clerk. The Legislature adopted as the test of population 5 inhabitants for every vote cast for Governor at the last preceding general election. It turned out under this test that Panola county appeared to have less than 8,000 population, when, as a matter of fact, and by the federal census, it had a much larger population. The Supreme Court, after holding that the Constitution, as to the population of counties, prescribed a federal census as a test, further held merely that the constitutional right depended on the actual population of the county; that the case showed that the actual population was much larger than the population as disclosed by the test prescribed by the Legislature; and that the Legislature had no power to deprive

the county of a constitutional right by adopting a test which failed to disclose at least approximately the true population of the county. In the present case the rights and limitations created by the law and the test of population are strictly within the power of the Legislature, because the power of the Legislature to fix fees or compensation of constables is not limited by the Constitution; hence the inquiry is as to what the Legislature intended to say or do. The proviso appears in both the original act and in the amendment in the same language as quoted above, and we think that it is thus made clear that the language was intentionally employed by the Legislature. To put upon the language used a construction different from that warranted by its plain terms would be to construct and not to construe the law; and this the courts are not at liberty to do. *Blythe v. Ayers*, 96 Cal. 532, 31 Pac. 924, 19 L. R. A. 40.

The fourth contention is that the intent and purpose of the lawmakers in passing the act in question being to limit fees of office, and fees of constables holding office in counties containing cities having in fact more than 15,000 inhabitants, the courts will construe the act so as to effectuate such purpose and intent.

[4] It is true that one of the fundamental canons of statutory construction is that:

"The courts will enforce the intent of the statute rather than to follow the strict letter of the act." *Forshey v. Railway*, 16 Tex. 528; *Weber v. Rogan*, 94 Tex. 68, 54 S. W. 1016, 55 S. W. 559, 57 S. W. 940.

The effect of the general demurrer was to admit as true the allegation that at the time in question the city of Houston had more than 15,000 inhabitants. It was clearly the purpose of the Legislature to limit the fees of constables in cities of 15,000 inhabitants only when such population should be ascertained in a certain manner. But by whom, or by what manner was the question of population to be determined? The Legislature might have provided that the last preceding federal census should control, or that the question might be determined in some way other than by a vote at a city election. There existed no constitutional restrictions upon its power in this regard, and, if in its wisdom it believed, and so enacted, that the test prescribed should be upon the basis of 5 inhabitants for each vote cast, why should the courts say that this plainly declared intention should be made to yield to the equally clear intention to apply the law in counties having a city of a certain population? We think the intent of the Legislature that the law should apply in cities having more than a designated population is not more clearly expressed than is the intent that such population should be determined in a particular manner. The intention of the Legislature is to be determined primarily from the plain and ordinary import of the language used; and, if the lan-

guage is plain and unambiguous, there is no room for construction. *Fire Association v. Love*, 101 Tex. 380, 108 S. W. 158, 810. Certainly the language of the proviso providing the method by which the population is to be determined is free from ambiguity. The adoption of the method of ascertainment was a matter of policy clearly within the constitutional power of the Legislature, with which the courts are not concerned. *Clark v. Finley*, 93 Tex. 179, 54 S. W. 343.

The fifth contention is that the courts, in construing statutes, should try out the right intendment of the law, and, in order to do this, they should ascertain the mischief the law was intended to remedy, and, after ascertaining this, to observe and follow the intent of the law, although it may conflict with the language actually used. This is a practical repetition of the fourth proposition, and what we have said in disposing of it sufficiently disposes of the fifth proposition.

The sixth and seventh propositions, even if abstractly correct, furnish no reason for giving the proviso a construction contrary to that we have above given it.

The eighth proposition is without merit, we think, and is overruled without further comment.

We find no error in the record, and the judgment of the trial court is affirmed.

Affirmed.

CHANNELL CHEMICAL CO. v. HALL.* (No. 7555.)

(Court of Civil Appeals of Texas. Dallas.
June 10, 1916. Rehearing Denied
July 1, 1916.)

1. PRINCIPAL AND AGENT — 89(5) — COMMISSIONS — ACTIONS — PLEADING.

A petition setting out the contract between plaintiff and defendant for commission agency, the amount of goods sold, the amount of commissions due, defendant's promise to pay, and that the sum is past due and unpaid, and had been demanded and refused, to which an exhibit of sales, amounts, purchases, etc., is attached, is sufficient as against demurrer.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 233, 234; Dec. Dig. 89(5).]

2. CORPORATIONS — 308(11) — COMMISSIONS — QUESTIONS FOR JURY.

Where the commission agent testified that the president of the corporation principal orally authorized departure from terms of written contract, that question was for the jury.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1347, 1348, 1349; Dec. Dig. 308(11).]

3. CORPORATIONS — 432(12) — POWERS OF AGENT — EVIDENCE.

A corporation president, who signed a written contract of employment of plaintiff, is sufficiently shown to be the agent of the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1717, 1737, 1743, 1762; Dec. Dig. 432(12).]

4. DAMAGES — 228 — EXCESSIVE VERDICT — REMITTITUR.

Error in awarding an agent an excessive judgment for commissions is cured by requiring him to file a remittitur of the excess.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 576-579; Dec. Dig. 228.]

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Action by J. W. Hall against the Channel Chemical Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Saner, Saner & Turner, of Dallas, for appellant. Cocke & Cocke, of Dallas, for appellee.

RAINEY, C. J. Appellee brought this suit against the appellant to recover the sum of \$2,659.75, commission earned in the sale of merchandise manufactured by the appellant as per contract. Appellant interposed a general demurrer, certain special exceptions to the sufficiency of the first amended original petition, a general denial, and further answered, admitting the execution of the contract, but denied that the appellee performed and carried out the contract according to its terms, and alleged, in making his pretended sales, or in taking his pretended orders, that appellee agreed and stipulated with the purchasers thereof that the goods should be shipped and held for a certain time, during which the appellee agreed to demonstrate and sell said merchandise and guaranteed the sale of same; that, claiming the benefit of such stipulation, many of the purchasers of said merchandise returned same for credit to the total value of \$4,723, upon which amount the appellee was not entitled to any commission. Appellant further alleged that upon the request of the appellee it agreed to permit him to employ demonstrators, and that because of his financial inability to pay them it agreed to advance the money necessary therefor, which it did in the total sum of \$3,293.84, and that after the allowance of all commissions to which appellee was entitled, and the deduction of commissions on goods returned, and of moneys paid to him and advanced for demonstrators, the appellee, plaintiff in the original suit was indebted to appellant in the sum of \$132.05. Appellee thereupon filed his first supplemental petition, same being a general demurrer, a general denial, and a special denial to appellant's original answer. The general demurrer and special exceptions of appellant having been overruled, to which action of the court the appellant in open court duly excepted, the case was submitted to the jury on special issues, which returned its verdict thereon. Upon appellee's motion, judgment was rendered for appellee for \$2,556.46.

Conclusions of Fact.

The agreement entered into between appellant and appellee was as follows:

"Chicago, Ill., Dec. 12, 1911.

"This agreement, entered into by and between Channell Chemical Company and J. W. Hall: Whereas, J. W. Hall has agreed to cover and advertise the products of the above company in the states of Mississippi, Alabama, Georgia, Florida, the eastern half of Louisiana, and the western half of Tennessee, and the eastern half of Arkansas: In consideration of J. W. Hall devoting his time to same, the Channell Chemical Company agrees to sell him O-Cedar Polish Ring Mops at 65 cents each f. o. b. in the above territory, and O-Cedar Polish in 25c, 50c, \$1.00, \$1.50 and \$2.50 sizes at 55% off the above list net, and also pay to him a commission of 35% on all orders he sells to the retail trade, the discount to the retail trade to be 33 1/2% f. o. b. delivery, 2% 10 days net 30, the Channell Chemical Company to carry the accounts. This contract covers all towns in the above-stated territory for a period of six months, where the population is 25,000 or more, and four months where the population is less than 25,000, after he has started to advertise said towns. No orders to be accepted from retail dealers for less than \$25. The Channell Chemical Company agrees to pay a commission to J. W. Hall after the above-stated period of 20% on all orders taken direct for new customers, 15% on all reorders taken direct, and 10% on all mail orders coming from above-stated territory. The above commission to be based on 33 1/2% off the retail price. The Channell Chemical Company agrees to pay on all jobbing orders, at a discount of 33 1/2% and 20, 2% ten net 30, f. o. b. delivery, 10% for all orders taken direct, and 5% on all mail orders coming from the above territory. This contract to continue in force as long as J. W. Hall devotes his entire time to the sales of the above products. Signed in duplicate, the day and date above written.

"[Signed] Channell Chemical Company,
"C. A. Channell, Pres.
"J. W. Hall."

After this agreement was signed, the appellant, by its president, C. A. Channell, authorized the appellee to make sales of the goods or products and to guarantee in the name of appellant the sale thereof to the purchasers. In pursuance of said contract and said authorization by the president, appellee sold goods and products for appellant and earned commissions which amounted to the sum of the judgment entered. Part of the goods sold by appellee were guaranteed as per the instructions of the president, which were returned to appellant.

Conclusions of Law.

The court did not err in overruling appellant's general and special demurrers.

[1] 1. The appellee in his petition sets out the contract between him and the appellant, also the instruction given by the president, that he made sales in accordance therewith, the amount of goods sold, and the amount of commissions due him, the promise of appellant to pay same, that the account was past due and unpaid, that it had been demanded, but appellant had failed and refused, and still refuses, to pay same, except a credit, and prays for judgment, etc. An exhibit as to date of sales, amounts, purchases, etc., is made a part of the petition. The petition, we think, fully notified appellant of the

nature and cause of action, and was sufficient as against the demurrers.

[2] 2. The trial court did not err in submitting to the jury the issue:

"Was there or not an oral agreement made between the plaintiff and defendant at Memphis, Tenn., subsequent to the written contract which is dated December 12, 1911, by which the defendant agreed to pay plaintiff a commission on all orders for goods shipped by the defendant, whether such goods were returned by the customer or not?"

This was answered in the affirmative. This issue was raised by the evidence. Channell was the president of the appellant company, and authorized appellee to sell the goods upon such terms. This was testified to by appellee. Whether or not the fact existed was a question for the jury.

[3] 3. It is complained that there was no evidence that Channell was an agent and authorized to make such an agreement. In this contention we do not concur. Channell, as agent of the company, signed the original contract. The appellee charged in his petition that such an authorization had been given to sell on such a guarantee. This allegation was not denied by appellant. Nor was there any denial by appellant that Channell was the president of it, or that he was not authorized to give instructions to so sell.

4. The other assignments attack the findings of the jury, in that they are not supported by the evidence. We think this complaint is without merit, as the evidence clearly warrants the findings of the jury, and there is no error in their finding.

5. The jury were authorized to find that appellee was entitled to commissions on the sale of goods sold on a guaranty and which were returned to appellant.

[4] 6. Complaint is made that the verdict is excessive. If the evidence shows that the judgment was excessive in any amount, the court required the appellee to make a remittitur of said amount, which was done, and such error, if any, was thereby cured.

7. Finding no material error of record, and the evidence supporting the judgment, it is affirmed.

SMITH v. WISE COUNTY. (No. 8371.)*

(Court of Civil Appeals of Texas. Ft. Worth.
May 6, 1916. On Motion for Rehearing,
June 17, 1916.)

1. COUNTIES ~~§~~74(3)—OFFICERS—ESTOPPEL.

That plaintiff knew when he became a candidate for the office of county treasurer and when he qualified that the commissioners' court did not intend to allow him the maximum compensation fixed by statute does not estop him from claiming such compensation, so long as the commissioners' court failed to give legal effect to its intention by passing an order fixing his commissions, as directed by statute, and thus reducing compensation.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 106-108; Dec. Dig. ~~§~~74(3).]

2. COUNTIES \S 74(3) — COUNTY TREASURER — SALARY OF—ORDERS.

By an order of February 26, 1907, the commissioners' court directed that the county treasurer should receive, for his services for the year ending November 28, 1907, such commissions on the amount of funds he might receive and disburse as when added to the commissions received on the school funds and the commissions already received would aggregate a total of \$1,600. The same order likewise declared that from November 28th, until the commissioners' court might change it, the treasurer should receive $1\frac{3}{4}$ per cent. for receiving and the same for disbursing county funds. By orders of 1909 and 1911, it was directed that the treasurer should receive the same compensation as he had the previous years, being \$1,600, while by order of 1913, the commissioners' court directed that the county treasurer should receive a salary not to exceed \$1,400 per year. Vernon's Sayles' Ann. Civ. St. 1914, art. 3873, declares that the county treasurer shall receive commissions on money received and paid out by him, said commissions to be fixed by orders of the commissioners' court, and not to exceed $2\frac{1}{2}$ per cent., while article 3875 fixes the maximum compensation which a treasurer can receive at \$2,000 per annum. *Held*, that as the commissioners' court has no power to fix the compensation of the county treasurer at a designated salary, and as the orders subsequent to 1907 made no attempt to fix the rate of commission, the treasurer was entitled to commissions at the rate of $1\frac{3}{4}$ per cent. on moneys received and disbursed until they equalled the sum of \$2,000 per annum.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 106-108; Dec. Dig. \S 74(3).]

3. LIMITATION OF ACTIONS \S 66(3) — RUNNING OF STATUTE—PERIOD OF STATUTE.

While Rev. St. 1911, art. 1366, declares that no county shall be sued unless the claim upon which suit is founded shall have first been presented to the county commissioners' court for allowance and such court shall have neglected or refused to allow it, a county treasurer can, after expiration of his term of office, recover commissions accruing and due only for a period of two years before institution of suit; for as, despite the statute, suit may be maintained against a county within a reasonable time after presentation of the claim, the county treasurer by delay in presenting his claim cannot stop the running of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 355, 356; Dec. Dig. \S 66(3).]

On Motion for Rehearing.

4. COUNTIES \S 74(3) — OFFICERS — TREASURER—SALARY.

An order fixing the salary of the county treasurer at a stated sum per annum cannot be maintained under Rev. Civ. St. art. 3873, as one fixing a rate of commissions on moneys received and disbursed; for, until the expiration of the year, the rate of commissions could not be determined.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 106-108; Dec. Dig. \S 74(3).]

5. COUNTIES \S 74(3) — TREASURERS — SALARY.

Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 3873-3875, declaring that the county treasurer shall receive commissions on moneys received and disbursed, to be fixed by the commissioners' court, not exceeding $2\frac{1}{2}$ per cent., and that he shall not receive fees in excess of \$2,000, the commissioners' court cannot fix a county treasurer's total compensation as such at a sum less

than the \$2,000 specified by statute, though it may fix any commission it desires.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 106-108; Dec. Dig. \S 74(3).]

Appeal from District Court, Wise County; F. O. McKinsey, Judge.

Action by R. D. Smith against Wise County. From a judgment denying part of the relief sought, plaintiff appeals. Reformed and affirmed.

McMurray & Gettys, of Decatur, for appellant. R. E. Carswell and M. W. Burch, both of Decatur, for appellee.

BUCK, J. On December 2, 1914, R. D. Smith sued Wise county for \$1,950, alleged to be the balance due him as compensation as county treasurer for the four years beginning November 10, 1910, and ending November 16, 1914. He alleged that the commissioners' court of Wise county had not fixed his compensation at any rate less than $2\frac{1}{2}$ per cent. on receipts and disbursements, fixed by statute as the maximum compensation, and that under the statute, in the absence of any legal action of the said commissioners' court fixing the compensation at a lower rate, he was entitled to the maximum compensation provided by statute, to wit, \$2,000 per annum; the receipts and disbursements for each of said four years being more than sufficient to entitle him to that amount. Defendant, in its answer, admitted the election of plaintiff and his four-year tenure of office as county treasurer, and admitted that for each of said four years his compensation, based on $2\frac{1}{2}$ per cent. commission, would have exceeded \$2,000, but alleged that by certain orders of the commissioners' court, hereinafter to be set out, the compensation of plaintiff had been legally fixed at a less sum than \$2,000 per annum, to wit, at \$1,600 for each of the first three years, and at \$1,400 for the last year. The defendant further pleaded an estoppel, in that plaintiff had accepted and entered into the office of county treasurer, knowing that his compensation had been fixed at the sum mentioned. The orders of the commissioners' court relied on were set out in defendant's answer and were introduced in evidence, and are as follows:

(1) "2-16-07. It is ordered by the court that the following officers be allowed the amounts opposite their names as ex officio salaries for one year: Sheriff, \$500; district clerk, \$250; county clerk, —; county judge, \$400. The county treasurer of Wise county shall receive, as compensation for his services for the year beginning November 28, 1906, and ending November 28, 1907, such commission on the amount of funds he may receive and disburse as when added to the commissions he receives on the school funds and the commissions he has already received on other funds as will aggregate him a total fee of \$1,600, and in no event shall his commission from all sources amount to more than \$1,600 for said year. And it is ordered that from November 28, 1907, until the commissioners' court may change it, he shall receive $1\frac{3}{4}$

per cent. for receiving and 1% per cent. for disbursing county funds."

(2) "2-12-1900. It is ordered by the court that all the county officers' ex officio be same as the last two years, except the county judge, who is to receive \$1,000 per annum, and the county treasurer is to receive the same compensation that he received for the last two years, being \$1,600 per year."

(3) "2-17-1911. It is ordered by the court that the treasurer's salary be \$1,600 per year, the same as last year."

(4) "2-11-1913. It is ordered by the commissioners' court of Wise county, Tex., that the following officers be allowed the following ex officio for the next two years: E. M. Allison, county judge, \$1,000 per annum; J. P. Williams, county clerk, \$400 per annum; Sam Faith, \$500 per annum; Buck Smith, treasurer, salary not to exceed \$1,400."

Defendant further pleaded the two-year statute of limitation. The cause was tried before the court without the intervention of a jury, and judgment was entered for plaintiff in the sum of \$50, from which judgment the plaintiff appealed.

The court filed his findings of fact and conclusions of law, which findings included matters hereinbefore stated, as to plaintiff's election and tenure, the orders of the commissioners' court, etc., and, further: (1) That the commissioners' court placed the construction on said orders that plaintiff's commission for the first three years of his tenure was to be 1% per cent. on receipts and disbursements, not to exceed \$1,600 a year, and for the last year, at the same rate, not to exceed \$1,400. The plaintiff acquiesced in such construction of said orders, in so far as the first three years were concerned, and settled with the county and made his quarterly reports to the court on that basis, and he did not claim any more compensation for such years. (2) That he made settlement for the last year, "withholding a commission of 1% per cent. of his receipts and disbursements until same amounted to \$1,400, after which he withheld or received nothing more, and his final report as treasurer was approved and he was settled with by the court on that basis, and no protest or further claim was then made by plaintiff." (3) "When the order of the court reducing the treasurer's compensation was made February 11, 1913, the plaintiff protested against the same, his objection, as stated to the court at the time, being that when he was elected and qualified the salary was \$1,600 a year, and that the court had no right to reduce the same, also urging his financial necessities. He made no complaint or objection to the form of the order, nor had he to that of any previous order, and if he had done so, the court would have taken counsel and made the order in proper form, it being the purpose and intent of the court by said orders to legally fix the maximum compensation of the county treasurer first at \$1,600 and then at \$1,400 a year, computed on a percentage of 1%." (4) "During each and every year of plaintiff's four-year tenure the receipts and disbursements of county funds, upon which by law the coun-

ty treasurer is entitled to commission, were more than sufficient in amount to produce a commission of over \$2,000 each year, when computed at the rate of 1% per cent." (5) "Prior to November 16, 1906, the county treasurer of said county received a straight commission of 2½ per cent. on county funds (other than school funds) received and disbursed by him, but whether by order of the commissioners' court or by virtue of the statute was not made to appear."

Our state Constitution, article 16, § 44, provides for the election of a county treasurer, who "shall have such compensation as may be provided by law." Article 3873, Vernon's Sayles' Texas Civil Statutes, reads as follows:

"The county treasurer shall receive commissions on the moneys received and paid out by him, said commissions to be fixed by order of the commissioners' court as follows: For receiving all moneys, other than school funds, for the county, not exceeding 2½ per cent., and not exceeding 2½ per cent. for paying out the same; provided, however, he shall receive no commissions for receiving money from his predecessor nor for paying over money to his successor in office."

Article 3874, Id., provides that the county treasurer shall be allowed 1½ per cent. for disbursing the school funds of a county, and by article 3875 the maximum compensation allowed the county treasurer is limited to \$2,000.

Since it is found by the trial court that the commission of 1½ per cent. on funds received and disbursed by plaintiff during each year of his tenure of office would exceed the maximum allowed by statute, the questions before us for determination are: (1) Was plaintiff estopped from claiming the maximum compensation allowed by statute because of his acceptance of the office under the circumstances stated, i. e., with the knowledge that the commissioners' court had entered the orders set out of date February 16, 1907, and February 12, 1909, prior to his entry into office in November, 1910, and the order of February 17, 1911, prior to the entry under his second term? (2) Did the commissioners' court, in passing the orders aforementioned, legally exercise its authority given under article 3873, supra? (3) Was the plaintiff barred by the two-year statute of limitation from recovering any or all of the claim asserted in his petition?

[1] We think the answer to the first question is determined by the authority of *Montgomery County v. Talley*, 169 S. W. 1141 (writ of error denied in 176 S. W. xv), in which the following language is used:

"The fact that appellee knew when he became a candidate for the office and at the time he qualified as county treasurer that the commissioners' court did not intend to allow him the compensation fixed by the statute did not estop him from claiming and retaining such compensation so long as the commissioners' court failed to give legal effect to its intention by passing an order fixing his commissions as directed by the statute."

See, also, 34 Cyc. 1051, and authorities under note 49; Woodall v. Insurance Co., 79 S. W. 1092; Insurance Co. v. Wickham, 141 U. S. 564, 12 Sup. Ct. 84, 35 L. Ed. 860; Insurance Co. v. Villeneuve, 25 Tex. Civ. App. 356, 60 S. W. 1014; Harms v. Insurance Co., 172 Mo. App. 241, 157 S. W. 1046.

[2] With reference to the second question presented, it is held in the Talley Case, cited above, that a commissioners' court, acting under the authority delegated by article 3873, supra, would have no power to fix the compensation of the county treasurer at a designated salary, as in exercising its authority in this respect said court would be limited by the statute, which empowers it only to fix the rate of commission for moneys received and disbursed. See, also, Hill County v. Sauls, 134 S. W. 267; Slaughter v. Hardeman County, 139 S. W. 662.

In so far as it affected the compensation to be received by the county treasurer, the order of the commissioners' court of February 16, 1907, provided: (a) That the salary for the year ending November 28, 1907, should not exceed \$1,600. This attempted limitation is not involved in this suit, for it was specially made to apply only to that year. (b) But that portion of said order, reading, "That from November 28, 1907, until the commissioners' court may change it, he (the treasurer) shall receive 1% per cent. for receiving and 1% per cent. for disbursing county funds," did not purport to fix any maximum compensation, except as to the rate of commission, and under said order the compensation was only circumscribed by the statutory maximum of \$2,000, as the court found that for each of the four years of the plaintiff's tenure the commissions of 1% per cent. would have aggregated more than the \$2,000. By the terms of the order of February 12, 1909, the compensation of the treasurer was not changed from that "received for the last two years." In so far as such order purported to fix a salary or stated sum, to wit, \$1,600 per annum, it must be held, under the authorities cited, to be invalid. The same may be said with reference to the order of February 17, 1911, and the order of February 11, 1913, fixing a "salary not to exceed \$1,400." Therefore, unless barred by the statute of limitation pleaded by defendant, plaintiff would be entitled to receive the full amount claimed, to wit, \$1,950. The majority of us, at least doubt the authority of the commissioners' court to fix a maximum compensation below that prescribed by statute, except as it may be limited by the rate of commission fixed, with which conclusion Associate Justice Dunklin does not agree, but we do not find it necessary to decide this question.

[3] As to the last question presented, we are of the opinion that the statute of limitation would preclude a recovery for any amount further than for commissions accru-

ing and due and payable under his second term of office, and for the two years preceding the date suit was filed, to wit, December 2, 1914. Appellant presented his claim to the commissioners' court, in the sum sued for, on November 25, 1914, and on the 27th thereafter it was by said court rejected. Appellant urges that the statute of limitation did not begin to run until such disallowance by the court, and cites, in support of this contention, article 1366 of the Revised Civil Statutes, which provides that:

"No county shall be sued unless the claim upon which such suit is founded shall have first been presented to the county commissioners' court for allowance, and such court shall have neglected or refused to audit and allow the same or any part thereof."

He also cites the case of Leach v. Wilson County, 62 Tex. 331. This case held that, where the county court, in May, 1872, allowed and audited plaintiff's claim, and a warrant was issued therefor, and subsequently, on June 28, 1881, said court directed the county treasurer not to pay said warrant, and thereafter, November, 1881, suit was brought thereon, the statute of limitation did not bar a recovery. The claim had been registered by the county treasurer in January, 1880, under a then existing statute, and it was held that limitation did not begin to run until the action of the county court of June 28, 1881, directing the treasurer not to pay the claim, evidenced the intention of the county to refuse the claim, which it had theretofore acknowledged as valid. To the same effect is the case of Caldwell County v. Harbert, 68 Tex. 321, 4 S. W. 607. In each of these cases the holding was based upon the fact that the county had acknowledged and recognized the validity of the claim until shortly prior to the suit. But in the instant case no such condition is presented. The statute was evidently enacted for the benefit of the county, that it might have the opportunity to have passed on by its representative managing body all claims against it before it could be subjected to the expense and vexation of suit. It certainly never was contemplated that one having a claim against a county could delay its presentation to the commissioners' court indefinitely, and thereby preclude the running of limitation. As is well said in 25 Cyc. 1198:

"Where plaintiff's right of action depends upon some act to be performed by him preliminary to commencing suit, and he is under no restraint or disability in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the preliminary act; if the time for such performance is not definitely fixed, a reasonable time, but that only, will be allowed therefor."

In the same text, page 1198 (B), it is further stated:

"Where, although the cause of action itself has accrued, some preliminary step is required before a resort can be had to the remedy, the condition referring merely to the remedy and not to the right, the cause will be barred if not

brought within the statutory period; therefore the preliminary step must be taken within that period."

When the right of action is not under plaintiff's control, but depends upon some act to be performed by another, in this event, it has been held that the cause of action does not accrue, and the statute does not begin to run until the performance of the act. *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877; *Thompson v. Orena*, 134 Cal. 26, 66 Pac. 24. Likewise it has been held that where until disaffirmance by a party he cannot be sued for money received under a contract which he subsequently avoids, the statute does not run until the time of such avoidance. *Cowper v. Godmond*, 9 Bing. 748, cited in 25 Cyc. 1198, 1199. But since, as was held in *Williams v. Bowie County*, 58 Tex. Civ. App. 116, 123 S. W. 199, the right to sue a county arises after a claim has been presented to the commissioners' court, and a reasonable time has elapsed without an allowance of such claim by said court, it cannot be said that under this article of the statute, plaintiff's right of action depended upon any act of disallowance of the commissioners' court. The failure or "neglect" of the court to act on his claim after a reasonable time, would give the plaintiff the right to sue.

While we have not taken up and discussed seriatim appellant's various assignments, yet we have carefully considered each of the same, and believe that in what we have said hereinabove we have properly disposed of every question presented.

For the reasons indicated, the judgment of the trial court will be reformed, so as to allow plaintiff judgment for compensation for the time he was in office subsequent to December 2, 1912, at the maximum fixed by article 3875, to wit, \$2,000, less the amount already retained or received by him during said period. This sum to which appellant is so entitled is found by this court to be \$982.20. Upon this amount so found in appellant's favor the appellee is to be credited with the sum of \$581.70, held in the bank in the name of appellant, but the right to which is involved in this suit, which controversy is by this judgment decided in favor of appellant, and the said sum held in bank awarded to appellant. Interest at 6 per cent. on \$400.50, balance allowed from date of judgment. As so reformed, the judgment will be affirmed, with costs of appeal taxed against appellee.

Reformed and affirmed.

On Motion for Rehearing.

Appellee urges error in the judgment of this court in two respects, to wit: (1) In holding that the several orders of the commissioners' court from February 16, 1907, to February 11, 1913, could not reasonably be construed as orders fixing the compensation of the county treasurer on a percentage or commission basis not to exceed the maximum amount named. (2) In failing to hold that

plaintiff was estopped by reason of his acceptance of and acquiescence in said orders, and especially those orders made by the commissioners' court after plaintiff went into office.

[4, 5] 1. It will be noted that in the order of February 16, 1907, the commissioners' court failed to fix any rate of compensation on a commission or percentage basis for the year ending November 28, 1907, but merely stated that the maximum should be "a total fee of \$1,600." The rate was not fixed by the court, but left to be determined by the amount of receipts and disbursements on the one hand, and the fixed maximum of \$1,600 on the other. The rate could not be determined by either court or officer until the close of the year, and was then of no controlling effect, but only an incident to and result of the two factors above mentioned. We do not think that such an order can reasonably be construed as one fixing the rate of compensation, or as one fixing the compensation of the treasurer on a commission basis. Upon no other basis has the commissioners' court authority to fix the treasurer's compensation. It is provided in the order of February 16th that:

"From November 28, 1907, until the commissioners' court may change it, he [the treasurer] shall receive 1¼ per cent. for receiving and 1¼ per cent. for disbursing county funds."

Therefore, from November 28, 1907, to February 12, 1909, there was no limitation upon the salary of the treasurer except as to the rate of compensation, to wit, 1¼ per cent. Hence, the order of February 12, 1909, which provides that "the county treasurer is to receive the same compensation that he received for the last two years, being sixteen hundred dollars per year," cannot be held to be a legal exercise of the authority of the commissioners' court to fix the treasurer's compensation, because if the expression "for the last two years" be referable to the year preceding November 28, 1907, as shown herein, no rate was fixed at all. If the expression be referable to that portion of the order which provided for a compensation of 1¼ per cent., such order did not attempt to fix any maximum of fees at all. The subsequent orders set out in the original opinion do not purport to fix any rate of commission, unless they do so by reference to the first order. As the only rate fixed in this one, as we view it, is 1¼ per cent. commission, we hold that our conclusions reached in the original opinion must be adhered to. Moreover, the majority, at least, hold that the commissioners' court had no power to fix the maximum compensation of the treasurer at a less amount than that fixed by statute, except as it might be reduced by lowering the rate of commission. Associate Justice Dunklin does not concur in this last conclusion, but does concur in the holding that the order of February 16, 1907, does not lawfully fix any other rate of compensation than 1¼ per cent. He is of

the opinion that an order of the commissioners' court, fixing a maximum of fees to be retained at a certain sum less than the maximum of \$2,000 fixed by the statute, without fixing the rate of commissions, would be valid, for in that event the maximum rate of commissions provided by the statutes would govern, and the effect of such an order would be that the treasurer would be allowed to retain commissions at that rate until the maximum amount so fixed by the order should be collected, and thereafter the treasurer would receive nothing more for his services.

2. As to the second proposition urged, we think the holding in the *Montgomery v. Talley* Case is conclusive. If, as it is held, the treasurer would not be estopped from claiming the compensation allowed by statute because he had accepted the office, knowing that the commissioners' court had attempted to fix a different basis of compensation, we cannot see how he would be estopped by reason of his continuance in office and his acceptance of the compensation allowed, and his alleged tacit acquiescence in the construction of an order which did not meet the requirements of the law.

The motion for rehearing is overruled.

DALLAS FAIR PARK AMUSEMENT ASS'N v. BARRENTINE. (No. 996.)

(Court of Civil Appeals of Texas. Amarillo.
May 17, 1916. On Motion for Rehearing, June 23, 1916.)

1. MASTER AND SERVANT ⇨154(1) — MASTER'S LIABILITY—WARNING A MINOR SERVANT.

The purpose of the rule requiring a master to warn and instruct a minor servant is to give information of unknown and unappreciated dangers, and, if the minor knows and appreciates the risks and dangers of his employment, the reason of the rule does not exist, and the law does not impose an unnecessary act.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 308; Dec. Dig. ⇨154(1).]

2. MASTER AND SERVANT ⇨158—WARNING MINOR SERVANT—NEGLIGENCE—PROXIMATE CAUSE.

If a minor servant really possesses the knowledge, understands the risk, and appreciates the danger, the master's failure to warn is not the proximate cause of his injury, without which there can be no actionable negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 304; Dec. Dig. ⇨158.]

3. MASTER AND SERVANT ⇨154(1)—ASSUMPTION OF RISK—KNOWLEDGE—MINOR.

A minor must not only know the danger, but also the extent, and have the capacity to appreciate it, in order to assume the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 308; Dec. Dig. ⇨154(1).]

4. MASTER AND SERVANT ⇨289(1) — MASTER'S LIABILITY — CONTRIBUTORY NEGLIGENCE.

If a servant assumes the risk, the question of contributory negligence does not arise, for

by his assumption of the risk he absolutely precludes himself from a recovery for any injury that may result to him from such danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1089; Dec. Dig. ⇨289(1).]

5. MASTER AND SERVANT ⇨204(1)—EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK.

Under Employers' Liability Act (Acts 33d Leg. c. 179) § 1, par. 3 (*Vernon's Sayles' Ann. Civ. St. 1914*, § 5246h), assumed risk as a defense is eliminated in cases to which the act applies.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 544; Dec. Dig. ⇨204(1).]

On Motion for Rehearing.

6. MASTER AND SERVANT ⇨154(1)—PERSONAL INJURY—MINOR—ASSUMPTION OF RISK.

A minor, aged 19, who for 2 years prior to the accident had been working about a merry-go-round and who had been closing the doors during different periods of such time, who was directed to close the doors after the lights were out, and who knew the danger of stumbling over stobs, set in the ground between the doors, as well as the master, was not entitled to warning not to stumble over the stobs.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 308; Dec. Dig. ⇨154(1).]

7. APPEAL AND ERROR ⇨1066—PREJUDICIAL ERROR—INSTRUCTIONS.

Where the master was not required to warn a minor servant to be careful of stobs standing in the ground between the doors inclosing a merry-go-round, the charge that a failure to warn if a man of ordinary prudence would have done so was material error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. ⇨1066; Trial, Cent. Dig. § 558.]

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Action by Thomas Barrentine against the Dallas Fair Park Amusement Association. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

W. H. Atwell, of Dallas, for appellant. Carden, Starling, Carden, Hemphill & Wallace, of Dallas, for appellee.

HENDRICKS, J. Thomas Barrentine, the appellee, was injured while in the employ of appellant, the Dallas Fair Park Amusement Association, at a merry-go-round. This particular merry-go-round was about 225 feet in circumference and 60 feet in diameter. It was inclosed by a series of doors, about 75 in all, the doors being about 3½ feet in width. In the center of the inclosure were the horses upon metal carriages, with sufficient room to make the circuit within the inclosure and to leave walking space for the patrons to get on and off the horses and still remain within the building or the main inclosure. The upper portion of the doors was glass, and at each unit there were two doors, swinging back to back, which could be fastened together and held in that position, and between each of the doors was a stob, driven into the ground, from 1 foot to

3½ feet in height, according to the variation in testimony. The doors, when open, were also probably fastened to these stobs. The appellee, at different times, for about 2 years prior to the accident, had been working around the carousel and, according to his own testimony, was familiar with the different kinds of work in the operation of said amusement feature. At the particular time, when the accident and injury occurred, the appellee was working "extra" and not on "weekly pay roll," though prior thereto he had enjoyed a considerable term of continuous employment. According to plaintiff's theory, the manager of the merry-go-round had ordered him to turn out the electric lights in that part of the inclosure where the accident occurred, and after a short intervening time he was also ordered, with others, to close the doors, containing the glass panels mentioned, preparatory to closing for the night; that in performing the particular work one of the doors would not close readily, and, in making the effort, he stumbled against one of the stobs, lost his balance, and in the attempt to guard his fall, pushed his hand and wrist through the glass panes of the particular door, producing the infliction of a severe wound, the loss of considerable blood, and the severing of some of the tendons in the wrist of that arm. He testified, on account of the turning out of the lights, it was "too dark to see a stob on the outside." On cross-examination, he testified:

"I have been closing those doors ever since I had been there for nearly 2 years. I have been going to those stobs every night, but I have never been warned about them. * * * I did not have to be warned about running over the stobs, * * * but I did not know anything about what the danger was of those stobs; I never had been told about it being dangerous to stumble over those stobs. If anybody had given me any warning about those stobs being dangerous, I certainly would have watched them. * * * I do not think that the reason I got hurt was solely on account of the fact that I had not been warned not to stumble over those stobs; that is not altogether the reason; it was on account of the darkness."

The appellee was 19 years of age at the time of the injury; had been working at the particular merry-go-round at intervals, for about 2 years, as stated, and had been upon his own responsibility for several years, independent of his father's control and support. The stobs had previously been painted white. The paint, however, had worn off by the weather and time, and the stobs were of the color of the ground. The inference is conclusive that appellee understood the details of the work contributing to the operation of the merry-go-round, and was thoroughly familiar with the surroundings of its make-up, and the presence and situation of the stobs as an obstruction in walking around the carousel under any conditions, whether night or day; the latter part of this statement limited in its meaning by the fact that on account of the darkness he could

not see the particular stob at the time injured.

The following is one of the grounds of the motion for new trial, constituting the ninth assignment of error, in appellant's brief:

"Because the court erred in the third paragraph of his charge to the jury, wherein he instructed the jury, in substance, as follows, to wit: 'And if you further find and believe from the evidence that a person of ordinary care, under the same or similar circumstances as you may find surround the defendant, would have warned plaintiff of such dangers or perils, if any, then you are further instructed that the defendant was guilty of negligence as the term is hereinafter used, because said charge placed a greater burden upon the defendant than the law requires, in that it required that the defendant should have warned the plaintiff even though the plaintiff knew of the danger of his employment; that is to say, the danger of stumbling or stumbling or running against a stob which was driven into the ground.'"

[1] The purpose of the rule requiring the master to warn and instruct the minor servant is to give information of unknown and unappreciated dangers. If the minor knows and appreciates the risks and dangers of his employment, the reason of the rule requiring an employer to warn does not exist. The law does not impose an unnecessary act. *Tucker v. National Loan & Investment Co.*, 35 Tex. Civ. App. 474, 80 S. W. 879; *Wiggins v. E. Z. Waist Co.*, 83 Vt. 365, 76 Atl. 36; *Ewing v. Lanark Fuel Co.*, 65 W. Va. 726, 65 S. E. 201, 29 L. R. A. (N. S.) 487; *Mitchell v. Comanche Cotton Oil Co.*, 51 Tex. Civ. App. 506, 118 S. W. 158; *Labatt on Master and Servant*, vol. 3 (2d Ed.) § 1155.

[2] If the minor in reality possesses the knowledge, understands the risk, and appreciates the danger, the failure to warn is not the proximate cause of the injury, without which there can be no actionable negligence. *Ewing v. Lanark Fuel Co.*, supra.

[3] Of course it is the rule in this state that a minor must not only know the danger, but also the extent, and have the capacity to appreciate the same, in order to assume the risk. Justice Gaines said:

"It is not sufficient that he knows the employment is dangerous, but he must also be aware of the extent of the danger, and have the discretion to understand the risk, before he can be held to have assumed it. These are questions of fact to be determined by the jury." *Texas & Pacific Ry. Co. v. Brick*, 83 Tex. 602, 20 S. W. 513.

Appellee says that the Brick Case is conclusive of this case on the question of assumed risk. The plaintiff in that case, at the time of the accident, was nearly 19 years of age, in the employment of the receiver of the railway company, as brakeman, in the switchyards of a city. He was on some coal cars, being pushed up the incline to a coal chute track, for the purpose of coupling onto a car standing upon the level. He was on the front car, in going up the incline, for the purpose of being present to make a coupling, and, when within a few feet of the stationary car on the level track, he jumped

from the moving car, struck a piece of coal, which turned with him, causing him to be thrown between the rails and injured. The track between the rails was not covered, and the coal chute was elevated several feet above the ground, constructed on a trestle. It was not distinctly shown "that he ever served upon the coal chute before the day of the accident," though he had served the receiver as brakeman for three months. He testified that if the track between the rails had been covered, he could have saved himself from injury. On the particular question, we do not believe, weighing the facts of that case and testing the decision as applied to the character of employment and the circumstances surrounding that plaintiff, that it is, by any means, wholly analogous to, and controlling of, this case. Quoting the syllabus of the case of *Tucker v. National Loan & Investment Co.*, which fairly reflects the opinion (35 Tex. Civ. App. 474, 80 S. W. 879):

"An experienced farm hand, though a minor, is held to have assumed risks incident to loading sheaf oats on a wagon frame and riding thereon over a road well known to him, and cannot recover for injuries sustained by the oats sliding and causing him to fall."

Associate Justice Fly said, adopting the language of the Court of Appeals of New York:

"He is bound to take notice of the ordinary operation of familiar laws, and to govern himself accordingly; and, if he fails to do so, the risk is his own."

In that case the verdict was against the minor, but it was affirmed upon the theory that erroneous instructions were harmless because the facts of the case would have supported a peremptory instruction. The case of *Houston & Texas Central Ry. Co. v. Martin*, 21 Tex. Civ. App. 208, 51 S. W. 641, decided by Justice Williams, when on the Galveston court, discloses this condition: Appellee was a section hand, engaged in unloading cross-ties from a flat car upon a railway switch track, and was hurt by some of the ties from the car falling upon him. The particular car was moved by use of pinch bars inserted behind the rear wheels, and was stopped by thrusting a piece of scantling in front of the wheels. The plaintiff himself placed the end of the timber upon the rail, standing beside it, and holding it in front of him, and when the wheel struck it, the piece of timber struck him, knocking him down, and the jolt of the car, passing over the timber, caused the ties to fall off the car and upon appellee. Appellee was a minor, employed for more than 2 years at the section, and was familiar with the duties of his employment. Justice Williams said:

"The risk incurred seems clearly to have been one of those known to appellee to be incident to this particular service, and was therefore assumed by him. But, if not, it was open and patent; was in fact one which arose from the operation of the plainest natural laws. The facts affecting the risk were all known to him, as well as to any one else. He did not realize or foresee the danger, but it was one which,

with his knowledge of the facts, he was required to foresee as well as another. It arose from conditions open to his observation. * * * The fact that he acted under the foreman's direction or orders cannot avail him. There was no fact affecting the danger known to the foreman which was not also known to him."

The court reversed and rendered the case in favor of the railway company. Writ of error was refused. Apparently, upon superficial analysis, it might be said that the emphatic declarations of Justice Williams are weakened on account of the fact that appellee had "been cautioned by the foreman to be careful and avoid getting himself hurt." Evidently the decision did not turn upon the general warning suggested in the opinion. Of course we are not advised as to the actual terms of the warning given, but the one indicated in the opinion would not suggest to an employe any better method, or any greater appreciation, or cause the danger to be lessened, to the minor on account of such an instruction. The real principle controlling the case was based upon familiarity and knowledge of the minor with the particular character of work performed by him, and his experience in that particular business. The case of *Producers' Oil Co. v. Barnes*, 103 Tex. 515, 131 S. W. 531, decided by Justice Brown of the Supreme Court, and cited by appellee, is an authority detrimental, instead of in his favor. Barnes was a minor, and injured at night while standing on planks laid horizontally on the framework of a derrick, 45 feet above the ground, caused by his foot slipping on the planks. "Barnes was about 19 years old at the time of the accident. He had worked in other oil well derricks about two months before he commenced to work at this, but he worked upon the floor of the derrick and never upon the double boards. He had been at work at this place about 15 days when the injury occurred," and, upon the particular occasion, volunteered his services to the foreman, necessary to be performed at night upon the boards above the ground, as stated. It was alleged by him that there were no lights at the place where he was required to work in the nighttime; that there were water, mud, and oil accumulated upon the boards upon which he was required to stand; that the boards upon which he was required to stand were slanting so as to cause his foot to slip. The Supreme Court granted the writ of error because they were inclined to the opinion that the evidence did not show with sufficient certainty the negligence of the oil company, nor that the slant of the boards contributed to the injury which Barnes received. Justice Brown said:

"It is evident when Barnes went upon the double boards he knew there was no light in that part of the derrick; therefore he assumed the risks incident to the absence of the light. The undisputed evidence shows that the manner of doing the work necessarily caused water and mud to be upon the double boards, and

Barnes assumed the risk incident to that condition."

Upon the third question, as to the slanting boards, and as to the negligence of the company in allowing them to be slanted, Justice Brown, upon analysis of the testimony, resolved it in favor of Barnes, and upon that question alone affirmed the judgment. If not for that question, it is clearly deducible the cause would have been rendered. The case of *Stamford Oilmill Co. v. Barnes*, 108 Tex. 415, 128 S. W. 375, 31 L. R. A. (N. S.) 1218, Ann. Cas. 1913A, 111, affords some analogy to the particular question at issue. Barnes was 12 years of age at the time of the injury; he was at the oilmill upon implied invitation sent by his father in company with an older brother on business, and as a licensee had the right to be at the mill. As we interpret, and test the case, the serious question was whether a boy of that age was entitled to a warning with reference to the dangers attendant upon the character of property owned and operated by defendant. There was a bridge, made for the use of employes hauling hulls in dump carts to be thrown into the "conveyor" of the oilmill. Young Barnes had walked to the part of the bridge over the conveyor and was watching its operation when, on being called by his brother and starting to leave, he was "overbalanced." He testified that he knew of the presence of the conveyor, and the effect of getting his foot into it, and "knew that the simple way to avoid that danger was to keep his foot out of the conveyor." Justice Williams said:

"It is necessarily true, therefore, that it was not from a lack of knowledge and experience, nor because of the absence of warning or restraint by defendant's employe, but from a mishap such as might be suffered by an adult as well as by one such as he, that the unfortunate boy suffered his injury."

He further said:

"We do not mean that contributory negligence is to be charged to the boy as a matter of law, but that the omission of the defendant in not instructing and protecting him does not constitute actionable negligence, since he had the knowledge which instruction would have given him, and knew how to avoid this particular danger."

[4] The question of contributory negligence is also pertinently raised by an assignment reproduced in the motion for new trial. "If he assumes the risk the question of contributory negligence does not arise, for by his assumption of the risk he absolutely precludes himself from a recovery for any injury that may result to him from such risk." *St. L. & S. F. Ry. Co. v. Mathis*, 101 Tex. 351-352, 107 S. W. 535.

The injury occurred subsequent to the enactment by the Thirty-Third Legislature of an act relating to employers' liability and changing the common-law rule with reference to contributory negligence, fellow servant, and assumed risk. *Gen. Laws of Texas*, pp. 429, 430 (*Vernon's Sayles' Ann. Civ. St.* 1914,

art. 5246h et seq.). This law provides that it shall not be a defense if an employe is guilty of contributory negligence, but in such event the damages shall be diminished in the proportion to the amount of negligence attributable to such employe. Section 1, par. 1. Paragraph 3, § 1, eliminates assumed risk as a defense unless the injury was caused by the willful intention of the employe, and section 2 of the act provides:

"The provisions of this act shall not apply to actions to recover damages for * * * personal injuries sustained by domestic servants, farm laborers, nor to the employes of any person, firm or corporation operating any railway as a common carrier, nor to laborers engaged in working for a cotton gin, nor to employes of any person, firm or corporation having in his or their employ not more than five employes."

The cause was tried in March, 1915, in the district court of Dallas county, and we feel persuaded that able counsel in this case were cognizant of the terms and purport of the act. The case was tried, however, as being controlled by the principles of the common law affecting the questions of negligence and assumed risk, and involving the proposition of minority, without any mention in the brief or in the argument therein of the statute. The cause having been pitched upon those lines, we are regarding it, as to this particular record, as controlled by those principles. We are assuming that under the view of counsel as to the provisions of this act, on account of the record not showing that appellant did not have in its employment more than five employes, the act does not apply. This court held the act constitutional, in the case of *Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309, and repeated the holding in the case of *Postex Cotton Mill Co. v. McCamy*, 184 S. W. 569.

[5] If, upon another trial of the cause, proof should be different, and the act applicable, the matter of assumed risk as a defense is, of course, eliminated. As stated, at common law, assumed risk precludes contributory negligence in ending the case, and Chief Justice Phillips, in the case of *G. & H. R. Co. v. Hodnett*, 106 Tex. 194, 163 S. W. 13, presents a clear disquisition of the difference between the defenses. If the act applies, the cause, of course, should be tried under that act. The case of *Railway Co. v. Mathis*, supra, by Chief Justice Gaines, presents on certificate an opinion upon assumed risk, as well as contributory negligence, answering both questions of the Court of Civil Appeals. An engineer was guilty of assumed risk, by falling into the unlighted pit of a turntable, in passing from the roundhouse of a railway to the depot, because he chose that path of travel instead of another which was safer. After so deciding, Chief Justice Gaines said:

"As pointed out in the case of *Texas & Pacific Railway Co. v. Bradford*, 66 Tex. 732 [2 S. W. 595, 59 Am. Rep. 639], between the doctrine of assumed risk and contributory negli-

gence, as applicable to such case, in contributory negligence the question usually arises. What would a prudent man have done under the circumstances? If a prudent man, under the exigencies of the case, would have taken the chances and acted as plaintiff acted, he is acquitted of negligence."

He also cited the case of Gulf, Colorado & Santa Fé Ry. Co. v. Gasscamp, 69 Tex. 545, 7 S. W. 227, holding that it was a question for the jury whether a plaintiff, who knew of certain defects on a bridge and crossed it, and was injured, was guilty of contributory negligence, although there was another safe way he may have gone and thus avoided the injury. Upon the facts propounded in the certificate the Supreme Court, in the Mathis Case, held Mathis guilty of assumed risk, though not conclusively guilty of contributory negligence. In this case, appellee Barrentine, testified that he was ordered to turn out the lights, and after a short period of time he was then ordered, with others, to close the doors for the purpose of discontinuing the business for the night. The care he used in the performance of his duty is not very clear in this particular record. Cases, of course, can exist where an ordinarily prudent man can exercise care in the dark in performing his work and at the same time stumble over an obstruction, the position of which in the daytime he would be acquainted with.

Upon the condition of the record we do not think the case should be reversed and rendered on the doctrine of assumed risk; hence reverse and remand it for another trial.

On Motion for Rehearing.

[8] Bearing in mind the ninth assignment of error, challenging the instruction of the court, on the question of the master warning the plaintiff, we have probably traveled from the main issue, to some extent, in the opinion. Applying the controversy over the rule, to the actual record as presented, the question is, Should the master be required to warn Barrentine, before he started around the inclosure, to close the doors, after the lights were out? He knew it was dark, and the inability to see the stobs was as imputable to him as any other person. He had been closing the doors during the different periods of time he had been engaged in work for nearly 2 years; he testified he did not have to be warned about running over the stobs, though he did say he did not know of the danger resultant from the stobs. Of course he did not have to be warned about running over the stobs, but, was he as cognizant of the danger in stumbling over the stobs, as the master? To say that the master, under such conditions, would have to warn a minor of the experience Barrentine is shown to have had not to stomp his toe upon the stobs it seems to us exceeds the limit of the persons attribut-

able by the law, requiring instructions to minors by employers. Bessey v. Newichawanick Co., 94 Me. 61, 48 Atl. 806; Wagner v. Plano Man. Co., 110 Wis. 48, 85 N. W. 643. There is no duty imposed upon the master to instruct a minor servant when he could not enlarge the minor's knowledge in the premises. Northern Alabama Coal, Iron & R. R. Co. v. Beacham, 140 Ala. 422, 37 South. 227. An employer is not required to instruct a 14 year old boy of average intelligence of allowing a portion of his body to project beyond the sides of an elevator on which his duties required him to ride, where he already knows that if he does so he is likely to be caught between the elevator and passing floors and injured. Cronin v. Columbian Mfg. Co., 75 N. H. 319, 74 Atl. 180, 29 L. R. A. (N. S.) 111. See, also, a discussion by Justice Presler, when on the Ft. Worth Court of Civil Appeals, in the case of Mitchell v. Comanche Cotton Oil Co., 51 Tex. Civ. App. 507-511, 113 S. W. 158.

[7] If the appellant was not required to warn the appellee, Barrentine, to be careful of the stobs, and avoid them, the charge that a failure to warn, if a man of ordinary prudence would have instructed Barrentine, constituted negligence was material error.

It is true that the criticism embodied in the particular assignment could have been leveled at the whole paragraph of the charge, on the particular question. However, we think the assignment, based upon the exceptions to the charge of the court, sufficiently raised the error to the trial court, as that we should regard it on this appeal.

The motion for rehearing is overruled.

MISSOURI, K. & T. RY. CO. v. GILCREASE. (No. 1005.)*

(Court of Civil Appeals of Texas. Amarillo. May 31, 1916. Rehearing Denied June 28, 1916.)

1. EVIDENCE 470—OPINION EVIDENCE—MATTERS FOR JURY.

A witness should state facts, where they are such as can be detailed to the jury, and leave it to the jury to draw the proper conclusion and deduction arising therefrom.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2220; Dec. Dig. 470.]

2. EVIDENCE 473—OPINION—INFERENCES FROM COLLECTIVE FACTS.

The conclusion of a common observer, testifying as to the result of observation made at the time in regard to the common appearance of facts and conditions of things which cannot be reproduced by description, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233; Dec. Dig. 473.]

3. EVIDENCE 501(3)—OPINION—CONCLUSION—BODILY AND MENTAL CONDITION.

A witness may give his opinion as to the mental or physical condition of a party, after relating the facts upon which such opinion is based.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2297; Dec. Dig. 501(3).]

4. EVIDENCE §501(3)—OPINION EVIDENCE—FOUNDATION.

Opinion as to mental or physical condition may be given before or after testimony of the witness as to the facts upon which his opinion is based.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2297; Dec. Dig. §501(3).]

5. EVIDENCE §477(2) — OPINION EVIDENCE — BODILY CONDITION.

After testimony of a witness as to his observation of the effect of labor upon plaintiff in personal injury suit, he could give his opinion whether the plaintiff could perform light or heavy labor and could do so continuously.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2238; Dec. Dig. §477(2).]

6. APPEAL AND ERROR §1048(7)—HARMLESS ERROR—EXCLUSION OF TESTIMONY ON FORMER TRIAL.

In personal injury action, the exclusion of testimony of doctors on former trial as impeaching evidence was not prejudicial to defendant; where its admission could not have affected the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4160; Dec. Dig. §1048(7).]

Appeal from District Court, Collin County.

Action by R. D. Gilcrease against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wallace Hughston and W. R. Abernathy, both of McKinney, and C. C. Huff, of Dallas, for appellant. F. E. Wilcox and R. C. Merritt, both of McKinney, for appellee.

HUFF, C. J. The appellee sued for injuries sustained while employed by appellant, as a section hand on appellant's railroad, and obtained a verdict and judgment for \$3,000. It is substantially alleged and so found by the jury, that one J. L. Faulkner, a collaborer with appellee on the section, and with whom appellee was working, gave a heavy, unusual jerk of a railroad tie; that he jerked it suddenly and before appellee was ready, quicker than was usual and customary; jerked it sideways instead of giving it a steady, straight pull, as it was usually and ordinarily done. This negligence was alleged and found to be the proximate cause of the injury, without any negligence on the part of the appellee contributing to his injury, and, further, that he did not assume the risk. His injuries alleged and shown were to his back, his kidneys, bladder, and other portions of his body. The evidence is conflicting between the physicians as to the nature of his injuries. If the jury accepted appellee's testimony, they could find he was severely injured and suffered severely, and so continued to suffer; that it incapacitated the appellee to do manual labor, and which was his only means of earning a living; and, while they find his injury was not permanent, there are facts which will warrant the finding that its continuance will probably be of long duration, and that he will con-

tinue to suffer for a long time. This particular issue was not submitted to the jury or passed on by them, and we must presume the court so found the issue in favor of appellant, and do so in sustaining the judgment of the court for the amount found by the jury. The first assignment of error is in admitting the testimony of one M. L. Brock:

"I think R. D. Gilcrease is able to do light work on the farm occasionally, but I do not think that he will be able to do any work regularly every day. R. D. Gilcrease is not able to do any heavy work on the farm or anywhere else."

The appellant objected because:

"(a) The same is the opinion or conclusion of the witness, and not a statement of any fact; (b) prejudicial; (c) and such evidence is the opinion of a nonexpert witness, concerning matters about which he is not competent to speak; (d) and said witness is not qualified to express an opinion."

The trial court added the following qualification to the bill of exception:

"This witness had also testified as follows: That plaintiff came to his place in November, 1914; that he gave him plowing to do; he gave him that kind of work to do because he apparently was not able to do hard work; that it had the appearance of making plaintiff weak and worn out, or to do a hard day's work; that he noticed during the time he was at work that he was weak and worn out after the day's work was over and to be suffering greatly; that after doing a day's work R. D. Gilcrease appeared to be very weak and worn out."

The evidence objected to is clearly the opinion of the witness. *Railway Co. v. Demsey*, 40 Tex. Civ. App. 398, 89 S. W. 787; *Wells Fargo, etc., v. Boyle*, 39 Tex. Civ. App. 365, 87 S. W. 164; *Roth v. Travelers' Protective Association*, 102 Tex. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97. Unless the facts recited by the trial judge in his qualification to the bill are sufficient as a predicate for the opinion, the evidence should have been excluded. The witness was a nonexpert. The witness must, under such circumstances, relate the facts upon which his conclusion is based. The testimony of this witness, as given by him is set out in appellant's brief, and is concurred in by appellee, and is as follows:

"My name is M. L. Brock; my age 45 years old. My business is farming, and I live five miles west of Ferris in Ellis county. I have been engaged in farming all my life. I have known R. D. Gilcrease since November, 1914. He has worked for me. R. D. Gilcrease is now living in a tent on J. M. Bachelor's farm on Bear creek, about three miles west of Ferris, Tex. I gave R. D. Gilcrease farm work, plowing. I have given him 20 days' plowing from that time until now. I gave R. D. Gilcrease, when he came to my place in November, 1914, that kind of work to do because he apparently was not able to do any hard work. It had the appearance of making R. D. Gilcrease weak and worn out to do a day's work, and after the day's work I noticed, during the time that R. D. Gilcrease was at work, that he was weak and not able to do a day's work, and was worn out after the day's work was over. He appeared to be suffering considerable. I don't think that R. D. Gilcrease is able to make a full hand

on the farm, because I don't think he is physically able to make a full hand on the farm. After doing a day's work R. D. Gilcrease appears to be very weak and worn out. I think that R. D. Gilcrease is able to do light work on the farm occasionally, but I don't think that he would be able to do any work regular every day. R. D. Gilcrease is not fit for any heavy work on the farm or anywhere else. He don't seem to be physically able to do hard work. * * * I have known R. D. Gilcrease since November, 1914."

The fifth assignment objects to the statement of this witness that he gave appellee that kind of work because apparently he was not able to do any other kind or hard work.

The sixth is to the testimony that it had the appearance of making appellee weak and worn out after the day's work, and he noticed during the time the appellee was at work that he was weak and not able to do a day's work, and was worn out after the day's work was over.

The seventh, that he did not think he was able to make a full hand on the farm.

The eighth, that he was able to do light farm work. The ninth, that he does not seem to be physically able to do hard work.

[1, 2] It has been repeatedly said by our courts that the correct practice is for the witness to state facts where they are such as can be detailed to the jury, and leave it to the jury to draw the proper conclusion and deduction arising therefrom. Clardy v. Callicote, 24 Tex. 170-173. There are exceptions, however, to the general rule, as well established as the rule. The conclusion of a common observer, testifying as to the result of his observation, made at the time, in regard to the common appearance of facts and a condition of things which cannot be reproduced and made palpable to the jury, is said to be admissible. McCabe v. San Antonio, etc., 39 Tex. Civ. App. 614, 88 S. W. 387. So, also, where the facts which constitute the cause from which the opinion of the witness deduced the effect cannot themselves be so presented or communicated to the mind of the jury as to impart to them the knowledge actually possessed by the witness. Turner v. Strange, 56 Tex. 143. Under these exceptions and the like, the statement of the witness that it appeared the work done made appellee weak and worn out after the day's work, that he noticed he was weak and worn out, are admissible. The courts of this state recognize these exceptions in the following cases: Railway Company v. Brown, 30 Tex. Civ. App. 57, 69 S. W. 1010; Railroad Company v. Adams, 121 S. W. 876; Railway Co. v. Parnell, 56 Tex. Civ. App. 265, 120 S. W. 951; Railway Co. v. Dellmon, 171 S. W. 799; San Antonio Traction, etc., v. Flory, 45 Tex. Civ. App. 425, 100 S. W. 202; Railroad Co. v. Pruitt, 157 S. W. 236; Railway Co. v. Sandlin, 57 Tex. Civ. App. 151, 122 S. W. 60.

The witness having testified to the apparent suffering, weakness, and worn-out condition after a day's work at light labor were

the facts observed by him which the trial court says was the testimony which authorized the admission of the opinion set out under the first assignment.

[3, 4] A witness may give his opinion as to the mental or physical condition of a party when they have related the facts upon which such opinion is found, and it is not material whether the facts are given before or after such opinion. It would hardly have fallen within the province of the trial judge to have excluded the opinion of the witness because he did not agree with him from the facts detailed. Garrison v. Blanton, 48 Tex. 302, 303; Railway Co. v. Jarrard, 65 Tex. 560; Railway Co. v. John, 9 Tex. Civ. App. 342, 29 S. W. 558. It has been held that a non-expert witness may testify as to the effect upon the injured party's capacity to work or labor. Railway Co. v. Smith, 90 S. W. 926; Railway Co. v. Watts, 36 Tex. Civ. App. 29, 81 S. W. 326; Railway Co. v. Jones, 39 Tex. Civ. App. 480, 88 S. W. 445, and the other authorities cited herein.

[5] We believe the witness, having observed the effect of labor upon the appellee, as to exhausting him, wearing him out, and noticing his suffering, and also that he was weak, could give his opinion whether he could perform heavy or light labor or could do so continuously. As to the testimony of Brock, objected to, we find no error on the part of the court in overruling the several exceptions thereto, and the assignments thereon will be overruled.

The second assignment is to the testimony of Frank Smith that, "Yes; R. D. Gilcrease seems to have a weak back and kidneys." The witness was a half-brother of appellee, and saw him work before and after his injury; saw him at work after the injury, plowing and picking cotton, which he had to do by crawling on his knees; that stooping gave him great pain. He noticed that appellee flinched when he would stoop; that he would have fever at night after this work; that he would have to stop often to let his kidney act; and that he seemed to suffer a great deal with his kidneys. Railway Co. v. Clippenger, 47 Tex. Civ. App. 510, 106 S. W. 155; Railway Co. v. Schuler, 46 Tex. Civ. App. 356, 102 S. W. 783, and authorities heretofore cited. Mrs. Smith, the mother of appellee, also testified as to the condition of his kidneys, without objection; her testimony being in its nature substantially the same as Frank Smith's.

The third assignment is also to Smith's testimony, to the effect that he was not able to make a full hand. This is disposed of by what has heretofore been said by us.

The fourth assignment is to the testimony of McDonald, to the same effect as that of Smith, and part of Brock's testimony. We believe this evidence also admissible, while the witness did not testify quite so fully as to his observation of the appellee as did the others, but simply states he seems to be

weak in the back and suffering with his back and kidneys. This assignment is overruled.

The eighth and tenth assignments are also overruled, to the evidence admitted over the objection of appellant, for the reasons heretofore given.

[8] We do not think any material error, if error at all, is shown by assignments 11 and 12, in excluding the testimony of Dr. Ben Largent and Dr. J. E. Hunter, given on a former trial of this case. It appears the court stenographer was placed on the stand to show that the two doctors, on the former trial, testified that they then found appellee with fever when they examined him for the purpose of testifying. The testimony offered as part of their then evidence we do not regard as explaining their statement with reference to his fever or their statement of that fact. The witnesses on the present trial had testified he had no fever, when they first examined him, and their former testimony on that point was offered in the nature of impeachment. We do not think the offered testimony explained the apparent contradiction, and could not, if it had been received, have affected the case either one way or the other.

The thirteenth assignment assails the verdict as being excessive. While the verdict is more than we would have awarded upon this record, we are yet unable to say that a remittitur should be filed. It was a matter which the jury and trial court could better determine than we, and it is not so grossly excessive in our judgment as to demand that it be set aside, or that a remittitur be ordered.

The case will be affirmed.

TEXAS & N. O. R. CO. et al. v. JONES.
(No. 1000.)

(Court of Civil Appeals of Texas, Amarillo.
May 31, 1916. On Motion for Rehearing,
June 21, 1916.)

1. CARRIERS ⇨818(9) — INJURY TO ALIGHTING PASSENGER—SUFFICIENCY OF EVIDENCE.

In action by husband for wife's injuries while alighting from passenger train, caused by bumping of cars, conflicting evidence strongly contradicting plaintiff's claim, and unexplained absence of testimony by plaintiff and daughter, both present at accident, *held* not to support verdict for plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1314; Dec. Dig. ⇨818(9).]

2. EVIDENCE ⇨76—PRESUMPTIONS—FAILURE OF PLAINTIFF TO TESTIFY.

The failure of plaintiff to testify as to facts material to her case and directly under her observation allows a presumption against her that such testimony would operate to her prejudice.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 96; Dec. Dig. ⇨76.]

3. APPEAL AND ERROR ⇨1003 — REVIEW — QUESTIONS OF FACT—SUFFICIENCY OF EVIDENCE.

It is the undoubted duty of the appellate court to interfere and set aside a verdict, where it has the conviction that the verdict is wrong and clearly against the preponderance of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. ⇨1003.]

On Motion for Rehearing.

4. APPEAL AND ERROR ⇨731(5)—ASSIGNMENT OF ERRORS—SPECIFICATIONS—SUFFICIENCY OF EVIDENCE.

An assignment of error, "because the verdict and the judgment are against the great preponderance of the evidence," specifying the evidence, followed by a statement, purporting to be a part thereof, that "said verdict and judgment being so clearly against the great preponderance of the evidence, the court should, in its discretion and the power invested upon it under the law, set the verdict aside and grant a new trial herein," *held* sufficient statement of a manifestly wrongful verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3021; Dec. Dig. ⇨731(5).]

5. APPEAL AND ERROR ⇨1003 — REVIEW — QUESTION OF FACT.

Although there may be sufficient evidence to carry a case to a jury, yet, if the verdict rendered is so against the preponderance of the evidence as to show that manifest injustice has been done, it may be set aside on appeal although in so doing it is necessary to disregard evidence overborne.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. ⇨1003.]

Appeal from District Court, Collin County; M. H. Garnett, Judge.

Action by A. J. Jones against the Texas & New Orleans Railroad Company and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

G. R. Smith, of McKinney, and Baker, Botts, Parker & Garwood, of Houston, for appellants. Clarence Merritt, of McKinney, for appellee.

HENDRICKS, J. The appellee, A. J. Jones, sued the appellants, the railway companies, for injuries alleged to have occurred to his wife, Mary Jones, as a passenger, at and near the depot in Dallas, Tex., while in the act of alighting from a train. The appellee and wife were residents of Collin county, Tex., and before the occurrence, charged as negligence, Mrs. Jones had been on a visit to some relatives in Houston county, Tex. She was accompanied by her five children, ranging in age from three to eleven years, and on the return trip, arriving at Dallas, at the Elm street station in that city, her husband was present at the depot to meet her, from which place they continued the journey over an interurban line from Dallas to McKinney.

As the journey proceeded on the interurban to McKinney, Mrs. Jones' condition developed the preliminary pains of miscarriage,

necessitating, upon arrival at McKinney, an immediate attendance of a physician, and after arrival, within a few hours, the miscarriage became complete. According to opinion testimony, at the time of the miscarriage, her condition of pregnancy had been of about three months' duration, and during which time the periodic menstrual flow of Mrs. Jones had continued. A cross-examination of Mrs. Jones developed that, a short time previous to her departure from Houston county for her return to Collin county, she had picked cotton, while visiting one of her relatives, for the period of about a week, necessitating the dragging of a cotton sack between the cotton rows. It was in evidence that she had made admission of a previous miscarriage, of not as severe a character, though, as the one in question. Her testimony on the stand was that she was not sure that the previous trouble was a miscarriage, and, if so, it occurred about eight years prior to the present injury, and subsequent thereto she had given birth to two children.

It was alleged in the petition that upon arrival of the train at Dallas, on account of the train standing upon the crossing at Elm street, the same was uncoupled at the Elm street crossing and the front end of said train was pulled north toward the Union Station, leaving plaintiff's wife and children in a coach south of the crossing, and that, while she was alighting and on the platform steps of the coach, the front of the train which had been uncoupled backed against the coach on which she was situated with unusual violence, throwing her against the floor and platform thereof as she was descending the steps, causing the injury. The alleged negligence submitted by the trial court as a special issue was:

"Whether or not the train upon which Mrs. Jones was riding gave a violent and unusual jar, or jerk, while she was attempting to alight therefrom, * * * caused by reason of the front coach on said train being propelled against the portion of the train upon which she was riding and from which she was attempting to alight."

The appellant specifically denied the allegation of negligence, and previous to the trial took the depositions of three different women friends of Mrs. Jones, who visited her at her home in McKinney, the testimony in which disclosed statements of Mrs. Jones, without any declarations of any jar or bump of the train causing the particular injury, and which, in its nature, such testimony of said statements is incompatible with the theory of negligence asserted in the petition; hence the appellee, A. J. Jones, the necessary and only party plaintiff to this suit, was upon notice before the trial of the proffer of a sharp contest of the issue whether or not the bump or jar of the coach, from which Mrs. Jones was alighting, ever actually occurred. The jury found that it did occur, and further found that the miscarriage of appellee's wife was not the natural

sequence "of her general condition and her acts and habits prior to the time she arrived at Dallas."

[1] The appellants vigorously assert that the verdict and judgment are against the great preponderance of the evidence, reciting the particulars, according to their theory, to sustain said position. Two other women friends of Mrs. Jones, who visited her at the home in McKinney while she was sick, testified by deposition on behalf of appellee that Mrs. Jones stated in their presence that the cause of the miscarriage was a jar of the train, causing her to be thrown against a "seat." Mrs. Hart testified:

"She said the car gave a sudden jerk, and that another car ran against it very suddenly, and she was knocked over against the seat, and that she came very near falling after she got up [from the seat], but caught herself." (The interpolation is ours.)

The testimony of Mrs. Jones was that, upon arrival at the station in Dallas, she saw her husband through the window on the platform of the station, and that all of the children preceded her from the coach in alighting, the little girl, eleven years old, carrying a three year old baby, and assisted by her husband to the platform, and a boy ten years of age carrying a small suit case, and that she was the last to leave the particular coach. She also said:

"I was on the platform, and had started down the steps, a step or two, and the train come back against the coach with such force, full force, and just knocked it winding, and me, too. It was a hard jerk or knock, and I fell down; it threw me up against the baluster like, and struck me in the side, and I fell back on the floor [of the platform]. * * *"

She further said:

"Nobody helped me down out of the coach [referring evidently to the absence of railway employes]; only my husband took hold of me and helped me down, after I fell and got up; he took hold of me and helped me down himself."

It is clearly inferable from the situation of the husband, the appellee herein, at the steps of the coach, that such an occurrence, if it happened, was under his direct observation. She testified to two jars, or bumps, of the train—another immediately succeeding the one which knocked her down, but which she withstood.

[2] The little girl, eleven years of age at the time of the alleged occurrence, and twelve at the time of the trial, was one of usual size and intelligence of a child of that age, and the mother testified that she was at home, and she supposed she could come to the trial and testify. It may be, of course, that the position of the child, having preceded the mother from the coach, was such that she could not see the fall of her mother back upon the platform, if it occurred; but the noise of a jar, such as testified to by the parent, producing such a fall, could have been easily heard, and the jar itself, as an occurrence producing an accompanying fall of her parent, it is reasonable to say, would have been cognizable, and impressive, to a

child of that age. Neither the husband of the injured wife, nor the little girl, were witnesses on the stand at the trial, nor were any justifying circumstances adduced, explaining the absence, or breaking the force arising from the fact, of such withheld testimony. Appellee says:

"The argument that plaintiff was present when the car came into Dallas, and did not testify, is without force, because defendant had the same right to use him as a witness as did the plaintiff in his own behalf."

Such a weak statement to break the force of withheld testimony of a plaintiff actually cognizant of the main controverted fact, and sharply contested as a pivotal issue in the case, by able counsel in this case, reflects a mental condition of recognition that the absence of such testimony, under the conditions, is hard to explain, and the force of which is perplexing to avoid as a logical inference that plaintiff's real knowledge of the alleged occurrence would have militated on the stand against his own case. Lord Mansfield said that it is certainly a maxim:

"That all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." *Blatch v. Archer*, Cowp. 63, 65.

Starkle says:

"The conduct of a party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his knowledge, frequently affords occasions for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice." *Evidence*, 54; *Jones on Evidence*, Blue Book, vol. 1, § 20, pp. 128, 129.

The decisions of the appellate courts of our state in substance announce the same principle. *Thompson v. Shannon*, 9 Tex. 536; *Bailey v. Hicks*, 16 Tex. 222; *Chandler v. Meckling*, 22 Tex. 36-44; *Needham v. State*, 19 Tex. 332; *Insurance Company v. Tillman*, 84 Tex. 31, 19 S. W. 294; *Welsh v. Morris*, 81 Tex. 159, 16 S. W. 744, 26 Am. St. Rep. 801; *Railway Company v. Walker*, 38 Tex. Civ. App. 76, 85 S. W. 28.

Dr. Hunter, the physician who administered to Mrs. Jones the night she arrived in McKinney, testified that he had no recollection of any complaint having been made that Mrs. Jones was knocked down on the train. He said, however, that several days after he had treated her (the time not definitely stated) Mr. Jones, the plaintiff, came to his office, and asked him "whether a person falling on a train, it could produce an abortion"; and he told him "it depended upon the condition of the woman and the nature of the injury."

Appellants' contention for reversal is that the charge of negligence was fabricated, and stresses, with other circumstances, the inquiry by the plaintiff of Dr. Hunter, as above stated. As a circumstance of suspicion, it is weakened by the testimony of two of the women who visited Mrs. Jones a short time after the alleged occurrence of statements by

her that she was jerked against a "seat." The five ladies, three for the defendant and two for the plaintiff, who visited Mrs. Jones, are, of course, apparently disinterested witnesses. Two of plaintiff's witnesses are explicit that Mrs. Jones stated that she was taken sick before ever she arrived in Dallas; one of them testifying, "Mrs. Jones told me she was very sick before she got to Dallas, but did not say anything about experiencing pains; she said she kept getting worse and worse until she got to McKinney;" another stating that Mrs. Jones said, "She took sick on the way, and got very sick before she got to Dallas." Two of these witnesses said that upon subsequent occasions she further stated that it was the jar and the fall which was the cause of the miscarriage.

Henry Lair, a blacksmith, and a witness for the defendants, testified that, about a week after Mrs. Jones' miscarriage, Jones, the plaintiff, was in his shop, and upon inquiry by him (Lair) as to the cause of his wife's condition, Jones stated that he did not know what it was that produced such condition "unless it was dragging a cotton sack." It is true that plaintiff established the reputation of Lair for truth and veracity as bad, and the credibility of the witness was necessarily weakened. However, the particular fact of Jones' alleged statement that he did not know the cause of his wife's condition unless it was dragging a cotton sack was uncontradicted; and the dragging of a cotton sack, extending over the period of a week, just prior to her return to Collin county, was an admitted fact. Jones on Evidence says that what a party has said or done at a time when litigation was not thought of, having regard to the circumstances of time, place, and person, should furnish a substantial reason for his defeat when his case is founded on facts inconsistent with those evidenced by statements to which he has given publication. Volume 2, § 236, bottom of page 358 and top of page 359 (Blue Book). Necessarily a statement of a principle of this character is to be received with caution.

We will not analyze and reproduce the theories derivable from the testimony of the physicians as experts, with reference to the susceptibility of this woman to a miscarriage, or state their opinions, based on different hypotheses, as to what caused the injury; but, after deliberate reflection on the whole record, we think this verdict and judgment should be set aside.

Neither will we detail the testimony of other passengers to the effect that, so far as they knew, no jar or jerk occurred; nor the testimony of the railroad witnesses that the passengers were all discharged from the coaches before the train was moved; nor set out the contradictory inferences adduced by plaintiff that the uncoupling of the train could have occurred, and the backing up of same happened, in corroboration of the af-

affirmative testimony of Mrs. Jones, for the reason that the nonproduction of the testimony of the little girl, and particularly the withholding and absence of the testimony of the plaintiff, cognizant of the sharply controverted fact, if it occurred, produces such a persistent and abiding conviction of strong doubt, in connection with other testimony in the case, of the impropriety of this verdict.

[3] It is the undoubted duty of this court to interfere and set aside a verdict where we have the conviction that it is wrong and clearly against the preponderance of the evidence. We admit the caution and reluctance of appellate courts in the manifestation of this power as against verdicts upon conflicting evidence. The purpose of withholding this testimony of the plaintiff and of the child, of course, is not shown. We impute to learned counsel a knowledge of the force of the principle of presumption, where unexplained there is a withholding of the testimony of witnesses of crucial facts, and in this case of the plaintiff, as we believe it should be imputed to this court, that we are entitled to the belief that the reasons for taking chances before the jury without such testimony is just as much attributable to the fact that the same would have injured very materially plaintiff's cause, and the accompanying inference that it was thought that the jury would believe against this kind of a defendant the uncorroborated affirmative statement of the wife testifying to the crucial fact, notwithstanding the husband's and child's mouths were closed. Though we are unable to find a particular case presenting a sharp analogy to the instant case, we unhesitatingly set aside this verdict. *Short v. Kelly*, 82 S. W. 944; *American National Insurance Co. v. Fulghum*, 177 S. W. 1008; *Zapp v. Michaelis*, 58 Tex. 275; *Nowlin v. Hall*, 97 Tex. 441, 79 S. W. 806; *Kohlberg v. Awbrey & Semple*, 167 S. W. 829; *Lee v. Railway Co.*, 89 Tex. 583, 36 S. W. 63; *Railway Co. v. Somers*, 78 Tex. 439, 14 S. W. 779; *Railway Co. v. Schmidt*, 61 Tex. 282.

Reversed and remanded.

On Motion for Rehearing.

[4] The assignment in appellants' brief, upon which this court reversed and remanded the cause, is that the trial court erred "because the verdict and the judgment are against the great preponderance of the evidence in this," following the statement with succinct and particular specifications wherein the testimony, by numerous witnesses, by strong inference, was opposed to said verdict. It is now contended that there was no complaint by appellant that the verdict was the result of prejudice or passion, or an improper motive by the jury, and hence we should not have considered said assignment.

This objection, unless the statement in the brief, to the effect that said assignment is a mere statement, argumentative, and not in

accordance with the rules, is made the first time in this motion for rehearing. The case of *Benford Lumber Co. v. Knox*, 168 S. W. 33, in a sense, sustains the position of the appellee, wherein the court says that a complaint presented by an assignment that the preponderance of the evidence did not justify the jury's findings does not raise the question that a finding is so manifestly against the great weight and preponderance of the evidence as to lead to the conclusion that the jury was influenced by an improper motive. We admit the technical distinction; however, it would seem that an assignment that a verdict is against "the great preponderance of the evidence" would present the thought, and import a meaning, of a manifestly wrongful verdict, because any verdict against the "great" preponderance of the evidence (in accentuating preponderance) is against the greater weight of the evidence to that extent as to exhibit an injustice. Evidently, though not probably appropriately merged into the assignment, that is the idea intended to be conveyed by the appellant, for at the close of the assignment, and purporting to be a part thereof, it is said:

"We submit to the court that, said verdict and judgment being so clearly against the great preponderance of the evidence, the court should, in its discretion and the power invested upon it under the law, set the verdict aside and grant a new trial herein."

Upon the whole, we shall let the assignment stand.

[5] Serious complaint is made that this court has improperly exercised such power. Necessarily, the exercise of a power of this character carries with it the idea of some discretion, for the reason that, in all cases of this character, there is testimony, though the appellate court thinks it is overborne, to sustain the verdict avoided. The appellee quotes the language of Chief Justice Stayton in *Niagara Insurance Company v. Lee*, 19 S. W. 1030, wherein he says:

"The Supreme Court will not reverse on the ground of the insufficiency of conflicting evidence to sustain the verdict, though it may be of opinion that the evidence somewhat preponderates the verdict."

The discretion exercised in cases of this character as to the amount of preponderance, it may be true, involves a difference at times of individual judgment on the part of the judges, which arises from the nature of the question and the temperamental composition of different courts. Take the case of *Choate v. San Antonio & Aransas Pass Ry. Co.*, 90 Tex. 83, 36 S. W. 247, 37 S. W. 319. A passenger positively testified that in attempting to pass from one car to another, as a train was about to stop at a station, he was thrown from the cars by a sudden jerk. However, the testimony of several unimpeached witnesses was to the effect that plaintiff thereafter stated to them that he had stepped off the train when it stopped at the depot, and that when he went to step back he missed

the step, or slipped, and the wheel caught his foot. The Court of Civil Appeals said, stressing particularly the undisputed admissions of plaintiff, that the jury was not warranted in finding the injury was caused as alleged, and necessarily the appellate court disregarded the testimony of the injured passenger. The Supreme Court, after granting the writ, first argued that there was no evidence to show that the jerk was anything unusual in stopping and starting the train, under ordinary circumstances. On motion for rehearing the question of the railway's negligence was reconsidered, the court holding there was evidence in that respect, but saying, however:

"Although there may be sufficient evidence in a case to require the court to submit it to the jury, yet if the verdict rendered thereon is against the preponderance of the evidence, to that degree which shows that manifest injustice has been done, the trial court may, and should, grant a new trial. The judge should not invade the province of the jury and take from it the decision of a question which properly belongs to it; neither should he abdicate the functions of his office and permit the prerogatives of the jury to be perverted to the accomplishment of wrong."

The cause was necessarily reversed and remanded, as the Supreme Court has no power over the action of a Court of Civil Appeals in that respect.

In regard to our comments of the failure of the plaintiff to testify, it is said that it is not shown in this case that the husband was in attendance upon the trial. He was the plaintiff in the case, and the recovery belonged to the community estate, and the duty, under the law, devolved upon him to take care of the litigation; that is the principal reason the law makes the husband the sole party plaintiff. It is shown that he challenged the witness Lair the day before the trial (though he failed to contradict his statement on the stand), who testified that Jones stated to him that his wife's sickness was caused by the dragging of a cotton sack. It is true the wife's testimony was positive that the jerk of the train threw her to the platform of the coach. The inferences, however, from the testimony of numerous witnesses that the train was not disconnected, and that there was no jerk or jar after it was at rest, for the purpose of permitting passengers to alight at Elm street; the testimony of certain women friends, in effect that Mrs. Jones stated that she was taken sick before she ever arrived at Dallas; the testimony of Lair, though his reputation for veracity was impeached, of the statement of the husband of the dragging of a cotton sack being the cause of his wife's sickness, undenied, however, as to the particular fact; the fact that Mrs. Jones admitted that she dragged a cotton sack between cotton rows for a week just prior to the alleged injury; the admissions in this case that the woman was sick before Dallas was reached, though attributed by

her to snuff and the heat; the fact that her husband, the plaintiff, saw the fall and did not see fit to corroborate her weakened testimony, after having been so strongly assailed by the appellant; the fact that a 12 year old daughter, normal so far as this record shows, immediately preceded the mother to the depot platform and necessarily heard the jar and the jerk of the train, testified to by her mother (if she did not see the mother fall), and shown to have been in the courtroom at a particular time of the trial, and not placed upon the witness stand to bolster the mother's assailed testimony on the pivotal point of the case, added to the testimony of the defendant's witness producing the inferences from its standpoint that no such jerk and collision ever occurred—impel this court to again reiterate, stronger than the statement in the original opinion, that according to this record this is an unjust verdict.

"Judicial tribunals are established to administer justice between litigants, and the first and most important step to that end is the ascertainment of the truth of the controversies which come before them. It is only when the truth is ascertained that the law can be properly applied in the just settlement of disputes. Litigants owe the duty of assisting in every legitimate way in the elucidation of the truth. When a defendant can by his own testimony throw light upon matters at issue, necessary to his defense and peculiarly within his own knowledge if the facts exist, and fails to go upon the witness stand, the presumption is raised, and will be given effect to, that the facts do not exist." *Bastrop State Bank v. Levy*, 106 La. 586, 31 South. 164-166.

The rule, of course, is not as strong in this state, as stressed by Justice Blanchard of the Supreme Court of Louisiana, where there is testimony sufficient to require the submission of the case to the jury; however, it has a commendatory ring as a forcible presentation, persuasive and appealing in certain character of cases. Notwithstanding the forcible and able argument of plaintiff's counsel, this court will not upon such a record make a fetish of a jury's verdict.

The motion for rehearing is overruled.

TEXAS GLASS & PAINT CO. v. REESE.* (No. 967.)

(Court of Civil Appeals of Texas. Amarillo.
April 26, 1916. On Motion for Rehearing,
June 7, 1916.)

1. MASTER AND SERVANT \S 237(1)—INJURY— NEGLIGENCE—PLACE TO WORK—FINDINGS.

Findings on special issues in an action for injuries to plaintiff, a night watchman, thrown down an elevator shaft, through striking his head on a plank of a scaffolding projecting into a doorway, through which his duties required him to pass, that the plank caused the accident, and that defendant proprietor by the exercise of ordinary care should have known of its existence, sufficiently finds that defendant was negligent in its duty of providing plaintiff a reasonably safe place to perform his services.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 1195; Dec. Dig. \S 297(1).]

2. EVIDENCE \S 314(1).—HEARSAY—WATCHMAN'S RECORD.

A watchman's record made by his punching or pulling boxes resulting in marks on a tape, in a central office, against which an operator puts down the time they came in, is not admissible on the question of such time, without testimony of the operator as to the accuracy of time put down by him, being hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1168; Dec. Dig. \S 314(1).]

On Rehearing.

3. MASTER AND SERVANT \S 217(1).—ASSUMPTION OF RISK—MASTER'S NEGLIGENCE.

An employé does not assume the negligence of the master unless he knows or should have known thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 574; Dec. Dig. \S 217(1).]

4. MASTER AND SERVANT \S 280.—ASSUMPTION OF RISK—KNOWLEDGE—EVIDENCE.

That a night watchman, before hitting his head on a plank negligently left projecting into a doorway, passed through several times in safety, is not conclusive that he knew or ought to have known of it relative to assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 981-986; Dec. Dig. \S 280.]

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Action by G. W. Reese against the Texas Glass & Paint Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Crane & Crane, of Dallas, for appellant. Muse & Muse, of Dallas, for appellee.

HUFF, C. J. The appellee sued appellant company for damages for alleged personal injuries. It is alleged: That appellant, for the purpose of installing a passenger elevator in its four-story building, had constructed a temporary stairway and in doing this work had negligently "left a plank or timber from the side of said walls across said doorway on said fourth floor at the stairway, at its opening into the elevator shaft on the fourth floor of said building, so that one undertaking to enter said stairway from the south side would strike their head on said plank or timber so negligently across a portion of said opening or doorway to the stairway aforesaid, endangering the life and safety of those using the stairway." That under a written contract between the Smith Detective Agency and appellant the agency was to furnish a guard for the premises on the inside during the nighttime. The duty of the watchman during the night was at stated hours to visit the basement and each of the several floors and register upon a punch clock on each floor, thereby verifying the performance of his duty, for which service the agency was paid a consideration by appellant; and that appellee was employed by the agency in such duty for the appellant under the contract. Negligence was also alleged in failing to fur-

nish sufficient lights to the appellee, as it is alleged appellant was bound to do. The findings of the jury eliminated this ground of negligence upon which recovery was sought. That while in the discharge of his duty, as night watchman, after registering on the fourth floor and in leaving the doorway to the stairway on the side upon which the plank or timber extended across the door, and in ignorance of the same, appellee struck his head and face against the timber, which caused him to fall or be thrown from the fourth floor of the building, through the elevator shaft down to the basement, thereby inflicting injuries of which complaint is made. Appellant, by its answer, in some particulars, admitted the allegations of the appellee, and in others denied, pleading contributory negligence and assumed risk on the part of the appellee. The case was submitted, upon special issues, to a jury. The jury find that appellee's injuries were occasioned by his head coming in contact with the projecting timber over or across the stairway landing on the fourth floor of appellant's building, thereby causing him to fall through the elevator shaft from the fourth floor of the building to the basement; that he had no knowledge of the existence of the timber prior to striking his head against it; that he could not have known of the existence of such projecting timber by the exercise of ordinary care in the discharge of his duties as such night watchman; that appellant company, in the exercise of ordinary care, should have known of the existence of such projecting timber prior to the injury and that the injury was sustained by appellee while he was in the performance of his duties of night watchman, in the appellant's building; that appellee exercised ordinary care in such duties at the time of the accident. They also find it was necessary for the appellee to pass under the timber to go through the door in entering and in leaving the room on the fourth floor. They find the lantern used was such that an ordinary prudent watchman would use in his duties as such, that appellee was not guilty of contributory negligence, and that he sustained damages in the sum of \$1,000.

We think the facts found by the jury are supported by the evidence; that these findings of fact may be legitimately inferred from the testimony of the witness. In making this finding, we do so without deeming it necessary to set out the evidence upon which it is based. We therefore overrule assignments 1 to 7, inclusive.

The eighth assignment is overruled for the reason that the findings of fact, in answer to issue No. 2, is to the effect that appellee had no knowledge of the timber across the door and could not have known of the same by the exercise of ordinary care. This issue included substantially the facts sought to be

passed upon by the requested charge, No. 2, of appellant.

Assignments 9 to 14, inclusive, are overruled, upon the ground stated in overruling 1 to 7.

[1] The jury having found that the timber caused the injury, and that appellee did not know and could not have known of the same by the use of ordinary care, and that appellant, by the exercise of ordinary care, should have known of its existence, sufficiently found that appellant was negligent in the performance of its duty towards appellee, who, in the discharge of his duty in appellant's service, owed to him the duty of providing him a reasonably safe place to perform that service. That the place was not a reasonably safe one is shown by the fact that in the door where appellee was required to enter and leave the room in the performance of his necessary work, a timber was placed so that it would strike his head, thereby rendering it probable that he would be precipitated into the well of the elevator. This scaffolding or platform, so erected by appellant, it must have known was dangerous, or by the use of ordinary care that it would be so to this night watchman.

[2] The fifteenth assignment of error asserts error in the action of the court in rejecting two slips of paper of the record of the detective agency of the morning of October 23, 1912, the date of the injury, which slips were the purported records of appellee's visits to the several floors of appellant's building on the night of October 22d and 23d. It appears the watchman punches or pulls the box every hour, and the record of the box pulled goes into the detective office on a wire, and the night manager in the office takes the number of the box and time on a record tape. In the morning, the agency would send one of them to appellant and it would keep the duplicate. The number is given by a ring in the office, and this number is designated by dots or a code. These rings do not give the hour. "The night manager looks at the time when the next one comes on the tape; he marks the time on it." The slips offered in evidence were not made out by the witness whose testimony was rejected, but by the night manager, who was not offered to show the accuracy of the report. The witness testified:

"On October 23d, we had one operator, Mr. Cunningham, and the accuracy of the report depends upon the accuracy of the operator in making the report. * * * The tape shows only the hieroglyphics—just like a telegraph operator. So many dots for each number, and you give him a key, and anybody can read the number."

The slips offered show the hours from the time appellant went on duty, 7 p. m., October 22d, to 6 o'clock a. m., October 23d, purporting to register each box on all five

of the floors, from the basement to the fourth floor.

The appellee objected that the validity of the paper depends upon the accuracy of the night operator, and, unless there was testimony of the operator who made them that the slips were correct, they should not be admitted; that the hours, as shown by the record offered, depended upon the accuracy of the act of the operator. The effect, if admitted, would be to admit hearsay evidence of the operator, Cunningham. The court sustained these objections, and we believe properly. The record made was not automatically done by the instrumentalities used as to the time, but this was made by the operator at the time of receiving the number of the box pulled. The time was the important question sought to be presented by this testimony. If the entries had been shown to have been made correctly, as to the time by the party making them, perhaps the slips would have been admissible. As we understand, evidence of this character is not admissible in this state. *Cathey v. Railway Co.*, 104 Tex. 39, 133 S. W. 417, 33 L. R. A. (N. S.) 103; *Id.*, 124 S. W. 217.

We find no reversible error, and the case will be affirmed.

On Motion for Rehearing.

The appellant assumes that this court affirmed the case, on the theory that the Workman's Compensation Law, passed October, 1912, and effective September, 1913, controls it. We do not refer to the act in the opinion and are unable to see upon what appellant based its assumption. The mere fact that one of the judges asked a question during the oral argument, before the court, certainly does not warrant any such presumption.

[3, 4] The employé does not assume the negligence of the master unless he knows, or should have known, thereof. The fact that he may know the master is repairing a stairway does not charge him with the knowledge that the master has negligently placed a timber in the door through which his duties require him to pass every hour of the night, in such a position as to endanger him. The fact that he was fortunate enough to miss it in making his trips theretofore during the night does not conclusively show that he knew it was so placed in the door, or that he ought to have known it was there. He had the right to assume it was not there and that the master had done its duty. There was nothing shown by the facts to put him upon the inquiry as to whether the plank was so dangerously placed in the doorway. On the question of negligence in maintaining the premises as a reasonably safe place, we cite *Memphis, etc., v. Gardner*, 171 S. W. 1082-1085.

The motion for rehearing will be overruled.

FIRST STATE BANK & TRUST CO. OF ABILENE et al. v. WALKER. (No. 587.)*
(Court of Civil Appeals of Texas. El Paso. June 15, 1916. Rehearing Denied June 29, 1916.)

1. FRAUDULENT CONVEYANCES — 74(3)—GIFT—STATUTE.

Under Rev. St. art. 3967, relating to fraudulent conveyances, to sustain a gift of land as against prior creditors it must appear that the grantor was, at the time of making the gift, possessed of property within the state subject to execution, sufficient to pay his existing debts.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 188; Dec. Dig. — 74(3).]

2. FRAUDULENT CONVEYANCES — 206(2) — STATUS AS PRIOR CREDITOR—RENEWAL NOTE.

Where a creditor takes a renewal note for his debt after the debtor makes a voluntary conveyance, the original debt still continues and has precedence over the fraudulent conveyance, if the debtor was insolvent at the time of the gift.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 630; Dec. Dig. — 206(2).]

3. SUBROGATION — 23(3)—PAYMENT OF MORTGAGE—VOLUNTARY PAYMENT.

A party, who, without interest to protect, voluntarily loans to a mortgagor to satisfy and cancel the mortgage, taking a new mortgage for his own security, cannot have the former mortgage revised and himself subrogated to the rights of the mortgagee, unless a subrogation takes place by reason of the agreement of the parties.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. § 63; Dec. Dig. — 23(3).]

4. SUBROGATION — 41(6)—PAYMENT OF MORTGAGES—AGREEMENT.

The mere delivery, to the party loaning money to a mortgagor for the purpose of satisfying and canceling the mortgage, of the instrument and the note was not sufficient to show an express or implied agreement that the lender should be subrogated to the rights of the mortgagee under the old instrument, being an evidentiary fact merely tending to show such agreement.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. § 115; Dec. Dig. — 41(6).]

5. SUBROGATION — 23(1)—PAYMENT OF MORTGAGES—RETENTION OF INSTRUMENTS.

Where money was lent a mortgagor to discharge mortgages, and the lender retained the instruments, their payment gave it the right of subrogation if it was not a mere volunteer.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. § 60; Dec. Dig. — 23(1).]

6. FRAUDULENT CONVEYANCES — 272 — SOLVENCY OF GRANTOR—BURDEN OF PROOF.

In suit to remove cloud on title, by one claiming under a parol gift from a debtor, against lenders of money to him, claiming the rights of mortgagees by subrogation, the burden was on plaintiff to show her donor's solvency at the time of the gift only if defendants were prior creditors of the donor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 804; Dec. Dig. — 272.]

7. FRAUDULENT CONVEYANCES — 271(1) — STATUS AS PRIOR CREDITOR — BURDEN OF PROOF.

In suit to remove cloud on title, by one claiming under a parol gift from a debtor, against lenders of money to him claiming the rights of

mortgagees by subrogation, the burden was on defendants to show that they were prior creditors of the donor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 796; Dec. Dig. — 271(1).]

8. WITNESSES — 159(7)—DISQUALIFICATION—TRANSACTIONS WITH DECEDENT — ACTION AGAINST CORPORATIONS.

In suit by one claiming under a parol gift from a decedent against corporations to cancel liens claimed by defendants as creditors of decedent, and to remove the cloud from her title, testimony of plaintiff as to transactions with, and statements by, such decedent showing the gift was admissible.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 674; Dec. Dig. — 159(7).]

Appeal from District Court, Taylor County; Thos. L. Blanton, Judge.

Suit by Mrs. Alice G. Walker against the First State Bank & Trust Company of Abilene and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. M. Wagstaff and D. M. Oldham, both of Abilene, and O. C. Mulkey, of Commerce, for appellants. J. W. Moffett, of Abilene, for appellee.

WALTHALL, J. Mrs. Alice G. Walker brought this suit against the First State Bank & Trust Company of Abilene, Kansas City Life Insurance Company, Dalby & Ray, administrators of the estate of A. G. Hamilton, deceased, and Ford Fleming, for 100 acres of land in Taylor county, and alleged that, during his lifetime, A. G. Hamilton made a parol gift of the land to her, that she went into possession of the land under the gift, made valuable improvements thereon, and was entitled to recover same from the administrators of the estate and the other defendants who were lienholders on the land. She asked for a cancellation of the liens and removal of cloud from title.

Fleming answered that he had no interest, and was a mere trustee of the Kansas City Life Insurance Company. The Kansas City Life Insurance Company answered by general demurrer, general denial, alleged that it was a lienholder on the land, its lien having been placed on the land by A. G. Hamilton during his lifetime, that it had no notice of plaintiff's claim, that its claim had been proved up before the administrators and allowed as a lien claim, that its claim was a continuation of a mortgage originally executed and placed on said land prior to plaintiff's claim, and was a valid lien even if there was a parol gift to plaintiff; that, at the time of the alleged gift, Hamilton was largely indebted to others over and above the value of his property; that his indebtedness includes large sums for the purchase of the land described in plaintiff's petition. The Kansas City Life Insurance Company also plead that it was subrogated to the rights of a mortgage executed by Hamilton

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

to Russell, and that mortgage taken up by Aston, the Russell mortgage being prior to the alleged gift. Dalby & Ray answered by general denial, general demurrer, and adopted the pleadings of the First State Bank & Trust Company and the Kansas City Life Insurance Company. The First State Bank & Trust Company adopted the pleadings of the Kansas City Life Insurance Company and set up the mortgage on the land involved in this suit, and alleged that it was an innocent lienholder for value. The appellee, by supplemental petition, denied the facts alleged by defendants; denied that defendants were creditors of Hamilton at the time of the parol gift, but were subsequent creditors and lienholders with notice; that, if any debts or liens existed on the land claimed by her at the time, same has long since been paid off, canceled, and released of record. The following are the questions submitted to the jury and their answers:

"No. 1. Did A. G. Hamilton, by designation and description sufficient to identify it, give the 100 acres of land in controversy to the plaintiff in 1908? Answer: Yes.

"No. 2. When the plaintiff went upon the land in controversy in October, 1908, did she then take possession of the land as her own property under a bona fide belief that the absolute fee of said land had been given to her by A. G. Hamilton? Answer: Yes.

"No. 3. Has the plaintiff been in continuous possession of the land in controversy and claiming the same as her property since October, 1909? Answer: Yes.

"No. 4. At the time A. G. Hamilton caused the house to be moved upon the land in controversy, was he acting for plaintiff, and did he intend that such should become the property of the plaintiff? Answer: Yes.

"No. 5. At the time R. G. Hamilton grubbed certain land, and built certain fences, sheds, barns, and outhouses upon the land in controversy, did he make such improvements for the plaintiff as her property? Answer: Yes.

"No. 6. During the time the plaintiff has occupied the premises in controversy, has any one else, claiming such premises adversely to her, or holding under others claiming adversely to her, occupied said house with her? Answer: No.

"No. 7. At the time he took his mortgage on October 1, 1910, did W. J. Aston have constructive notice of the claims of plaintiff to the property in controversy? Answer: Yes.

"No. 8. At the time the representatives of the Kansas City Life Insurance Company took its mortgage on December 4, 1911, did they have constructive notice of the claims of plaintiff to the land in controversy? Answer: Yes.

"I further instruct you that where, at the time of the execution of a mortgage, a person other than the mortgagor is in actual possession of the mortgaged premises, and such possession is open, notorious, and visible and unequivocally hostile to the mortgagor, then, in law, such possession would be sufficient to put the mortgagor upon inquiry as to the rights of the person in possession.

"No. 9. At the time he took his mortgage on October 1, 1910, did the possession of plaintiff meet the above requirements such as to put the said Aston upon inquiry? Answer: Yes.

"No. 10. At the time the representatives of the Kansas City Life Insurance Company took its mortgage on December 4, 1911, did the possession of plaintiff meet the above requirements such as to put said representative upon inquiry? Answer: Yes."

To the following special questions, the jury made the following answers:

"No. 1. Did the plaintiff place on the land, involved in this suit, improvements, after October 6, 1909? Answer: Yes.

"No. 2. If plaintiff placed improvements on the land after October, 1909, what was the value of such improvements so placed on the land? Answer: \$584.

"No. 3. Did the agent of the Kansas City Life Insurance Company use such care and diligence to discover the plaintiff's claim to the land, if any, as an ordinarily prudent person would use under the same or similar circumstances? Answer: No.

"Question (a). Was the improvement placed on the land in controversy by A. G. Hamilton or by Mrs. Alice Walker? Answer: Mrs. Walker.

"Question (b). What was the value of said improvements? Answer: \$884.

"Question (c). What was the value of the use, that is, the rental value of said premises and land, from October 6, 1909, to the present date? Answer: \$500.

"Question (d). Has R. G. Hamilton been a tenant of A. G. Hamilton since October 6, 1909? Answer: Yes.

"Question (e). If so, then concerning what land or lands? Answer: Land or lands, but not lands in controversy."

On defendant's motion for additional findings, the court made the following additional findings:

"(1) The evidence in this case failing to show that, during the years 1907, 1908, 1909, 1910, 1911, 1912, and 1913, or during any of said years, the said A. G. Hamilton was insolvent, the court finds that the said A. G. Hamilton was solvent.

"(2) That on October 1, 1908, A. G. Hamilton executed to J. C. Russell a note for \$5,000 and to secure same a mortgage covering the land in controversy, and also 197 acres of additional land, which mortgage was at once recorded in the county clerk's office of Taylor county, Tex.

"(3) That after said Russell note became due, on October 1, 1909, the said A. G. Hamilton borrowed from W. J. Aston, \$8,725, to pay off said Russell note, and executed and delivered to W. J. Aston a note for such amount and likewise a mortgage upon the same land covered by the Russell mortgage, which mortgage was placed of record in Taylor county, immediately thereafter.

"(4) That about the 1st day of December, 1911, the said Hamilton borrowed from the Kansas City Life Insurance Company, one of the defendants in this case, the sum of \$7,000, which he used in paying off the said Aston note; and at such time the said Hamilton executed and delivered to the said Kansas City Life Insurance Company a note for said amount, secured by a mortgage upon the above-mentioned land and other lands, which mortgage was properly recorded in the office of the county clerk of Taylor county, Tex. At the time the above note and mortgage were given to the Kansas City Life Insurance Company, all of the Aston papers were likewise delivered to said insurance company.

"(5) At the time said Russell made said loan, Cunningham and Oliver, attorneys of Abilene, examined the title of such land for him; and, at the time said Aston and the Kansas City Life Insurance Company made their loans, J. M. Wagstaff, an attorney of Abilene, examined the title for them, and, at the time of the loaning of said money respectively, each of said mortgagees believed that they were loaning money to A. G. Hamilton and believed that said A. G. Hamilton had good title to the land covered by their mortgages, and believed that they were getting a first lien on said land.

"(6) As to all other matters which the defendants have requested the court to find on, it is the opinion of the court that the record does not warrant the court in making the findings such as are requested by the defendants, and the court therefore declines to make the findings."

The court rendered judgment for plaintiff for the 100 acres of land in controversy, and decreed that the deed of trust executed by A. G. Hamilton to Fleming for the use and benefit of the Kansas City Life Insurance Company, and the deed of trust executed by Hamilton to Bynum as trustee for the First State Bank & Trust Company, so far as they cover the one hundred acres, be canceled; that the cloud on appellee's title by reason of said deeds of trust be removed, and that appellee be quieted in her title as to all of appellants.

The refusal of the court to give appellants' peremptory instructions to the jury, to find in favor of appellants, is made the ground of error in each of the first three assignments, the first, on the ground that there is no evidence in the record tending to show that Hamilton was solvent at the time of the alleged gift of the land to appellee, there being evidence to show that, at the time of the gift, Hamilton owed debts which have not been paid, said debts having been proved up before the administration of the estate of Hamilton, and said debts are now represented in this suit by the administration of the Hamilton estate; the second, on the ground that the peremptory instruction should have been given for the reason that there was no testimony to show that appellee had made valuable improvements on the land, the evidence showing that the improvements were placed there by Hamilton; the third assignment claims that the peremptory instruction should have been given in appellants' favor on the ground that the evidence fails to show exclusive possession and control of the land under the alleged gift.

[1] In order to sustain the gift under article 3907, Revised Statutes, as against prior creditors, it must appear that such debtor was then possessed of property within this state subject to execution, sufficient to pay his existing debts. In *Maddox et al. v. Summerlin et ux.*, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567, our Supreme Court construes the above article as placing the burden on the one seeking to uphold the gift to show the solvency of the donor, at the time of the gift, as to prior creditors. Two questions are thus presented: Are appellants prior creditors? If they are, has appellee discharged the burden of showing the solvency of Hamilton at the time of the gift? The issue of Hamilton's solvency at the time of the gift was not submitted to the jury. We do not find in the record a request by either for a finding as to whether Hamilton was solvent at the time of the gift. The court's first additional finding is not such finding, although possibly intended to be such. The jury found that Hamilton made a gift of the land to Mrs. Alice G.

Walker, in 1908, and that she took possession of the land under the gift in October, 1909.

[2] At the request of appellants, the court made additional findings of fact. The court found that on October 1, 1908, Hamilton executed to Russell a note for \$5,500 and, to secure the note, gave a mortgage on land including the land in controversy. That on October 1, 1910, Hamilton borrowed \$6,725 from Aston to take up the Russell note, and again gave a mortgage on the same land to secure the Aston loan. That, in 1911, Hamilton borrowed \$7,000 from appellant, Kansas City Life Insurance Company, to pay off the Aston note, in each instance executing a new mortgage on the land to secure the new loan. It is evident that the indebtedness of Hamilton now held by the Kansas City Life Insurance Company, less the accrued interest, existed at the time of the gift, the same indebtedness being evidenced by different obligations held at different times by different creditors; while it is equally evident that the holding of the indebtedness by the appellee, the Kansas City Life Insurance Company, was not prior but was subsequent to the gift. Unless the appellants are prior creditors within the meaning of the statute, they are not in a position to question the validity of the gift on the ground that it is without consideration, or that Hamilton was insolvent at the time of the gift. It is evident that there is a difference in the attitude that Russell sustained toward the indebtedness of Hamilton at the time of the gift, and that sustained by Aston. Russell clearly was a prior creditor. If Russell had taken a renewal note for his then existing debt, under *Gonzales v. Adoue et al.*, 94 Tex. 120, 58 S. W. 951, the original debt would still continue and would hold preference over the voluntary conveyance of Hamilton, if he was insolvent at the time of his gift. The most that can be said of Aston is that he was a subsequent holder or purchaser of a prior indebtedness. Aston was not a creditor in any sense, was not interested in the Hamilton matters, until he loaned his money on the Hamilton note and mortgage on the 1st of October, 1910. He was interested in the disposition made of the money to the extent of seeing that the Hamilton mortgage to Russell was satisfied, thereby making his the first mortgage. His loan in no wise referred to the Russell note or mortgage, expressed no agreement of subrogation of right that Russell had, and his loan was in no way in protection of any interest he had in any of Hamilton's affairs. When his note became due the same proceeding was had as to appellant, Kansas City Life Insurance Company, its money discharging the Aston note and mortgage and a new note and mortgage executed in its favor, the new note and mortgage in no wise referring to the Russell or Aston notes or mortgages, nor do they contain any agreement for subrogation of any right of either. Appellants, Kansas City Life Insurance Company, and its trustee, and those

adopting its pleading, alleged that its loan to Hamilton of \$7,000 was for the purpose of and that it was used to take up the Aston note and mortgage lien, and that by reason thereof, and by reason of the agreement of the parties, appellant is subrogated to the rights of Russell and Aston. The facts stated in the pleadings as to the purpose and effect of the loan, to take up the preceding Hamilton note and mortgage, is clearly sustained both by the finding of the court and the evidence, but, in our opinion, not so as to the allegation of subrogation, and we are of the opinion, as appellants seem to be by their pleading, that before appellant, the Kansas City Life Insurance Company, has the right to set aside the gift, it must show that it is a prior creditor by reason of its having been subrogated to that right, by the attitude it sustains to the Russell note.

[3] The principal underlying subrogation is indemnity and no more. *Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528. Neither the Aston loan nor the loan of appellants to Hamilton was made to protect any interest then held by the lender. There was not in either instance a substitution of one creditor for that of the other, to whose rights the subsequent creditor succeeded in relation to the former debt, and in neither case was the subsequent loan an act done in protecting an interest then held by the lender. In fact, there is nothing in either loan to Hamilton that suggests an equitable proceeding, but each subsequent lender or creditor, after the Russell loan, is a mere volunteer, a stranger, in the matter of the loan, and the doctrine of subrogation does not enter into the transaction, unless it be by reason of an agreement between the parties that it should, as pleaded by appellants. It has often been held that one, who, having no interest to protect, voluntarily loans money to a mortgagor for the purpose of satisfying and canceling the mortgage, taking a new mortgage for his own security, cannot have the former mortgage revived and himself subrogated to the rights of the mortgagee therein. 37 Cyc. 471; *Rice v. Winters*, 45 Neb. 517, 63 N. W. 830; *Pollock v. Wright*, 15 S. D. 134, 87 N. W. 584. Under such circumstances, if any subrogation takes place, it must be by reason of an agreement of the parties. *Fleavel v. Zuber*, 67 Tex. 275, 3 S. W. 273. But there is no finding nor a request for a finding as to whether there was such agreement, either express or implied. In the *Fleavel v. Zuber* Case, supra, the court said:

"A party who has an interest in property, to be protected by discharging an incumbrance upon it, has the right to pay it and to substitute himself to the rights of the lienholder, whether either the creditor or debtor give his assent or not. But neither Brown nor Kaufman and Runge had such right. As long as the note remained undischarged in the hands of the * * * holder or his indorsers, they were strangers to

the title. Brown, as mere trustee in the deed in trust, had the power to make a sale if the debt were not paid, but had no interest in the property to be protected by the discharge of the lien. If any subrogation took place, therefore, it must have been by agreement of parties. That this can be accomplished by a payment in accordance with an express understanding between the debtor, the creditor, and a third party, to the effect that if such third party pays the debt he may hold the security for his reimbursement there can be no doubt. *Dillon v. Kauffman*, 58 Tex. 696; *Flanagan v. Cushman*, 48 Tex. 241; it is also recognized law that a payment upon a like agreement between a stranger and the creditor will have the same effect. In both these cases, however, this would seem a virtual assignment without reference to the doctrine of subrogation."

[4-7] It seems to us that, appellee being a stranger, a mere volunteer to the debt, having no interest to be protected by the payment of the Aston note and a release of the mortgage securing that note, if Aston had such an agreement with Russell as to give him the right of subrogation, it would be necessary that appellant show that it had such agreement with Aston. We do not believe that the mere delivery to appellant, the insurance company, of the Aston note and mortgage, as found by the court, would be sufficient to show an express or implied agreement for the right of subrogation. It is an evidentiary fact only tending to show such agreement. The retention of the Russell and Aston notes and mortgages and their payment would be sufficient to give the right of subrogation if appellant, the insurance company, were not a mere volunteer. *Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537. The burden is on appellee to show the fact of Hamilton's solvency at the time of the gift only in the event appellants are prior creditors. The record does not show that fact to have been established. Until the fact that appellants are prior creditors is shown, they would not be in a position to question her title. That they are prior creditors is purely defensive, and the burden is on appellants to show that fact. For the reason given, the first three assignments are overruled.

[8] Appellants' ninth and tenth assignments, complaining of error in permitting Mrs. Walker to testify as to transactions with and statements by Hamilton with her, in showing the alleged gift to her of the land, must be overruled, under *San Antonio Light Publishing Company v. Moore*, 46 Tex. Civ. App. 259, 101 S. W. 867.

Other assignments not specifically passed upon have been fully considered and are overruled, as they come within the principles discussed under the first three assignments.

We believe that the findings of fact so far as made by the jury and the court are well sustained by the evidence. We adopt their findings. Finding no reversible error, the case is affirmed.

MODERN WOODMEN OF AMERICA v. YANOWSKY. (No. 5628.)

(Court of Civil Appeals of Texas. San Antonio. April 19, 1916. On Motion for Rehearing, May 31, 1916. Rehearing Denied June 21, 1916.)

1. INSURANCE ⚡813—**FRATERNAL ASSOCIATIONS—ACTION ON POLICY—PARTIES.**

In a suit on a certificate of a fraternal association originally payable to plaintiff's father and mother, wherein plaintiff claimed to own all their interests by virtue of assignment from the heirs of her father, the failure to make her father a party was not error, where it appeared that he was dead.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1994; Dec. Dig. ⚡813.]

2. APPEAL AND ERROR ⚡731(5)—**ASSIGNMENT OF ERROR—SUFFICIENCY.**

An assignment of error in that "the verdict was not sustained by the evidence, the facts proven being insufficient on which to base a verdict for the plaintiff," was too general to require consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3021; Dec. Dig. ⚡731(5).]

3. APPEAL AND ERROR ⚡730(2)—**ASSIGNMENT OF ERROR—SETTING OUT CHARGE.**

An assignment of error complaining of material omissions from the court's general charge in that it failed to give certain instructions and in that it erred in the general charge, where neither it nor the statement contained the charge objected to, and where there was no reference to the page of record where the charge might be found, presented nothing for consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3014, 3015; Dec. Dig. ⚡730(2).]

4. TRIAL ⚡255(1)—**REQUEST FOR INSTRUCTIONS—NECESSITY.**

Notwithstanding Acts 33d Leg. c. 59, requiring all objections to the court's charge to be presented in writing to the opposing counsel and the court before the jury is instructed, it is still necessary to request a special instruction to supply an alleged omission in a charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-629; Dec. Dig. ⚡255(1).]

5. APPEAL AND ERROR ⚡268(1)—**EXCEPTION TO CHARGE—SUFFICIENCY OF EVIDENCE.**

Under Acts 33d Leg. c. 59, the complaint as to the sufficiency of the evidence to support a verdict would not be considered, where no exception was taken to the trial court's charge submitting the issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1596, 1604; Dec. Dig. ⚡268(1).]

6. APPEAL AND ERROR ⚡994(2)—**REVIEW—VERDICT.**

In a suit on a certificate of insurance, defended on the ground of nonliability by reason of failure to pay assessments, the credibility of the witnesses and the weight to be given their conflicting testimony was for the jury, and its verdict could not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3902, 3903; Dec. Dig. ⚡994(2).]

7. DESCENT AND DISTRIBUTION ⚡91(5)—**ACTION ON POLICY BY HEIR OF BENEFICIARY—PLEADING.**

In a suit on an insurance certificate payable to insured's father and mother as beneficiaries, where plaintiff claimed to own all the beneficiaries' interest by inheritance and as-

signment from her mother and from all the heirs of her father, a petition alleging that the insurer agreed to pay to each of the original beneficiaries sum of \$1,000 each at the death of the insured, the subsequent death of her father, without alleging that he died intestate and that there was no administration and no necessity for administration, was error of law apparent upon the face of the record and fundamental.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 365; Dec. Dig. ⚡91(5).]

8. DESCENT AND DISTRIBUTION ⚡91(5)—**ACTIONS BY HEIRS—DEMURRER.**

In such case the want of allegations that no administration was pending and that none was necessary could properly be raised by a general demurrer to the petition.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 365; Dec. Dig. ⚡91(5).]

9. DESCENT AND DISTRIBUTION ⚡91(5)—**FRATERNAL ASSOCIATIONS—ACTION ON CERTIFICATE—JURISDICTION—INTEREST OF JOINT BENEFICIARIES.**

A petition not showing plaintiff's legal right to sue for the beneficial interest of her deceased father, one of the two original joint beneficiaries in the policy, did not give the trial court jurisdiction to adjudicate the interest of the deceased beneficiary, and judgment disposing of such interest was fundamental error.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 365; Dec. Dig. ⚡91(5).]

10. JUDGMENT ⚡248 — **CONFORMITY TO PLEADINGS—ALLEGATIONS TO SUPPORT.**

Facts proven, but not alleged, cannot form the basis of a judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 434; Dec. Dig. ⚡248.]

11. EXECUTORS AND ADMINISTRATORS ⚡53—**EXEMPT PROPERTY.**

Where the fund due upon a policy of insurance is exempt property, it is not subject to administration.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. ⚡53.]

12. EXECUTORS AND ADMINISTRATORS ⚡46—**FRATERNAL ASSOCIATIONS—PROCEEDS OF POLICY—EXEMPTION.**

Where one of the joint beneficiaries named in a certificate of insurance survived the insured and died in April, 1913, before the fund was exempted from administration by Acts 33d Leg. c. 113, § 21, and where the rights of creditors to subject the benefits to the payment of debts became fixed upon the death of the insured, the fund was not exempt at the death of the joint beneficiary.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 297; Dec. Dig. ⚡46.]

On Motion for Rehearing.

13. APPEAL AND ERROR ⚡1172(2)—**DETERMINATION—PARTIAL REVERSAL.**

Under rule 62a for Courts of Civil Appeals (149 S. W. 2) declaring that, where the issues are severable, the judgment shall be reversed only as to that part affected by error, a judgment in a suit on an insurance certificate showing on its face that it was the intention of the parties that it should be a severable contract would be reversed in so far as it affected the interest claimed as an heir and by an assignment of other heirs of a deceased beneficiary, affected by fundamental error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4556; Dec. Dig. ⚡1172(2).]

Error from District Court, Bexar County; R. B. Minor, Judge.

Action by Minnie Yanowsky, as assignee of Rosie Yanowsky and of the heirs of Shop-sy Yanowsky, the beneficiaries named in a policy of insurance, against the Modern Woodmen of America. Judgment for plaintiff, and defendant brings error. Reversed in so far as the judgment affects the interest claimed from Shopsy Yanowsky, and cause remanded.

Truman Plantz, of Warsaw, Ill., and Pat M. Neff, of Waco, for plaintiff in error. Arnold, Cozby & Peyton, of San Antonio, for defendant in error.

SWEARINGEN, J. This suit was instituted by Minnie Yanowsky against the Modern Woodmen of America, an incorporated fraternal beneficiary organization, to recover \$2,000 claimed to be due by virtue of the maturity of an insurance policy issued to Leon Yanowsky, a brother of plaintiff. The policy was payable to Shopsy and Rosie Yanowsky. Plaintiff claimed to own all the interests of both beneficiaries named in the policy, by virtue of inheritance and assignments from the beneficiary Rosie Yanowsky and from all the heirs of the beneficiary Shopsy Yanowsky. The defendant organization answered by general demurrer and affirmatively that there was no liability on the policy sued on, because of violations of the contract by Leon Yanowsky during his life. Among other violations it was averred that Leon Yanowsky had failed to pay assessment No. 271, for February, during February, whereby he was suspended, and his attempted reinstatement was invalid because of breach of warranty of health at time of reinstatement. The case was tried before a jury.

[1] Plaintiff in error's first assignment complains of fundamental error and submits this proposition thereunder:

"Shadsa (or Shopsy) Yanowsky being named as one of the beneficiaries in the policy sued upon, he was a necessary party to his suit for the collection thereof. The failure to make him a party is therefore such fundamental error as will be considered on appeal without assignment of error thereon in the court below."

A sufficient answer to this proposition is that the petition of defendant in error alleged that Shadsa Yanowsky died in April, 1913, and there was uncontradicted evidence that warranted the jury in finding that Yanowsky was dead. The failure therefore to make Shadsa Yanowsky a party to the suit was not error, fundamental or otherwise.

Under the second assignment of error, plaintiff in error submits the following proposition:

"During coverture the husband has the sole management, not only of all community property, but also the sole management of the wife's separate property."

Inasmuch as the death of the husband, Shadsa Yanowsky, was both alleged and

proved, this proposition under the second assignment presents no error.

[2] The third assignment of error is as follows:

"Because the verdict is not sustained by the evidence, the facts proven being insufficient on which to base a verdict for the plaintiff."

This assignment is too general to require consideration. *Stacy v. Delery*, 57 Tex. Civ. App. 242, 122 S. W. 303; *Estes v. Estes*, 122 S. W. 305; *First State Bank v. Jones*, 139 S. W. 671.

[3] The fourth, fifth, and sixth assignments complain of material omissions from the court's general charge. The assignments are as follows:

Fourth: "Because the court did not instruct the jury as to the law in this case as to whether or not the plaintiff, Minnie Yanowsky, had authority under the law to bring this suit."

Fifth: "Because the court did not instruct the jury as to what the law was in regard to the rights of Shopsy (Shadsa) and Rosie Yanowsky, who were named as the beneficiaries in the policy or certificate on which this suit is based."

Sixth: "Because the court erred in his general charge to the jury for the reasons stated in the defendant's exceptions taken and filed with the court before said charge was read to the jury, in this: The court did not instruct the jury in regard to the administration of the estate of Leon Yanowsky or the estate of Shadsa Yanowsky, and leaves the jury in darkness as to what the law is with respect to the transfer of interests of deceased persons."

"These assignments are not presented in accordance with the rules, and cannot be considered. Neither the assignments nor the statement contains the charge objected to. * * * Nor are we directed to the page of the record where the charge can be found." *Darby v. White*, 165 S. W. 481.

[4] Furthermore, plaintiff in error did not request a special instruction to supply the omission now complained of. In 1907 the Supreme Court, through Justice Williams, held that it was necessary for the complaining party to supply an omission from the general charge by requesting a special instruction. Observe the following:

"* * * What is complained of was the mere omission of the court to go as far as it is now contended it should have gone, which omission should have been supplied by a request for a special instruction. *Parke v. San Antonio Trac. Co.*, 100 Tex. 222, 94 S. W. 331, 98 S. W. 1100; *San Antonio & Aransas Pass, Ry. v. Lester*, 89 S. W. 752. For this reason we say that the question indicated as in the minds of the Court of Civil Appeals does not appear from the certificate to be properly presented in the case." *Yellow Pine Oil Co. v. Noble*, 100 Tex. 360, 99 S. W. 1024.

The Legislature (Gen. Laws 1913, p. 114) made a change in the law governing charges to juries, requiring all objections to the court's charge to be presented in writing to the opposing counsel and the court before the jury were instructed. The question naturally arises: Since the passage of that act of 1913 is the trial court's attention properly called to the omission by exception, incorporated in the record by bill of exception, or is it still necessary to request a special instruction as was necessary before the act of 1913? The

question is answered by the Court of Appeals; for in May, 1915, after the act of the Legislature of 1913, the appellate court held that a special requested instruction is still necessary to avail of an omission. *Texas Central R. Co. v. Claybrook*, 178 S. W. 581 (writ of error pending in Supreme Court).

For the reasons indicated, we cannot sustain the fourth, fifth, and sixth assignments.

[5] The seventh assignment is as follows:

"Because the verdict of the jury is contrary to the overwhelming preponderance of the evidence, in that the overwhelming preponderance and weight of the evidence clearly showed that assessment 271 was not paid until about March 29, 1912, and was not paid at any time during the month of February, 1912."

The court's general charge instructed the jury upon the issue involved in this assignment as follows:

"If you further believe from the evidence that assessment 271 for the month of February, 1912, was paid to E. M. Hawk, the clerk of Bexar Camp of the Modern Woodmen of America, during the month of February, 1912, then you are instructed that your verdict must be for the plaintiff. If you believe from the evidence that assessment 271 for the month of February, 1912, was not paid during the month of February, 1912, then you are instructed to find for the defendant."

This charge was submitted to attorneys for plaintiff in error before being read to the jury. Plaintiff in error made no objection to the charge in so far as it submitted the issue of the date of payment of assessment No. 271. No charge was requested for an instructed verdict. It has been repeatedly held that complaint of the sufficiency of the evidence to support a verdict will not be considered where no exception was taken to the trial court's charge. In the case of *Elser v. Putnam Land & Development Company*, 171 S. W. 1052, the law is clearly construed:

"The act approved March 29, 1913 (Gen. Laws 1913, p. 114), which we have several times had occasion to consider, provides, among other things, that: 'The ruling of the court in giving, refusing or qualifying of instructions to the jury shall be regarded as approved unless excepted to as provided for in the foregoing articles.' In the case before us the issues raised by the pleadings and evidence were generally submitted to the jury by the court's charge. * * * No objections to the court's general charge, nor to the special charge submitting the defense noted, were made in accordance with the terms of the act of the Legislature referred to. So that, if we are to give the effect that the law says shall be given, when the issues are submitted without objection, the plaintiff in error is in the attitude of a litigant who, after the introduction of the evidence, has submitted to him the charge of the court and special charges given, and who has 'approved' such charges, thus legally assuming the position that the evidence before the court requires the submission of the issue to the jury for determination. If the facts were clearly uncontroverted which entitled the plaintiff in error to a judgment, he should have requested an instructed verdict. This he did not do, but assumed, as we have seen, the inconsistent position of saying to the court, in effect, This case cannot be taken from the jury on the ground that there is no evidence to support the cause of action or defense.

"In the case of *Cleburne Street Ry. Co. v. Barnes*, 168 S. W. 991, this court, among other

things, said: 'If, as provided by the amended statutes (act of 1913, above mentioned), a charge given without objection must be regarded as approved, it follows logically, we think, that parties who thus approve the charge are in the same situation as if that charge had been requested by them.'

"If the proposition embodied in the quotation is correct, and we think it is, it can hardly be contended that plaintiff in error, under the circumstances stated, will now be heard to say that the evidence in his favor is 'uncontroverted'; for by a long line of decisions in this state, it has been held that an appellant cannot complain of a charge given at his request. It is held to be invited error of which he can take no advantage on appeal. We conclude that plaintiff in error cannot now be heard upon the only proposition he urges before us."

[6] Then again the issue of fact was clearly and distinctly made by evidence of a direct and positive character; for the defendant in error, Minnie Yanowsky, testified, as shown by the statement of facts and plaintiff in error's bill of exception No. 5, that Leon Yanowsky paid assessment No. 271, for February, in February. The witnesses for plaintiff in error who testified to the date of the payment of No. 271 assessment were Mr. E. M. Hawk and his wife. Mr. Hawk said he had no independent recollection of the date of the payment and had to rely upon his books. He further testified that he would not say the payments were made on the dates indicated in either the letters, the books, or the receipts. Mrs. Hawk did not testify whether or not Mr. Hawk was in San Antonio during the month of February, 1912. She did, however, testify that the February and March money was paid to her on the 29th of March. Inasmuch as the jury was the exclusive judge of the credibility of the witnesses and of the weight to be given their testimony, this court cannot disturb the jury's verdict upon this question of fact. This assignment must be overruled.

[7] Plaintiff in error in propositions under the fourth, fifth, and sixth assignments has directed this court's attention to a fundamental error which is apparent in the petition of defendant in error. The original petition, filed August 23, 1913, by defendant in error, is the foundation of the case at bar. It is as follows:

"(1) Now comes Minnie Yanowsky, and, complaining of the Modern Woodmen of America, alleges:

"(2) That plaintiff is a resident of Bexar county, Tex., and the defendant is a fraternal beneficiary association incorporated under the laws of the state of Illinois, and doing business in Bexar county, Tex., and having an agent in Bexar county in the person of E. M. Hawks, upon whom service of citation in this cause may be had.

"(3) Plaintiff further alleges that the said defendant is a fraternal beneficiary society engaged in the life insurance business, and that the said defendant issued its policy of insurance on the life of Leon Yanowsky, such policy being dated December 8, 1910, and a copy of which is hereto attached and marked Exhibit A, and for all purposes made a part of this petition, and the defendant, in consideration of certain premiums or assessments, contracted and agreed in accordance with said policy of insurance to pay unto

Shopsy Yanowsky and Rosie Yanowsky the sum of \$1,000 each, respectively, upon the death of said Leon Yanowsky; the said defendant contracting and agreeing to pay the sum of \$2,000 upon the death of Leon Yanowsky to the beneficiaries designed by Leon Yanowsky in accordance with the provisions of said certificate of insurance above referred to.

"(4) Plaintiff further alleges that the said Leon Yanowsky, while in good standing, and while a member of the fraternal society, and while said policy was in full force and effect, died on or about October 12, 1912, and at the time of his death said policy of insurance matured.

"(5) Plaintiff further alleges that prior to the death of said Leon Yanowsky, in consideration of the plaintiff helping Leon Yanowsky in his business, Leon Yanowsky contracted and agreed with the plaintiff that the plaintiff should have the \$2,000 referred to in said policy of insurance upon the death of said Leon Yanowsky, and the plaintiff is the sister of Leon Yanowsky, and by virtue of said contract with Leon Yanowsky is entitled to be and is the beneficiary under said policy of insurance.

"(6) Plaintiff further alleges that the said Rosie Yanowsky referred to in said policy of insurance is the mother of the plaintiff, and the said Shopsy Yanowsky was the father of the plaintiff, and the said Shopsy Yanowsky died on or about April, 1913, and left as his only heirs his wife, Rosie Yanowsky, and his children, Mrs. Lena Smith, Ida Yanowsky, Louis Yanowsky, and the plaintiff; and subsequent to the death of the said father, and subsequent to the death of said Leon Yanowsky, the said Rosie Yanowsky and the heirs of the said Shopsy Yanowsky transferred and assigned unto the plaintiff all interest which they might have in and to the proceeds of the above-described policy of insurance, and confirmed the transfer of said policy of insurance made by Leon Yanowsky prior to his death, and confirmed the attempted change of beneficiary made by Leon Yanowsky prior to his death, and by virtue of all of the foregoing the plaintiff is entitled to all of the rights under said policy of insurance which the said Shopsy Yanowsky and Rosie Yanowsky would have been entitled to had no change of beneficiary been made by Leon Yanowsky, and had no transfer been made to this plaintiff as above alleged.

"(7) Plaintiff further alleges that by virtue of said policy or certificate of insurance above referred to, and by virtue of the said beneficiary made by Leon Yanowsky, and by virtue of said transfer as above alleged, the defendant is indebted to this plaintiff on said policy of insurance in the sum of \$2,000, and this plaintiff is the owner of all rights under said policy of insurance as above alleged.

"(8) Plaintiff further alleges that at the time of the death of Leon Yanowsky he was in good standing, and the defendant contracted and agreed to pay the \$2,000 upon the death of Leon Yanowsky to the beneficiaries named in said certificate of insurance, and by virtue of the said change of beneficiary made by Leon Yanowsky, and by virtue of the said transfer to this plaintiff, this plaintiff is entitled to all of the rights that the beneficiary named in said policy would have been entitled to.

"(9) The plaintiff alleges that all proofs of loss required by the above policy of insurance, or by the by-laws, have been furnished by the plaintiffs to the defendant, and the defendant on or about April 1, 1913, refused to pay the claim, and denied liability thereunder.

"Considering the premises, plaintiff prays for citation upon defendant, and that upon hearing hereof she have judgment against the defendant for the sum of \$2,000, with 6 per cent. per annum interest thereon from April, 1913, and all costs of court; and she further prays for general and special relief."

It will be noticed that in paragraph 3 it is alleged that plaintiff in error agreed to pay unto Shopsy Yanowsky and Rosie Yanowsky the sum of \$1,000 each, respectively, upon the death of Leon Yanowsky.

In paragraph 4 the death of Leon Yanowsky on or about October 12, 1912, is alleged.

In paragraphs 6 and 7 it is alleged that Shopsy Yanowsky, one of the joint beneficiaries named in the insurance contract, died in April, 1913; and it is further alleged that all his interest in the contract became vested, after his death, before the filing of this suit, in the defendant in error, his daughter, by inheritance and by assignment from all his heirs. It will further be observed that the petition of defendant in error contains no allegation that Shopsy Yanowsky died intestate; that there was no administration; that there was no necessity for an administration. And the petition contains no allegation that will excuse the omission of such allegations. The omission of such allegations from the petition of defendant in error is an error of law apparent upon the face of the record and is fundamental.

[8] Our Supreme Court, considering this question, says:

"We answer that the want of an allegation that 'no administration was pending and that none was necessary' could properly be raised upon a general demurrer to the petition. A general demurrer has the effect to admit as true for that purpose all facts which are alleged in the pleading challenged, as well as all facts which may reasonably be inferred from the facts alleged. If a fact necessary to be proved to sustain a recovery on the part of the plaintiff be neither alleged in the petition nor fairly inferable from facts alleged, a [general] demurrer to the petition must be sustained. *Canales v. Perez*, 65 Tex. 293; *Warner v. Bailey*, 7 Tex. 517. If the plaintiff in this case had alleged that there was no administration upon the estate of the decedent and no necessity for such administration, but had failed to prove it upon a trial, judgment must have been given for the defendant. Can the existence of those facts be inferred from the allegations of the petition in this case? It is claimed that the allegation that the estate was solvent would support the inference that 'there was no administration nor necessity for administration.' The estate might be solvent, and yet there would be a necessity for administration to pay the debts and to settle the affairs of the estate, to get it in proper shape for distribution among the heirs. The law does not provide that administration shall be had upon insolvent estates only, nor that heirs may sue for the property if the estate be solvent.

"In *Richardson v. Vaughan*, 86 Tex. 93 [23 S. W. 640], this question was raised by an exception that 'the plaintiffs had no right to institute and prosecute the suit as the heirs of John P. Richardson.' The trial court sustained the demurrer and dismissed the case, which judgment was affirmed by the Court of Civil Appeals, and upon writ of error to this court the judgment was affirmed. That case is directly in point, and settles the question certified to this court; for the objection was raised in that case by what was practically a general demurrer. The report of the case in 86 Texas does not show the manner in which the question arose, but the report of the decision of the Court of Civil Appeals shows that the question was raised as stated. [*Richardson v. Vaughan*] 22 S. W.

1112." *Laas v. Seidel*, 95 Tex. 442, 67 S. W. 1015.

[8] And, further, since the petition has failed to make the necessary allegations required by law to show that defendant in error has the legal right to sue for the interest of Shadsa Yanowsky, one of the two joint beneficiaries of the contract, it follows that the petition does not give to the trial court jurisdiction to adjudicate the interest of Shopsy Yanowsky. To render judgment disposing of this interest of the joint beneficiary not legally before the court was fundamental error. *Western Grocery Co. v. Jata & Co.*, 173 S. W. 518; *Hanner v. Summerhill*, 7 Tex. Civ. App. 235, 26 S. W. 906; *Monday v. Vance*, 32 S. W. 559; *Anderson v. Chandler*, 18 Tex. 436; *Ebell v. Bursinger*, 70 Tex. 120, 8 S. W. 77.

[10] Defendant in error urges that the omission in the pleadings is cured by the evidence. Justice Reese says:

"It is not necessary to cite authorities to sustain the proposition that facts proven, but not alleged, cannot form the basis of a judgment." *Stacy v. Delery*, 57 Tex. Civ. App. 242, 122 S. W. 303.

[11, 12] Defendant in error insists that, because the petition shows on its face that the fund sued for is exempt property, any attempt by the court to subject it to administration is null and void, as is the case with homesteads. This is a correct proposition of law as to exempt property. *Kimmons v. Abraham*, 176 S. W. 671; *Childers v. Henderson*, 76 Tex. 664, 13 S. W. 481; *Dignowity v. Baumblatt*, 38 Tex. Civ. App. 363, 85 S. W. 835.

Section 21, p. 228, of the General Laws of Texas, Regular Session, 33d Leg. 1913, does make money or other benefits to be paid by fraternal benefit societies exempt property. The section is as follows:

"No money or other benefit, charity or relief or aid to be paid, provided or rendered by any such society shall be liable to attachment, garnishment, or other process, or be seized, taken or appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary or any other person who may have a right thereunder, either before or after payment."

It will be noticed, however, that this section became a law 90 days after the adjournment of the Thirty-Third session of the Legislature. The adjournment was April 1, 1913. The law became effective about July 1, 1913.

The petition alleges that the beneficiary Shopsy Yanowsky died in April, 1913, which was before the funds sued for became exempt from administration. In fact, the rights of creditors to subject this benefit to the payment of debts became fixed upon the death of the member, Leon Yanowsky, which is alleged to have occurred about October 12,

1912. It clearly appears from the petition, in view of the date of the law, that this fund was not exempt at the time of the death of the joint beneficiary, Shopsy Yanowsky.

Our conclusion is that, because the petition shows that the interest of the beneficiary Shopsy Yanowsky was not legally subjected to the jurisdiction of the trial court, and because the petition further showed that Shopsy Yanowsky was one of two joint beneficiaries in the contract sued upon, the judgment of the trial court based upon the defective petition is fundamental error of law which is apparent upon the face of the record.

We reverse the judgment and remand the cause.

On Motion for Rehearing.

We are asked by appellee to modify our judgment, reversing the judgment of the trial court and remanding the cause generally, so as to affirm that part of the judgment of the district court by which appellee recovered the interest acquired by assignment from Rosie Yanowsky.

[13] In our original opinion we treated the contract of insurance as a joint contract, because the appellee, as well as the appellant, the jury, and the trial court had so treated it. Since, however, appellee asks for a severance in his motion for rehearing, and since the contract on its face shows that it was the intention of all parties to the contract that it should be a severable contract (*Keary v. Mutual Reserve Fund Life Ass'n* [C. C.] 30 Fed. 359; *Emmeluth v. Home Benefit*, 122 N. Y. 130, 25 N. E. 234, 9 L. R. A. 704; 6 Ruling Case Law 858, § 246; *Pioneer Co. v. Phoenix Co.*, 110 N. C. 176, 14 S. E. 731, 38 Am. St. Rep. 673; *Coleman v. Insurance Co.*, 49 Ohio St. 310, 31 N. E. 279, 16 L. R. A. 174, 34 Am. St. Rep. 565; 1 Story on Cont. [5th Ed.] § 26; 1 Addison on Contracts [Morgan's Ed.] 80, § 42, notes 1 and 2), we conclude that appellee's motion should be granted (Rule 62a for Courts of Civil Appeals [149 S. W. x]; *Nona Mills Co. v. Jackson*, 159 S. W. 932; *Johnson v. Conger*, 166 S. W. 406).

The judgment of the trial court is reversed only as to that part affected by the fundamental error, which is the interest claimed as an heir and by assignment from the other heirs of Shopsy Yanowsky. The judgment as to the interest acquired by assignment from Rosie Yanowsky is to be deemed conclusive, and so taken in entering the final judgment to be rendered in the case upon trial of the other issues.

The judgment of the trial court is reversed in so far as it affects the interest claimed from Shopsy Yanowsky, and the cause remanded.

BIGHAM v. STAMPS. (No. 7619.)

(Court of Civil Appeals of Texas. Dallas. July 1, 1918.)

BOUNDARIES \S 37(5)—ACTION—EVIDENCE.

In action to quiet title, the issue being a disputed boundary, evidence held to show valid agreement and location of boundary between defendant and a predecessor in title of plaintiff.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. $\S\S$ 186-189, 193; Dec. Dig. \S 37(5).]

Appeal from District Court, Freestone County; A. M. Blackman, Judge.

Action by A. D. Stamps against E. V. Bigham. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Dexter Hamilton, of Corsicana, for appellant.

TALBOT, J. This suit was instituted by the appellee against the appellant to recover a tract of land, a part of the D. Bratt survey situated in Freestone county. The petition is in the usual form of an action of trespass to try title, but the real question involved is one of disputed boundary. The defendant pleaded not guilty, the statutes of limitation of three, five, and ten years, and set up claim to only a part of the land in controversy. No evidence appears to have been offered in support of the pleas of limitation, and no question arises on this appeal in reference thereto. The case was tried by the court without the aid of a jury and judgment rendered in favor of the plaintiff. Defendant's motion for a new trial being overruled, he perfected an appeal to this court, and the case was submitted on briefs for appellant; no briefs having been filed in this court by appellee. The court filed the following conclusions of fact and law:

"Conclusions of Fact.

"(1) In September of the year 1898, the defendant E. V. Bigham and one J. C. Wells owned in common, or jointly, a tract of land in Freestone county, Tex., aggregating 287 acres, of which the land in controversy in this suit was a part.

"(2) In November of 1898, the said defendant, E. V. Bigham, and the said J. C. Wells, effected a partition of said tract of land, and the defendant Bigham erected a fence along the west line of the portion of the tract deeded to him by Wells, and asserted no title or claim to any portion of the tract west of this line until about the year 1910.

"(3) During the year 1910, one W. D. Anderson owned that portion of the 287-acre tract formerly owned by J. C. Wells. This he had verbally promised to sell to one Ben Pillans.

"(4) While Ben Pillans was occupying this tract of land as the tenant of Anderson, he (Pillans) and defendant Bigham undertook to agree upon a new division line between the two tracts belonging to Anderson and Bigham, respectively.

"(5) At the time of the alleged agreement as to the new division line, Pillans had no title or interest in any portion of the land in controversy. No definite or fixed line was ever agreed

upon between Pillans and defendant Bigham. Anderson, the owner of the Wells tract of land, took no part either in person or by agent in the attempted establishment of this new line, and afterwards sold the land and executed a deed conveying all the land in controversy herein.

"(6) Plaintiff, A. D. Stamps, deraigned title to all the land in controversy in this suit.

"(7) The defendant, E. V. Bigham, nor those under whom he claimed, have held the land in controversy for a sufficient length of time to mature title under any of the statutes of limitation.

"Conclusions of Law.

"1. This being a suit in trespass to try title, and the plaintiff having deraigned title to the land in controversy, and there being no limitation in behalf of the defendant, and no partition or contract for the establishment of a division line, other than that asserted by the plaintiff, it follows, as a matter of law, that the plaintiff should recover herein."

The appellant contends, in substance, that the evidence adduced conclusively shows that the boundary line as claimed by him was agreed upon between him and the parties who owned the adjoining tract at the time of such agreement; that the trial court erred in finding, in the fifth paragraph of his conclusions of fact, that W. D. Anderson took no part in fixing the said boundary line, as the uncontroverted testimony showed he suggested and agreed to the running of the line by appellant and Pillans; and that the court erred in finding, in said fifth paragraph of his conclusions of fact, that, at the time of the agreement between appellant and Ben Pillans, Pillans had no title or interest in any portion of said land. These contentions of the appellant we believe to be well taken. It appears that J. C. Wells and appellant Bigham owned jointly lands purchased of W. A. Dean, situated in Navarro and Freestone counties. By deed dated September 17, 1898, these lands were partitioned; the western portion, consisting of a part of the Bishop survey and a part of the Bratt survey, being conveyed to the said Wells, and the balance, consisting of a part of the Bratt survey, being conveyed to the appellant. That part of the Bratt survey received by J. C. Wells in this partition was conveyed by Wells to J. C. Hagler, by deed dated October 20, 1898, and by J. C. Hagler to W. D. Anderson by deed dated March 16, 1901. In 1910, Ben Pillans entered into an agreement with W. D. Anderson to purchase the land, and Anderson executed and delivered to him a bond for title thereto dated November 25, 1910. Before the bond for title was executed, but evidently upon the faith that it would be, Pillans and appellant agreed that they would have the division line between appellant's tract and the tract which he (Pillans) had agreed to buy from Anderson run out and the boundary line fixed and established.

Appellant testified without dispute that he and Wells, with whom he partitioned the land, never fixed the boundary line and never knew just where it was; that he and

Pillans employed W. W. Stewart, a surveyor, to run the line; that this was done; that he (Bigham) put a division fence on the line as thus surveyed and established; that said fence was still there and had been continuously since its erection; that Pillans had moved on the land, had made improvements on it, and called it his home. Appellant further testified that at the time the survey was made to fix the boundary line he had a conversation with W. D. Anderson, as well as with Pillans; that he went to see Anderson to get him to go with him and have the surveyor run the line and Anderson told him to see Pillans; that he had sold to Pillans, and that Pillans was the one to have it surveyed; that he said, "You get Pillans and have it surveyed." W. D. Anderson testified, in substance, that at the time the survey was made the land was not his, but belonged to Pillans, and that he was not asserting title to the land at the time the fence was put up. He testified that Pillans gave him a note for \$75, which, while it was called a rent note in the bond for title, was in fact a note given for interest on the purchase money, and that Pillans kept the interest paid up; that he also believed Pillans paid him something when the sale was made. Anderson further testified that Pillans sold the land to Tom Platt and that at the request of both of them he made a deed therefor to Platt. This deed was dated April 24, 1914, and on that day Platt deeded the land to appellee Stamps. W. W. Stewart, the surveyor who surveyed the land, testified that he was employed in 1910 by E. V. Bigham and Ben Pillans to locate the boundary line between them. Bigham and Pillans were both there when he ran the line. The distance in one of the calls had been scratched and another distance substituted for it. He ran the line through the shortest distance from the northeast corner of the Bratt survey to get the line between Bigham and Pillans, and it appeared the distance was shorter than the call on the south line. He then ran another distance, and Bigham and Pillans agreed to divide that distance in proportion to the amount of land each was to have in the division, provided some papers Mr. Anderson had should be the same as the papers used in running the line. He testified that it seemed to him that those papers were a partition deed between Bigham and Wells, but he did not read them, and that he supposed he had the partition deed to go by; that the question was whether or not Anderson's deed had the same field notes as the partition deed; that it was a question of distance in both tracts; that in the Wells-Bigham partition Wells got about one-third of the land and Bigham two-thirds; that there was an excess, and he divided the excess in the same proportion as nearly as he could; that, if the deed to Anderson showed the same field notes as the partition deed, then the line was to be where he fixed it; if not, then farther east about

192 varas. Pillans testified substantially as Stewart did with reference to the agreement between him and Bigham. The line agreed upon was to be the boundary line if Anderson's deed contained the same field notes as the original partition deed.

It is quite clear that the survey made by appellant and Pillans was made for the purpose of fixing the boundary line. In making this survey it was found that there was an excess of land, and this excess was divided two-thirds to Bigham and one-third to Pillans. The line thus ascertained and fixed, which was marked by the surveyor, was the line upon which Bigham immediately erected a fence. That it was agreed that this line should be the boundary line, unless it should appear that the field notes in the deed made by Hagler to Anderson should be at variance with the field notes in the Wells-Bigham partition deed, which partition deed was used by the surveyor Stewart in running the line, is shown beyond controversy. By this survey and the agreement of the parties the boundary line was definitely fixed. It also appears, without contradiction, as we understand the record, that the field notes contained in the Wells-Bigham partition deed as recorded in the deed records of Freestone county, and as set forth in the original partition deed itself, both of which were introduced in evidence, were the same as in Anderson's deed; that there was no variance between the description of the Bratt plat contained in Anderson's deed and the original partition deed. The terms of description in the original partition deed, in the deed from J. C. Wells to Hagler, in the deed from Hagler to Anderson, in the deed from Anderson to Platt, and in the deed from Platt to the plaintiff Stamps, were precisely the same, and the description of the land in all these instruments is set out in the identical terms of the original partition deed. The bond for title made by Anderson to Pillans also contains the same description. In this connection, it may be stated incidentally that appellant swore that the line was fixed and agreed upon without any condition or qualification whatever. The effect of the evidence also is to show, practically without contradiction, not only that Pillans agreed to the establishment of the boundary line as claimed by appellant, but that W. D. Anderson agreed thereto or acquiesced therein. As hereinbefore shown, appellant testified that at the time the survey was made at the request of himself and Pillans he had a conversation with Anderson, and that Anderson told him to see Pillans and to get Pillans and have the line surveyed. After the fixing of the division line by appellant and Pillans as shown, he (Anderson) never made any claim, so far as is disclosed by the record, that it was unsatisfactory to him, or that it was so fixed without his knowledge or consent. On the contrary, this line was recognized or acquiesced in by all parties for two or three years.

Pillans very shortly after the establishment of the line received a bond for title from Anderson, in accordance with their verbal agreement, lived upon the land, cultivated and improved it, with full knowledge that appellant, recognizing the division line as fixed, had placed his fence upon the line run by the surveyor Stewart. Under the facts shown by the record before us and the law applicable thereto, it must be held that the true division line is where it was established by the surveyor Stewart acting under the agreement of the parties. The legal title, it is true, was in Anderson at the time the division line was run and fixed by the surveyor Stewart, and even if it should be conceded, which is not done, that at that time Pillans had no such interest in the land as authorized him to make an agreement with appellant with respect to the establishment of the division line that would be binding on Anderson and those subsequently acquiring the land from him, still the evidence adduced shows, in our opinion, that Anderson was a party to the agreement under which said line was ascertained and fixed and that he and those holding under him are bound thereby.

We think the judgment of the court below should be reversed, and the cause remanded, and it is, accordingly, so ordered.

Reversed and remanded.

BENDER v. BENDER et al. (No. 7198)*
(Court of Civil Appeals of Texas. Galveston.
May 18, 1916. Rehearing Denied
June 8, 1916.)

1. TRIAL \S 350(1) — SUBMITTING ISSUE TO JURY.

It is error to submit an issue not raised by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 828; Dec. Dig. \S 350(1).]

2. NEW TRIAL \S 68—VERDICT CONTRARY TO EVIDENCE.

A verdict unsupported by evidence should be set aside on motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 135-140; Dec. Dig. \S 68.]

3. VENDOR AND PURCHASER \S 44—VALIDITY OF CONTRACT.

In suit under Vernen's Sayles' Ann. Civ. St. 1914, art. 3518, allowing suit for specific performance of contract for sale of land made by deceased, to enforce a contract for sale of land by defendant's testatrix, evidence that she was of sound mind and understandingly canvassed the contract, which was not unfavorable to her, with several advisors and her lawyers, and that complainant did not urge her action, although it also appeared she was 70 years old and on friendly terms with complainant, held not sufficient to raise an issue of undue influence.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. \S 69-76; Dec. Dig. \S 44.]

4. CONTRACTS \S 10(5) — VENDOR AND PURCHASER \S 13 — CONSIDERATION OF CONTRACT—MUTUALITY OF OBLIGATION.

An ordinary land sale contract providing for earnest money, examination of title, and

conveying a good and merchantable title, or on failure to do so to return the earnest money, was not lacking consideration or mutuality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 25; Dec. Dig. \S 10(5); Vendor and Purchaser, Cent. Dig. \S 14; Dec. Dig. \S 13.]

5. SPECIFIC PERFORMANCE \S 117—PLEADING —VARIANCE.

Where the petition pleaded the contract, in which the description was in part erroneous but stated that the contract in this particular was incorrect because of clerical error, and correctly described the property, and the undisputed evidence supported these allegations, there was no fatal variance between the description in the contract and in the petition.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. \S 377-381; Dec. Dig. \S 117.]

6. PLEADING \S 248(1) — AMENDMENT — NEW MATTER.

It was not intended by the rule allowing the filing of trial amendments that an amendment so filed might be made as a matter of right so as to include amendments setting up new causes of action or new defenses not pleaded or set up in some former plea, and which might cause a reopening of the case after proceeding to trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 686, 689-692; Dec. Dig. \S 248(1).]

7. PLEADING \S 245(3) — AMENDMENT—DURING TRIAL.

An amendment which would probably cause delay in a trial comes too late if offered after the parties have entered upon the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 658, 659; Dec. Dig. \S 245(3).]

8. APPEAL AND ERROR \S 959(3)—REVIEW—DISCRETION—REFUSING AMENDMENT.

The discretion of the court in refusing an amendment offered after trial has begun which would probably cause delay in trial is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3830; Dec. Dig. \S 959(3).]

Error from District Court, Harris County; Chas. E. Ashe, Judge.

Suit by W. F. Bender against Louis Bender, in which Peter Borgstadt intervened and answered. Judgment for defendant and intervener in district court on appeal by intervener from judgment for plaintiff in county court, and plaintiff brings error. Reversed and rendered.

H. E. Stephenson and T. H. Stone, both of Houston, for plaintiff in error. D. E. Simmons and Jones & Jones, all of Houston, for defendants in error.

LANE, J. For the purposes of this opinion we make the following statement:

On the 26th day of November, 1913, Mrs. Mary Hafer, under her maiden name, Borgstadt, and appellant, W. F. Bender, entered into a written contract in words and figures as follows:

"State of Texas, County of Harris.

"This contract of bargain and sale made and entered into by and between Mrs. Mary Borgstadt, a feme sole, party of the first part, and W. F. Bender, party of the second part, both

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Writ of error pending in Supreme Court.

residents of the city of Houston, Harris county, Tex., witnesseth:

"(1) That the party of the first part has this day bargained and sold, and by these presents does hereby bargain, sell, and obligate herself to convey, unto said party of the second part, or his assigns, subject to the conditions hereinafter named, all the following described property, to wit: Being a part of lot No. 11 in block No. 57, S. S. B. B., in the city of Houston, Harris county, Tex., fronting 45 feet on McKinney avenue, and running back between parallel lines 100, more or less, feet for depth, forming a rectangle, together with all improvements thereon, and being known and designated as No. 1818 McKinney avenue, and being generally known as the residence or homestead place of first party, upon which she has resided for about 40 years. First party is to have and retain the right to continue to use and occupy the premises herein sold, or contracted to be sold, for use as a homestead, without cost to her, so long as she may live, but the right reserved to use and occupy said premises by first party shall not be assignable, nor shall she sublet the same to any person, but shall have the right only to use and occupy same herself as a home until her death, whereupon all right to occupy the same by any person whomsoever except by, through, or under second party, shall terminate and cease. First party agrees to carry, at her own expense, insurance upon the improvements on said premises in the sum of one thousand dollars (\$1,000.00) so long as she shall occupy the same and until her death, the policies of insurance to be payable to second party, but second party is to pay all taxes which may be levied or assessed against said property from and after the date of the conveyance of the said premises to second party, except that first party is to pay all taxes due thereon for the year 1913 and all back taxes, if any, which may be chargeable against said property and be unpaid at the date of the conveyance by first party to second party.

"(2) The consideration to be paid to first party by second party for the property and premises above described is the agreed sum of fifteen hundred dollars (\$1,500.00) cash, to be paid as follows: One hundred dollars (\$100.00) on the execution by first party and the delivery to second party of this contract of sale and conveyance, and the remaining fourteen hundred dollars (\$1,400.00) to be paid within 60 days from the delivery of the complete abstract of title to said property for examination by second party, provided the title to said premises is a good and merchantable title as hereinafter provided.

"(3) First party agrees to deliver to second party at the earliest practicable date a complete abstract of title certified to date of delivery to the above-described property for examination, the said abstract of title to be paid for by party of second part. If upon examination the title as shown by the abstract is a good and merchantable title, then first party will make, execute, and tender to second party a good and sufficient deed conveying the aforesaid property to second party with covenants and general warranty clause in accordance with the terms and conditions of this contract.

"If the title to said property upon examination is found not to be a good and merchantable title, the defects therein shall be pointed out in writing by the attorney of second party, and first party shall have 60 days' time within which to cure said defects, or second party may have equal right to cure or remove said defects in said title at his own expense within 60 days after same are pointed out in writing by his said attorney. If the title is not good, and the defects are not cured by either first or second party within the time herein provided, then upon demand of second party first party agrees to return and repay the one hundred dollars

(\$100.00) in cash this day paid to first party as part payment upon the purchase price of the property herein sold to second party, and both parties shall, after said sum of one hundred dollars (\$100.00) is repaid to second party, be released from all liability hereunder as to each other.

"If the title to said property is found to be a good and merchantable title, and second party does not within 60 days after delivery of abstract of title and upon a tender of a warranty deed in accordance with the terms and conditions of this contract by first party pay to the first party the remaining amount, namely, fourteen hundred dollars (\$1,400.00) in cash due hereunder, then first party shall forfeit to herself and keep the said sum of one hundred dollars (\$100.00) this day paid by second party, which both parties hereby agree shall be forfeited as liquidated damages in the event of failure of second party to carry out the conditions of this contract, and thereupon both parties hereto shall be released from all liability hereunder.

"In the event the improvements upon the property herein sold shall be destroyed by fire during the occupancy and before the death of first party, after conveyance thereof to second party the money received for insurance under any policies of insurance on said premises paid for by first party shall be promptly used and expended by second party, or his assigns, in the construction of a building upon said property which first party shall have the right to use and occupy as herein provided until her death.

"Witness our hands in duplicate at Houston, Tex., this the 28th day of November, A. D. 1913.

Mary Borgstadt.
"W. F. Bender.

"Witness: G. W. Tharp."

Said contract was duly acknowledged by both parties thereto. The abstract of title provided for by the contract was delivered to appellant, W. F. Bender, on the 8th day of January, 1914. Mrs. Mary Hafer died on the 14th day of January, 1914, six days after the delivery of said abstract to appellant, W. F. Bender. From the time the abstract was delivered to appellant, Bender, up to the time of the death of Mrs. Hafer, she (Mrs. Hafer) was too ill to attend to any kind of business. After the abstract of title had been delivered to appellant on the 8th day of January, 1914, and before the death of Mrs. Hafer, appellant concluded to accept a deed to the property described in the contract from Mrs. Hafer, and to pay the \$1,400 balance of the purchase money due as stated in the contract, and, as Mrs. Hafer was too ill to transact any kind of business, appellant tendered said \$1,400 to G. W. Tharp, Sr., Mrs. Hafer's attorney, before the death of Mrs. Hafer, who declined to accept same. Mrs. Hafer died without making a deed conveying said property to Bender.

At the March term of the county court of Harris county, 1914, Louis Bender was appointed and qualified as executor of the will of Mrs. Mary Hafer, deceased. Thereafter, on the 4th day of April, 1914, appellant, W. F. Bender, filed his complaint in writing in the county court of Harris county, under the provisions of article 3518, Vernon's Sayles' Statutes, praying for a decree of the county court directing a specific performance of said contract entered into between himself and Mrs. Hafer, deceased, and Louis

Bender, executor, was served with proper process. Peter Borgstadt intervened in said cause to contest the application or prayer of appellant, W. F. Bender, for specific performance.

Upon trial in the county court a decree was entered directing Louis Bender, executor, to execute a deed conveying said property to said W. F. Bender under the terms of said contract. From this judgment the intervenor, Borgstadt, appealed to the district court of Harris county. In the district court W. F. Bender amended his petition, set up said contract, and, as before, prayed for a decree directing specific performance. On the 6th day of April, 1915, intervenor, Peter Borgstadt, filed his third amended answer, upon which he went to trial. He alleges that he is the owner of the property involved in this suit under the provisions of the will of Mrs. Mary Hafer, deceased, which had been duly probated, and entitled to the possession of the same; that the contract the specific performance of which is here sought to be enforced was obtained by appellant, W. F. Bender, by reason of undue influence brought to bear on the mind of Mrs. Hafer by said Bender. He alleges that at the time said contract was issued Mrs. Hafer was 70 years of age, weak in body and mind; that she lived within a few feet of appellant, W. F. Bender, at the time said contract was executed and was his close and confidential neighbor, and had so lived for a great number of years; that she had great confidence in Bender, and that she frequently and habitually consulted and advised with him about her affairs; that said Bender by reason of the confidence and trust imposed in him by Mrs. Hafer overreached her and wrongfully persuaded and induced her to execute said contract, to her great injury, and to the great advantage of said W. F. Bender; that, as said contract was obtained by said Bender by the exercise of undue influence upon the mind of Mrs. Hafer, the same should be declared void; and that the prayer of Bender for specific performance should be denied.

Plaintiff by supplemental petition denied all the material matters in defendant's answer.

We deem the statement above made, as to the material allegations of intervenor's petition sufficient, as the only issue the trial court submitted to the jury was: Was said contract obtained by W. F. Bender from Mrs. Hafer by the exercise of undue influence, as alleged by intervenor?

The case was submitted to a jury upon the following issues:

(1) "Did Mrs. Hafer (née Borgstadt) execute the contract which is in evidence before you by reason of undue influence of W. F. Bender operating upon her mind at said time? Answer 'Yes' or 'No.'"

(2) "What was the reasonable market value of the premises in controversy in this suit on November 26 and 27, 1913? State the amount you find in dollars and cents."

The jury answered the first question "yes," and the second that the value of said property at such time was \$4,900. Upon the answers of the jury the trial court rendered judgment that plaintiff, W. F. Bender, take nothing by his suit, and that the defendant, Louis Bender, executor, and intervenor, Peter Borgstadt, go hence without day, and that they recover their costs incurred herein against W. F. Bender. From such judgment W. F. Bender has appealed.

Practically the only question submitted by the trial court to the jury was as to whether or not the contract executed by Mrs. Hafer was obtained by appellant, W. F. Bender, by undue influence exercised upon or over the mind of the said Mrs. Hafer. Wherefore we think this is the principal, if not the sole, only, and controlling, question presented for our decision, and which, if answered in the negative, will dispose of all the issues presented in this cause.

[1, 2] If there was no evidence introduced to authorize the court to submit the question of undue influence to the jury, or, in other words, if the evidence was insufficient to raise that issue, the trial court should not have submitted the question to the jury for its verdict, and in the second instance the court should have set said verdict aside upon motion for new trial. To determine the foregoing question resort to such portions of the testimony of the various witnesses as bear upon this question must be had.

W. F. Bender, plaintiff in error, testified:

"Mr. T. H. Stone represented me in the preparation of said contract. I gave him full authority to represent me in said business. I signed said contract in Mr. Stone's office. I think Mrs. Borgstadt signed it in Mr. Tharp's office. Mr. G. W. Tharp and his son, Phillip Tharp, represented Mrs. Hafer in this matter. The contract is dated November 26, 1913. I think Mrs. Hafer and I were furnished duplicate copies of the contract between the 20th and 25th of November, 1913. Duplicate copies were furnished before the contract was signed up. I know that Mrs. Hafer had possession of a copy at her home before she signed it. I do not remember exactly what day I went to Mr. Stone's about the drawing up of this contract. I think it was about the 22d or 23d of November, 1913, something like that. Mrs. Hafer went up there with me at the time to see Mr. Stone. She had her attorney with her. She had her attorney called over after we got there. She wanted Mr. G. W. Tharp as her attorney but he was not in, and she said Mr. Phillip Tharp would do. My recollection is that this was about the 22d or 23d of November, 1913. That was the first time I had been up to Mr. Stone's office to see about the contract. I think it was the only time Mrs. Borgstadt was up there in Mr. Stone's office."

"I have transacted business next door to Mrs. Borgstadt since about 1906 myself, and my father was in business there probably 35 or 40 years before me. Mrs. Borgstadt was as healthy at the time she signed the contract as she ever was. She was 70 years old at the time of her death."

"I never did see the abstract that I procured. My attorneys had the abstract. I think I ordered it from Stewart Abstract & Title Company."

I ordered it about the latter part of December, 1913."

Phillip Tharp, witness for plaintiff in error, testified as follows:

"I am a son of Mr. G. W. Tharp. I knew Mrs. Mary Hafer during her lifetime. I was present when a contract between her and W. F. Bender was discussed in the latter part of 1913. Some one called from Mr. T. H. Stone's office that they wanted my father to come over, that Mrs. Hafer wanted him present, and he was out at the time, and so I went over."

Cross-examination:

"When I got over to Mr. Stone's office there was no contract drawn; that is, it was not in writing. The contract had apparently been agreed upon. The capacity in which I acted was to see that the contract was put in proper shape to carry out the terms as they had been agreed upon. I did not discuss in any way the advisability of the contract; that was not discussed. Mr. T. H. Stone dictated the contract."

W. G. Tharp, witness for plaintiff in error, testified as follows:

"With reference to whether or not I represented Mrs. Hafer in this transaction, I can explain just what I did. I was called up over the telephone by Mr. Stone, or somebody in his office, and was told that Mrs. Borgstadt was coming over to my office with a contract to submit to me about the date it was signed, and a few minutes later she came with a copy of the contract, and I was informed that she was making the contract, and she wanted me to read it to her and explain it to her, and I did so. A little later Mr. Stephenson came over, and Mrs. Borgstadt signed the contract in my office, in my presence, and in Mr. Stephenson's presence. There was no money paid there that I remember; I do not think there was. My son, Phillip, was with me at that time. I do not know whether I had taken him in as a partner at that time or not; I think I had. I think my son was present at the time the contract was signed, but I would not be positive. At that time I had known Mrs. Hafer, or Borgstadt, about five years. I had really known who she was for a great many years, but had never transacted business for her until about five years before that. I have no recollection of having heard anything about this particular transaction before that day. I do not think I had. It is possible that I had, but I do not remember it. At the time Mr. Stephenson got over to my office we had read the contract over, and I explained the provisions of it to Mrs. Hafer. It impressed itself somewhat on my mind, and I think I remember what took place while she was there. I read the contract to Mrs. Hafer. When we got down to the description it said '45 feet front on McKinney avenue and 102 feet in depth.' She remarked that she would not give a deed to 102 feet, or would not execute a contract to 102 feet, because she did not know whether she had it or not. She said that her deed called for 100 feet, and that is all she would contract for. I remember that. And after Mr. Stephenson came that question was raised, and he wrote in the contract '100 feet more or less'; scratched out the '2' in '102,' and wrote 'more or less.' That was to satisfy Mrs. Hafer. I explained to her that 'more or less' would not bind her to 100 feet, but it would give the party that was getting the property whatever it was; if it was less than 100 feet he had to take it, and if it was over he got it. Then the next question that was raised we got down to the third provision, and as written in the contract that was that she was to furnish an abstract of title. She said she would not do that. She said she had not agreed to do that, and she would not do it, because she had a good title; she had had over forty years' possession, and she would not give anybody an abstract, and

my recollection is she said that she never agreed to do it. So Mr. Stephenson wrote in with a pen: 'The said abstract to be paid for by party of second part.' That left her free from paying it. The other provisions of the contract she did not object to, and she did not ask me about the advisability of making it at all. She just simply asked me to read the contract and explain it to her, and that I did do. The only objections she made were where the interlineations were made as I have stated, and she did not ask me to raise objections to anything, and I did not. When Mrs. Hafer came to my office she brought with her either the copy of the contract now shown me or another one just like it. I do not think anybody came in the office with her."

H. E. Stephenson, witness for plaintiff in error, testified as follows:

"I want to state that after the execution of the original contract, and before the death of Mrs. Mary Hafer, I approached Mr. G. W. Tharp in his office in the city of Houston, and stated to him that Mr. T. H. Stone and myself had made an examination of the title to the land in question, and had decided in behalf of Mr. W. F. Bender to accept the title to the property and to pay the balance due, which was \$1,400, and in answer to which Mr. Tharp stated that Mrs. Hafer had not spent all of the \$100, but that he would take the matter up with her and get her up there to make the deed."

T. H. Stone, witness for plaintiff in error, testified:

"I prepared the contract in this case. At the time the contract was first discussed by me there was no one present except W. F. Bender, whom I represented, and Mrs. Hafer, or Mrs. Borgstadt; she was addressed interchangeably. I think, by both names. My recollection is we had two conferences in my office. As I recall it now, I believe, both of these conferences occurred the same day, or one ran into the other, perhaps; I think that is it. Mrs. Hafer and Mr. Bender came into my office and submitted a statement to me of the contract as they agreed upon it, and I discussed it with them until I understood it thoroughly, and they both seemed to understand it thoroughly. As I now recall, I asked Mrs. Hafer who represented her, if she had any attorney, and my present recollection is that after she had told me that Messrs. Tharp & Tharp represented her we rang them up, and my recollection is that at the first time Mr. G. W. Tharp was not in his office, and that his son came over. I am not so clear about which one came over, but I know that one of them came over, and I think—in fact, I am quite sure—was present when I dictated the contract, after we had gone over the entire transaction. Then, after the contract was written out, and I think the next day—I am quite sure the next day—Mr. Stephenson took the contract as prepared and went over to Mr. Tharp's office with it, and rang me up from there about their refusing to pay for the abstract of title, and talked to me about it, and I finally suggested that we waive that and go ahead and pay for the abstract of title. Mrs. Hafer was present and heard all this. I was not in Mr. Tharp's office. This last conversation between Mr. Stephenson and Mr. Tharp and Mrs. Hafer was not in my office; it was in Mr. Tharp's office. I was in my office. Mrs. Hafer was present in my office, and heard the whole conversation we had there, and stated to me that Mr. Tharp had represented her for years, and that he would represent her in this matter, and she would sign no contract which he did not approve, and I therefore asked that she get her attorney over there."

L. G. Bender, witness for plaintiff in error, testified on redirect examination:

"During 30 or 40 years I saw Mrs. Hafer every day. She would be over at my shop every

day. I would not call her an educated woman, but she was a woman of good common sense, and especially had lots of sense for her own interests."

"As to Mrs. Hafer's mental condition on or about November 26, 1913, I think her mental condition was the same always, one time like another. She was hurt the year previous to her death, but that never affected her mind a particle. She was hurt in the hip and back somewhere, she was always telling me, but she was always the same. During the time I have mentioned I never noticed anything peculiar or out of the ordinary in Mrs. Hafer's acts and conduct."

Mrs. Henry Harris testified in behalf of plaintiff in error as follows:

"I reside at 117 Chartres street, Houston, and have resided at that place for about 27 years. I knew Mrs. Mary Hafer about 27 years, and I knew of her all of my life. * * * I knew her right up to her death. There was not any change in our social relations at any time before Mrs. Hafer's death; we were on the best of terms and friends."

"During my acquaintance and association with Mrs. Hafer I had occasion to talk and converse with her about different things. I never did notice any indication of insanity or weakness of mind. She was the same to me always, like when I first got acquainted with her. She spoke mostly English with me, and sometimes German, just as we felt like. We both spoke German. On or about November 26, 1913, her mind was in a normal, ordinary condition, certainly, in my opinion."

On cross-examination she further testified:

"By a normal mind I mean just like my mind would be. She had just as good and sound a mind the last day I talked to her as she always had ever since I had been acquainted with her. She had a very bright mind, a very sensible woman. I considered her a very bright and very sensible woman. I was not present when Mrs. Hafer signed any agreement with Mr. Bender. I read said contract over. She brought it to my house and I read it over, and I told her it was a very good proposition. She brought it to my house because she was this kind of a woman that she would go around and let different people give her advice, I suppose, or wanted different people to know about her transactions, whatever she made. She always liked to get somebody's suggestions. She confided, placed confidence, in people, I think. I do not think she wanted my advice; she had a kind of a mind of her own that way, but she would like to tell people about it. The way the contract read it sounded to me like it was a good one. I did not know what the property she was selling there was worth. I did not know how long she was going to live either. * * * If I was just a single person in the world, and a proposition like that should be put before me I believe I would accept it."

On redirect examination she further testified:

"I saw that contract. She brought it over there and she let me read it. I do not remember whether she had her signature on it at that time. I don't remember that, but she let me read it, and I told her, I said, 'Well, Mrs. Hafer, if everything is like it says here, that's a pretty good proposition.' She says, 'Yes; I think so myself.' So, of course, I just left it with her. She seemed to understand the contract thoroughly. She did not express any dissatisfaction with it; she was perfectly willing, and she told me she wanted Mr. Bender to have the property of hers; she said she wanted no one else but Mr. Bender to have it."

C. L. Fitch, witness for plaintiff in error, testified as follows:

"I reside at 1906 McKinney avenue, on the corner of McKinney and Hamilton, in the city of Houston. I am engaged in the real estate business. I have resided out there on McKinney avenue some 16 or 17 years. I should imagine my residence from the front door would be about half a block from Mrs. Hafer's. I knew her during her lifetime. As to the extent of our social relations, she would call around to the house very frequently, and particularly so when she had any business; she generally advised with me when she had any business. During that length of time I saw her often, and on every time I passed her house I would stop and chat with her. She had some flowers, and I was very fond of those and chat with her. That relation continued up to her death. I know about the contract that was executed by Mrs. Hafer to Mr. W. F. Bender. I read it. She brought it over to the house before it was executed. It hadn't been executed when I read it. I remember that. I don't remember the time, but she brought it over there for the purpose of my reading it over and advising her. I read it over and explained it to her. She seemed to understand it thoroughly and knew what she was doing. She did not at any time ever indicate a weakness or unsoundness of mind, and defect in mind or memory. Miss Mary, from the time I knew her up to the time she died, I think she was practically the same; she had a good mind so far as I was able to judge."

"I cannot state what time she brought me that contract, only she told me she hadn't turned it over to Mr. Bender yet. She brought it over for me to read and explain to her. I don't think any signatures were attached to it at all at that time. She only brought one copy to me. I never saw it afterwards; I don't know whether she signed that contract or not. When she brought it to me, she wanted me to read it over and see what I thought about the trade she was making, and I read the contract over, and I impressed upon her mind that she was deeding that property away to Willie Bender when she did. I said, 'If that's your intention, that's in the contract, but you understand when you deed that that property is going over to Mr. Willie Bender.' She says, 'Well, I want Willie Bender to have it.'"

On redirect examination this witness testified as follows:

"As near as I can read the contract handed me, that looks like practically the same one that she brought over to the house; it read just that way; that was the way it read. I don't know whether this was the one or not. This is practically the same; the reading of it is the same. I can't recall any new clause in this that wasn't in the other. I can't recall anything that's left out of this; just as I remember it."

A. J. Harris, witness for plaintiff in error, testified:

"I live at 1117 Chartres street, corner Dallas. I have resided there 26 or 27 years. I think my residence is about three blocks from Mrs. Hafer's residence. I have known her for 45 years. During that time I have seen her every once in a while. That continued on up to about, say, a week before her death. I haven't seen anything different in her actions regarding her mind from the time I first knew her until a week before she died, during that entire time. My opinion is that her mind was sound at the time of her death."

On cross-examination this witness testified:

"My wife was on the stand this morning. I married Miss Kolbow. My wife is not related to Mr. Bender. Mrs. Hafer came over to my house every once in a while, sometimes once a

week, about on an average once a week. She brought the contract around to my house, and I read it. She met me on the street, and I read it on the street at her request, before I got home with her; then I read it again at my house. I met her across the street in front of Mr. —, near home. She was coming from town. She pulled it out on the street and let me read it. Afterwards she came on home with it. I believe it was that night she came to my house. I don't know of anybody else that read it for her; I couldn't say positively, only what I heard. I have heard of another party reading it—Mr. Fitch. I didn't hear him testify a while ago that he had read it. When I read it over I told her that she was making a very cheap bargain, and that if she wanted to I would fulfill it, every part of it, and give her \$1,000 more, and she said there wasn't any use talking to her about giving her any amount of money for it; that she wanted Mr. Bender to have the property. I don't know exactly why; she just said she wanted him to have it. She seemed to be friendly with Mr. Bender. I actually offered to give her \$1,000 more than was given her, but she wouldn't take it. That was before the contract was signed, before she told me she was going to make the contract. She told me what Mr. Bender had offered her. Then I made her this offer, and she wouldn't accept it."

Herman Schneider, witness for plaintiff in error, testified:

"I reside at 1904 McKinney avenue. That is 200 feet from where Mrs. Mary Hafer resided last. I have resided there about 24 years. I knew her during her lifetime. I expect I saw her four or five times a week, probably every day. I have had occasion to discuss different matters with her from time to time. * * * I couldn't say as to the date, but as long as I have known her I always considered her to be sound in mind. I knew her up to her death."

Mrs. Mary Schmidt, witness for plaintiff in error, testified:

"I reside at 1118 Hamilton. That is two blocks from where Mrs. Mary Hafer resided during her lifetime. I have resided there 31 years the 23d day of this month (April, 1915). I met Mrs. Hafer just 2 years before I got married. I got married on the 23d day of April, 1884, I believe it was. I don't know how often I saw her during that time; sometimes I saw her every day for a week or so; then again sometimes I wouldn't see her for two or three weeks. That continued up to her death. I saw her in the later years more than I did in the first years. I had occasion to converse with her about various matters from time to time; we spoke matters over, you know. Lots of times I told her not to take my advice; to go to Mr. Schneider; to go to Mr. Bender lots of times. She came to her neighbors with her troubles, you know. * * * I never noticed during the time I have known her any weakness in her mind or memory. She was always of a sound mind. I always thought she had a very good memory. In my opinion, her age had no effect at all upon her mind or memory; I never noticed any flaw of any kind. I did not know anything about a contract she executed with Mr. W. F. Bender until after it was over with, but I had oftentimes joshed with her and said, 'Mrs. Hafer, I reckon Mr. Bender will fall heir to your estate.' She said, 'Well, Mr. Bender is mighty good to me.' That is all I know about it. At the time it happened I was away from home. Mr. Bender has always done more for her than anybody else's son; he has been her daily companion."

"I attended the funeral of Mrs. Hafer. Mr. Bender attended to the duties of arrangements of the details. Afterwards her cousin came. I don't know anything about it, but Mr. Bender was the person that took it in charge. That

was Mr. Will Bender. In her sickness, from time to time, or needs through the year, he attended to her wants. He was her daily companion and knew from time to time whether she was sick or whether she was well, because his butcher shop was right next door; all she had to do was to call out of the window and she could call him."

It was also shown by the undisputed evidence that Mrs. Hafer (née Borgstadt) became very ill on the 7th of January, 1914, and remained so until she died on the 14th of said month, without having conveyed the premises in question to W. F. Bender; that the abstract provided for under the contract was delivered to said Bender on the 8th day of January, and that in a very few days thereafter, and before Mrs. Hafer died, he agreed to accept a conveyance to said property, and so expressed his intention to G. W. Tharp, Sr., who Mrs. Hafer had informed him was her lawyer, and offered to pay said Tharp the balance of the purchase money named in the contract, and that, owing to the serious illness of Mrs. Hafer, it was impossible for him to make such tender to her at that time; that the property described in the contract was situated in Houston, Tex., at No. 1816 McKinney avenue, and was at the time said contract was made, and had been for 30 or 40 years, the home of Mrs. Hafer, that said property was worth about \$4,000 to \$4,900 at the time of the execution of said contract.

Intervener, Peter Borgstadt, testified as follows:

"The first time I talked with Mrs. Hafer about selling the place she did not show me any written agreement. She had not signed it then. She said she sold her place for \$1,500, and she could stay there and live. That was before she had the contract in the house; I do not know whether she had it written; I was at her house. At that time she told me she wanted to sell it, and after I got there again she done sold it already, the second time. I do not remember when I was there the second time; it was about a week after, or something like that. Mrs. Hafer showed me the contract then. I think I would know the contract if I were to see it. The paper now shown me is the contract. Mrs. Hafer showed me the contract, and I read it over. It was already signed at that time when I saw it."

"I do not recollect the day at all that I last talked to Mrs. Hafer before November 26, 1913. I had some conversation with her in November, 1913. In the conversation in November, 1913, we talked about her selling her place. I do not know particularly how long the conversation lasted; it lasted a good while. The day I was in there we would be together maybe an hour, or half an hour, something that way. The first time she told me she wanted to sell her place to Mr. Bender, and the next time we had the contract. She took the contract out of her desk and showed it to me. I did not see the contract any more before she died. After Mrs. Hafer died I found the contract in her desk, where she took it out the first time to show it to me. The desk was in her little room where she always had been sleeping. I also found her will there. I took the contract home, and Mr. Tharp took the will and brought it to the courthouse. Sometimes Mrs. Hafer spoke about her business affairs to me. She talked lots of that money that she lost back there—that was something that bothered her

a heap—to Lyons, or whatever his name was. That was at the time I talked to her before November, 1913. That is what she had been talking about, about what she had loaned out at that time to Lyons, and talked about Bollfrass, and everything. She said she was afraid always she would lose that. That is the most we talked about that I can remember much of in 1912. During 1913 selling her place was the most that we talked about. At the first time I went over there she told me she sold the place to Mr. Bender, and he would support her, and they would live together. She told me then she wanted to sell the place to Mr. Bender, and he would stay and live with her and build up the house better yet, and he would give her all she wanted to eat, and buy her a hat once in a while; that is all she would need. She would not live on her money. She did not have the contract yet. The next time she came in she had the contract there. Before I saw the contract Mrs. Hafer had been telling me how she sold the place; that Mr. Bender would support her and live with her. That is what she told me just before I saw the contract. I cannot remember everything she said. Mrs. Hafer did not do anything for a living. I do not know any reason why she did not have an occupation or business except she was too old to do anything. I have no objection to telling all I know about this case, but what I do not know I cannot tell. I have stated I had these conversations with Mrs. Hafer almost every week, when I would come in to town. From those conversations and discussions I had with Mrs. Hafer I reached a conclusion as to whether her mind was a strong mind or a weak mind. When she sold the place she told us Bender would attend to her and support her, and he would live with her, and he was going to make a two-story house out of it; and later on she said that she had to live by herself, anyhow; that she done sold it. It looked to me like she did not know; looked like she did not have a good mind. I cannot remember everything that Mrs. Hafer spoke, it is so long, over a year now. I just cannot recall those things Mrs. Hafer said that caused me to form those opinions I had; I did not think I had to remember them. I think we have all now that I know about this case that I can remember. Maybe I can remember later on yet, if I think about it."

Mrs. Peter Borgstadt testified that Mrs. Hafer was weak in mind, and was for a whole year, and that she had not been strong for a whole year just prior to her death, and that she, Mrs. Borgstadt, and her husband, read and explained the contract to Mrs. Hafer after it had been signed.

Mrs. Meincher, for intervener, testified that Mrs. Hafer was weak-minded; that she came to her house with her dress on hind part in front and insisted that that was the way it belonged; that she lost her way in returning to her home; and that she accompanied her back to her home.

Rev. Mr. Dycke, for intervener, testified that Mrs. Hafer was more feeble after she got injured by a fall than she had been prior thereto; that he noticed that she was absent-minded for some time; that she would sometimes mumble to herself, talk to herself; that she brought the contract to him and he read and translated it into German and explained it to her.

There is neither allegation nor evidence that Mrs. Hafer was laboring under such mental incapacity as rendered her incapable

of disposing of her property by deed, or that any misrepresentations or other fraud was practiced upon her by W. F. Bender, or any one for him, to procure the execution of the contract in question, but intervener's defense is based upon the theory that W. F. Bender procured the execution of said contract by undue influence. In support of such theory he offered evidence tending to support three propositions: (1) That Mrs. Hafer was 70 years of age, weak and feeble in body and mind, at the time said contract was executed; (2) that plaintiff, W. F. Bender, was a close neighbor of Mrs. Hafer's, and one in whom she had great confidence, and with whom she frequently consulted and advised about her affairs, and that he was in such position and bore such friendly relations to Mrs. Hafer that he could have wrongfully overreached and induced her to execute a contract against her interest and to his advantage; (3) that the consideration to be paid by plaintiff, W. F. Bender, for the property in question under the terms of said contract was much less than the value of said property; and (4) that the evidence tending to prove the three foregoing propositions was sufficient evidence to authorize and require the trial court to submit the question as to whether or not W. F. Bender procured the contract in question by means of undue influence, to the jury.

[3] We do not think the evidence is sufficient to show such weakness of mind on the part of the deceased as to render her easily susceptible of undue influence. The mere fact that appellant was her neighbor and friend in whom she placed confidence and trust, and that he had the opportunity to use undue influence upon her to induce her to make the contract, cannot, in the face of the undisputed evidence that she relied upon and consulted her other friends and her attorney before making it, and that appellant did nothing to urge or induce her to make it, be held sufficient to raise the issue of undue influence. In so far as the inadequacy of the consideration is concerned, we think the evidence falls to show such inadequacy. Such consideration was \$1,500 cash, and the payment of all future taxes, and to permit Mrs. Hafer to use such property as her home as long as she might live. No one could know how long Mrs. Hafer could live. She might have lived 10, 15, or even 20 years longer, and in such case W. F. Bender would have had the \$1,500, and the amount paid for taxes and general repairs on the property, invested for such time without interest or revenue of any kind arising therefrom. It is apparent that conditions might have arisen which would have made it a poor investment for Bender.

The only circumstance presented by the record which would have a bearing upon the question of undue influence is that plaintiff in error, W. F. Bender, had an opportunity to see and talk with Mrs. Hafer, deceased. There is no evidence that he took advantage

of this in any manner whatsoever. There is no fiduciary relation alleged or proved. The evidence shows that Mrs. Hafer expressed a desire prior to the execution of the contract in question, directly to Peter Borgstadt and his wife, to sell the place to W. F. Bender for the sum of \$1,500. She was represented by counsel at the time the contract was agreed upon and dictated, and was furnished with a copy of same several days prior to its execution. She advised with several of her neighbors about the contract before she executed it, and was represented by counsel at the time same was signed by her.

The case of *Barry v. Graciette*, 71 S. W. 309, lays down the proposition that:

"Undue influence avoiding a will is not established by evidence of opportunity therefor and the fact that testatrix had some time before expressed an intention to make a different disposition of her property."

Judge Fly, in *Salinas v. Garcia*, 135 S. W. 588, in which case a writ of error was denied by the Supreme Court, states the following:

"There is no presumption against a will because made by a man advanced in age. * * * Incapacity cannot be inferred from enfeebled condition of mind or body; for, if incapacity could be inferred from such facts, a man by mere inference might be deprived of his legal right to dispose of his property as he sees fit. The evidence showed without contradiction that the will was read to the testatrix in Spanish, her mother tongue, and that she expressed approval of it and thoroughly understood it. Her inability to see and read the will under such circumstances would not invalidate it. It is stated in 1 *Jarman on Wills*, p. 63, that blindness or deafness alone would not incapacitate to make a will."

See, also, *Patterson v. Lamb*, 21 Tex. Civ. App. 512, 52 S. W. 98, in which a writ of error was denied by the Supreme Court. *Helsey v. Moss*, 52 Tex. Civ. App. 57, 113 S. W. 590; *Simon v. Middleton*, 51 Tex. Civ. App. 531, 112 S. W. 441.

We find no evidence which justified the trial court in submitting the question of undue influence to the jury, nor to support the finding of the jury that the contract in question was procured by such influence.

Appellee Peter Borgstadt, by his cross-assignment No. 1, insists that the trial court erred in admitting in evidence, over his objection, the contract entered into by W. F. Bender and Mrs. Hafer, hereinbefore set out, for the following reasons:

(1) "Because said paper shows no independent consideration within itself, it merely showing it is an offer on the part of Mrs. Mary Borgstadt to sell to W. F. Bender a certain piece of property within a certain time, and it shows there was no consideration paid for such offer, and therefore it is unenforceable as to its specific performance for that reason."

(2) "Because the paper offered shows no mutuality or binding contract from Mrs. Mary Borgstadt to W. F. Bender or any binding contract on his part to her that could be enforced in the form of specific performance."

(3) "Because said paper described a piece of property different from that which is described in plaintiff's petition, and about which he seeks to enforce specific performance in this suit,

the purported contract describing a piece of property as lot 11 in block 57, and plaintiff seeks in his petition to have a contract enforced against 45 feet off of the west part of lots 5 and 6 in block 157, and it varies and differs from the pleadings in the case."

(4) "Because the said instrument shows it is merely an option, without consideration, and not binding, and there being no evidence to show it was accepted."

[4, 5] We overrule this assignment. We find that the considerations supporting the making of said contract were mutual and bound both parties thereto. We also find that the property in question was described in the contract between W. F. Bender and Mrs. Hafer as:

"A part of lot 11 in block No. 57, S. S. B. B., in the city of Houston, Harris county, Tex., fronting 45 feet on McKinney avenue and running back between parallel lines 100 feet, more or less, for depth, forming a rectangle. * * * being known and designated as No. 1816 McKinney avenue, and being generally known as the residence or homestead place of first party [Mrs. Mary Borgstadt], upon which she has resided for about 40 years."

Appellant's petition described the lots sued for exactly as they are described in the contract, except they are designated as "parts of lots 4 and 5 block 157," instead of "part of lot 11 in block 57." It is also alleged in the petition that the property described in the contract is the identical property described in the petition, and that that part of the description of said property in said contract which designates the same as a part of lot 11 in block 57 was inserted in said contract by mutual mistake, and was a clerical error, and was so erroneously inserted by inadvertence. And it is further alleged that the property sued for and the property described in said contract is one and the same property, and that it is the property upon which Mrs. Hafer resided for the last 40 years next preceding her death, and that it is generally known as the homestead of Mrs. Hafer, and that it is located on McKinney avenue, in the city of Houston, and is known and designated as No. 1816 McKinney avenue, and that it does front 45 feet on McKinney avenue, etc. The undisputed evidence supports these allegations.

"The office of description in a deed or other writing is, not to identify the land, but to furnish means of identification." *Duffie v. White*, 184 S. W. 1065; *Holley v. Curry*, 58 W. Va. 70, 51 S. E. 135, 112 Am. St. Rep. 944, and cases there cited.

There is no fatal variance in the description of the property as made in the contract and in appellant's petition.

By appellee's cross-assignment No. 2 he insists that the trial court erred in refusing him permission, after plaintiff had introduced his evidence and rested his case, to file his trial amendment alleging for the first time that W. F. Bender procured the execution of the contract by Mrs. Hafer by means of false and fraudulent representations made by said Bender to Mrs. Hafer, for the purpose of inducing her to execute,

and which did induce her to execute said contract, that the whole of the consideration agreed to be paid by W. F. Bender for the property in question was not stated in the written contract, and that after Mrs. Hafer discovered this fact she withdrew her said contract, etc.

[6-8] It was not intended by the rule allowing the filing of trial amendments that an amendment so filed might be made as a matter of right so as to include amendments setting up new causes of action or new defenses not pleaded or set up in some former plea, and which might cause a reopening of the entire case after the case has proceeded to trial. A trial amendment comes too late when offered after the parties have entered upon the trial, if such amendment would probably cause a delay in the trial of the case, and the discretion of the court in refusing same will not in such cases be interfered with by the appellate court. *White v. Bank*, 27 Tex. Civ. App. 487, 65 S. W. 498. The cross-assignment is overruled.

Having reached the conclusion that the undisputed evidence shows that appellant, Bender, was entitled to the decree prayed for, and that there was no evidence showing that the contract in question was procured by him by the exercise of undue influence over Mrs. Hafer, deceased, and as the case seems to have been fully developed, we further conclude that the judgment of the trial court should be, and it is here, reversed, and judgment is here rendered directing Louis Bender, executor, to execute a deed in his official capacity conveying to said W. F. Bender the property in his petition described.

Reversed and rendered.

RELIANCE LIFE INS. CO. v. BEATON.* (No. 7564.)

(Court of Civil Appeals of Texas. Dallas. June 10, 1916. Rehearing Denied July 1, 1916.)

1. INSURANCE ~~84~~(1) — AGENT'S COMPENSATION.

In an action by an insurance agent on bonus contract allowing compensation upon the amount of insurance procured, the words "sixty days allowed for settlement," in the absence of testimony showing the sense in which used, *held* to mean a grace of 60 days after the year covered by the contract in which to allow the parties thereto to settle among themselves the volume of business which had been procured, and not to have reference to the time allowed for the collection or payment of premiums due for such business.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 111, 114; Dec. Dig. ~~84~~(1).]

2. INSURANCE ~~84~~(1) — COMPENSATION OF AGENT — ACTION — INSURANCE AGENT — EVIDENCE.

In an action by an insurance agent on a bonus contract, based upon the amount of insurance procured during the year, evidence of plaintiff and a telegram from the company near the close of the year stating that his territory had procured \$1,223,000 life insurance business

and asking for more business, *held* sufficient to support a finding that the business procured during the year exceeded \$1,250,000.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 111, 114; Dec. Dig. ~~84~~(1).]

3. TRIAL ~~356~~(5)—SPECIAL ISSUES—APPLICABILITY.

In an action by an insurance agent for commissions on a contract for business "procured" during the year, judgment for plaintiff upon a finding of amount of business "procured" during the year was not invalidated by refusal of the jury to answer questions submitted by defendant as to the amount of business "procured and issued" and "charged, but not paid for in cash, and issued" during the year.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 852; Dec. Dig. ~~356~~(5).]

4. NEW TRIAL ~~34~~—MOTION FOR CONTINUANCE—DILIGENCE.

Where, in an action by an insurance agent for bonus upon business procured during the year, the defendant had had many months to prepare its defense, and had a duplicate set of books of the agency in its home office, from which it appeared that such defense was prepared, refusal of second postponement to enable the defendant to further examine the books was not ground for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 49; Dec. Dig. ~~34~~.]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by Ralph A. Beaton against the Reliance Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Harry P. Lawther, of Dallas, for appellant. Henry P. Edwards and Cockrell, Gray & McBride, all of Dallas, for appellee.

TALBOT, J. This suit was instituted by the appellee, Beaton, against the appellant, Reliance Life Insurance Company, March 14, 1914. The controversy arises out of a written contract entered into between appellant and appellee, whereby the appellant employed the appellee for the term of one year, beginning January 1, 1913, to solicit applications for insurance on the lives of individuals personally, and to procure agents and supervise their work in what is known as appellant's "Texas-Oklahoma Department." No question is raised about the pleadings, and it is unnecessary to state or set them out. The contract sued on provided that appellee should receive for his services certain commissions and a named "cash prize," provided the business procured by the Texas-Oklahoma Department, together with appellee's personal business during the year, reached a certain specified amount. The material portions or sections of the contract involved in the suit are as follows:

"Section 23. Party of the first part agrees to allow party of the second part a cash prize of one thousand (\$1,000.00) dollars provided the business procured by the Texas-Oklahoma Department, together with his personal business during the year ending December 31, 1913, amounts to seven hundred fifty thousand (\$750,-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

000.00) dollars (face value). Sixty days extra allowed for settlements.

"Section 24. In lieu of the above prize, party of the first part agrees to allow party of the second part a cash prize of two thousand (\$2,000.00) dollars, provided the business procured during any year as outlined above equals one million (\$1,000,000.00) dollars (face value). Sixty days allowed for settlements.

"Section 25. For each additional two hundred fifty thousand (\$250,000.00) dollars of business procured during any year as outlined in sections 23 and 24, an additional cash prize of five hundred (\$500.00) dollars will be allowed.

"Section 26. In volume requirements in sections 23, 24, and 25, \$5,000.00 of level accident additions with weekly indemnity or \$25.00 weekly indemnity health additions will count pro rata as \$1,000.00 life insurance. \$10,000 accidental death only will count as \$1,000.00 life insurance. Term insurance will count in volume requirement toward winning the cash prizes, but no bonus will be paid on term insurance."

Appellee's contention is that the business procured by the department over which he was appointed supervisor, together with his personal business, during the year ending December 31, 1913, exceeded \$1,250,000, and therefore by the terms of his contract with appellant he was entitled to the cash prize of \$2,500 provided for therein and sued for in this suit. Appellant contends that the prizes named accrued to appellee under the aforesaid provisions of the contract only upon the amount of business "procured by the Texas-Oklahoma Department, together with appellee's own personal business," being settled for in cash within 60 days, and that the business thus procured and settled for for the year ending December 31, 1913, and within 60 days thereafter, amounted to the sum of \$768,450 (excluding the South Texas business excepted by section 27 of the contract), whereby appellee became entitled to a prize of \$1,000, which appellant admitted to be due him, offered to pay, and which amount it tendered into court, and prayed that upon it being so found that it go hence without day and recover of appellee all of its costs.

The court submitted the case to the jury upon special issues, and upon the answers thereto judgment was rendered in favor of the appellee, and the appellant perfected an appeal to this court.

[1, 2] The first issue the jury was called upon to determine was submitted to them in the following question:

"Did the business procured by the plaintiff for defendant during 1913, and for which defendant received pay during said year or within 60 days thereafter, exceed \$1,250,000?"

To this question the jury answered "Yes." Appellant's first assignment of error complains of the submission of this issue, and the proposition asserted is that "It was error to submit to the jury an issue upon which there was no evidence." It will be noted that section 23 of the contract quoted above closes with the language, "Sixty days extra allowed for settlements," and section 24 with the language, "Sixty days allowed for settlements," and that section 25 provides that:

"For each additional two hundred fifty thousand (\$250,000.00) dollars of business procured during any year as outlined in sections 23 and 24, an additional cash prize of five hundred (\$500.00) dollars will be allowed."

The appellant admitted its liability under section 23 of the contract for \$1,000 and tendered that amount into the registry of the court, but denied liability for any sum over that amount. The contention of appellant, as we understand, is that, in view of the language of the contract, "Sixty days allowed for settlements," the appellee was not entitled to recover the \$2,500 sued for, even though the volume of business procured during the year 1913 exceeded the \$1,250,000, unless the further fact was shown that within that year, or within 60 days thereafter, the premiums on said amount of business had been paid in cash, and that the evidence was insufficient to establish that fact. The appellant offered no oral testimony tending to show the meaning of or sense in which the language quoted was used. The appellee's contention and version of the contract is that its terms show he is entitled to the \$2,500 claimed, if the business procured during the year 1913 amounts to \$1,250,000, and that the language "sixty days allowed for settlements" means that a grace of 60 days after December 31, 1913, was allowed the parties to the contract in which to ascertain and settle among themselves the volume of business which had been procured, and had no reference to time allowed for the collection or payments of premiums due for such business. In appellee's construction of the contract we concur, and hold that the evidence is sufficient to show (and the jury so found) that the volume of business procured by the appellant's Texas-Oklahoma Department, together with appellee's personal business during the year 1913, exceeded \$1,250,000.

But if it should be conceded that appellant's construction of the contract is correct, still we think the appellee, under the issue as submitted and the jury's answers thereto, was entitled to recover the amount awarded him. At all events the evidence was not so lacking in probative force as to warrant this court in saying, as a matter of law, there was no evidence that the premiums due for the amount of business procured by appellant's Texas-Oklahoma Department, together with appellee's personal business, for the year 1913, which exceeded \$1,250,000 were not paid during said year or within 60 days thereafter. The appellee testified:

"I assumed the duties for the defendant under the terms of that contract. * * * During the year 1913 I procured in person and through my agency under the terms of that contract considerably in excess of \$1,500,000 face value of the business (insurance) and turned same into the defendant. Just the figures I cannot give, because I haven't access to the books. The books and records that would show those transactions are in the Dallas office of the defendant. Under this contract every \$5,000 of level accident insurance counted \$1,000 life. In other words, in

accident you had to get five times as much as in life. \$279,000 accident, reduced down to life, would be one-fifth of \$279,000, which would be \$55,800, and the \$230,000 health would be divided by 25; every \$100 premium would be \$4,000 life. According to this letter the aggregate of the insurance stated to have been paid for at that time, computing it on that basis, would be in excess of \$1,000,000 for nine months. I was throughout the year 1913 engaged exclusively in the business of representing the defendant under the terms of this contract, absolutely so every minute of my time. I kept at Dallas records of the amount of business—life insurance and insurance business—procured by me the same as they did in the home office, duplicate set of books. The cashier reported to the home office how much business had been procured by and through me. I had no management whatever of that portion of the business; that is under the cashier's supervision. The home office of the company paid the salary of that cashier. I did not pay any part of it. He was absolutely the employee of the company at that time. * * * This is a telegram from Mr. Scott, December 29th. Mr. Scott is vice president and secretary of the company, the boss of the bunch. Throughout the year he was vice president and secretary of the Reliance Life Insurance Company."

The telegram referred to in the testimony of appellee just quoted is as follows:

"Pittsburgh, Pa., December 29, 1913.

"Mr. Ralph A. Beaton, 711 Prætorian Building, Dallas, Texas: At close of business Saturday for year shows Texas, Oklahoma million two hundred twenty-three thousand life, three hundred fifty-six thousand accident and four hundred seven dollars health insurance paid for. Counting on you sure for at least two hundred seventy-seven thousand more life insurance paid for. Wire us as soon as you receive this whether or not we are going to get it. This allotment made in order to be sure that sufficient business is paid to put second automobile in contest and to break all records of company. Will keep you advised by wire how much we need to pass three and half million mark for month.

"[Signed] H. G. Scott."

The appellee further testified:

"Reducing \$1,223,000 life, which goes by the thousands under the contract straight, and \$356,000 accident, running 5 into it, and \$407 health, counted every \$25 as \$1,000, counting that \$16,000, adding that, the aggregate amounts would give us \$1,310,200. That was on the 27th day of December. We pushed for business the last few days. Of course, we got in above those figures; I cannot recall just exactly, but approximately \$200,000. I would say not less than \$200,000 more after that. In the last two or three days after this, and up to December 31st, we added something like \$200,000 to it as I remember. It was \$100,000 on the last day. The books here in the office will show that; it was easy \$200,000 more."

The appellee, on November 1, 1913, wrote a letter to the agents. This letter was introduced in evidence by the appellant and contained the following statement as to the volume of business procured by appellee up to its date:

"We have closed October, completing our first ten months of the year, with \$1,504,950 written life and \$523,280 written accident and health, of which we have paid for \$991,326 life and \$306,200 accident and health."

It further appears from the testimony of the appellee that he requested through correspondence that appellant furnish him a statement showing the business he had writ-

ten for it, and what he was entitled to, and that such request was refused. Appellee also testified that he tendered his resignation to appellant January 8, 1914, to take effect 30 days afterwards, and that at that time Mr. Allmond was superintendent of agencies and in the Dallas office; that during the month of January, 1914, he requested of Mr. Allmond a number of times permission to look over the books of the company to see how his account stood, and was denied such permission. There is also testimony to the effect that the appellant charged to its several agents who wrote the business, and who were working under the appellee, the premiums to which the appellant was entitled on such business. This is, in substance, the testimony of appellant's supervisor, Harris, who succeeded the appellee, and is not contradicted. Among other things, Mr. Harris said:

"All this business shown on these statements is 1913 business as shown by the books, written in 1913, and paid for or charged, either paid for within 60 days extra allowed for settlements, or charged. * * * The books show that the net amount of the premiums due the company on these policies in this list of business charged was charged to the agent within 60 days following December 31, 1913."

Appellee testified:

"My contention has been all the time, as my correspondence will show, that I was entitled to my cash prizes for the business procured according to the company's acceptance of the business, for the reason that I had no interest whatever in the agents. I believe my contention is right."

The testimony bearing upon the question under consideration is entirely too lengthy to be stated or copied in full in this opinion. That portion of it reproduced here is sufficient, we think, to justify the submission of the issue objected to by appellant, and supports the finding of the jury upon it. This is very clearly true when the testimony is considered in its entirety. If it be true, as appellant argues, that the evidence fails to show what pay appellant received upon business procured within 60 days after the expiration of the year 1913, there was evidence from which the jury might reasonably conclude that the business procured under the terms of the contract, and for which appellant received pay during the year 1913, exceeded \$1,250,000, and the language "or within 60 days thereafter," included in special issue No. 1, and the absence of testimony showing what pay appellant received within 60 days after the expiration of the year 1913, or that it received any during that time, furnishes no good reason for a reversal.

[3] At the request of appellant the court submitted the following questions to the jury:

"First. What was the amount of paid business procured by the Texas-Oklahoma Department of the Reliance Life Insurance Company and issued by it during the year 1913?

"Second. What was the amount of business charged, but not paid for in cash, procured by

the Texas-Oklahoma Department of the Reliance Life Insurance Company and issued by it during the year 1913?"

To which questions the jury made the following answer:

"Special issues, requested by the defendant, we cannot answer."

In its second assignment of error appellant asserts that the only issues raised by the testimony were submitted to the jury in these questions, and advances two propositions under the assignment, namely: (1) That it is error to render judgment upon a verdict not answering material interrogatories; (2) that a special verdict, the various findings of which are inconsistent with and in conflict with each other, is insufficient to support a judgment. What we have said practically disposes of this assignment against appellant. Under our construction of the contract sued on, both of these questions called for findings of fact not material to the controversy. The volume of business procured by appellant's Texas-Oklahoma Department, together with appellee's personal business during the year 1913, was the controlling issue in the case, and what the amount was of either "paid business" or "business charged, but not paid for in cash," or the volume of business which had been issued during the year, was immaterial as affecting the amount appellee was entitled to recover. A finding of the facts involved in the questions not being essential to the rendition of a proper judgment, the fact that the jury was unable to answer them furnishes no just ground of complaint, or cause for reversing the judgment that was rendered. This being true, the answers of the jury to question No. 1 submitted by the court, and to the two questions submitted at the request of appellant, involve no such conflict as forbade the court to render the judgment authorized by the answer of the jury to the first issue submitted to them.

[4] The third assignment of error complains of the trial court's action in overruling appellant's motion for a new trial. The contention here is in substance that appellant should have been granted a new trial because the court erred in refusing to permit the defendant to withdraw its announcement of ready and postpone the case to such time later in the term as would enable it to ascertain from its books in the Dallas office the exact amount of business procured by the Texas-Oklahoma Department, together with the plaintiff's personal business, during the year ending December 31, 1913, and settled for within 60 days. The record discloses that the postponement was sought to enable the appellant's witnesses Harris and O'Mara to further investigate the appellant's books and to furnish testimony which they claimed they were then unable to give. Prior to this request the appellant had made a similar request for a postponement and had stated to the court the time desired. That request was granted, and the trial postponed for

2 days. At the expiration of the 2 days the court called upon the appellant for an announcement as to whether it was ready to proceed with the trial. The appellant then stated that it was not ready, and requested a further postponement, for the reason that, although the said witness O'Mara, who was the cashier of the said defendant company at the branch office at Dallas, and also Mr. C. H. Harris, supervisor at said office, both working together continuously since the court had taken its recess, had been unable and had found it impossible to complete their examination of the books and records of the Dallas office, so as to enable them to testify as to what portion of the business procured by the Texas-Oklahoma Department and by Beaton's personal business during the year 1913 had been paid for in cash during said year and within 60 days following December 31st of said year 1913; that said work will probably take several weeks—this statement being testified to by the said H. C. Harris under oath upon the stand in answer to questions put to him by the court and also by counsel. This motion for further postponement of the trial was overruled and the parties required to proceed with the trial. The trial judge in explanation and qualification of the bill of exception reserved by the appellant to his action in refusing to further postpone the trial, among other things, says:

"The court overruled the application for continuance purely on the ground that no diligence of any character had been used to get the data that counsel claimed he wanted. Months having elapsed in which the data, if needed, could have been gotten, the court was of the opinion that he would not be justified, under the law and the facts in this case, with all the facts before the parties at interest for months prior thereto, in granting this continuance. No explanation was ever made of the telegram that was sent from the manager of the home office, and the court was of the opinion that none could ever be made from a showing from the books here. With those facts and circumstances before the court, the court overruled the application for a continuance, and with this explanation approved this bill."

The granting of appellant's request for a further postponement of the trial rested very largely in the discretion of the court, and we would not be warranted in saying, either that the court abused its discretion in that matter, or that upon the showing made a new trial should have been granted. It does not appear that the court acted arbitrarily in either matter, or that the verdict should have been set aside on the ground that appellant will suffer a palpable wrong as a result thereof without fault on his part. If it be conceded that the affidavit of the witness O'Mara, attached to appellant's motion for a new trial, disclosed material testimony which he claimed to have discovered from an investigation of appellant's books, still these books had been in the possession of appellant all the while, and it had been given notice to produce them on the trial. It does not ap

pear that the defendant was in any manner prevented from having the books before the court and availing itself of such evidence as they might have been able to furnish, and no excuse, so far as we have been able to discover, was given for it not having done so. Furthermore, the witness Harris, offered by appellant, testified upon the trial of the case:

"I am at this time supervisor for the Reliance Life Insurance Company, Pittsburgh. I succeeded Mr. Beaton. I have been connected with the company in that capacity a little over one year. I went in April 15, 1914. The books showing the business written and paid for, for the year 1913, January 1st to December 31st, have been in charge of the office; the entire records since the beginning of the company in Texas. Those books and records are duplicates of the ones kept in the home office at Pittsburgh. I have made a statement from the books that will give the figures that the books would show if they were brought here and gone through. I endeavored to give the entire written business showing paid for in cash and charged. (Witness was handed paper.) This is the statement paid for in cash and also charged business. This was taken from our books in the Dallas office, and is a correct statement to my knowledge. This is a statement showing the business paid for in cash and also the charged business secured by Mr. Beaton during the year 1913. This record was furnished us from the home office record, and checked by our record, as they are duplicates."

If this testimony should be regarded unimportant in passing upon appellant's motion for a new trial, in view of the affidavit of O'Mara, offered in support of said motion, then it may be said that the witnesses Harris and O'Mara each testified in substance that he did not keep the books in the Dallas office during the year 1913, and had no knowledge of those books, except from what he found in the books, and the trial court may have properly concluded that the statements of O'Mara, made in his affidavit attached to appellant's motion for a new trial, with regard to what the books showed as the amount of business procured by appellee, was of little value.

It is clear, we think, that we would not be justified in reversing the judgment of the court below, and it is therefore affirmed.

TEXAS SEED & FLORAL CO. v. CHICAGO SET & SEED CO. (No. 984.)*

(Court of Civil Appeals of Texas. Amarillo. May 10, 1916. Rehearing Denied June 14, 1916.)

1. CONTRACTS \S 10(4)—CONSTRUCTION—CONDITIONS—EFFECT.

A contract for the sale of onions to be grown "subject to crops" is not unilateral and will not excuse reasonable efforts on the part of the seller, since contracts should provide against hardships and performance will not be excused if the hardship is not anticipated, and the contract is not nonenforceable when the contingency provided against does not happen.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 37; Dec. Dig. \S 10(4).]

2. CONTRACTS \S 10(4)—CONSTRUCTION—CONDITIONS—EFFECT.

A contract for the sale of onions to be grown, providing that the seller should not be held to delivery if the onion sets grown to fill the order were damaged or destroyed from any cause not resulting from its negligence, was not a unilateral contract, but a promise for a promise, and requires no more than the law employs, since where a contract depends upon the continuance of a thing, a condition is implied that its destruction without negligence will excuse performance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 37; Dec. Dig. \S 10(4).]

3. CONTRACTS \S 134—CONSTRUCTION—UNILATERAL CONTRACTS.

If a contract for the sale of onions to be grown could be defeated by failure of crops or destruction while being held was unilateral, part performance by the buyer in growing a crop and holding it for shipment, being that upon which mutuality depends, relates back and makes the contract good from the beginning, since a contract does not lack mutuality because every obligation is not met by an equivalent counter obligation, because where the act of one depends upon the act of the other, an obligation to allow the thing necessary for the completion of the contract is necessarily implied.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 722; Dec. Dig. \S 134.]

4. CORPORATIONS \S 591—CONSOLIDATION—EVIDENCE—SUFFICIENCY.

In an action on a contract for onions to be grown, brought against a corporation formed upon the consolidation of the corporation with which the contract was made with another, evidence held sufficient to justify a finding that the new corporation agreed to assume the indebtedness of its constituent companies.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2084, 2368-2372; Dec. Dig. \S 591.]

5. CORPORATIONS \S 590(1)—CONSOLIDATION—ASSUMPTION OF DEBTS—STATUTE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1137, authorizing the consolidation of two or more corporations under a new corporate name, or the name of either, with the privileges, immunities, and rights of property of each, although the mere purchase by a corporation of the franchise of another does not constitute a consolidation, where two corporations consolidated and formed a new corporation, which took the name of one and assets of both, they did not defeat the obligations of the old companies, but both rights and liabilities are common; and, where the new corporation, although nothing was said at the time of consolidation, paid all but the contested debts of the old corporations, there was an implied promise to pay its obligations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2354, 2361; Dec. Dig. \S 590(1).]

6. SALES \S 339, 369—ACTIONS FOR BREACH OF CONTRACT—DAMAGES.

Where a contract for the sale of onions to be grown before time for performance was repudiated by the buyer, since one party cannot himself, by renunciation, rescind a contract, the seller could accept the repudiation at the time and sue for damages, or elect to consider the contract as still in force, treat the onions as the property of the buyer, and sell them at the time set for performance, damages being the difference between the price brought and the contract price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 924, 926, 1083, 1084; Dec. Dig. \S 339, 369.]

Error from District Court, Dallas County; J. C. Roberts, Judge.

Action by the Chicago Set & Seed Company against the Texas Seed & Floral Company and others. From a judgment for plaintiff and other defendants, the named defendant brings error. Affirmed.

John C. Robertson and Jas. P. Haven, both of Dallas, for plaintiff in error. Thompson, Knight, Baker & Harris, Short & Feild, Geo. S. Wright, and Alex S. Weisberg, all of Dallas, for defendant in error.

HUFF, C. J. The defendant in error, Chicago Set & Seed Company, brought this action against plaintiff in error, the Texas Seed & Floral Company, Robinson Seed & Plant Company, C. W. Robinson, W. M. Robinson, E. P. Brown, and A. J. Mayes, for damages upon the alleged breach of contract. The several parties answered, and the case was tried before the court without a jury, who rendered judgment in favor of the Chicago Set & Seed Company, against the defendant Texas Seed & Floral Company, for the sum of \$2,025, and judgment in favor of the defendants Robinson Seed & Plant Company, C. W. Robinson, W. M. Robinson, E. P. Brown, and A. J. Mayes.

It will not be necessary to set out the pleadings and facts further than is stated by the trial court in the following findings of fact and conclusions of law:

First. On January 13, 1910, the defendant Robinson Seed & Plant Company made and executed at Dallas, Tex., a certain written contract and order for the purchase of 2,000 bushels of onion sets from the plaintiff, Chicago Set & Seed Company, which order and contract was as follows:

"A. L. Jones, Pres. & Treas. L. B. Jones, V. P. G. A. Bradt, Sec. Office of Chicago Set & Seed Company, Chicago, Ill. Contract for onion sets, between Chicago Set & Seed Company, of the city of Chicago, state of Illinois, party of the first part and Robinson Seed & Plant Co., city of Dallas, state of Texas, party of the second part: Said party of the first part agrees to grow and to hold for shipment to party of the second part the following amount of onion sets for delivery January, 1911, 2,000 bushels. — bu. dark red sets at \$1.30 per 32 lb. bu. — bu. at \$ — bu. — bu. yellow sets at \$1.20 per 32 lb. bu. — bu. at \$ — bu. — bu. white sets at \$1.60 per 32 lb. bu. — at \$ — bu. Party of the second part, as buyer agrees to take the sets ordered hereon at times specified, and to pay for them at the net cash prices annexed thereto, upon presentation of sight draft with railroad company's bill of lading showing the sets have been delivered for said buyer on board cars at Chicago, in good condition by said sellers. All orders are taken subject to approval of Chicago Set & Seed Co., at their home office in Chicago, and providing stock is unsold upon receipt of order. All orders taken previous to receipt of new crop are subject to crop. It is also understood that in case of damage or destruction of the onion sets held to fill this order, from any cause not resulting from the negligence of Chicago Set & Seed Company, that Chicago Set & Seed Company will not be held to deliver same, and shall not be held liable for the nondelivery of goods while they have any overdue account against the within party. Packages charged extra. Sec-

ondhand barrels, 20¢ each; one bushel crates, 11¢ each; two bushel sacks, 5¢ each. Sets to be screened through 1½-inch mesh sieve. Robinson Seed & Plant Co., per C. W. Robinson. Chicago Set & Seed Co., G. A. Bradt, Sec'y. January 13, 1910."

Second. On the 7th day of April, 1910, defendant Robinson Seed & Plant Company, by written communication to the plaintiff, specified the quantities of the different kinds of onion sets desired by defendant, stipulating 850 bushels yellow sets, 850 bushels red sets, and 300 bushels white sets.

Third. That on January 13, 1910, said order and contract was forwarded through the United States mail to the plaintiff, Chicago, Set & Seed Company, and in due course of mail same was received by plaintiff, Chicago Set & Seed Company, at its home office in Chicago, Ill., at a time when stock was unsold, and said order and contract was duly approved by plaintiff at its home office on or about the — day of January, 1910.

Fourth. That shortly after the approval of the said order and contract for the purchase of the onion sets above described, the plaintiff, pursuant to its duty, began growing and preparing the onion sets described in said order and contract, and thereafter, all said onion sets were grown, and practically all the same had been harvested on or before August 6, 1910.

Fifth. That on August 6, 1910, defendant Robinson Seed & Plant Company wrote a letter to the plaintiff, Chicago Set & Seed Company, as follows: "We are inclosing herewith our contract for onion sets, and beg to advise that our firm has gone out of business, and will kindly ask you to cancel your order." And in due course of mail, on August 10, 1910, said letter was received by plaintiff at Chicago, Ill.

Sixth. That at the time of the receipt of said letter by the plaintiff, the onion sets described in the order or contract had been sown, grown, and practically harvested, there being only a small portion of same unharvested, and it was necessary for the onion sets that had not been harvested to be harvested in order to prevent their being totally lost and in order that they might be properly preserved.

Seventh. That the plaintiff refused to accept a cancellation of the said contract by defendant Robinson Seed & Plant Company, and so advised said defendant, and after the receipt of the letter of date August 6, 1910, plaintiff completed the harvesting of the onion sets that had not been harvested at the time of the receipt of said letter, stored all the onion sets for the account of defendant Robinson Seed & Plant Company, and notified said defendant that it would hold defendant liable on its contract.

Eighth. That on October 10, 1910, defendant Robinson Seed & Plant Company again refused to perform its contract with plaintiff, and on January 24, 1911, the plaintiff wrote the defendant Texas Seed & Floral Company, advising that plaintiff would attempt to hold the Texas Seed & Floral Company upon the contract of purchase of onion sets made by the Robinson Seed & Plant Company, and also advising that the onion sets were at the time held for the account of the Texas Seed & Floral Company, and any expense incurred in reference to the onion sets after January, 1911, would be charged to the defendant Texas Seed & Floral Company. This letter was received by the Texas Seed & Floral Company, and on January 27, 1911, C. W. Robinson, who was at that time one of the officers of the Texas Seed & Floral Company, on behalf of the Robinson Seed & Plant Company, answered this letter, and instructed the plaintiff to dispose of the onion sets, and advising that if they were shipped it would be at the risk of the plaintiff.

Ninth. Meanwhile, continuously from and after the repudiation of said contract by the Robinson Seed & Plant Company, plaintiff diligent-

ly tried to dispose of said onion sets, but was unable to sell the red sets. Finally, upon about — it succeeded in selling the yellow and white sets for \$665, which was the best price obtainable therefor, and which was the actual cash value of said onion sets at the time and place of said sale.

Tenth. That a reasonable charge for the storage of onion sets during the time they were held by the plaintiff subject to the order and for the account of the Robinson Seed & Plant Company, to wit, 5 cents per buahel per month, making a total of \$85.

Eleventh. That plaintiff in all things complied with the terms and conditions of the contract aforesaid.

Twelfth. That the Robinson Seed & Plant Company was a corporation, organized under the laws of Texas, and doing business at Dallas, and its officers, directors, and stockholders were C. W. Robinson, W. M. Robinson, E. P. Brown, and A. J. Mayes.

Thirteenth. That the Texas Seed & Floral Company was a corporation organized under the laws of Texas, and doing business at Dallas, and at the time of the execution of the contract aforesaid all its capital stock was owned by R. Nicholson.

Fourteenth. That it was agreed between the stockholders, officers, and directors of the said two corporations, about June, 1910, that said two corporations should be consolidated, and the same was done in the following manner: A charter was obtained from the state of Texas, for a new corporation to be known as the Texas Seed & Floral Company, said new corporation being one of the defendants herein. All of the assets of each of said two constituent companies were by said companies transferred to the new corporation, with the purpose and intent of said constituent companies then and there ceasing to do business, and they did then and there cease to do business. It was agreed and understood that the stockholders in the constituent companies should receive for their respective interests in said companies stock in the new corporation, the amount of said new stock to be determined as soon as the net equity of the stockholders of the said two constituent companies could be ascertained definitely, by said net equity being meant the value of the assets liabilities of said respective constituent companies, and the amount of said net equities being unknown and unascertained at the time of said consolidation. That the open accounts belonging to each of said constituent companies were kept separate by the new corporation, and collections made upon same by the latter, and the proceeds of said collections applied from time to time to wipe out petty liabilities of said constituent companies, as far as the said proceeds would go. That all the other assets of the said two constituent companies, consisting principally of goods, wares, and merchandise, were transferred to the new corporation and commingled together, and were commingled with other goods, wares, and merchandise belonging to the new corporation, and the whole sold from time to time, and the proceeds used in the regular course of business of the new corporation.

Fifteenth. That the new corporation did not, at the time of the making of said agreement, assume in express words the payment of the debts of the constituent companies, but later the new corporation in fact paid said debts in the manner aforesaid, and all the debts of the constituent companies were in fact paid off by the new corporation, except one or two disputed debts and obligations, among which disputed debts and obligations is the one involved herein, and the new corporation finally assumed the debts of the said constituent companies.

Sixteenth. That the active officers and directors of the new corporation were C. W. Robinson, W. M. Robinson, E. P. Brown, and R.

Nicholson, and all the matters and things aforesaid were done by the said persons.

Seventeenth. That the capital stock of the new corporation was \$125,000, and all of the same was owned by the old stockholders of the said two constituent companies, except \$5,000 thereof, subscribed by William Doran.

Eighteenth. That said stock remained unsold until long after the matters and things involved herein, because there was no agreement as to or ascertainment of the value of the net equities aforesaid.

Nineteenth. That the new corporation, the defendant Texas Seed & Floral Company, paid nothing to the Robinson Seed & Plant Company, or the old Texas Seed & Floral Company, for the assets of the said constituent companies, which were transferred to the new corporation, as aforesaid, and said assets were taken over by the new corporation, and appropriated to its own use and benefit. And in the process of consolidation the stockholders in the constituent companies were to be allotted stock in the new corporation, as above stated, in lieu and stead of their stockholdings in the constituent companies, and the business of each of the said constituent companies was, without interruption, merged into the new corporation, as aforesaid; and the managing officers and directors of the said two constituent companies became the managing officers and directors of the new corporation, and they negotiated and carried out the said consolidation, and did collect, sell, commingle, and appropriate the said assets, as aforesaid. That the assets commingled, as aforesaid, were so commingled as to render them indistinguishable and untraceable.

Twentieth. That at the time of said consolidation, the assets of the old Texas Seed & Floral Company were approximately —, and the liabilities approximately \$—, and that at said time the reasonable value of the assets of the old Robinson Seed & Plant Company were \$35,000, and its liabilities were approximately \$45,000, but all parties believed at the time of said consolidation that the assets of the old Robinson Seed & Plant Company would substantially exceed its liabilities.

Conclusions of Law.

(1) I conclude that there was a valid and binding contract of purchase for said onion sets, and that the same was breached by the Robinson Seed & Plant Company without just cause, and the plaintiff thereupon became and still is entitled to the contract price of said onion sets, plus \$85 storage, after deducting from said amount the sum received by it for the resale of the yellow and white sets.

(2) I further conclude that said obligation, amounting to \$2,025.00, with interest from the — day of — until paid was a valid and binding obligation upon the Robinson Seed & Plant Company, and that by reason of the facts herein shown the new corporation, the Texas Seed & Floral Company, defendant herein, became and still is bound to pay same to the plaintiff."

The contract entered into was signed by the Robinson Seed & Plant Company, as will be perceived, and where we refer to plaintiff in error as having made the contract, it is intended to include the contract made by the Robinson Company.

[1-3] The first and second assignments of error and the propositions thereunder assert the judgment is erroneous for the reason that the contract sued on is unilateral, and lacks mutuality, and therefore unenforceable; that the Chicago Set & Seed Company was not liable under the terms of the contract for nondelivery. Defendant in error agreed to

grow and hold for shipment to plaintiff in error the amount of onions specified all orders taken previous to the new crop "are subject to crop." This order was taken before the new crop. The order given and accepted subject to the new crop did not relieve defendant in error from growing and holding for shipment the amount agreed upon and at the price stipulated. The defendant in error could not arbitrarily refuse to grow and ship the onions, but the agreement is that it would undertake to grow and ship. This would not, therefore, relieve it from its obligation to do so. If, after undertaking and using reasonable effort to grow, no crop was made, under the agreement perhaps defendant in error would be relieved. The contract implies that defendant in error will undertake to grow and use reasonable effort to do so. It is bound, on its part, to perform this part of the agreement, as much so as if it had been written into the contract in terms. *Jones v. Gammel*, 100 Tex. 320, 99 S. W. 701, 704, 8 L. R. A. (N. S.) 1197. If its efforts would not grow a crop, and some natural cause, over which it had no control, prevented a crop, this clause might relieve it. The other portion of the contract, that onion sets held to fill the order, if damaged or destroyed from any cause not resulting from the negligence of defendant in error, that it should not be held to deliver, did not give the defendant in error an arbitrary right to refuse to deliver or to damage or destroy the onions. If they were held for delivery, defendant in error, under the contract, was required to use reasonable care to preserve them from damage or destruction, and if it did not, it was not excused from delivery. This does not render the contract unilateral. The agreement to perform on the part of defendant in error does not rest upon its will, wish or wants, but is a promise for a promise. A contract whose performance depends upon the continuance of a thing implies a condition that the destruction of the same without negligence shall excuse performance. *The Tornado*, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747; *Howeth v. Anderson*, 25 Tex. 573, 78 Am. Dec. 538. The stipulation in the contract if damaged or destroyed by causes not resulting from negligence excuse delivery perhaps require no more than the law implied. The agreement to grow and deliver the onion sets from new crop, subject to crop, implies if there is no crop not resulting from fault on the part of the defendant in error, there can be no delivery. It is a well-recognized rule that contracts should provide against difficulties and hardships, and the hardship should be anticipated; if not, the party will not be excused from performance, but held to his contract. Where such contingencies are provided against in the contract, the contract by the provision is not thereby rendered nonenforceable, when the contingency did not happen. *North Texas Construction Company v. San Jacinto Oil Co.*,

95 S. W. 706. The performance in part related back to the promise and made a binding contract. The plaintiff in error agreed to take and pay for the onion sets; defendant in error agreed to grow, hold, and deliver them at the specified time and price. Even though the agreement could have been defeated by failure of crop or the destruction while being held, the performance on the part of defendant in error, in growing and gathering being that upon which the mutuality depends relates back and makes the contract good from the beginning if it was not so before. *Taber v. Dallas County*, 101 Tex. 241, 106 S. W. 332, on page 336; *Page v. Payne*, 41 Tex. 143, on page 146; *Rose v. Railway*, 31 Tex. 49.

This case is distinguishable from *American, etc., v. Kennedy*, 103 Va. 171, 48 S. E. 868, cited by plaintiff in error. If the onion sets were not damaged or destroyed, delivery under the contract could be enforced or damages recovered for failure to do so. The defendant in error was bound to use reasonable care not to damage or destroy. Damage or destruction was all that would excuse non-delivery after they were grown. Delivery did not depend upon the will or wish of the defendant in error, but it was bound to reasonable diligence to preserve, and keep them for that purpose. The plaintiff in error also cites *Texas Produce Exchange v. Sorrell*, 168 S. W. 74, which interpreted the contract then under consideration:

"That there is not a word in the contract which binds the Produce Company to handle the onions, but only limitation upon its liability in the event it should handle them, and giving it powers and privileges."

We do not interpret the contract in this case as not binding on the defendant in error. On the contrary, it was bound to grow, keep, and ship onions in the quantity and for the price designated. This liability could only be excused by failure of crop and destruction or damage not caused from the negligence of the defendant in error. We do not interpret the contract in question as unilateral, but one upon consideration mutually binding. Generally, there is mutuality of obligation where both parties undertake to do something. A contract does not lack mutuality merely because every obligation of the one party is not met by an equivalent counter obligation of the other. So, where an act to be done by one party can be done only upon a corresponding act by the other, an obligation by the latter to do or allow the thing necessary for the completion of the contract is necessarily implied. *R. C. L. Contracts*, § 95, vol. 6; *Jones v. Gammel*, supra.

In this case the evidence and findings of the trial court show that the defendant in error performed part of its obligation before notice that the plaintiff in error would not take the onions. The order or contract was given and executed a year in advance. The understanding, as evidenced by the contract of the parties, is that the defendant

would have to grow the onions, gather them in season, and hold until the date of delivery. The evidence indicates that after the work of growing and gathering there is but little market for the product. Orders are taken in advance, so that the output is sold before grown. Defendant, relying upon this agreement, grew and gathered onions, and after this work had been done, and after it had complied with its obligation or the demands of the contract, plaintiff sought to renounce its obligation. We think the rule in unilateral obligations, where the party does the thing or performs in part, at least, the thing to be done, that the promise will relate back to the original contract will apply, and that plaintiff will be bound thereby, even if it should be determined that this is a unilateral contract. Assignments 1 and 2 are overruled.

The third, fourth, and fifth assignments present the propositions: (1) That there is no evidence supporting the fifteenth finding of fact by the trial court that the new corporation assumed the debts of its constituent companies; (2) the new corporation, in the absence of an agreement to assume the debts of the old, would not be liable therefor on account of having purchased the stock of the old; (3) the old company having been dissolved according to law, the officers thereof became trustees to liquidate the debts and dispose of its assets, in the absence of an appointment of a receiver.

If the finding of the trial court has support in the testimony that there was an agreement that the new corporation should assume and pay the indebtedness of its constituent corporations, then the above propositions must fail. The facts and the evidence in this case shows that the Robinson Seed & Plant Company and the old Texas Seed & Floral Company, by agreement of its officers and stockholders, consolidated and obtained a charter for the new corporation, retaining the corporate name Texas Seed & Floral Company, with all the assets of both companies which were placed into the new organization, and the debts and obligation of these old companies were paid therefrom. It is shown by the testimony that, some few months after the new corporation, it borrowed the sum of \$75,000 for the purpose, among other things, of paying an indebtedness of the Robinson Seed & Plant Company to one of the banks, of \$45,000, and, as expressed by Mr. Nicholson of the old Texas Company, to cover everything. Mr. Nicholson testifies that there was a written contract drawn at the time of consolidation, but this appears to have been lost or mislaid, and was not produced upon the trial. The witnesses, however, testified that there was nothing stated in that contract about the assumption of the debts, and Nicholson says that he could not say that the new company assumed the claim sued on, but further testified:

"Of course these things came up you know, after the consolidation was made and of course the new company I suppose would have to take that up."

And he also testified in one or two places that, while the contract of consolidation did not provide for assumption, they did later assume the debts; that the merchandise was thrown together, and instead of waiting to realize on the assets or merchandise, they decided to borrow money and take care of the debts.

W. M. Robins testified:

"The general outline of the deal of the consolidation was this: That each side was to throw its assets into the new corporation; that as soon as it could be definitely ascertained what the net equity of each side was, stock was to be issued in the new corporation to the respective sides representing their net equity. * * * All small accounts I presume have been paid. The Texas Seed & Floral Company paid them. There is another debt or two in question that have been paid. There is a dispute about them. All the debts except those in dispute have been paid by the Texas Seed & Floral Company."

The evidence shows that the stock was to be issued in accordance with the value of the equity of the respective parties in the two old companies, and that equity was to be determined and ascertained from the assets left after the payment of the indebtedness of the two companies, and in proportion thereto.

[4, 5] We believe the trial court's finding that there was an agreement to assume the indebtedness of the constituent companies of plaintiff is supported by the testimony. The authorities cited by appellant (*Island City Savings Bank v. Sachtlebeen*, 67 Tex. 420, 3 S. W. 733, and *Cattlemen's Trust Co. v. Beck*, 167 S. W. 753), if they can be construed to hold, as contended by plaintiff, that there must be an express assumption, would not therefore require a reversal in this case, for the reason that we believe the evidence supports the court's finding. In the first case cited, the Supreme Court says, in substance, that it was not doubted that when the bank was unable to pay its debt it might transfer its assets to a new organization without incurring liability for the debts of the insolvent concern, but such was not the fact in that case. There was, in fact, no new corporation, only a transfer by the stockholders of their interest. There was a mere change of membership, and not a change of the corporation itself. That case does not hold, and we do not think implies, that the liability of the new corporation must be established by an express agreement; the latter case cited by appellant for the statement that:

"The law seems to be that, in the absence of an agreement to this effect on the part of the new company, it is not bound for the obligation of the old."

The court, in that case, upon rehearing, stated, in effect, that their holding that there was no evidence of assumption, and that it

had not received any benefits or come into possession of any assets from the old company, was error; that the evidence in both these respects shows that there was an agreement and the taking of all the assets of the old company. The case quotes 10 Cyc. 287, which is to the effect that the new corporation will be liable for the obligation of the old:

"(1) Where the circumstances are such as to warrant the construction that the former is not a separate and distinct corporation, but merely a continuation of the latter, and hence the same in law; and (2) where it has, in express terms, or by reasonable implication, assumed debt of the old corporation, where this liability is imposed by the statute under which reorganization takes place, or where such liability is imposed upon it by decree of the court on foreclosure."

Article 1137, Vernon's Sayles' Civil Statutes, authorizes the consolidation of two or more corporations, under a new corporate name, or under the name of either, with all the privileges, immunities, and rights of property enjoyed by each at the date of the expiration of their charters. In this case the new corporation took the name of the old and the assets belonging to both. Certainly by this act they did not defeat the obligations of the old companies. We cannot conceive that it was ever the purpose of the Legislature to work such a result. The old companies having voluntarily assumed a new name, their rights are common, and their liabilities, it seems to us, should be. They could not be sued in the old name. Property in the new corporation belonging to the old cannot be divested out of the new in the name of the old. The mere purchase of franchise, etc., by one corporation, of that of another, does not constitute a consolidation, but this case presents a consolidation of two corporations, who are the constituents of the new, thereby vesting it with all the rights, property, and immunities of both. This should, it appears to us, be sufficient, with the other facts in this case, to show an implied promise to pay the obligations of the old, whose representative it is in name and in law. We believe the above proposition is supported by the well-considered case of *Atlantic & Birmingham Ry. Co. v. Emma Johnson*, 127 Ga. 392, 56 S. E. 482, 11 L. R. A. (N. S.) 1119. The opinion in that case was delivered by Lumpkins, J. We do not quote from the opinion, but believe that the reasons given there which render the new corporation liable for the obligations of the old are unanswerable. We quote the following from the notes under that case, at page 1120:

"Where the corporation incurring the liability ceases to have an independent existence de jure, the consolidated or absorbing corporation is liable at law as well as in equity, the ground of such liability being sometimes stated to be the continuance of the original corporation under a new guise (citing quite a number of cases). It is frequently said that the extent of such liability is to be measured by the assets received, but as such assets are usually, if not always, greater than the claim in litigation, this ques-

tion cannot be regarded as having been directly decided. Such limitation would seem inconsistent with the theory that the new or surviving corporation is to be regarded as the alter ego of the corporation, consolidated or merged, but is reconcilable with the implied assumption theory. Where, however, there is an absorption of the business and assets—in other words a merger de facto—by either a corporation formed for the purpose, or one already in business, the liability of the corporation receiving the assets is rested upon the familiar trust fund doctrine. Since such receiving corporation does not stand as a bona fide purchaser for value, in such case the extent of the liability is necessarily determined by the value of the property received."

The findings of the trial court in this case establish a consolidation under the statute. The new corporation, we believe, was liable at law for the obligation incurred by one of the old corporations which is a constituent of the new; at least upon the theory of an implied assumption. In the case of *Railway Co. v. Shirley*, 54 Tex. 126, it quotes with approval the following, at page 137:

"The consolidated corporation, for the purpose of answering for the liabilities of the old corporations, is deemed the same as each of its constituents, and may be sued under its new name for their debts as if no change had been made in the name or organization of the original corporation."

The Supreme Court therein says:

"Evidently such a consolidation cannot be accomplished in disregard of the rights of creditors or stockholders, and accordingly, either in the statute authorizing or in the agreement consummating such consolidation, stipulations are inserted for the protection of those rights. And even if neither statute nor agreement make mention of creditors, the consolidated corporation is held to have assumed the liabilities of its constituents."

The Court of Appeals follows the rule above announced in 1 *White & Willson*, §§ 384, 386; 3 *Willson*, § 97. It is stated in the last cases cited that it is settled in this state that the new corporation is held to have assumed the liability of its constituents upon voluntary consolidation. The evidence in this case, at most, shows that at the date of consolidation there was nothing said about assuming the obligation of the old company. However, it is ample to show that they afterwards did assume and pay them and agreed to do so and borrowed the money for that purpose; that they recognized at the time of the consolidation that, in order to ascertain the equity that each would have in the new company, or the stock to which they would be entitled, the debts must be deducted or paid from the assets of the old companies in determining their interests in the new.

[6] The sixth assignment asserts error on the part of the company as to the measure of the damages applied. At the time of the repudiation the contract was not wholly completed. The crop had been grown and nearly all gathered. Substantially all that was required to be done was the delivery. The defendant in error could have accepted the repudiation at the time and sued for the damages on the breach, or it could elect to

consider the contract as still in force. One party cannot by himself rescind a contract. The renunciation itself does not amount to a rescission. *Greenwall v. Markowitz*, 97 Tex. 479, 79 S. W. 1080, 65 L. R. A. 802; *Kilgore v. North Texas, etc.*, 90 Tex. 139, 37 S. W. 598. We regard the contract in question more than a mere order for goods. However this may be, defendant had the right to treat the amount of onion sets ordered as property belonging to the plaintiff, and sell them on plaintiff's account and recover of it the sum representing the difference between the price brought and the contract price. *Waples v. Overaker*, 77 Tex. 7, 13 S. W. 527, 19 Am. St. Rep. 727; 2 Mech. on Sales, 1645 et seq. While defendant did not have a right, after the order was countermanded, to do anything which would enhance the damages, it was not bound to treat plaintiff's repudiation of it as ending the contract. It had the right, as it did, to treat the contract as still in force, and to have its damages determined with reference to the condition existing at the time fixed by the contract for performance. *Palestine Ice, etc., v. Walter Connally & Co.*, 148 S. W. 1109, 1112; Mech. on Sales, §§ 1707, 1088, 1090; 3 Suth. on Damages, § 648.

We believe the trial court applied the proper measure of damages under the facts of this case and the findings of fact made by the trial court. The case will be affirmed.

A. HARRIS & CO. v. GRINNELL WILLIS & CO. (No. 7610.)

(Court of Civil Appeals of Texas. Dallas.
June 24, 1916.)

1. ACCOUNT, ACTION ON \S 12 — PLEADING AND PROOF—"MERCHANDISE."

Under the statute relating to suits on sworn accounts, a sworn account, not itemized as required by statute, stating defendant's indebtedness to plaintiff for "merchandise" bought on certain dates, in the absence of a sworn answer, did not prove itself, as the term "merchandise" includes every article of traffic which is properly embraced in a commercial regulation, so that it did not notify the defendant what it was called upon to deny under oath if any of the articles were not right.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 87; Dec. Dig. \S 12.

For other definitions, see Words and Phrases, First and Second Series, Merchandise.]

2. ACCOUNT, ACTION ON \S 14—DEFENSE—BURDEN OF PROOF.

The burden was on the plaintiff to make out its case by legitimate evidence, and, until it has done so the Court of Civil Appeals cannot take notice of the defendant's defense, if it has any.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 41, 42; Dec. Dig. \S 14.]

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Action by Grinnell Willis & Co. against A. Harris & Co. Judgment for plaintiff, and de-

fendant appeals. Reversed, and cause remanded.

Cockrell, Gray & McBride and H. P. Edwards, all of Dallas, for appellant. Bennett Hill, of Dallas, for appellee.

RAINEY, C. J. Appellee sued appellant on a sworn account for merchandise amounting to \$1,357.92. Appellant answered by general demurrer and general denial. A trial resulted in a judgment for the plaintiff, and the defendant appeals.

When the case was regularly called for trial defendant called for a jury, which was denied. The plaintiff then called attention to the answer of defendant, which was not sworn to, and urged the court not to consider it as an answer. The court did not consider the answer, and rendered judgment for plaintiff on the introduction only of the sworn account which was made an exhibit to plaintiff's petition, and is as follows:

A. Harris & Co., Dallas, Texas, to Grinnell Willis & Co., 44 & 46 Leonard Street.

Payable in New York City funds

Dec. 10	To	Mdse	2/10	2/10	
10		"		10	271 44
10		"		10	606 52
10		"		10	101 66
17		"		17	142 74
20		"		20	105 48
22		"		22	130 08

1,857 92

To the introduction of this account, without any other testimony, and the rendition of judgment thereon, the defendant duly excepted, and assigns said action of the court as error. We think this assignment well taken.

[1] The sworn account sued on and received as evidence is not such an account as contemplated by our statute as proving itself, although no denial to it under oath is presented. It is not itemized, but only designates the purchases as merchandise bought on certain dates. The term "merchandise" is very comprehensive, and includes every article of traffic, "which is properly embraced in a commercial regulation" (Cyc. 27, p. 478), yet as used in the account here sued on, it does not specify the kind of article that was purchased. Hence it did not notify the defendant what it was called upon to deny under oath if any of the articles were not right. Therefore we take it that the account was not itemized as contemplated by our statute, and not such an open account as when sworn to would be admissible to prove itself, although there was no denial under oath to any item. In *Glass Co. v. Roquemore*, 88 S. W. 449, Mr. Chief Justice James, in passing upon an account similar to the one here, said:

"The court refused to allow plaintiff to introduce in evidence the verified account. In this, we think, the court did not err, the account in itself not indicating the items nor their nature; and hence it could not be told therefrom that it had reference to matters that could be proved by a sworn account under our statute."

In *Hickman v. Grocer Co.*, 62 S. W. 1081, this court held that such an account as here sued on was subject to demurrer because not itemized. We are of the opinion that the account was not admissible as evidence, and plaintiff's case was not properly proven.

We deem it unnecessary to discuss the question of not being allowed a jury, presented by appellant, as this matter is not liable to arise on another trial.

[2] Appellee insists that appellant has no defense to the action, and therefore the cause should be affirmed. The burden was on appellee to make out its case by legitimate evidence, and, until this is done, we cannot take notice of the attitude of appellant as to its defense, if any it has.

The judgment is reversed, and the cause remanded.

YOUNG v. STATE. (No. 4148.)

(Court of Criminal Appeals of Texas. June 23, 1916.)

CRIMINAL LAW §1192—APPEAL—STIPULATIONS—EFFECT.

Where there is an agreement on file between attorneys that no motion for rehearing would be filed, requesting immediate issuance of mandate, as accused was confined in the county jail, the mandate will be issued immediately on affirmance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3231-3240, 3243; Dec. Dig. §1192.]

Appeal from Criminal District Court, Harris County; O. W. Robinson, Judge.

W. R. Young was convicted of manslaughter, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction of manslaughter, but without a statement of facts or bill of exceptions. Nothing is presented which can be reviewed in the absence of these.

There is an agreement on file herein by the attorneys for both sides, stating that no motion for rehearing will be filed and requesting that the mandate issue at once, as the appellant is now confined in the county jail. Therefore the clerk is directed to issue at once the mandate in accordance with this agreement. The judgment is affirmed.

HALEY v. STATE. (No. 4139.)

(Court of Criminal Appeals of Texas. June 23, 1916.)

CRIMINAL LAW §1097(1)—REVIEW—BILL OF EXCEPTIONS AND STATEMENT OF FACTS.

No question for review is presented by a record on appeal which is accompanied by no statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2862, 2864; Dec. Dig. §1097(1).]

Appeal from Tarrant County Court; Jesse M. Brown, Judge.

Jim Haley was convicted of disturbing the peace, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of disturbing the peace, and prosecutes an appeal from such judgment.

As no statement of facts accompanies the record, there is no question we can review.

The judgment is affirmed.

HALEY v. STATE. (No. 4140.)

(Court of Criminal Appeals of Texas. June 23, 1916.)

Appeal from Tarrant County Court; Jesse M. Brown, Judge.

Jim Haley was convicted of aggravated assault, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of aggravated assault, and his punishment assessed at a fine of \$25.

The record contains no bill of exceptions, and no statement of facts accompanies it. Under such circumstances there is no question presented for review.

The judgment is affirmed.

McPEAK v. STATE. (No. 4125.)

(Court of Criminal Appeals of Texas. June 21, 1916.)

1. HOMICIDE §169(1)—EVIDENCE—ADMISSIBILITY.

In trial for murder of a drug store clerk, evidence, that accused before the shooting on same day had gotten a bottle of bitters for a friend from deceased, was inadmissible because irrelevant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 341; Dec. Dig. §169(1).]

2. CRIMINAL LAW §770(3)—INSTRUCTIONS—FORM.

Where an issue is in a case favorable to accused, he should have that issue submitted in an affirmative way untrammelled by conditions which are unfavorable to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. §770(3).]

3. HOMICIDE §304—INSTRUCTIONS—ACCIDENTAL HOMICIDE.

In a murder trial, it is error to instruct that accused, if homicide was accidental, and if it was not negligent or careless, is not guilty; since the jury should not be required to find that negligent homicide was not in the case before they could acquit on the theory of accident.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 636; Dec. Dig. §304.]

4. HOMICIDE §74—"NEGLIGENT HOMICIDE"—ELEMENTS.

For one to be guilty of negligent homicide, there must be apparent danger of killing, but no apparent intent to kill.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 97-101; Dec. Dig. §74.]

For other definitions, see Words and Phrases, First and Second Series, Negligent Homicide.]

5. HOMICIDE \Leftrightarrow 304 — INSTRUCTIONS — NEGLIGENT HOMICIDE.

Where there was no direct evidence that accused intentionally shot his pistol, an instruction, allowing accused to be found guilty of negligent homicide if he so negligently and carelessly handled his pistol that it might be discharged and thereby killed deceased, was error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 636; Dec. Dig. \Leftrightarrow 304.]

6. HOMICIDE \Leftrightarrow 125 — "ACCIDENTAL HOMICIDE."

If homicide occurs through mistake as to pistol being on safety guard so that it cannot be fired, or through mistake as to its being loaded, it is "accidental," not negligent, homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 189, 190; Dec. Dig. \Leftrightarrow 125.]

For other definitions, see Words and Phrases, First and Second Series, Homicide by Misadventure.]

7. CRIMINAL LAW \Leftrightarrow 722(2), 723(3)—TRIAL—ARGUMENT TO JURY.

In a murder trial, statements of district attorney, "If you turn this man loose, you had as well burn up your law books and tear down your courthouse," and, "You gentlemen of the jury are not going to let men come to town loaded down with whisky and armed with a gun and shoot down your business men," were improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1674, 1676; Dec. Dig. \Leftrightarrow 722(2), 723(3).]

Prendergast, P. J., dissenting.

Appeal from District Court, Floyd County; R. C. Joiner, Judge.

Jim McPeak was convicted of murder, and appeals. Reversed and remanded.

Martin, Kinder, Russell & Zimmerman, of Plainview, and T. F. Houghton, of Floydada, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of murder, the jury assessing his punishment at six years' confinement in the penitentiary. This is not the lowest penalty, five years being the minimum.

Appellant and deceased had been friends from early boyhood, some of the testimony showing about 30 years. This continued to the moment of the firing of the pistol which killed the deceased. The state's contention is that the killing was murder; appellant's that it was accidental homicide. There is testimony, it is claimed, suggesting negligent homicide. The court submitted murder, negligent homicide in the second degree, and accidental shooting. Appellant contends the issue of murder is not in the case. There is considerable strength and cogency in this contention. It is also contended that, if negligent homicide is in the case, it is of the first degree and not of the second. It is further contended that the court erred in not submitting negligent homicide of the first degree. The further contention is made the court erred in submitting the issue of accidental homicide to such an extent that it deprived the defendant of a fair hearing before the jury on that issue.

The state's theory was that appellant was drinking, and had gone to his friend Bishop, who was in some way connected with a drug store, and wanted Bishop, deceased, to give him a drink of whisky or alcohol, which Bishop promised as soon as he closed the store for the night. As Bishop was preparing to close his business house, appellant was sitting in a chair. His pistol was discharged, striking Bishop in the leg, producing hemorrhage from which he died. Some of the witnesses thought that a firecracker had been exploded. No one saw the pistol when it was fired. No eyewitness saw appellant have the pistol, and the facts justifying the conclusion that he had the pistol and the conclusion that he fired the pistol is the fact that it was fired, Bishop was struck in the leg, appellant's statement that he had a pistol and that it was discharged accidentally. Appellant was sitting in a chair, and Bishop either standing still or walking about the room. Appellant's statement with reference to firing the pistol was that he had the pistol in his left-hand pants pocket, and in his sitting position he was afraid the pistol would fall out. He reached down and got it with a view of transferring it to his inside right-hand coat pocket; that in doing so it caught on his coat or something about his person and was falling, and in catching at it it struck the chair and accidentally discharged. He stated he had no ill will towards Bishop, who was his life-long friend, and would not have hurt him. He also testified that it was an automatic pistol, and that he thought and believed that the hammer was on the safety guard and it could not be discharged. The evidence further shows that it takes but slight pressure to remove the hammer from the safety guard to place the pistol in a shooting condition; that it could not be shot while on the safety guard. He was not aware that the pistol was in such condition that it could be shot at the time he was transferring the pistol from one pocket to the other, but thought it was not, and that he was so transferring it to avoid the falling on the floor and a subsequent arrest for carrying the pistol. Without going further into details, this, we think, is a sufficient statement of the case to bring in review the law questions.

[1] There is a bill of exceptions reserved to the action of the court permitting testimony to the effect that some time prior to the tragedy, but the same day, appellant, at the request of his friend Honea, had gotten a bottle of bitters for Honea. Various objections were urged to this. This testimony was not admissible. It is not shown to have had any connection with this transaction, was between appellant and third parties, and in no way connected with the homicide or other events which brought about the unfortunate tragedy. A number of cases are

cited which sustain appellant's contention. *Hodges v. State*, 73 Tex. Cr. R. 378, 166 S. W. 512; *Roquemore v. State*, 59 Tex. Cr. R. 568, 129 S. W. 1120; *Campbell v. State*, 37 Tex. Cr. R. 572, 40 S. W. 282. Other cases might be cited, but we think these are sufficient.

[2] A number of exceptions were reserved to the court's charge and special requested instructions refused which tended to present what appellant thought to be correct propositions of the law, that accidental homicide was in the case is not to be questioned, and the court recognized this by charging the jury as follows:

"I further charge you that if you believe from the evidence, or have a reasonable doubt, that defendant fired the pistol accidentally, that is, without intending to do so, and thereby killed the said S. D. Bishop, and if you believe that he did not intend to kill the said S. D. Bishop, and that defendant was not guilty of negligence and carelessness in firing said pistol, then you will find the defendant not guilty."

This is the only charge the court gave with reference to this phase of the law. Without taking up either the special instructions or the reasons urged why this charge is not correct, we will say, where an issue is in the case favorable to the accused, he should have that issue submitted in an affirmative way untrammelled by conditions which are unfavorable to him and requiring the jury before they give him the benefit of his defense they must find other facts which, if true, would deprive him of his affirmative defensive charge. The court gave a separate charge to the jury on negligent homicide and carelessness in that connection.

[3-5] If the jury should believe the testimony of appellant, he should have been acquitted on the ground of accidental discharge of his pistol, and, whether they should believe it or not, he was entitled to have the matter fairly and squarely presented to the jury untrammelled by other conditions. The court had given the jury a charge on negligent homicide of the second degree. This question, as contended by appellant, has been decided in quite a number of cases, some of which are here cited: *Hamilton v. State*, 64 Tex. Cr. R. 175, 141 S. W. 966; *McCray v. State*, 63 Tex. Cr. R. 522, 140 S. W. 442; *Chant v. State*, 73 Tex. Cr. R. 345, 166 S. W. 513; *Egbert v. State*, 176 S. W. 560; *Windham v. State*, 173 S. W. 681; *Williams v. State*, 45 Tex. Cr. R. 218, 75 S. W. 859; *Miller v. State*, 52 Tex. Cr. R. 72, 105 S. W. 502; *Maldonado v. State*, 70 Tex. Cr. R. 205, 156 S. W. 647. Upon another trial the law of accidental homicide will be submitted in accordance with the statute unfettered and untrammelled with conditions requiring the jury to find that negligent homicide was not in the case before they could acquit on the accidental theory. The court charged the jury, if they should find there was no apparent intention on the part of the defendant to kill the deceased, and

further that at the time of the shooting the defendant was handling the pistol with which deceased was killed in such a negligent manner as that it might be discharged and thereby kill the deceased, or some other person, and if they further believe from the evidence that at the time of the killing the defendant was not exercising such care and caution, under all the facts and circumstances of the case, as an ordinary prudent person would have exercised under the same or similar circumstances, then they will find the defendant guilty of negligent homicide of the second degree. Many exceptions were taken to this; among others, that it did not properly submit the law of negligent homicide of the second degree. We are of opinion that the criticisms are correct. The statute fixes the criterion by which a party may be guilty of negligent homicide; among others, there must be apparent danger of killing, but no apparent intent to kill. If negligent homicide of the second degree is in the case, it must be by reason of the facts which show that the pistol was fired intentionally in a room with apparent danger of killing, but no apparent intent to kill. As we understand this record, no one saw appellant fire a pistol; it was fired from where he was sitting. No witness swears that he shot Bishop; nobody saw the pistol, and about all they testify is that the pistol was fired, the bullet taking effect in Bishop's leg, who was in the room. Appellant testified that the pistol went off accidentally, as heretofore stated. If appellant fired the pistol so that it could not be seen, in a careless way or intentionally, in the room, and the jury should find there was apparent danger of it killing somebody, it might constitute negligent homicide, and the facts, if there be any, which would justify the jury in finding there was apparent danger to kill, would indicate by reason of the surrounding circumstances that the bullet, there being three others besides appellant in the room at the time, might strike or could strike some of those in the room. This we understand to be the only theory upon which negligent homicide of the second degree could be predicated under the circumstances. There was no direct testimony that he fired the pistol intentionally. His evidence excludes that idea; but if he did fire it intentionally, and there was apparent danger of the bullet striking some one of those in the room, negligent homicide would be an issue. It would be an unlawful act on his part if he thus fired in the room. We think the charge of the court along this line does not present that issue fairly to the jury. Upon another trial the court will properly instruct the jury.

We have said this much in a general way so that upon another trial the court may submit the law applicable to the facts introduced on the trial. These questions are pre-

sented in quite a number of ways and in different forms, and a great number of bills of exceptions were reserved; but, generally stated, the court submitted, or undertook to do so, murder, negligent homicide in the second degree, and accidental homicide. We are of opinion the court was in error in the manner in which he submitted negligent homicide and accidental shooting. What is said has been said in a general way without taking up each bill of exceptions and the refusal to give special requested instructions, which would have eliminated or corrected the errors in the charge given. The writer does not believe that murder is in the case, and has stated enough already to justify his conclusion. There was no evidence of ill will; there was nothing to indicate that appellant wanted to shoot his friend; no witness saw him point the pistol at or towards Bishop, and he was waiting for Bishop to close the store in order that he might give him a drink of whisky which appellant had requested of Bishop and which Bishop had agreed to give him as soon as he closed the store, and was in the act of closing at the time the pistol shot, and as the writer understands the record the firing of the pistol was not intended to kill Bishop, and the offense should not be higher than negligent homicide if he fired the pistol at random. If the pistol went off accidentally, as he claims, the jury should have been told to acquit, and this charge should be unfettered by requiring the jury to first find that he was not negligent in discharging the pistol.

[6] There is another question in the case which it might be well enough to notice. Appellant's contention is, and the testimony shows, that he believed the pistol was so arranged by being on the safety guard that it could not be fired, and that if the guard was removed in any way he was not aware of it, and that this suggested the theory of mistake. In this we think appellant is supported by the authorities and the decisions of this court. It has been held that where a party striking another over the head with a pistol, the pistol is accidentally discharged, it would not be negligent homicide. Quite a number of cases announcing this proposition might be cited, but we deem it unnecessary. If the safety guard had been so removed that the pistol could be discharged by striking the chair or some object when defendant had it in his hand or was grabbing it as it was falling, he would not be responsible for negligent homicide, but it would be an accident, and, if the guard was removed in such manner as the pistol was discharged, the defendant believing it to be on the "safety," this would constitute mistake and require the court to so charge. We might suppose a case: If appellant had pointed the pistol at the deceased, believing that it was unloaded, and it proved to be otherwise, the doctrine of mistake would be in the case. If

he believed the pistol was so arranged by being on the "safety" guard as not to be able to be fired and it did fire, there still would arise the question of mistake. This phase of the law should be given in charge to the jury upon another trial.

Some exceptions were also taken to the argument and speeches of the prosecution. Appellant sought to eliminate these features by special charges to the jury to disregard them. These the court refused. It is shown that this occurred in a county where local option is in force and the feeling of the county seems to be rather acute on that question. The state had been permitted to introduce the fact that appellant had obtained a bottle of bitters for his friend Honea, which was disconnected with this case. There is evidence that he was drinking at the time, and also that he was sitting in a chair waiting for his friend Bishop to give him another drink. These matters were used by the prosecution to show the question of malice or reckless disregard of the prevailing sentiment engendered by the operation of local option. We do not believe it is evidence that taking a drink of intoxicants in local option territory is usually malice in a homicide case, unless there is connection shown in the testimony between the drinking of the whisky and the shooting as a reason for the shooting.

[7] Another bill of exceptions recites that the district attorney said, "If you turn this man loose, you had as well burn up your law books and tear down your courthouse," and further stated, "You gentlemen of the jury are not going to let men come to town loaded down with whisky and armed with a gun and shoot down your business men." Special requested instructions were asked that these statements be withdrawn from the jury. This was refused. Upon another trial such argument should be avoided.

For the errors indicated, the judgment is reversed, and the cause remanded.

HARPER, J. (concurring). I think the physical facts and circumstances adduced would authorize a finding by the jury that appellant intentionally shot the deceased, and if so he would be guilty of murder. If under the circumstances the jury should find that he intentionally fired the pistol, yet had no intention to shoot deceased or any other person present, then appellant would be guilty of negligent homicide. If appellant did not intentionally fire the pistol, and it was accidentally done, accidental homicide would be presented, and appellant would be guilty of no offense. The fact that he was unlawfully carrying a pistol would not render him guilty of any grade of homicide, if it was not intentionally fired, under the facts in this case.

PRENDERGAST, P. J. (dissenting). It is so late in the term I will not have oppor-

tunity to fully study the record. However, I think the testimony as to the Honea matter was admissible. I think murder was in the case strong, and I am inclined to believe no reversible error is in the case.

SMITH v. STATE. (No. 4142.)

(Court of Criminal Appeals of Texas. June 21, 1916.)

1. CRIMINAL LAW §1131(4)—APPEAL—DISMISSAL—IMPRISONMENT.

An order overruling a motion for a new trial, stating that defendant, having failed to enter into a recognizance, was committed to jail until the decision of the Court of Criminal Appeals, sufficiently evidenced that appellant was confined in jail, so that the motion to dismiss the appeal will be overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2974, 2976, 2977; Dec. Dig. §1131(4).]

2. CRIMINAL LAW §1095, 1102 — BILLS OF EXCEPTIONS—STRIKING OUT.

In a misdemeanor case, where there was no order in the record authorizing the bills of exception and statement of facts after the adjournment of the court for the term, the motion to strike them from the record will be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2847; Dec. Dig. §1095, 1102.]

3. CRIMINAL LAW §1133—APPEAL—REHEARING.

If appellant in term time had an order entered granting him time after the adjournment of the court for the term in which to prepare and file a statement of facts and bills of exceptions, he might make such showing on rehearing, when the record would then be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2984; Dec. Dig. §1133.]

4. CRIMINAL LAW §1090(1)—APPEAL—REVIEW.

Without a statement of the evidence or any bill of exceptions, there is no question presented for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2807, 3204; Dec. Dig. §1090(1).]

Appeal from Wichita County Court; Harvey Harris, Judge.

Dock Smith was convicted of vagrancy, and he appeals. Affirmed.

O. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of vagrancy, and prosecutes this appeal.

[1] The state moves to dismiss the appeal, because there is no affirmative showing made that appellant is confined in jail and no recognizance appears in the record. We think the order overruling the motion for a new trial sufficiently evidences that appellant is confined in jail, it stating that, "said defendant having failed to enter into a recognizance, he is now committed to jail until the decision of the Court of Criminal Appeals can be made and received." Therefore the motion to dismiss the appeal is overruled.

[2, 3] This being a misdemeanor, and there being no order in the record authorizing the filing of the bills of exception and statement of facts after the adjournment of court for the term, the state moves to strike them from the transcript. This motion, under the law, must be sustained. However, if appellant did in term time have an order entered granting him time after the adjournment of court for the term in which to prepare and file a statement of facts and bills of exceptions, such showing can be made on rehearing, and the record will be then considered.

[4] Without a statement of the evidence, or any bill of exception, there is no question presented we can review.

The judgment is affirmed.

MOODY v. STATE. (No. 4081.)

(Court of Criminal Appeals of Texas. June 21, 1916.)

CRIMINAL LAW §917(2)—NEW TRIAL—REFUSAL OF CONTINUANCE—ABSENCE OF WITNESSES.

In trial for assault, it was error to refuse new trial where the court refused continuance for absence, because of sickness, of one of accused's witnesses, whose affidavit as to testimony on new trial was strongly corroborative of accused's claim of self-defense; it appearing that the attendance of the witness could be secured on another trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2162; Dec. Dig. §917(2).]

Appeal from District Court, Rusk County; W. C. Buford, Judge.

Frank Moody was convicted of assault on murder, and appeals. Reversed and remanded.

Futch & Tipps, of Henderson, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of assault on murder, and his punishment assessed at four years' confinement in the penitentiary.

Appellant moved to continue the case, this being his first application, on account of the absence of several witnesses. The witnesses had been subpoenaed, and when his application for a continuance was overruled, he asked for and was granted an attachment to secure the attendance of the witnesses. The attendance of Roxie Renfro was not obtained. The return of the sheriff shows that he found the witness at her home, but she was too sick to be brought to court. On the motion for a new trial, it was shown that she was still too sick to attend court, but her affidavit as to what she would testify was obtained and attached to the motion for a new trial. Under the evidence adduced on the trial her affidavit would show her testimony to be most material.

The injured party testified to a difficulty

occurring on Saturday night between appellant and himself and his brother. The details or the merits of this Saturday night difficulty need not be gone into further than to state that, if the state's theory of the difficulty is true, it would furnish a motive for appellant to commit the crime alleged. On the other hand, if appellant's theory of it was believed, it would furnish ground to believe that perhaps his contention as to the Sunday difficulty might be correct. As to the difficulty on Sunday morning, the prosecuting witnesses Julius Griffin and Jesse Lewis testified they had gone to Pinehill church, and while waiting for services to begin, they left the church building, and had gone out near the road, and were standing there talking; they heard a saddle squeak and a horse's feet; as they turned appellant rode up and said, "G—d d—n you, I have come to kill you," and pulled his pistol; that as appellant did this Julius Griffin started to run, when appellant shot him in the shoulder.

Appellant testified in his own behalf, and said that on account of the Saturday night difficulty he carried a pistol in his coat pocket to protect himself if he was again assaulted; that as he rode up to the church he saw two men standing near the road; that when he got near they turned around and saw it was Julius Griffin and Jesse Lewis; that Julius Griffin placed his hand in his pocket and began to draw a pistol; that he (appellant) then grabbed his pistol and drew it, and as he did, Julius Griffin "ducked," and he fired; he then wheeled his horse and ran.

As to whether or not Julius Griffin had a pistol on this occasion was a hotly contested issue on the trial, but none of the witnesses who testified for appellant claimed to have seen the difficulty, but testified to seeing Julius Griffin with a pistol immediately after the shot was fired. He had no witness present who claimed to see the difficulty, and the state had no other witnesses present who claimed to have seen the difficulty other than Julius Griffin and Jesse Lewis and appellant's father, who claimed to have seen it from the church, and testified in the main as did Julius Griffin and Jesse Lewis. On the motion for a new trial, it was shown by the affidavit of Roxie Renfro that had she been able to attend court she would have testified as follows, being in question and answer form:

"Q. What is your name? A. Roxie Renfro. Q. Where were you when Frank shot Julius Griffin? A. In the schoolhouse. Q. Where were Frank and Julius? A. Julius and Jesse Lewis were sitting by a pine tree. Q. Where was Frank? A. Frank was coming up the road on horseback. Q. What taken place when Frank rode up? A. Julius got up and started toward Frank, pulling out his pistol as he went. Q. What did Frank do then? A. Frank pulled his pistol and fired. Q. Was Frank still on his horse? A. Yes. Q. Did you see Frank's pistol before he fired? A. No. Q. Did you see Julius with a pistol when Frank rode up? A. Yes.

Q. What kind of pistol did Julius have? A. A white or pearl-handle pistol."

This is all the affidavit material to the question under discussion, and by it it is seen that her testimony would be corroborative of the testimony of appellant that the prosecuting witness had a pistol on that occasion, drew it first, and was advancing on appellant when appellant shot. Under the circumstances, we think the court erred in not granting a new trial when the absent witness swears she would so testify had she been able to attend court, and it is shown that her attendance can be secured on another trial.

Being of this opinion it is unnecessary to discuss the alleged misconduct of the jury, the alleged newly discovered testimony, or the other questions presented, as they will not arise on another trial.

The judgment is reversed and the cause remanded.

DERRICK v. STATE. (No. 4138.)

(Court of Criminal Appeals of Texas. June 23, 1916.)

1. CRIMINAL LAW \S 594(3), 600(3)—CONTINUANCE—ABSENT WITNESSES.

It is not error to deny continuance asked on account of absence of witnesses, where one was a fugitive from justice, and the state admitted truth of testimony the others were expected to give.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1332, 1344; Dec. Dig. \S 594(3), 600(3).]

2. CRIMINAL LAW \S 857(2) — TRIAL — CONDUCT OF JURY.

It is improper, after jury retires, for jurors favoring conviction to say to those favoring acquittal that conviction will stop disturbances in a certain community, where there was no evidence on that question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2055; Dec. Dig. \S 857(2).]

3. CRIMINAL LAW \S 719(1) — TRIAL — COMMENTS OF COUNSEL.

It is improper for the prosecuting attorney in argument to say that his only witness had, at the first opportunity and consistently, told the same story, there being no evidence to that effect, since that is supporting a witness as to facts not testified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1609; Dec. Dig. \S 719(1).]

Appeal from Kaufman County Court; James A. Cooley, Judge.

Chester Derrick was convicted of violating the local option law, and he appeals. Reversed and remanded.

Cognahan & Ashworth, of Kaufman, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' imprisonment in the county jail.

[1] There was no error in overruling the motion for a continuance. As to what it was stated was expected to be proven by two of

the witnesses, the state admitted such testimony to be true, and it was so stated to the jury. As to the third witness named in the application, he is shown to be a fugitive from justice.

[2] When the motion for a new trial was heard, one of the jurors testified that he and two others first voted for an acquittal; that he (Juror Lindsey) did not think the evidence sufficient to show the guilt of appellant; that the foreman of the jury, Mr. Liston, said to the jury "that he lived near the defendant, and that the negroes down there were accustomed to raising disturbances, and he thought defendant should be convicted, and that would break it up." It seems that none of the other jurors were called, and this was all the testimony heard. The matter is hardly presented in a way, as the bill was not filed until after term time, we would be authorized to reverse the case upon this alone; but, inasmuch as we think there is another ground that will necessitate a reversal of the judgment, we call attention to this matter. It was improper to bring such matters before the jury, when there was no evidence in the case upon which to base such remarks.

[8] The state made its case by one witness alone. The defendant denied making the sale, and other witnesses testified to facts rendering it highly improbable that appellant did make the sale to the prosecuting witness. His reputation as a peaceable, law-abiding citizen was testified to by witnesses. Counsel for the defendant in their argument attacked the credibility of the state's witness, insisting "that the witness had been broken down and the jury could give no credence to his testimony," etc. In reply to this the county attorney said:

"Sam Livingston [the prosecuting witness] on the night he was arrested told the officers that he bought whisky from appellant, and this was his first chance to tell where he got the whisky; the next chance was before the grand jury, and if he had told a different story there do you suppose they would have returned a bill; and the witness here now makes the same statement he made to the officers when arrested."

In the record there is no evidence as to what the prosecuting witness told the officers the night of his arrest, or that any whisky was found on his person, and no evidence as to what he testified to before the grand jury. This was supporting the witness by matters not testified to on the trial, and should not have been permitted.

The judgment is reversed, and the cause remanded.

STATE ex rel. McNAMARA, Co. Atty., v. CLARK, District Judge, et al. (No. 3721.)

(Court of Criminal Appeals of Texas. Dec. 15, 1915. Dissenting Opinion Feb. 16, 1916. Concurring Opinion June 30, 1916.)

1. COURTS \S 204 — JURISDICTION — TEXAS — CRIMINAL APPEALS.

If the district court acts beyond its jurisdiction by issuing an injunction restraining en-

forcement of a criminal provision, the Court of Criminal Appeals has power to declare the order a nullity.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 499, 504, 619, 758½, 791; Dec. Dig. \S 204.]

2. COURTS \S 89 — JURISDICTION — TEXAS — CRIMINAL APPEALS.

Under Const. art. 5, \S 3, defining powers of Supreme Court, section 8, defining jurisdiction of the Court of Civil Appeals, and section 5, giving the Court of Criminal Appeals appellate jurisdiction coextensive with the state in all criminal cases, and to issue writs of habeas corpus and all other writs necessary to enforce its jurisdiction, where a law imposes a penalty by prosecution for its violation, and not a remedy by civil recovery, the opinion of the Supreme Court against its validity is not binding on the Court of Criminal Appeals, which may proceed to enforce the statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 311, 312; Dec. Dig. \S 89.]

3. COURTS \S 480(1) — JURISDICTION — TEXAS — CIVIL COURTS.

Civil courts may restrain by injunction acts of prosecutor in enforcing penal statute declared valid by Court of Criminal Appeals only when a vested property right is about to be invaded by such act.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 1270, 1271, 1274-1278; Dec. Dig. \S 480(1).]

4. INJUNCTION \S 105(2) — WHEN INVOKED — PROPERTY RIGHTS.

Injunction will not lie to prevent enforcement of the pool hall law (Laws 33d Leg. c. 74 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 6319a-6319n]), which merely imposes a penalty upon violators and does not affect property rights.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 179; Dec. Dig. \S 105(2).]

5. CONSTITUTIONAL LAW \S 101 — VESTED RIGHTS—WHAT CONSTITUTE.

Where an individual acquired pool hall and fixtures and licenses after prohibitory penal statute was adopted and declared valid by the Court of Criminal Appeals, but after Supreme Court declared it invalid, he had no vested property rights to entitle him to enjoin enforcement of the statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 209-211; Dec. Dig. \S 101.]

6. CONSTITUTIONAL LAW \S 101 — VESTED RIGHTS—WHAT CONSTITUTE.

Where pool halls become inherently vicious and properly subject to police power, the license granted them does not create a vested right, since no one has a vested right to carry on a business hurtful to public welfare.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 209-211; Dec. Dig. \S 101.]

7. HABEAS CORPUS \S 44 — INJUNCTION \S 105(1) — WHEN ISSUABLE — RESTRAINT IN CIVIL CAUSE.

A court of equity could not enjoin a grand jury from returning an indictment, if the grand jury saw proper to do so, and the Supreme Court could not release on habeas corpus if they did do so, because their authority to issue a writ is limited by the Constitution and Rev. St. art. 1529, to restraint in a civil cause.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. \S 35; Dec. Dig. \S 44; Injunction, Cent. Dig. \S 178; Dec. Dig. \S 105(1).]

8. INJUNCTION \S 105(1)—**CRIMINAL PROSECUTIONS—STATUTES—ENFORCEMENT.**

If prosecution by the county attorney is enjoined, the court may appoint another person to prosecute, and neither the Supreme Court nor any court of equity could prevent prosecution.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 178; Dec. Dig. \S 105(1).]

9. LICENSES \S 1 — **CHARACTER — PROPERTY RIGHT.**

A license to operate a pool hall is not a property right, nor a contract, nor does it create a vested right, but is a mere permit.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. \S 1; Dec. Dig. \S 1.

For other definitions, see Words and Phrases, First and Second Series, Licenses.]

10. INJUNCTION \S 105(2)—**WHEN ISSUABLE—CRIMINAL PROCEEDINGS.**

The general rule is that injunction will not be granted to stay criminal proceedings or quasi criminal proceedings, whether the prosecution be for the violation of the common law or the infraction of statutes or municipal ordinances.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 179; Dec. Dig. \S 105(2).]

11. PROHIBITION \S 10(1)—**WHEN ISSUABLE—CRIMINAL PROCEEDINGS.**

If the petition alleges no ground of injunction within Rev. St. arts. 4643-4693, the district court is without jurisdiction to issue the writ; and, the remedy by appeal from the order granting injunction being inadequate, defendant may apply for writ of prohibition to the Court of Criminal Appeals if the law involved is penal.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. \S 37-42; Dec. Dig. \S 10(1).]

12. COURTS \S 207(5)—**POWER TO ISSUE—CONSTITUTION—CONSTRUCTION.**

Under Const. art. 5, \S 5, stating the powers of the Court of Criminal Appeals, that court may issue writs of prohibition to enforce its jurisdiction and prevent restraint of prosecutions by the civil courts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \S 207(5).]

13. JUDGMENT \S 648—**PROHIBITION** \S 10(1)—**PERSONS CONCLUDED—MATTERS OF PUBLIC INTEREST.**

A judgment of the Court of Criminal Appeals that a prohibitory pool hall law is valid is of such public interest as to be conclusive upon all persons, and when district courts seek to enjoin prosecutions thereunder, it is the duty of the Appellate Court to issue writs of prohibition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1309, 1310; Dec. Dig. \S 648; Prohibition, Cent. Dig. \S 37-42; Dec. Dig. \S 10(1).]

Davidson, J., dissenting.

Prohibition by the State, on the relation of John B. McNamara, County Attorney, against Erwin J. Clark, District Judge, and another, in the case of Sam Reed against John B. McNamara. Ordered that the writ issue.

John B. McNamara, Co. Atty., and Damon C. Woods, Asst. Co. Atty., both of Waco, for relator. Williams & Williams, of Waco, for respondents. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. The application of John B. McNamara, county attorney of McLennan county, filed in this court, would show, that

upon petition filed by Sam Reed in the district court of the Seventy-Fourth judicial district, alleging—

"that he is the owner of eight pool and billiard tables, necessary balls, racks, etc., of the value of \$1,000; that he is renting a hall and paying therefor the sum of \$35 per month; that he has procured state, county, and city licenses at a cost of \$40 to run a pool hall; that if allowed to run said hall he can earn the sum of \$150 to \$200 per month. He further alleges that at an election theretofore held in McLennan county, under a law adopted by the Legislature in 1913, known as the 'pool hall law,' the running of pool halls had been prohibited in McLennan county. He alleges that said act of the Legislature is unconstitutional and void, but unless the said Jno. B. McNamara, county attorney, is enjoined, he will institute criminal proceedings against the said Sam Reed, wherefore he prays that a writ of injunction be granted, restraining the said Jno. B. McNamara and his assistants from instituting any criminal proceedings under said law."

Upon the filing of said petition E. J. Clark, judge of the district court of the Seventy-Fourth judicial district, indorsed thereon the following order:

"The clerk is hereby directed to issue the writ of injunction as prayed for, this 7/26/1915."

The clerk of the district court, in obedience to said order, issued an injunction, enjoining and restraining the county attorney from filing any complaint or information against the said Sam Reed for a violation of said law, which was duly served on the county attorney. Upon application being first made to us by the county attorney, seeking relief from such injunction, this court refused to issue any process until the county attorney had filed a motion or plea seeking the dissolution of said injunction. After the court had refused to dissolve the injunction, application was again made to us, when we issued temporary process, and set the cause down for hearing. Upon the hearing it was agreed that the evidence on the motion to dissolve showed that if the pool hall law is valid, it had been legally adopted in McLennan county, and after said law had been adopted all pool halls were closed in McLennan county; that at the time of the adoption of said law Sam Reed owned the pool and billiard tables, but that he rented the building long after the adoption of the said law, and paid the city, county, and state license long after the law had been adopted, and after the Court of Criminal Appeals in *Ex parte Francis*, 72 Tex. Cr. R. 304, 165 S. W. 147, had held the law valid, and had not rented the building, nor obtained the state, county, and city licenses until after the Supreme Court had rendered the opinion in *Ex parte Mitchell*, 177 S. W. 953, in which that court held the law invalid.

[1] The first inquiry to be made is whether or not under the above state of facts it was within the jurisdiction and authority of the district court of McLennan county to issue the writ of injunction under the Constitution

and laws of this state. If so, then we would have no jurisdiction nor authority to interfere with the orders made by that court in granting the injunction, no matter how unwise we might deem its action. If it had jurisdiction and authority to issue the writ, we cannot pass on whether it acted properly or improperly in doing so. On the other hand, if the facts set out did not confer jurisdiction upon the district court to issue the writ of injunction, then its action in doing so is wholly void, and if the order is void, and under it the enforcement of the criminal laws of this state is being restrained, we think, under the law, this court has not only the authority, but it is its duty, to declare such order a nullity, in order that the county attorney may proceed with the proper performance of the duties enjoined on him by the other laws of this state the validity of which are not questioned.

[2] Whether wisely or unwisely, the people of this state in framing their Constitution divided the jurisdiction of the civil and criminal courts of final resort, conferring on the Supreme Court final jurisdiction in all civil matters, and upon this court final jurisdiction in all criminal matters. Section 3, art. 5, defines the jurisdiction of the Supreme Court, and section 6 of said article defines the jurisdiction of the Courts of Civil Appeals, making it plain that the jurisdiction of those courts extends to civil cases only. Section 5 of said article specifically provides that this court, the Court of Criminal Appeals, "shall have appellate jurisdiction co-extensive with the limits of the state in all criminal cases of whatever grade," and it is given the power to issue writs of habeas corpus, and issue all such other writs as may be necessary to enforce its jurisdiction. Thus the people, in their Constitution, drew a definite line of division of jurisdiction and authority between the courts of this state, and if the pool hall law provided a penalty to be recovered by civil suit, this court would have no jurisdiction to inquire into the validity of the law, or to seek to enforce it or restrain its enforcement, and we would seek to exercise none. However, the Legislature, in its wisdom, saw proper to make a violation of that law a crime, and provide for the punishment for a violation of its provisions, enforceable only upon the filing of an indictment or information. Section 13 of the act provides, when the law is put in operation in a given territory:

"Any person who shall thereafter operate or maintain a pool hall shall be subject to prosecution, and on conviction shall be punished by fine of not less than \$25.00 and not to exceed \$100.00, or by confinement in the county jail not less than thirty days nor more than one year, and each day such pool hall is run shall constitute a separate offense."

No provision is made to collect any penalty for violating the law by any civil suit. Unfortunately the Supreme Court and this court arrived at different conclusions as to the

validity of this law. As said by us in *Ex parte John Mode*, 180 S. W. 709, recently decided, but not yet officially reported, in upholding the validity of the law, had the Legislature provided for the recovery of a pecuniary penalty by a civil suit, we would concede that under the Constitution of this state, the opinion of the Supreme Court was binding, as it was given final jurisdiction in all civil suits. But the Legislature did not so provide, and made the enforcement of the law a criminal case, and of which cases the Constitution made this court the court of final jurisdiction, and this court has twice upheld the validity of the law, in suits brought to test its constitutionality. That question we do not care to again discuss, as we have so fully set forth our reasons in *Ex parte John Mode*, supra, and in *Ex parte Francis*, 72 Tex. Cr. R. 304, 165 S. W. 147.

[3] The question next arises is, When have civil courts the jurisdiction to restrain by injunction an officer from enforcing a criminal law which the civil courts deem unconstitutional, and especially in a state like this, where the civil and criminal jurisdiction of the courts have been separated, and two courts of final resort created? A writ of injunction is an equitable remedy, and that well-known author on Injunctions, Mr. High, says, in section 68:

"Since courts of equity deal only with civil and property rights, they will not interfere by injunction with criminal proceedings, having no jurisdiction or power to afford relief in such cases. Jurisdiction over such actions is conferred upon courts specially created to hear them, and with few exceptions, it is beyond the power of equity to control, or in any manner interfere with, such proceedings by injunction. If, however, the act concerning which an arrest or criminal prosecution is threatened affects civil property and its enjoyment, in protecting the property right, equity may properly enjoin the criminal prosecution. But in such case its interference is founded solely upon the ground of injury to property and the necessity of preserving property rights. And where such rights are not clearly involved, the relief will be denied."

And in section 1244 he says:

"It necessarily follows from the doctrines above stated that when municipal ordinances have been enacted by proper authority, proceedings on the part of municipal officers for their enforcement will not be enjoined merely because of the alleged illegality of the ordinances. A court of equity will not, therefore, interfere by injunction to restrain municipal officers from prosecuting suits against complainants, or from interfering with their business because of their violation of municipal ordinances which are alleged to be illegal, since the question of the validity of such ordinances does not properly pertain to a court of equity when complainants have a perfect remedy at law, if the ordinances are invalid" (citing many authorities and illustrations).

The American and English Ency. of Law, vol. 16, page 370, lays down the rule:

"It is a well-settled rule, both in England and America, that a court of equity has no jurisdiction to interfere by injunction to restrain a criminal prosecution, whether the violations be for violations of statutes or for an infraction of municipal ordinances. The rule applies whether the prosecution is by indictment or by sum-

mary process, and to prosecutions which are merely threatened or anticipated, as well as those which have already been commenced. If the prosecution is under an ordinance, no ground for enjoining it is constituted by the fact that the ordinance is void. There is a line of decisions which establish an exception to the rule. In those cases where the enforcement of an ordinance or statute would work great injury to property rights, injunctions are allowed."

The Supreme Court of the United States is generally regarded as the highest authority on any question of law in this country. In the case of *Ex parte Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, that court says:

"Any jurisdiction over criminal matters that the English Court of Chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of habeas corpus for the discharge of persons unlawfully imprisoned. 2 Hale, P. C. 147; *Gee v. Pritchard*, 2 Swanst. 402, 413; 1 Spence, Eq. Jur. 689; Atty. Gen. v. *Utica Ins. Co.*, 2 Johns. Ch. [N. Y.] 371, 378.

"From long before the Declaration of Independence, it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the Court of Chancery, whether those proceedings are by indictment or by summary process.

"Lord Chief Justice Holt, in declining, upon a motion in the Queen's Bench for an attachment against an attorney for professional misconduct, to make it a part of the rule to show cause that he should not move for an injunction in chancery in the meantime, said: 'Sure, chancery would not grant an injunction in a criminal matter under examination in this court; and, if they did, this court would break it, and protect any that would proceed in contempt of it.' *Holderstaffe v. Saunders*, Cas. temp. Holt. 136; S. C. 6 Mod. 16.

"Lord Chancellor Hardwicke, while exercising the power of the Court of Chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff, who had by his bill submitted his rights to its determination, from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to stay criminal proceedings, saying: 'This court has not originally, and strictly, any restraining power over criminal prosecutions; and again, 'This court has no jurisdiction to grant an injunction to stay proceedings on a mandamus, nor to an indictment, nor to an information, nor to a writ of prohibition, that I know of.' *Mayor, etc., and Corporation of York v. Pilkington*, 2 Atk. 302; S. C. 9 Mod. 273; *Montague v. Dudman*, 2 Ves. Sr. 396, 398. * * *

"Mr. Justice Story, in his *Commentaries on Equity Jurisprudence*, affirms the same doctrine. Story, Eq. Jur. 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the state or under municipal ordinances. *West v. Mayor, of N. Y.*, 10 Paige [N. Y.] 539; *Davis v. Am. Society, etc.*, 75 N. Y. 862; *Tyler v. Hamersley*, 44 Conn. 419, 422 [26 Am. Rep. 479]; *Stuart v. La Salle Co.*, 83 Ill. 341 [24 Am. Rep. 897]; *Devron v. First Municipality*, 4 La. Ann. 11; *Levy v. Shreveport*, 27 La. Ann. 620; *Moses v. Mobile*, 52 Ala. 198; *Gault v. Wallis*, 53 Ga. 675; *Phillips v. Stone Mountain*, 61 Ga. 338; *Cohen v. Goldsboro Com'rs*, 77 N. C. 2; *Waters-Pierce Oil Co. v. Little Rock*, 39 Ark. 412; *Spink v. Francis* [O. C.] 19 Fed. 670, and [C. C.] 20 Fed. 567; *Suess v. Noble* [C. C.] 31 Fed. 855."

And in *Davis v. Los Angeles*, 189 U. S. 216, 23 Sup. Ct. 498, 47 L. Ed. 778, the Supreme Court says:

"That a court of equity has no general power to enjoin or stay criminal proceedings unless * * * to prohibit the invasion of rights of property by the enforcement of an unconstitutional law was so fully considered and settled in an elaborate opinion by Mr. Justice Gray, in *Re Sawyer*, 124 U. S. 200 [8 Sup. Ct. 482, 31 L. Ed. 402], that no further reference to authorities is deemed necessary."

Our own Supreme Court has followed this rule, and in *Chisholm v. Adams*, 71 Tex. 682, 10 S. W. 336, Chief Justice Stayton, speaking for the court, says:

"It is too clear that a threatened prosecution for a violation of a law, defining and prescribing a punishment for crime, of whatever grade, furnishes no ground on which a court of equity can grant an injunction."

And in the case of *City of Austin v. Cemetery Ass'n*, 87 Tex. 331, 29 S. W. 646, 30 S. W. 430, Chief Justice Gaines, speaking for the court, reiterates the rule, and holds:

"Courts of criminal jurisdiction have power to enforce an observance of statutes against crime by visiting upon offenders the penalties affixed for their infraction, and ordinarily no one can call to his aid the powers of a court of equity in order to enforce their observance. Yet it has been held that 'the court will interfere to prevent acts amounting to crime if they do not stop a crime, but also go to the destruction or deterioration of the value of property.'"

He illustrates the rule:

"Suppose a city, not having the power under its charter to do so, should pass an ordinance prohibiting the sale of butcher's meat in a certain locality, and suppose it should also prohibit any one from selling meat to be there sold or from buying in the prohibited place? The ordinance would be void, but could any one say that the business of a market man in the locality might not be effectually destroyed by it? Under such circumstances, we are of the opinion he should have the right to proceed against the corporation to enjoin its enforcement. If a penalty was denounced against no one but the market man who should sell, it would seem his remedy would be to proceed with his business and defeat any prosecution that should be brought against him for the infraction of the void ordinance."

[4] In the *Pool Hall Law* (Laws 38d Leg. c. 74 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 6319a-6319n]), a penalty is denounced against no one except the man who shall run a pool hall in the prohibited territory, and in such an instance, Chief Justice Gaines holds no injunction will lie, even though the ordinance be void. And this is the unbroken rule of decision in our Supreme Court: That no injunction will lie to restrain the enforcement of a criminal law, even though in their opinion void, unless irreparable injury will be done to property rights. It is the property rights the court protects. In rendering this opinion Chief Justice Gaines recognized it was in conflict with a line of decisions holding that, even in such instance, an injunction will not lie, citing *Wardens v. Washington*, 109 N. C. 21, 13 S. E. 700, but he follows the rule that a court of equity may, in such an instance, protect property from ir-

reparable injury, citing *Atlanta v. Gaslight Co.*, 71 Ga. 108, as authority for so holding. When the Georgia court had rendered the opinion in the case of *Atlanta v. Gaslight Co.*, supra, it appears that it was contended in that state (as some seem to contend in this state) that it was authority for holding that the civil courts would enjoin the enforcement of a law if they deemed it void, even though no vested property rights were involved, but the Supreme Court of Georgia, in the case of *Paulk v. Mayor of Sycamore*, 104 Ga. 24, 30 S. E. 417, 41 L. R. A. 772, 69 Am. St. Rep. 128, made it plain that no such rule of law had been announced in the case of *Atlanta v. Gaslight Co.*, supra, and adheres to the rule that:

"Courts of equity will not by injunction prevent the institution of prosecutions for criminal offenses, whether the same be violations of state statutes or municipal ordinances; nor will they, upon a petition for an injunction of this nature inquire into the constitutionality of a legislative act making penal the act or acts for the doing of which prosecutions are threatened."

They say:

"It will be seen that the distinguishing feature of that case, and the one which was successfully employed in invoking the interposition of equity, was the patent fact that the threatened prosecutions under the municipal ordinance were being used, not for the legitimate purpose of preventing the streets of a city from being unlawfully injured or obstructed, but for the purpose of destroying the valuable, vested franchises of the Gate City Gaslight Co., and equity * * * stretched forth its strong arm to prevent irreparable damages."

[8] And this is the rule which Judge Gaines announces: That an injunction will issue only to prevent the destruction of vested property rights. Under the petition filed for injunction in the case we are considering, and under the facts agreed to, no vested civil property rights are or can be involved. But the case of *Paulk v. Mayor of Sycamore*, supra, is one in which the facts are almost identical with this one, and the Supreme Court of Georgia says:

"Here no question as to the destruction or invasion of civil rights which had become vested under a legislative charter is presented; and, so far as the record discloses, the municipal authorities of Sycamore are simply endeavoring, in good faith, to enforce the penal provisions of the charter and ordinance of the city, the enactment of each of which appears to have been a bona fide effort to exercise the police power, for the protection and preservation of the peace and good order of the community. The plaintiff in error, with full knowledge that the charter of the city contained a provision prohibiting the sale of intoxicating liquors within its incorporated limits, and that one of its ordinances prohibited the keeping of such liquors for sale or barter therein, after seeking and taking legal advice, deliberately purchased a stock of whisky, beer, etc., procured state and federal licenses, opened a 'store' in that city, and commenced selling his stock, in defiance of the law and the ordinance. Having voluntarily gotten himself into this predicament, he now invokes the aid of equity to extricate him therefrom, upon the plea that his business will be ruined, without authority of law, unless he is accorded this relief. He deliberately undertook to test the validity of both the local law and ordinance of Sycamore by

voluntarily and knowingly engaging in the business which they prohibited. He has ample opportunity to make this test in the court having jurisdiction over criminal matters, and a court of equity will not invade their domain in his behalf.

"A case which is almost the exact counterpart of this one is that of *Burnett v. Craig*, 30 Ala. 135, 68 Am. Dec. 115, in which there was a bill for injunction which alleged that the town council of Cahaba had passed an ordinance fixing a license for retailing within its incorporate limits; that the complainant had obtained a state license, and, acting upon legal advice that the ordinance was illegal, had opened a store in that town, and commenced retailing spirituous liquors; that he was thereupon arrested for violating the ordinance, and fined and imprisoned; that he had instituted a proceeding, which was still pending, to test the ordinance; and that the council still threatened to fine and imprison him as long as he persisted in carrying on his business. The prayer was that the municipal authorities be enjoined until the validity of the ordinance was determined by the legal proceedings. The bill was dismissed in the court below for want of equity, and the case was carried to the Supreme Court, where the judgment of the lower court was affirmed, the higher court holding that 'chancery will not restrain quasi criminal proceedings on the part of the municipal authorities (of a municipal corporation) for repeated violations of an alleged invalid ordinance.'"

Our own civil courts also so hold. In the case of *Lane v. Schultz & Buss*, 146 S. W. 1012, the Court of Civil Appeals at San Antonio holds:

"Plaintiffs were doing business under a license granted them, and what they complain of is that the comptroller and county judge were molesting them by threats of criminal prosecution for carrying on the business without a license. The foundation of their position is that they had a valid license, and that the acts of said officers, primarily the action of the comptroller, were, under the circumstances, without warrant of law and void. We are satisfied that plaintiffs' right to do business under said new license can as readily, and more conclusively, be determined in the proposed criminal proceeding, if brought, and that if, as courts of equity, the district courts of the state should assume jurisdiction to grant injunction in this class of cases, and forestall the criminal courts by trying the questions involved, it would be a precedent to practically transfer a large portion of the criminal jurisdiction to the civil docket, where it does not belong.

"Another very important consideration is that it would have to be held, in order to support the jurisdiction to grant injunction, that as between the state and the liquor dealer the latter has a property right in the license or privilege to carry on his business, and the authorities are agreed that, as against the state, such right does not exist. It would be useless to pursue the subject further, in view of the reasoning of the Supreme Court in *Greiner v. Truett*, 97 Tex. 877, 79 S. W. 4."

The court then adds:

"We express no opinion at this time on the question whether or not the new license was rendered void by reason of the forfeiture declared by the comptroller of the 1910 license. What we decide on this appeal is simply that the temporary injunctions were improperly granted."

Our civil courts have also held that a license is but a permit, and grants no vested rights that may not be revoked. In *Hernandez v. State*, 135 S. W. 175, the Court of Civil Appeals at San Antonio held:

"It cannot be said that the license revoked by the order appealed from was of such value as would form a basis for a civil case within the jurisdiction of the county court. A license to sell intoxicating liquors is neither a contract nor a property right in the licensee, but a mere permit to do what would otherwise be unlawful. It has none of the elements of property, and confers none within the contemplation of the constitutional provision that 'no person shall be deprived of life, liberty or property without due process of law'; there being no vested right in a license which a state may not take away when the interest of the public may demand it. The rights and privileges of the licensee exist solely by virtue of the law under which the license is granted, and are subject to the police power of the state under which the license was granted, which power itself precludes the state from divesting itself of it whenever the interest of the public may demand it. See *Black, Intoxicating Liquors*, 127, 145, 150; *Joyce, Intoxicating Liquors*, 185-187, 190; *Cooley's Constitutional Limitations* (7th Ed.) p. 887; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Com. v. Kinsley*, 133 Mass. 573; *Voight v. Excise Com'rs*, 59 N. J. Law, 358, 36 Atl. 686, 37 L. R. A. 292; *Sprayberry v. Atlanta*, 87 Ga. 120, 13 S. E. 197; *Claussen v. Luverne*, 103 Minn. 491, 115 N. W. 643, 15 L. R. A. (N. S.) 698 [14 Ann. Cas. 673]; *Le Croix v. County Commissioners*, 50 Conn. 321, 47 Am. Rep. 648; *Calder v. Kurby*, 5 Gray (71 Mass.) 597; *Newson v. City of Galveston*, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797."

In the case of *Baldacchi v. Goodlet*, 145 S. W. 325, the Court of Civil Appeals (Galveston district) held:

"A license to sell intoxicating liquor is a mere permit and not a vested property right or contract right, and the state may, in the exercise of its police power, revoke it."

And the court held no injunction would issue. The rule announced in this case was affirmed by our Supreme Court, and a writ of error refused.

[6] Not only is this the holding of our civil courts, but this court has held that a license is a bare permit. *Ex parte Vaccarezza*, 52 Tex. Cr. R. 112, 105 S. W. 1119; *Ex parte Lynn*, 19 Tex. App. 295. In those cases it was held that in revoking a license it was not a taking or destruction of property within the purview of the Constitution. Judge Willson says there is strong reasoning to support that position—

"but opposed to these views there is a strong and almost uniform array of authorities which unequivocally declare that laws such as our local option law are within the scope of the police powers of a state, and do not take, damage, or destroy private property for public use within the meaning of that provision of the organic law, and do not infringe upon any other provision of constitutional law."

He was speaking of our local option liquor law, which revoked license, prevented the using of houses as a place of sale theretofore so used, the stock of liquors on hand, prospective profits, and the fixtures necessarily connected with said business. A man having a mere permit to pursue such business, the state had a right to revoke it, one had no property right in such license. And the fact that the building would have to be used for some other purpose, that his stock of liquors

could not be sold in that territory, and that his counters, shelving, and glasses, which were peculiarly applicable to that business, could be no longer so used was not taking away from him any vested right, nor destruction of property within the purview of the law. And as that law was passed under the police power, so was the pool hall law, and one has no more vested right in a license in one instance than in the other. Pool halls had become in some instances notoriously obnoxious and hurtful to the public welfare. In portions of the state, where there were no liquor saloons, and after 9:30 in other territory, they had become, in many instances, the resort of thieves and criminals of every class. In them more than any other place is where the "bootlegging" in both dry and wet territory was carried on. In this resort of the criminals, crimes were hatched, and the boys and young men who entered them were brought in contact with improper influences. They had become festering sores, and by this law an opportunity was given to those communities, where the pool hall had become the breeding place of vice, to close them under the police power of the state, and no man has a vested right to carry on any business that has become hurtful to the public welfare. It is a matter of common knowledge that they were so run, in some instances, as to be more obnoxious to the general welfare of the state than the open saloon. There were no restrictions around those who could obtain a license to run such a place as there were about the saloon; they were and are under no bond to obey the law, and we cannot conceive how any court can hold that any person has a vested right to run that character of place which a court of equity can or would protect by a writ of injunction. In the case of *Littleton v. Burgess*, 14 Wyo. 173, 82 Pac. 865, 2 L. R. A. (N. S.) 631, the Supreme Court of Wyoming, in a case where the plaintiff had a license to run a gambling house, and sought to enjoin the county attorney from prosecuting him, claiming that it was an invasion of his rights, says:

"The principal question that confronts us, and one which we think is decisive of this case, is whether a court of equity has jurisdiction to afford the relief sought by the plaintiff. The jurisdiction of a court of equity, unless expressly made so by statute, is limited to the protection of the rights of property. It has no jurisdiction over the prosecution of crimes. To assume such jurisdiction is to invade the domain of the courts of law, and both the executive and administrative departments of government. Let us investigate for a moment where the contention of plaintiff, if sustained, would lead. The defendant is the prosecuting attorney of Sheridan county, charged with the duty of prosecuting within his county all infractions of the criminal laws of the state. He was proceeding under the provisions of a general statute of the state making gambling a crime, and prohibiting the same. Criminal prosecutions are conducted in Wyoming in the name of the state. The prosecuting officer is a mere agent of the state, which is the real plaintiff in every crim-

inal proceeding. We have therefore in this case the strange anomaly of a court of equity being asked to issue an order of injunction to restrain the state from exercising one of its highest prerogatives in the maintenance of government. Courts of equity possess no such power. To hold that they do would be to invest them with power to restrain and paralyze the operation of the government itself in all its functions and departments. If a court of equity were to assume jurisdiction of the case at bar and try the issues involved, it would be equivalent to a trial of the criminal action here sought to be restrained. The guilt or innocence of the plaintiff would be the fundamental question for the court to determine, and, as bearing upon this feature of the case, the court would have to pass upon the constitutionality of the law under which the criminal proceedings were instituted, and the validity of the ordinance under which the licenses were granted to the plaintiff. These are proper matters of defense in the criminal proceedings. Under our system of jurisprudence, criminal actions can only be tried by a jury, while the trial of actions in equity have always been reposed in the court, and have never been the proper subject of reference to a jury. Neither the criminal actions against the plaintiff, nor the infirmities of the statute, if any there be, can be lawfully determined in this proceeding."

In *Suess v. Love* (C. C.) 31 Fed. 855, it is held:

"Public offenses are prosecuted in England in the name of the King, and in the United States in the name of the state. It is manifest that neither the King nor the state could be made a defendant to a bill in equity. The restraining power of a court [of equity] would be futile as against them, and it would avail nothing for the court to address its restraining process to public and private prosecutors, even if the power to do so existed, since the state would readily find other agents to represent it in the criminal proceeding. Courts of equity, therefore, deal only with civil and property rights. They have no jurisdiction to give relief in criminal cases, and they will not therefore interfere by injunction with the course of criminal justice."

[7, 8] A court of equity could not enjoin a grand jury from returning an indictment, if the grand jury saw proper to do so, and our Supreme Court could not release on habeas corpus if they did do so, because their authority to issue such a writ is limited by the Constitution and laws of this state to restraint in a civil cause. Article 1529, Revised Statutes. The jurisdiction of our Supreme Court is thus much more limited than in those states where the civil and criminal jurisdiction have not been divided and placed in two courts of final resort, and yet in those states where the court has final jurisdiction in both civil and criminal cases, the court of final resort held that there is no jurisdiction to restrain criminal actions by injunction, nor in such action to determine the validity of a statute. If the county attorney should be enjoined, the trial court under the law can appoint another officer to prosecute, and there is no power in our Supreme Court, nor in any court of equity, to enjoin a trial judge from trying such person, or appointing sufficient officers to see that the case is tried, if a county judge should deem it his duty to do so. Any court that has jurisdiction to issue an

order or issue a writ should have authority to see that its orders are respected and obeyed, and so long as courts of equity deal with civil rights and the rights of property, they have that authority and power, but when they step beyond the jurisdiction conferred on them by law, then, and in that instance only, is the court without authority to enforce its decrees. As said by the New York Court, in *West v. Mayor*, 10 Paige, 539:

"The question as to the validity of the corporation ordinances [or statute] does not properly belong to this court for decision. * * * And it would be an usurpation of jurisdiction by this court [a court of equity] if it should draw to itself the settlement of such questions * * * in the discharge of the legitimate duties of the court."

In *Phillips v. Mayor*, 61 Ga. 386, it is held:

"Injunctions or orders in the nature of injunction are not granted by courts of equity to restrain proceedings in criminal matters. * * * For this reason, whatever may have been the infirmities of the penal ordinances. * * * an injunction was properly denied. * * * Chancery takes no part in the administration of criminal law. It neither aids the criminal courts in the exercise of jurisdiction, nor restrains nor obstructs them."

[9] The permission granted by these licenses is not a property right. A license is a mere permit. It is not a contract, nor does it carry a vested right. *Littleton v. Burgess*, supra. We could continue such quotations from the decisions of the various states, but we do not deem it necessary. Those who might desire to investigate the matter further will find that the following decisions, in addition to those already cited, hold in accordance with the above-stated rules of law: *Burnett v. Craig*, 30 Ala. 135, 68 Am. Dec. 115; *Poyer v. Des Plaines*, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 491; *Ex parte Wimberly*, 57 Miss. 437; *Predigested Food Co. v. McNeal*, 4 Ohio Dec. 356; *McLaughlin v. Jones*, 3 Wkly. Notes Cas. (Pa.) 203; *Denver v. Beede*, 25 Colo. 172, 54 Pac. 624; *O'Brien v. Harris*, 105 Ga. 732, 31 S. E. 745; *New Home Sewing Machine Co. v. Fletcher*, 44 Ark. 139; *Schwab v. Madison*, 49 Ind. 329; *Ewing v. Webster City*, 103 Iowa, 226, 72 N. W. 511; *Hottinger v. New Orleans*, 42 La. Ann. 629, 8 South. 575; *St. Peters Episcopal Church v. Washington*, 109 N. C. 21, 13 S. E. 700; and numerous cases cited in Cyc. vol. 22, pp. 903, 904, under this statement of the law.

[10] The general rule is that injunction will not be granted to stay criminal proceedings or quasi criminal proceedings, whether the prosecution be for the violation of the common law or the infraction of statutes or municipal ordinances. But where the statute or ordinance is unconstitutional and void, and the prosecution may result in irreparable injury to property rights, an injunction will be granted. Nevertheless where no property rights are involved, the injunction will not be granted. Among other cases cited by Cyc. is that of *Yellowstone Kit v. Wood*, 18 Tex. Civ. App. 683, 43 S. W. 1068, an opinion reu-

dered by our Court of Civil Appeals at Dallas.

A license is in no sense property or contract. It is a mere temporary permit to do that which without would be illegal, issued in the exercise of the police power. *Lantz v. Hightstown*, 46 N. J. Law, 107; *Voight v. Board of Excise Com.*, 59 N. J. Law, 358, 36 Atl. 686, 37 L. R. A. 292; *Metropolitan Board v. Barrie*, 34 N. Y. 657; *Powell v. State*, 69 Ala. 10; *La Croix v. Fairfield County*, 50 Conn. 321, 47 Am. Rep. 648; *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; *State v. Mullenhoff*, 74 Iowa, 271, 37 N. W. 329; *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83; *Com. v. Brennan*, 103 Mass. 70; *Moore v. State*, 48 Miss. 147, 12 Am. Rep. 367; *State v. Holmes*, 38 N. H. 225; *State v. Horton*, 21 Or. 83, 27 Pac. 165; *Sights v. Yarnalls*, 12 Grat. (Va.) 292; *Richland Co. v. Center*, 59 Wis. 591, 18 N. W. 497; *Sprayberry v. Atlanta*, 87 Ga. 120, 13 S. E. 197.

[11] The only question remaining to be discussed is the jurisdiction and authority of this court to grant the county attorney any relief from the injunction granted by the judge of the Seventy-Fourth judicial district. As before stated, if the district court had jurisdiction and authority to grant the injunction, the writer is of the opinion this court would be powerless to grant any relief. But if under the allegation of the petition and the facts agreed to on file in this court, the district court was without jurisdiction to grant the injunction, the injunction granted is null and void. Some authorities hold it would be the duty of the county attorney to ignore the injunction, and, if the equity court sought to punish for such violation, to then apply to this court for relief under a writ of habeas corpus. But we think the action of the county attorney in obeying the injunction until its legality could be tested in the proper tribunal is the proper and better course to pursue; for if the various officers seek to sit in judgment on the decrees of courts, and ignore them when they deem them unauthorized, it would beget a disrespect for all law. Under the well-established rules of law, as shown above, declared by our own civil courts and the courts of other states, there is no allegation in the petition that would authorize a writ of injunction under title 69 of the Revised Civil Statutes, and if no authority is there found, then the district court was without jurisdiction to issue the writ. The *Encyclopedia of Pleading and Practice*, vol. 10, p. 804, lays down the rule:

"A writ of prohibition will be issued by the Supreme Court to a judge or court which entertains a suit for injunction in a case in which there is no jurisdiction."

It may be contended that, as an appeal would lie from an order granting the injunction, the county attorney would be restricted to this remedy alone. If this remedy would be adequate, then such contention

should be sustained. But by the issuance of the writ of injunction the district court has paralyzed the arm of the law, and all who might desire to do so, during the pendency of that appeal, could openly run pool halls in McLennan county, without restraint or restriction. Taking into consideration the law governing appeals in this state, the county attorney would be compelled to appeal to the Court of Civil Appeals, and if that court should decide that the writ was wrongfully issued, Mr. Reed could apply to the Supreme Court for a writ of error, and, if granted, taking into consideration the well-known condition of the docket of the Supreme Court, it would be two or three years before it could be finally determined whether or not the county attorney could institute criminal proceedings. In such a case, as said by the Supreme Court of West Virginia, in *Swinnburn v. Smith*, Judge, 15 W. Va. 483:

"The remedy by appeal and writ of error * * * is inadequate to meet the necessities of the case, and when this is the case, and the judge and court is proceeding without having any jurisdiction, or by the usurpation of power, a writ of prohibition ought to issue, although an appeal * * * would lie."

The court held: The acts done by the judge of the circuit court were without authority and without any jurisdiction; they were null and void, and writs of prohibition should be awarded to prohibit said court from proceeding in said cases. "A writ of prohibition may as well be granted to prohibit proceedings in a court of chancery as to a common-law court," citing *Flrebrass Case*, 2 Salk. 550.

In the case of *Thomas v. Mead et al.*, 36 Mo. 232, the Supreme Court of Missouri reviewed at great length the authorities, and held that:

"A 'prohibition' is an original remedial writ, and was provided by the common law as a remedy for encroachment of jurisdiction."

It is directed to the judge and parties to a suit in an inferior jurisdiction, upon the ground that they have illegally assumed or transgressed the limits of their jurisdiction. If an inferior court misinterprets a statute, that is held to be a proceeding contrary to the statute, and when the courts of peculiar jurisdiction, as the Ecclesiastical or Admiralty Court, which proceed in general according to the civil law, bring in question the statutes or common law of the realm, they are required to interpret, construe, and expound them as they are expounded by the superior courts of common law, or as those courts shall say they ought to be expounded, when brought before them on prohibition. *Horne v. Carden*, 2 H. Bl. 5337. It was held in *Gould v. Gapper*, 5 East, 345, in an elaborate decision by Lord Ellenborough, that the court of Kings' Bench would prohibit the spiritual courts, or any inferior court, from proceeding upon the construction of an act of Parliament different from that which was put upon it by that court, notwithstanding

there was a remedy by appeal or writ of error. Mr. Blackstone says of the writ of prohibition (3 Black. Com. 112):

"It was the King's prerogative writ provided by common law as a remedy for 'encroachment upon jurisdiction.'"

Again:

"It will keep all inferior courts within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below." 3 Black. Com. 41.

Says Justice Coke, from the King's Bench:

"We, here in this court, may prohibit any court whatever, if they transgress and exceed their jurisdiction. And there is not any court in Westminster Hall but may be by us prohibited if they exceed their jurisdiction, and all this is clear and without any question." Warner v. Sucterman, 3 Bulst. 119.

See, also, 2 Inst. 607; 2 Sel. 308; 6 Com. Dig. 105, 140; 6 Bac. Abr. 579, 600; Full v. Hutchins, Cowp. 424; Buggin v. Bennett, 4 Burr, 2035.

In Culpeper County v. Gorrell, 20 Grat. (Va.) 484, the Court of Appeals holds a prohibition is a proper remedy to restrain an inferior court from acting in a matter of which it has no jurisdiction, or from exceeding the bounds of its jurisdiction. See, also, Glide v. Yolo County, Super. Ct., 147 Cal. 21, 81 Pac. 225; State v. Lake Co. Dist. Ct., 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850; State v. Judge Eleventh Jud. Dist., 48 La. Ann. 1501, 21 South. 94; State v. Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; State v. Fisk, 15 N. D. 219, 107 N. W. 191; State v. Moultrieville, Rice S. C. 158; Ex parte Hill, 38 Ala. 429; Wood County v. Boreman, 34 W. Va. 87, 11 S. E. 747; Russell v. Jacoway, 33 Ark. 191; Fayerweather v. Monson, 61 Conn. 431, 28 Atl. 878; State v. Superior Court, 13 Wash. 638, 43 Pac. 877; Ex parte Branch, 63 Ala. 383; Arnold v. Shields, 5 Dana (35 Ky.) 18, 30 Am. Dec. 669; Vermont Ry. Co. v. Franklin Co., 10 Cush. (64 Mass.) 12; Appo v. People, 20 N. Y. 531; State v. Hopkins, Dud. (S. C.) 101; Jasper County v. Spitler, 13 Ind. 235; Thomson v. Tracy, 60 N. Y. 31; State v. Gary, 33 Wis. 93.

Our own courts have had this question before them, and followed the rule announced in the above opinions. In the case of Hovey v. Shepherd, 105 Tex. 289, 147 S. W. 224, Chief Justice Brown, in speaking for the court, in construing the authority of the Supreme Court under article 5, § 3, of the Constitution, says:

"The Supreme Court shall have authority to issue such other writs as may be necessary to enforce its jurisdiction"

—and holds it has power in an original proceeding for that purpose to issue the writ of prohibition to a district judge, where necessary to prevent such officer from modifying by injunction the effect of a judgment of that court, and where the matter adjudicated in an action affected the interest of the public, as distinguished from private interest of the

citizen, all citizens are bound thereby, though not parties to that suit, citing authorities which will be found collated in the report of that case. They reiterated that holding and issued a writ of prohibition in the case of Conley v. Anderson, 164 S. W. 935.

[12] Shortly thereafter this court, in the case of State ex rel. Looney v. Hamblen, District Judge, 74 Tex. Cr. R. 526, 169 S. W. 678, issued a writ of prohibition to a district judge in a case wherein that court had no jurisdiction. And in the case of State v. Travis County Court, 174 S. W. 365, held that in a case where the court had no jurisdiction, the writ of prohibition would issue. So it is no longer an open question in this state as to whether the Supreme Court or this court has authority to issue the writ of prohibition when necessary to enforce its jurisdiction. This court, and it alone, is given appellate jurisdiction coextensive with the limits of the state in all criminal cases of whatever grade, with such exceptions as may be prescribed by law. This is exclusive of all other courts, and in the same language as is the power given to the Supreme Court in civil cases "to issue such writs as may be necessary to enforce its own jurisdiction." If such language gives to the Supreme Court authority, as held by Chief Justice Brown in Hovey v. Shepherd, supra, to issue an original writ of prohibition in civil cases, it certainly cannot be contended that the language of the Constitution does not give to this court the same power and authority in criminal cases. And although Mr. Reed was not a party to the suit in the cases of Ex parte Francis or Ex parte Mode, supra, yet the state was a party, and the state is composed of all the people residing therein, and the question he presents, the validity of the law, was there decided. He was a citizen of this state, and as said by Judge Brown in Hovey v. Shepherd, supra:

"The important question in the case is reached by the announcement of the well-settled proposition of law that if the matter adjudicated affected the interest of the public as distinguished from private interest of the citizens of the city although not parties to the suit, all citizens are concluded thereby" (citing Cannon v. Nelson, 83 Iowa, 242, 48 N. W. 1033; Clark v. Wolf, 29 Iowa, 197; 2 Black on Judgments, § 584; McEntire v. Williams, 63 Kan. 275, 65 Pac. 244; Sampson v. Com'rs, 115 Ill. App. 443).

[13] The question adjudicated by this court in Ex parte Francis and Ex parte Mode, that the pool hall law is valid, certainly was one that affected the interest of the public, as contradistinguished from private interest, and, under the holding of our Supreme Court, it being a matter of which this court was given jurisdiction by the Constitution, all citizens are concluded thereby, and when district courts seek to nullify that adjudication by issuing a writ of injunction, this court not only has authority, but it becomes its duty, to issue the writ of prohibition to be directed to E. J. Clark, judge of the district court of

the Seventy-Fourth judicial district, that he desist from further interference with or hindrance to Jno. B. McNamara, county attorney of McLennan county, in bringing such criminal proceedings as he deems it his duty as an officer, under his official oath and the law, to bring, and issue to Sam Reed and the attorneys in that case, that they desist from taking any steps to prevent the said John B. McNamara, county attorney, from instituting and prosecuting criminal proceedings if he deems it his duty to do so. And as the order made by Hon. E. J. Clark, judge of the Seventy-Fourth judicial district, in granting the injunction was void and a nullity, in that he exceeded the authority and jurisdiction granted him under the laws of this state, the said Jno. B. McNamara, county attorney, be, and he is hereby, released from all restraint sought to be placed upon him in the performance of his official duties by virtue of said void order and writ.

The writ of prohibition and all other necessary writs to secure the enforcement of this judgment will be issued by the clerk of this court.

DAVIDSON, J. I cannot concur and will write.

DAVIDSON, J. (dissenting). The history of this case is briefly this: Reed was the owner of one or more pool tables, and was operating them legally under the terms of the legislative act, requiring payment of taxes for that purpose, but when *Ex parte Francis*, 72 Tex. Cr. R. 304, 165 S. W. 147, was decided by the majority of this court, upholding the validity of the local option pool hall act, Reed at once ceased to operate his pool tables. Later the Supreme Court, in *Ex parte Mitchell*, 177 S. W. 953, held the local option pool hall act invalid and unconstitutional. Thereupon Reed paid all taxes required by the state, county, city, and federal authorities preparatory to opening his pool hall and operating his pool tables. Looking to this, in addition to paying the taxes, he rented a house that cost \$35 per month and spent about \$1,000, or such matter, securing his tables, from which he expected to realize something like \$150 a month. Such is substantially the agreed statement of facts in regard to this phase of the case. In this condition of things the county attorney, Mr. McNamara, threatened Reed with criminal prosecutions for violating the local option pool hall statute if he should operate his pool tables. The pool hall act had been favorably voted upon by the people of McLennan county, and so far as that vote is concerned, it was placed in operation in that county. Reed's pool hall and tables were in the city of Waco, which, of course, is in McLennan county. These threatened prosecutions were based upon the proposition that the local option election had suspended the tax law of the state, and that therefore Reed could not operate his pool

tables under the tax law with which he had fully complied. Reed, through his attorneys, Messrs. Williams & Williams, instituted injunction proceedings against the county attorney before Judge E. J. Clark, district judge, who granted a temporary restraining order or injunction. The county attorney then applied to the Court of Criminal Appeals for a writ of habeas corpus, a writ of prohibition, and writ of mandamus. It seems from the opinion of Judge Harper that they did not then grant any of these writs, but suggested to the county attorney that he should move to dissolve the temporary injunction, and, if this was refused, then present his application to the Court of Criminal Appeals. The motion was made to dissolve the injunction, which was refused by Judge Clark, and an order entered to that effect, and, further, that all the parties were to await the further order of his court. After the entry of this order the county attorney again presented his application for the three writs, habeas corpus, prohibition, and mandamus. This occurred in vacation, but was granted by Presiding Judge PRENDERGAST and Judge HARPER. All three of the writs were included in the application and granting order, and Judge Clark, Mr. Reed, and his attorneys were prohibited from taking any steps or doing anything whatever against the county attorney, McNamara, under and by virtue of the injunction suit and orders. The case was set down by my Brethren for hearing on the 4th of October, upon the convening of this court. It was submitted on briefs and oral arguments at that time, and the court took it under advisement. Later Judge HARPER wrote the opinion for the majority of the court, overruling the district judge and sustaining the county attorney. In the opinion the writs of habeas corpus and mandamus seem not to have been discussed, but the opinion was based upon that part of the application which sought a writ of prohibition. So I take it for granted that the majority came to the conclusion that, except as to the writ of prohibition, their order was improvidently made. Be that as it may, they found that Judge Clark was in error in granting the temporary injunction and making his subsequent orders, and that he could not restrain the county attorney from prosecuting under the local option pool hall statute vitallized by reason of the favorable vote of the majority of the voters of McLennan county, that it was a binding and valid law by reason of that election, and that Reed was thereby interdicted from carrying on his pool hall or exhibiting his pool tables under the legislative tax act. Under the tax act he could run and operate his hall and tables; under the pool hall act, if it is valid, he could not.

As I understand the record, Judge Clark has never finally disposed of the case before him. What his final order may have been in the premises would be, to some extent,

speculative. He may or may not have perpetuated the injunction. The writer is of the opinion, however, that he should have perpetuated it. The authority of this court or its jurisdiction in the premises would depend, as a matter of course, and of law, upon the question of this court's jurisdiction to grant the writ of prohibition to restrain Judge Clark in the injunction case. That the order of the majority of this court is ultra vires and beyond their authority and jurisdiction is, to the mind of the writer, not even debatable; but, the majority of the court having held the other way, I shall state some reasons why I am not concurring with them. In my conclusion, or from my viewpoint of the case and the law, and under the facts presented to this court, I am supported, not only by the Constitution, but by the decisions of this court in *Ex parte Mussett*, 72 Tex. Cr. R. 487, 162 S. W. 846, and *Ex parte Zuccaro*, 72 Tex. Cr. R. 217, 162 S. W. 844. I also am of the opinion that I am further supported in this conclusion by the opinions of the majority in *Ex parte Francis*, 72 Tex. Cr. R. 304, 165 S. W. 147, and *Ex parte Mode*, 180 S. W. 709. These were all habeas corpus cases. In the *Mussett* and *Zuccaro* Cases, supra, it was decided that contempt punishment for violation of injunction orders was a civil proceeding, of which the Court of Criminal Appeals could not entertain jurisdiction. That was the only assigned reason for dismissing the application for writs of habeas corpus in both of those cases. An inspection of those cases will show that injunction had been granted in each, prohibiting and enjoining the owners of "moving picture shows" from operating their shows on Sunday, which in *Ex parte Lingenfelter*, 64 Tex. Cr. R. 30, 142 S. W. 555, Ann. Cas. 1914C, 765, and *Oliver v. State*, 65 Tex. Cr. R. 150, 144 S. W. 604, was declared to be a violation of the Sunday law. I did not agree with my Brethren in those matters, but their decision became law by the majority opinion applicable to "moving picture shows on Sunday." The parties, *Mussett* and *Zuccaro*, ignored and violated the injunction of the district court of Tarrant county, and were by the district judge placed in contempt of his court, and punished as authorized by the statute, and to the limit. Each party applied to this court for a writ of habeas corpus, which was granted, set down for argument, heard on oral argument as well as on briefs. Subsequent to the submission of these cases Judge Harper wrote the opinion in *Mussett's* Case, and Presiding Judge Prendergast wrote the opinion in the *Zuccaro* Case, holding they were civil cases and this court had no jurisdiction, dismissing both cases from this court without prejudice should they make application to the Supreme Court. It seems *Mussett* and *Zuccaro* applied to the Supreme Court after the rendition of the opinions by the majority of this court, and were granted writs of habeas corpus, and discharged from custody, as they should have been. Speaking

of the question as to whether the *Zuccaro* Case was a civil or criminal case, Presiding Judge Prendergast uses this language:

"We are met at the threshold of this inquiry by the question of whether or not this court has jurisdiction to grant the writ of habeas corpus in this case. *That the case in which this punishment in contempt was imposed is a civil case we have no doubt. Any judgment which would have been rendered by the district court of Tarrant county in said cause could only have been appealed, and by either party, to the civil courts of this state, and it could not have been appealed to this court.* (Italics mine.) By the Constitution of our state this court has jurisdiction in criminal cases only. It has no jurisdiction in civil cases of any character. It cannot grant a writ of habeas corpus in any case except a criminal matter. Likewise, our Supreme Court and the Justices thereof are given power and authority expressly by our Constitution to grant and hear writs of habeas corpus in all civil cases, and the Supreme Court, and neither of the Justices thereof, have any jurisdiction, power, or authority to grant such writs in criminal cases. *It is true that this court, in the case of Ex parte Allison, 48 Tex. Cr. R. 634 [90 S. W. 492, 3 L. R. A. (N. S.) 622, 13 Ann. Cas. 684], in a matter practically exactly like this, granted and heard a writ of habeas corpus and decided it November 15, 1905. It may be that in other cases since then this court has first granted writs of habeas corpus in such matters. We can but believe that this court inadvertently did so without its attention being called to the Amendment of our Constitution, and especially to the statute.*"

The *Allison* Case was subsequently brought before the Supreme Court, and that court entertained jurisdiction. The *Allison* Case was a violation of an injunction as was the case of *Zuccaro* herein quoted. Quoting from *Ex parte Mussett*, supra, which opinion was written by Judge Harper, I find this:

"Without entering into a discussion of the merits of these two propositions, we are met at the threshold with the grave proposition, even if relator is entitled to relief, To which court should the application for a writ of habeas corpus be presented—to this court or the Supreme Court? They are both courts of final jurisdiction, in matters in which they have any jurisdiction, and from the action of either no appeal will lie. If we assume jurisdiction, and order the writ to issue, it should be a finality whatever order we might make, and if the Supreme Court should entertain jurisdiction and order the writ to issue, likewise its orders should be a final disposition of the matter."

The judge then enters into a discussion somewhat of the *Allison* Case, decided by the Court of Criminal Appeals, 48 Tex. Cr. R. 634, 90 S. W. 492, 3 L. R. A. (N. S.) 622, 13 Ann. Cas. 684, and also the same case by the Supreme Court in 90 Tex. 455, 90 S. W. 870, 2 L. R. A. (N. S.) 1116, 122 Am. St. Rep. 633. Quoting further from the opinion in the *Mussett* Case, this language is used:

"That a suit brought to enjoin one from doing any act or thing, we think will be conceded by all to be a civil case. An appeal lies to the civil appellate branch, and not to this court. That the suit instituted in the district court of Tarrant county for a writ of injunction was a civil case will, we do not think, be questioned: that the order made by Judge Simmons was in this civil suit is certain, and it is equally certain that relator is restrained of his liberty by virtue of an alleged violation of this order, and

an order made in that case. To our mind, taking into consideration our Constitution, and the amendment thereto, the acts of the Legislature, in pursuance of this amendment to the Constitution, quoted above, it was the clear intent and purpose that in this character of case the application for a writ of habeas corpus should be addressed to the Supreme Court, and not to this court. Its action will be final, and will finally determine the question of whether or not the civil courts have jurisdiction to entertain suits and enjoin in cases of this character where specific authority to do so has not been conferred on them by the Legislature. Any expression we might give upon that question would not bind the Supreme Court, while it would be the duty of all courts to abide the opinion of the Supreme Court in the premises, and it would be our pleasure to respect it as the opinion of the court having final jurisdiction in the matter.

"We have held that the opening of shows of the character mentioned in plaintiff's petition was a violation of the Sunday law, and we adhere to that opinion, and we are sure that the Supreme Court will and does appreciate the fact that our decision should be final in that matter. But whether or not they can be enjoined from opening on the Sabbath involves a construction of the jurisdiction of district courts in civil matters, and thus under the law they are made the final arbiters, and we and all others should and will bow to their opinion. (Italics mine.)"

"Being of this opinion, the application to this court for a writ of habeas corpus is denied, but in so ordering it is done without prejudice to the right of relator to apply to the Supreme Court for a writ."

In the instant case the statement of facts shows that Judge Clark had granted an injunction, restraining the county attorney from interfering with Mr. Reed in his pool hall exhibitions, or the running of his pool tables. The county attorney had not violated this injunction, and therefore the instant case is not burdened with contempt proceedings. Here we have the simple question as to whether or not this court can issue a writ of habeas corpus or prohibition in a civil case without even a contempt punishment attached to it or any violation of the injunction. In the Mussett and Zuccaro Cases, supra, there had been an injunction. This injunction had been violated and contempt proceedings instituted and the parties placed in contempt, with a judgment awarded against them, punishing by fine and imprisonment for disobedience of the injunction. Here we have nothing of that sort. We have simply, only and purely an injunction. If the contempt proceeding in the Zuccaro and Mussett Cases, supra, growing out of an injunction, was a civil matter, certainly this case cannot be dignified as a criminal case, as none of the elements of criminality attach to it. Mr. Reed had sued out his injunction upon the theory that he had prepared himself, and paid out his money for a house, etc., and was deprived of pursuing his business. He had a property right in the matter which he had a right to test. He could not test this in a criminal action. It could only be done in a civil case, and wherever his property rights are affected to a sufficient extent an injunction may be used

to restrain the parties seeking to injure that business. He is at least entitled to a hearing on the injunction, and if the court granting the injunction should agree with him he is entitled to its perpetuation. He should be awarded the protection of the law against unlawful interference with his property rights.

Our Constitution provides that this court shall have authority to issue writs of habeas corpus. This is general, and will apply wherever a party is illegally restrained of his liberty. McNamara, the county attorney, was not restrained of his liberty in this case. Therefore the writ of habeas corpus could not apply. Section 5, art. 5, of the Constitution reads as follows:

"The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the state in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law. The Court of Criminal Appeals and the judges thereof shall have the power to issue the writ of habeas corpus, and under such regulations as may be prescribed by law, issue such writs as may be necessary to enforce its own jurisdiction. The Court of Criminal Appeals shall have power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction."

It will be seen from this language that not only the court but the judges of the Court of Criminal Appeals shall have power to issue writs of habeas corpus. But it further provides that under such regulations as may be prescribed by law the court may issue such writs as are necessary to "enforce its own jurisdiction." As was said by Presiding Judge Prendergast in the Zuccaro Case, and Judge Harper in the Mussett Case, supra, this court would have no authority to issue any writ in a civil case because of the fact this court has no jurisdiction in such cases; its jurisdiction being confined to criminal cases. That an injunction suit is not a criminal case is fully adjudicated by those two decisions, and in fact it is not debatable. The fact that the injunction in this particular case is a civil matter is recognized in the opinion written in the instant case by Judge Harper. I quote, in this connection, from the opinion:

"Taking into consideration the law governing appeals in this state, the county attorney would be compelled to appeal to the Court of Civil Appeals, and if that court should decide that the writ was wrongfully issued, Mr. Reed could apply to the Supreme Court for a writ of error, and if granted, taking into consideration the well-known condition of the docket of the Supreme Court, it would be two or three years before it could be finally determined whether or not the county attorney could institute criminal proceedings."

This is an expressed recognition of the doctrine laid down by the majority opinion in Ex parte Mussett, supra, and Ex parte Zuccaro, supra. It is an emphatic statement that the county attorney could not appeal to the Court of Criminal Appeals. That he necessarily would have to go on his appeal to the Court of Civil Appeals and thence, if the parties

were not satisfied, by writ of error to the Supreme Court is expressly held. This ought to have settled this case with an opinion holding exactly the opposite of what the opinion does hold. *Delay in decision of a civil case does not confer jurisdiction of such case on this court.* The Constitution only authorizes this court to issue these extraordinary writs to "enforce its own jurisdiction." Const. art. 5, § 5; *Hovey v. Shepherd*, 105 Tex. 237, 147 S. W. 224. Especially see *Millam County v. Bass*, 106 Tex. 260, 163 S. W. 577. This last-cited case so clearly, accurately, and succinctly states the rule as to when writs of prohibition can issue to enforce the jurisdiction of the granting court I would quote freely from it but for the length of this dissent. That case shows the utter fallacy of the decision in this case. *This court cannot issue extraordinary writs to acquire or assume jurisdiction of a matter that is a civil case and which under no circumstances this court could entertain jurisdiction or try.* If this court should not have jurisdiction and could not entertain jurisdiction in any given matter, it would be powerless to issue writs to enforce a jurisdiction in a matter over which it did not and could not have authority. *Nor can this court use the writ of prohibition as a regulatory process. It can only use it "to enforce its own jurisdiction."* It cannot be used to prevent the district court from exercising its jurisdiction. *Millam County v. Bass*, 106 Tex. 260, 163 S. W. 577.

There is some intimation in the opinion of the majority in this case that, the pool hall law being a criminal law, therefore this court could entertain jurisdiction of the injunction because it enjoined a threatened criminal prosecution. There was no criminal prosecution pending, if I understand the facts of the case as agreed to by the parties, but the county attorney was threatening to prosecute for violations of the pool hall law. But be that as it may, that identical question was decided by my Brethren to the contrary in the *Zuccaro and Mussett Cases*. There a violation of the Sunday law was enjoined. The majority of this court held in *Lingenfelter and Oliver Cases* that such was a criminal case; that is, a violation of the criminal statute which prohibited the exhibition of moving picture shows on Sunday. It was upon a disobedience of that injunction the parties were fined for contempt. They held the *Mussett* and *Zuccaro Cases* were civil cases, and that an appeal could not lie from an injunction to this court. They, therefore dismissed the writs of habeas corpus in both cases, and the parties went to the Supreme Court for adjudication because the cases were only civil proceedings. That was the only question involved in those cases, and is the main question involved in this case. If this court had no jurisdiction of an appeal, and could have no jurisdiction of an appeal in an injunction case because it was a civil case, it would be a difficult proposition to assert, understand, or

to maintain that, on account of the "public interest" or delay it might entail in the decision of the matters involved, therefore this court could assume jurisdiction in a civil case, and this simply from the standpoint of public policy or "public interest," or the incidental delay of final decision on appeal by the civil courts. The Constitution placed those matters of "public interest," where they are civil cases, in the hands of those courts having jurisdiction of civil matters. It did not place them in the hands of those courts which alone have criminal jurisdiction. If the Constitution in dividing jurisdiction, awarding to the Supreme Court ultimate and final power in civil matters, and intermediately in the Courts of Civil Appeal, confining the jurisdiction of this court only to criminal cases and appeals in criminal cases, means anything, then this court cannot have or entertain legally jurisdiction of civil matters, and especially in injunction cases that pertain to civil issues or property rights.

I do not purpose to review the question of injunction in criminal cases. My views are known, as shown in various dissents that I have taken occasion to write, commencing with *Allison v. State*, 48 Tex. Cr. R. 634, 90 S. W. 492, 8 L. R. A. (N. S.) 622, 13 Ann. Cas. 684, down through the stages of the advancing injunction matters in criminal cases under what is, or seemed to be, termed the "progressive and evolutionary authority of police power." I do not understand how it can be thought, under a constitutional form of government, that police power can reach beyond the plain provisions and inhibitions of the constitutional requirements or limitations. Nor can it be conceived how the police power can be used to overturn or override the plain exactions and provisions of the organic law. *Necessity* has been used to bolster and enlarge the police power, and the police power has been used to aggravate and augment necessity, but no power, police or otherwise, and no necessity, however urgent, should be entertained, and cannot be legally entertained, that violates the provisions of our Constitution. It is the fundamental law, superior to all departments of the government. There is a limit to police power, which, under stress, is sometimes applied on assumption of power and relied upon to sustain such assumption in the face of the provisions of the Constitution, though in this connection it has been stated "that police power is inherent in government." That is a very latitudinous statement, and one which as applied upon inspection and in final analysis is not correct. "Inherent power in Texas" is in the people, not in the government. Const. art. 1, § 2. The government can only exercise such authority as is conferred upon that government or its created departments through the "inherent power of the people." This is so by express provisions of the Constitution in the Bill of Rights. Section 2 of the Bill of Rights thus provides:

"All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient."

The people have not conferred this power upon the government or the Legislature through empty sounding phrases of "police power." They have conferred upon the Legislature and other departments of government such authority as they saw proper to invest in them, to be exercised under the delegated authority, and to the end that there might not be any mistake about this, and that the "inherent power of the people" might not pass from them to these agencies and departments of government, they saw proper to emphasize and re-emphasize "their inherent power" in the following language (section 29 of the Bill of Rights):

"To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void."

If the "inherent power" is in the people, as is set forth in section 2 of the Bill of Rights, and not "in the government," it would be a difficult matter to understand how, in the face of the provisions of section 29 of the Bill of Rights, the Legislature may assume, without violating the Constitution, or this court uphold such assumption without direct infringement of the Constitution, any power by any department of government where the inhibition is set forth as it is in the Bill of Rights. This is a dangerous proposition to the liberty of Texas citizenship, and it is more than a dangerous proposition to the perpetuation of constitutional representative form of government. It means the overthrow, in the face of these provisions, of the plain inhibitions set forth in the Constitution and reserved by the people to themselves, and this by the agencies created by the people through their organic law. It is an assumption of original power. It ignores delegated authority.

I had not intended to write in any extended manner on this question, but, regarding it as important, I have written beyond what I originally purposed to write.

Another phase of this case I desire to mention. In *Ex parte Francis*, supra, as in *Ex parte Mode*, 180 S. W. 709, the majority opinion concedes that if the act in question delegates power or authority to enact, put into operation or suspend a law of the state, it would be unconstitutional. In both cases the opinion concedes that if there was a delegation of authority by the Legislature to the people in regard to the local option election under the pool hall law, or if having exercised such authority, and by reason of

the vote under the provisions of that act the pool hall law went into effect, and operated to suspend any law of Texas, the pool hall law would be invalid. However, those opinions both hold that it was neither a delegation of authority nor could it operate to suspend any state law. The Supreme Court took the opposite view and held it unconstitutional. *Ex parte Mitchell*, 177 S. W. 953. The majority of that court held that local option law invalid. Judge Hawkins dissented. The majority of this court held it valid, the writer dissenting. Now, this case brings the matter to a crisis. The issue is as sharply made by the facts as is possible for facts to make an issue, and clearly demonstrates the correctness of the view of the Supreme Court, and the views expressed by the writer's dissenting opinions. The opinion in this case by the majority is in direct conflict with what they wrote in the *Zuccaro and Mussett Cases*, supra. In the instant case the agreed facts show that Reed was operating a pool hall, exhibiting his tables, etc., when the *Francis Case* was written. The people of McLennan county voted the pool hall law into operation under the provisions of the act authorizing such election. When the *Francis Case* was written, Reed ceased operating his pool tables. However, when the Supreme Court wrote the opinion in the *Mitchell Case*, he prepared himself to exhibit and operate his tables. He complied with the tax law fully, so far as its provisions were concerned, taking all necessary steps. The injunction proceedings followed, and the county attorney was enjoined from prosecuting Reed. Now we have two laws; one directly by the Legislature under which Reed was authorized to operate his pool tables by paying the specified tax, and under the other law he was interdicted under heavy penalties from exhibiting his pool tables. He was met under this condition of things with threatened prosecution because the pool hall law had been voted into operation by the people of McLennan county. Now if the tax law was not suspended by the local option law vitalizing the pool hall act, he certainly could operate his tables, had a legal right to do so, because he had fully complied with the tax law. If the pool hall law was operative in that county, it necessarily suspended the operation of the tax law, else Mr. Reed could exhibit his tables. My Brethren, deciding this case and restraining Judge Clark by virtue of their writ of prohibition, had necessarily to decide that the pool hall law superseded the tax law. If the tax law was not suspended, Reed had the legal right to operate his tables after paying the required taxes. If it was suspended by the pool hall vote, then the pool hall law was unconstitutional, admittedly so by the majority opinions in the *Francis* and *Mode Cases*, supra, and if the law was unconstitutional by reason of the suspension, then Reed could

operate his tables, because the tax law still remained in full force.

Therefore the issue of suspension of the tax law vel non is the critical issue in this case, and it is the only real issue decided. Both laws could not legally operate in the same territory at the same time, and it is held in the prevailing opinion in this case that Reed could not operate his tables, and Judge Clark was ordered not to interfere with the county attorney in prosecuting him for violations of the local option pool hall act. Under one of these laws he could operate; under the other he could not. One is a general act of the Legislature, operative throughout the state, and was a revenue measure. The other was necessarily inoperative; at least until a vote of the people of a given community had vitalized it. The pool hall law would remain dormant until the end of time if the local option vote did not put it into operation. It could never interfere with the tax law until the local option election was held resulting favorably to the pool hall law. After that favorable action my Brethren sustains the pool hall law, and holds that the party cannot operate his tables under the tax law. They hold the Legislature could authorize such elections. If they are correct, it is evident that such elections can only be held by virtue of the pool hall law. There is no other authority relied upon or shown which justifies such election. This is necessarily the reason, and the only reason, why Reed could not operate his tables, and it is the only reason assigned by the opinion of the majority upholding the local option pool hall law and restraining Judge Clark from interfering with the county attorney in his prosecution of violations of the pool hall act. So if Reed operated his tables under the tax law he would be punished under the pool hall law, and if the tax law was inoperative, it was so because the pool hall law had suspended it. The two acts cannot coexist and both be enforced, and this decision by the majority necessarily adjudicates the fact that the pool hall law did supersede the tax law and put it out of operation; else there is no basis for their opinion. Their opinion finds no other basis for support and assigns no other reason. Judge Clark may have granted the injunction upon the theory that the pool hall law operated a suspension of the tax law, and was therefore void. This was in accord with the opinion of the Supreme Court. It was also in accord with the majority opinion of this court in Francis and Mode Cases, as well as the writer's dissenting opinion. The Francis and Mode Cases both concede and hold that if the local option election operated a suspension of the tax law, it would be invalid and unconstitutional. Here we have the majority opinion expressly holding that it did suspend the tax law. It is the basis of their opinion, and if that proposition is

taken out of their opinion, there is no reason for the conclusion they have reached. If this was not a delegation of authority by the Legislature to the people to hold a local option election, it may be pertinently asked, From what source did these voters obtain the authority to hold that local option election? It is only found in the body of the act, and it is found nowhere else. The Legislature placed it there. The people exercised it, voted favorably upon the pool hall law, and this necessarily, under the prevailing opinion, in this case, voted out and suspended the tax law. If this is not a delegation of authority to those people to vitalize the local option pool hall law, it would be difficult to understand what it is, or what is its operation. The exercise of that authority by the people vitalized the pool hall law in McLennan county, and the pool hall law was not vitalized otherwise, and if it was not thus vitalized and put into operation, it necessarily is not in existence, and if it becomes operative, as my Brethren held in restraining Judge Clark, it necessarily suspends and puts out of operation the tax law. Of course, this is upon the theory that the local option election was a legal one, and my Brethren hold that it is. It cannot be legal as I understand the law. So from any viewpoint, whether from the decision of the Supreme Court in the Mitchell Case or the opinion of the majority and dissenting opinion in this court in Francis and Mode Cases, it is not only a delegation of authority to vote out the tax law by local option election, but it was actually consummated by voting the pool hall law into existence, which necessarily, if the election be valid, brought a suspension of the tax law. I cite the Mode and Francis Cases, and the Mitchell Case and the majority opinion in the instant case in support of that proposition. If the local option election had failed to carry, the tax law would have remained in full force and effect. As the local option election did carry, the tax law ceased, at least the majority so hold in this case. The pool hall election won. This put out of operation the tax law; at least this is the decision of the majority in this case. I cannot see how my Brethren reached their conclusion, viewed from any legal standpoint.

I might follow this with other reasoning, but it seems to me this is sufficient. I desired to express some views about the matter, which I have done. I therefore enter respectfully my dissent from the conclusion reached by the majority in this case. Judge Clark should not have been restrained, and the only authority for restraining him is that the pool hall local option election suspended the tax law.

PRENDERGAST, P. J. (concurring). When our state was first organized as a state government, one appellate court only was created, named "the Supreme Court." The

people by our then Constitution (1845) expressly gave it appellate jurisdiction of both criminal and civil causes, direct from the trial courts. Like jurisdiction, of both criminal and civil, was then also given to such courts of final appellate jurisdiction of every other state of the United States, and in England and Canada, whatever named—in fact, of every English-speaking people on the globe. And with some minor exceptions, our Constitutions of 1861, 1866, and 1869, were to the same effect.

The rapid increase in population, and consequent increase in legal business, in our state, soon after the war (by 1876), showed that it was impossible for one appellate court to dispose of all business, criminal and civil. This was demonstrated by the fact that our Supreme Court by that time was some three or four years behind in its decisions, like it is now, and every day getting still further behind. It was then not infrequent for persons convicted of crime, who appealed, to have to lie in jail for a year or longer, awaiting a decision of their cases, an outrage on justice and humanity, and a very great, and unnecessary, expense to our counties and state. The Supreme Court itself, in endeavoring to avoid this, began to devote more of its time to deciding criminal, to the necessary neglect of, civil causes, thereby, in effect, denying justice in all civil causes. With this state of fact staring them in the face, and getting worse day by day, our people wisely and humanely determined to remedy these crying evils. It was then (1876) thought by our people and wisest and best statesmen that a solution would be had by taking all jurisdiction of *criminal* business away from the Supreme Court, confining it exclusively to civil business, and creating a new appellate court of *supreme and final jurisdiction in all criminal matters*. So this was done by the people in their Constitution of 1876. That is, they changed the jurisdiction of our Supreme Court so as to deprive it absolutely of any and all jurisdiction in criminal matters, and created a new court called "Court of Appeals," and gave it *supreme and exclusive jurisdiction in all criminal matters*. At that time it was believed that this new appellate court could not only keep up with all criminal business, but could also decide and keep up with appeals in civil causes from our county courts, as well. Hence, appeals from our county courts in civil matters were denied the Supreme Court, and jurisdiction thereof given exclusively to said new appellate court.

By actual experience, as early as 1891, it was demonstrated that the Supreme Court could not even keep up with its civil appellate jurisdiction as restricted by our Constitution of 1876, and that said new appellate court could not keep up with its exclusive jurisdiction in criminal matters, and appeals too from our county courts in civil matters,

and also that it was very bad policy to have two tribunals of final appellate jurisdiction in civil matters, so that in 1891 the people determined to again give relief, and amended our 1876 Constitution, and then created *Courts of Civil Appeals*, and gave them exclusive appellate jurisdiction in all civil matters direct from the trial courts, and further restricted the jurisdiction of the Supreme Court, not only exclusively to civil matters, but even as to certain character of civil matters, made the decision of said civil appellate courts final, and prohibited the Supreme Court from having any jurisdiction thereof, and also prohibited jurisdiction to the Supreme Court from any trial court, and restricted its jurisdiction to certain character of civil business from the new Courts of Civil Appeals alone. And at the same time, the people by these amendments of 1891 absolutely took *all civil jurisdiction* away from said "Court of Appeals," changed its name to "The Court of *Criminal Appeals*," and restricted its jurisdiction exclusively to *criminal* matters. It is needless to call attention to the recent legislation, authorized by said 1891 amendments, still further restricting the jurisdiction of the Supreme Court in even civil matters.

The fact that the people by their Constitution and amendments thereto, as stated, have taken absolutely all jurisdiction in *criminal* matters, and a great deal of its original civil jurisdiction, away from the Supreme Court has not been from any lack of confidence therein, or the great judges who have constituted that court, but has been from actual necessity. Since our people have thus provided a court of supreme, final, and exclusive jurisdiction in criminal matters, and first set the example, several other states of the United States and England and Canada have adopted our plan, and likewise have established courts of exclusive jurisdiction in criminal matters.

I have given briefly the constitutional history of our appellate courts, so as to show the reason, and to emphasize the facts, that: (1) The Court of Criminal Appeals has *exclusive, supreme, and final* jurisdiction in all *criminal* matters; and (2) the Supreme Court has *no* jurisdiction whatever in *criminal* matters, but it is *prohibited* from taking any such jurisdiction, and that it has only very limited appellate jurisdiction in even civil matters. (The sole exception to what might be called a quasi criminal matter is the writ of habeas corpus in civil causes, which I will later discuss.) The *people* select and elect the judges for both of said courts. They are just as capable of selecting and electing for the one as for the other. They select and elect the judges of the Court of Criminal Appeals for the purpose, among others, of determining the constitutionality and construction of criminal laws, and select and elect the judges of the Supreme Court for

an altogether different purpose. The Supreme Court, discussing this very question in *Comrs. Ct. v. Beall*, 98 Tex. 109, 81 S. W. 526, said:

"We think it a reasonable deduction from the establishment of two courts of final resort, one for criminal and the other for civil cases, that it was contemplated that the decisions of each upon the questions pertaining peculiarly to its own jurisdiction should be authoritative and controlling upon all other courts. Let us take the Court of Criminal Appeals for example. What was more reasonable to conclude than that the court would be composed of lawyers, not only learned in the law, but especially versed in the jurisprudence of its criminal branch and of the great experience in the criminal courts, and that by reason of this fact and of the duty devolved upon them to determine with rare exceptions, questions of criminal law only, their decision upon such questions would be entitled to more weight than that of a court of civil jurisdiction only."

The people have expressly and repeatedly determined, and emphatically declared, in substance and effect, by their Constitution and amendments thereto, that the Court of Criminal Appeals *alone shall* determine the constitutionality, *vel non*, of any and every criminal law enacted by our Legislature, and that our Supreme Court *shall not* do so. The Supreme Court, as heretofore constituted, has expressly declared and held that the Court of Criminal Appeals alone has jurisdiction to determine the constitutionality *vel non*, and construction, of every criminal statute, and that the Supreme Court has not that right nor jurisdiction, and in such matters said:

"The Supreme Court should follow the decisions of the Court of Criminal Appeals," and "We think we may safely say that it has been the rule of this court, * * * to follow the construction placed upon the statutes embraced in our Penal Code and Code of Criminal Procedure by the Court of Criminal Appeals," and that said "*rule is binding authority upon us.*"

So held the Supreme Court unanimously through Chief Justice Gaines, when that court was composed of he and Justices Brown and Williams. *Comrs. Ct. v. Beall*, 98 Tex. 108, 109, 81 S. W. 526; *Green v. Southard*, 94 Tex. 470, 61 S. W. 705; *State v. Schwarz*, 103 Tex. 110, 124 S. W. 420, and other cases. And they announced and adhered to that rule, even when they were unanimously of the opinion this court was in error. Not only is the Supreme Court bound by the decisions of this court on criminal matters, but every other lower court of this state for much stronger reasons is so bound. The civil appellate courts have so held. The Supreme Court of the United States has always held the same doctrine, in *Forsyth v. Hammond*, 166 U. S. 518, 519, 17 Sup. Ct. 665, 41 L. Ed. 1095, saying:

"The construction by the courts of a state of its Constitution and statutes is binding on the federal courts. We may think that the Supreme Court of a state has misconstrued its Constitution, or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

The conclusion is therefore inevitable that as to all criminal statutes, any opinion, judgment, or decision of the Supreme Court of this state as to its constitutionality has no binding force or effect whatever as authority on any court, or person, in this state. It would have no more authority or legal effect, for instance, than the opinion, judgment, or decision, of any court, from the highest to the lowest, of the state of Maine would have, if such court of Maine should hold that a statute of our state under our Constitution was unconstitutional. In other words, any decision, judgment, or opinion of our Supreme Court as to the constitutionality of any criminal statute passed by our Legislature is without legal authority, power, or effect on any court or person in this state. As to criminal statutes, our Supreme Court is just as foreign to our state, and every person and court in it, as if in truth it was a court of the state of Maine, elected by the people of Maine, and located and holding its sessions in said state, under and by virtue of its laws, and not ours.

That our pool hall statute is a criminal statute, and depends exclusively for its construction and enforcement on the criminal courts, no one can question. It is as precisely and certainly so as our local option liquor prohibition statutes are. It was specifically founded upon and wholly modeled after and follows them as directly and positively as could be done. Our Supreme Court in *Comrs. Court v. Beall*, supra, 98 Tex. 108, 81 S. W. 526, held:

"We are of opinion that our local option statutes are strictly and essentially criminal laws, and as such primarily subject to the decisions of the criminal courts as to their validity and construction."

If our people had intended that the Supreme Court should have had any sort of supervisory jurisdiction over the Court of Criminal Appeals, they would have, in some direct provision, so declared. On the contrary, in their Constitutions and amendments thereto, they have clearly excluded any such jurisdiction from the Supreme Court.

Notwithstanding our Supreme Court had no right, jurisdiction, power, or authority to decide that our pool hall law is unconstitutional, but on the contrary, is by our Constitution expressly prohibited from doing so, yet, in the case of *Ex parte Mitchell*, 177 S. W. 953, unfortunately, and it seems to me, without mature investigation or deliberation, said that that law was unconstitutional. And this too after, and in the very face of, the decision of this court (*Ex parte Francis*, 72 Tex. Or. R. 304, 165 S. W. 147), both upon reason and authority, after the most thorough investigation, holding that said statute is clearly valid and constitutional: this court being the only court of supreme and final jurisdiction, power, and authority which can legally determine such question. It will be noted that neither the report of

the Mitchell Case, nor the memo. opinion therein in any way discloses how the question therein arose, or could have arisen. On the contrary, it seems, the Supreme Court's holding therein was merely gratuitous. Said holding in the Mitchell Case, on its face shows that it was hastily delivered, on the last opinion day of the term, and in no way backed by reason or argument, the holding itself stating:

"A full opinion will be later filed, the preparation of which has been prevented by the approaching close of the term."

The report of that case also shows that no one appeared, by brief or otherwise, for the state, respondent. More than a year has now passed since it was handed down, and still no "full opinion" has yet been filed. The only two cases cited as authority are State v. Swisher, 17 Tex. 441, on one proposition, and Brown Cracker, etc., v. Dallas, 104 Tex. 290, 137 S. W. 342, Ann. Cas. 1914B, 504, on the only other proposition. Before the opinion in said Ex parte Francis Case, supra, was handed down, in our thorough investigation of the question and authorities, we, more than once, discussed said Swisher Case and the questions in said Francis Case with the late lamented Chief Justice Brown of the Supreme Court. He was very familiar with the Swisher Case, and with much emphasis said to me: "*The old Swisher Case is not the law, and never was the law.*" After the opinion in the Francis Case was handed down by this court, and just after the Mitchell Case had been submitted in the Supreme Court, Chief Justice Brown called for, and was furnished, a copy of our opinion in the Francis Case. After thoroughly considering the questions decided therein, and that decision, he more than once said to us: "Your decision is unquestionably correct and the law." Chief Justice Brown died May 26, 1915; an appointment to the vacancy created thereby was made June 1st (177 S. W. vi), and the mere memo. holding in the Mitchell Case filed June 23, 1915. I have no apology to make for consulting, and discussing with Chief Justice Brown the Swisher and Francis Cases. He was a member of our Supreme Court for many years, and was entirely familiar with our Constitution and the construction and application thereof and the decisions of our courts, and had himself written a large number of opinions on constitutional questions. I felt I could get aid from him, as well as I could by poring over text-book writers and opinions of other judges and courts. I regarded him, as I think he was generally regarded, one of our great judges. I have no doubt if he had lived a short time longer, the decision in the Mitchell Case would have been the reverse of what it is. What I say is not intended as any reflection, and not even a criticism, of any one; I am merely recording recent pertinent events.

No one can read the opinion in the Swisher

Case and reach any other conclusion than that: (1) It was not the opinion, upon mature deliberation and investigation of the great judges who then composed that court, for they expressly say:

"The question presented is not now of very general interest, *as the act, whether constitutional or not, has been repealed.* We shall not therefore give to it the elaborate investigation that we would otherwise have felt called on to bestow on it." 17 Tex. 448.

(2) It, therefore, was unquestionably dictum, pure and simple, and no authority whatever. Chief Justice Brown, in Grigsby v. Reib, 105 Tex. 602, 153 S. W. 1124, L. R. A. 1915E, 1, Ann. Cas. 1915C, 1011, correctly defined dictum.

Our Supreme and civil appellate courts, and this court, have so often held and decided the reverse of what was said as dictum in the Swisher Case, as we show in the opinion in the Francis Case, as, without any doubt, to destroy, annul, and overrule the dictum in the Swisher Case, as even any suggestion of argument or authority.

Still further, we show in the Ex parte Mode Case, 180 S. W. 708, that the opinion of every other highest appellate court of every state of the United States (with *possibly one* exception) holds the reverse of what is said as dictum in the Swisher Case and held in the Mitchell Case. So that it is worse than idle to further discuss or consider the Swisher Case as any authority whatsoever.

Chief Justice Brown wrote the opinion in Brown Cracker Co. v. Dallas, supra, just shortly before we had the Francis Case before us. He knew his opinion in that case was wholly inapplicable to the Francis Case, else he could not, and would not, have so emphatically approved the opinion in the Francis Case. There can be no question but that the decision in the Brown Cracker Company Case is the law, and we have all the time so held. But it is just as certain that it is wholly inapplicable to the questions in this case. Judge Harper has demonstrated this in the opinions in the Francis and Mode Cases, on both reason and authority. The Brown Cracker Company Case was this: The charter of the city of Dallas provided:

"That no ordinance shall be enacted inconsistent either with the laws of the state, or with the provisions of the act [charter]."

The city passed an ordinance, which Judge Brown says:

"An argument to demonstrate that the ordinance permits such houses [bawdy] to exist in that district would be inexcusable, the language is too plain to require explanation or application." 104 Tex. 294, 137 S. W. 342, Ann. Cas. 1914B, 504.

He quoted article 500 (361) P. C., which makes it a crime for any person anywhere in the state to keep, etc., any such house, and cited article 503 (362a), which expressly authorizes any person, or the state, to enjoin the actual, threatened, or contemplated use of any place for any such house, etc., and said,

"The antagonism between the ordinance and the law is as emphatic as that between life and death," and held the state law "must prevail." He further held that under article 1, § 28, of our Constitution as it now is, the Legislature could not even authorize the city of Dallas to suspend said state law.

The recent decision of the Supreme Court in *Middleton v. Texas Power & Light Co.*, 185 S. W. 556, is directly and pointedly the reverse of what that court held in said *Mitchell Case*. I will show this: On April 16, 1913, page 429 (*Vernon's Sayles' Ann. Civ. St.* 1914, § 5246h) the Legislature enacted a law, whereby it fixed, as the Supreme Court said—

"the liability of employers for personal injuries to their employes, or for death resulting from such injuries, and the compensation afforded therefor to employes, or their beneficiaries."

The Supreme Court further states:

"The operation of the act, as to employers of labor within the state (not excepted by its terms) is this:

"1. *They may, at their election, become subscribers under the act, or what may be termed consenting members, to its general scheme of liability and compensation, or remain without its pale.*

"2. *If they become subscribers, and give the required notice to that effect to their employes, they are exempt from all common law, or other statutory liability, for personal injury suffered by such employes in their service, except that for exemplary damages where an employe is killed through an employer's willful act or omissions or gross negligence, which may be defended against as under existing law.*

"3. *If they do not become subscribers, they are amenable to suits for damages recoverable at common law, or by statute, on account of personal injuries suffered by their employes in the course of their employment, and are denied the right of making what constitutes the common-law defenses thereto.*" * * *

Such employers, under the terms of the act, who subscribe thereunder, do so only from year to year, and at the end of any year *at their option* can cease to become members, or in any way be affected by said act as subscribers would be. The act further provides that certain features of it shall not be in force "until not less than 50 employers have subscribed, who have not less than 2,000 employes," and "if the number of subscribers afterwards falls below 50, or the number of employes falls below 2,000," then, the act ceases to be in force, but is again put in force when the said number of subscribers reaches the prescribed number of 50, with 2,000 employes. Thus by the option of these employers only, the law will be in effect one year, and not the next, and will be shuttlecocked back and forth—in force and not in force, as they, from year to year, and no one else, determine. The employes have no option whatever as to putting the law in force or preventing it from being put in force. They are at the mercy of their employers, 50 to 2,000, or rather 1 to 2,000, or even 10,000 or more employes; for if 49 employers only subscribed, the act will not be put in force. If 50 subscribe and then one of them drops

out, the law thereby ceases to be in operation. The result is therefore that *one employer* alone can put the law in force, and withdraw it from being in force, at his sweet will, and all employes, though there be 100,000 of them, are utterly helpless, as far as putting the law in force, or keeping it from being in force. Of course, the employers would not put and keep the said law in force unless it was in *their* favor, and against their employes. It is thus seen that if there ever was an *option statute* of the rankest and most radical type, and one which could be alternately suspended, and then put in force—shuttlecocked back and forth, now suspended and now not, and that too by an individual or individuals, without even the people having any say thereabout—this is one. It is so unmistakably so. It is useless to further recite its provisions. The Supreme Court held:

"The act, in our opinion, is, in its several provisions, a constitutional law." (Italics mine.)

This decision of the Supreme Court, being its latest expression, and applying what Chief Justice Brown in the *Cracker Company Case* said of the state law and Dallas ordinance, I say: The antagonism between the holding in the *Middleton Case* with the holding in the *Mitchell Case* "is as emphatic as that between life and death," and if from any other court in the land, the last deliberate decision, and not the first hasty and immature utterance, being a civil and not a criminal statute, should, and would, be followed by all other courts, as well as by that court itself.

It is claimed the occupation tax law, which requires persons who run pool tables to pay an occupation tax as a prerequisite to following that occupation, was "suspended" by the people, and not by the Legislature, when all the people of McLennan county voted by such an overwhelming majority to have said pool hall law enforced in said county, and is therefore contrary to section 28, art. 1, of the Constitution. In the *Middleton Case*, in precisely the same line of reasoning, the Supreme Court held the employers alone, or rather 1 of 50, suspends or alternately puts in force that law, against all employes, without such employes, or the people, in any way, having anything to say or do, on the subject. In the first place, the Legislature itself, and not the people as contradistinguished therefrom, in the pool hall law, "suspended" said tax law, if it has been "suspended." The Legislature had the unquestioned constitutional power under that section, and every other, to suspend said tax law if it so desired. It has many times and uniformly been expressly held by this court, the Supreme Court, and our Courts of Civil Appeals that our cities can prohibit sales of liquor within parts of its limits, being nonprohibition territory therein, and make it a crime to do so, and such law is not unconstitutional, because of article 1, § 28, of our Constitution. So far as said occupation tax law is concerned, as to pool halls it is, in substance and

effect, precisely the same as to liquor dealers in "wet," or other than prohibition territory. I will cite some of these decisions.

One Garonzik, for years, had legally engaged in the liquor business at a certain place in the city of Dallas, not prohibition territory, and had paid all his occupation taxes to do so for another year. The city, however, passed an ordinance, prescribing a small district, within its limits only, wherein such business could be carried on, and made it a crime for any one to sell liquor anywhere in the city outside of said district. Garonzik was convicted for violating said ordinance by selling at his said place, although prior to the ordinance, he had paid all licenses to do so for the time, and appealed to this court. He expressly attacked said ordinance on the ground it was void and unconstitutional under article 1, § 28, because it suspended said state tax law. This court, in a unanimous opinion, held the city had the right to enact and enforce said ordinance, and it did not violate said constitutional provision. *Garonzik v. State*, 50 Tex. Cr. R. 534, 100 S. W. 374. Exactly the same was held in *Ex parte Levine*, 46 Tex. Cr. R. 364, 81 S. W. 1206, and in *Ex parte King*, 52 Tex. Cr. R. 383, 107 S. W. 549, and other cases by this court, and by the Supreme Court in *Henderson v. Galveston*, 102 Tex. 163, 171, 114 S. W. 108, wherein the Supreme Court, said:

"All of the contentions advanced by appellant under article 1, § 28, of the Constitution are decided correctly in *Ex parte King*, 52 Tex. Cr. R. 383 [107 S. W. 549], and in others therein referred to. *Discussion of the question is unnecessary.*"

The same thing was held in *Cohen v. Rice*, 101 S. W. 1052, by our Court of Civil Appeals at Dallas. It has always been so held by every court of this state until said Mitchell Case was hurriedly decided.

Further as to the constitutionality of said pool hall law. It was passed by a very large majority of both houses of the Legislature, and approved by the Governor. Each legislator, and the Governor, took exactly the same oath to support the Constitution of this state that the Supreme Court Justices did, and every other officer does. The legislators by a large majority of each house, and the Governor, and the judges of the lower courts, and this court, under their official oaths, after the most thorough investigation, hold said law is constitutional. Each of these persons and tribunals had the unquestioned right, and it was their duty, to pass on and determine the constitutionality of said law.

In *Winn et al. v. Dyess*, County Attorney, et al., 167 S. W. 294, an election under said pool hall act had resulted in favor of putting that law in force in Bell county. Winn and others at that time were engaged in running pool halls, had full equipments therefor, and were making money thereby, and had paid

all taxes and procured licenses for that purpose, which were then in force. And they had filed a suit to contest the validity of such election. They then sought an injunction from the district court against the county attorney and other officers from prosecuting them for running their pool halls pending their election contest suit. The district judge denied them an injunction, and they appealed to the Court of Civil Appeals at Austin. That court, through Chief Justice Key, in an able opinion, showing thorough investigation of the question unanimously, correctly held:

"If the entire statute is unconstitutional, appellants will have the right to interpose that defense in whatever legal proceedings may be instituted by the county officers to enforce that law in Bell county, and therefore appellants will have an adequate remedy at law; and, having such remedy, they are not entitled to relief by injunction or otherwise from a court of equity. *City of San Marcos v. International & Great Northern Ry. Co.*, 167 S. W. 292, recently decided by this court."

The Court of Civil Appeals at Dallas (*Roper v. Lumpkins*, 163 S. W. 110) had already, in a unanimous opinion, held said pool hall law constitutional, and affirmed the district judge in denying an injunction against the officers to prevent an election under said pool hall law. The judges of these two courts are conceded by all to be judges of great learning and ability, and have long been members of the courts they constitute, and their opinions deservedly have great weight.

Thus we see all three of the departments of this state, legislative, executive and judicial, which have the unquestioned authority, jurisdiction and power to pass upon and determine the constitutionality of the pool hall law, expressly hold it constitutional, and two judges of the Supreme Court, against one of its members, hold said law unconstitutional, when that court had no authority, jurisdiction, right, or power to determine such question, but by the Constitution are expressly prohibited from doing so. And yet, it seems, there may be some persons who want to make the decision of the two Supreme Court judges an excuse to protect persons in the flagrant violation of said pool hall law!

Our Constitution, prior to 1876, expressly gave the Supreme Court, and judges thereof, original jurisdiction to issue a writ of habeas corpus in both criminal and civil matters. The 1876 Constitution expressly deprived that court and the judges thereof of such jurisdiction in criminal matters, and expressly conferred such jurisdiction exclusively on said Court of (Criminal) Appeals and judges thereof, but never, at any time, conferred on said Court of (Criminal) Appeals such jurisdiction in some exclusively civil probate proceedings, nor deprived the Supreme Court of such jurisdiction in such exclusively civil probate matters. Both courts have uniformly, and in many cases, so held. *Ex parte Berry*, 34 Tex. Cr. R. 36, 28 S. W. 806; *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281, and

other cases from both courts. By 1891 it was demonstrated to the people that the civil courts could not properly control such courts, and persons connected therewith, unless the Supreme Court should be reinvested with power to issue, and determine questions arising on, writs of habeas corpus such as punishment for contempt, growing out of exclusively civil causes. In other words, that the Supreme Court should have the privilege to first issue said writ and hear and determine all matters arising out of such exclusively civil proceedings, and that the Court of Criminal Appeals in such civil proceedings should not have exclusive jurisdiction. It is unnecessary to state the reasons for this. They are obvious. Hence, by said 1891 constitutional amendments the people reclothed the Supreme Court and judges thereof with power to issue such writ, "as may be prescribed by law." Thereupon the Legislature gave the Supreme Court, or any justice thereof, power to issue said writ *only*—

"where any person is restrained in his liberty by virtue of any order, process, or commitment issued by any court or judge, on account of the violation of any order, judgment or decree theretofore made, rendered or entered by such court or judge in any civil cause."

The constitutional, judicial, and legislative history of our state, well known to all, in connection with the provisions and amendments of our Constitution itself, caused us to be of opinion that the people and Legislature clearly intended the Supreme Court, in said exclusively civil proceedings, should, in preference to this court, first have the opportunity to determine whether or not it would issue a writ of habeas corpus. Hence, respecting that intention, and in express deference to the Supreme Court, in the companion cases of *Ex parte Zuccaro*, 72 Tex. Cr. R. 214, 162 S. W. 844, and *Mussett*, 72 Tex. Cr. R. 487, 162 S. W. 846, we declined to issue said writ until the Supreme Court should first be given an opportunity to do so. For this court in the *Zuccaro* Case, I said:

"Certainly the Legislature intended thereby (article 1529, Revised Civil Statutes) to make certain that the Supreme Court had power and authority to issue the writ of habeas corpus in such cases as therein provided, and we think by the amended Constitution and said act of the Legislature it was intended that the Supreme Court should first be given an opportunity to take jurisdiction in such matters as are provided for by said statute, in civil matters"

—and Judge Harper in the *Mussett* Case said substantially the same thing. He said:

"It was contemplated and intended that when an application for a habeas corpus grew out of a civil suit, the Supreme Court should entertain jurisdiction. * * *

And, further:

"We think as a matter of policy both courts should not exercise it [issue the writ] in this character of cases, and only in extreme cases would we feel called upon to issue the writ in any case where by law the matter should properly go to the Supreme Court for final review in the ordinary course of court procedure."

In both of those cases we dismissed or denied the writ without prejudice, so the parties could, as they did, apply to the Supreme Court, which granted the writs, heard the causes, and discharged the parties. Such "extreme case" recently arose in *Ex parte Duncan*, 182 S. W. 313, as explained therein.

"Much ado" is made in the dissenting opinion herein, because we said in the *Zuccaro* and *Mussett* Cases that the fine and imprisonment by the lower court, from which they sought relief by habeas corpus, grew out of a civil cause. There can be no doubt that that was true. My dissenting Brother then not even intimated a doubt thereof. Surely, no one can doubt it. The "much ado" is now made, however, and a clear misapplication thereof attempted, because the case of *Reed v. McNamara, Co. Atty., etc.*, which caused this proceeding, may also be termed a civil case. No one questions that. We specifically so treated it in Judge HARPER'S opinion herein, and show that whatever final judgment might have been rendered therein could, in no event, have been appealed to this court. But, when it is stated that both were civil cases, all further resemblance ceases. "The antagonism between them is as emphatic as that between life and death." In the one, the county attorney of Tarrant county sued *Zuccaro* and *Mussett*, and enjoined them from flagrantly violating a criminal law of this state, on several grounds stated in the *Zuccaro* Case, supra, as the statute and law expressly authorized. In the other, *Reed* sued the county attorney of McLennan county, and procured the shield and protection in advance of his sworn intention to openly and flagrantly violate a criminal law of this state, by having a district judge enjoin and prohibit the county attorney from discharging his sworn constitutional and statutory duty of prosecuting him when he should commit the intended crimes. I think no such legal monstrosity was ever before heard of as was attempted in the *Reed* Case. There is no possible conflict, either in principle or in fact, between the *Zuccaro* and *Mussett* Cases and our holding in this cause.

It is claimed, however, as an excuse or pretense for *Reed* having the county attorney so enjoined, that he had *vested property rights*, and that therefore a judge of the district court, in a civil suit, an appeal from which could never reach this court, had jurisdiction and power to defy and violate the express decision and solemn judgment of this court in this very matter, take it out of the criminal courts, and himself be shielded and protected in his express avowed intention to violate said criminal law, and prevent even his prosecution in the criminal courts when he carried out his intention and actually openly and flagrantly committed said crimes. That his action of thus inducing said injunction by the district judge in this instance, if not prevented by this court, was intended to have, and

would have had, apparently at least, this effect no one can question.

That said pool hall law as stated is exclusively a criminal law no one can deny. The *Ex parte Francis* Case was instituted and prosecuted to final adjudication in this court, for no other reason or purpose whatever than to have determined and adjudicated, legally and constitutionally, by the only court of supreme and final jurisdiction and power which could determine such question, whether or not it was constitutional. Francis was a party on one side, and all other persons in this state were parties on the other side. It was wholly unnecessary and improper to have named all the other persons on the other side from Francis. They were as clearly included in the name of "The State" as if they had been individually named. This would include, of course, Reed himself and his attorneys, and the district judge whom he induced to so enjoin in his behalf. This is so in every case where the state is a party to any case. (Of course, these other persons would not be such parties as to disqualify them as jurors or other officials in such causes.) This has been expressly held in principle by the Supreme Court in *Hovey et al. v. Shepherd*, District Judge, et al., 105 Tex. 237, 147 S. W. 224, wherein the Supreme Court issued and enforced a writ of prohibition, commanding the district judge and parties to that suit from further interference, by injunction or otherwise, with its solemn judgment in another cause, that court through Chief Justice Brown saying that by their action in seeking and procuring an injunction against the enforcement of the Supreme Court judgment in such other cause thereby—

"manifesting a disregard of and contempt for law, and the swift compliance of the judge in granting the injunction without a hearing were sufficient to admonish this court that its authority must be exercised promptly and firmly to maintain the dignity of the state's judiciary. The writ of prohibition is the only effective preventive remedy appropriate to the conditions which confront us; therefore, we have authority to use it to guard and enforce our jurisdiction. * * * The interveners were not parties to the suit of the City of Sweetwater v. Kansas City, Mexico & Orient Railroad Company at the time the judgment of this court was entered [in that suit], but they were citizens of that municipal corporation, and the important question in the case is reached by the announcement of the well-settled proposition of law that, if the matter adjudicated affected the interest of the public as distinguished from the private interest of the citizens of the city, although not parties to the [other] suit, all citizens are concluded thereby. *Cannon v. Nelson*, 83 Iowa, 242, 48 N. W. 1033; *Clark v. Wolf*, 29 Iowa, 197; 2 Black on Judgments, § 584; *McEntire v. Williams*, 63 Kan. 275, 65 Pac. 244; *Sampson v. Com'rs*, etc., 115 Ill. App. 443."

Two cases could hardly be more alike in principle than that and this case. And to precisely the same effect is the decision of the Supreme Court in *Conley v. Anderson*, 164 S. W. 985. The decision of that court in *Milam County*, etc., v. Bass et al., 106 Tex. 260, 163 S. W. 577, is not only not in

conflict with the two cases from that court just cited, but is an express approval of them, as a reading of it will demonstrate.

It is absolutely essential that every appellate court, of supreme and final power and jurisdiction, should and must have the authority and power to enforce its own jurisdiction and judgments—"to guard and enforce its jurisdiction" and "to maintain the dignity of the state's judiciary." Such power and authority would be implied as inherent in every such court. No court would or could be a real court without this. But it is not necessary to resort to this implied inherent power and authority, in this instance, for the people, in our Constitution, expressly conferred on this court such power and authority, "to issue such writs as may be necessary to enforce its own jurisdiction." Section 5, art. 5, Const. Constitutions and statutory "laws conferring jurisdiction on courts must necessarily be in words somewhat general." Chief Justice Stayton in *Pickle v. McCall*, 86 Tex. 219, 24 S. W. 265. "This court has plenary power over its judgments during the term, and even after the term, * * * in order to support its jurisdiction. * * *"
McCorquodale v. State, 54 Tex. Cr. R. 362, 98 S. W. 879, and cases therein cited. "This court has heretofore fully recognized its power to inquire into and maintain its jurisdiction, and will take all proper steps to determine and enforce that jurisdiction." Id., 54 Tex. Cr. R. 363, 98 S. W. 879. "This court * * * will not permit any disobedience of, nor interference with its judgment * * * by any judge of any court of this state, nor by any other person." *State ex rel. Atty. Gen. v. Hamblen*, Dist. Judge, 74 Tex. Cr. R. 528, 169 S. W. 678, and authorities therein cited. These principles are so well established by all authorities and reason, no discussion of them is necessary.

Now, what have we in this cause? Francis sued out and was granted by this court a writ of habeas corpus, for no other purpose whatever than to test, and have judicially determined, the constitutionality vel non, of said pool hall law, for a violation of which he had been arrested, and was then held by valid proceedings by the state against him. There can be no possible doubt, by any one, that this court had the unquestioned right, power, and jurisdiction to grant said writ, hear said cause, and determine said question. It did so, after hearing most forcible oral arguments and elaborate briefs by eminent and able attorneys, and after the most exhaustive investigation and thorough consideration, and then and there determined that said law was plainly and clearly constitutional, and so wrote its opinion, and entered its solemn judgment. This opinion and judgment is binding and conclusive on every court and person in this state. No court, and no person, had the right, power, or jurisdiction to annul, vacate, or set them aside, nei-

ther by any direct, nor especially by any indirect, proceedings. But Mr. Reed, by an indirect proceeding, did attempt to have one of the district judges to do this very thing for him, to annul, vacate and set aside the opinion and judgment of this court, by enjoining the county attorney from even prosecuting him when he should openly and flagrantly violate said law and the opinion and solemn judgment of this court, as he asserted he would do. If this could be thus done, then likewise every other opinion and judgment of this court could be annulled, vacated and set aside by any and every district judge, and perhaps county judge also, and no criminal law of this state could be enforced unless graciously permitted by such inferior judges. No such inferior judge is given, directly or indirectly, any such power, authority, or jurisdiction, and any assumption of the same by any such judge is an absolute usurpation, and whatever he does attempting this is a nullity and void. It is inconceivable that under such circumstances it should be even thought by any one that this court is utterly powerless to protect and enforce its own jurisdiction and judgment. It is not powerless to do so, but is by the Constitution fully and expressly clothed with power, authority, and jurisdiction, by the writ of prohibition, to protect and enforce its jurisdiction and judgment. This is the very object and purpose of the ancient writ of prohibition. When we granted and issued said writ herein, we were not invading the jurisdiction of any civil court or cause; we were simply and solely preventing usurpation of power, authority, and jurisdiction, and preserving the sanctity of the jurisdiction and judgment of this court.

The agreed facts and record herein conclusively show that Reed had no *vested* property rights whatever, which he even could pretend justified him to have a district judge and himself defy and violate the law and said opinion and judgment of this court. The facts are: The pool hall law was enacted March 31, 1913. Prior thereto he had been in the business of running a pool hall in Waco. Our decision and judgment in the said Francis Case was rendered January 4, 1914. In April, 1914, as soon as said law was put in force in McLennan county, he voluntarily quit that business. The memo. opinion in the Mitchell Case was filed June 23, 1915. Immediately thereafter he set about to fraudulently attempt to *then create* some sort of claimed *vested* property rights. He had none before. Just immediately before he filed his injunction suit, on July 26, 1915, he paid the state and county what would be the tax in territory where not prohibited, to run pool tables, and then rented a house in Waco, so as to illegally place and run his pool tables. No case can be found where any court has ever yet held that a person can fraudulently *create* pretended

vested property rights, after a law has been enacted and in force, and then claim that a court of equity has power or authority, by injunction or otherwise, to prevent his prosecution for his crime in violation of such law. At most, a court of equity might have power and authority to thus protect him in his *vested* property rights, acquired *before* such law was enacted, but not *afterwards* purposefully and fraudulently acquired.

As Mr. Reed had no vested property rights, he was in no attitude to be entitled to an injunction, in any contingency. I therefore think it unnecessary to discuss the question on the theory that he had vested property rights. However, even if he had had, the authorities are overwhelming that his remedy was not by injunction, but by defending criminal prosecutions in the criminal courts on the ground of the claimed unconstitutionality of said law. Of course, it would have been wholly unnecessary for him to have had any property rights, in order to have successfully defended, if the law had not been constitutional. This is particularly and especially so under our judicial system, where our criminal and civil jurisdiction and courts are so wholly separated and distinct.

It would be idle, if not silly, for Reed to contend that a court of equity would have jurisdiction to enjoin the county attorney from prosecuting him at all because he should frequently violate said law; that he should be immune from all prosecution to avoid a multiplicity of prosecutions. A very easy and simple method to avoid frequent prosecutions, would be to stop violating the law. If there was no violation, there would be no prosecutions, frequent or otherwise. The doctrine of multiplicity of prosecutions has no application in this cause.

I will briefly state my individual views of why the writ of habeas corpus is applicable, and was issued, in this matter. A decision of the question, however, became immaterial because of the disposition of the case by writ of prohibition. My views are supported by reason and numerous authorities other than our statute, which I will not now cite.

Originally the writ of habeas corpus was issued and used to release a person from actual physical confinement which prevented his free locomotion at his will. But our statute expressly enlarged the use and purpose of the writ. It enacts:

"A writ of habeas corpus is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody, or under restraint." Article 161, C. C. P.

"By 'restraint' is meant the kind of control which one person exercises over another, not to confine him within certain limits, but to subject him to the general authority and power of the person claiming such right." Article 162.

"Every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the

rights of the person seeking relief under it." Article 164.

The district judge, in this instance, did not have Mr. McNamara imprisoned in jail, or elsewhere, nor did he have him chained, or tied, so as to prevent his physical locomotion at will, but by his injunction, without a shadow of doubt, he had him *restrained*, and under his control, and subject to his, not only *general*, but *special*, authority and power, to absolutely prevent him from doing his sworn official duty. Mr. McNamara had fine and imprisonment both staring him in the face, and doubtless would have been inflicted with both if he had made any move to have discharged his sworn duty. How he could have been more grievously *restrained* and subject to the authority and power of the district judge I fail to see. As quoted, the statute expressly distinguishes between being physically "in custody" and otherwise "under restraint" not confined, and one entitled him to the writ as much as the other. The statute itself makes the two so distinct and clear, it is wholly useless to further now discuss or illustrate them.

It is my opinion that this court also had the right and power, and if necessary it was its duty, to have issued, and compelled by, mandamus the district judge in this matter to vacate said injunction granted by him, and permit the county attorney to discharge his constitutional and statutory duty of prosecuting Reed for violating said pool hall law. This to guard and enforce the jurisdiction, and to maintain and enforce the judgment, of this court, as expressly authorized by our Constitution. Article 5, § 5. In *Terrell v. Greene*, District Judge, et al., 88 Tex. 530, 31 S. W. 631, that district judge, by his order, refused to permit the county attorney to take charge of and prosecute a suit in behalf of Tarrant county, as he had the authority, and was his duty, to do. The Supreme Court in an original proceeding by peremptory mandamus commanded said district judge to permit said county attorney to discharge his said duty. However, this court accomplished the same result herein by the writ of prohibition, and mandamus was therefore unnecessary. Hence I will not discuss the right of this court to issue and enforce the writ of mandamus herein.

I fully concur in Judge HARPER'S opinion, and the judgment herein entered.

STATE ex rel. SPENCER, Co. Atty., et al.,
v. NABERS, District Judge, et al.
(No. 4128.)

(Court of Criminal Appeals of Texas. June 23, 1916.)

Prohibition by the State, on the relation of F. M. Spencer, County Attorney, and another, against J. A. Nabers, District Judge, in the

case of Will Fullingim against B. F. Walker and F. M. Spencer. Ordered that the writ issue as prayed.

C. C. McDonald, Asst. Atty. Gen., for the State. D. E. Decker, of Quanah, for respondent.

PRENDERGAST, P. J. This cause is on all fours with No. 3721, State of Texas ex rel. John B. McNamara, County Attorney, v. Erwin J. Clark, District Judge, et al., 187 S. W. 760, from McLennan county, which was fully discussed and decided by this court on December 15, 1915, in an opinion rendered and judgment entered on that date.

It is entirely unnecessary to herein again discuss the question. Among other things, it is conclusively shown in this cause that Will Fullingim, the party at whose instance J. A. Nabers, judge of the Forty-Sixth judicial district of Texas, including Hardeman county, granted a writ of injunction against B. F. Walker, sheriff of Hardeman county, Tex., and F. M. Spencer, county attorney of said county, has, and had, no vested property right whatever, and had none at the time he applied for and obtained from said judge a writ of injunction against said sheriff and county attorney; and that the said district judge had no power, authority, or jurisdiction to grant said order of injunction; and that his pretended order therein to that effect is a nullity and absolutely void; and that he had, and has, no authority, power, or jurisdiction whatever to attempt to enforce the same against the said Walker, sheriff, and Spencer, county attorney. Said sheriff and county attorney be, and they are hereby, released and relieved from any and all restraint sought to be placed upon them, or either of them, in the performance of their official duties by virtue of said void order and pretended writ of injunction.

It is therefore the order of this court that the clerk of this court at once issue a writ of prohibition directed to said J. A. Nabers, judge as aforesaid, requiring that he desist from any further interference whatever with or hindrance of said sheriff and county attorney, or either of them, or the successors of them, or either of them, from instituting and prosecuting any and all criminal proceedings they, or either of them, deem it necessary or proper as such officers under their official oaths against said Will Fullingim for the violation, or alleged violation, of the pool hall law of this state. And the clerk of this court is further directed and required to at once issue to said Will Fullingim and his attorney, D. E. Decker, a writ, prohibiting them, and each of them, from taking any further action or proceeding whatever in cause No. 1246 on the docket of the district court of said Hardeman county, Tex., wherein said Will Fullingim, acting by and through his said attorney, filed in said district court against said sheriff and county attorney and obtained an order of injunction and writ thereunder, prohibiting said sheriff and county attorney from proceeding to prosecute the said Will Fullingim for a violation, or an alleged violation, of said pool hall law, as they, the said sheriff and said county attorney, their successors, or the successor of either of them, may deem it their duty as officials to so prosecute.

It is hereby further ordered that any and all other writs necessary or proper to enforce this judgment are ordered to be issued by the clerk of this court.

DAVIDSON, J. (dissenting). For reasons stated in my dissenting opinion in State ex rel. McNamara v. Clark, 187 S. W. 760, decided at present term, I enter my dissent in this case.

STATE ex rel. SPENCER, Co. Atty., et al.,
v. NABERS, District Judge, et al.
(No. 4129.)

(Court of Criminal Appeals of Texas. June 23,
1916.)

Prohibition by the State, on the relation of F. M. Spencer, County Attorney, and another, against J. A. Nabers, District Judge, in the case of Dave Barnes against B. F. Walker and F. M. Spencer. Ordered that the writ issue as prayed.

C. C. McDonald, Asst. Atty. Gen., for the State. D. E. Decker, of Quanah, for respondents.

PRENDERGAST, P. J. This cause is on all fours with No. 3721, State of Texas ex rel. John B. McNamara, County Attorney, v. Erwin J. Clark, District Judge, et al., 187 S. W. 760, from McLennan county, which was fully discussed and decided by this court on December 15, 1915, in an opinion rendered and judgment entered on that date.

It is entirely unnecessary to herein again discuss the question. Among other things, it is conclusively shown in this cause that Dave Barnes, the party at whose instance J. A. Nabers, judge of the Forty-Sixth judicial district of Texas, including Hardeman county, granted a writ of injunction against B. F. Walker, sheriff of Hardeman county, Tex., and F. M. Spencer, county attorney of said county, has, and had, no vested property right whatever, and had none at the time he applied for and obtained from said judge a writ of injunction against said sheriff and county attorney; and that the said district judge had no power, authority, or jurisdiction to grant said order of injunction; and that his pretended order therein to that effect is a nullity and absolutely void; and that he had, and has, no authority, power, or ju-

risdiction whatever to attempt to enforce the same against the said Walker, sheriff, and Spencer, county attorney. Said sheriff and county attorney be, and they are hereby, released and relieved from any and all restraint sought to be placed upon them, or either of them, in the performance of their official duties by virtue of said void order and pretended writ of injunction.

It is therefore the order of this court that the clerk of this court at once issue a writ of prohibition, directed to said J. A. Nabers, judge as aforesaid, requiring that he desist from any further interference whatever with or hindrance of said sheriff and county attorney, or either of them, or the successors of them, or either of them, from instituting and prosecuting any and all criminal proceedings they, or either of them, deem it necessary or proper as such officers under their official oaths against said Dave Barnes for the violation, or alleged violation, of the pool hall law of this state. And the clerk of this court is further directed and required to at once issue to said Dave Barnes and his attorney, D. E. Decker, a writ, prohibiting them, and each of them, from taking any further action or proceeding whatever in cause No. 1247 on the docket of the district court of said Hardeman county, Tex., wherein said Dave Barnes, acting by and through his said attorney, filed in said district court against said sheriff and county attorney and obtained an order of injunction and writ thereunder, prohibiting said sheriff and county attorney from proceeding to prosecute the said Dave Barnes for a violation, or an alleged violation, of said pool hall law, as they, the said sheriff and said county attorney, their successors, or the successor of either of them, may deem it their duty as officials to so prosecute.

It is hereby further ordered that any and all other writs necessary or proper to enforce this judgment are ordered to be issued by the clerk of this court.

DAVIDSON, J., dissents.

MCLEAN COUNTY BANK v. BROWN.

(No. 14268.)

(St. Louis Court of Appeals. Missouri. July 5, 1916. Rehearing Denied July 18, 1916.)

1. PLEDGES ~~§~~44—EXECUTION OF RENEWAL NOTES—EXTINGUISHMENT OF INDEBTEDNESS.

Where a bank renewed an original debt, for which two notes were deposited as collateral, extending the time of payment by taking other notes therefor, the original debt continued to subsist, and the collateral notes continued as security on the renewal notes.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 103-107; Dec. Dig. ~~§~~44.]

2. BILLS AND NOTES ~~§~~357—HOLDER IN DUE COURSE—ASSIGNMENT AS COLLATERAL.

An assignment of notes, made long before maturity to a bank as collateral security for a loan, without notice of any equities existing between the original parties, rendered the bank secure as a holder in good faith and for value; the defense of want of consideration not being available to the maker.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 909-912, 961; Dec. Dig. ~~§~~357.]

Appeal from Circuit Court, Pike County; Edgar B. Woolfolk, Judge.

"Not to be officially published."

Suit by the McLean County Bank against Elmer E. Brown. From a judgment for defendant, plaintiff appeals. Judgment reversed, and cause remanded, with directions to give judgment for plaintiff.

Robert L. Motley, of Bowling Green, and Clarence A. Barnes, of Mexico, Mo., for appellant. D. A. Ball and Pearson & Pearson, all of Louisiana, Mo., for respondent.

NORTONI, J. This is a suit in as many counts on two promissory notes. The finding and judgment were for defendant, and plaintiff prosecutes the appeal.

The notes sued upon are of date November 25, 1911, and in the amount of \$200 each, one payable four months and the other eight months, respectively, after date, to the Pioneer Stock Powder Company, a copartnership. On December 26, 1911, the copartnership was incorporated under the same name; that is, the Pioneer Stock Powder Company. On December 30, 1911, the two notes in suit were hypothecated to plaintiff bank for an indebtedness of the Pioneer Stock Powder Company. The indebtedness to the plaintiff bank, to which the notes were deposited as collateral, continued for some time through renewal notes, and during all of the time the plaintiff bank held the two notes in suit here as collateral to such indebtedness. There appears to be no valid defense made to the notes in suit. The answer admits the execution of the notes by defendant to the Pioneer Stock Powder Company, a copartnership, and it is conceded that the notes have never been paid. It is averred in the answer, however, that the plaintiff bank did not become the holder of the notes for value, before maturity, by indorsement or assignment by the payee thereof. A further de-

fense set forth in the answer sets up a contract of even date with the notes by which it is said the payee—that is, the Pioneer Stock Powder Company—took the notes from defendant merely to represent the value of certain powder delivered by it to defendant for sale; that defendant was merely the selling agent of the powder company, and the notes were not to be paid in event the powder was not sold. It is averred, too, that the powder was not sold, and therefore there is no consideration for the notes.

[1] But the answer neither avers, nor does the evidence tend to prove, that plaintiff had any knowledge whatever of this contract between the original parties to the notes before the bank took them as collateral, which was before maturity. This defense wholly fails, and it is unnecessary to notice it further. The mere fact that the bank renewed the original indebtedness of date December 30, 1911, to which the two notes were deposited as collateral, through extending the time of payment by taking other notes therefor, as is so frequently done in the banking world, is immaterial, so long as that indebtedness continued to exist, and no agreement whereby it should be treated as paid attended the transaction by which the new notes were taken. In such circumstances, the original indebtedness continues to subsist as before, unless an agreement between the parties reveals an intention to extinguish the indebtedness as through payment. When the holder receives a renewal note thus without such an understanding, it amounts to no more than an agreement on his part that, if such note is paid at maturity, the original indebtedness shall be satisfied, and in the interim he assumes an obligation, if consideration appear, as it does here, to await the payment until the maturity of the renewal note. See *Night & Day Bank v. Rosenbaum*, 191 Mo. App. 559, 572, 177 S. W. 693; *Meredith v. Pemberton*, 170 Mo. App. 100, 156 S. W. 70. Here no agreement as for satisfaction is even suggested. The answer admits the execution of the notes. It appears beyond question that they were deposited with the plaintiff bank as collateral to an indebtedness which then exceeded and continues to exceed the amount of the notes in suit. This indebtedness, to which the notes were deposited as collateral, has never been paid. The same is true as to the notes in suit.

[2] By his answer defendant denies that the plaintiff bank became the holder of the notes in suit for value, before maturity, by indorsement or assignment of the payee. The evidence is all contrary to this, for it appears that the notes were duly assigned on September 30th by the partnership, Pioneer Stock Powder Company, through its indorsement affixed thereon by M. A. Letson, one of the partners, and such is sufficient. This assignment, made long before the maturity of the

notes, to the plaintiff bank as collateral security for a loan, without notice whatever of any equities existing between the original parties, renders the holder secure on that score. In such circumstances the defense of want of consideration is not available, for the holder is regarded as one in good faith and for value. See *Bank v. Cape Girardeau & C. R. Co.*, 172 Mo. App. 662, 155 S. W. 1111. We are unable to discover any defense whatever as against plaintiff bank, who became a holder of the notes in good faith and for value, before maturity, and also without notice of existing equities, which might be available between defendant and the original payee.

The judgment should be reversed, and the cause remanded, with directions to the trial court to give judgment for plaintiff for the amount of the notes and interest thereon. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

JACKMANN v. ST. LOUIS & H. RY. CO.
(No. 14350.)

(St. Louis Court of Appeals. Missouri. July 5, 1916. Rehearing Denied July 18, 1916.)

1. CARRIERS \S 316(5)—INJURY TO PASSENGER—BURDEN OF PROOF.

When a passenger suffers injuries in consequence of derailment of a coach, the prima facie presumption arises that the accident was caused by the negligence of the carrier, and the burden is on it to repel the presumption and show that the injury was the result of unavoidable accident or cause unavoidable by human precaution or foresight.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 1288; Dec. Dig. \S 316(5).]

2. TRIAL \S 251(8)—CARRIAGE OF PASSENGERS—ACTION FOR INJURIES—INSTRUCTION.

In an action for injuries to a passenger, an instruction requiring the road to prove that the train and coach were not overloaded, etc., that they were being operated with the highest degree of skill, etc., and that unless the road was exercising its skill, knowledge, and foresight in operating its train, their verdict should be for plaintiff, was improper and possibly misleading, where the road did not make the defense that the derailment was the result of inevitable accident.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 593; Dec. Dig. \S 251(8).]

3. EVIDENCE \S 506—OPINION EVIDENCE.

In an action against a railroad for injuries in a derailment, where the road contended that plaintiff did not receive the injuries through the derailment, but from disease, testimony of a physician that in his opinion there was an injury to the cartilages of the knee joint, and that when plaintiff received the injury of which she told him there was a fracture of one or more of the synovial cartilages, was inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 2309; Dec. Dig. \S 506.]

4. TRIAL \S 29(1)—REMARK OF COURT.

In an action against a railroad for injuries, where, upon defendant's endeavoring to show that attorneys were called into the case by plaintiff before she called in physicians, the court stated that he thought the attorneys at his bar were reputable and their records clean, the court's language was improper as a reflection

on the conduct of defendant's attorneys and a voucher for the high character of plaintiff's.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 80, 508; Dec. Dig. \S 29(1).]

Appeal from Circuit Court, Lincoln County; Edgar B. Woolfolk, Judge.

"Not to be officially published."

Action by Mary Jackmann against the St. Louis & Hannibal Railway Company. From a judgment for plaintiff, defendant appeals. Judgment reversed, and cause remanded.

Hostetter & Haley, of Bowling Green, and Sutton & Huston, of Troy, for appellant Creech, Penn & Palmer and Frank Howell, all of Troy, and Henry S. Caulfield, of St. Louis, for respondent.

REYNOLDS, P. J. Action for damages for personal injuries alleged to have been sustained by plaintiff while a passenger on defendant's road.

The amended petition upon which the case was tried, avers that while plaintiff was a passenger on a passenger train of defendant and seated in a coach of the train, in transit from Troy to Silex, a portion of the train and especially the coach in which plaintiff was being carried as a passenger, was suddenly and violently and forcibly, and without warning to plaintiff, thrown from the track, brought to a sudden, violent and forcible stop and tilted to almost the point of capsizing or turning over; that by reason of this coach being thrown from the track she was violently and forcibly thrown from the seat she was occupying and down between that seat and the seat in front of her, whereby the bones, cartilages, ligaments and muscles of her right leg in and about the knee were injured, and she was bruised and wounded in and about her body and limbs and her nervous system greatly shocked. Charging that the injuries sustained by her were directly and "approximately" (sic) caused by the negligence and want of care on the part of defendant in permitting the train, and especially the coach occupied by plaintiff to leave the track, and that all these acts, omissions and failure and neglect on the part of defendant, directly and proximately contributed to cause plaintiff's injuries, and that the injuries sustained were permanent and that she does now and will continue to suffer great bodily pain and anguish of mind and has thereby been permanently incapacitated to go about and attend to her personal wants, and is permanently injured, crippled and diseased, and has incurred and will incur great expense for treatment, etc., she lays her damages at \$15,000, for which she demands judgment.

The answer is a general denial.

A trial before the court and a jury, resulting in a verdict in favor of plaintiff for \$7,500, judgment followed, and defendant, having interposed a motion for new trial, which was overruled, has duly appealed.

Fifteen assignments of error are made, going to the admission and exclusion of testimony and to the overruling of the motion for a new trial. Error is also assigned to the action of the court in giving an instruction (No. 1) at the instance of plaintiff.

We do not consider it necessary to notice all of these assignments, but will confine ourselves to a few of them which we consider most material.

[1, 2] Taking up this last assignment, as to error in the first instruction, which was a very long one and practically required the defendant to prove that the train and coaches were not overloaded, that its roadbed, tracks, trains, coaches, equipment and appliances were safe and sound, and that the train and coach were being run and operated by the exercise on the part of defendant with the highest degree of skill, knowledge, foresight, care, inspection and examination of its roadbed, tracks, train, coaches and appliances, it told the jury that unless they found defendant was at the time of the alleged injury to plaintiff, exercising its skill, knowledge and foresight in operating its train, their verdict should be for plaintiff. These particular matters are unnecessary. It is demanded of a railroad company carrying passengers to carry them safely and it is responsible for all injuries to the passengers arising from even the slightest negligence on its part, and when a passenger suffers injuries in consequence of the breaking down or overturning or derailment of the coach in which he is riding, the prima facie presumption arises that such casualty was caused by negligence on the part of the carrier, and the burden is on the latter to repel such presumption and to show that the injury was a result of inevitable accident or some cause which human precaution or foresight could not have averted. See *Norris v. St. Louis, I. Mt. & S. Ry. Co.*, 239 Mo. 695, 144 S. W. 783; *Siegel v. Illinois Central R. R. Co.*, 186 Mo. App. 645, loc. cit. 653, 654, 172 S. W. 420; *Nagel v. United Rys. Co.*, 169 Mo. App. 284, 152 S. W. 621. Defendant did not undertake to make any such defense and the inclusion of these matters in this instruction was improper, possibly misleading, to a certain extent, although hardly reversible error. We notice it here to avoid its repetition.

It is also charged that this instruction does not connect plaintiff's injuries with the accident. We do not find this defect in the instruction.

[3] This case was tried on the theory, so far as defendant was concerned, that plaintiff did not receive the injuries of which she complains in consequence of the overturning of the coach in which she was a passenger, and that the injuries from which she was suffering were the result of disease. The testimony of medical experts was, therefore, very prominent in the case as meeting this, each party armed with their own experts,

who, not unusually, made very different diagnoses of the case.

The accident is alleged to have happened August 29th, 1912.

A witness, Dr. Pendleton, called an examined on the part of plaintiff, testified that he had been first called in to examine plaintiff in December, 1912; visited her at her home in Sillex. Afterwards, and at the time of the trial, which was commenced on October 14th, 1913, he had examined her again. He was asked on examination in chief by counsel for plaintiff, what he had found upon making his examination of her on the morning of the trial. He testified that she still complained of intense pain when the joint of her right knee was moved; found on measurement that the right knee was larger than the left and the right foot somewhat swollen. These questions, answers, objections and rulings then followed:

(By counsel for plaintiff.) Q. "I will ask you, Doctor, in your examination made in December, 1912, and the examination you made this morning, what is your opinion as to what is the trouble with that knee?"

Mr. Hostetter (counsel for defendant): "We object to that as calling for a conclusion of the witness and invading the province of the jury." (Objection overruled and exception saved.)

"A. You want my opinion as to the condition or the nature of the trouble?"

"Q. What in your opinion brought about the condition of that knee, the nature of the trouble?"

Mr. Hostetter: "We object to that as calling for an opinion of the witness and thereby invading the province of the jury." (Objection overruled and exception saved.)

"A. In my opinion there was an injury to the cartilages of that joint; one or more, *that when she received this injury of which she tells me, there was a fracture of one or more of the synovial cartilages.*"

Mr. Hostetter: "We object to all this testimony."

The Court: "I understand; objection overruled." Exception was duly saved to this and the witness continued.

"A. That fracture, if it has united, has left a rough surface on the cartilage, the membrane of the cartilage, which interferes with the motion and causes pain, or possibly still, a displaced piece of that cartilage."

The words we have italicized are those particularly objected to.

According to the settled line of authority in our state, we are obliged to hold that the question itself was improper and the answer improper, that proper objection to both was made and should have been sustained. *Taylor v. Grand Avenue Ry. Co.*, 185 Mo. 239, loc. cit. 255, 84 S. W. 873; *Glasgow v. Metropolitan St. Ry. Co.*, 191 Mo. 347, 89 S. W. 915; *Castanle v. United Rys. Co.*, 249 Mo. 192, 155 S. W. 38, L. R. A. 1915A, 1056. It is true that our court, in *Jerome v. United Rys. Co.*, 155 Mo. App. 202, 134 S. W. 107, and *Torreyson v. United Rys. Co.*, 164 Mo. App. 366, 145 S. W. 106 (the opinion in which was approved by the Supreme Court, as see *Torreyson v. United Rys. Co.*, 246 Mo. 696, 152 S. W. 32), as well as in *Goodes v. Order of United Commercial Travelers*, 174 Mo. App.

330, 156 S. W. 995, has gone very far in relaxing the technicalities which have characterized the rulings as to the admission of expert testimony in cases of this character, but where, as here, the very fact of the present condition of the plaintiff is challenged as having been the result of the alleged accident, we think that our Supreme Court has settled the question so conclusively in the cases cited that we cannot ignore its rulings and are bound to follow them. The admission of this testimony was reversible error.

The same error, but not to so marked an extent, cropped out in the examination and cross-examination of some of the other professional experts. What we have said as to this one is sufficient precaution as to the admission of evidence of this character at a new trial, if one is had.

[4] A very strenuous effort was made on the part of defendant to show that attorneys had been called into the case by plaintiff before she called in physicians; in short, it was part of the defense, which it endeavored to maintain, to show either a case of malingering or of suffering from a disease or from injuries other than the overturning of the coach while plaintiff was a passenger on defendant's road. During the examination of a witness as to when he had first seen plaintiff after she claimed to have received the hurt from the overturning of the coach, this witness, an old gentleman who had been acquainted with plaintiff from the time she was thirteen years old, and who testified that she had lived with him until she was married, testified that he had never had any knowledge of her complaining prior to the accident, and that the first time he saw her after she claimed to have been hurt in August, was on November 5th, 1912, election day. On cross-examination he repeated that he did not think he had seen plaintiff until after the November election day and sometime after the wreck. Then followed this:

"Q. (By defendant's attorney): And in the meantime her lawyers had been engaged in the case."

Mr. Creech (attorney for plaintiff): "We object to that, if the court please." (This objection was sustained and exception saved.)

Mr. Hostetter (attorney for defendant): "We claim the right to prove when the lawyers were engaged."

The Court: "I think the attorneys at my bar are reputable attorneys and their records are clean." (Objection was made to this remark by the court and exception duly saved.)

Mr. Hostetter, continuing: "I am not claiming they are not, your Honor, I think we have the right to show what the conduct was before and after the matter was put in the hands of attorneys." To which the court remarked, "Objection will be sustained." Counsel for defendant duly excepted.

We are compelled to say, that under the facts in evidence in this case, and the line of defense that the defendant was endeavoring to make, that this comment of the court, which could only be construed as vouching

for the high character of the attorneys for plaintiff, was improper and could not fail to be highly prejudicial to the defendant. It could only be construed as a reflection on the conduct of the attorneys for defendant and placed them in a very unfavorable light before the jury.

For the errors which we have specified as to the admission of the testimony of Dr. Pendleton and the remarks of the court concerning counsel, the judgment of the court will have to be reversed and the cause remanded. In view of that action, it is not necessary to discuss any of the other assignments of error presented. We pass them silently, neither approving nor disapproving the ruling of the court concerning them.

ALLEN, J., concurs. NORTONI, J., in result. While regarding Mr. Hostetter's question as proper, he does not view the remark of the court as reversible error.

In re DREW'S ESTATE.
BAKEWELL v. BATLEY.

(No. 14381.)

(St. Louis Court of Appeals. Missouri. July 5, 1916. Rehearing Denied July 18, 1916.)

1. WILLS \S 812—CONSTRUCTION—SPECIFIC AND GENERAL BEQUESTS—ABATEMENT.

A will, containing specific and general bequests and disposing of decedent's residuary estate, is strong evidence that testator believed the estate would be ample to discharge all the legacies, and that it was not intended that specific legacies should be subject to deduction or abatement in favor of general legacies.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 2108; Dec. Dig. \S 812.]

2. WILLS \S 812—CONSTRUCTION—SPECIFIC AND GENERAL LEGACIES—ABATEMENT.

Where testator by specific legacy devised her interest in a leasehold to respondent, such legacy was not subject to abatement or deduction, in order to pay a general legacy to a religious institution, although the will contained a clause that, should testator's personal estate prove insufficient for the payment of such general bequest, resort should be had to any realty of which testator died seised and possessed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 2108; Dec. Dig. \S 812.]

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

Application for an order of sale of real estate by Paul Bakewell, executor of the estate of Emma L. Drew, against Ellen Batley, testamentary legatee. From a judgment denying the application, plaintiff appeals. Affirmed.

J. L. Hornsby, of St. Louis, for appellant. Abbott & Edwards, of St. Louis, for respondent.

NORTONI, J. This proceeding originated in the probate court in the form of an application for an order of sale, and found its

way into the circuit court by appeal. The controversy arose over the interpretation of the will of Emma L. Drew, deceased. Mrs. Drew, by item 1 of her will, bequeathed to St. Stanislaus Seminary the sum of \$12,000. By item 5 of her will she made a specific devise to Ellen Batley of her interest in a leasehold in certain property in St. Louis. It transpired that there was insufficient personal property in the estate of Mrs. Drew to pay the general legacy of \$12,000 to St. Stanislaus Seminary provided for in item 1 of the will, and the executors thereupon prayed an order of the court, authorizing the executors to sell the leasehold involved in the specific legacy to Miss Batley so as to realize funds with which to compensate the general legacy to St. Stanislaus Seminary. In other words, it is sought to abate the specific legacy to Miss Batley in favor of St. Stanislaus Seminary, in the view that the will discloses an intention on the part of the testator that such general legacy should be paid at all events. The court denied the application of the executors, and they prosecute an appeal from that judgment.

We copy the entire will, to the end that the provisions thus drawn into question may speak for themselves, as follows:

"State of Missouri, City of St. Louis—ss.:

"I, Emma L. Drew, of said city and state, do hereby make, publish and declare this my last will and testament.

"Item 1. I give and bequeath to St. Stanislaus Seminary at Florissant, in the county of St. Louis, said state, for the purpose for which said seminary was founded and established, to wit: the education of young men for priesthood in the Roman Catholic Church, the sum of twelve thousand (\$12,000) dollars.

"Item 2. I give and bequeath to the church of the Roman Catholic faith situate in said city at the southwest corner of Grand and Lindell avenues for use upon its altars all my jewels and jewelry, said church being called St. Francis Xavier Church, and I direct my executors hereinafter named, to deliver said jewels and jewelry to the Reverend Rector of said church after my death.

"Item 3. I give and bequeath to the directress of the Sodality of the Children of Mary, a sodality at the Convent of the Ladies of the Sacred Heart situate in said city at the northeast corner of Maryland and Taylor avenues all my clothing in trust to distribute same among deserving poor persons.

"Item 4. I give and bequeath to my dear children as mementos all my books and articles of devotion, the same to be divided among those of my children, that shall survive me as my oldest child shall direct.

"Item 5. I give, devise and bequeath to my dear friend Miss Ellen Batley of the city of Philadelphia and state of Pennsylvania all my interest in the leasehold of the real estate and improvements at the northwest corner of Jefferson avenue and Chestnut street of thirty-one feet and eleven and one-half inches and a width on the alley to the north of fifty-three feet and eight inches, for and during her natural life, with remainder to my husband, Francis A. Drew, if then in life, and in the event of his death before the termination of said life estate, the said remainder shall vest in my children share and share alike, the child or children of a deceased child to inherit a parent's share.

"Item 6. All the rest and residue of my estate I give, devise and bequeath to my said husband

should he survive me, and, in the event of his death before mine, then to my children share and share alike, the child or children of a deceased child to have a parent's share, and should either of the foregoing bequests for any reason fail it is to be disposed of by this item of my will.

"Item 7. I nominate, constitute and appoint Paul Bakewell and George S. Drew executors of this my last will and testament, and I direct, that they shall not be required to give bond and security for the performance of their duties, and I further direct that in carrying out item 1 of this my will said executors convert into money such securities and other personal estate as may be most advantageously disposed of, at private or public sale and with or without advertisement, as may in their discretion seem best, to make the said sum of twelve thousand dollars or any deficiency that may remain between said sum and money which I may have at the time of my death, and should my personal estate prove insufficient resort may be had to any realty of which I may die seized and possessed.

"Given under my hand and seal this 19th day of July, A. D. 1900.

"[Signed] Emma L. Drew. [Seal.]"

[1] It appears that the testatrix owned several parcels of real estate, and these are inventoried in the estate. As this real estate was not otherwise disposed of, it passed into the residuum of the estate under item 6 of the will subject to payment of debts. The real estate has been sold, the debts paid, and a few hundred dollars only remain in the hands of the executors. It is sought here to abate the specific legacy created in favor of Miss Batley in item 5 in favor of the general legacy created in item 1 of the will, in the view that a manifest intention is revealed in the will to compensate the general legacy under item 1 at all events. It is conceded that item 1 of the will, by which \$12,000 is devised to St. Stanislaus Seminary, is a general legacy. It is conceded, too, that item 5 of the will, by which the testatrix's interest in the leasehold is devised to Miss Batley, is a specific legacy. The general rule that specific legacies are preferred over general legacies, and that, in the absence of express direction by the testatrix to the contrary, general legacies abate before specific legacies, is in no wise questioned. But it is argued that the intention of the testatrix must control in every case where the interpretation of the will comes into question, and that it is manifest here from the provisions of the will that the testatrix intended the general legacy provided in item 1 should be paid at all events. The language in item 7 of the will is pointed out as revealing this intention. The language thus relied upon is:

"I further direct that in carrying out item 1 of this my will said executors convert into money such securities and other personal estate as may be most advantageously disposed of, at private or public sale * * * to make the said sum of \$12,000 or any deficiency that may remain between said sum and money which I may have at the time of my death, and should my personal estate prove insufficient, resort may be had to any realty of which I may die seized and possessed."

It appears that this will was executed in July, 1900, more than 10 years before the tes-

tatrix departed this life. No doubt she at the time possessed sufficient personal property to satisfy the several specific bequests, for she treated with the matter in that view, and even provided for the residuum of her estate. It is said the fact that testatrix made a disposition of her residuary estate showed that she believed her estate would be ample to discharge all of the legacies in her will. *Matter of Williams*, 27 Misc. Rep. 716, 717, 59 N. Y. Supp. 606. Moreover, by making a legacy specific, the testatrix gives the strongest expression of an intention to exempt it from deduction or abatement. See *Towle v. Swasey*, 106 Mass. 100, 106. From these recognized principles, it would seem that Mrs. Drew believed her estate was probably sufficient to satisfy the several bequests, and that she intended the specific legacies should not abate in favor of the general legacy above referred to. Especially is this true when we see the will refers to the real estate, if necessary, to compensate the general legacy in item 1. It is therefore not clear from the language in the seventh item of the will, when considered with the whole, that she intended an abatement of any of her specific legacies of personalty to liquidate the general legacy.

[2] It is argued that the direction of the testatrix in item 7 of the will that the executors convert into money such securities and other personal estate as may be advantageously disposed of should be read as a direction to convert into money "all of my securities and other personal estate," in which event an abatement of the specific legacies would be declared in favor of the general legacy if the remaining personalty should prove insufficient. But obviously this language intends that the executors should convert all of the securities and personal estate not otherwise disposed of by the provisions of the will. Furthermore, if the argument of the executors is to be regarded as sound, then we must understand that the testatrix intended the specific legacies to her children as mementos, concerning her books and articles of devotion, should abate in favor of the general legacy, and likewise that concerning her jewels to be placed upon the altar of St. Francis Xavier Church, and her clothing which, through a spirit of charity, is awarded to the worthy poor through the offices of the directress of the sodality at the Convent of the Ladies of the Sacred Heart, for why should one specific legacy abate rather than another? It would be cruel to attribute such an intention to this good lady when we consider the sacred character which attends the gifts of these smaller items.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

HOETTE v. NORTH AMERICAN UNION.
(No. 14480.)

(St. Louis Court of Appeals. Missouri. July 5, 1916. Rehearing Denied July 18, 1916.)

1. INSURANCE — §819(4)—LIFE INSURANCE—SUICIDE OF INSURED—EVIDENCE—SUFFICIENCY.

In an action on a life insurance policy, evidence held insufficient to warrant a peremptory instruction for defendant on the ground that decedent committed suicide by drinking carbolic acid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2006; Dec. Dig. §819(4).]

2. INSURANCE — §817(3)—LIFE INSURANCE—SUICIDE OF INSURED—PRESUMPTION AGAINST SUICIDE—BURDEN OF PROOF.

In an action on a life insurance policy, the presumption against the suicide of the insured is very strong, and the burden is on the insurer, who claims that the insured committed suicide by drinking carbolic acid, to show that he not only drank the carbolic acid, but that he took it with suicidal intent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1999; Dec. Dig. §817(3).]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

"Not to be officially published."

Action by Lillian Hoette against the North American Union. Judgment for plaintiff, and defendant appeals. Affirmed.

Martin T. Farrow, of St. Louis, for appellant. John Cashmann, of St. Louis, for respondent.

ALLEN, J. Plaintiff is the widow of one Henry Hoette, deceased, and the defendant is a fraternal beneficiary society organized under the laws of the state of Illinois and duly licensed to transact business in this state. This is an action upon a certificate of membership in the defendant order, insuring the life of Henry Hoette in the sum of \$1,000 for the benefit of the plaintiff. Hoette died on January 8, 1912, having, up to the time of his death, complied with the constitution, laws, and rules of defendant order, and having paid all dues or assessments due and payable by him to defendant. A section of the "Constitution and Laws" of defendant order provides that:

"If a member shall die by his own hand or act, either sane or insane, such death shall forfeit any and all rights and claims to the amount agreed to be paid on his death, and specified in the benefit certificate of such member, and the beneficiary shall receive and be paid in lieu thereof a sum equal to the total amount actually paid by such member to the mortuary and reserve fund of the order, unless it is otherwise provided in and by the benefit certificate of such member, issued prior to the taking effect of this section."

This section was in force at the time of the issuance of the benefit certificate sued upon, wherein Hoette agreed to be bound by the constitution, laws, and rules of defendant. The defendant in its answer set up the aforesaid provision of its constitution and laws, and the terms of the membership certificate, averred

that Hoette "died by his own hand and act, that is to say, he committed suicide," by swallowing phenol, commonly known as carbollic acid, and that by reason thereof plaintiff was not entitled to recover the amount named in the benefit certificate sued upon, but was entitled to receive only the amount actually paid by Hoette to the "mortuary and reserve fund" of defendant, which had been and was then tendered to plaintiff and paid into court. At the opening of the trial below the following proceedings were had (quoting from appellant's abstract before us), viz.:

"Defendant moved the court to be permitted to open and close the case with evidence and argument, admitting that insured during his lifetime had duly complied with all the defendant's laws and regulations, and since the death of insured plaintiff had duly complied therewith in all respects, and that the averments of plaintiff's petition were admitted to be true, except as alleged in the second count of defendant's answer, and that plaintiff was entitled to recover unless the defense of suicide by carbollic acid poisoning was established, as pleaded in said count, as to which defendant had the burden of proof."

The court sustained this motion, and defendant introduced its evidence to support the defense of suicide, plaintiff adducing evidence in rebuttal. The one issue tried, viz., that of suicide vel non, was submitted to the jury by instructions which need not be here noticed. There was a verdict and judgment for plaintiff in the sum of \$1,000, from which the defendant appeals.

Appellant contends that the evidence conclusively shows that Hoette committed suicide by means of carbollic acid, and that the trial court therefore erred in refusing to peremptorily direct a verdict in its favor. This is the only question of consequence in the record before us. The evidence shows that Hoette resided on Bircher street, in the city of St. Louis, with his family which consisted of his wife (this respondent) and two small children. He was employed at a box factory, and though he earned small wages, it is said that he met his obligations promptly. At the time of his death he owed a small grocery bill and perhaps a few dollars for coal, but it does not appear that he was otherwise indebted, or that he was in any serious trouble, financially or otherwise. The evidence is that he was of a happy, jovial disposition, and a fond and devoted husband and father. Though he sometimes drank intoxicants, it is said that he was ordinarily temperate and did not drink to excess. From the testimony of the plaintiff given at the coroner's inquest and by defendant introduced in evidence below, it appears that Hoette returned to his home from work about noon on Saturday, January 6, 1912, and was told that his dog, of which he was fond, had strayed away; that he thereupon went in search of the dog, and did not return until about 7 p. m.; that shortly thereafter he was summoned to a nearby grocery store to answer a telephone

call, and did not again return home until about 11 p. m. During the following day, Sunday, a very cold day, he remained at home, and the testimony of plaintiff at the coroner's inquest is that he did not eat as usual and acted unnaturally. This testimony need not be rehearsed here in detail. It was given by plaintiff at a time when, as she says, she was in a highly nervous state and sick; and it is without material influence in passing upon the propriety of the ruling below upon the demurrer. On the following Monday, January 8, 1912, Hoette left home at the usual hour, but it appears that he did not go to his work. He was seen early in the forenoon by two acquaintances at the barn, of a box company other than that at which he worked, where he remained but a few minutes, during which time he and his companions drank some whisky. Between 9 and 10 o'clock a. m. he was seen at a grocery store and saloon, where he spoke of the loss of his dog. At this place he drank some port wine, and, it is said, his appearance indicated that he had been drinking intoxicants. At about 1 o'clock p. m. he returned to his home and found his wife and the children absent. He removed his overcoat, coat, vest, and shoes, and went out into the street, leaving on the table the following note:

"Good bye, Love; Take good care of Ruth and sister. Bye Bye Good little From your true Husband."

According to plaintiff's testimony she found this note upon her return, shortly after it was written. She testified that she and her husband were in the habit of leaving notes for each other in the event that one was away, and that her husband was always solicitous as to the children's welfare; that because of this she was not alarmed at finding the note, and after "fixing the fire" and getting a piece of needlework she returned to the house of a neighbor where she was visiting. Later in the afternoon Hoette was found on Bircher street a few blocks from his home, lying in the snow, and was taken into a nearby house, where he died within a few minutes. A physician, Dr. Hadley, was summoned, and he reached the house a few minutes after Hoette's death and examined the body. Testifying as to this examination he said:

"I know that he was not frozen to death. I thought from the appearance of the body, I mistrusted it was poison. There was some froth about his lips. I opened his mouth and looked for symptoms or marks of carbollic acid poison. I thought that possibly inside of his mouth it looked a little like he might have had a weak solution of carbollic acid. I know it was not a strong solution because his mouth was not white. A concentrated solution will turn the tissue white, almost as white as snow; this didn't look that way. It was a little bit gray, but there were no symptoms of burning either outside or inside of his mouth. The face was very purple; the whole body was pretty purple; especially the face and neck were very purple."

He was unable to detect any odor of carbolic acid. This witness testified that pure carbolic acid will leave very apparent burns, though a weak solution of it may be sufficient to kill without leaving such marks; that the carbolic acid commonly sold by druggists is about 90 to 95 per cent. pure, and will produce burns. He said:

"If Hoette had taken carbolic acid as it is sold to lay people commonly, it would have shown different symptoms from what I saw in his mouth or person when I went there. The mouth would have been burned nearly as white as snow, but no such appearance was present."

He testified that the appearance of the lips, which were dry and perhaps cracked a little, would naturally be caused by the cold weather.

One Dr. Abeken performed an autopsy at the city morgue on the body of Hoette, and testified as a witness for defendant. He had forgotten the case, and could only testify from notes which he made at the time of the autopsy. Thus testifying, he stated that he had examined the stomach of the deceased and found that it contained about three ounces of a gray turbid fluid, which had a decided odor of phenol; that the smell of whisky was also noticeable; that the lining of the stomach was congested, but not greatly corroded. He testified that he found the organs in normal condition, aside from the congestion of the lining of the stomach, and that there were no marks about the mouth or on the tongue of the deceased. He made no chemical analysis of the contents of the stomach. On cross-examination he stated that though there was no doubt in his mind as to the presence of phenol, there is "a chance for doubt" if a chemical test is not made. He further stated that "the brain is usually congested in case of death by carbolic acid, but was not in this case."

Dr. Gradwohl, a "consulting bacteriologist to other physicians," testified that what is termed "pure carbolic acid," such as is ordinarily purchased from druggists, will burn the mucuous membrane wherever it touches it; and that it is very easy to tell carbolic acid poisoning by the condition of the stomach, which is changed from "a soft velvety feeling to a leathery feeling." He testified that if the brain and the membrane thereof were found normal this would indicate the absence of carbolic acid; and that lack of congestion in the lungs and other organs would also tend to show no carbolic acid present. As to Dr. Abeken's report of the autopsy, he said:

"I don't think I would think of carbolic acid poisoning much from those conditions. * * * In every fatal case I saw or heard of, carbolic acid produced well-marked symptoms; produced burns on the outside of the face because at the time of death or immediately after death the fluid from the stomach runs up and runs out, and it burns."

Again he said:

"I consider the sense of smell as to what killed a man as very misleading, and the safe meth-

od is by chemical analysis, which is absolute and necessary in cases of poisoning where there is any doubt, which, as reported in this case, excites a pronounced doubt."

And again he said:

"If there was no odor of carbolic acid within a few moments after the death of the person I should say that would indicate no such acid present."

Though it is said that search therefor was made after Hoette's death, no bottle or other container was found which had held carbolic acid or other poison. The evidence is that no carbolic acid was kept in the home of the deceased, and there is no evidence that he made any purchase thereof.

[1, 2] Under the evidence adduced we are unable to assent to the proposition that the defense of suicide was conclusively established, warranting a peremptory instruction for defendant. The presumption against suicide is strong, and may not be overthrown except by evidence that is clear, cogent, and convincing. The burden was on defendant to show that Hoette, not only drank carbolic acid, but that he took it with suicidal intent. It was by no means conclusively shown that he drank any carbolic acid. No vial or bottle was found; there were no burns about the mouth or face of the deceased; and no odor of carbolic acid could be detected shortly after death. While there is some evidence tending to show carbolic acid poisoning, the expert testimony of Dr. Gradwohl goes to show that the pronounced symptoms of carbolic acid poisoning were absent, and that the only safe test in such cases is a chemical analysis of the contents of the stomach. The evidence fails to reveal any motive for suicide. Nothing appears which would lead one to believe that Hoette had any reason to take his own life. It is true that he left the note mentioned above, which, standing alone, would appear to be a strong circumstance indicating that he contemplated suicide; but there is testimony that it was customary for him to leave notes in case of his wife's absence, and that because of this custom and his solicitude for his children mentioned therein, this note caused plaintiff no alarm. Under the circumstances we regard it as altogether clear that no court can say that the defense of suicide was conclusively established. We do not concede that the prima facie case established for plaintiff could have been overthrown, as a matter of law, by anything short of an admission appearing in the case, unexplained and uncontradicted, that Hoette committed suicide. As to this see *Castens v. Knights and Ladies of Honor*, 190 Mo. App. loc. cit. 65, and cases cited, 175 S. W. 264. The question need not be discussed or treated with here, for upon appellant's own theory of the case, viz., that an affirmative defense such as this may be so clearly and indisputably proved that its existence should be accepted by the court as an established fact in the case, it is plain

that the evidence contained in this record is not such as to bring the case within the doctrine invoked. The facts involved differ widely from those present in *Richey v. W. O. W.*, 163 Mo. App. 235, 146 S. W. 461, upon which appellant greatly relies, whatever may be said of the soundness of that doctrine. And other cases cited by appellant are likewise not here persuasive.

That evidence of the character here present is insufficient to warrant a court in taking the case from the jury is supported by the following cases: *Almond v. Modern Woodmen*, 183 Mo. App. 382, 118 S. W. 695; *Claver v. Woodmen of the World*, 152 Mo. App. 155, 133 S. W. 153; *Kane v. Lodge*, 113 Mo. App. 104, 87 S. W. 547; *Hunt v. Ancient Order of Pyramids*, 105 Mo. App. 41, 78 S. W. 649. And to these many others might be added.

Two assignments of error are made respecting the admission of testimony at the trial, but it is clear that the rulings complained of could not constitute reversible error. In each instance the testimony which appellant sought to have excluded was competent for the purpose for which it appears to have been offered. Likewise error is assigned to the giving of certain instructions, but the only complaint on this score relates to the sufficiency of the evidence to support the instructions, and that matter is disposed of by what we have said above.

It follows that the judgment should be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

CRAIG et al. v. McNICHOLS FURNITURE CO. et al. (No. 14117.)

(St. Louis Court of Appeals. Missouri. May 2, 1916. Rehearing Denied July 10, 1916.)

1. APPEAL AND ERROR §1018—SCOPE OF REVIEW—FINDINGS OF REFEREE.

On appeal involving referee's findings of fact, the court may fully review them if the matter was subject to compulsory reference regardless of consent given; but, if referred by agreement and not compulsory, the referee's report operates as a special verdict, and if supported by substantial evidence cannot be set aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4006, 4007; Dec. Dig. § 1018.]

2. REFERENCE §8(3) — WHEN COMPULSORY — "LONG ACCOUNT."

When an account sued on contains 271 items of debit and credit on various dates, it is a "long account," subject to compulsory reference under Rev. St. 1909, § 1996.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 16, 17; Dec. Dig. § 8(3).]

For other definitions, see Words and Phrases, First and Second Series, Long Account.]

3. REFERENCE §8(6)—WHEN COMPULSORY—LONG ACCOUNT.

Whether a matter is one for compulsory reference is to be determined from the pleadings when the order of reference is made, and the

petition determines unless the account is conceded, especially where there is a general denial.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 21; Dec. Dig. § 8(6).]

4. APPEAL AND ERROR §1022(1)—SCOPE OF REVIEW—FINDINGS OF REFEREE.

Findings of fact by the referee who had the witnesses before him, approved by the circuit court, are entitled to deference and respect, but may be set aside if clearly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015, 4017, 4018; Dec. Dig. § 1022(1).]

5. CONTRACTS §322(4) — PAROL EVIDENCE VARYING WRITING—SUFFICIENCY.

Evidence held to sustain referee's finding against plaintiffs' claim on an oral contract for extra plaster work replacing that which fell, and which by written contract they were bound to replace.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1534; Dec. Dig. § 322(4).]

6. APPEAL AND ERROR §1019—SCOPE OF REVIEW—CONFLICT IN EVIDENCE.

Where the evidence directly conflicts and the question becomes one of credibility of witnesses, the finding of the referee will be deferred to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4008-4010; Dec. Dig. § 1019.]

7. CONTRACTS §289—PERFORMANCE—CERTIFICATE OF ARCHITECT—AMOUNT OF RECOVERY.

Where plaintiffs contracted to plaster a building in a good workmanlike manner and replace any defective work in two years, and did replace some which was accepted, they could recover in quantum meruit for work done, within limit of the contract price, although the architect refused his certificate.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1310; Dec. Dig. § 289.]

8. EVIDENCE §571(7)—OPINIONS—VALUE.

Where plaintiffs contracted to plaster a building in a good workmanlike manner and replace any defective work in two years, testimony of a plasterer who examined it after four years is without evidentiary value, as to value of work done.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2397; Dec. Dig. § 571(7).]

9. DAMAGES §62(4) — REDUCTION — DILIGENCE.

Where plaintiffs contracted to plaster a building in a good workmanlike manner and replace any defective work in two years, it was the defendant's duty to repair defects promptly and so lessen his damages, and he can recover only the amount he would have been compelled to spend had he been diligent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 128-131; Dec. Dig. § 62(4).]

10. CONTRACTS §322(4) — PERFORMANCE — EVIDENCE.

Evidence held insufficient to support judgment for defendants for cost of repairing plastering not attended to for four years, which plaintiffs, in putting in, agreed to repair in two years.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1534; Dec. Dig. § 322(4).]

11. MECHANICS' LIENS §157(5) — STATEMENTS—VALIDITY.

Inclusion of nonlienable item in account of 261 lienable items does not necessarily invalidate the whole account.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 272; Dec. Dig. § 157(5).]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

"Not to be officially published."

Action by Lon C. Craig and another, doing business under the firm name of Craig & Binks, against the McNichols Furniture Company and others, in which defendants filed a counterclaim. Judgment for defendants, and plaintiffs appeal. Reversed and remanded, with directions.

L. Frank Ottofy, of St. Louis, for appellants. Edward A. Feehan, of St. Louis, for respondents.

ALLEN, J. This is an action to recover the reasonable value of labor and material furnished by plaintiffs to and upon a building in the city of St. Louis, and to establish a mechanic's lien therefor. Defendant McNichols Furniture Company, a corporation, erected the building, and is sued as the contractor. The other defendants are owners of the lots upon which the building was erected by the corporation as lessee.

Plaintiffs are copartners engaged in the plastering business. On October 11, 1905, they entered into a written contract with the McNichols Furniture Company to do the plastering upon the building in question, a six-story structure being erected by the defendant corporation for the purpose of conducting therein its furniture business. Under this contract plaintiffs were to do all of the plastering upon the building, according to certain specifications referred to, and were to be paid therefor the sum of \$5,300. The specifications shown in evidence contain, among other things, the following clause, viz., "All plaster on ceilings to be guaranteed to remain in position at least two years."

Plaintiffs began work under the contract on October 19, 1905, first plastering some of the walls of the building. The first ceilings plastered were those of the second and third stories. Shortly after completing the work on these two ceilings, some time in November, 1905, the plastering fell therefrom. Plaintiffs replastered these ceilings, though they claim to have done so under an oral agreement with defendant Henry J. McNichols, president of the McNichols Furniture Company, that they were to be paid therefor. The entire work, including the replastering of the ceilings of the second and third stories, was completed by plaintiffs on or about February 14, 1906. During the progress of the work, various payments were made plaintiffs by defendant corporation, the contractor, on certificates of the architect as provided in the contract, totaling \$4,500; leaving \$800 of the original contract price unpaid.

The suit, however, is not on the contract, but proceeds as on quantum meruit, for the reasonable value of all labor and materials furnished by plaintiffs, including the replastering of the two ceilings, less the amount paid them by the contractor. The lien actually filed and sued upon consists of a long

list of items of labor and material alleged to have been furnished by plaintiffs on the various dates mentioned, with the respective prices charged therefor, totaling \$6,740.29. Credit is given for the \$4,500 paid plaintiffs by the contractor, leaving a balance of \$2,240.29 alleged to be due and payable to plaintiffs, for which sum judgment is prayed.

The defendants originally filed a general denial. Thereafter the cause was referred, by consent, to a referee to try all of the issues. About a year thereafter, and after the testimony of defendants had been taken before the referee, the defendant corporation, the McNichols Furniture Company, was allowed to file an amended answer and a counterclaim. This answer sets up that the work was done under the contract and specifications above mentioned, and pleads that plaintiffs failed to comply with the terms and conditions thereof in certain particulars. Among other things, it is alleged that plaintiffs did not use the proper proportion of sand and cement in making the plaster, in accordance with the contract. It is averred that the plastering upon the ceilings of the second and third stories fell in November, 1905, and that plaintiffs thereupon promised to replaster such ceilings, without extra charge therefor, and that on this condition the defendant corporation made further payment to plaintiffs on the contract. And it is further averred that plaintiffs furnished defective material and bad workmanship, by reason whereof much of the plaster put on by them fell, and that the plastering as a whole done by them was worthless and of no benefit to said defendant.

The counterclaim follows the lines of the amended answer respecting the performance of the work by plaintiffs under the contract, and avers that the failure of plaintiffs to perform the contract resulted in diminishing and depreciating the value of the premises and improvements, to the damage of the defendant corporation. It is averred that the \$4,500 paid plaintiffs was paid them through mistake, in ignorance of the fact that plaintiffs were violating their contract, and that defendant corporation, on this account, is entitled to the return thereof; and that by reason of plaintiffs' failure to comply with the contract the defendant corporation has been further damaged in the sum of \$15,000.

In their reply to this answer, plaintiffs admit the contract, but aver that the defendant corporation failed to comply therewith in certain respects; that certain provisions thereof were waived by both parties; and that the labor and materials in question were not furnished by plaintiffs pursuant thereto. It is averred that the plans and specifications referred to in the contract as having been identified by the signatures of the parties were never so identified, and, for that reason, did not become a part of the contract; that the work was done under the supervision of defendant Henry J. McNichols,

president of defendant corporation, and not under that of the architect as the contract provided; and that the defendant corporation, through its president, accepted the work after its completion. Further replying, plaintiffs deny that they promised to replaster the ceilings of the second and third stories, without extra charge therefor, or that any payment was made them on condition that they would do so. They allege that the plastering fell from these ceilings through no fault on their part, but because of the failure of defendant Henry J. McNichols to maintain a proper temperature in the building, as, it is averred, he promised to do, and because of other existing conditions for which plaintiffs were not responsible. It is averred that the surfaces to be plastered were wet, and that the building, while warm during the day, was allowed to become cold at night, so that ice formed in vessels therein; that defendant corporation permitted large quantities of water to be poured on the floors above the ceilings, which seeped through the floors and caused the plaster on the ceilings to become loose and to fall; that said defendant permitted heavy timbers to be thrown on the floors above the ceilings which contributed to loosen the bond between the plaster and its "base," causing it to fall; that the surfaces to be plastered were "out of plumb," or "not true," which further contributed to cause the plaster to fall. And plaintiffs aver that they informed the president of defendant corporation that the plaster would not remain in position if put on under the conditions existing, as alleged by them, but that he nevertheless directed them to proceed therewith. The reply further alleges that plaintiffs did "a good and workmanlike job upon the building and used on most of the building one part of Acme (cement) to three parts of sand"; that they used cement and sand in equal portions only on the two ceilings which fell and which they replastered; and that the replastering of the same, using such portions of cement and sand, was a proper, workmanlike manner of performing the work under the conditions. Plaintiffs' answer to the counterclaim of defendant corporation is said to be identical with the allegations of their reply to the amended answer of that defendant. It appears that no reply was filed by defendant corporation to this answer of plaintiffs to its counterclaim.

We have stated above the substance of the pleadings, in so far as this appears to be necessary to an understanding of the questions involved on appeal. Much testimony was adduced pro and con on the issues made by the pleadings, and after hearing and considering the same the referee filed his report setting forth his findings of fact and conclusions of law.

The referee found that the written contract between plaintiffs and the defendant corporation was not waived or abrogated by

the parties, but remained in full force and effect throughout the period during which plaintiffs were engaged in the work, and that it was neither superseded nor modified by any oral agreement between the parties; that the work was done under the supervision of the architect, who was recognized by plaintiffs as being the superintendent, and not under the supervision of the president of defendant corporation; and that the specifications offered in evidence were the specifications referred to in the contract, under which the work in the main was performed.

As to the cause of the falling of the plastering from the ceilings of the second and third stories, the report and finding of the referee is as follows:

"Plaintiffs undertook to show, as part of their case in chief and against the objections of defendants, why the plastering of the second and third story ceilings fell almost entirely, and why other plastering fell at different places in the building. The reasons alleged by plaintiffs for the falling of the plaster were as follows: First, changes in temperature in the building; that it was warm in the daytime and freezing at night. Second, that the contractor for the concrete construction negligently threw down the false work above ceilings which had been plastered by plaintiffs, thereby causing the building to shake and vibrate and the plaster to become loose. Third, that said contractor for the concrete construction negligently prepared and mixed the cinder concrete fill which was used as a foundation for the wooden floors; that said contractor put too much water in the mixture; and that said water ran through the cinder mix and through the 5½-inch concrete slabs, damaging the plaster which plaintiffs claim they had put on the under side of said concrete slabs before the concrete contractor had put in the cinder fill. Fourth, contraction and expansion in the concrete construction of the building. Fifth, moisture in the building and in the concrete construction thereof. Sixth, the running of street cars on Market street in front of the building; the vibration caused by the motion of the cars tending to shake the plaster off the ceilings of the building. Seventh, that the concrete slabs which formed the ceilings of the building were sagged. There was a direct conflict in the testimony as to all these matters, except that Henry J. McNichols testified that one Hennessey, foreman for plaintiffs, one day called his attention to frozen drops or globules of water upon the ceiling of the first story, near the front entrance of the building, which at the time was roughly inclosed with boards. None of the ceiling of the first story fell, nor was there any testimony that it was loose or in danger of falling; so it does not appear that any damage resulted from the frozen drops or globules of water that appeared on the plastered ceiling of the first story of the building. As above stated, plaintiffs' own testimony showed that a considerable part of their work fell, and they undertook to prove that it fell because of some or all of the causes above set forth; but the referee finds from the evidence that it has not been shown that plaintiffs' work fell or was rendered defective by reason of any or all of said causes."

On the issue as to whether or not the president of defendant corporation orally agreed to pay plaintiffs for replastering the ceilings of the second and third stories, the referee found the preponderance of the evidence to be against plaintiffs on such issue, and consequently found that there was no

such promise or agreement on the part of Henry J. McNichols or his company.

As to the duty of the defendant corporation to furnish heat in the building, it is pointed out in the referee's report that the written contract contains no provision requiring the principal contractor to furnish heat; whereas, it is provided in the specifications that:

"Each contractor shall at all times cover and protect his work and the materials to be used therein from damage by weather or otherwise, and shall make good and repair any damage thus occurring."

And the finding of the referee is that the testimony adduced to establish a promise or agreement on the part of the president of defendant corporation to furnish heat does not sustain plaintiffs' allegation in that regard.

The referee found that the architect refused to issue a final certificate to plaintiffs on the ground that the work appeared to be defective, and found that thereafter, within two years, considerable quantities of plaster fell from the ceilings of different floors of the building. The referee further found that the use of cement and sand in equal parts by plaintiffs on part of the building constituted a breach of the contract on their part; and that, though plaintiffs claim such mixture to be better than that called for by the specifications, they, by such departure from the contract, became, in effect, guarantors of the work so performed.

The ultimate findings of the referee are that plaintiffs are not entitled to recover on their cause of action; that defendant corporation, on the other hand, is entitled to recover, on its counterclaim, the reasonable value of the labor and material necessary to repair the surfaces from which the plaster fell or proved to be defective during the two years following the completion of the entire work, finding \$1,250 to be a reasonable sum therefor. As this sum added to the \$4,500 which had been paid to plaintiffs exceeds the total contract price (\$5,300) by \$450, the finding of the referee is that defendant corporation is entitled to recover such excess from plaintiffs. The referee further found for defendant corporation on its counterclaim in the sum of \$3,500, as damages for depreciation in the value of the property, resulting from plaintiffs' failure to properly perform the work under their contract, and accordingly recommended judgment against plaintiffs for \$3,950. The last-mentioned finding, however, was clearly without competent testimony to support it, and the circuit court sustained an exception of plaintiffs to this portion of the referee's report thereby eliminating this item, and we are consequently not concerned with it here.

To the referee's report the plaintiffs filed 48 exceptions. All of these, but the one sustained as above mentioned, the circuit court overruled. Judgment was accordingly entered for defendants on plaintiffs' cause of ac-

tion, and in favor of the defendant corporation, McNichols Furniture Company, and against the plaintiffs, on the counterclaim of that defendant, for the sum of \$450. From this judgment plaintiffs prosecute this appeal.

[1] I. The first question presented concerns our power to review the referee's findings of fact, as we would review the findings of a chancellor in a suit of equitable cognizance. It is contended by respondents' learned counsel that the report of the referee stands as a special verdict, and, if there is any substantial evidence tending to establish the facts found, such findings cannot properly be disturbed by this court. On the other hand, appellants' learned counsel contend that the findings of fact made by the referee are here fully open to review, and that it is our duty to review and pass upon them precisely as in an equity case.

The determination of this question depends upon whether or not the case made by the pleadings, as they stood at the time of the making of the order referring the cause to a referee, was one for a compulsory reference under the statute. If a case is one wherein the circuit court is empowered under the statute (section 1996, Rev. Stat. 1909) to order a reference without regard to the consent or desire of the parties, or either of them, then that court, in thereafter passing upon exceptions to the referee's report, is invested with the power to review the findings of the referee, as to matters of fact, as well as of law, reject them if it sees fit, and make its own findings as in equity cases; and in such event this court, on appeal, will review and pass upon the facts as in a suit in equity. And as to this, if the case is one for compulsory reference, it matters not that the parties consent that it be referred. The character of the proceeding is in no wise altered by the fact that the record shows such consent, where none is needed. On the other hand, where an action which, under the statute, cannot be the subject of a compulsory reference, is nevertheless referred by consent of the parties, the referee's report operates as a special verdict, and neither the circuit court nor this court can set aside the findings of the referee if supported by substantial evidence. See *Reed v. Young*, 248 Mo. 606, 154 S. W. 766; *Bank v. Russell*, 181 Mo. App. 698, 164 S. W. 694; *Buxton v. Debrecht*, 95 Mo. App. 599, 69 S. W. 616.

In *Reed v. Young*, supra, it is said:

"When a compulsory reference may be had under this statute, the court enjoys and may exercise the supervisory power of a chancellor over the findings of the referee whether the issues submitted be legal or equitable, or whether they were committed to the referee by the consent of both parties or by the order of the court without the consent of either. *Williams v. Railroad*, 153 Mo. loc. cit. 495 [54 S. W. 689]. On the other hand, when there is a reference by consent of other issues than those which are the subject-matter of a compulsory reference, then the report of the referee stands as the verdict of the

jury and cannot be set aside as being opposed to the weight of the evidence. This distinction in the power of review of the court over the reports of referees in the two classes of cases grows out of the fact that the purposes for which references, in invitum, may be ordered, are (especially as to the 'examination of a long account') akin to the head of equitable jurisdiction (bill for an accounting) which grew out of the right to apply to that court owing to the inadequacy of the remedy at common law. *Bispham's Equity* (7th Ed.) § 482; *Fetter on Equity*, pp. 247, 248, 249, § 164.

[2] The contention that the account sued upon is not a "long account," within the meaning of the statute, but a "bill of particulars" (see *Reed v. Young*, supra, 248 Mo. loc. cit. 616, 154 S. W. 760), cannot be upheld. This account consists of 261 debit items, being charges for labor and material on as many different dates, and 10 credit items for payments made plaintiffs on the 10 respective dates named. The account alone covers 8½ pages of the record before us. Manifestly, it is a long account within the meaning of the statute.

[3] It is suggested that the case is not to be viewed as one for compulsory reference, for the reason that, in the trial before the referee, there was no controversy concerning the items of the account—i. e. that defendants did not dispute the alleged fact that the respective items of labor and material were furnished as shown by the account and that they were reasonably worth the prices charged—but that the contest waged below had to do with the issues raised by the amended answer and counterclaim and the reply and answer thereto, respectively. But this suggestion is without merit, for the reason that the nature of the proceeding, as one for compulsory reference or otherwise, is to be determined with reference to the state of the pleadings when the order of reference was made. In a case such as this the petition, declaring upon the account, determines the character of the action, unless it be that the account stands conceded. See *Ittner v. Exposition Ass'n*, 97 Mo. loc. cit. 567, 11 S. W. 58; *Reed v. Young*, supra, 248 Mo. loc. cit. 615, 154 S. W. 766. In the instant case the entire account sued upon was put in issue by the general denial of defendants; and, as the pleadings stood thus when the order of reference was made, the case was one for compulsory reference.

It follows that the report of the referee does not here stand as a special verdict, but was open to review by the trial court in the exercise of his supervisory powers as a chancellor, and is likewise subject to review here as to both the facts and the law, as we would review findings in an equity case on appeal.

[4] II. The questions of law involved are few and simple, and not difficult of application. But the nature of the case has necessitated a most careful examination and thoughtful consideration by us of the evidence detailed in this record. The findings

of fact made by a referee, who had the witnesses before him, which findings have been subjected to the scrutiny of the circuit court and approved by it, are entitled to deference and respect. They are ordinarily quite persuasive, and for obvious reasons are not to be lightly cast aside by an appellate court reviewing the evidence in the cold printed record before it. See *McGrath v. O'Hare*, 175 Mo. App. loc. cit. 16, 150 S. W. 826. But, reviewing the case as one in equity, if we become convinced that any finding is not sufficiently supported by the evidence, it is our duty to set it aside and pass judgment upon the facts as we find them.

Under the circumstances, it is unnecessary to review in detail all of the findings of the referee. We approve the findings that the specifications in evidence were a part of the contract, that the contract was not abrogated or materially modified, and that the architect supervised the work. As to the conclusions of the referee respecting the use of cement and sand in equal proportions, we need not here comment thereupon, but the view which we take of the question involved will later sufficiently appear.

[5] III. A careful review of the evidence pro and con touching the matter has led us to the conclusion that we ought not to disturb the findings of the referee respecting plaintiffs' claim for extra compensation for replastering the ceilings of the second and third stories of the building. There is considerable testimony tending to show that water, seeping from the "cinder-concrete fills" above these ceilings, combined with the change in temperature in the building due to the lack of heat therein, caused the plaster to become loose and fall. On the other hand, defendants' evidence tends to show that the cinder-concrete fills above these ceilings did not contain an excess of water, and that these particular ceilings were not dampened or affected in such manner. Though defendants' own evidence shows that too much water was put in the cinder-concrete fill laid above the ceiling of the first story—which ceiling did not fall—it is said that those in charge of the concrete work were cautioned respecting the matter and that this did not occur on any other floor.

[6] As to the duty to furnish heat in the building, it is true, as the referee finds, that the written contract nowhere provides that the principal contractor shall furnish heat; while there is the provision quoted by the referee, to the effect that each contractor shall cover and protect his own work and materials. It is charged that the president of defendant corporation, Henry J. McNichols, orally agreed to furnish heat, and that relying thereupon and at his direction plaintiffs proceeded with the work. On this question the testimony is in direct conflict. And since it becomes a matter of the credibility of the witnesses, we cannot well do other-

wise than defer to the finding of the referee who occupied a more advantageous position than do we.

The referee does not find what caused the plaster to fall, nor need we. Plaintiffs were under a duty to execute the work in a workmanlike manner, and had specially guaranteed that the plaster on ceilings would remain in position for two years. It may be here said that they do not contend that the sagging of the ceilings, the passing of street cars, or the falling of timbers on the floors above, sufficed to cause the plaster to become loose and fall; but it is contended that the water on these ceilings and changes in temperature loosed the "bond" between the plaster and its "base," and that the other matters mentioned contributed to cause it to fall. But the referee finds that the falling of the plaster from these two ceilings did not result from any cause for which defendants were responsible; and, in the state of the record before us, we think that we would not be justified in disturbing that finding.

[7] IV. What we have said above applies only to plaintiffs' claim for replastering the ceilings of the second and third stories. Plaintiffs did replaster these ceilings at their own expense and completed the entire work and turned it over to the principal contractor; and, according to testimony for plaintiffs, defendant corporation, through its president, accepted the work as being satisfactory in all respects. Touching this matter, the testimony of defendant Henry J. McNichols simply is that he does not remember that on the occasion in question he told one of the plaintiffs that there was nothing further to be done, and that "everything was satisfactory." At all events, there is ample evidence, and persuasive too, going to show that, with the replastering of the two ceilings mentioned, the plastering work as a whole was done with reasonable skill and care and at least in substantial compliance with the specifications—barring the question of the proportion of cement and sand used. As to the latter, the evidence tends to show that the use of more cement, in proportion to sand, than called for by the manufacturer's directions, gave a better "bond" and better results, and that it was for this reason that plaintiffs used such proportion of these materials, deeming it wise under the prevailing conditions. And it does not appear that the work was thereby in any wise rendered defective, but all of the evidence is to the contrary. Whatever effect plaintiffs' conduct in this respect might have upon a suit on the contract, it does not prevent a recovery by plaintiffs on quantum meruit. Neither does the refusal of the architect to give plaintiffs a final certificate have such effect. Plaintiffs are nevertheless entitled to be allowed the reasonable value of their work and material, within the limit of the contract price, to the extent of the benefits accruing thereby to defendant corporation. See *Yeats v. Ballentine*, 56 Mo.

530; *Rude v. Mitchell*, 97 Mo. 365, 11 S. W. 225. Such allowance to plaintiffs, if any, is, however, here subject to be reduced, or offset and entirely overcome, by such sum as may properly be allowable to defendant corporation as damages on its counterclaim.

The referee stated that the work done by plaintiffs was "to a considerable extent a failure and not worth the sum of \$4,500 paid plaintiffs"; but a full review and careful scrutiny of the record before us has convinced us that the evidence does not justify this, and there is much evidence tending to show that plaintiffs are not wholly chargeable with defects or deficiencies later appearing therein. It is true that some of the plastering afterwards became cracked and some of it fell. But the evidence is that the cracking of plaster such as this will inevitably result in many instances from causes for which the plasterer is not responsible, particularly from the expansion and contraction of the building, which is said to be often pronounced in a concrete structure. And though small patches of plaster fell during the first year after the completion of the work, and considerable plaster fell thereafter, satisfactory proof is lacking to show to what extent this was due to defective workmanship or material; and the evidence makes it appear that the early repairing of the small places from which the plaster began to fall would have prevented much, if not all, of the subsequent damage on this score. This matter will be further considered in passing upon the counterclaim of defendant corporation.

Upon the whole, we are of the opinion that it would not be just and equitable to deny plaintiffs a recovery in toto. On the contrary, we think that the showing made by plaintiffs justifies a recovery in quantum meruit to the extent of the balance remaining unpaid on the contract price, to wit, \$800, subject to be reduced by such allowance to defendant corporation on its counterclaim as the evidence may appear to justify, as for a breach of the guaranty or warranty of plaintiffs respecting the plaster on ceilings, or for the failure of plaintiffs to otherwise perform the contract according to its terms. In spite of the findings of the referee as to the merit of plaintiffs' work, the effect of the judgment entered below is to give them credit for \$800, the balance of the contract price, thereby reducing the recovery of defendant corporation on its counterclaim from \$1,250 to \$450. This would be well enough, as we view the case, if we were satisfied that defendant corporation is justly entitled to the amount awarded it on its counterclaim under the evidence adduced in support thereof. This is the question to be next considered.

[8] V. The allowance by the referee of \$1,250 to defendant corporation, as the reasonable cost of repairing the plastering after the lapse of two years from the completion of the work, is based alone on the testimony of one witness for defendants, one

Lauritson, who examined the plastering and made a bid to defendant corporation for repairing the same, in December, 1907. Another witness testified for defendants respecting the matter, but his examination of the building was made about four years after the completion of the work, and his testimony as to what it would then cost to make the necessary repairs is without probative force or evidentiary value on the matter in hand. It was evidently rejected by the referee, who refers alone to Lauritson's testimony on this phase of the case.

[8, 10] Lauritson, a "boss plasterer," made his examination of the building in December, 1907, and testifies, in a very general way, as to the quantity of plaster which had then fallen from the various ceilings. He does not undertake to give any estimate of the number of square yards or feet of surface from which plaster had fallen, but deals altogether in generalities. He says that the ceiling of the first story was "all right"; that plaster on the ceiling of the second story "partly had fell off and partly was cracked," so that he was led to "judge that practically all the ceiling would have to be replastered"; that on the ceiling of the third story the plaster was "in fairly good condition," excepting a "place off," judged to be "about 14 by 20" (feet); that the plaster on the ceiling of the fourth floor was "fairly good" (none, evidently, having fallen); that about one-fifth of the plaster had fallen from the ceiling of the fifth story; and that "considerable" plaster had fallen from the ceiling of the sixth story, perhaps two-thirds thereof.

Such is the testimony of this witness as to the amount of plaster which had actually fallen from the ceilings. But he examined the building, not to ascertain how much plaster had fallen from the ceilings, but to determine to what extent the plaster on the building as a whole, including plaster on columns, beams, etc., was either off, or loose and in his opinion ought to be taken off. And to this end he examined the ceilings by sounding them, either by getting upon a step-ladder or by using a long pole, and examined the plaster on the concrete columns by tapping the plastered columns with his pocket-knife. And his estimate of the repairing of this general nature then necessary to be done throughout the building, the reasonable value of which he estimated to be "between \$1,250 and \$1,300," includes the removing of the plaster from large areas from which no plaster had fallen but which in his judgment was "loose," and included, too, the removing of the plaster from numerous columns and beams throughout the various stories of the building, from which no plaster had fallen, but upon which he claims to have found the plaster loose. Plaintiffs' guaranty or warranty of their work applied only to ceilings, and was that the plaster on ceilings would remain in position for two years. Clearly

the estimate of this witness, as to the cost of doing the work contemplated by him, furnishes no basis for arriving at the extent of the liability, if any, of plaintiffs on such warranty. And the evidence does not justify the assumption that defendant corporation could otherwise rightfully charge plaintiffs with the cost of doing such extensive "repairing" after the lapse of approximately two years. If defendant corporation sustained loss not covered by plaintiffs' said warranty but otherwise referable to a breach of the contract by plaintiffs, we think it clear that the testimony of this witness furnished no correct basis for estimating and allowing the same. Nor do we understand that this was the theory upon which this item of damages was allowed in favor of defendant corporation.

In rebuttal plaintiffs adduced evidence to show that one cannot ascertain that plaster on concrete columns is defective by tapping it with a pocketknife. There is no contention that any plaster had fallen from any of the numerous columns included in the estimate of this witness, and we are convinced that the replastering thereof, and of other parts of the building as well, proposed to be done by this witness, under his bid, cannot, under any theory here tenable, be chargeable to plaintiffs.

But aside from this, there is abundant and convincing evidence going to show that defendant corporation is not entitled to recover the cost of replacing all plaster that fell from the ceilings within two years after the doing of the work. Plaintiff Craig and one Anderson, a contracting plasterer, examined the plaster in the building in the spring of 1906, and testify that but from 8 to 12 square yards of plaster had then fallen from the ceilings. Plaintiff Binks testified that two or three weeks after the completion of the work the plaster was loose in small patches—not more than 20 yards—which could have been repaired for \$20. In April, 1907, plaintiff Craig, one McDonnell, a contracting plasterer, and one Cann, an architect, testified that they examined the building thoroughly. Craig says that about 65 or 75 yards of plaster had then fallen from ceilings. Cann says there was then "about 75 yards of broken plaster * * * on all the floors—the ceilings." McDonnell says that from 60 to 100 yards in all "was loose then and injured."

Defendants' evidence is that the plaster began to fall soon after the completion of the work, but there is no evidence tending to overcome the above testimony for plaintiffs as to the extent of such falling during a period of more than a year after the completion of the work.

In behalf of plaintiffs, there is much testimony going to show that, if defendant corporation had used reasonable diligence, to repair the small places where the plaster

first became loose or from which it fell, further damage would have been greatly lessened, if not prevented altogether. The testimony is that in such cases failure to seasonably repair such places in a ceiling entails the loosening and falling of much plaster. It is unnecessary to go into the evidence in detail touching this matter. It need only be said that it suffices to justify a finding that defendant corporation did not exercise reasonable diligence to prevent the loss and damage claimed to have been ultimately suffered by it. It was the duty of this defendant to use reasonable diligence and make reasonable exertion to mitigate the damages caused by any breach of the contract on plaintiffs' part. See *Creve Coeur Lake Ice Co. v. Tamm*, 90 Mo. App. 189; *Shelby v. Railway Co.*, 77 Mo. App. 205; *Ferd Bauer Engineering, etc., Co. v. Storage Co.*, 186 Mo. App. 664, 172 S. W. 417. It would serve no useful purpose to cite the many other authorities which might readily be collated in support of this well-established principle of law.

In the case of *Gallais v. Asphalt Co.*, 127 Mo. App. 338, 105 S. W. 693, cited by respondents in this connection, the facts are unlike those here presented, and the language of the opinion relied upon is not here persuasive. On the other hand, the opinion approved an instruction telling the jury that it was "the duty of plaintiff to reduce the damages as much as possible."

On plaintiffs' guaranty or warranty that the plaster on the ceilings would remain in position for two years, the allowance to defendant corporation ought to be limited to such sum as this defendant would have been compelled to expend in replacing and repairing the plaster had it acted with due diligence. But what expenditure would have been necessitated had defendant taken due steps to mitigate the damages is not readily deductible from the facts established. However, we are justified in finding that at most 100 square yards of plaster had fallen or become loose during more than a year following the completion of the work, and that the necessary repairs could then have been made at a cost not to exceed \$100; and, under all of the circumstances appearing, we think that this is a reasonable and fair allowance to defendant corporation on its said claim.

The referee makes mention of the fact that defendant, after repairing the plaster, will have "patched plastering." We are not unmindful of this; but there is no competent evidence here to show the monetary value of the damage, if any, thus entailed, if loss to defendant corporation on this score is here properly recoverable.

[11] There are questions discussed in the briefs which need not be here considered. But it may be well to say that the fact that

the lien account contains a nonlienable item, or nonlienable items, does not, under the circumstances present, invalidate the whole account. See *State ex rel. O'Malley v. Reynolds*, 182 S. W. 743.

Our conclusion is that under the evidence in this record plaintiffs ought to be adjudged entitled to recover on their cause of action the sum of \$800, and that defendant corporation should be awarded \$100 on its counterclaim, resulting in a net recovery by plaintiffs of \$700, with interest from May 2, 1906; and that plaintiffs have a lien therefor, and recover costs.

The judgment is therefore reversed, and the cause remanded, with directions to the circuit court to enter judgment in accordance with these views.

REYNOLDS, P. J., and NORTONI, J., concur.

LYNCH v. UNITED RYS. CO. OF ST. LOUIS. (No. 15183.)

(St. Louis Court of Appeals. Missouri. July 5, 1916.)

WITNESSES \S 53(2)—COMPETENCY—HUSBAND AND WIFE—STATUTES—ACTION FOR LOSS OF SERVICES—"PROPERTY."

In action by husband for injuries to wife while boarding a street car, causing loss of her services, the wife then being on her way as agent of her husband to get some tailoring material, the wife is not a competent witness, notwithstanding *Rev. St. 1909, § 6359*, providing that no married woman shall be disqualified as a witness in any civil suit in the name of her husband, "in actions against carriers, so far as relates to the loss of property and the amount and value thereof" and in business transactions conducted by such married woman as the agent of her husband; since the cause of action is not one arising out of any business transaction conducted by the wife as agent under the statute, nor are plaintiff's rights to his wife's services property rights, a loss of which is loss of property within the statute, the term "property" so used having reference to the subject-matter of a carriage or shipment undertaken by a carrier; nor is an action for loss of services such an action that from necessity of the case the wife's testimony must be received.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 138; Dec. Dig. \S 53(2).

For other definitions, see *Words and Phrases*, First and Second Series, Property.]

Appeal from St. Louis Circuit Court, Thos. L. Anderson, Judge.

"Not to be officially published."

Action by Ben Lynch against the United Railways Company of St. Louis. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

Boyle & Priest, G. T. Priest, and Chauncey H. Clarke, all of St. Louis, for appellant. M. N. Sale and W. R. Gilbert, both of St. Louis, for respondent.

ALLEN, J. Plaintiff prosecutes this action to recover for loss of services of his wife and expenses of her treatment, grow-

ing out of injuries said to have been sustained by her as a result of defendant's negligence. The negligence charged is the alleged premature starting of one of defendant's street cars, in the city of St. Louis, while plaintiff's wife was in the act of boarding the same, whereby, it is alleged, she was thrown to the street and injured.

When the cause came on for trial, plaintiff called his wife as his first witness, whereupon defendant interposed an objection upon the ground that the wife was not a competent witness in plaintiff's behalf. This objection was sustained. Plaintiff's counsel thereupon stated to the court that the wife was the only witness which plaintiff had to establish the negligence charged against defendant, and stated the facts which plaintiff expected to prove by his wife's testimony. Among other things plaintiff offered to show that at the time of the alleged injury to the wife she was on her way to some business house to get certain "tailor's trimmings" for plaintiff's use in his business as a tailor; it being plaintiff's custom to send his wife on such errands as his agent. Upon inquiry by the court, defendant's counsel stated that three witnesses to "the accident," resulting in the alleged injuries to plaintiff's wife, had been summoned to testify in defendant's behalf. And it is said that, in the wife's suit previously tried, a witness to the casualty testified for plaintiff. Upon this showing the court adhered to its ruling excluding the testimony of plaintiff's wife, except as to the nature and extent of her injuries. Plaintiff thereupon took a nonsuit, with leave to move to set the same aside. Thereafter plaintiff filed a motion to set aside the nonsuit, which motion the court sustained, and awarded plaintiff a new trial. From this order defendant has appealed.

We think it clear that the trial court correctly held, in the first instance, that plaintiff's wife was incompetent to testify respecting the alleged negligence of defendant, and that the court thereafter erred in setting aside the nonsuit and granting a new trial. The wife was not a competent witness at common law in an action of this nature by or against her husband. *Tockstein v. Bimmerle*, 150 Mo. App. 491, 131 S. W. 126. Our statute, section 6359, creates certain exceptions to this rule, as follows:

"No married woman shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of or against her husband, whether joined or not with her husband as a party, in the following cases, to wit: First, in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed; second, in actions against carriers, so far as relates to the loss of property and the amount and value thereof; third, in all matters of business transactions when the transaction was had and conducted by such married woman as the agent of her husband. * * * Provided, that nothing in this section shall be construed to authorize or permit any married woman, while the relation exists, or subsequently, to testify to any admis-

sion or conversations of her husband, whether made to herself or to third parties."

Respondent urges that the facts which plaintiff offered to show were such as to establish an agency on the part of the wife for plaintiff, so as to bring the case within this statutory exception to the rule disqualifying the wife; that is to say, that plaintiff's wife, when injured, was upon an errand for plaintiff, as his agent, and that the existence of this agency rendered her a competent witness in his behalf. But this argument is not persuasive. Though it be true that plaintiff's wife, when injured, was on an errand for him, the cause of action, i. e., the right of plaintiff to recover, in his own right, for the alleged injuries to his wife, is not one arising out of or pertaining to any business transaction conducted by the wife as plaintiff's agent, and hence is not within the purview of the statute. See *Connecticut Fire Ins. Co. v. Railroad*, 171 Mo. App. 70, 153 S. W. 544; *Gardner v. St. Louis, I. M. & S. R. Co.*, 124 Mo. App. 461, 101 S. W. 684.

It is also argued that the wife is competent under the second subdivision of section 6359, supra, providing that the wife shall not be disqualified as witness for her husband "in actions against carriers, so far as relates to the loss of property and the amount and value thereof." The argument is that plaintiff's right to his wife's services is a property right, the loss of which is a "loss of property," within the meaning of the statute. But we think it would be a perversion of the statute to so hold. The term "property," as used in the statute, evidently has reference to the subject-matter of a carriage or shipment undertaken by a carrier, and cannot be said to include the loss of a wife's services by reason of personal injuries received by her through a carrier's negligence.

A further insistence is that the wife is here a competent witness under the exception ingrafted upon the common-law rule, allowing the wife to testify in certain actions where, because of the nature of the case, necessity demands that her testimony be received. This doctrine is exemplified in cases such as *Pettis County v. De Bold*, 186 Mo. App. 265, 117 S. W. 88; *Coy v. Humphreys*, 142 Mo. App. 92, 125 S. W. 877; *Cramer v. Hurt*, 154 Mo. loc. cit. 120, 55 S. W. 258, 77 Am. St. Rep. 752. But the case before us does not belong to a class in which the wife may be properly held to be a competent witness *ex rei necessitate*. As to whether or not a given case falls within this exception, "the decisive question is whether the evidence offered is admissible in the class of cases to which the one in hand belongs, not whether other evidence might have been obtained in the particular case." Here the suit is an ordinary action by the husband to recover for such loss as, in contemplation of law, he may have suffered by reason of personal injuries alleged to have been negligently inflicted upon his wife by defendant. So far as concerns

proof of the facts alleged to constitute defendant's negligence, the case is unlike one wherein the husband sues for the alienation of his wife's affections (see *Coy v. Humphreys*, supra), or where the action is one for an abortion performed on the wife (see *Cramer v. Hurt*, supra), or one by the wife for the illegal sale of liquors to her husband, an habitual drunkard (see *Pettis County v. De Bold*, supra). To hold that the wife's testimony may be here received, upon the ground of necessity, would be to hold that the wife is a competent witness in any civil action by the husband when such testimony appears to be requisite to make out the husband's case.

While the trend of judicial decision is decidedly in the direction of relaxing the common-law rule on the subject (see *Pettis County v. De Bold*, supra; *Lyle v. Andalaft*, 178 Mo. App. loc. cit. 176, 165 S. W. 1146), it is not within our power to abrogate it.

It follows that the judgment should be reversed and the cause remanded, with directions to the circuit court to vacate its order setting aside the nonsuit. It is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

BRUNSWICK v. STANDARD ACC. INS. CO. OF DETROIT, MICH.
(No. 14380.)

(St. Louis Court of Appeals. Missouri. July 5, 1916. Rehearing Denied July 20, 1916.)

1. INSURANCE §147(1) — CONSTRUCTION OF POLICY—WHAT LAW GOVERNS.

An accident policy issued to one residing in the city of St. Louis, and who died there, was to be interpreted in connection with the suicide statute of the state.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 293; Dec. Dig. §147(1).]

2. INSURANCE §465—ACCIDENT INSURANCE—SUICIDE—STATUTE—"ACCIDENTAL MEANS."

Under Rev. St. 1909, § 6945, providing that in suits upon policies of life insurance it shall be no defense that insured committed suicide, unless it appears that he contemplated suicide when he made his application, and that any contrary stipulation in the policy shall be void, an accident policy is regarded as a policy on the life of the insured, and where it insured against liability or death resulting directly, exclusively, and independently of all other parties from accidental bodily injury except when self-inflicted while insane, the defense of suicide will be rejected where insured came to his death as a result of "accidental means," that is, through violence or otherwise, as by the intentional taking of an overdose of poison, and is also to be rejected in case of the insured's suicide, as suicide is regarded as an accident permitting a recovery on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1185; Dec. Dig. §465.

For other definitions, see Words and Phrases, First and Second Series, Accidental Means.]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

"To be officially published."

Action by Pauline Brunswick against the Standard Accident Insurance Company of Detroit, Mich. Judgment for defendant, and plaintiff appeals. Case certified to the Supreme Court for final determination by reason of its conflict with the decision of another Court of Appeals.

Emerson E. Schnepp, Otto F. Karbe, and Taylor & Mayer, all of St. Louis, for appellant. Merritt U. Hayden, of St. Louis, for respondent.

NORTONI, J. This is a suit on a policy of accident insurance. The finding and judgment were for defendant, and plaintiff prosecutes the appeal.

Plaintiff is beneficiary in the policy issued by defendant to her husband, William Brunswick. The policy, as stated, is one of accident insurance in that it stipulates insurance on William Brunswick against disability or death resulting directly, exclusively, and independently of all other causes from accidental bodily injuries except when self-inflicted while insane. There is no substantial evidence tending to prove an "accident," as that term is commonly understood and accepted, but it is said plaintiff's husband committed suicide.

[1] There is ample evidence in the record tending to prove that the insured, plaintiff's husband, while the policy was in force and effect, committed suicide through taking poison, that is, cyanide of potassium. It sufficiently appears that the policy was issued to Brunswick in the city of St. Louis, where he resided, and in which city he subsequently died, and therefore it is to be interpreted in connection with our suicide statute.

At the instance of defendant, the court gave the two following instructions:

"(1) The court instructs the jury that if you find and believe from the evidence that the death of William Brunswick was caused in any other manner or by any other means than by accident, then the plaintiff cannot recover, and your verdict must be for the defendant.

"(2) You are instructed that, even though you may find from the evidence that William Brunswick took cyanide of potassium, on the day of his death, and even though you may further find that his death was caused thereby, there is still no presumption in law that his act in taking said poison, if you find that he did take it, was accidental, or that his death resulted from accidental bodily injuries. On the contrary, the burden is upon the plaintiff to prove that the death of said William Brunswick resulted, independently of all other causes, from accidental bodily injuries, and, unless she has proved such fact, she cannot recover, and your verdict must be for the defendant."

It is argued the court erred in so instructing the jury, in that under the law suicide is deemed an accident within the policy when construed together with our statute (section 6945, R. S. 1909). The statute is as follows:

"In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured commit-

ted suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

[2] There is no suggestion in the case that the insured contemplated suicide at the time of taking out the policy sued upon, and the matter is to be considered alone on the face of the policy as influenced by the statute quoted. When there is evidence tending to prove the insured came to his death as a result of accidental means—that is, through violence or otherwise—as by the unintentional taking of an overdose of poison or something of that character, it appears to be well enough that the defense of suicide should be rejected under this statute, for a policy of accident insurance is regarded as one on the life of the insured. See *Logan v. Fidelity & Casualty Co.*, 146 Mo. 114, 47 S. W. 948. But though such be true, it is indeed difficult to perceive on what principle suicide, which is the intentional taking of one's life, may be said to be an accident within the terms of the policy, even as influenced by the statute. However that may be, the course of decision seems to sustain the view that suicide is to be regarded as an accident, and a recovery may be had on an accident policy when the death results from the act of the insured intentionally taking his own life as if it occurred through accidental means. In *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895, the policy involved was one of accident insurance, as here, and it was admitted in the pleadings that the insured "died from bodily injuries caused by a pistol shot fired by himself, and the cause of his death was suicide." Moreover, the case was submitted on an agreed statement of facts, which recited that the insured—"died from bodily injury caused by a pistol shot intentionally fired by himself for the purpose of thereby taking his own life; that the cause of the death of said Whitfield was suicide."

On these facts the question of liability under an accident policy was considered in connection with our suicide statute above quoted by the Supreme Court of the United States, which gave judgment to the effect that the plaintiff was entitled to recover the full amount of the policy sued on. Subsequently this court, in *Applegate v. Travelers' Ins. Co. of Hartford, Conn.*, 153 Mo. App. 63, 90, 132 S. W. 2, 11, considered the matter of a suicide through the taking of poison, as here, and enforced a recovery on an accident policy considered together with our suicide statute. In that case the court said:

"The policy, as interpreted by the law and by the courts, does provide that when death occurs from suicide, whether that suicide is accomplished by poison or by shooting, the beneficiary shall recover for the full amount insured to be paid by reason of death occurring."

If these judgments are sound, then suicide is to be regarded as an accident within

the terms of the policy, and the instructions above set forth are erroneous.

The judgment should be reversed and the cause remanded. It is so ordered.

ALLEN, J., concurs. REYNOLDS, P. J., concurs in result only, not agreeing to the apparent doubt cast upon the correctness of the holding in the *Whitfield* and *Applegate* decisions, *supra*.

NORTONI, J. Since the above opinion was filed, the attention of the court has been directed to the case of *Scales v. National Life & Accident Ins. Co.*, 186 S. W. 948, recently decided by the Springfield Court of Appeals, which appears to reflect a contrary view. This case should therefore be certified to the Supreme Court for a final determination in accordance with the mandate of the Constitution as in conflict with the case last cited. It is so ordered. All concur.

REYNOLDS, P. J. (concurring). This case is to be certified to the Supreme Court as in conflict with the decision of the Springfield Court of Appeals in *Scales v. National Life & Accident Ins. Co.*, not yet officially reported but see 186 S. W. 948, the opinion in that case filed May 25th, 1916, after our court had filed its opinion in the case at bar and not brought to our attention until after we had filed our opinion in it, which we did July 5th, 1916. I think it proper to add a few words to what I said in my concurring opinion in the case at bar. There I said that while agreeing to the reversal and remanding of the case I could not agree to the apparent doubt cast upon the correctness of the holding of the United States Supreme Court in *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895, or of our court in *Applegate v. Travelers' Ins. Company of Hartford, Conn.*, 153 Mo. App. 63, commencing at page 90, 132 S. W. 2. I add to the above that since reading the very learned and elaborate opinion by my brother Farrington, speaking for the Springfield Court of Appeals in the *Scales* case, *supra*, I think that that opinion is contrary to what was held by our court in *Keller v. Traveler's Ins. Co.*, 58 Mo. App. 557, as well as in the *Applegate* case, *supra*, and by what is held by our Supreme Court in *Logan v. Fidelity & Casualty Co.*, 146 Mo. 114, 47 S. W. 948, as well as by the Supreme Court of the United States in construing our suicide statute. It is clear to me that if the view taken by the Springfield Court of Appeals in the *Scales* case is correct, its effect is not only to overturn those decisions but to evade and nullify our suicide statute (Revised Statutes 1909, sec. 6945). It is not pretended in this case that at the time the insured made his application for the policy he contemplated suicide. It is also clear that at the time of taking out the policy he was a citizen of this state. So that this section 6945, as it

seems to me, is directly applicable here. That must be so unless it is held that this section does not apply to accident policies. As a matter of fact suicide is never an accident but is always, in the case of a sane man, premeditated and unless we hold contrary to the former decisions of our court in the Keller and Applegate Cases and of our Supreme Court in the Logan Case, and of the Supreme Court of the United States in the Whitfield Case, every one of which were cases of suicide, it must follow that the result arrived at by the Springfield Court of Appeals in the Scales Case is erroneous.

It is not to be overlooked, moreover, that the decision of the Supreme Court of the United States in the Whitfield Case was directly in line with what that court had held in *Knights Templars' and Masons' Life Indemnity Co. v. Jarman*, 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139. The opinion in the last mentioned case was written by Mr. Justice Brown and concurred in by all the Justices of the Supreme Court except Mr. Justice Harlan, who, as reported, took no part in its decision. But afterwards Mr. Justice Harlan wrote the opinion of the court in the Whitfield Case. So we have the unanimous holding of the Justices of the United States Supreme Court sustaining and applying our suicide law to accident policies. As I understand the decisions of our own court, of our Supreme Court and of the Supreme Court of the United States, the defense of suicide, whether by shooting, hanging or taking of poison, is no defense under our statute against the payment of the principal sum to the beneficiary of an accident policy and that the insurance company cannot limit its liability below that amount by any provision either denying any compensation in case of suicide or diminishing the amount to be paid when death is the result of suicide. I think the decision of the Springfield Court of Appeals in the Scales Case is not only contrary to what we have here held, but what our own court, our Supreme Court, and the Supreme Court of the United States has held in the cases I have cited.

STATE ex rel. SCANLAND v. THOMPSON,
Probate Judge. (No. 15267.)

(St. Louis Court of Appeals. Missouri.
July 31, 1916.)

**1. EXECUTORS AND ADMINISTRATORS §17(3)—
WIDOW'S RIGHT OF APPOINTMENT.**

Under Rev. St. 1909, § 15, naming the persons entitled to priority in administering a decedent's estate, a widow who was improvident, wasteful and extravagant, without proper appreciation of the value of money, of immoral character and of bad reputation for morality, deficient in integrity, and incapable of managing advantageously so large an estate as her husband's, also being hostile to the heirs and distributees, was entitled to appointment as administratrix, unless disqualified by section 14,

naming the persons disqualified from administering.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 45-47; Dec. Dig. §17(3).]

**2. EXECUTORS AND ADMINISTRATORS §19—
RIGHT TO ADMINISTER—RENUNCIATION.**

A party entitled to administer upon a decedent's estate may renounce the right, the statute so providing, and may do so by an antenuptial contract executed in consideration of marriage.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 78-82; Dec. Dig. §19.]

**3. MANDAMUS §60 — RENUNCIATION OF
RIGHT TO ADMINISTER—DETERMINATION BY
PROBATE COURT.**

The probate court acts judicially in determining whether or not the right to administer an estate has been renounced by one of those entitled to priority, and, in the absence of an abuse of discretion in respect to such matter, its acts may not be reviewed or interfered with by mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 70, 71; Dec. Dig. §60.]

**4. MANDAMUS §60—MATTER INVOLVING DIS-
CRETION—RENUNCIATION OF RIGHT TO AD-
MINISTER.**

When it appears from the return in mandamus that the probate court found that a widow's right to administer her husband's estate was waived or renounced, and sets forth all the facts concerning the matter, so that it affirmatively appears that the question turns entirely on a conclusion of law, the immunity from review by mandamus does not necessarily obtain.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 70, 71; Dec. Dig. §60.]

**5. EXECUTORS AND ADMINISTRATORS §19 —
RIGHT TO ADMINISTER—RENUNCIATION OR
WAIVER—ANTENUPTIAL CONTRACT.**

An antenuptial contract between decedent and his widow, which merely awarded her \$5,000 at the time of the marriage and \$2,000 per year so long as she continued his wife, and thereafter "barred her from his property," was not a renunciation or waiver of her right as widow to administer his estate; the statutory right of a widow to administer upon her husband's estate not being essentially a marital right in his property, but rather the right to perform an office through which, after paying debts and proper charges, the estate is eventually turned, less commissions, over to the distributees on final settlement.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 78-82; Dec. Dig. §19.]

Mandamus by the State, on the relation of Anna Estelle Scanland, against J. E. Thompson, Judge of the Probate Court of Pike County. Preliminary writ made absolute, with direction.

R. H. Norton, of Troy, E. L. Corwine, of Frankford, and David Ball, of Louisiana, Mo. (Barclay & Wallace, of St. Louis, of counsel), for relator. Jones & Haden, of Frankford, Hostetter & Haley, of Bowling Green, Pearson & Pearson, of Louisiana, Mo., and W. C. Hughes, of Montgomery City, for respondent.

NORTON, J. This is a proceeding in mandamus originating here. The writ is directed against the probate court of Pike county in aid of the application of a widow

to be appointed administratrix of her deceased husband's estate. Relator is the widow of Charles B. Scanland, who departed this life intestate in Pike county on May 31, 1916, leaving a personal estate, it is said, of between \$80,000 and \$75,000. On the application of the widow, Anna Estelle Scanland, to the probate court for letters of administration on her deceased husband's estate, certain collateral heirs of Scanland objected, and the court set the matter down for a hearing. Judgment is invoked by motion on the return.

It appears from the return of the respondent, the judge of the probate court, that the court heard evidence upon the objections and denied the application of relator in the view that the evidence revealed her to be grossly improvident, wasteful, and extravagant, and that she had no proper appreciation of the value of money; that she is a woman of immoral character, and her reputation for morality and chastity is bad; that she is deficient in integrity and business honor; and that because of these facts she is incapable of managing advantageously so large an estate; and, also, that she is hostile to the heirs and distributees, and it is said her appointment would subject the estate to unusual hazard. Moreover, the court found and declared that prior to relator's marriage to decedent she had entered into a marriage contract with him whereby she relinquished all her right or interest in the estate of decedent. After reciting these facts in the judgment, the probate court denied relator's right to be appointed administratrix and appointed instead the public administrator of Pike county.

[1] It is clear that none of the matters so found and declared by the court in its judgment and set up in the return are sufficient to preclude relator's right to be appointed administratrix of the estate of her deceased husband. The statute relating to the matter (section 14, R. S. 1909) is as follows:

"Persons Disqualified from Administering.—No judge or clerk of any probate court, in his own county, or his deputy, and no male person under twenty-one years of age, or female person under eighteen years of age, or of unsound mind, shall be executor or administrator. No married woman shall be executrix or administratrix, nor shall the executor of an executor, in consequence thereof, be executor of the first testator."

This section inhibits the appointment of persons therein named, and it is conceded that relator is qualified to perform the office of administratrix on her husband's estate in so far as this statute is concerned; that is, she in no wise falls within any of its terms. She is the widow of the decedent and a woman of about 30 years of age. She is unmarried and of sound mind. She is neither the judge nor clerk of the probate court of the county, nor is she deputy clerk, and so far as this statute is concerned she is free to be appointed and to enjoy the valuable right incident to the office of administratrix

of her husband's estate. Section 15, R. S. 1909, affords an arbitrary rule on the subject which it was within the power of the Legislature to prescribe. Therefore, unless some statutory grounds to the contrary appear, it is the duty of the court to confer the appointment upon the person whom the Legislature has nominated to have it as of right. The statute is as follows:

Persons Entitled to Priority in Administering.—Letters of administration shall be granted: First, to the husband or wife; secondly, to those who are entitled to distribution of the estate, or one or more of them, as the court or judge or clerk in vacation shall believe will best manage and preserve the estate." Section 15, R. S. 1909.

The right to administer on an estate is a valuable one which should not be denied to the person entitled to priority unless sound reason therefor appears. Grounds for denying the right to either the husband or wife of the deceased are set forth in the statute (section 14, supra) unless a renouncement of it appears. Indeed, touching this the Supreme Court has said the law fixes the order of priority and the court can be compelled to follow it by writ of mandamus. See *State ex rel. Grover v. Fowler*, 108 Mo. 445, 470, 18 S. W. 968; also, *Flick v. Schenk*, 212 Mo. 275, 279, 110 S. W. 1074. A sound reason in addition to the mandate of the statute itself for appointing the person whom the Legislature has nominated to the office is that no appeal is allowed as a means of review in such matters, and it therefore may be that a valuable right is denied without proper recourse to the injured party. See authorities supra. In view of this, it would seem to be just that the appointment should be made in the first instance, and then, if grounds for removal exist, they should be invoked under section 50 and a full hearing had so the usual right of appeal and review may be enjoyed.

But it is argued that section 50, R. S. 1909, which provides the causes for which letters of administration may be revoked, is to be considered in pari materia with sections 14 and 15 and the whole matter adjudicated on the application for letters in the first instance. It is true this court so declared in *State ex rel. v. Reddish*, 148 Mo. App. 715, 129 S. W. 53; but that case in no wise involves the right of the husband or wife of the deceased to administer on his or her estate. Rather the question arose under the second subdivision of section 15, supra, for that there the son of the decedent sought to be appointed administrator of his father's estate, and it appeared that three of his brothers and sisters objected, though they renounced their own right. The adjudication was against the right of the son so applying on the grounds that he was administrator of his mother's estate and a conflict of interest because of this appeared. It is to be observed, however, that the second subdivision of the statute (section 15, supra) essentially

confers a discretion on the probate court as to whom among the distributees of the estate shall be appointed. The statute reads that the letters shall be granted, secondly, "to those who are entitled to distribution of the estate, or one or more of them, as the court or judge or clerk in vacation shall believe will best manage and preserve the estate." In considering this provision of the statute, which by its very terms appears to confer a discretion on the probate court, for that it says the appointment shall be conferred upon the distributee or distributees that the court "shall believe will best manage and preserve the estate," it was declared in *State ex rel. v. Reddish*, supra, that the court may consider in pari materia with sections 14 and 15, section 50, setting forth causes for which an administrator may be removed. But under this second subdivision of the statute, as stated, there is a discretion lodged in the probate court touching the matter of the appointment; that is, in making the selection of an administrator from among the distributees. And, where such discretion is to be exercised, it is well enough to take into account the grounds for removal set out in section 50. But it is certain that the doctrine referred to may not be extended in view of the recent decision of the Supreme Court in *State ex rel. Abercrombie v. Holtcamp* (Sup.) 185 S. W. 201, for there the court rejects the argument that section 50 is to be interpreted and read in connection with section 14. The facts that relator is improvident, wasteful, and extravagant, and has no proper appreciation of the value of money, that she is a woman of immoral character and her reputation for morality bad, that she is deficient in integrity and business honor, that she is incapable of managing advantageously or properly so large an estate, and that she is hostile to the heirs and distributees, are not sufficient to defeat her right in the first instance to be appointed administratrix of her husband's estate in accordance with the statute; for the statute says she shall be appointed if she is the widow and a woman of sound mind not otherwise disqualified by section 14. After she is once appointed, it may be it would be competent for the court to remove her under the provisions of section 50; but that question would be open to consideration on appeal, whereas, no appeal is afforded to the applicant for letters in the first instance. In this connection, see the reasoning in *State ex rel. Abercrombie v. Holtcamp* (Sup.) 185 S. W. 201.

[2-5] But it is argued that the probate court found as a fact that relator had entered into an antenuptial contract in consideration of marriage with her husband, whereby she relinquished all right or interest in the estate of decedent, and this will suffice to defeat her right to have letters of administration thereon issued to her. No one can doubt that one entitled to administer upon an estate may renounce this right, for

the statute so provides. It is true, too, that one may renounce this right by an antenuptial contract executed in consideration of marriage, as this court declared in *Evans v. McDaniel*, 117 Mo. App. 629, 93 S. W. 922. In that case *Evans* bound himself by the marriage contract not to "control or claim" any of the property of his wife during her lifetime or after her death, and the court declared that this amounted to a renunciation of his right to administer on her estate, for that the renunciation of the right to control her property in any wise after her death renounced as well the right to administer thereon. It may be conceded that the probate court acts judicially in determining whether or not the right to administer an estate has been renounced by one of those entitled to priority, and, in the absence of an abuse of discretion in respect of that matter, such discretion may not be reviewed or interfered with by mandamus. In other words, though a discretion be lodged in the court in determining that particular matter, it is not permitted to act arbitrarily, or abuse such discretion, nor conclude the matter by a finding which is wholly unsupported by the evidence, as is said in *State ex rel. Abercrombie v. Holtcamp* (Sup.) 185 S. W. 201.

When, therefore, it appears from the return in mandamus, as here, that the court found the right to administer was waived or renounced and sets forth all the facts concerning that matter so it affirmatively appears that the question turns entirely on a conclusion of law, the immunity from review by mandamus which usually attends the exercise of a judicial function does not necessarily obtain. Here it appears from the return that the court found the marriage contract between decedent and relator merely awarded to the wife \$5,000 at the time of the marriage and \$2,000 per year as long as she continued his wife and thereafter "barred her from his property." Obviously this reveals no intention on her part to renounce her right as the widow to administer upon his estate. It is certain no express relinquishment appears and a waiver is purely a matter of intention. Such intention may only be found from facts tending to prove it. See *Francis v. Supreme Lodge A. O. U. W.*, 150 Mo. App. 347, 130 S. W. 500. Therefore, though relator received \$5,000 at marriage and \$2,000 per year thereafter, and her marital rights in the husband's property were barred after his death, this in no wise included the statutory right of the widow to administer upon the estate, for such is not essentially a marital right in his property, but is rather the right to perform an office through which, after paying the debts and other proper charges, the estate is eventually turned, less commissions, over to the distributees on final settlement.

We see nothing in the return which precludes the right of relator to be appointed

administratrix of her husband's estate, and the preliminary writ of mandamus should therefore, notwithstanding such return, be made absolute, with a direction as well to the probate court of Pike county to vacate its order appointing the public administrator as administrator of the estate of Charles B. Scanland and appoint relator instead.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

P. M. BRUNER GRANITOID CO. v. GLENCOE LIME & CEMENT CO. (No. 14402.)

(St. Louis Court of Appeals. Missouri. April 4, 1916. Rehearing Denied July 14, 1916.)

1. PLEADING \S 36(3)—ANSWER—ADMISSIONS—DENIAL.

Specific admissions and confessions in an answer overcome the effect of a general denial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 82; Dec. Dig. \S 36(3).]

2. WITNESSES \S 181—TESTIMONY OF PARTIES AS TO TRANSACTIONS WITH DECEASED—WAIVER OF OBJECTION.

Objection to competency of plaintiff's testimony relative to agreement between him and defendant's remote predecessor, since deceased, is waived by defendant's examining plaintiff on deposition during pendency of suit and after the death, although the deposition was never transcribed and filed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 727, 728; Dec. Dig. \S 181.]

3. FRAUDS, STATUTE OF \S 72(1)—REAL PROPERTY CONTRACT.

A suit to enforce an agreement for common use of a railroad switch on land of complainant and respondent under which the switch has been constructed and operated is not one to enforce a contract for the sale of lands, or an interest therein, within Rev. St. 1909, \S 2783, requiring such a contract to be in writing in order to support a suit.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. \S 72(1).]

4. INJUNCTION \S 128—ACTION—EVIDENCE—SUFFICIENCY.

Evidence showing the use of switch by respondent for purposes not originally contemplated, and that respondent questioned complainant's right to use the switch at all, with answer admitting that respondent's use cast an additional burden on the switch, held sufficient to show an unwarranted interference with complainant's use, justifying injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 278; Dec. Dig. \S 128.]

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

"Not to be officially published."

Suit by the P. M. Bruner Granitoid Company against the Glencoe Lime & Cement Company. From a decree for complainant, respondent appeals. Affirmed.

Douglas W. Robert and Wm. B. Homer, both of St. Louis, for appellant. Alexander Young and Percy Werner, both of St. Louis, for respondent.

ALLEN, J. This is a suit in equity seeking to restrain defendant from using a common railroad switch, located partly upon plaintiff's property and partly upon that of the defendant, for purposes which it is alleged were not originally contemplated and which it is said constitutes an unwarranted interference with plaintiff's use and enjoyment thereof. This appeal is from a decree rendered for plaintiff upon the second trial of the cause in the circuit court. The first trial resulted in a judgment for defendant, dismissing plaintiff's bill; but the trial court set the judgment aside, on motion, and granted plaintiff a new trial. From the order granting a new trial defendant appealed to this court, where the action of the trial court in awarding the new trial was affirmed. See Bruner Granitoid Co. v. Glencoe Lime & Cement Co., 169 Mo. App. 295, 152 S. W. 601.

The Petition.

The petition avers that plaintiff corporation is engaged in the granitoid business in the city of St. Louis, and that the defendant corporation is engaged in the lime and cement business in said city; that it is necessary for both plaintiff and defendant to maintain yards and buildings, and that to conduct the business of each in an efficient and economical manner it is necessary that the premises of both plaintiff and defendant be accessible by railroad switches or connections in order to ship in and out material; that at the time of the institution of the suit the defendant owned and occupied lots 10 and 11 in city block No. 2211 of the city of St. Louis, and that plaintiff owned and occupied lots 8 and 9 in said block—said lots 9 and 10 being adjoining lots. And it is averred that, in the year 1889, one P. M. Bruner was engaged in the granitoid business in the city of St. Louis, and one Goetz was engaged in the lime and cement business in said city; that it was mutually agreed between Bruner and Goetz that they would secure adjoining property suitable for the conduct of their respective businesses, and with this end in view Goetz selected said lots, 8, 9, 10, and 11, in city block 2211, above mentioned, and, in 1889, with the consent and approval of Bruner purchased the same, the latter paying one-half of the total purchase price thereof, and it being orally agreed that Bruner should receive lots 10 and 11 and Goetz lots 8 and 9. And it is alleged that in January, 1889, after the purchase of the lots, Goetz and Bruner caused a railroad switch to be run into and built "as near as could be upon the line dividing lots 9 and 10, that is to say, about one-half of the said switch being on lot 9 and the other half on lot 10"; and that it was understood and agreed between Bruner and Goetz that the switch should be so built, and "that it should be used exclusively and equally for their busi-

ness carried on upon said lots and no other"; and that the cost incident to the construction of the switch was borne equally by Bruner and Goetz.

It is then averred that Goetz permitted a stone company, in which he was interested, to use a portion of lots 10 and 11, upon which it erected derricks, machinery, and appliances; that thereafter, and after the full purchase price of the lots had been paid by Bruner and Goetz, to wit, in March, 1901, and because it was inconvenient to remove the stone company's property from lots 10 and 11, Goetz prevailed upon Bruner to accept a conveyance for lots 8 and 9 instead of lots 10 and 11, it being understood "that the said railroad switch as then located and built on and between lots 9 and 10 should be for the exclusive use and benefit of lots 8, 9, 10 and 11, and that the said lots 8 and 9 should have the same use and right to said switch as lots 10 and 11." And it is alleged that Goetz thereupon, by proper conveyances, conveyed lots 8 and 9 to Bruner for the expressed consideration of \$4,500, being the amount which Bruner had theretofore contributed to the purchase of the four lots. It is further averred that Bruner, having received the conveyances for lots 8 and 9, located thereupon a plant for his granitoid business, and that at about the same time Goetz located upon lots 10 and 11 a plant for his lime and cement business; that, in accordance with the prior understanding between them, they jointly used the railroad switch for their respective businesses, "each being conceded as having equal rights in the use of said railroad switch"; and that they continued to so use their respective properties and said switch until the business of each was "put into corporations." And it is averred that on February 26, 1892, Bruner caused the plaintiff company to be incorporated, and thereupon transferred to it his granitoid plant and business, and on March 7, 1892, conveyed to it said lots 8 and 9 by warranty deed, with the rights, privileges, and immunities thereto belonging, "including the use, right, and privilege of said railroad switch"; and that since said time plaintiff corporation has been the owner of and in possession of said lots and plants and engaged in operating said granitoid business. And it is averred that Goetz conducted a lime and cement business on lots 10 and 11 until about the month of October, 1900, when he organized a corporation known as the Chas. W. Goetz Lime & Cement Company, of which he was chief stockholder, president, and manager, transferred said lime and cement plant business to it, and conveyed to it said lots 10 and 11; that the last-mentioned corporation continued to conduct such business on lots 10 and 11 until February, 1909, when (Goetz having in the meantime died in 1906) that corporation was "absorbed" by the defendant corporation, the Glencoe Lime & Cement Company, to which the plant and

business was transferred, and to which lots 10 and 11 were conveyed. And it is averred that defendant "acquired said lots and plants, and took conveyances of the same with full knowledge of the rights of the plaintiff to the use of and rights in said switch." It is then further averred that since the defendant, Glencoe Lime & Cement Company, thus acquired the lime and cement properties, including lots 10 and 11, it has "impeded and interfered with plaintiff's use of the railroad switch aforesaid," and has used said switch for the use and benefit of property other and outside of that for which said switch was built and paid for by Bruner and Goetz and in violation of the understanding and agreement between them when the property was bought and the switch constructed; and that the defendant "further threatens to interfere with the use of said switch by this plaintiff so that its plant upon said lots 8 and 9 is and would be greatly damaged and plaintiff's business would be greatly interfered with and plaintiff's business would be irreparably injured and damaged, and in such manner as not to be adequately recompensed in damages." And it is alleged that plaintiff is without adequate remedy at law in the premises.

The prayer of the petition is that the court issue its writ of injunction restraining defendant from using the switch or any part thereof, "for the use of any other property than the said lots 9 and 10, and restraining it from interfering with the equal right of the plaintiff to use said switch," and that the writ "may be mandatory, commanding the defendant to grant to plaintiff the equal right with it in the use of said railroad switch," and for general relief.

The Answer.

The second amended answer, filed after the cause was remanded on the former appeal, contains first a general denial. Answering further, the defendant admits that plaintiff has the right to use the switch in question "jointly with the defendant," but denies that defendant has ever interfered with the use thereof by plaintiff or with any of the rights of plaintiff therein, jointly with defendant, and denies that it ever threatened to interfere with such use or rights, or that it intends so to do. Further answering, defendant avers that whatever use was made by it of said switch for the benefit of property other than that described in the petition was commenced in the year 1889; "that at said time, 1889, said switch was used adversely to plaintiff for the use and benefit of said other property, outside of the land described in the petition, and at all times to the present;" that from 1889 to the institution of this suit the defendant and its predecessors "claimed the right, and so asserted it, to use said switch for the purpose of switching cars to other property than that described in plaintiff's peti-

tion; that plaintiff and its predecessors knew all the time of the use to which the defendant and its predecessors put said switch for said other land and the character of the use and the claim of defendant and its predecessors asserted to use it for such purposes." It is then averred that the use of the switch for such other land was adverse to plaintiff, and that defendant and its predecessors at all times claimed the right to so use the switch with plaintiff's knowledge, and that such use of the switch for said other property "was of necessity an additional burden upon it." It is further averred that this suit was instituted September 9, 1909, "more than 19 years after said adverse use was begun," and that plaintiff's cause of action, if any it had, accrued more than 15 years before the commencement of the action, and is barred by the statute of limitations, to wit, sections 1888 and 1889, Revised Statutes 1909.

The reply controverts the allegations of fact contained in the answer.

The Evidence.

P. M. Bruner, president of plaintiff corporation, testified that in January, 1889, he paid \$1,500 toward the purchase of the four lots in question; and that, in accordance with an understanding and agreement between him and Goetz, the latter purchased the lots, taking title in his own name. And the deed to Goetz was introduced in evidence, showing the conveyance of these four lots to him by one Mrs. Talmage, on January 14, 1889. Bruner testified that he and Goetz thereafter paid off the incumbrance upon the property, in equal amounts; that he made no use of any of the lots until the early part of 1891; but that the railroad switch was put in within 60 days after the purchase of the property from Mrs. Talmage.

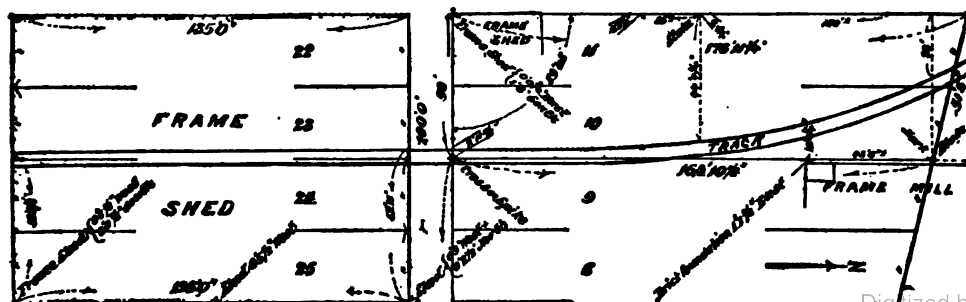
The accompanying plat shows the location of the property and the railroad switch. These four lots are separated from lots 22, 23, 24, and 25, lying to the south, by an alley. The switch, according to Bruner's testimony, originally began at this alley and extended north, as shown on the plat, curving to the west across the north end of lot 10 and the northeast corner of lot 11.

About two years after the purchase of the property from Mrs. Talmage, i. e., on March 7, 1891, lots 8 and 9 were conveyed to Bruner by warranty deed of Goetz and wife; and on March 7, 1892, Bruner and wife conveyed the same property to the P. M. Bruner Granitoid Company, the plaintiff herein.

Bruner testified that for about two years after the purchase from Mrs. Talmage, the four lots were occupied for the most part by the Carthage Marble & White Lime Company, but after Bruner began to erect his crusher (designated "frame mill on the plat") the "Carthage Company" used lots 10 and 11, and he lots 8 and 9. He testified that the Carthage Company moved from the property some time in 1892, and that thereafter lots 10 and 11 were used by the "Goetz Company," and that they passed into the hands of the defendant, Glencoe Lime & Cement Company, in 1909.

It appears that Goetz purchased lots 22, 23, 24, and 25 in January, 1890. A shed or frame warehouse building was constructed by Goetz upon these four lots. Bruner testified that this structure was built in 1891, after he had begun to occupy and use lots 8 and 9, and that after the warehouse was built the switch was extended into it. He also testified that from the time that the defendant company took possession of the lime and cement properties, in 1909, it began to make, and thereafter did make, more use of the switch than had its predecessors; that prior to 1909 both parties "got about equal number of cars in on an average," amounting to a car or two each per day; that the number of cars taken in and out by the defendant, beginning in 1909, largely increased, though he could give no definite figures as to this; and that such increase in the use of the switch interfered much with the conduct of plaintiff's business, in that it was necessary to move plaintiff's cars out of the way, often while they were being unloaded, in order to move defendant's cars over the track.

Though Goetz was dead, Bruner was permitted, over defendant's objections, to testify to the agreement had with him respecting the original purchase of the property and



the location and putting in of the switch. Evidence was adduced tending to show that at some early stage of this litigation the defendant, through its counsel, took Bruner's deposition, and examined him concerning the understanding and agreement between him and Goetz; and, upon the theory that defendant had thus waived the incompetency of Bruner, his testimony, relative to the agreement between him and Goetz, was received in evidence. That testimony went to show that the agreement between Bruner and Goetz, under which the switch was put in, was that they would together purchase the four lots, and that the switch should be installed along the dividing line between lots 9 and 10; that each would bear one-half of the expense; and that they "should have equal use" of the switch.

It appears that Bruner and Goetz were quite friendly, and that no difficulty arose relative to the joint use of the switch prior to the death of the latter in 1906. Bruner testified that he knew that the switch had been extended into the warehouse built south of the alley. As to this he said:

"I didn't like it in one way; but we were friendly, and he helped me to get the lots, and we always were friendly."

When asked if at that time it amounted "to any practical interference" in his business, he said: "Not anything to question his rights or mine."

It appears that upon one occasion, after the death of Goetz (the precise time not appearing), the foreman of plaintiff company complained to Goetz's son, who was connected with the lime and cement business, that plaintiff's use of the switch was being interfered with. And it is said that young Goetz—whose authority to speak for the "Goetz Company" does not distinctly appear—denied that plaintiff had any rights in the switch. There is no evidence that any further controversy in this regard arose until June, 1909, after defendant company acquired the lime and cement business. On June 1, 1909, a letter was written to plaintiff by defendant's president, saying:

"We find you are occupying some of the ground in the rear of our warehouse at Theresa avenue and are also unloading cars from our switch at the same place. Will you please advise us at your convenience your authority for so doing?"

To this plaintiff replied by letter in which reference was made to "the common switch"; and plaintiff added, "We do not intend to abate our rights to this switch whenever we need the same." On the following day the defendant wrote plaintiff, inquiring regarding the latter's right to the use of the switch, and adding:

"If you have any switching rights, we certainly do not wish to encroach on them, but in order to avoid any possible encroachment by us, we wrote our letter of June 1st."

To this letter plaintiff did not reply until June 15, 1909, when a letter was written to

defendant by an attorney representing plaintiff, stating that:

Plaintiff's "claim to the switch" was based "partly and sufficiently upon the fact that Mr. P. M. Bruner bought these lots from Charles W. Goetz, after this switch had been constructed upon the property, and that the deed not only conveyed the property but all the appurtenances thereto belonging, and the switch being upon the property, the switching privileges attached thereto, was the moving inducement for the purchase thereof."

One Campbell, foreman of plaintiff company, testified for plaintiff, relative to the use made of this switch. He stated that after 1909, when the defendant company began to operate the lime and cement properties, it used the switch oftener and for the switching of more cars than theretofore; and that the use of the switch for moving cars to and from the warehouse interfered much with plaintiff's business. He thought that 12 or 15 cars more per week were brought in over the switch by defendant than had been brought in prior to 1909, but could give no definite figures as to this.

The evidence adduced in defendant's behalf went to show that the switch was installed in 1889 or early in 1890. One Gruetzmacher, who was formerly interested with Goetz in the "Carthage Company," testified that it was put in during the year 1889, for that company's use. He could not say when it was extended south across the alley and into the warehouse, but he testified that the warehouse was built before Bruner began operation on his lots, and that the switch was "completed" when the warehouse was erected.

One Remmers, a witness for defendant, testified that he built the warehouse for "Goetz & Co.," and that this was in 1890. Another witness, formerly a "copartner" with Goetz, testified that the switch was installed "in the latter part of 1889 or the first part of 1890"; and that, according to his recollection, all of it, as it now stands, was put in at one time, "with the special purpose to reach Mr. Goetz's warehouse."

The testimony of two other witnesses for defendant tended to show that the warehouse was built in 1890, and one of them, one Dornhelm, said, "The time the building was completed then we continued the switch into it."

Evidence adduced by defendant tended to show that since the acquisition of the lime and cement business by defendant, in 1909, fewer cars have been taken in and out over this switch by defendant than were transferred over the same by the "Goetz Company."

The trial court, in its decree, found that plaintiff, "as the owner of lots 8 and 9, is entitled to the common and equal right in and use and enjoyment of said switch with the defendant, as the owner of lots 10 and 11"; and perpetually enjoined defendant "from in any way interfering with the plain-

tiff and its successors and assigns, as owners of lots 8 and 9 in such common and equal right in, and in the common and equal use and enjoyment of, said switch for loading, unloading, moving, and storage of cars, and from using said switch in any manner for the use or benefit of any other property of defendant or its successors or assigns than the said lots 10 and 11."

[1] I. When the case was here on the former appeal, the answer then contained no denial of the allegation in the petition that the switch was installed under an agreement between Goetz and Bruner that it "should be used exclusively and equally for their business carried on upon said lots (8, 9, 10, and 11) and no other." As defendants did not deny this averment in any manner, this court said that it was to be taken as true, and that no evidence was needed in support thereof. See *Granitoid Co. v. Cement Co.*, 169 Mo. App. loc. cit. 301, 302, 152 S. W. 601. The answer upon which the case was tried upon this second trial contains a general denial, but this is followed by admissions, and allegations in the nature of confession and avoidance. The specific admissions and confessions of the answer overcome the effect of the general denial, and are to be taken as true. See *Dickey v. Porter*, 203 Mo. loc. cit. 20, 101 S. W. 586; *Price v. Mining Co.*, 83 Mo. App. loc. cit. 474; *Keyser v. Hinkle*, 127 Mo. App. loc. cit. 77, 106 S. W. 98.

The answer admits that plaintiff has the right to use the switch "jointly with the defendant." Its effect is to admit the use of the switch by defendant for the benefit of property other than that described in the petition, and it sets up a prescriptive right to such use, by adverse user, averring in this connection that such use "was of necessity an additional burden" upon the switch.

If these admissions are not as far-reaching as the admissions referred to in the former opinion, they are nearly so; and, in any event, so far as they go, they are binding upon defendant.

Though plaintiff's right to use the switch jointly with defendant is admitted, it is not specifically admitted that the switch was installed under an agreement that it was to be used exclusively for business conducted on lots 8, 9, 10, and 11. However, the answer sets up that the use of the switch for other property was adverse to plaintiff, and was an "additional burden upon it"; thereby inferentially alleging that such use of the switch for the benefit of other property was one beyond the scope of the original agreement under which it was installed and inconsistent with plaintiff's rights thereunder. The effect of this seems to be to admit that the switch was originally installed for the exclusive benefit of the lots described in the petition, leaving nothing in the case but the special defense asserted; but this is controverted by appellant, and we shall take the case made

by the evidence and consider briefly the contentions of appellant's counsel.

[2] II. The point made respecting the competency of Bruner's testimony relative to the original agreement between him and Goetz we regard as without merit, for the reason that defendant waived the right to object on the ground that one party to the transaction was dead. If, as the evidence tends to show, defendant, during the pendency of the suit and after the death of Goetz, took the deposition of Bruner and examined him along this line, this undoubtedly would operate as a waiver. The evidence adduced showed the service of a notice to take depositions, and that pursuant thereto Bruner and one of plaintiff's counsel appeared at the office of defendant's counsel, where Bruner was examined as aforesaid. Nothing was offered to controvert this, and we regard the showing in this respect amply sufficient to prove that such deposition was taken. It was immaterial that the deposition was never transcribed and filed. We therefore hold that defendant's objections to the testimony of Bruner on this ground were properly overruled.

[3] III. Another contention, argued at length, is that the original agreement between Bruner and Goetz, being merely oral, was within the statute of frauds and void, though the statute was not pleaded. Respondent contends that the statute is inapplicable here, and that if applicable the contract is one which had been fully performed and thus taken out of the statute. Controverting the latter point, appellant, upon the authority of *Reigart v. Coal & Coke Co.*, 217 Mo. 142, 117 S. W. 61, and *Aylor v. McInturf*, 184 Mo. App. 691, 171 S. W. 606, urges that even full performance will not take this contract out of the statute. But we think that these cases find here no application, and that the statute of frauds is not involved in this case. This is not an action "brought to charge any person * * * upon any contract made for the sale of lands, tenements or hereditaments, or an interest in or concerning them," within the meaning of section 2783, Rev. Stat. 1909. It is not sought to enforce an executory contract respecting an interest in lands, nor one which has been fully performed on one side only. The case proceeds upon the theory that the original agreement between Bruner and Goetz was fully performed, whereby they became entitled to the equal use of this common switch, and that the defendant is interfering with the rights of plaintiff so acquired and established.

We rule this assignment of error against appellant.

IV. The point urged as to the statute of limitations need not be here dwelt upon, for it was fully disposed of on the former appeal. The record before us contains nothing tending to show an adverse user on the part of defendant of the switch for the benefit of lands south of the alley, i. e., for switching

cars in and out of the warehouse. So far as the evidence goes touching this matter, it is now, as this court said it was on the former appeal, such as to indicate merely a permissive use of the switch for this outside property. See *Granitoid Company v. Cement Company*, supra, 169 Mo. App. loc. cit. 303, 304, 152 S. W. 601. It is true that there is evidence of some difficulty with young Goetz, occurring at some indefinite time after the death of his father in 1906; but this, if of consequence, was within the statutory period. It was not until 1909, shortly prior to the institution of this suit, that a distinct adverse claim was asserted by defendant. We think that defendant cannot interpose the bar of the statute, and that plaintiff has not been shown to be guilty of such laches as to preclude a court of equity from granting the relief sought.

V. It is argued for appellant that the evidence wholly fails to sustain the essential averments of the petition. This contention appears to be predicated upon the idea that Bruner did not testify that the original agreement confined the use of the switch to the purposes of the business operations on lots 8, 9, 10, and 11. But we think it obvious that the testimony adduced by plaintiff was sufficient to establish the terms of the agreement as alleged. Bruner testified that these four lots were purchased by him and Goetz in order that each might take two of them and establish his business thereon; and that this switch was put in, along the dividing line between the two halves of the property so acquired, under an arrangement between them whereby each was to have the equal use thereof. The inference is irresistible that the switch was intended to be used by each only in connection with his business conducted on his property so acquired, and there is practically nothing in defendant's evidence tending to controvert this.

The evidence as a whole tends very strongly to show that the extension of the switch across the alley to reach property subsequently acquired by Goetz was not a matter contemplated when the switch was originally installed. That the switch was first constructed north of the alley, and at a later period extended south thereof to reach the warehouse, which had been built in the meantime, is well established by the evidence. There is nothing tending to controvert it but the testimony of one witness, testifying to the best of his recollection; and his memory was otherwise shown to be faulty.

It is true that defendant adduced testimony tending to show that the warehouse was built in 1890, and not in 1891, as Bruner testified; but, however this may be, the evidence is quite persuasive that the switch was first installed north of the alley and for the benefit of the business to be conducted on the lots there situated, and that

thereafter Goetz caused it to be extended south to reach the warehouse constructed later.

[4] VI. It is further contended that plaintiff has not shown such an interference in its business by reason of the use of the switch for defendant's property south of the alley as to entitle plaintiff to the relief sought. Touching this question, we deem it unnecessary to review in detail the evidence adduced respecting the number of cars handled by the parties during the different periods of time involved. The evidence shows a use of this switch for purposes not originally contemplated. The answer admits that this use casts an "additional burden upon it." There is evidence tending to show that this use is prejudicial to plaintiff, and manifestly it may become more so in the future. Defendant plainly questioned plaintiff's right to use the switch at all, and the controversy thus precipitated led to the institution of this suit. If Bruner originally had the right to prevent Goetz or his company from using the switch for purposes not contemplated when it was put in, as we think he did, plaintiff, as Bruner's successor, may, in our judgment, now assert that right. And we hold that plaintiff's action is not barred by limitations, and that plaintiff is not guilty of laches. There is no estoppel pleaded, and, we think, the elements of estoppel are not present.

VII. It is said that plaintiff does not come into equity with clean hands, for the reason that the evidence disclosed that plaintiff now owns lots 6 and 7, immediately east of lots 8 and 9, and is itself making use of this switch for the benefit of property other than the original four lots. But this question may be disposed of by saying that the record totally fails to show what use, if any, plaintiff is making or has made of lots 6 and 7 to which it appears to have title.

VIII. It is further contended that to enjoin the use of this switch for reaching defendant's warehouse south of the alley will now work such an unconscionable hardship upon the defendant as ought to deter a court of equity from granting the relief sought. It is said that it will destroy the effective use by defendant of its warehouse. But as to this it need only be said that there is no evidence in the record to show that defendant will thus suffer any such hardship. There is nothing to show that this warehouse may not readily and conveniently be reached by cars without the use of the switch in controversy. On the contrary, it affirmatively appears in the record that a certain percentage of the cars switched in and out of this warehouse during a certain period of time did not go over this switch, making it appear that the defendant has other means of reaching its warehouse with railroad cars for the purposes of its business.

Upon the whole record before us, we are

of the opinion that the decree entered below should not be disturbed. The judgment is, accordingly, affirmed.

REYNOLDS, P. J., and NORTONI, J., concur.

DEUBLER v. UNITED RYS. CO. OF ST. LOUIS. (No. 14429.)

(St. Louis Court of Appeals. Missouri. July 5, 1916. Rehearing Denied July 18, 1916.)

1. WITNESSES \S 380(5) — IMPEACHMENT OF OWN WITNESS—SURPRISE.

Where plaintiff, without objection, introduced evidence in chief tending to prove his good character, and where an adverse character witness upon whom defendant relied testified contrary to his previous statements to defendant's claim agent, the defendant, on the ground of surprise, was entitled to impeach such witness by showing his previous statements to its claim agent as to plaintiff's character for sobriety and peacefulness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1214, 1219; Dec. Dig. \S 380(5).]

2. EVIDENCE \S 106(1) — ADMISSIBILITY — CHARACTER.

Evidence as to plaintiff's good character was inadmissible, where his character had not been attacked.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 177-182, 185; Dec. Dig. \S 106(1).]

3. TRIAL \S 84(1) — OBJECTION TO EVIDENCE—SUFFICIENCY.

Where defendant had objected on the ground that defendant could not impeach its own witness, and where the court had allowed such impeachment on the ground of surprise, an objection to a question to another witness as to whether the first witness had said anything about plaintiff being a disturber, that plaintiff wished to object on the ground that defendant's question was leading, was not a sufficient objection to the introduction of impeaching testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 211-213, 220, 221; Dec. Dig. \S 84(1).]

4. WITNESSES \S 240(2) — EXAMINATION — LEADING QUESTION—DISCRETION OF TRIAL COURT.

If such question to the witness called to impeach defendant's character witness was leading, it was within the discretion of the trial court to allow it.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 795; Dec. Dig. \S 240(2).]

5. WITNESSES \S 379(1) — IMPEACHMENT—CONTRADICTORY STATEMENTS.

A witness may be impeached by showing his former statements contradictory to those made by him on the witness stand.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1209, 1247; Dec. Dig. \S 379(1).]

6. TRIAL \S 210(3) — INSTRUCTIONS — CREDIBILITY OF WITNESSES.

Where plaintiff introduced evidence as to his good character and where defendant's adverse character witness testified on the stand to plaintiff's good character though he had previously stated to defendant's claim agent that plaintiff was a disturber and quarrelsome, it was proper to instruct the jury as to the credibility of witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 492, 501; Dec. Dig. \S 210(3).]

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

Action by Bernhard Deubler against the United Railways Company of St. Louis. Judgment for defendant, and plaintiff appeals. Affirmed.

Henry E. Haas and John B. Dempsey, both of St. Louis, for appellant. Boyle & Priest and Paul U. Farley, all of St. Louis, for respondent.

REYNOLDS, P. J. This is an action commenced before a justice of the peace to recover damages alleged to have been sustained by plaintiff while a passenger on a car operated by defendant, it being charged that defendant, by its agents, servants and employees, with force and arms, and without any just reason or excuse, wrongfully, unlawfully and maliciously, made an assault upon plaintiff and beat, pounded and bruised him in his person and damaged him in his property. Plaintiff recovering before the justice, the cause was appealed to the circuit court where on a trial before the court and a jury there was a verdict for the defendant from which plaintiff has duly appealed.

The errors assigned are to the action of the court in permitting the defendant to impeach its own witness, and in giving, of its own motion, an instruction as to the credibility of witnesses, and to error in refusing to grant plaintiff a new trial. It is stated in the abstract before us that plaintiff, to sustain the issues on his part, offered and introduced evidence tending to prove the allegations of his petition, and that there were no witnesses to the assault other than the participants, and that without objection by defendant the plaintiff also introduced evidence in chief tending to prove his good character.

This is all the evidence which the abstract furnished by appellant sets out, except that the testimony of a police officer named Scherzinger, a witness called by defendant, and that given by one Callahan, recalled by defendant after Officer Scherzinger had testified, is given in full.

Referring to this, it appears that Officer Scherzinger, on direct examination by counsel for defendant, testified that he was a member of the metropolitan police force of the city of St. Louis and had been such for 6 years and knew plaintiff. Counsel for defendant then asked him if he was acquainted with the reputation of plaintiff for sobriety and peacefulness, and he answered that he was. He was asked what it was, and he answered, "It is all right." He further testified under examination by counsel for defendant, that he had been subpoenaed on the part of defendant, and was asked if he had talked with anybody about this case, to which he said, "No." Counsel for defendant then asked him this question: "Didn't you talk

with this man," indicating one Slough, "the claim agent?" Witness answered, "Why, yes." Whereupon counsel for plaintiff interposed, "We object upon the ground that he can't impeach his own witness." Whereupon counsel for defendant said: "I claim surprise." The Court: "It is clearly a case of surprise. He is entitled to impeach him, if he can." To this ruling counsel for plaintiff excepted.

The witness then testified on further examination by counsel for defendant, that he had been subpoenaed and that accompanying the subpoena was a card asking him to call at the office of the defendant; that he called there and had talked with Mr. Slough. He was asked if he had said anything to Mr. Slough about plaintiff drinking, to which he answered: "Why, they asked me if I knew him, and I told them, 'Yes;' and he says: 'How long have you known him,' and I says, 'All my life.' And he says, 'What do I know? Is he a drinking man?' I said, 'Yes; he drinks occasionally. I have seen him already drinking.'" He was asked: "Isn't it a fact that in that conversation you characterized him as a 'booze-fighter?'" to which he answered, "No, I don't know as I said that he was a booze-fighter." He was asked if he did not know that he had said that, and he answered, "No." Asked when this conversation took place between him and the claim agent, he said that it was the day before the trial. Asked if he did not now know what he then said, he answered, "No; I don't know if I called him a booze-fighter. Q. Didn't you say he was a disturber? A. Not as I remember. Q. Well, will you state now whether or not you said yesterday in that conversation that you are referring to that he was a disturber? A. No. I don't know that he ever disturbed anybody." Asked who was present at this conversation, he named, among others, Mr. Callahan. He further testified that he knew the plaintiff well but had not seen him since the time of this conversation referred to and had not seen him for three months; had not talked to him the morning of the trial; that no one else had talked to him since the time of the conversation when he said he (plaintiff) was a drinking man. Asked what else he said besides that plaintiff was a drinking man, he answered: "Well, all I says, that he drinks, and you know he is around when he is drinking." Asked what he meant by that, he said, "Well, I said he talks loud. Q. Well, he is not mean; that is what you meant to say by saying he is not a disturber? A. No; he is no disturber, at all. Q. But he doesn't object to a little friendly fight now and then, does he? A. Not as I know of. I never knew of him fighting. Q. He doesn't do anything but talk loud; that is all you had reference to, is it? A. That is all."

The witness was then turned over to counsel for plaintiff for cross-examination, and answering questions of that counsel, he said

that he had been served with a subpoena which he produced and which required his appearance before the court in which the case was pending at 10 o'clock a. m., on March 2nd, 1914, to testify as a witness in the cause on behalf of defendant, and that there was a card attached to this subpoena asking him to call at the office of the United Railways Company, giving its location, at 9 o'clock of the date set for the trial (that is, 10 o'clock a. m., March 2nd, but in point of fact the trial did not come off until the following day, March 3rd); that in response to this card he called at the office of defendant at 9 o'clock, March 2nd. He further testified on this cross-examination that he had known defendant for 25 years and had never known of his being charged with disturbance of the peace, or drunkenness, or with assault and battery, or with any offense against the laws of the state of Missouri or the city of St. Louis, although he knew that he drank and was not a teetotaler.

On redirect examination this witness testified that he had gone voluntarily to the office of defendant and when he got there there were witnesses in a number of cases to which defendant was a party, present, these cases pending in other divisions of the circuit court; that the claim agent told these several witnesses when the case in which they were subpoenaed was coming up and when to go over to the court, and if the case was not coming up right away, the claim agent told them to go about their business and he would let them know when to come back.

Defendant then recalled the witness Callahan, who testified, on direct examination, that he was present at the time of the conversation the day before between Officer Scherzinger and Mr. Slough. Asked if he remembered what Officer Scherzinger had said at that time in regard to plaintiff, witness answered: "Well, he said he knew him all his lifetime, and they went to school together; and he was windy and a booze-fighter; and he left the impression that he was a hard case, you see." Counsel for defendant then asked this witness: "Did he (Officer Scherzinger) say anything about him being a disturber?" Whereupon counsel for plaintiff said: "I certainly want to object; certainly, the objection on the ground that Mr. Farley's question is leading." The Court: "That is the same question he put to the previous witness. He may answer." This ruling of the court was excepted to by counsel for plaintiff and witness answered that Officer Scherzinger had said that plaintiff "was a disturber and a booze-fighter, and no good;" that he had known him "all his lifetime and they went to school together." On cross-examination by counsel for plaintiff the witness testified that he was not acquainted with plaintiff; might have heard of him before but had no dealings with him.

This is practically all the testimony that is brought up to us by this abstract.

In overruling the motion for a new trial the learned trial court handed down a memorandum opinion, which has been brought up to us by appellant. In this memorandum the court said that counsel for plaintiff, in support of the motion for a new trial, urges particularly as error, the action of the court in allowing defendant to impeach its own witness, Officer Scherzinger. The learned trial court says of this:

"That counsel overlooks the fact that when the impeaching testimony of which he now complains was offered, he failed to object thereto, or to sufficiently call the court's attention to the fact that he was objecting thereto on account of the fact that defendant was impeaching its own witness. The record discloses the fact that defendant placed Officer Scherzinger on the stand, and in reply to counsel for defendant's questions it was immediately evident to the court that it was a clear case of surprise; and Officer Scherzinger himself testified that he had, shortly prior to the trial, been to the defendant's office or witness room and had there made certain statements, which were, in the opinion of the court, contradictory of his testimony. To the cross-examination of Officer Scherzinger, bringing out these facts, counsel for plaintiff objected, on the ground that defendant was impeaching its own witness. Mr. Farley (counsel for defendant) then states that he claimed surprise. Counsel for plaintiff then no longer urged their objection, and counsel for defendant was allowed to cross-examine Scherzinger at length. At the completion of the examination of this witness, the defendant called one Callahan, and offered to prove by him that Scherzinger had, shortly prior to the trial and in the witness room of the defendant company, made statements inconsistent with his testimony at the trial. To the questions seeking to bring forth this evidence, counsel for plaintiff objected, stating, as the sole ground of his objection, that the question was leading; which objection was overruled, and the witness was allowed to testify. So that the record does not disclose a sufficient objection to this testimony to allow plaintiff now to complain of the action of the court."

The trial judge further said that even if this objection of the counsel was sufficient "the court is of the opinion that there was no error whatsoever in allowing the defendant to show the prior statements of this witness. In the opinion of the court there was a clear case of surprise, together with such action on the part of this witness, namely, going to the defendant's witness room and giving his statement shortly prior to the trial, as to, in the words of the Supreme Court, 'entrap' the defendant; and under such circumstances the rule, as understood by this court, is that a witness may be impeached by showing his prior inconsistent statements." The court cited in support of this *Clancy v. St. Louis Transit Co.*, 192 Mo. 615, 91 S. W. 500.

[1, 2] The learned counsel for appellant insists with great earnestness, that the objection which he made to the question propounded to Officer Scherzinger by counsel for defendant, namely, "We object upon the ground that he can't impeach his own witness," was carried forward when the witness Callahan was under examination and was

asked if Officer Scherzinger had said anything about plaintiff being a disturber. That objection, as we have seen, is:

"I certainly want to object; certainly, the objection on the ground that Mr. Farley's question is leading."

As noted by the learned trial judge, when counsel for appellant made his first objection, which he placed upon the ground that he could not impeach his own witness, counsel for defendant stated that he was asking this impeaching question on the ground of surprise and, as noted, the court held that it was clearly a case of surprise and that counsel for defendant was entitled to impeach his own witness if he could on that ground. That is the law, as said by the trial court, and as we shall hereafter show, if this was a case of surprise. It is reasonably clear that this was a case of surprise. Relying upon what it is claimed Officer Scherzinger had said the day before, defendant put him on the stand, solely as a witness to impeach the character of the plaintiff. Not only had Officer Scherzinger then made directly contrary statements, statements entirely inconsistent with the testimony which he gave at the trial, but it is evident that counsel for defendant relied upon that witness giving the same testimony when placed upon the stand at the trial. This is shown, not only by the fact that defendant put him on the stand solely as an impeaching witness to the character of plaintiff, but by the fact that he had allowed plaintiff, without objection on the part of defendant, to introduce evidence tending to prove the good character of plaintiff. Surely testimony as to the good character of plaintiff was not admissible, in a case such as this, when the good character of plaintiff had not then been attacked. Clearly this was allowed to come in without objection by counsel for defendant, because that counsel relied on the fact that he had, in the person of Officer Scherzinger, a witness to meet this testimony of good character. He clearly refrained from making objection to this testimony of good character by reliance upon what he expected to prove by Officer Scherzinger and was entrapped into placing the officer on the stand as an adverse character witness. The learned trial court, with the witnesses before him and a full knowledge of what had taken place in the conduct of the trial, correctly held that it was a case of surprise of counsel for the defendant.

[3, 4] Learned counsel for appellant claims that the objection as to impeachment was renewed, when, in answer to the question put to witness Callahan, as to whether Officer Scherzinger had said anything about plaintiff being a disturber, the learned counsel for appellant said: "I certainly want to object; certainly, the objection on the ground that Mr. Farley's question is leading." We think that the view taken of this objection by the trial judge is correct. We do not

think that this was sufficient objection to the introduction of impeaching testimony. It was not an objection on the ground of lack of power to impeach one's own witness, but was distinctly or, as counsel says, "certainly" placed on the ground that the question was leading. Granting that it was leading, it was within the discretion of the trial court to here allow a leading question.

There are various modes of impeaching a witness, or by which his credit as a witness may be impeached. "The principal ones are by cross-examination; by disproving the facts stated by him, by the testimony of other witnesses; by evidence of bad character, of reputation, conviction of an infamous crime, bias for or against a party, or former statements contradictory of his testimony." (Italics ours.) 30 Am. & Eng. Ency. (2d Ed.) p. 1062, sec. VII. It is further said in the same work (page 1130, par. C and 2):

"It frequently happens that a party is entrapped into calling a hostile and unscrupulous witness, who has given one account of a state of facts before the trial, but gives a materially different account on the witness stand. This circumstance has given rise to much discussion, and no little contrariety of opinion, as to how far a party thus surprised and deceived may impeach such a witness by proving his statements out of court. If a witness unexpectedly gives material evidence against the party who called him, such a party may, for the purpose of refreshing the memory of the witness and awakening his conscience, ask him if he did not, on a particular occasion, make a contrary statement. Thus far the authorities are agreed, but the question is, should the inquiry stop here. If the witness admits that he has made a contrary statement, there is, of course, no necessity for other evidence of it, and according to many weighty decisions, if he denies making the imputed statement, the party cannot be allowed to prove it by other witnesses where it would not be admissible as independent evidence, and can therefore have no effect but to impair the credit of the witness with the jury. On the other hand, it has been urged with much reason that a party should not thus be placed at the mercy of a designing witness, and there are many cases in which it is held that where a party has been surprised and entrapped by his own witness, the court may, in its discretion, allow him to call other witnesses to prove that such treacherous witness had previously made statements contrary to his testimony, not for the purpose of proving the truth of such previous statements, but to show the treachery of the witness and to set the party right before the jury. To this effect is the great weight of modern authority."

This, we think, is the law in our state as announced in the case cited by the learned trial judge, namely, *Clancy v. St. Louis Transit Co.*, supra. The learned counsel for appellant claims that this *Clancy* case is distinguished and explained in two subsequent decisions by our Supreme Court, namely, *Beier v. St. Louis Transit Co.*, 197 Mo. 215, loc. cit. 234, 94 S. W. 876, and *State v. Bowen*, 263 Mo. 279, 172 S. W. 367. We do not think that the decision in either of those cases in any way militates against what was said by the court in the *Clancy* case.

[8] In the case at bar the term "impeachment," as used, goes more to contradiction; more to prove former statements made by the witness, differing from those made on the witness stand and was here admissible. Using the term "impeachment" in the sense of contradiction, it is not correct to say, as does counsel for appellant, that the respondent could not impeach his own witness. So, even granting that counsel for appellant had duly excepted to impeaching evidence of this kind, the objection was not well taken.

Our conclusion is, as to this part of the case, that we find no error in the action of the trial court in the admission of the challenged testimony.

[9] It is further claimed that under the facts in this case, it was error for the court, of its own motion, to give an instruction touching the credibility of witnesses. It is true that it has been held in several cases by the Supreme Court and by our court, that an instruction of this character is only to be given when there is a conflict of evidence, either among the witnesses or in the testimony of the witness himself. We think the latter situation was presented here. This officer had testified on the witness stand to the good character of plaintiff, whereas, as shown by testimony in the case, and which we have held is properly admitted, he had stated when subpoenaed as a witness and about to give his testimony, and in answer to questions from the representatives of defendant, that his character was not good in the way that he was a disturber and quarrelsome, to put it mildly. In the light of this contradictory testimony, it was proper to instruct the jury as to the credibility of the witnesses, which the court here did generally and not by particular reference to any witness.

Our conclusion is that there is no error in overruling the motion for a new trial. The judgment of the circuit court should be and is affirmed.

NORTONI and ALLEN, JJ., concur.

ALLAIRE, WOODWARD & CO. v. COLE
(No. 14252.)

(St. Louis Court of Appeals. Missouri. July 5, 1916.)

1. SALES \S 181(13)—ACTION FOR PRICE—EVIDENCE.

In action by drug company for the price of podophyllin, a poisonous drug, evidence that defendant, manufacturer of a hog remedy, ordered some podophyllum, a comparatively harmless drug, and plaintiff's superintendent, changing the word "podophyllum" to "podophyllin," shipped the latter to defendant, who, mixing it with his hog remedy and selling the remedy, became liable for hogs killed thereby. Held to support verdict for defendant, although it was not shown that defendant had inspected the goods or rejected or offered to return them.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 491; Dec. Dig. \S 181(13).]

2. SALES §124—RESCISSION BY BUYER — INSPECTION AND RETURN.

Ordinarily a buyer must seasonably inspect goods and reject them within a reasonable time and return, or offer to return, them if he wishes to rescind a contract of sale because the goods do not comply with the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 303-312; Dec. Dig. §124.]

3. SALES §347(6)—ACTIONS FOR PRICE—DEFENSES—FAILURE OF CONSIDERATION.

If goods are wholly worthless, the buyer may successfully defend a suit for their price on the ground of total failure of consideration, even though he does not tender them back.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 970-976; Dec. Dig. §347(6).]

4. SALES §343, 344—RECEIPT BY BUYER.

Where goods are of any value and the buyer retains them, he must pay the reasonable value thereof.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 947-955; Dec. Dig. §343, 344.]

5. SALES §418(19)—ACTION BY BUYER FOR BREACH—DAMAGES.

Where drug company shipped the manufacturer of a hog remedy in place of that which he ordered, a poisonous drug, which he mixed with his remedy, the drug company was liable for money paid by him to his customers, whose hogs died from the compound, for loss by destruction of the compound on hand in which the drug had been used, and for loss of business resulting from the use of the drug in the compound.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1200; Dec. Dig. §418(19).]

6. APPEAL AND ERROR §1033(5)—HARMLESS ERROR—INSTRUCTIONS—CONFLICT.

Where instructions, although conflicting, are favorable to appellant, their conflict is not error of which he can complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. §1033(5); Trial, Cent. Dig. § 587.]

Appeal from Circuit Court, Lewis County; Chas. D. Stewart, Judge.

"Not to be officially published."

Action by Allaire, Woodward & Co. against Paul F. Cole, in which defendant, counterclaimed. From judgment for defendant on both answer and counterclaim, plaintiff appeals. Affirmed.

Hilbert & Henderson, of Monticello, and A. F. Haney, of Canton, for appellant. N. U. Simpson, of La Belle, and R. J. McNally, of Ewing, for respondent.

ALLEN, J. This is an action by plaintiff, a wholesale drug company, to recover the sum of \$200 upon an account for 100 pounds of powdered podophyllin, alleged to have been sold and delivered to defendant at the latter's instance and request. The defense to plaintiff's alleged cause of action is that the defendant ordered from plaintiff 100 pounds of powdered podophyllum, to be used as an ingredient in a certain compound sold by him as a hog remedy, but that plaintiff, disregarding the plain terms of defendant's order, shipped to him 100 pounds of podophyllin, a powerful and deadly drug; that, relying upon plaintiff's knowledge of drugs,

and defendant's express order for podophyllum, and upon the fact that defendant had advised plaintiff that the substance ordered was to be used for veterinary purposes, defendant assumed that the article shipped to him was podophyllum, and accordingly used it as such in the compound mentioned; that he sold some of this mixture to customers, causing the death of hogs belonging to them, and was compelled to destroy that which remained on hand. The answer sets up in detail the facts relied upon in defense, averring that the substance shipped by plaintiff to defendant proved to be wholly worthless, and denies that defendant is in any wise indebted to plaintiff. The defendant also interposed a counterclaim, consisting of two counts. The first count thereof seeks a recovery against plaintiff for sums of money alleged to have been paid out by defendant to his customers whose hogs died as a result of administering to them the compound containing the podophyllin shipped by defendant, and also for loss entailed upon defendant by the destruction of the compound on hand, when it was discovered that podophyllin had been used. The prayer of this count is for judgment against plaintiff in the sum of \$178. The second count of defendant's counterclaim is for damage for the alleged loss to defendant in his business, resulting from the use by defendant of the podophyllin shipped him by plaintiff. The facts relied upon in this connection are fully pleaded, and judgment is prayed on this count for \$1,900. The trial below, before the court and a jury, resulted in a verdict and judgment for defendant on plaintiff's cause of action, and for defendant on both counts of his counterclaim, to wit, \$175 on the first count thereof and \$200 on the second count. From a judgment entered upon this verdict the plaintiff prosecutes the appeal now before us.

[1] Defendant, a physician and pharmacist, operated a drug store at Ewing, Mo., at the time with which we are here concerned, and was engaged in manufacturing and selling a compound known as "Swino," a hog remedy, which contained a certain proportion of powdered podophyllum. The evidence shows that podophyllum is the crude form of the mandrake or "May apple" root, and is used for veterinary purposes, while powdered podophyllin is the "active agent" of the mandrake root, a powerful drug, and is a deadly poison if administered in other than small doses. On November 2, 1911, defendant wrote plaintiff company, at its office in Peoria, Ill., asking for quotations on "Pow'd. Podophyllum in 25 lb. and 100 lb. lots for veterinary use. (Commercial.)" On the following day plaintiff, replying to this inquiry, quoted: "100 lbs. Podophyllin \$2.00 per pound." On November 7, 1911, defendant wrote plaintiff the following letter, ordering 100 pounds of podophyllum, viz.:

"Please ship to us by first freight 100 lbs. Pow'd. Podophyllum (quoted at \$2.00)."

This letter came into the hands of plaintiff's superintendent, who, upon referring to the above quotation made defendant, changed the word "podophyllum" therein to podophyllin." And plaintiff thereupon shipped to defendant 100 pounds of powdered podophyllin. The evidence is that defendant was preparing a quantity of his compound, had the other ingredients of the mixture ready, and was waiting for the podophyllum ordered from plaintiff when a keg containing the podophyllin shipped by plaintiff arrived, and that defendant's clerk, observing the name of plaintiff company thereon, and assuming that the keg contained the substance ordered, caused the contents thereof to be put into the mixture. The evidence shows that the mixture containing this podophyllin was sold to some of defendant's customers, who lost hogs as a result of feeding it, and that defendant was called upon to, and did, reimburse his customers for such losses; that it became necessary to destroy all of the compound which defendant had on hand, and to withdraw the remedy from the market for some months.

The evidence conclusively shows that plaintiff did not ship to defendant the substance which defendant ordered, but a different substance, to wit, a deadly poison. Under the circumstances, we think that plaintiff made no case for the jury on its alleged cause of action. It is argued that defendant was at fault in not discovering that plaintiff was quoting prices on podophyllin and not podophyllum. The course of reasoning pursued need not be here set out. It is sufficient, as to this phase of the cause, to say that defendant's order plainly called for podophyllum; but plaintiff's superintendent admits that he changed this order to read "podophyllin."

[2-4] It is argued for appellant that it was defendant's duty to inspect the substance shipped to him within a reasonable time, and, if the article was not that which he had ordered, then to promptly reject it and return, or offer to return, it to plaintiff, and that, having consumed the goods, he cannot escape liability to plaintiff. It is true that ordinarily a buyer must seasonably inspect goods and reject them within a reasonable time, and return, or offer to return them, if he wishes to rescind a contract of sale on the ground that the goods do not comply with the contract. On the other hand if the goods are wholly worthless, the buyer may successfully defend on the ground of a total failure of consideration, even though he does not tender them back. But if the goods are of any value and he retains them, he must pay the reasonable value therefor. *Buss v. Window Glass Co.*, 146 Mo. App. 71, 123 S. W. 949; *Rico v. Peter*, 185 S. W. 752,

and cases cited. But in the case before us there was, properly speaking, no contract to rescind; for plaintiff altered defendant's order without his consent, and proceeded to fill it as altered. And the substance shipped to defendant was utterly worthless, and worse than worthless, to him for the purposes for which it was intended. That it had a value for other purposes we regard as wholly immaterial here, for the reason that plaintiff, by the wrongful act of its superintendent, led defendant to take the substance and mix it with other substances, by reason whereof it was beyond defendant's power to restore it to plaintiff. And under the circumstances we think that nothing can be predicated upon defendant's alleged negligence in failing to inspect the article shipped.

[5] The argument that the evidence is insufficient to authorize a recovery on the two counts of defendant's counterclaim is likewise without merit. We have closely scrutinized the testimony adduced, and it is plain that on the first count of defendant's counterclaim the amount recovered is supported by the evidence. The evidence goes to show that defendant paid out to customers, whose hogs had been killed by consuming the poisonous podophyllin, the sum of \$124, and that the circumstances were such as to make defendant liable to the owners of such hogs for their value. And the evidence further shows a loss to defendant, by reason of the destruction of the compound on hand, sufficient to swell the damages on this count to at least the amount awarded thereon, to wit, \$175.

As to the second count of the counterclaim, upon which the jury allowed him \$200, the evidence, among other things, tends to show a loss in defendant's business, proximately resulting from the use of the substance shipped by defendant, of \$90 per month for four months, or a total of \$360. Consequently, aside from other elements of damage claimed by defendant, the verdict on this count is well within the evidence.

[6] Complaint is made respecting the instructions, but we need not dwell upon the errors assigned in this connection. Respecting plaintiff's alleged cause of action there is some conflict between an instruction given for plaintiff and those given for defendant. But, for reasons indicated above, we regard plaintiff's said instruction as unduly favorable to it. And the instructions submitting defendant's counterclaims are at least as favorable to plaintiff as it could require.

The judgment is clearly for the right party, and we perceive no error in the record of which appellant may justly complain. It follows that the judgment should be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

STATE ex rel. LASHLY v. KIRKWOOD LEISURE HOURS' SOCIAL AND PASTIME CLUB et al. (No. 14314.)

(St. Louis Court of Appeals. Missouri. July 5, 1916.)

1. NUISANCE —19—INJUNCTION—JURISDICTION—CRIMES.

Injunction against the use of premises in a noisy and boisterous way by immoral parties, etc., is not precluded because the illegal sale of liquor is also present.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 55; Dec. Dig. —19.]

2. INTOXICATING LIQUORS —260 — INJUNCTION—JURISDICTION.

The illegal sale of intoxicating liquors cannot be enjoined when unaccompanied by circumstances making a nuisance.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 399; Dec. Dig. —260.]

3. INTOXICATING LIQUORS —279 — INJUNCTION—VIOLATION.

Where an injunction was issued upon a petition alleging that a certain place was a nuisance because of its boisterous gatherings, illegal liquor sales, etc., held that the court had no jurisdiction to punish disobedience of its injunction where only illegal sales of liquor were proven.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 414; Dec. Dig. —279.]

Appeal from St. Louis Circuit Court; John W. McElhinney, Judge.

"Not to be officially published."

Bill by the State, on the relation of Arthur V. Lashly, against the Kirkwood Leisure Hours' Social and Pastime Club. From an order punishing his disobedience of a temporary injunction, Mark Gumberts appeals. Reversed and rendered.

T. J. Rowe, T. J. Rowe, Jr., and Henry Rowe, all of St. Louis, for appellant. Arthur V. Lashly, of Clayton, for respondent.

ALLEN, J. On August 12, 1913, the relator, the prosecuting attorney of St. Louis county, filed a bill in equity in the circuit court of that county averring that the defendant therein named, the 'Kirkwood Leisure Hours' Social and Pastime Club, was a corporation incorporated, by a pro forma decree, under the provisions of article 11, chapter 12, Revised Statutes 1899, its objects and purposes, as stated in its charter, being educational, literary, and fraternal in character; but that, under the fraudulent pretense of carrying out the purposes of its charter, the defendant at and about a certain building and premises on Manchester Road, in said county, through its officers, members, agents, servants, and employes, unlawfully sold intoxicating liquors, without a license therefor, on Sundays, as well as on other days. The petition further charged that such sale of intoxicating liquors caused a large number of persons, addicted to the use thereof, to be attracted to the defendant's premises, and by reason thereof much drunkenness, disorderly and immoral conduct, and lewdness were indulged in; that gambling and other immoral practices were

permitted on the premises, and boisterous and hilarious conduct there permitted and encouraged; by reason whereof defendant's premises became and constituted a public nuisance to the great annoyance and injury of a large part of the inhabitants of the county. The prayer of the petition is that the defendant, its officers, agents, servants, employes, and members be restrained and enjoined from selling or disposing of intoxicating liquors on Sunday or on any other day within the county of St. Louis, and from engaging in or permitting gambling to be carried on at said premises or in any other place within said county, or from doing any of the wrongful acts or things complained of.

Upon the filing of this petition, the circuit court issued an order upon the defendant to show cause why a temporary injunction should not issue as prayed. Defendant appeared and on September 2, 1913, after a hearing, the court granted a temporary injunction restraining the defendant, its officers, members, servants, agents, and employes from selling or otherwise disposing of intoxicating liquors, and from doing or committing any of the other acts complained of in the petition. Thereafter, upon application of the relator, the court issued a citation to this appellant, Gumberts, and to one Better and one Scott, as agents and servants of the defendant, requiring them to show cause why they should not be punished for an alleged violation of the aforesaid temporary injunction. Gumberts, Better, and Scott filed a return to this citation, and after a hearing the court dismissed the citation as to Better and Scott, but rendered judgment against Gumberts, finding him guilty of contempt as charged in the citation and assessing his punishment at a fine of \$50 and imprisonment in the county jail for a period of 10 days. From this judgment, Gumberts prosecutes the appeal now before us.

It appears that the place in question known as Flora Fauna, was operated in the name of the defendant, with appellant as manager thereof, from July 2, 1913, to September 4, 1913, under a lease from appellant. On the latter date, two days after the issuance of the temporary injunction, this lease appears to have been canceled and possession of the premises was delivered to appellant. The evidence shows that thereafter, while the temporary injunction was in force on the premises, intoxicating liquors were sold without a license, though appellant disclaims personal responsibility therefor. But there is no evidence to support other and essential allegations of the petition. Though it is charged in the petition that the illegal sale of intoxicating liquors attracted many lawless and immoral persons to the premises, and caused much drunkenness, disorderly and immoral conduct, and lewdness thereabout, and that gambling and immoral practices were permit-

ted and loud and boisterous conduct permitted and encouraged, the evidence fails to substantiate these charges of the petition. All that appears in support of the petition is that, on certain occasions, witnesses purchased intoxicating liquors upon the premises.

[1-3] The power of the court below, sitting as a court of equity, to issue and enforce the restraining order made can be upheld only upon the theory that the place in question was so conducted as to constitute a public nuisance. Had it been shown that lawless and immoral persons congregated there and conducted themselves in the manner charged in the petition, rendering the premises a disorderly place and a menace to the peace and moral welfare of the community, undoubtedly it would have been within the jurisdiction of a court of equity to enjoin such use of the premises, under the power of such courts to abate public nuisances. See *State ex rel. v. Canty*, 207 Mo. 439, 105 S. W. 1078, 15 L. R. A. (N. S.) 747, 123 Am. St. Rep. 393, 13 Ann. Cas. 787; *State ex rel. v. Lamb*, 237 Mo. 437, 141 S. W. 935. But courts of equity are powerless to enjoin the commission of acts constituting criminal offenses, unless it be that other elements are present such as to bring the case within equity jurisdiction. In the instant case the evidence does no more than tend to convict the appellant of the crime of selling intoxicating liquor without a license. Such offense is one cognizable only in courts of law, and punishable under the criminal code; and proof that such offenses are being committed furnishes no ground for invoking the extraordinary powers of a court of equity.

In *Laymaster v. Goodin*, 260 Mo. 618, 168 S. W. 755, the court, in referring to the cases which we have cited above, said:

"By an examination of both of those cases it will be seen that it was alleged and proven, according to the majority opinion of the court, that not only a crime was being committed, as here, but also that the business complained of was so vile, open, notorious, and vicious that bad and dangerous men, in large numbers, were attracted thereto; even criminals were constantly congregated there, to the great detriment of the peace and safety of the community. In other words, those cases hold that a public nuisance, even though a crime, may be enjoined by a court of equity, though having no criminal jurisdiction, not because of the crime, but because of its inherent and constitutional authority to abate such nuisances.

"There is no doubt but what a court of equity has this power, and it should be exercised freely whenever the exigency of the case demands; yet it should not invade the province of the criminal courts of the country, which must try criminals with the assistance of a jury, according to the Constitution and laws of this state and country generally."

The *Laymaster Case* was a habeas corpus proceeding in the Supreme Court, and the majority opinion of that court holds that the circuit court of Cole county had no jurisdiction to enjoin the petitioner from committing the crime of keeping a common bawdyhouse. It is pointed out by Graves, J., in

a separate opinion, that at common law the maintenance of a bawdyhouse was a public nuisance; but he places his concurrence on the ground that the state's petition in the circuit court did not in terms aver that the defendant was maintaining a public nuisance. In the case before us the petition does allege the maintenance of a public nuisance, but the proof fails to substantiate the allegations of the petition in this regard. Under the authorities, *supra*, the circuit court, sitting as a court of equity, must be held to have exceeded its jurisdiction in adjudging the appellant guilty of contempt and undertaking to punish him therefor. If appellant committed a criminal offense, or criminal offenses, by selling intoxicating liquor without a license, it was incumbent upon the state to proceed against him by criminal prosecution, if at all, since under the Constitution and laws of the state he was entitled to a trial by jury, to determine the question of his guilt or innocence.

There is authority for the proposition that the habitual sale of intoxicants on Sunday on the vendor's premises constitutes a nuisance. See 14 Cyc. 487. But this question need not be discussed, for no such showing was here made.

The judgment is therefore reversed, and appellant discharged; no costs to be taxed against relator personally.

REYNOLDS, P. J., and NORTONI, J., concur.

VOSS v. DES MOINES & MISSISSIPPI LEVEE DIST. NO. 1. (No. 14349.)

(St. Louis Court of Appeals, Missouri. July 5, 1916. Rehearing Denied July 21, 1916.)

1. LEVEES \S 13½ — LEVEE DISTRICTS — APPROPRIATION OF LEVEES—COMPENSATION—"OWNERS."

After officers of a levee company refused to serve and the company became defunct, when plaintiff and adjacent owners furnished land for and constructed new levees integral with the old, they could not, when a new levee district was organized, have compensation as "owners" of the old levee, under Rev. St. 1909, § 5707, providing for compensation to owners or other persons interested on the taking of a levee by a newly organized levee district.

[Ed. Note.—For other cases, see *Levees*, Cent. Dig. § 5; Dec. Dig. \S 13½.

For other definitions, see *Words and Phrases*, First and Second Series, Owner.]

2. LEVEES \S 13½ — LEVEE DISTRICTS — APPROPRIATION OF LEVEES—COMPENSATION—"PERSONS INTERESTED."

In such case, they could not have compensation as "persons interested," since their work was done voluntarily and for their own interests.

[Ed. Note.—For other cases, see *Levees*, Cent. Dig. § 5; Dec. Dig. \S 13½.

For other definitions, see *Words and Phrases*, First and Second Series, Interest.]

3. LEVEES \Leftrightarrow 13 $\frac{1}{2}$ — LEVEE DISTRICTS — APPROPRIATION OF LEVEES—COMPENSATION.

In such case, the statute created no liability against the defunct company on the ground of acceptance and use of benefits, as the work was entirely voluntary, and could in no event have been accepted by the defunct company.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 5; Dec. Dig. \Leftrightarrow 13 $\frac{1}{2}$.]

Allen, J., dissenting.

Appeal from Circuit Court, Clark County; N. M. Pettingill, Judge.

Action by Henry Voss, Sr., against the Des Moines & Mississippi Levee District No. 1. Judgment for defendant, and plaintiff appeals. Affirmed, and certified to the Supreme Court for final determination.

John M. Dawson and Wm. L. Berkheimer, both of Kahoka, for appellant. Bert L. Gridley and C. T. Llewellyn, both of Kahoka, for respondent.

NORTONI, J. This is a suit in assumpsit for the reasonable value of a portion of levee constructed by plaintiff and his assignors. The finding and judgment are for defendant, and plaintiff prosecutes the appeal.

It appears the Egyptian Levee Company, incorporated under a special act of the Legislature of 1855, constructed and maintained a system of levees in Clark county, Mo., to protect certain lands from the overflow of the Des Moines, Fox, and Mississippi rivers. About 11,500 acres of land were included in the district, and the levees were maintained for many years; but finally the corporation became dormant. In other words, the corporate officers a number of years ago refused to qualify and act after election, and the Egyptian Levee Company remained thereafter an inactive corporation. The company owned the rights of way for its levee and a number of ditches, and also a number of levees. Finally, a considerable portion of the levee was washed away, and at that time the corporation was without officers or anybody to represent it. Plaintiff and a number of others owning land within the levee district went voluntarily about the repair of the broken levee in order to protect their crops. It appears they called upon the landowners to contribute their proportionate part, and this they did. The parties had a meeting which about 60 landowners in the district attended, and it was agreed each should pay his portion toward rebuilding the levee which had been theretofore washed away and present their claims to a new levee corporation to be subsequently formed in respect to the same territory. Plaintiff and his assignors contributed the several amounts sued for here and rebuilt the levee of the old, defunct Egyptian Levee Company. To this end they purchased a parcel of right of way and constructed a portion of the levy on this in filling in a considerable gap but connected the new levee with the old. Also, a portion

was constructed on the land of plaintiff Voss, but all was builded into and connected up with the levees of the old company. About a year after, defendant Des Moines & Mississippi Levee District No. 1 was incorporated under the general statutes of Missouri; that is, article 7, c. 122, R. S. 1890 (now article 9, c. 41, R. S. 1909, as amended and reenacted). Section 8365, R. S. 1890, same section 5707, R. S. 1909, under which defendant was organized, provides, among other things, as follows:

"If the commissioners shall find that any levees or other works have been constructed, which can be used in making the levees and improvements herein contemplated, they shall assess the value of the same and report the same to the board of supervisors, and said supervisors may order said levee or such works, be used so far as they extend, for the purposes of the levee district in which they are situated, and that the owners of such levee, or other improvements, or other persons having an interest in the same by virtue of having contributed money, material or labor in the construction of the same, be paid, in proportion to their interest, a reasonable compensation therefor, which shall in no event exceed the assessed value thereof."

Although the matter of the several contributions herein sued for was brought to the attention of the board of commissioners appointed to assess the benefits in connection with the organization of defendant, this board declined to allow plaintiff and his assignors, as if they were either the owner or interested parties, compensation for the expenditure by them in acquiring other right of way and in improving the old levee of the Egyptian Levee Company. The board of commissioners nevertheless adopted the levee of the old company together with the portions repaired by plaintiff and his assignors, and the whole was utilized by defendant, that is, the new corporation, in protecting the district.

Plaintiff sues defendant, the new corporation, in the view that it should respond to him and his assignors for the reasonable value of the benefits conferred in furnishing the additional right of way and in reconstructing the levee of the old company, and relies in part upon the principle reflected in *Winkelman v. Des Moines & Mississippi Levee Dist. No. 1*, 171 Mo. App. 49, 153 S. W. 539; also, *Wilson v. King's Lake Drainage & Levee Dist.*, 176 Mo. App. 470, 158 S. W. 931; *Id.*, 257 Mo. 266, 165 S. W. 734. But those cases are distinguishable from this, in that there existed a valid claim against the old or prior company contracted by the prior company, in the one case the then existing corporation—that is, the Egyptian Levee Company—which claim had been reduced to judgment, and in the other against the prior existing de facto corporation for services performed under a contract with the officers of such corporations; whereas, here, the money was contributed by plaintiff and his assignors in voluntarily furnishing right of

way and rebuilding the levee of the defunct Egyptian Levee Company without any contract whatever with that company or its officers, for, indeed, it had no officers at the time and existed only as a lifeless corporate being.

[1] By instructions requested, which the court refused, it appears plaintiff insists that the statute above copied (section 8365, R. S. 1899, same statute section 5707, R. S. 1909) laid an obligation upon the commissioners to allow reasonable compensation to him and his assignors as individuals for the value of the right of way furnished and the levee constructed in rebuilding the breaks in the old levee of the prior company, even though such money was expended without any arrangement whatever with the officers of that company and after it had ceased to be an active going concern. In this connection, it is argued that the commissioners failed in their duty in rejecting the claims thus presented, and thus entailed an obligation against the new corporation—that is, the defendant company—to make compensation for the reasonable value of the right of way and of the levee constructed in the circumstances above stated, for that the new company appropriated the benefits to its own use. We are not inclined to declare the just principle reflected in the statute quoted to comprehend the facts in judgment here. The statute provides that the commissioners may treat with the value of old levees, and on their report the new company may utilize them in building the new, and “that the owners of such levee or other improvements, or other persons having an interest in the same by virtue of having contributed money, material or labor in the construction of the same, be paid in proportion to their interest a reasonable compensation therefor, which shall in no event exceed the assessed value thereof.” Although this statute is to be interpreted liberally, nevertheless the intent of the Legislature in respect of the subject-matter should control. The statute seems to authorize the payment by the new levee district to be made only to persons owning the levee taken over or having an interest in the same by virtue of “having contributed money, material or labor in the reconstruction, etc.” The important words of the statute for consideration here are “the owners of such levee * * * or other persons having an interest in the same.” No doubt the statute intends to include the case of the owner of a private levee on his individual property which may be taken over in the organization of a levee district, and no doubt it includes as well the case of an old levee district owning levees which are taken over in the construction of a new and, it may be, enlarged system.

It would seem, too, that from the words “having an interest in the same by virtue of having contributed money, material, or labor in the construction, etc.,” the Legislature intended to provide a remedy for those who

may expend money or furnish material or labor in the construction of a levee under contract with the authorities representing the levee company, as is frequently done in cases where the organization of the levee district so served and benefited is subsequently overturned in the courts through defects in its organization as in the case of King's Lake Drainage & Levee Dist. v. Jamison, 176 Mo. 557, 75 S. W. 679. But obviously the plaintiff and his assignors are not within the terms of this statute, for in the first place they did not own any portion of the levee constructed by them, but rather merely repaired the old levee owned by the old corporation, and in this connection contributed a portion of the right of way for their own benefit. If plaintiff and his assignors owned the levee so repaired and the right of way thus contributed as their private property and defendant appropriated it to its own use, this feature of the case would no doubt invoke the aid of the statute above copied. But it would seem the act of voluntarily going in upon the property of the old company and reconstructing the broken levee and voluntarily providing a right of way on which to build it, connecting the whole with the levees of the old company, invokes the principle which attends the case of one who voluntarily commingles his goods with another, which may not thereafter be segregated, and as a result forfeits his right in the premises. In this view it appears that plaintiff and his assignors were not the “owners” of the levee on which they had conferred benefits, for the owner continued to be the old Egyptian Company, and they stood as voluntary contributors to the old company in the repair so as to preserve it intact for their mutual benefit.

[2] Neither are they persons “having an interest” in the levees of the old company as by contributing money, material, or labor in the construction for that they volunteered in the matter and did not proceed by the authority or on the invitation of that company. At most, these parties went about voluntarily repairing the old levee owned by the old company and, in carrying out their self-conceived plans, purchased some additional right of way, and plaintiff Voss furnished other right of way with a view to constructing the levees where they thought it should stand. The deed to this right of way so purchased was taken in the name of a committee. No conveyance to the new company appears, and neither is there a conveyance shown from Voss to defendant. However this may be, the parcel of right of way purchased and that occupied on Voss' land together with the reconstructed fill in the levee were voluntarily builded in to the old levee of the old company of the free volition of plaintiff and his assignors solely; that is, they voluntarily commingled such right of way and the repairs with the property of the old company. Obviously these parties had

no interest in the old levees on account of the money expended voluntarily for the prior, or old Egyptian Levee Company, and, this being true, none which may be regarded as enforceable against the new corporation. It is true plaintiff and his assignors were interested parties, in that they owned land within the district, and it is said upon the breaking of the old levee because of the flood their lands were inundated and crops were being overflowed. Because of these facts, the parties had a meeting and contributed the amounts involved to reconstruct the old levee which they did and in this connection purchased the parcel of new right of way.

[3] But in any view of the case this must be regarded as a voluntary act, when viewed from the standpoint of the law, for the Egyptian Levee Company as such was in no wise obligated in the matter whatever. At that time the Egyptian Levee Company was inactive as a corporation, for that its officers had refused to qualify and act in its behalf some time before. It is said its franchises had been forfeited through nonuser, and because of this the defendant, or new company, was subsequently organized to construct and maintain levees for the protection of the same territory, the same inhabitants, and gathered together new franchises with a view to serve the same ends which the prior company had abandoned. Obviously the statute created no contract rights between plaintiff and his assignors and the old defunct Egyptian Levee Company, for contracts are either to be found from facts or implied in law when one renders benefits to another which are accepted and utilized. The old Egyptian Levee Company was a dormant concern and incapable of either accepting or rejecting the benefits said to have been conferred. Such being true, no interest accrued against it in favor of plaintiff and his assignors enforceable at law, and therefore it appears to be a voluntary performance. It is believed that to give the statute the broad construction insisted upon by plaintiff would impinge a just principle which makes for security against the onslaught of invalid claims when the integrity of the principle should be protected and held immune as well in the case of a levee company as in that of other concerns or individuals. Although it be true that, if one performs valuable services and so renders benefits to another which the other retains and utilizes, the law raises up and implies a promise to pay the reasonable value, the principle would seem to be without application here, for that the services were rendered voluntarily without request to the old company when it was incapable of accepting or rejecting the benefits. Indeed, to declare an existing obligation in such circumstances to compensate on such an ex parte voluntary conferring of benefits would be the equivalent of declaring that a property owner who sojournd for a season abroad would find himself on return under a legal obligation to

compensate a stranger who had voluntarily gone about the task of building a new porch on his house during his absence without consulting either his wishes or convenience in the matter and this because he used the porch so erected. It would seem this suit seeks to extend the just principle relied upon beyond the confines of security for the rights of others which should always attend its application, in that injustice may not be done in some cases.

The court did not err in refusing the instruction requested, and the judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., concurs. ALLEN, J., dissents and deems the opinion of the court to be in conflict with the judgment of the Supreme Court in *Wilson v. King's Lake Drainage & Levee Dist.*, 257 Mo. 266, 165 S. W. 734. Because of this, he requests the case be certified to the Supreme Court for final determination, and it is so ordered.

ALLEN, J. (dissenting). I concurred in the opinion written by my Brother NORTON herein, but upon motion for rehearing and a further consideration of the matter I have concluded to withdraw such concurrence for reasons which I shall briefly indicate.

It appears that the money laid out by plaintiff and his assignors went to make up the total sum of \$4,253.42 expended by certain landowners in the drainage district in question, for the purpose of making levee improvements at what is termed the "McGuire Fill" and the "Voss Dike." These are spoken of in the majority opinion as repairs to the old levee maintained by the Egyptian Levee Company which became defunct, and they were of that general nature, but in fact it appears that at the McGuire Fill a new strip of right of way was purchased, the title being taken in a committee appointed by those contributing the funds, upon which right of way, 100 feet wide and perhaps a quarter of a mile in length, a new piece of levee was constructed; the ends thereof being made to connect with the old levee so as to form a continuous embankment. And in doing the work at the Voss Dike it appears that the new dike or embankment was built, not on the right of way of the Egyptian Levee Company, which was then in the bed of the river, the latter having forced its way behind the old dike, but upon land owned by plaintiff Voss and more than 100 feet from the river bank. The ends of the new dike thus constructed were evidently made to connect with the old dike or levee, as in the case of the McGuire Fill.

In other words, as I understand the evidence contained in the record before us, moneys laid out by plaintiff and his assignors, and certain other landowners as well, were expended through a committee in constructing these two embankments, one upon a right of way purchased for that purpose, and the

other upon land of plaintiff Voss; the newly constructed work in each instance being entirely off of the right of way of the old levee company but made to connect with the old levee. The record discloses that \$3,241.48 was expended at the McGuire Fill, of which \$100 was contributed by an attorney, the remainder, to wit, \$3,141.48, being advanced by plaintiff and his assignors and other owners of land in the district, each contributing on the basis of \$1 per acre of land owned; and it appears that \$1,111.94 was expended on the Voss Dike, one-half of which was contributed by plaintiff. The total acreage in the district is said to be approximately 11,500 acres. And it therefore appears that the owners of much less than one-half of the land in the district contributed to the making of these improvements. The moneys were raised by subscriptions among the landowners, and plaintiff's evidence goes to show that this was done in contemplation of the organization of a new levee district which was expected to make reimbursement therefor.

In view of the fact that the work done at the McGuire Fill was on a new piece of right of way purchased for that purpose, and that at the Voss Dike upon land of plaintiff Voss, and the fact that the defendant, the new drainage district subsequently incorporated, took over and utilized for its purposes, for the benefit of all of the landowners of the district, both of these embankments, strengthened and enlarged them, and incorporated them into its improved levee, the case appears to me to be one falling within the purview of the statute under which defendant was organized, and upon which plaintiff here in part relies, viz., section 5707, Rev. Stat. 1909, quoted in the majority opinion. It appears that plaintiff and his assignors had such interest in work constructed at the McGuire Fill and at the Voss Dike, "by virtue of having contributed money, material and labor" in the construction thereof, and by reason of their title to the two pieces of right of way utilized, as to bring them within the contemplation of the statute, entitling them to be reimbursed to the extent of the benefits conferred upon the new levee district.

In the majority opinion it is said that this case is distinguishable from that of *Winkelman v. Des Moines & Mississippi Levee District No. 1*, 171 Mo. App. 49, 153 S. W. 539, and *Wilson v. King's Lake Drainage & Levee District*, 176 Mo. App. 470, 158 S. W. 931, Id., 257 Mo. 266, 165 S. W. 734, in that in each of the cases mentioned a valid claim existed against the old or prior company, contracted by it, and which was held to continue as a liability of the new company subsequently organized. But it seems to me that the distinction made is not of controlling importance, and that this case falls within the broad principle upon which the *Wilson Case*, supra, proceeds. Irrespective of the statute, it seems that liability should here be cast upon the defendant upon a contract implied

by law to reimburse plaintiff and his assignors to the extent of the benefits received by defendant by virtue of its appropriation and use of these two distinct and separate embankments constructed off of the right of way of the old levee to which defendant succeeded.

The action is one in assumpsit, equitable in character, and which in general lies whenever the defendant has received money, or its equivalent, which in equity and good conscience should be repaid to plaintiff. *Henderson v. Koenig*, 192 Mo. loc. cit. 709, 91 S. W. 88; *Stout v. Hardware Co.*, 131 Mo. App. loc. cit. 529, 110 S. W. 619. It appears that defendant in reconstructing or improving the entire levee did not, at the McGuire Fill or the Voss Dike, follow the course of the old levee, but took possession of the work constructed by plaintiff and other landowners at these points, though not upon defendant's right of way, incorporated them into its levee, and utilized them for the benefit of the drainage district as a whole. Such being the case, I think that the law will imply a contract to reimburse plaintiff and other contributing landowners to the extent of the benefits thus received by defendant; and plaintiff's evidence tends to show that the embankments in question were reasonably worth to defendant the amounts expended thereon.

It does not appear that the old Egyptian Levee Company had ceased to exist, though it does appear that it was lying dormant. But with this, I take it, we are not here particularly concerned. In *Wilson v. Drainage District*, 257 Mo. loc. cit. 238, 165 S. W. 734, it is said:

"Moreover, though the prior drainage district were not a corporation either de jure or de facto, it would seem that defendant should pay for the benefits thus received which inured to the lands and inhabitants its charter was issued to conserve. No one can doubt that defendant as an incorporated drainage and levee district under our statute possesses the power to construct a levee, and it would seem that if it utilized a portion of an old one in the construction of the new that such would be moving along the lines of the very power conferred."

This is the language of my Brother Norton in the opinion of this court adopted by the Supreme Court in the *Wilson Case*, supra; and the opinion as adopted holds that the defendant therein acted within the power conferred upon it in incorporating a certain piece of levee into the new levee which it had constructed, and that as it was acting within the powers conferred upon it, as a municipal corporation, it was estopped to deny the validity of the plaintiff's claim for work done in constructing the portion of the levee thus appropriated. In this connection the following language is used, viz.:

"It seems entirely clear that defendant, having acted within its power in using the old levee and incorporating it into a new one, is estopped from denying reasonable compensation for the value of the services rendered by those constructing it and who have not been compensated."

While the levee taken and appropriated in that case was one which had been constructed under contract with the old levee company, the principle asserted and upon which the case proceeds seems to apply with equal force to the facts here involved.

Were the case indeed one where plaintiff and his assignors had voluntarily made certain repairs upon the old levee of the Egyptian Levee Company, situated upon its right of way, while that company lay dormant, the case would present quite a different aspect. But the facts are, as I gather them from the record, that plaintiff and other landowners constructed two distinct embankments entirely off of the old right of way, at points where the river had broken through the old levee and encroached upon the adjoining land. Had the defendant, upon its organization, reconstructed the old levee at these points, upon the old right of way, were that found feasible, plaintiff and his assignors, who had built these embankments off of such right of way, would have had no claim for the moneys thus expended. But, since the defendant has seen fit to depart from its right of way and utilize for its purposes the embankments thus constructed, it may, I think, under the doctrine announced in the *Wilson Case*, properly be held to be estopped to deny compensation to those who constructed such improvements, to the extent of the benefit which it received thereby.

It is suggested that plaintiff and his assignors contributed to the building of these improvements for their own protection, and that they now have and enjoy the benefit thereof. While it is doubtless true that the primary object was to protect their own lands, yet when the improvements thus made are incorporated into the improved levee maintained by the new levee district, and are made to serve as a protection to all of the lands therein, it would seem but just and equitable to require that the new organization make reimbursement therefor, in order that the cost of such construction may fall ratably upon all included within the district.

I therefore dissent from the result reached in the majority opinion and as I deem the decision of my Associates herein to be contrary to the decision of the Supreme Court in *Wilson v. King's Lake Drainage & Levee District*, 257 Mo. 286, 165 S. W. 784, I request that the cause be certified to the Supreme Court for final determination.

WEHRS v. SULLIVAN et al. (KING & KING, Intervener). (No. 17805.)

(Supreme Court of Missouri, Division No. 1. June 2, 1916. On Rehearing, July 3, 1916.)

1. APPEAL AND ERROR \S 110—DECISIONS REVIEWABLE—ORDER OVERRULING MOTION FOR NEW TRIAL.

Under Rev. St. 1909, § 2038, providing that appeal may be taken from any circuit court from

an order granting a new trial, or in arrest of judgment * * * or from any final judgment in the case, "or from any special order after final judgment," an order overruling a motion for new trial is not appealable, but appeal is to be taken from the final judgment following it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 740-748; Dec. Dig. \S 110.]

2. APPEAL AND ERROR \S 82(1)—DECISIONS REVIEWABLE — "SPECIAL ORDER AFTER FINAL JUDGMENT."

The provision in Rev. St. 1909, § 2038, that appeal may be taken from any circuit court from "any special order after final judgment," refers to orders in special proceedings attacking or aiding the enforcement of a judgment after it has become final in the action in which rendered, and does not apply to motions required by statute to preserve in the record matters arising upon the trial of the issues of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 384, 521; Dec. Dig. \S 82(1).]

For other definitions, see Words and Phrases, First and Second Series, Special Order.]

3. APPEAL AND ERROR \S 627(1)—RECORD—CERTIFIED COPY OF JUDGMENT APPEALED FROM.

Under the statute providing no other way of appealing from final judgment than by filing a certified copy of the judgment itself in the appellate court in the statutory time, an appeal from an order overruling a motion for new trial cannot be considered by implication on appeal from the final judgment in the case where no copy of the judgment was filed in the Supreme Court until nearly four years after order overruling the motion and such copy was merely an uncertified copy in appellant's printed abstract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749; Dec. Dig. \S 627(1).]

On Rehearing.

4. APPEAL AND ERROR \S 627(1)—TIME OF APPEAL—WAIVER OF OBJECTIONS.

That respondents do not call attention to appellant's failure to file in time a certified copy of the judgment appealed from does not excuse appellant, on whom the law devolves that duty.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749; Dec. Dig. \S 627(1).]

Appeal from St. Louis Circuit Court; John W. McElhinney, Judge.

Suit by Herman H. Wehrs against William B. Sullivan, in which William L. Watkins was appointed receiver, and King & King intervened and made claim. Interveners appeal from order denying new trial after denial of their claim. Dismissed.

King & King, of St. Louis (Marshall & Henderson, of St. Louis, of counsel), for appellants. Jones, Hocker, Hawes & Angert, of St. Louis, for receiver. J. E. Watkins, of Chillicothe, amicus curiae.

BROWN, C. The respondent William L. Watkins was receiver appointed by the circuit court for St. Louis county in a suit pending in that court in which Herman L. Wehrs was plaintiff and William B. Sullivan, doing business by the name and style of Home Co-

operative Company of the City of St. Louis, Mo., was defendant. The appellants are lawyers, and filed their intervening petition in that cause in which they alleged that they had performed many and valuable professional services in that capacity, in collecting assets of the defendant Home Co-operative Company to divide among its "contract holders" (of whom plaintiff was one and sued as the representative of all), and its creditors. The claim of the interveners was referred to a referee appointed by the court, who found for the receiver. This report was afterward set aside, and the cause was heard by the court by agreement upon evidence taken by the referee. On June 12, 1911, the court entered its findings and judgment which, after a full review of the facts, which were summarized in the statements that the services of interveners were of no real or appreciable value to said estate, contract holders, or creditors, and are found by the court to have been without any value, concluded:

"And the court, as a matter of law and equity, upon the facts found, as aforesaid, finds and concludes that the claimants are not entitled to recover for any services rendered by them as attorneys for plaintiff in this cause, and their claim for such services is denied."

The appellants "thereafter, within four days, at the same term, to wit, on the 16th of June, 1911, * * * filed their motion for a new trial," which occupies about 35 printed pages of the abstract, contains 38 elaborate exceptions to the findings of fact, and closes as follows:

"Wherefore, in consideration of the premises, your exceptors pray the court to set aside the findings of fact and conclusions of law and decision made herein and will make to your exceptors a reasonable allowance, whether partial or entire, for the services to which they may be entitled as attorneys for the plaintiffs in said suit."

This motion was continued to the next or September term of the trial court, when it was taken up and overruled on November 20, 1911, by the following order:

"Herman H. Wehrs, Plaintiff, v. William B. Sullivan, doing business as Home Co-operative Co., Defendant. The motion for rehearing in the matter of solicitors' fees of Messrs. King & King heretofore filed and submitted herein, having been duly and fully considered is now by the court hereby overruled."

At the same term on January 3, 1912, an appeal was granted by the following order:

"Herman H. Wehrs, Plaintiff, v. William B. Sullivan, doing business as Home Co-operative Co., Defendant. Come now Attorneys King & King, appellants herein and tender and file their affidavit for an appeal, and pray an appeal from the order of the court herein on November 20, 1911, overruling the motion of said attorneys King & King for a rehearing in the matter of solicitors' fees, to the Supreme Court of Missouri; and it appearing to the court that said appellants have deposited the sum of ten (\$10.00) dollars, docket fee required by law, it is thereupon ordered that the said appeal be and it is hereby granted to the Supreme Court of Missouri. Ordered further by the court on motion that said appellants King & King be

and they are hereby given sixty (60) days from this date to file their bill of exceptions in this cause."

Leave was granted during the same term to file bill of exceptions, which was done. On August 20, 1912, the short transcript consisting of the two orders of court above quoted was filed in this court for the purpose of perfecting the appeal. No copy of the judgment of disallowance was placed before this court until October 5, 1915, when it was included in the appellants' printed abstract filed on that day.

[1] The question is thus presented whether there is anything before this court which gives us jurisdiction of the cause in this appeal.

The order granting the appeal limits it to the order of the trial court made on November 20, 1911, overruling the motion of the interveners for a rehearing, which motion is properly described by the appellants in their abstract and brief as a motion for a new trial, and a copy of this order, and of the order granting the appeal from it, constitutes the short record certified to this court in accordance with the terms of the statute for the purpose of perfecting the appeal. We have no power to amend it or disregard its terms, so that the question arises whether or not the statute permits an appeal from this order. This statement carries with it its own answer. Section 2038 of the Revised Statute of 1909, to which we must look for support, provides that an appeal may be taken from any judgment of any circuit court in the following cases:

"From any order granting a new trial, or in arrest of judgment, or order refusing to revoke, modify or change an interlocutory order appointing a receiver or receivers, or dissolving an injunction, or from any interlocutory judgments in actions of partition which determine the rights of the parties, or from any final judgment in the case, or from any special order after final judgment in the cause."

This does not include orders overruling motions for a new trial for the simple reason that such orders are but steps leading to the final judgment which follows, and from which an appeal is expressly given by the same statute. Until the motion is determined, the matter is in fieri, and only upon its decision does the judgment take effect and become appealable. *State ex rel. v. Smith*, 104 Mo. 419, 423, 16 S. W. 415; *Molitor v. Wabash Ry. Co.*, 180 Mo. App. 84, 168 S. W. 250, 253.

[2] The fact that an appeal might have been taken from this judgment at any subsequent term upon the overruling of this motion, and not before, demonstrates that this order does not come within the final clause which we have quoted from section 2038, which refers to "any special order after final judgment in the cause," and that this clause refers to the orders in special proceedings attacking or aiding the enforcement of the judgment after it has become final in the ac-

tion in which it was rendered. It is, however, only necessary to say here that it does not apply to motions required by statute to preserve in the record matters arising upon the trial of the issues of fact.

[3] Even if it be suggested that this order might be considered by implication as an appeal from the final judgment, we have only to say that the statute provides no other way of bringing it before us for the purpose of review than by certified copy of the judgment itself to be filed in this court. Not only was the statutory time for doing this disregarded, but it has not been done at all. It was first brought to our notice by an uncertified copy in appellants' printed abstract filed here on October 5, 1915, when the cause was ready for hearing, nearly four years after the overruling of the motion for a new trial from which this appeal was attempted to be taken. We do not think that this will justify us in bringing it under the wings of this appeal by taking jurisdiction of the merits.

The appeal is, accordingly, dismissed.

RAILEY, C., not sitting.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the Court. All concur.

On Rehearing.

PER CURIAM. [4] After the judgment of this court, dismissing the appeal, the appellants filed a certified copy of the judgment disallowing their application, and secured the amendment, nunc pro tunc, of the order granting the appeal, so as to make it apply to that judgment, and now ask us to grant them a rehearing.

In the last paragraph of the opinion we held that, even had the appeal been duly taken from the judgment of disallowance, the failure for four years to perfect it by filing a certified copy of such judgment in this court would call for its dismissal, as was done upon the hearing. The failure of the respondents to call attention to the omission ought not to excuse the appellants, upon whom the law devolved that duty.

The motion for a rehearing is therefore overruled. All concur, except WOODSON, J., absent.

UNION PAC. R. CO. v. PUBLIC SERVICE COMMISSION. (No. 10318.)

(Supreme Court of Missouri, Division No. 1, July 3, 1916. Motion for Rehearing and to Transfer to Court in Banc Overruled July 18, 1916.)

1. RAILROADS § 33(1) — REGULATION AND CONTROL — FOREIGN CORPORATIONS SUBJECT TO STATE LAWS.

A foreign railroad company which has acquired property by authority of Rev. St. 1879, § 790, is subject to all the duties, liabilities, and provisions of the laws of this state concern-

ing railroad corporations as fully as if incorporated in the state.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 70; Dec. Dig. § 33(1).]

2. PROPERTY § 6 — LAWS — EXTRA TERRITORIAL EFFECT.

The laws of a foreign state have no effect to regulate or control the conveyances, incumbrances, or diversion of real property from the use to which it has been devoted by the laws of the state in which such real property is located.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 3; Dec. Dig. § 6.]

3. RAILROADS § 150 — REGULATION AND CONTROL — PUBLIC SERVICE COMMISSION — FEE FOR APPROVING ISSUE OF BONDS.

Under Public Service Commission Act (Laws 1913, p. 567) § 21, a fee fixed by the Public Service Commission amounting to \$10,962.25 for issuing a certificate authorizing an issue of bonds of indebtedness by a railroad company amounting to \$31,848.900 to reimburse it for expenditures, only \$124,930.38 of which had been expended upon the property in the state, held valid and reasonable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 461, 462; Dec. Dig. § 150.]

4. RAILROADS § 150 — PUBLIC SERVICE COMMISSION — STATUTORY FEES — APPROVAL OF BONDS.

A railroad company which avails itself of the privileges and immunities under Public Service Commission Act, § 21, to secure the approval of an issue of bonds, cannot thereafter deny the existence of the power which it invoked, for the sole purpose of avoiding the payment of the fee fixed by the Legislature for the services of the commission in approving said bonds.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 461, 462; Dec. Dig. § 150.]

5. RAILROADS § 150 — PUBLIC SERVICE COMMISSION — STATUTORY FEES — APPROVAL OF BONDS.

The fee chargeable by the Public Service Commission under Public Service Commission Act, § 21, for approving an issue of railroad bonds, held to be a reasonable and proper exercise of legislative discretion.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 461, 462; Dec. Dig. § 150.]

Appeal from Circuit Court, Cole County; J. G. Slate, Judge.

Writ of review by the Union Pacific Railroad Company against the Public Service Commission of the State of Missouri to review the order of the commission assessing a fee for a certificate authorizing the issuance of bonds. From an order setting aside the fee fixed by the commission and remanding the cause to the commission with directions, the defendant appeals. Reversed and remanded, with directions.

Wm. G. Busby, Gen. Counsel, of Carrollton, and Alex. Z. Patterson, Asst. Counsel, of Jefferson City, for appellant Public Service Commission. R. W. Blair, of Topeka, Kan., and I. N. Watson, of Kansas City, for respondent.

BROWN, C. The Union Pacific Railroad Company is a Utah corporation. Its principal office is in New York City. It owns and operates about 3,500 miles of railroad in the states of Iowa, Nebraska, Wyoming, Utah,

Colorado, Kansas, and Missouri; its main lines extending from Kansas City, Mo., and Council Bluffs, Iowa, by way of Cheyenne, Wyo., to Ogden, Utah. It was constructed more than 25 years ago and has been used for the transportation of freight and passengers from, to, through, and between those states. It has about six-tenths of a mile of main track in Missouri, extending from the Kansas state line to the old Union Depot in Kansas City, and also has side tracks, freight house, and other terminals upon its own lands in said city; all being of a value which it estimates at \$3,058,893.29. The book value of its entire property investment on June 30, 1914, was \$281,057,730.06.

Of date June 1, 1908, it executed a "first lien refunding mortgage" of all its property securing a proposed issue of 200,000,000 of first mortgage 4 per cent. bonds, 100,000,000 of which were to be used in refunding a like amount outstanding of old first mortgage bonds. None of the refunding bonds were issued, leaving the first mortgage still in force as a first lien. Of the remaining 100,000,000, \$85,085,640 had been issued prior to June 1, 1910. On September 4, 1914, the company made application to the Public Service Commission of Missouri for permission to issue \$31,848,900 more of bonds secured by said new mortgage, to reimburse it for expenditures made upon the property for purposes authorized by the mortgage, \$124,930.38 of which had been expended upon the Missouri property. On September 22, 1914, the appellant commission, after a hearing, made its order, granting a certificate authorizing the issue of said bonds as applied for, taxed the amount of its fee to be charged for the issuance of said certificate at the sum of \$10,962.25, which was the amount provided by the terms of section 21 of the Public Service Commission Act of March 17, 1913, on the full amount of bonds covered by said application. On the next day the secretary of the commission transmitted copies of the order to respondent's attorney at Topeka, Kan., accompanied by its statement of the amount of fee taxed therefor as above stated, which order was afterward accepted by respondent in writing as follows:

"Comes now Union Pacific Railroad Company, by A. L. Mohler, its president, duly authorized, and hereby accepts the order of the commission, dated September 22, 1914, in the above-entitled cause, and agrees to obey the terms of said order."

The respondent paid the said sum of \$10,962.25, the amount of the fee so assessed, after offering to pay the sum of \$125 based upon the proportion the amount so expended in Missouri bore to the whole amount of the bonds to be issued, which offer was refused by the commission. It then offered to pay \$250, the minimum fee authorized by the statute, which was also refused. At the same time it made the following protest in writing:

"Union Pacific Railroad Company hereby pays under protest the sum of \$10,962.25, being the

amount of fees assessed and demanded for certificate authorizing the issue by said company of \$31,848,900, face value, of additional first lien and refunding mortgage bonds.

"Protest is made upon the grounds: (1) That said assessment is not authorized by the Public Service Commission Law of the state of Missouri, approved March 17, 1913, under which it purports to have been made; and (2) that if such assessment is authorized by said statute, said statute and said assessment are in conflict with the Constitution of the United States and the amendments thereto, in that they impose a burden and tax on the interstate business of said company, and a burden and tax upon said company's property beyond the limits of the state of Missouri.

"And you are hereby notified that this payment is made involuntarily and under duress, and without waiving the assertion and claim that the assessment is illegal, unauthorized and void, and such payment is made solely to escape the penalties prescribed and to prevent the revocation of the certificate issued herein, and to enable said company to issue and sell the bonds referred to in said certificate which are necessary to the carrying on of the business as a common carrier.

"You are further notified that a petition for rehearing of the decision fixing the fees herein at the sum of ten thousand nine hundred sixty-two dollars and twenty-five cents (\$10,962.25) will be immediately filed and such further proceedings will be taken as are necessary to recover such sum less the sum of one hundred and twenty-five dollars (\$125.00) this day tendered as the legal fees herein, and you are further respectfully notified not to disburse the money hereby paid until the legality of the fees are finally determined."

It then immediately filed its motion for a rehearing upon said assessment of the fee, which was overruled by respondent, and the record was then taken by writ of review, as provided in section 111 of the Public Service Commission Act, to the circuit court for Cole county, where, upon hearing, it was considered and adjudged that the order of respondent "fixing the fee for the issuance of bonds by the plaintiff Union Pacific Railroad Company, amounting to \$31,848,900, at the sum of \$10,962.25, was and is unreasonable and unlawful," and the said order was therefore set aside by the circuit court which fixed the fee to be paid by the respondent at \$250, the minimum fee provided by said section 21 of the act, and remanded the cause to the appellant commission with direction to enter its order fixing the fee at that amount. It is from this order that the present appeal is taken.

I. The respondent railroad company has furnished us with an elaborate argument as to the power of the Public Service Commission, under the terms of the statute which created it, to take cognizance of the issue of these bonds, and also upon the power of the General Assembly to confer such jurisdiction, as affected by certain provisions of the federal Constitution relating to interstate commerce and the property rights guaranteed by the first section of the fourteenth amendment to that instrument. However interesting these questions may be, we must not lose sight of the nature and scope of the proceeding in which they are presented.

It was instituted by the presentation to the appellant commission of an elaborate petition setting forth at length the organization of the respondent, its financial condition, and the purpose for which it desired to issue the bonds in question, and asking the authority of the commission for that purpose. It does not question the constitutionality of the provision of the Public Service Commission Act which the petitioner was invoking for that purpose, nor intimate that the commission was without authority to grant it the desired relief. What it wanted was such authority as the commission could grant under the act, for the purpose, as it now explains, not only of protecting itself and its agents from penalties provided in the act, but to give value to the securities by such evidence of their validity and security as the inquiry and action of the commission might afford. The respondent obtained and accepted the coveted order, and made no attempt to have it vacated or modified in respect to the authority it granted, but, while retaining its benefits, denies its liability to pay the amount which the act prescribes as compensation to the state for the issue of the certificate. Even its motion for a rehearing before the commission is confined solely to the assessment of the fee, so that both parties agree that the only question in this appeal is whether the respondent should be required to pay the sum of \$10,962.25 as assessed by the commission, or \$250 as determined by the circuit court by the judgment from which this appeal is taken. The respondent has elected, without protest, to submit itself to the jurisdiction of the commission, and is satisfied with the judgment of the circuit court. It desires to obtain the indorsement of the appellant commission as cheaply as it can, and the price is the only thing with which we have to deal.

[1, 2] II. It is true that respondent now suggests that it would not have applied for this order but for the stringent provisions of the Public Service Commission Act. This may be true, but we can see in the record many reasons why it might have desired the indorsement of the state as to this security even had no penalty been imposed by the act. It has more than \$3,000,000 worth of real property in the state acquired by authority of a statute which imposes the condition that it shall be subject to all the duties, liabilities, and provisions of the laws of this state concerning railroad corporations as fully as if incorporated in this state. 1 R. S. Mo. 1879, § 790. It was incorporated under the laws of Utah from which it takes its general powers. While we have no doubt that the Congress of the United States might constitute corporations in the exercise of its constitutional powers with reference to commerce between the states, we do not think it has ever been contended that it might carry the laws of one state into the jurisdiction of another without giving them its own authority by re-enactment. It is incompetent for Utah under any

gulse to direct how real property within the jurisdiction of this state shall be conveyed, incumbered, or diverted from the use to which it has been devoted by our laws. As we said in the late case of *De Lashmuth v. Teetor*, 261 Mo. 412, loc. cit. 433, 434, 169 S. W. 34:

"It is not to be conceived that any government would permit the title to the lands which constitute the foundation and define the territorial limits of its sovereignty to depend upon the operation of the laws of any foreign state or nation. Real estate transfers of every description, whether by act of the parties or by operation of law, depend, for their validity and effect, upon the laws of the jurisdiction in which the property is situated."

In this case it is sought to incumber this \$3,000,000 worth of property by a mortgage of \$31,000,000, and its validity and conformity to the provisions of our own laws would evidently receive valuable support from the sanction of the state through its own agency, at least so far as the Missouri security goes. In this particular case a property of the book value of \$281,000,000, of which the Kansas City terminal was a part, was already incumbered with mortgages to secure bonds amounting to more than \$165,000,000 to which this \$31,000,000 was to be added. Its capital stock outstanding consisted of more than \$222,000,000 of common stock and about \$100,000,000 of preferred stock. The bonds in question were to go into the treasury of the company to reimburse it for moneys that it claimed to have expended during the preceding five years for betterments; but whether this money had come from its earnings or from speculation or from former issues of bonds and stocks neither the lawyers before the commission nor its auditor who was present knew. The common stock had, while this \$31,000,000 was being expended, paid dividends amounting to \$100,000,000, while the preferred stock had paid dividends amounting to \$20,000,000. Under these circumstances, who shall say that it was not of interest to the purchaser of these securities as well as to the state whether these betterments had been paid for from capital already applicable to that use or from earnings, and the opinion of the commission, expressed in its order, that the bonds came fairly within the provision of the mortgage, would not be of advantage in their disposition.

[3] III. The fee fixed by law for this inquiry is primarily to reimburse the state for the maintenance of the commission and is in no sense a tax in the ordinary meaning of that term. The Legislature has seen fit to distribute this burden upon a plan having reference to the value and importance of the services, which are highly technical in their nature. The matter lay in its constitutional discretion, and the plan adopted was clearly within that discretion and is embodied in section 21 of the act, which, so far as it refers to this particular fee is as follows:

"The commission shall charge and collect the following fees. * * * For certificate authorizing an issue of bonds, notes or other evidences of indebtedness, one dollar for each thousand dollars of the face value of the authorized issue, or fraction thereof, up to one million dollars, and fifty cents for each one thousand dollars over one million dollars and up to ten million dollars, and twenty-five cents for each one thousand dollars over ten million dollars, with a minimum fee in any case of two hundred and fifty dollars."

The assessment was made in exact accordance with this legislative direction which affords the only rule for the guidance of the commission. The powers of the commission having been invoked and exercised under the act which created it, we must look to the act for the terms imposed. The assessment of the commission must therefore be sustained.

[4] IV. We have already held that the respondent, having without protest, or question, availed itself of the privileges and immunities incident to compliance with the Public Service Act at the expense of the state, cannot now deny the existence of the power which it invoked, for the sole purpose of avoiding the payment of the fee fixed by the Legislature for the same services before it requested their performance. We have also held that this fee was fixed by law in the reasonable exercise of the legislative discretion, and is therefore reasonable and proper, and must now be paid. It remains to notice in a general way the cases cited by the respondent.

[5] These may be divided into four classes: (1) Those like the Missouri case of *Westlake & Button v. St. Louis*, 77 Mo. 47, 46 Am. Rep. 4, in which we properly held that, where a water rate greater than that permitted by law had been paid under business duress, the excess might be recovered back; (2) those cases in which equity is invoked on the ground that the remedy at law is rendered burdensome and dangerous by the pains and penalties by which it is jeopardized, as in the late cases of which *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, is typical; (3) those cases in which it is sought to enforce such excessive penalties, as in *Railway v. Tucker*, 230 U. S. 840, 33 Sup. Ct. 961, 57 L. Ed. 1507; and (4) those cases in which, as in *Railway v. O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050, it is sought to recover back illegal taxes paid with protest under duress of the pains and penalties and business annoyance and injury which might result from permitting them to remain apparent charges against property. It is plain that such cases have no relation to a case in which it is sought to avoid paying to the state the statutory fee for services performed at the request of the complaining party, relying upon its own judgment as to their legal necessity or desirability.

The judgment of the circuit court for Cole

county is reversed, and the cause remanded to that court, with directions to affirm the action of the Public Service Commission in assessing the fee to be paid by the respondent at the amount of \$10,962.25.

RAILEY, C., not sitting.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the Court. All concur, except WOODSON, J., not sitting; BOND, J., in result.

McWHIRT v. CHICAGO & A. R. CO. et al.
(No. 17000.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916. Motion to Transfer to Court in
Banc Overruled. July 3, 1916.)

1. RAILROADS \Leftrightarrow 259(1) — OPERATION — INJURIES TO PEDESTRIANS — LIABILITY OF LESSOR ROAD.

A railroad company, which leases its tracks to another company, is liable for injuries to pedestrians by negligence of the lessee company, equally with such company, under specific provision of Rev. St. 1909, § 3078 (Act March 24, 1870 [Laws 1870, p. 90]).

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 802, 806, 808, 813; Dec. Dig. \Leftrightarrow 259(1).]

2. CONTINUANCE \Leftrightarrow 31 — GROUNDS — SURPRISE — CHARACTER OF EVIDENCE.

Where a case was once tried on the theory that plaintiff was struck by cars attached to a switch engine, introduction of evidence at the second trial, tending to show that he was struck by a single car shunted onto a crossing, is not ground for continuance where the case was submitted on the same theory as at the first trial, as it is merely cumulative of conditions surrounding the injury, and defendant could not assume that evidence on the second trial would be no different than on the first.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. § 98; Dec. Dig. \Leftrightarrow 31.]

3. CONTINUANCE \Leftrightarrow 31 — GROUNDS — SURPRISE — CHARACTER OF EVIDENCE.

Continuance on the ground of surprise can be granted only when the evidence introduced is of such character or the circumstances of its introduction are such as to indicate that the other party has not only been misled, but prejudiced.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. § 98; Dec. Dig. \Leftrightarrow 31.]

4. PLEADING \Leftrightarrow 433(10) — AIDES BY VERDICT — SUFFICIENCY OF PETITION.

An objection to the petition for duplicity comes too late after the verdict.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1475; Dec. Dig. \Leftrightarrow 433(10).]

5. ACTION \Leftrightarrow 38(4) — PLEADING — DUPLICITY — PERSONAL INJURIES.

A petition, seeking recovery for injuries to a pedestrian at a crossing, is not bad for duplicity in alleging several grounds of negligence, all going to the ultimate fact that plaintiff was injured at a traveled crossing because of failure to watch and warn him.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. § 549; Dec. Dig. \Leftrightarrow 38(4).]

6. RAILROADS \Leftrightarrow 345(3)—INJURIES TO PEDESTRIANS—ACTIONS—EVIDENCE—ADMISSIBILITY.

Although there was no complaint as to position of cars near the point of plaintiff's injury, evidence on that question cannot be excluded from consideration by the jury, since it is from such surrounding facts and conditions that liability is to be determined.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1115; Dec. Dig. \Leftrightarrow 345(3).]

7. TRIAL \Leftrightarrow 418—DEMURREN TO EVIDENCE—WAIVER OF OBJECTIONS.

Refusal of instructions in the nature of demurrers to the evidence need not be reviewed, where the party requesting them afterwards introduced evidence, abandoning his position indicated by them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 981; Dec. Dig. \Leftrightarrow 418.]

8. RAILROADS \Leftrightarrow 312(3)—OPERATION—INJURIES TO PEDESTRIANS—NEGLIGENCE.

It is gross negligence for the engineer in switching operations to approach a traveled street crossing from a point 600 feet distant without giving any of the signals required by statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 960; Dec. Dig. \Leftrightarrow 312(3).]

9. RAILROADS \Leftrightarrow 312(11), 333(3)—OPERATION—INJURIES TO PEDESTRIANS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

Where a pedestrian, on approaching a railroad crossing, and seeing a moving lantern at one side, watched it while crossing and was struck by the blind end of switching train, which approached without warning and without a light on the front car, from the opposite direction, he was not contributorily negligent, but the railroad was negligent in failing to provide a light.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 990, 1082; Dec. Dig. \Leftrightarrow 312(11), 333(3).]

10. RAILROADS \Leftrightarrow 350(13)—OPERATION—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

The mere fact that plaintiff had had two drinks of whisky, and that a bottle of whisky was found in his pocket, does not show contributory negligence, in the absence of evidence that such facts caused him to relax vigilance, nor does it absolve the railroad from its negligence, but it does no more than make it a jury question.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1166; Dec. Dig. \Leftrightarrow 350(13).]

11. APPEAL AND ERROR \Leftrightarrow 1050(1)—HARMLESS ERROR—EVIDENCE.

Admission of evidence, showing visual conditions at time and point of plaintiff's injury, is not prejudicial; such facts being material to a determination of liability.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063, 1069, 4153, 4157; Dec. Dig. \Leftrightarrow 1050(1).]

12. DAMAGES \Leftrightarrow 132(10)—EXCESSIVE DAMAGES—AMOUNT.

Verdict of \$10,000 to a pedestrian whose injuries in a railway crossing accident necessitated amputation of one leg below the knee, and whose other foot was crushed and broken, but not permanently disabled, and who received injuries about the head, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 381; Dec. Dig. \Leftrightarrow 132(10).]

13. DAMAGES \Leftrightarrow 95—MEASURE—PERSONAL INJURIES.

In determining damages for personal injuries, the jury must consider the loss of earning capacity and the physical and mental ca-

capacity to enjoy the fruits of his labor, from which grows mental suffering, resulting from physical disability and disfigurement.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. \Leftrightarrow 95.]

Appeal from Circuit Court, Ralls County; William T. Ragland, Judge.

Action by William J. McWhirt against the Chicago & Alton Railroad Company, and another. Judgment for plaintiff and defendants appeal. Affirmed.

Scarritt, Scarritt, Jones & Miller, of Kansas City, for appellants. E. S. Gantt, of Mexico, Mo., J. S. Gatson, of Vandalia, Ben. E. Hulse, of Hannibal, and E. L. Alford, of Perry, for respondent.

BROWN, C. This is a suit for personal injury alleged to have been received from the negligent operation of the engine and cars of the defendant Chicago & Alton Railroad Company, an Illinois corporation operating a railroad through the city of Vandalia in this state as the lessee of the Louisiana & Missouri River Railroad Company, a Missouri corporation which is sued by reason of its alleged liability as lessor. The petition alleges, in substance, that the accident occurred while the plaintiff was crossing the tracks of defendants upon a public road or street in that city called D street, where "he was struck by cars, engine, and tender" being backed west on defendants' tracks, across the street. The particular allegations of negligence upon which the plaintiff depends are: (1) That the crossing is at all times extensively used by persons on foot and in vehicles, and it was the duty of defendants to have their locomotives and cars under full control and a light on the front of cars being moved at night at that place and some person in advance and on the front end of such cars moving over said crossing in order to give travelers crossing the track the necessary warning of the approach of such cars, but that defendants and their agents and servants in violation of their duty carelessly ran a train of cars and locomotive backwards up to and over said crossing, and negligently and carelessly failed to keep a lookout for persons thereon. (2) That the defendants did not, within 80 rods, or within any other distance of said crossing, ring the bell or blow the whistle on said cars and locomotive, and keep the same ringing and blowing until the engine had passed the crossing, but negligently and carelessly and unlawfully failed to give any signal at all of the approach of said train at said crossing, but negligently ran the said cars against said plaintiff. (3) That the defendants carelessly and negligently backed said cars, engine, and tender upon and across said street without having any one in charge thereof, and without having any one in advance of said cars to indicate their approach, and without having any one at the front end of said cars to

keep a lookout for pedestrians, who were, as defendants knew, in the habit of crossing the tracks at that point frequently at all hours of the day and night.

D street is the principal business street of the city of Vandalla, and is sometimes called Main street. It is crossed at right angles by the three tracks of the railroad, which run approximately east and west through the city. The main track is on the north side; then comes the passing track and business track in that order. The freight and passenger station is west of D street on the north side of the main track. The passing track connects with the main track by switch, about 600 feet east of D street. The business track leaves the passing track about 100 feet west of the eastern connection of the latter. These tracks are parallel, and so close together that the three occupy a space of only 31 feet. The business houses fronting on the east side of D street extend to within 21 feet of the business track on the south, while those north of the railroad begin about 43 feet from the north rail of the main track, leaving a right of way of about 95 feet exclusively occupied by the railroad company. At between 8 and 9 o'clock in the evening of the day of the accident (May 11, 1910) train No. 130, a freight train, going east, came into Vandalla and stopped at the depot, where it had orders to pick up two cars standing on the business track west of D street. Counting from the east, these were the fourth and fifth cars in a string standing coupled together. The engine was cut off with its tender and, with the head brakeman, went to get these cars. Proceeding east to the switch, which with the switch to the business track was lined by the brakeman, it backed west on the business track across D street, brought out the five cars, put the two west ones onto the main track, and went back with the other three to set them on the business track west of D street, where he had found them. When the front car came to the sidewalk on the east side of D street the plaintiff, who was going north on that walk, had just stepped upon the track, and was struck by it and seriously injured. These movements will be more fully described in the opinion. D street is 64.6 feet wide. Near its west line and about 10 feet north of the main track was an electric bell, which one of defendants' brakemen testified was set so that when the switches were lined for the passing and business tracks, it would ring, and that it was ringing at the time of the accident. Plaintiff's evidence tended to prove that it was not.

Several of plaintiff's witnesses testified without objection on the part of defendants that before the accident a car or cars stood upon the business track just east of the east line of D street, and some of them testified, also without objection, that they were in a building near by and heard a crash as if cars were coupling, and soon afterwards

heard cries, and ascertained that the accident had occurred. At the close of plaintiff's evidence defendants moved for an instruction in the nature of a demurrer to the evidence, which was refused. At this point in the trial the defendants filed an affidavit of surprise, and for a continuance, the nature of which is sufficiently shown by the following colloquy between the attorneys at the time:

"Mr. Jones: I would like a few minutes to prepare an affidavit of surprise. This evidence about any cars standing on the track comes as an absolute surprise to us, because nothing intimated that in the petition, and there was at the last trial not even a suggestion of any cars standing upon that track—

"Mr. Gantt: I will state to the court, Mr. Jones says, 'That came as a surprise to him, this evidence.' I really think I was the one that was surprised. I did not know about it at the time of the trial—

"Mr. Jones: You admit when you wrote the petition you did not know about that?

"Mr. Gantt: Yes, sir; I did not know that there were any cars standing there."

Affidavits and application for a continuance was then filed and overruled by the court, and exception saved. The defendants then introduced their evidence, after which they renewed their request for peremptory instructions which were again refused. When the evidence was all in, plaintiff abandoned all the charges of negligence contained in the petition except the failure to give statutory or other sufficient signals as the cars approached and entered upon the street crossing, and at his instance the jury were especially instructed that if the agents and servants of the railroad company in charge of the train and cars should elect to give other signals and warnings instead of either ringing the bell or sounding the whistle, they might do so, and omit the statutory signals, provided such other signals were sufficient to give notice to a careful and observant person on or near the crossing that a train of cars was approaching it, and that there was no evidence of any other acts of negligence charged in the petition. It instructed, at defendants' instance, and in many forms, upon the subject of contributory negligence, but refused to instruct that section 3078 of the Revised Statutes 1909 is not applicable to the defendant Louisiana & Missouri River Railroad Company, and that in its application to that company it is unconstitutional and void. There was a verdict and judgment for \$10,000 against both defendants.

[1] 1. For the fourth time the defendant corporations are in this court, asking us to construe the lease dated August 1, 1870, by which the defendant Louisiana & Missouri River Railroad Company leased this railroad property to the predecessor of its codefendant under the very circumstances out of which this suit has grown, and to declare the act of March 24, 1870 (Laws 1870, p. 90), unconstitutional in so far as it attempts to make the lessor liable for the negligence of the lessee. *Fleming v. Railroad*, 263 Mo.

180, 172 S. W. 355; *Brown v. Railroad*, 256 Mo. 522, 165 S. W. 1060; *Markey v. Railroad*, 185 Mo. 348, 84 S. W. 61. Long before the first of these cases came before us, the most of the questions involved had necessarily been construed and determined in *Smith v. Pacific R. R.*, 61 Mo. 17 (1875), and the last in the category which the ingenuity of appellants has suggested was expressly determined against them in the *Fleming Case*. We are still satisfied with our decision in that case, and hold that the *Louisiana & Missouri River Company* is liable with the *Chicago & Alton Railroad Company* in cases of this character.

[2, 3] 2. Nor are we impressed by the force of the defendants' contention that the court erred in overruling the application for continuance made at the close of plaintiff's evidence, on the ground of surprise by plaintiff's testimony to the effect that before the accident occurred cars were standing upon the track on both sides of the crossing, and that some men in a building near by heard a noise as of the impact of cars, and cries or calls at the place of the accident, which occurred at that time. The affidavit for continuance showed that the cause had been tried upon the same petition in Audrain county; that it was then tried upon the theory that the plaintiff had been struck by the foremost of a string or drag of cars attached to and being pushed by an engine over the crossing, and that no evidence had been introduced in that trial as to plaintiff having been injured by a car which was not at that time attached to any train or other car, but was "shunted" by the impact onto the crossing. This theory was not submitted to the jury. If the evidence was not pertinent to the issues made in the petition, it should have been objected to, and had it then been admitted, the action of the court in so doing could have been assigned as error and reviewed in this appeal. Had the court permitted the petition to be amended to conform to it, the cause for continuance would then have been in the amendment. The cause, so far as the record shows, was submitted upon the same issues made and submitted in Audrain county. So far as the evidence was pertinent to those issues it was cumulative, and the defendants should have been prepared to meet it. They were not called upon to assume that the second trial would be a mere duplicate of the first, without additional evidence, and its introduction can only be permitted to stop the trial when there is something in its character, or the circumstances under which it has been withheld, that indicates that the other party has not only been misled, but has been prejudiced. This testimony related simply to the physical conditions existing at the place of the accident; and, in view of the facts developed at the trial by both parties, we do not think it affected the real issue. The action of the court in refusing the con-

tinuance was harmless, and does not constitute reversible error.

[4-6] 3. The defendants seem to object to the petition on the ground of duplicity; that is to say, that the facts stated constitute two or more causes of action inconsistent with each other. This objection comes too late after the verdict, and the record is silent as to any attempt to make it before. Both defendants answered to the merits, and no objection was made on this ground to any proceeding in the trial, nor in either the motions for a new trial or in arrest of judgment. But aside from this, we find no duplicity in the petition. The fact constituting the wrong charged is that the plaintiff "was struck by cars, engine and tender, running west on defendant railway companies' tracks," then and there being backed over and across said D street. The negligence charged is, in substance, that the defendants did this without taking any precaution to warn the plaintiff, so that he would know of the coming of the engine and cars in time to save himself from injury, and that they were running at an illegal rate of speed. It does not impair the sweeping character of this statement that it enumerates diverse things which the defendant should have done to warn plaintiff. When reduced to their final analysis, it avers that the defendant operating the road ran its engine, tender, and cars upon the plaintiff on a public highway crossing at a high rate of speed without any warning whatever. This is the single cause of action stated, of which enough of the elements to constitute a wrongful injury had necessarily to be proven, and these elements consist of all the circumstances which tended to characterize the act as wrongful or innocent, and these were all admissible in evidence. While an injury by a car, negligently kicked across the street without warning, might of itself constitute a cause of action, there was no such complaint in the petition. The position of the cars at the time, and the manner in which they were handled, were the things from which the jury must determine the wrong and consequent liability. For this reason the defendants' instruction, directing the jury not to consider the testimony of the witnesses introduced by the plaintiff as to the position of the cars on this track before the accident, was properly refused. We will notice its character and effect to some extent in the next paragraph.

[7] 4. Although the defendants complain of the refusal of their instructions in the nature of demurrers to the evidence asked at the close of plaintiff's evidence, they did not seem willing to stand upon the position so taken, as they had the right to do, but introduced testimony for themselves. We are therefore relieved of the duty of examining the question whether these instructions were well founded, and must consider the entire evidence in determining whether the court should have taken the case from the jury.

The testimony of defendants throws much light upon the subject, and tends to illuminate many things which might otherwise have escaped the attention of the plaintiff, who was not in so favorable a position to find them out. The very gist of his complaint is that the defendants wrongfully kept him in ignorance of what they were doing at a time when it was their duty to inform him.

[8] The railway owned the right of way approximately 100 feet wide through the entire city. Its station was something more than 300 feet west of the main street upon which this accident occurred, and the entire block in which it was situated, about 600 feet wide, except the right of way upon which its tracks were situated, had been planted with trees and shrubbery by the appellants, and was used as a park. There was no sidewalk on the west side of Main street. All the principal business houses of the town were arranged along its east side, where there was a concrete walk and crossing over the tracks. On the east side of the street north of the tracks was an incandescent electric light of 16 candle power, 8 feet from the ground, while in the other side of the street was an electric bell. The light was about 25 feet north of the main track, while the bell was about 10 feet north of it. The railway yard in which the accident occurred consisted of a main track running on a straight line a little north of east past the station and through the town. Immediately south of it at the usual distance for clearance, and connecting with the main track about 600 feet east of Main street, was the passing track, while still further south was the business track on which this accident occurred, having about the same clearance, and connecting with the passing track about 500 feet east of the street.

The freight train came into the station from the west at sometime between 8 and 9 o'clock. The crew consisted of Mr. Wiseman, the conductor, Mr. Stevenson, the engineer, Mr. Reynolds, the head brakeman, and Mr. Edwards, the rear brakeman (who all testified for defendants) and a fireman who did not testify and whose name does not appear. The evening was very dark, wet, and misty, so dark in fact that one of the witnesses testified that in coming to town just before the accident on horseback he was compelled to dismount in order to see the approach of a bridge, and led his horse, which was gentle, across it. There was an arc light one block south of the right of way about 14 feet high, hooded with an ordinary reflector, and another similar light a block north of the right of way, both on the east side of the street. These were the only lights in the vicinity.

The testimony of the engineer and trainmen developed the fact that they were to pick up two freight cars at the station which were coupled in a string of cars sitting on

the business track, the two being somewhat east of the station. When the train stopped the engine was cut off and went forward on the main track with the head brakeman, who got out, lined the switches into the business track, and signaled the engine to come back. The whistle did not answer this signal, but the engine came into the business track, and across Main street, and coupled to the string sitting west of the street and down toward the station. The two cars to be taken were the fourth and fifth cars in this string. The conductor had come out of the station and stood at the coupling between the fifth and sixth cars of the string. He released the five cars to be taken out, gave the signal, and what then became of him does not appear. The engine with the five cars then proceeded to the east switch line for the main track, the two cars were released, and kicked into it, the switch relined for the passing track by the head brakeman, who signaled the engineer, who says he answered it with the back-up signal of three short blasts, which was the only sound that either bell or whistle made during the two movements. The engineer says he is sure he gave the back-up signal at this time, and that he did not give it when he first backed into the switch, but gives no reason. The train then consisted of the engine and tender, the length of which is not mentioned, running backward, and three cars, each 42 feet long, with its couplings, with a clear track to the string from which the cars had been taken. When the front car arrived at the Main street sidewalk it struck the plaintiff. Up to this point there is no controversy about the movements of the engine and cars. Whether a car stood east of the Main street crossing that afternoon is of no consequence; if it did, it had simply been taken up in this movement, leaving a clear track. Nor is it of any consequence how close to the west line of Main street the string from which this drag was taken was standing that afternoon or evening. It simply has nothing to do with the case, except as a detail of the situation to be taken into consideration by the jury in determining the movements of the various actors and the accuracy of their testimony. Nor is the testimony of the three men who were in a nearby room, who heard the crash of the cars and the cries indicating that some sort of accident had happened, of any more importance than the position of these cars. It does not appear that taking up the slack of the coupling devices and their impact would necessarily make a louder and different noise than the sudden impact of the same coupling devices caused by the sudden stoppage of the engine. The defendants are not disputing the statement of the engineer that he approached this crossing from a point at least 600 feet away without giving any of the signals required by the statute during the movement of his train. That this was gross

negligence on the part of those in charge of the movement, unless some other reasonable and adequate warning was given, cannot be denied, so that the entire question of the negligence of defendants depends upon whether such warning was given.

[9] The head brakeman in charge of the movement testified that he was riding upon the ladder at the east end of the front car. This would leave 40 feet between him and the dangerous end of the car along a dark alley, approximately 18 feet in width, enveloped in darkness, into which he could only look through the little circle of light from his own lantern, which he held in his left hand between himself and the crossing. Edwards, the rear brakeman, testified that he was on the west car for the purpose of riding as near as he could to the caboose, which was his place on the train sitting from the top to the north side, but not being able to state just where he was at the time of the accident. If he was then on the side of the car, he would have to look through it to see the approach of Mr. McWhirt, which he does not claim to have observed. The wavering character of his impressions renders his testimony valueless as a guide to the facts. The evidence for defendants, without the aid from the positive testimony of plaintiff, conclusively shows that there was no lookout at the front end of the car, and no one in position to protect or warn people passing along the sidewalk. Mr. Stevenson voluntarily testified that he knew that Main street was very much traveled, and that it was necessary to exercise care in crossing it; while Mr. Reynolds testified that it was his duty to keep watch ahead of the cars for the purpose of protecting people crossing the tracks at that street. Even had not the plaintiff testified that he approached the track with care, stopping and looking both ways, and, seeing a lantern west of the crossing which gave light enough to disclose some portion of the man who held it and the car, stepped upon the track with the picture in his mind, and was immediately struck by the car coming from the other way, carries evidence of its truth, and the accuracy of his observation upon its face. He was a farmer, and the law will not hold him to a perfect knowledge of railroad operation. Its rules are for the protection of all who have rightful occasion to use the public streets. Even those who may not have had an opportunity to observe the practice of railroads are not outlawed in this respect. When he heard the rumbling of the switching in the east end, the law did not require him to wait until something had crossed the street, for it might never come. When he looked east he saw nothing. He looked west, and saw the lantern and the man holding it at the very place where Mr. Wiseman had, but a few moments before, stood with his lantern and released the five cars from the string to which it had been coupled, and it seems

reasonable to suppose that he was waiting to signal the engineer when he should approach, either directly or through the head brakeman, to couple the remaining three cars into the same string from which they had been taken. He cannot be blamed for believing that the danger was from that direction and for keeping that light in view when he stepped upon the track. In short the testimony of Mr. McWhirt fits so nicely in the circumstances of the movement as related by Mr. Stevenson as to demand attentive consideration. If it were true, and the jury had the right to believe it, a light at the front end of the car would have saved him from harm.

The evidence was convincing of the negligence of defendants. The plaintiff testified, and we cannot blame the jury if it believed him, that when he heard the rumbling of cars toward the east, he stopped twice and looked and listened to see if there were evidences of their proximity. He neither saw nor heard any such evidences, but did see the light at the end of the string of cars opposite the depot, and took measures to protect himself against the danger it might indicate. We think that if his statement be true, he met all the requirements of the law in his effort to guard himself against the defendants' negligence. We do not take it to be the law that, having done all, without success in escaping the pursuing negligence, the victim must be held to have brought the calamity upon his own head.

[10] It is suggested, also as evidence of contributory negligence, that plaintiff had taken two drinks of whisky, and that the bottle containing what he had not consumed or given to his friends was broken in his pocket and communicated its odor to his clothing. Even this unfortunate circumstance ought not to justify the defendants for neglecting their duty to use reasonable care under the circumstances to protect him. A careful reading of the testimony has failed to impress us that his two drinks had any tendency to relax the care which he owed to defendants to protect himself from dangers to which their negligence in the operation of the road might expose him, or that it affected his ability to accurately observe his surroundings. We think that the question of contributory negligence was well submitted to the jury.

[11] 5. The defendants have assigned numerous errors in the admission of testimony relating to visual conditions surrounding the 18 feet of walk included in the plaintiff's progress from the corner of the millinery store to the corner of the car which collided with his head. These errors, if they were errors, were distributed with reasonable equality between the parties, and we do not think this testimony prejudiced or influenced the jury. A situation was before them, which it is true could not well be reproduced for ob-

servation. The darkness, the mist and fog, the little 16 candle power light 50 feet north, the arc lights a block away to the north and south to the scene—all these things were before the jury in a vivid verbal picture. They could determine from all this unquestioned evidence where the lights or shadows predominated with respect to this particular view, and a part of their equipment for the performance of their own duties, no doubt, consisted of a recollection of the caprices of eyesight which they themselves had experienced. We do not think that the rulings of the court in this connection were prejudicial error.

[12, 13] 6. Finally the defendants contend that the damages are so excessive as to indicate such an improper state of mind on the part of the jury and neglect of duty on the part of the trial court as call for our interference. While the judgment is a substantial one, and if one's limbs were to be considered as investments, founded only upon the income which they return, and which would afford a simple measure of damage for their destruction, there would be much justice in this claim, but there are elements which the law takes into consideration in case of such injuries that do not admit of such simplicity of measurement. The pain and physical and mental suffering are elements more difficult to determine. And there are two elements in every human life that must be reckoned with under such circumstances: (1) The earning capacity which may be measured with more or less accuracy in money; and (2) the physical, as well as the mental, equipment by which one enjoys the fruits of his activities. Out of the latter grows mental suffering which the law considers as resulting from physical disability and disfigurement. Plaintiff's left leg was amputated between the foot and the knee. The right foot was crushed and broken, but not permanently disabled, and he was injured about the head. Taking all these things into consideration, we do not think the judgment in this case is so excessive as to justify our interference with the discretion lodged by law in the trial court.

The judgment is therefore affirmed.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

ST. LOUIS & S. RY. CO. v. STEWART et al.
(No. 17854.)

(Supreme Court of Missouri, Division No. 1. June 2, 1916. Motion for Rehearing and to Transfer to Court in Banc Overruled July 8, 1916.)

INDEMNITY — CONTRACT TO "ASSUME ALL RISK OF ACCIDENT."

Under a contractor's contract with a street railway for constructing a coal chute upon the

railway company's property, providing that "the contractor shall assume all risk of accident to materials, workmen or persons engaged in or about the building," the contractor was liable to the railway company for amount paid by the railway company on a judgment recovered against it and a subcontractor of the original contractor by an employé of the subcontractor for injuries by coming in contact with uninsulated feed wires on a pole of the railway company, the contractor having been called to defend such suit, although the pole was not on the premises where the chute was to be erected but about 20 or 25 feet distant, and although the accident was due to the railway's negligence, where, although by necessary implication of the contract the railway company was under duty to make the wires safe for contractor's servants upon request, no notice by the contractor to make them safe appeared to have been given.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 10-15; Dec. Dig. —8.]

Appeal from St. Louis Circuit Court; William T. Jones, Judge.

Action by the St. Louis & Suburban Railway Company against Alexander M. Stewart and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This suit was brought by the plaintiff against the defendants to recover the sum of \$25,412.85, the amount of a judgment one Clark recovered against it, in a suit brought by him against the present plaintiff and the Union Iron & Foundry Company, of the city of St. Louis, a subcontractor of the present defendants, who were the original contractors with this plaintiff to construct for it certain coal bins and chutes in said city for the consideration of \$7,000; the defendants, by written contract assuming all accidents to materials, workmen, or persons engaged in or about the structure.

The facts of the case, as disclosed by this record, are practically undisputed, and are stated by counsel for defendants substantially as follows:

On August 19, 1904, the plaintiff and the defendants entered into a contract, whereby defendants undertook the work of constructing certain coal bins and chutes for plaintiff at or near its power house, just inside the western limits of the city of St. Louis. The contract price to be paid to the defendants (appellants) for this work was \$7,000. The defendants sublet the structural steel work under this contract to the Union Iron & Foundry Company, as an independent contractor. Clark was an employé of the Union Company. On January 17, 1905, at a time when the only persons engaged on the work were those employed by the Union Company, Clark, under the directions of a foreman of the Union Company, one Samuel Armstrong, ascended a pole on which the plaintiff company maintained heavily charged feed wires, leading from its power house to the trolley wires, which furnished the power for the movement of its cars. While undertaking to pass a guy rope over the top of the pole, Clark was shocked and severely injured by

the electric current passing through the wires. Plaintiff's evidence shows that these wires carried a current of 6,600 volts, a very powerful and deadly voltage.

The pole upon which Clark climbed and was injured was not upon the immediate premises upon which the coal chute was being erected, but was removed about 20 or 25 feet from the place where the buildings were to be erected, which were in possession of the plaintiff. The pole was in such close proximity to the site of the building as to be considered a part thereof, for certain purposes to be later noted. The poles and wires carrying the electric current were indispensable instrumentalities in the operation of plaintiff's street car system, and were used and operated by plaintiff exclusively for that purpose; and plaintiff owned and had exclusive control over them and over the premises upon which Clark was injured, subject to the implied rights the defendants and their subcontractor had to work around and about them in the performance of certain portions of their said contract, which will be specially considered later.

Clark sued both the plaintiff, the railway company, and his employer, the Union Iron & Foundry Company, to recover for the injuries which he sustained. The appellants herein were not a party to that suit. Upon a trial in the circuit court of the city of St. Louis, there was a verdict and judgment in his favor against the plaintiff railway company for \$20,000, but a verdict was returned in favor of the Union Iron & Foundry Company, and judgment was entered against Clark as to that company. Plaintiff appealed from the judgment against it, and Clark appealed from the judgment in favor of his employer, the Union Iron & Foundry Company. In this court Clark's judgment against the plaintiff company was affirmed (*Clark v. St. Louis & Suburban Ry. Co.*, 234 Mo. 396, 137 S. W. 583), and the judgment in favor of the Union Iron & Foundry Company and against Clark was reversed and remanded (234 Mo. 436, 137 S. W. 577, 45 L. R. A. [N. S.] 295). As to the Union Iron & Foundry Company, this court held that it, as Clark's employer, owed Clark a reasonably safe place in which to perform his work; that the dangerous condition of such place may be the result of acts of a third person over whom the master has no control, and yet leave the master liable; and that therefore Clark had established a prima facie case against his employer. Thereafter, on May 29, 1911, Clark dismissed his case in the circuit court as to the Union Iron & Foundry Company, and the judgment was entered in favor of Clark against the plaintiff company for \$25,800. This amount represented the original judgment and interest, and the plaintiff company paid same on June 2, 1911, together with \$112.85, accrued costs. Having paid the judgment and costs, plaintiff brought this

suit against the defendants to reimburse it for the sum so paid to Clark.

The petition of plaintiff against defendants proceeds on the theory that, in their contract of August 19, 1904, for the construction of the coal bins and chutes, the defendants insured or agreed to indemnify the plaintiff against liability for accidents and injuries to all persons or property, arising during the construction of the work, even if such injuries were due to the wrongful act of plaintiff; that the contract was an ordinary builder's contract for the construction of a coal chute upon a certain portion of the property of the plaintiff. The particular provision of the contract which is construed by plaintiff as a liability insurance undertaking is found under the head of "General Conditions" in the specifications forming a part of the contract, and reads as follows:

"The contractor shall assume all risk of accident to materials, workmen or persons engaged in or about the building, and where the building adjoins or fronts on a public thoroughfare shall assume all risk of damage to persons passing the said building, and shall also make good any damage to adjoining property, whether public or private, caused by him or his employés during the construction of the building herein specified, before a final settlement is made and prior to the acceptance of the finished structure."

Upon the trial the plaintiff called Clark as a witness, and he testified that upon the orders of his foreman, Armstrong, employed by the Union Iron & Foundry Company, he climbed the pole in question, to get a guy rope over the wires, which was necessary in the construction of the bins, and that while on top of the pole he was suddenly shocked by the current, thrown from the pole, and severely injured. Clark testified that he did not know when he ascended the pole that the feed wires which caused his injuries were not insulated; that there was a black covering on them, but he did not know what it was, and the moment he came in contact with the wires he was shocked and burnt. He also testified that Armstrong, his foreman, represented the Union Iron & Foundry Company, for which he himself was working, and had no connection with the defendants James Stewart & Co. Clark also testified that the pole where he was injured was not upon the premises where he was putting up the iron work, but was about 20 or 25 feet away therefrom on the property of the St. Louis & Suburban Railway Company, the plaintiff.

Julius Walsh, who was the vice president and general manager of the plaintiff company at the time this work was going on and when Clark was hurt, testified in substance that the wires were highly charged, and that he knew it would be dangerous for any one to touch them or come in contact with them, directly or indirectly, in any way. He claimed to have told Armstrong, the foreman of the Union Iron & Foundry Company, to keep the rope, teams, and men from con-

tact with the wires, because they were highly charged, and also claims to have told the representative of the defendants, Henry W. Lohmann, the same facts early in the year 1905, when they began the work under their contract of August 19, 1904. This was contradicted by Lohmann.

Lohmann, superintendent of the defendants, testified that he knew nothing about the insulation of the wires; did not think he could tell from looking at the wires from 30 feet below them; had no knowledge of the voltage of the current carried through the wires at that time; that neither he nor any one else on behalf of Stewart & Co., undertook to direct the Union Iron & Foundry Company as to how the work was to be carried on.

The defendants offered in evidence the instructions given in the case of *Clark v. St. Louis & Suburban Railway Company*, supra, and also offered to read in evidence the opinion of this court in the same case in connection with the mandate. Upon plaintiff's objection, both offers were excluded. Defendants also offered to read in evidence that part of the opinion of this court in the case of *Clark v. St. Louis & Suburban Railway Company*, supra, which recited that the evidence in the case showed gross negligence on the part of the railway company, and upon objection made by plaintiff, the court excluded such evidence. At the conclusion of the plaintiff's case, and again at the close of the whole case, defendants offered peremptory instructions for a finding in their favor, which instructions were each refused by the court, defendants in each instance duly saving their exceptions. At the conclusion of all the evidence, the court instructed the jury in favor of plaintiff in the following language:

"The court instructs you that if you find and believe from the evidence that plaintiff and defendants entered into a written contract on the 19th of August, 1904, wherein defendants undertook to erect a coal bin or chute at plaintiff's power house at Hodiamont; and if you further find from the evidence that while said coal bin or chute was being erected by defendants, pursuant to said contract, if you so find, one C. E. Clark was injured, while engaged in and about the construction of said coal bin, and that thereafter he sued plaintiff and recovered a judgment against it, on account of his injuries so received, and that plaintiff paid the same, and that defendants were notified by plaintiff and requested to defend said action and refused to do so—then your verdict must be for plaintiff."

And the court refused an instruction asked by defendants, announcing the contrary proposition to that stated in the instruction given for the plaintiff. The jury found their verdict in favor of plaintiff for \$28,169.35, on which judgment was entered, and from which judgment, after an unavailing motion for new trial, defendants have appealed to this court.

The only question for this court to decide is stated by counsel for the defendants in the following language:

"On behalf of defendants, we respectfully suggest, at this time, that if the provision of the contract relied on by plaintiff amounted to an insurance covenant, then the trial court proceeded correctly. If, on the other hand, the provision amounted to an indemnity covenant merely, then the trial court was in error, and its judgment will have to be reversed."

Stewart, Bryan & Williams and Schnurmacher & Rassieur, all of St. Louis, for appellants. Boyle & Priest and G. T. Priest, all of St. Louis, for respondent.

WOODSON, J. (after stating the facts as above). I. There is but a single legal proposition presented by this record for determination by this court, and it is not difficult of solution. In the *Clark Case* before mentioned, 234 Mo. 396, 137 S. W. 583, it was held it was the legal duty of the plaintiff in this case, one of the defendants there, to furnish the employes of the Union Iron & Foundry Company, Clark being one of them, a reasonably safe place in which to work while performing their duties in constructing the bins and chutes mentioned. On page 417 of 234 Mo., on page 588 of 137 S. W., the court, in discussing this question, said:

"By contracting with Stewart & Son, the contractors, to erect the coal chute upon its premises and for its use, the appellant by necessary implication agreed with the contractors and the subcontractors that they and all necessary laborers whom they should employ might be taken by them to the premises and there assist in the construction of the coal chute. The evidence also was uncontradicted that the respondent was rightfully upon the premises as an employe of the Union Iron & Foundry Company, subcontractor, engaged in the work of erecting the said coal chute for the appellant. While so engaged in the performance of his duties, respondent came in contact with two or more of appellant's high-tension wires, and received the shocks of which he now complains. According to all of the adjudications of this court regarding this class of injuries, the foregoing evidence made out a prima facie case for the respondent, especially when it was conceded by all that the wires in question were not insulated at all, but were simply covered with some weather-proof substance, intended to protect the wires from the elements, and not for the purpose of preventing the electric current from escaping therefrom."

That ruling was bottomed upon the common-law duty of the plaintiff here, one of the defendants there, to furnish Stewart & Son, the defendants here, the original contractors, and their subcontractors and employes, with a reasonably safe place in which to work, while constructing the buildings mentioned. In other words, that duty of the plaintiff extended down the line to and from the original contractors and their employes to the subcontractors and their employes; and it was because of the breach of that duty by the plaintiff here to Clark that it was held liable to him for the injuries he sustained. But that was not all; it was also equally the legal duty of the subcontractor, the Union Iron & Foundry Company, the other defendant there, to furnish Clark, one of its employes, with a reasonably safe place in which to work, and because of the breach of

that duty to Clark, it was also held liable to him. In short, both defendants in that suit owed Clark the same duty and, because of its breach by both of them, were held liable to him for said injuries. Under that state of facts, when Clark dismissed his suit as to the Union Iron & Foundry Company, the full liability for the injury rested upon the street car company, the plaintiff in this case, and for that reason it was compelled to pay the entire judgment to Clark. After doing that, the plaintiff naturally turned to its contract with Stewart & Son, the original contractors, the defendants here, for reimbursement for the \$25,412.85 it was compelled to pay Clark. Upon that state of facts the defendants insist that they are not liable to the plaintiff for the money so paid by plaintiff, because the injury to Clark was caused by its negligence in not furnishing him a reasonably safe place in which to work.

In this connection it should be remembered that the pole and wires mentioned were in a reasonably safe condition for the uses for which they were constructed and were being used when the building contract mentioned was executed—not defective. The insulation of the wires was for their protection against the elements, and not for the protection of man, as he had no business there, in connection with the purposes for which they were constructed, except perhaps for repairs, etc., which are foreign to this case. Under those conditions is that insistence sound? We are of the opinion that it is not, and for this reason: Had it not been for the contract of insurance or indemnity before mentioned, by which the defendants agreed to "assume all risks of accident to materials, workmen, or persons engaged in or about the building," etc., they clearly would not have been liable to plaintiff for the injuries sustained by Clark, because the injuries were caused by its own negligence, as before stated, in not having furnished him with a reasonably safe place in which to work. It was for that very reason that the contract of indemnity between the plaintiff and defendants was executed. The latter being an independent contractor, and having exclusive management and control over the construction of the buildings and the employes engaged thereon, and the plaintiff having no voice in the premises, naturally did not want to assume liability for accidents caused by the new conditions to be created by the defendants or their subcontractors, or for injuries to their employes, which might be caused by the former's negligence, over which plaintiff had no control, while, upon the other hand, the defendants, having full charge and control of the buildings and the employes, were quite willing to assume that responsibility, and for a moneyed consideration paid therefor by the former, the latter agreed to reimburse plaintiff for all sums it might have to

pay out on account of injury done to materials and men used in or working upon the buildings.

And the effect of that contract was not modified or nullified by the fact that the defendants themselves had no authority to meddle or interfere with the pole and the deadly wires mentioned. This is true for the reason that the contract between the plaintiff and the defendants to construct the bins and chutes upon the former's premises, and in such close proximity to the pole and wires mentioned, which might thereby render certain portions of the work dangerous to the employes engaged thereon, in which event it by necessary implication agreed with the latter to make the place reasonably safe for the purposes mentioned, or to permit the defendants to so do; but this record wholly fails to show that defendants notified plaintiff of that dangerous condition or to remedy the same or to permit it to do so. The record, however, does show that the defendants offered in evidence certain portions of the record in the case of *Clark v. Railway Co.*, supra, but the defendant took no part in the trial of that case, although notified to appear and defend it; nor does this record show the bearing or materiality of the portions of that record offered to said notice of danger or request to remedy the same. This record is perfectly silent upon those matters. Moreover, the Clark Cases were contests between him and the plaintiff there, and the Union Iron & Foundry Company, and not between the plaintiff and these defendants, and this question was not necessarily there involved; but, be that as it may, no such showing was made in this case, nor offered to be made.

The principle of the implied contract between the plaintiff and defendants here was decided in the case of *Clark v. Railway*, supra. See quotation heretofore taken therefrom.

Finding no error in the record, the judgment is affirmed. All concur.

MILLER v. FALLOON. (No. 19299.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916. Rehearing Denied
July 3, 1916.)

1. APPEAL AND ERROR \S 544(2) — ABSENCE OF BILL OF EXCEPTIONS — RECORD — QUESTIONS PRESENTED FOR REVIEW.

Where it did not appear, either in the abstract filed by defendant or in the additional abstract filed by respondent, that any bill of exceptions was taken embodying the proceedings resulting in the appointment of a receiver, or in the court's refusal to revoke such appointment, defendant's appeal from the order denying a motion to revoke the appointment presented only such questions as arose on the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 2424, 2428, 2478; Dec. Dig. \S 544(2).]

2. APPEAL AND ERROR §544(2)—ABSENCE OF BILL OF EXCEPTIONS—RECORD—QUESTIONS PRESENTED FOR REVIEW.

If the judgment appealed from is within the scope of the petition, and the court making it has jurisdiction to act, the judgment is not open to review, where only such questions as arise upon the record proper are presented by the appeal, on account of the absence of a bill of exceptions in the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2424, 2428, 2478; Dec. Dig. §544(2).]

3. APPEAL AND ERROR §934(2) — PRESUMPTION FAVORING COURT BELOW—ABSENCE OF BILL OF EXCEPTIONS.

In the absence of bill of exceptions setting forth the evidence, the appellate court must indulge the presumption that the judgment of the trial court was justified by the facts shown on trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. §934(2).]

4. DOWER §74—SUIT FOR ADMEASUREMENT—JURISDICTION.

The circuit court of the county where a decedent's land was situated had jurisdiction of the subject-matter of the suit and of the person of defendant in a suit by decedent's daughter and only child against his widow, praying the admeasurement of dower.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 256-259; Dec. Dig. §74.]

Appeal from Circuit Court, Bates County; C. A. Calvird, Judge.

Action for the admeasurement of dower by Jessie Falloon Miller against Ellen M. Falloon. From an order denying defendant's motion to revoke an order appointing a receiver for decedent's estate, defendant appeals. Judgment affirmed.

Frank M. Ludwick, John B. Gage, and George Lockridge, all of Kansas City, for appellant. Silvers & Silvers, of Kansas City, for respondent.

BOND, J. I. This action was instituted May 25, 1915, in the circuit court of Bates county, by the plaintiff, Jessie Falloon Miller, who is the only child and heir of George Falloon, deceased, against his widow, Ellen M. Falloon, alleging that her father died intestate, and asking that the dower of Ellen M. Falloon be determined and set apart to her, and the balance of the property of the estate of George Falloon be turned over to her as his heir at law.

Defendant answered July 6, 1915, denying that George Falloon died intestate, and averred that by a will, executed in January, 1914, he devised to defendant all of the real estate mentioned in the petition, and also all of the personal property of which he died possessed, except \$1,000, which he bequeathed to his granddaughter Susan Cooley, that said will had never been revoked, and that there was then on file in the probate court of Jackson county a petition asking that court to probate said will and to establish its contents. Defendant further averred that the petition of the plaintiff was premature, and that the circuit court of Bates county was without ju-

risdiction to determine the amount of dower or the rights of the defendant in and to said property until the proceedings in the Jackson probate court were concluded.

On October 18, 1915, the plaintiff filed in the circuit court of Bates county an application for the appointment of a receiver, alleging that this was necessary for the preservation of the property of the estate. Notice was given of this application, and it was granted October 21, 1915. Thereupon defendant filed a motion to revoke the order appointing a receiver, which was denied, from which interlocutory order of the circuit court of Bates county defendant appealed to this court.

[1] II. It nowhere appears, either in the abstract filed by appellant or in the additional abstract filed by respondent, that any bill of exceptions was taken in the lower court embodying the proceedings resulting in the appointment of the receiver or in the refusal of the court to revoke such appointment; hence this appeal presents only such questions as arise upon the record proper.

[2, 3] In such cases the rule is that, if the judgment or decree appealed from is within the scope of the petition and the court making it in possession of jurisdiction to act, then its judgment or decree in so doing is not open to review. The reason of the rule is that, in the absence of a bill of exceptions setting forth the evidence, the appellate court has no means of knowing or reviewing the grounds upon which the lower court based its judgment, and therefore must indulge the presumption that the judgment was justified by the facts shown on the trial.

[4] The face of the record proper in the instant case discloses a suit in the circuit court of the county where the land is situated by the daughter and only child of the deceased owner, praying the admeasurement of dower of the widow. After a traverse in the answer, a receiver was applied for and appointed upon due notice. From a refusal to vacate such order the present appeal was taken.

It is evident that these proceedings invested the circuit court of Bates county with jurisdiction of the subject-matter and the person of the defendant, and, there being nothing presented by bill of exceptions showing error in the exercise of its jurisdiction, the judgment of that court must be and is affirmed. All concur.

BLANKENBAKER v. ST. LOUIS & S. F. R. CO. (No. 17913.)

(Supreme Court of Missouri, Division No. 1
June 2, 1916. Rehearing Denied
July 3, 1916.)

1. MASTER AND SERVANT §285(7)—LIABILITY FOR INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.

In an action for injuries under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), the issue of fact as to whether a

crack in the flange of a car wheel was an old chilled crack or not held a jury question under conflicting evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1016; Dec. Dig. ⚡ 285(7).]

2. WITNESSES ⚡ 219(5)—PRIVILEGE—TESTIMONY OF PHYSICIAN—WAIVER.

Under Rev. St. 1909, § 6362, making physicians incompetent witnesses as to any information acquired from a patient, which was necessary to enable them to prescribe, held, the privilege thus created is waived by testimony of the plaintiff in a personal injury action as to advice given to him by his attending physician as to his physical condition and future fitness for work, and the defendant may fully inquire into the conversation in which such advice was given.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 781, 782; Dec. Dig. ⚡ 219(5).]

3. NEGLIGENCE ⚡ 141(12) — COMPARATIVE NEGLIGENCE — FEDERAL EMPLOYERS' LIABILITY ACT—INSTRUCTIONS.

In an action for personal injuries under the federal Employers' Liability Act, where the cause of negligence is attributable partly to the negligence of the carrier and partly to that of the injured employé, an instruction that plaintiff cannot recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence of the carrier bears to the negligence attributable to both, is proper.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 397-399; Dec. Dig. ⚡ 141(12).]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

Action by H. L. Blankenbaker against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

W. F. Evans, of St. Louis, and Cowherd, Ingraham & Durham and Hale Houts, all of Kansas City, for appellant. F. P. Sizer, of Monett, and White, Hackney & Lyons, of Kansas City, for respondent.

BOND, J. Action under the federal Employers' Liability Act for damages for personal injuries sustained by plaintiff while in the employ of defendant. Plaintiff was the conductor of a freight train owned and operated by the defendant; his usual run being from Amory, Miss., to Memphis, Tenn., a distance of about 128 miles. On the morning of April 28, 1911, plaintiff left Amory with a train of 50 cars, all with air brakes in operation. They reached Holly Springs, 83 miles to the north safe, but some 2 miles further on the coupling broke between the eighteenth and nineteenth cars. An "emergency drawhead" was put in by plaintiff, the train was coupled together, but the severance of the air line on the nineteenth car rendered the air brakes on all cars to the rear of that one useless. There was evidence tending to show that, in case of such an accident, one of the printed rules of defendant company required the conductor in charge of the train to proceed to the next station, where the car with the severed air brake should be switched

out and placed at the rear of the train so that the air brakes on the other cars could be operated. In this instance, the train proceeded to the next station, Red Bank. Here plaintiff endeavored to have the defective car switched to the rear of the train, but was informed the engine was short of water and the engineer said he would not be able to reach the next water tank if he used what water he had for switching purposes. Plaintiff then endeavored to get into telegraphic communication with the train dispatcher, but the office at that point was closed. On leaving Red Bank, the plaintiff and both brakemen rode on top of the train to be near the hand brakes, and thus have better control of the cars on which the air had been cut out. The train passed through the next station, Victoria, but about a mile from this point a derailment was caused by the breaking off of the flange of one of the wheels of the nineteenth car. Plaintiff was found unconscious under the derailed car at the side of the right of way and was taken to the Railroad Hospital at Memphis. The evidence tended to show that the derailment was caused by the stripping off of the flange of one of the wheels of the nineteenth car, the one on which the "emergency drawhead" had been used, due, it is claimed by plaintiff, to an old "chilled crack," and, by the defendant, to a new break. There was a verdict and judgment in favor of plaintiff for \$10,000. Defendant thereupon filed its motions for new trial and in arrest of judgment, which being overruled, it appealed to this court, assigning as error, among other things, the giving of that portion of instruction No. 9 which related to the rule prescribed for diminution of damages where the evidence discloses contributory negligence on the part of plaintiff. On this point the instruction was, to wit:

"And you are further instructed that, if you shall find that the plaintiff was guilty of any negligence that contributed to produce the derailment and his consequent injury, then the jury will deduct from the damages assessed such proportion thereof as may be attributable to the contributory fault of the plaintiff."

II. This whole case turns on one issue of fact and the correctness or incorrectness of its submission to the jury. The plaintiff had one witness from whose testimony the jury might have inferred that the breaking of the flange of the car wheel causing the derailment of the car was the result of an old crack in the flange, termed by persons cognizant of such matters as a "chilled crack," for the reason that it might be caused by the rapid cooling and consequent contraction of the tread of the car wheel in the treatment accorded to it in the process of hardening at the foundry.

[1] The unsupported evidence of this witness was contradicted by a number of witnesses for the defendant who stated that

they examined the car wheel after the injury and it showed no "chilled crack" in the flange, but did disclose the existence of a new crack where the flange was stripped off the wheel. This conflicting evidence on the issue of fact as to the nature of the crack in the flange made that issue one for determination by the jury. Hence the only remaining inquiry is whether it was submitted without error in the giving or refusal of instructions or in the reception or exclusion of evidence. Appellant assigns error as to both.

Taking that relating to the evidence first, the plaintiff testified that, on leaving the hospital at St. Louis, he was told by his physician, Dr. Woolsey:

"That there was no use for him (plaintiff) to stay there any longer, and that in the course of time he might be able to assume his duties as a conductor."

This statement, in substance, was testified to by plaintiff on his direct, cross, and re-examination. Thereafter defendant called Dr. Woolsey for the purpose of proving the exact statement or conversation which took place when he discharged the plaintiff from the hospital. The court excluded this testimony. The record as to this ruling is as follows:

"Q. I will get you to state to the jury just what that conversation was that occurred between you and Mr. Blankenbaker at that time. Mr. White: Well, we object to that because he does not put the question in the form required for impeachment. Mr. Cowherd: It is not an impeaching question. Mr. White: Well, that is the shape it is in, and, whether it is intended as an impeachment or not, we object to it, and we object to any conversation or communication between the witness and the plaintiff while the plaintiff was under the charge of the witness as a patient in the St. Louis Hospital, on the ground that it is incompetent for any purposes. (Which objection was by the court sustained, to which action and ruling by the court the defendant at the time duly excepted and still doth except.)"

[2] This ruling was erroneous. The statutory provision (R. S. 1909, § 6362), making physicians incompetent witnesses as to any information which they may have acquired from a patient which was necessary to enable them to prescribe, is in derogation of the common law and creates a privilege which the patient may waive at will. 4 Wigmore on Evidence, § 2388; Epstein v. Railroad, 250 Mo. loc. cit. 22, 156 S. W. 699, 48 L. R. A. (N. S.) 394, Ann. Cas. 1915A, 423; State v. Long, 257 Mo. loc. cit. 221, 165 S. W. 748.

In the matter in hand the plaintiff, as a part of his case, stated the advice given to him by his attending physician as to his physical condition and future fitness for work at the time he left the hospital. This, under the cases cited, opened a door for a full inquiry as to the knowledge of the physician and the health and extent of the injuries of the plaintiff at the time of the alleged statement by the physician, and as to what

advice he then gave plaintiff in view of the knowledge upon which it was predicated. The statutory bar to the testimony of the attending physician having thus been removed by the conduct of the plaintiff, it necessarily follows that the foregoing ruling of the trial court was erroneous.

[3] III. As this cause must be reversed and remanded for the error above pointed out, it might be well, on a retrial, for the plaintiff to frame his instructions as to the applicability of the federal Employers' Liability Act in strict accordance with the interpretation given to that act by the Supreme Court of the United States in the case of Seaboard Air Line v. Tilghman, 237 U. S. loc. cit. 501, 35 Sup. Ct. 653, 59 L. Ed. 1069, where it is said, in referring to the provisions of that act, providing for the diminution of damages assessed where proof has been made of contributory negligence on the part of the plaintiff:

"It means, and can only mean, as this court has held, that, where the causal negligence is attributable partly to the carrier and partly to the injured employé, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery a proportional part of the damages corresponding to the employé's contribution to the total negligence. Norfolk & Western Ry. v. Earnest, 229 U. S. 114, 122 [33 Sup. Ct. 654, 57 L. Ed. 1006, Ann. Cas. 1914C, 172]; Grand Trunk Western Ry. v. Lindsay, 233 U. S. 42, 49 [34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168]."

The result is that the judgment in this case is reversed, and the cause remanded. All concur.

CARLSON et al. v. ATCHISON, T. & S. F. RY. CO. (No. 17905.)

(Supreme Court of Missouri, Division No. 1. June 2, 1916. Rehearing Denied July 3, 1916.)

1. DEATH — 58(1) — PRESUMPTION THAT DECEASED EXERCISED DUE CARE.

In an action for death at railroad crossing the decedent is presumed to have exercised ordinary care for her own protection; but this presumption does not continue after all the facts of the injury are shown.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 76; Dec. Dig. — 58(1).]

2. RAILROADS — 328(4) — NEGLIGENCE — COLLISIONS AT CROSSINGS — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY.

Where plaintiff's intestate, a woman of mature age and unimpaired sight and hearing, was killed on defendant's railroad crossing, at a point where there was an unobstructed view of 2,228 feet in the direction from which the train came, held, her contributory negligence precluded recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1061; Dec. Dig. — 328(4).]

Appeal from Circuit Court, Jackson County; T. J. Seehorn, Judge.

Action by Anton Carlson and another

against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Action by the husband and child of Ida Carlson for the alleged negligent killing of the said Ida, by one of defendant's passenger trains at a road crossing at or near Le Loup, Kan. The action is predicated upon Kansas statutes and their construction in the state of Kansas by its Supreme Court, which statutes and decisions are specifically pleaded. The negligence charged in the petition runs thus:

"On or about the 20th day of October, 1911, in said Franklin county, and at the western edge of said Le Loup, while Ida Carlson, the wife of (Anton Carlson, and mother of Hulda Carlson) was driving a horse hitched to a buggy in which she was riding on a public highway across said railroad, defendant ran a locomotive drawing a west-bound passenger train against her, whereby she was killed. Said death was caused by defendant's negligence in the following respects: Defendant did not sound a whistle of said locomotive or give any other warning of its approach at least 80 rods from said crossing nor at any other point so as to give reasonable warning of the approach of said train. Defendant ran said train at a speed so great that deceased did not have reasonable opportunity to escape after she could have discovered its approach. Although the place where (said wife and mother) was killed was a regularly laid out public highway where it was crossed by a number of defendant's tracks, defendant had not restored the highway to such state as not to unnecessarily impair its usefulness, and had not constructed and had not kept in repair a good and substantial crossing, and had not secured on each side of each rail of its railroad a board not less than 12 feet long and not less than 10 inches wide and 2 inches thick, nor a board of any other character, and had not filled the space between its rails nor any part of said space with gravel or broken stones, nor floored the space with boards of any kind, by reason of which omissions the vehicle in which deceased was riding was caught in and impeded by the ties, rails, and uneven surface of said railroad and depressions of the spaces between said rails and tracks, whereby she was prevented from getting out of the way of the approaching train."

The answer was (1) a general denial, (2) a plea of contributory negligence, and (3) another defense, which in our view of the law and facts of this case need not be described or set out. Reply general denial of all new matter in the answer. Verdict was for plaintiff in sum of \$7,500, and from the judgment entered thereon the defendant has appealed.

The trial court by instruction took from the jury the alleged negligence of failure to warn, as charged in the petition, and submitted the case solely on the negligent rate of speed at which the train was being run at the time and place of the accident. This was submitted, as it was pleaded, as common-law negligence; the trial court having declared that no rate of speed had been fixed either by law or ordinance. The instruction reads:

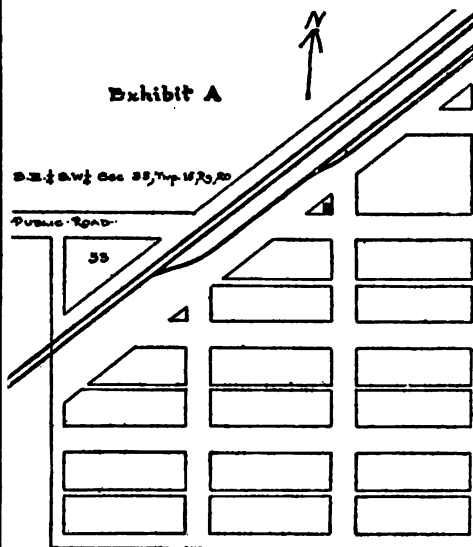
"The court instructs the jury that the amount of care required of a railroad company in operating a train as it approaches a public highway crossing is proportionate to the particular circumstances of the particular crossing, and what might be due care with reference to the speed at one crossing is not necessarily due care with

reference to the speed at another crossing, and, with reference to the highway where Ida Carlson was killed, it was the duty of the defendant to use ordinary care to operate all its trains approaching the crossing of said highway at a rate of speed which, under the particular circumstances shown in the evidence to exist there, would be reasonably consistent with the safety of travelers upon the highway, who are themselves using ordinary care for their own safety, and not to operate its trains at a speed so great that such travelers would not have reasonable opportunity to escape injury to their property or themselves after they could by the exercise of ordinary care discover the approach of defendant's trains to the crossing."

The question of the contributory negligence was likewise submitted to the jury. Defendant demurred to the testimony and presses its demurrer here upon two grounds: (1) That the evidence showed no negligence upon part of defendant; and (2) that the facts conclusively show the contributory negligence of the deceased. We shall not discuss the former, but will the latter, because in our judgment, even if the negligent rate of speed be conceded, the contributory negligence of the deceased precludes a recovery by plaintiffs. The pertinent facts follow in the opinion.

Thomas R. Morrow, Cyrus Crane, Geo. J. Mersereau, and John H. Lathrop, all of Kansas City, for appellant. E. H. Gamble, of Kansas City, for respondents.

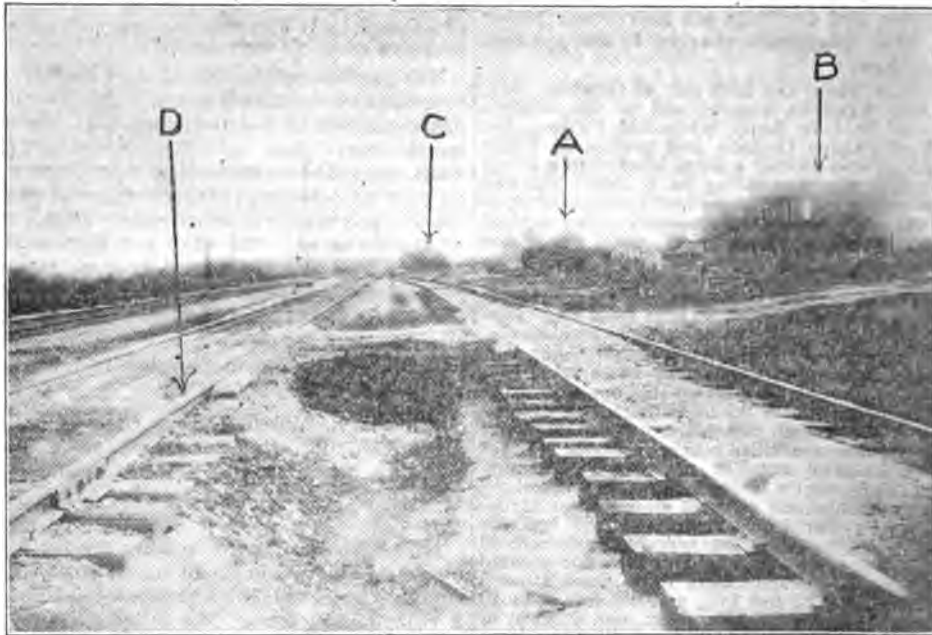
GRAVES, P. J. (after stating the facts as above). The public road runs north and south through the little village of Le Loup, a village of 82 souls. The railroad does not cross at right angles, but runs at an angle indicated by the following plat:



From this plat it appears that the little village is southeast of the railroad tracks, with one single triangular block on the north and west of said tracks. Deceased had driven in her buggy to a store in the vil-

lage, and was returning home at time of accident. She was driving a gentle farm mare, and her buggy was not so topped as to exclude her view of the surroundings nor as to interfere with her hearing. She was a mature woman, and fully possessed of both the sense of sight and hearing. The attached plat, offered in evidence by plaintiff, shows the situation:

curve. The depot was 694 feet northeast of the public road crossing. From the house or storage track on the south to the center of the south main line track was 84 feet. By actual measurement it was shown that after passing the storage track a person could see a point down the south main track 900 feet from the road crossing, or 206 feet northeast of the depot; that standing at a point 19



It was a clear day, and deceased left the store marked by the arrow B on this plat. She first passed the storage track of the railroad, being the one just in front of the store. Upon this there were some standing cars, which might have interfered with her vision toward the northeast. Going forward from the storage track, she encountered and crossed the passing tracks, and from thence she went to the next track, which is called the south main line track, and at the crossing of this track she met with the accident which resulted in her death.

Through this village the defendant had a double-tracked road. In other words, it had two main line tracks. West-bound trains used this south main track, and east-bound trains used the other main track. The train which struck plaintiff was coming from the northeast on this south main track. The depot in the picture is northeast from the point of accident heretofore mentioned.

Witnesses testify to the speed of the train being as high as 45 miles per hour. These witnesses were not specially experts and gave their impressions only as to the speed.

Taking the road crossing as a viewpoint, the railroad track toward the southwest was straight for a half mile or more, and looking to the northeast it was straight for about a half mile, and then bore to the right in a

feet from the passing track, or $36\frac{1}{2}$ feet from the south rail of the south main track, you could see a point 1,250 feet northeast of the road crossing of the south main track; that, standing in the center of the passing track, there was an unobstructed view to the northeast for 2,228 feet from the crossing of the south main track.

[1, 2] Now in this case, the injured party being dead, the law indulges the presumption that she exercised ordinary care for her own protection; but we have often said that this presumption takes flight upon the appearance of the facts. That this deceased did not exercise ordinary care is made apparent by the physical facts in this case. When deceased was crossing the passing track, she was still in a place of safety, and had she looked she could have seen the train a distance of 2,228 feet to the northeast. The distance from this passing track to south line track was in the neighborhood of 12 feet. The measurement was 11.28 feet between the south rail of the main track and the north rail of the passing track, or nearly 15 feet from middle of the passing track to south rail or main track. We need not be exact to the inches, because it is so apparent that had deceased looked to the northeast she could have seen this train. In making this statement we are considering the rate of the train

at 45 miles per hour, and the speed of the horse at 3 to 4 miles per hour. The physical facts refute the presumption of due care in looking for approaching trains. Plaintiff was not unfamiliar with the crossing. She used it several times each week, and had so done for several years.

Not only does it appear that she did not look for a train, but the witnesses introduced for her heard this train before the collision, and what they heard, she could have heard, had she exercised due care. Under the facts, her contributory negligence precludes a recovery by plaintiff. *Kelsay v. Railroad Co.*, 129 Mo. 362, 30 S. W. 339; *Burge v. Railroad*, 244 Mo. 76, 148 S. W. 925; and other cases in this state too numerous to mention. We would have to rewrite the negligence law of this state to permit a recovery in the case at bar. This unfortunate woman was evidently absorbed and gave no heed to her danger. We need not discuss other questions.

The judgment should be simply reversed, and it is so ordered. All concur; BOND, J., in result.

GERMAN EVANGELICAL PROTESTANT
CONGREGATION OF CHURCH OF THE
HOLY GHOST et al. v. SCHREIBER et al.

(Supreme Court of Missouri, Division No. 1.
June 2, 1916. Rehearing Denied
July 3, 1916.)

RELIGIOUS SOCIETIES \S 25—SUIT TO QUIET
TITLE—PARTIES PLAINTIFF—CHURCH.

Where land was conveyed to eight named trustees of the "German Evangelical Protestant Congregation of the Church of the Holy Ghost," then an unincorporated voluntary association, and to its assigns in trust for use for cemetery purposes forever, for a stated money consideration secured by mortgage afterwards paid by the congregation to which a deed of release of the mortgage was duly executed, and where the land was thereafter used by the congregation as a cemetery, and where an act of the Legislature incorporated the "Evangelical Protestant Cemetery of the Church of the Holy Ghost," and thereafter certain persons, representing themselves as a part of the members of the voluntary church association, applied for and received a pro forma decree of incorporation under the name "German Evangelical Protestant Congregation of the Church of the Holy Ghost," and where there was no showing that such action was authorized by the then existing association, or that the incorporators constituted all or a majority of such organization, and no transfer of the cemetery property was ever made to the church or to the cemetery corporation, the church corporation, suing to quiet title to the land used as a cemetery, failed to prove any interest in itself to the land.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. \S 154-167; Dec. Dig. \S 25.]

Woodson, J., dissenting.

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Suit by the German Evangelical Protestant Congregation of the Church of the Holy Ghost and the Evangelical Protestant Ceme-

tery of the Church of the Holy Ghost against Johan Schreiber and Agnesa Schreiber, his wife, and their heirs, etc., and others with cross-bill by the Schreibers and their heirs. Judgment for plaintiffs, and the heirs of Johan and Agnesa Schreiber appeal. Reversed, and cause remanded.

A. W. Wenger and Cashman & Readey, all of St. Louis, for appellants. George W. Lubke and George W. Lubke, Jr., both of St. Louis, for respondents.

BLAIR, J. This is an appeal from a judgment of the circuit court of the city of St. Louis in a suit to quiet title to a plat of ground used as a cemetery. The decree vests the title in the German Evangelical Protestant Congregation of the Church of the Holy Ghost (incorporated), and declares appellants are without any interest therein.

One question presented is whether the corporation mentioned has shown in itself any right to the cause of action. In 1846 Johan Schreiber and wife conveyed to eight named trustees of the "German Evangelical Protestant Congregation of the Church of the Holy Ghost" (then an unincorporated voluntary association) and its assigns the land here involved, in trust for use for cemetery purposes "forever, and for no other purpose, foreign or adverse to the one mentioned whatsoever." The consideration for the deed was \$1,800, which was secured by mortgage until November, 1847, when it was paid by the congregation, and a deed of release of the mortgage duly executed and delivered. Thenceforward the property was used by the congregation as a cemetery. In 1865 an act of the Legislature was passed, incorporating the respondent Cemetery Association, and in 1884 fifteen persons, representing themselves as a part of the members of the voluntary church association, applied for and received a pro forma decree of incorporation under the name appearing as that of the first of the above respondents. There is no evidence this action was authorized by the then existing voluntary church organization, and it is clear the incorporators did not constitute all the members of such organization, nor does it appear they constituted a majority thereof. It is admitted no transfer of the cemetery property has ever been made by any one to either of the respondent corporations. Appellants are the heirs of Johan Schreiber. Other defendants are heirs of the survivor of the trustees to whom the Schreibers conveyed the property in 1846; these have not appealed. In *Catholic Church v. Tobbein*, 82 Mo. loc. cit. 424, it was held the incorporation of a voluntary religious association, a church, after the taking effect of a will devising property to the voluntary association, did not clothe the corporation with any power to sue to establish the will, the right thereto remaining in the association, which was held not to lose its ex-

istence by reason of the incorporation. In view of the failure of this record to show the congregation authorized the incorporation of the church and to show any other fact warranting the conclusion that the voluntary association intended to, and did, part with its property to the corporation formed, it must be concluded that respondent church corporation failed to prove any interest in itself in the cemetery property. In *North St. Louis Christian Church v. McGowan et al.*, 62 Mo. loc. cit. 285, it appeared the incorporation of the church society was fully authorized by orderly action of the congregation, taken in accordance with the rules governing it respecting such matters. In *Colquitt et al. v. Howard*, 11 Ga. loc. cit. 566, 567, all persons concerned moved for incorporation and accepted and acted under the charter received. In *Scots' Charitable Society v. Shaw*, Adm'r, 8 Mass. loc. cit. 534, 535, the act of incorporation specifically designated the corporation created as the proper agency to receive payments due the previously existing voluntary charitable association; and the court held the corporation might receive payment and give full discharge, leaving open the question whether members of the voluntary association might have remaining a beneficial interest in sums so collected. In *Preachers' Aid Society, etc., v. Rich*, Ex'r, 45 Me. 553, it was alleged and admitted that the voluntary association named as devisee had itself procured and accepted a charter of incorporation. The voluntary association, or its whole membership, moved in the matter of incorporation. In *Estate of Winchester*, 133 Cal. loc. cit. 278, 65 Pac. 475, 54 L. R. A. 281, the whole membership of the voluntary association participated in the incorporation. In *Dubs v. Egli*, 167 Ill. loc. cit. 520, 47 N. E. 766, incorporation was had pursuant to a statute which provided for the vesting of the voluntary association's property in the corporation formed. The same was true in *Christian Church v. Church of Christ*, 219 Ill. loc. cit. 515, 76 N. E. 703. In *Reorganized Church of Jesus Christ of Latter Day Saints v. Church of Christ (C. C.)* 60 Fed. loc. cit. 940, 941:

"This church, according to its ecclesiastical polity, rules, and system of government, at its annual general conference * * * directed and authorized the articles of association and incorporation."

Frank v. Drenkhahn, 76 Mo. 508, *Willis v. Chapman*, 68 Vt. loc. cit. 464, 465, 35 Atl. 459, *McLeary v. Dawson*, 87 Tex. loc. cit. 536, 537, 29 S. W. 1044, and *Com. ex rel. v. Jarret et al.*, 7 Serg. & R. (Pa.) 460, tend to support the conclusion reached in *Catholic Church v. Tobbein*, supra, so far as applicable here, this being a case in which the question arises with regard to property purchased and paid for by a voluntary association long prior to the alleged incorporation. Cases decided in jurisdictions denying the capacity of volun-

tary associations to take and hold property are measurably distinguished by that fact.

Our conclusion is that the evidence fails to disclose any cause of action in favor of the respondent church corporation. This leaves no party plaintiff with any claim to the property, the cemetery corporation manifestly having none, as found by the trial court, and the matters pleaded in appellants' cross-bill consequently raise merely moot questions.

It may be there is evidence available to supply the want of proof pointed out. The judgment is reversed, and the cause remanded. All concur, except *WOODSON, J.*, who dissents.

KRAEMER et al. v. BENNETT et al.
(No. 17182.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916. Rehearing Denied
July 3, 1916.)

FRAUDULENT CONVEYANCES § 299(12)—
DEEDS BETWEEN HUSBAND AND WIFE.

Evidence held insufficient to warrant a cancellation of deeds from a husband to his wife on the ground that such deeds were fraudulent as to creditors, it being shown that the grantor was shiftless or irresponsible, and that he was indebted to the grantee, his wife, and that the transfer was made for a valuable consideration; the wife having no knowledge of her husband's indebtedness at the time of the conveyance.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 888, 889; Dec. Dig. § 299(12).]

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Suit by Charles Kraemer, administrator, and another against John H. Bennett and others, to set aside deeds as fraudulent. Judgment for defendants, and plaintiffs appeal. Affirmed.

Eugene Kraemer and Amos A. Knoop, both of Kansas City, for appellants. Wm. A. Settle, of Greenville, and Munger & Wise, of Piedmont, for respondents.

BLAIR, J. This is a suit by judgment creditors to set aside deeds on the ground the conveyances were fraudulent. On the hearing the relief prayed was denied, and this appeal followed. Respondents John H. Bennett and L. J. Bennett are husband and wife, and respondent Maggie Bennett is their daughter. The petition as filed also included the Wayne County Bank as defendant, but as to it the case was dismissed when the trial began, and it is no longer a party.

The evidence shows three judgments were rendered against respondent John H. Bennett and several others (not parties here) on February 15, 1910. One of these judgments was in favor of appellant Charles Kraemer in the sum of \$182.49 and was rendered upon a note dated November 26, 1906. On this judgment \$21.65 had been paid. Another was in favor of appellant Charles Kraemer, administrator of the estate of Elizabeth Kraemer, in

the sum of \$278.58, and was based on a note dated August 17, 1907, due in one year. On this judgment \$93.94 had been paid. The third judgment was also in favor of the same administrator, in the sum of \$270.09, and was based on a note dated August 16, 1907, also due in one year. Nothing had been paid on this judgment, and neither of the payments on the other two was made by Bennett. The evidence indicates he was a surety on two of these notes, if not on all three of them. The land involved in this suit consisted of three contiguous tracts. One of these was conveyed by H. F. Sebastian and wife to respondent J. H. Bennett by warranty deed dated March 6, 1903. This tract consisted of 65 acres, and is hereinafter referred to as the Sebastian tract. A second tract, containing 40 acres, was conveyed by D. G. Stevens and wife to respondent John H. Bennett by warranty deed, dated March 11, 1907. It will be referred to as the Stevens tract. A third parcel, consisting of "something like 100 acres," respondent John H. Bennett acquired in 1903 or 1904 under the will of his brother, C. A. Bennett. This tract will be referred to hereinafter as the C. A. Bennett tract. March 17, 1905, respondents John H. Bennett and wife, L. J. Bennett, for a consideration of \$400, conveyed 40 acres of the Sebastian tract to F. M. Ward. Appellants do not attack this conveyance. This left, of the three tracts mentioned, about 160 acres. Respondent L. J. Bennett for many years owned a farm purchased with her own means, partially derived from her father's estate. From its location it was called the Otter Creek farm, and references to it hereinafter will be by that name. December 21, 1907, respondents John H. Bennett and L. J. Bennett conveyed to respondent Maggie Bennett the 160 acres comprised in the Stevens and C. A. Bennett tracts and the portion of the Sebastian tract remaining after the sale to Ward. On April 24, 1908, Maggie Bennett conveyed the same land to her mother, the respondent L. J. Bennett. These are the deeds attacked as fraudulent. Another deed which becomes material was one whereby respondent L. J. Bennett conveyed her Otter Creek farm to Judge Henry Carpenter. This deed was contemporaneous with that whereby John H. and L. J. Bennett conveyed to Maggie Bennett on December 25, 1907. The judgments forming the basis of appellants' present suit were rendered February 15, 1910, and this suit was not commenced until July, 1911, and the trial had in 1912. Appellants' counsel state their opinion is the trial court found "there was a sale of the property by Mr. Bennett to his wife, and that it was not fraudulent." This is the view of the case the brief discusses. It is unnecessary to present the testimony in detail, since the facts decisive of the real questions are shown too clearly to admit of real differences of opinion.

The record shows unquestionably that re-

spondent Mrs. L. J. Bennett bought and paid for the Stevens tract of 40 acres, and that for some reason John Bennett took title in his own name. In these circumstances this tract was in equity the property of the wife. The title to the Sebastian tract was placed in John Bennett's name, and a mortgage was given upon it and the C. A. Bennett tract for the entire purchase price of \$1,040. Not a cent of the purchase price was paid in cash when the title of this Sebastian tract was acquired. Subsequently 40 acres of it was sold for \$400 and applied on the mortgage, leaving a balance of \$640. This balance respondent L. J. Bennett paid out of her own means, with the aid of her correspondent, Maggie Bennett. The trial court was warranted by the evidence in finding that the value of the land included in the deed from respondents John Bennett and Mrs. L. J. Bennett, his wife, to Maggie Bennett was less than \$3,000 at the time that deed was executed, December 21, 1907. The land conveyed consisted of the Stevens tract of 40 acres, the 25 acres of the Sebastian tract remaining after the sale of 40 acres of that tract to Ward, and the C. A. Bennett tract. One of appellant's witnesses testified the whole was worth \$3,000 to \$3,500 at the time of the trial, but was worth \$600 less in December, 1907, at the time the deed mentioned was made. There was other testimony by appellants' witnesses that it was worth \$3,000 to \$4,000 at the time of the trial. One witness testified it was worth \$3,500 to \$4,000 when the deed assailed was made. He was the former husband of respondent Maggie Bennett, who had divorced him, and his testimony gives evidence of some little hostility to respondents. On the whole evidence, a fair value of the land in December, 1907, the evidence shows was \$2,600 to \$2,900, allowing \$600 as the increase in value between that time and the trial.

Of the tract conveyed to Maggie Bennett, Mrs. L. J. Bennett owned, in equity, the 40-acre Stevens tract, and had paid \$640 of the purchase price of the Sebastian tract, which was the entire sum paid for that part of that tract not sold to Ward. Her money had thus paid for all of the Sebastian tract included in the deed to Maggie Bennett. For this sum her husband was indebted to her even if we reject her testimony that she bought the Sebastian tract and the deed was put in her husband's name by mistake. In addition to this, the land conveyed to Maggie Bennett and thence to Mrs. L. J. Bennett was mortgaged for \$500, which was assumed. Besides this, Mrs. Bennett surrendered her Otter Creek farm, which the uncontradicted evidence shows was worth \$1,500 at the time. Valuing the Stevens tract at \$200, the purchase price paid some years before, and adding what John Bennett owed his wife for payments she made on the Sebastian tract, and adding to these the value of the Otter Creek farm, \$1,500, we have the sum of \$2,340, to which must be added the \$500 incumbrance

on the land Bennett conveyed, making a total of \$2,840, a sum fairly equal to the value of the tracts conveyed in consideration thereof. Our first conclusion is therefore that the exchange of lands was based upon a fair and reasonable equality of values, all the circumstances being considered. At least, there is no such discrepancy as to tend, of itself, to impeach the transaction.

Counsel contend, however, that respondent John Bennett made the exchange to defraud his creditors, and that respondent Mrs. L. J. Bennett knew of and participated in this fraudulent intent, and consequently the land in her hands is subject to their clients' judgments. The faces of the notes upon which these judgments were rendered aggregated \$560. Each of the three notes was signed by three or four others besides Bennett. The record shows that two of the notes, aggregating \$410, lacked eight months of being due when the assailed exchange of lands was made. Nothing appears as to when the other was due. The deed to Maggie Bennett sought to be set aside was executed December, 1907, and the judgments on the notes were rendered in February, 1910. There is no testimony either Mrs. L. J. Bennett or Maggie Bennett ever knew John Bennett was in debt until executions were issued on these judgments. It is said they must have known, being John Bennett's wife and daughter. The testimony of both is they did not know, and John Bennett's testimony is that he concealed his business and troubles from his family. Disinterested witnesses supported him in this, testifying to his having his mail sent to a bank in Greenville, and to his instructions to the postmaster not to deliver his mail to members of his family. There is not a circumstance in evidence, as we read the record, indicating respondents L. J. and Maggie Bennett knew of his financial troubles. The fact is that John Bennett was shiftless and irresponsible. He taught school a little, gambled a little, ran for office a little, drank a little, and *one day*, the record shows, worked on the farm a little. He had squandered \$1,500 in money received from his brother's estate, and otherwise demonstrated his incapacity to manage his affairs successfully. In December, 1907, he became feverishly anxious to enter the mercantile business at Greenville. He determined to sell the farm on which his family was living. The opposi-

tion of the wife and daughter resulted in a discussion, the upshot of which was the exchange detailed above. There is nothing in the record, in our opinion, having a just tendency to impeach the transaction in any way. Bennett had a perfect right to sell the home place and make a good title, despite his indebtedness and in the absence of fraud. He exchanged what interest he had in it for a tract belonging to his wife, whose value equaled the interest he had in the land she got, less what he owed her for payments made on the purchase price of the Sebastian tract. We do not believe he had any intent to defraud any creditor. On the contrary, he had a dream of wealth to be acquired in merchandising, in which occupation he expected great returns from small effort. He failed in his expectations, his interest in the mercantile company going the way taken by the money from his brother's estate. After this happened, these creditors, over 2 years after the exchange was made and the deed recorded, became alarmed, and now attempt to take from Mrs. L. J. Bennett the property which represents her girlhood inheritance and her labors in teaching school and working upon the farm for 20-odd years. Something is said about certain expressions she uses. A few times she answered she "didn't remember." These answers were ordinarily given in response to inquiries as to the dates of some of the small payments made by her upon indebtedness upon the lands. These payments ran through years. They were the fruit of unremitting toil extending over a decade, and were made with money accumulated by every honest means open to her. We have given her testimony a most careful consideration. She is practically uncontradicted by any one, and is corroborated by a number of witnesses as to the vital matters to which she testifies. Her testimony bears the stamp of truth upon its face, and we, as the trial judge did, believe what she said. There is nothing in the suggestion that the making of the deed to respondent Maggie Bennett characterized the transaction as fraudulent. Maggie had a sort of expectant interest in the Otter Creek farm, based on a long-standing promise of the mother, but the real reason for the transfer was that the parties were of the opinion the husband could not make a valid deed directly to the wife.

The judgment is affirmed. All concur.

YOUNG v. LUSK et al. (No. 19114.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916. Motion to Transfer to Court
in Banc Overruled July 18, 1916.)

1. MASTER AND SERVANT ⇨284(1)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—INTERSTATE COMMERCE.

Evidence held sufficient to go to the jury on the issue whether defendant railroad company and an injured employé were engaged in interstate commerce, within the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), when the accident occurred.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1000; Dec. Dig. ⇨284(1).]

2. MASTER AND SERVANT ⇨137(5)—INJURIES TO SERVANT—METHOD OF WORK—EMPLOYERS' LIABILITY ACT.

Under federal Employers' Liability Act, negligently switching cars against an employé is a ground of liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 274, 277, 278; Dec. Dig. ⇨137(5).]

3. MASTER AND SERVANT ⇨134—INJURIES TO SERVANT—WARNING—EMPLOYERS' LIABILITY ACT.

Under federal Employers' Liability Act, negligently failing to warn an employé of danger is a ground of liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 280; Dec. Dig. ⇨134.]

4. MASTER AND SERVANT ⇨278(18) — INJURIES TO SERVANT — SUFFICIENCY OF EVIDENCE—WARNING.

Evidence held to sustain a verdict that defendant railroad company was negligent in failing to warn an air inspector before shunting cars against the standing car on which he was working.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 971; Dec. Dig. ⇨278(18).]

5. MASTER AND SERVANT ⇨226(1)—INJURIES TO SERVANT—RISKS ASSUMED—NEGLIGENCE OF MASTER.

A servant does not assume the risk of his master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659, 660; Dec. Dig. ⇨226(1).]

6. MASTER AND SERVANT ⇨278(19) — INJURIES TO SERVANT — SUFFICIENCY OF EVIDENCE—WAIVER OF RULE.

Evidence held to sustain a verdict that defendant railroad company waived a rule requiring air inspectors to set out a blue flag before going between standing cars by a superior's direction not to use the flag and general nonobservance of the rule.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 969; Dec. Dig. ⇨278(19).]

7. DAMAGES ⇨132(12)—EXCESSIVE DAMAGES —LOSS OF ARM.

\$12,000 damages for loss of the left arm above the elbow by a railroad air inspector earning \$2.40 per day was excessive by \$4,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 883; Dec. Dig. ⇨132(12).]

Appeal from St. Louis Circuit Court; Thomas C. Hennings, Judge.

Action by Arthur L. Young against James

W. Lusk and others as receivers of the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendants appeal. Affirmed upon condition.

W. F. Evans, E. T. Miller, and A. E. Hald, all of St. Louis, for appellants. Joseph A. Wright, of St. Louis, for respondent.

GRAVES, P. J. Action for personal injuries brought in the state circuit court in St. Louis, under the federal Employers' Liability Act of April 22, 1908. The negligence charged is best stated in the language of the petition, thus:

"That at about 4:45 p. m. on said 27th day of August, 1914, plaintiff, in the discharge of his duties as such employé, was trying to turn the angle-cock of the air-brake equipment of a freight car and at the northeast of a string of three freight cars on one of the tracks in said Frisco freightyards, and whilst so engaged a switching crew of defendants consisting of an engineer, fireman, foreman, and two brakemen, while acting within the scope of their duties, and while so employed by defendants in said yards, and while both said switching crew and plaintiff were actually engaged as such employes in carrying on of commerce for defendants as such receivers between the state of Missouri and the other states of the United States hereinbefore named, in violation of an act of Congress approved April 22, 1908, entitled 'An act relating to the liability of common carriers by railroad to their employes in certain cases,' carelessly and negligently made a (flying) switch with about three or four other freight cars coupled together, causing said cars to be moved with rapidity after the switch engine had been uncoupled therefrom along and down the track where the said car was standing upon which plaintiff was working, as aforesaid, and carelessly and negligently caused said string of cars thus being moved to strike the string of cars standing on said track at the southwest end thereof, thereby causing plaintiff to be violently struck by the end of said car upon which he was working and thrown on the tracks, and his left arm run over by one of the wheels and trucks, and so mutilated as to necessitate its immediate amputation and bruising and contusing his back and shoulders. That said cars were thus switched and run by said switching crew upon said string of cars where plaintiff was working without any warning to plaintiff, and when they knew, or by the exercise of ordinary care might have known, that plaintiff was at said northeast end of said car and string of cars standing on said track and in a position of peril and danger while discharging his said duties as an employé of defendants by reason of switching and running of said cars."

The answer, after making certain formal admissions, pleads three defenses: (1) Contributory negligence; (2) assumption of risk; and (3) violation of a designated rule of the company.

Upon a trial before a jury, the plaintiff had a verdict for \$12,000, upon which judgment was duly entered, and from such judgment defendants, as receivers of what is called the "Frisco Railroad," have appealed.

The assignment of errors runs the usual gamut in cases of this character, and the evidence, so far as material, can best be stated in connection with the points for discussion.

I. Plaintiff, aged 47 years at date of accident, was a railroad man of many years' ex-

perience. At the time of accident he was engaged by defendant as air inspector in the yards of the St. Louis & San Francisco Railroad Company at or near Chouteau avenue, St. Louis, Mo. His duties were to couple up the air appliances as cars were being put in a train, and after the train was made up and the engine attached to test the air on the completed train. When not thus engaged, he did some minor repair work. He had worked in this capacity some months prior to his unfortunate injury.

Defendant urges that plaintiff's case failed for several reasons, and that their demurrer to the testimony should have been sustained. Of these in their order.

[1] II. First it is urged that plaintiff failed to show that he was so engaged at the time of injury as to bring him within the federal law, *supra*. This contention cannot be sustained. The petition charged that the defendants were operating a railroad between the state of Missouri and other named states, and the answer admitted this portion of the petition. The defendants were therefore admittedly interstate carriers.

The yards in which the plaintiff was at work was what is known as a gravity yard. Through it ran a "lead" track, and from this "lead" track there were a number of tracks (some 26 or 27) connected therewith by means of switches. The surface of the ground so sloped that cars could be pushed in on these several tracks, and would move down them without power, or by mere gravity. At the time of the accident, plaintiff was working with cars on track 4, having just left track 5. As to the use of these several tracks, he testified:

"Q. How long is this Chouteau avenue yard, Mr. Young; can you tell us? A. Why, this yard I was working in, the in-bound yard, is something about a quarter or half mile long, hardly a half; something between that. I believe track 4 held the biggest string of cars, I believe 46 cars. Q. Were you working in-bound or out-bound? A. Working on the out-bound track, but I worked in-bound and out-bound. Trains would come in, and we would make them up there on that other track, and they would go through. Dead freight came there to this other yard. Q. In what track were you working when you were hurt? A. No. 4. Q. What was that used for? A. Dead freight going east that was used for. Q. And in these Frisco tracks or yards were certain tracks assigned for certain railroads and certain places in the make-up of out-bound cars? Or freight? A. Yes, sir. Q. What different tracks were on the out-bound, if you remember? A. Why, 4, 5, 6, 7, 8, 9, 14, 17, 15, and 16; 15 and 16 the stuff was west-bound, stuff went west. Q. The other tracks were east-bound? A. Yes, sir; 10, 11, and 12 were mostly empty cars, went to the house for loading. Q. Track 4, what was it used for, out-bound? A. The cars were all carded 'bridge' on there; all went to Illinois, and on different roads after they got to Illinois. Q. What bridge did that go over? A. Eads bridge. Q. Did the Frisco put a label on cars, any distinct label, going over Eads bridge? A. Yes, sir; always had a green card they marked, 'Bridge.' Q. What's the east words on the check or tag? A. Just, 'Bridge,' then it stated what road after it got across, but the green card was marked, 'To Bridge.' Q.

Do you know what was the name of the railroad on the side of this car where you were working when you got hurt? A. No, I never noticed where it was going, or what road it was delivered to. It was delivered to the bridge; I didn't notice what bridge. Q. The name on the side of the car? A. Oh, that was Houston & Texas Central. Q. Do you know where that railroad operates? A. In Texas."

Later on he further says:

"Q. Don't they receive cars on tracks 4, 5, and 6, and deliver to industries on this side of the river, I mean? A. Not that I know of. I never seen them billed that way. Everything on 4 was always carded, 'Bridge,' unless sometimes they were not using it, and throws a lot of junk on there. * * * Q. Did you look at the label on all three of the cars? A. Yes, all three on there; they were carded, 'Bridge.' Q. Where were those labels placed on the cars? A. On the side of the cars, supposed to be placed on the north end of the car; on the west side they are supposed to be. Q. When did you see labels on all three of the cars? A. I saw them when I came up there."

Witness Allen W. Harvey, among other things, said:

"Q. Those yards up there are used for the receiving of freight cars from all over the United States, aren't they? A. Yes, I expect in the course of every few minutes there is a car goes from there to every point in the United States in these yards. Q. Cars go in and out of those yards for many states, don't they? Different states in the Union? A. Yes, I guess they do."

Cars for the bridge crossed the river and went to the state of Illinois. The above was ample evidence upon which to submit, under proper instructions, the question as to whether or not the plaintiff and the railroad were engaged in interstate commerce at the time of the accident. On this question the demurrer was well overruled.

III. The next contention of the defendants is thus stated in the brief:

"The record fails to show any negligence on the part of defendants. The negligence charged is not a violation of any federal statute enacted for the safety of employes. The negligence charged is failing to warn plaintiff of the approach of cars when defendants should have known of plaintiff's position of peril. Defendants were under no obligation to warn plaintiff."

This contention, like the tongue of the serpent, is forked. We have (1) no negligence shown as against defendants, (2) that the negligence charged does not fall within the purview of the federal act, and (3) that the negligence charged in the petition is a failure to warn plaintiff of the approach of the cars.

The latter statement can be shortly disposed of by a reading of the petition. The petition charges two acts of negligence, and the defendants are in error when they say that a failure to warn the plaintiff is all the negligence charged. The previous portion of the petition charged a negligent switching of the cars by the switching crew.

[2, 3] Whether the negligence charged falls within the purview of the federal act is best determined from the wording of that act. U. S. Statutes at Large, vol. 35, p. 65, § 1 (U. S. Comp. St. 1913, § 8657), so far as applicable here, reads:

"That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbeds, works, boats, wharves, or other equipment." (The italics are ours.)

Both acts of negligence (if they be negligence) charged in this petition were acts of the agents or employes of the defendants, and fall fairly within the terms of this statute. The switching of the cars was an act of the servants and employes of defendants. The failure to warn, if such failure is negligent, is an act of the servants or employes of the defendants. We think that the negligence charged is such as falls within the purview of the federal law. We mean by this that the negligent handling of cars by agents and employes of a railroad which results in injury to another employé is actionable under this law; and, further, that there might be cases where the failure to warn would likewise be actionable under this law. The real question is whether or not the evidence discloses negligence in either of the two particular charges. That we take next.

[4] IV. Whilst the language of the petition is broad enough to cover two acts of negligence, as above indicated, yet plaintiff did not see fit to so submit his case in the trial court. The matter was thus submitted, by instruction, below:

"And if the jury further find and believe from the evidence that, while he was so engaged, a switching crew of defendants, in charge of the engine and cars mentioned in the evidence, and while acting within the scope of their duties, and while so employed by defendants in said yards, carelessly and negligently caused and suffered said cars to be moved with rapidity against or into the cars on which plaintiff was working, thereby causing said cars to run against the plaintiff and knock him down and injure the plaintiff; and if the jury further find and believe from the evidence that said switching crew, by the exercise of ordinary care, should have known that plaintiff was working on said car in a situation of danger from injury by the movement of said cars, and failed to warn said plaintiff of the approach of said cars, and that by a timely warning of the approach of said cars plaintiff could, by the exercise of ordinary care, have avoided injury therefrom; and if the jury further find and believe from the evidence that at said time and place said switching crew and plaintiff were actually engaged in carrying interstate commerce between the state of Missouri and the state of Illinois; and if the jury further find and believe from the evidence that plaintiff's injury, if any, was not the result of the ordinary risks or dangers assumed by him in

his contract of employment by defendants—then your verdict will be for plaintiff."

This instruction did not permit a recovery on mere proof of a negligent switching of the cars at a rapid rate, but bottoms plaintiff's right to recover on failure to warn. So whilst defendants' counsel is in error in saying "the negligence charged is failing to warn plaintiff," yet the submission below was on that theory. The instant verdict, if sustained, must be sustained on the idea (1) that a failure to warn was negligence under the circumstances, and (2) that such failure was the proximate cause of the injury.

The evidence shows that, whilst plaintiff was working upon track 5, three cars were put in upon track 4. These cars had their brakes set to keep them from moving on down the track. Plaintiff went to the end car (then located the greatest distance from the switch) for the purpose of turning an angle-cock, and was in the act of turning it when injured. He was kept there longer than usual because the angle-cock was rusted. Whilst he was there, the switch crew put in another car, and on this car was an employé, by the name of Harvey. Harvey had been with the first three cars when they were put in and had put on their brakes. Harvey was told to remain with this single car, that others were coming. This he did, and the switching crew cut off two more cars from the train on the lead track and switched them in on track 4. These cars struck the car upon which Harvey was standing, and he then put on the brakes on that car, and started to a tank car next to it, when the three cars he was then with struck the three stationary cars (at the end of one of which plaintiff was working) and moved them, so that the plaintiff was knocked down and run over by the car, inflicting the injuries sued for herein.

There is no evidence of the speed at which these cars were running when they struck the car upon which Harvey was standing, nor at the time they struck the three stationary cars. The only circumstance is that the three stationary cars were moved further down the track some 815 feet by the impact.

There is evidence in the record of what is known as the "blue flag rule." This rule required employes working around stationary cars to put out a blue flag, and then other cars would not be pushed against them. There is evidence tending to show that this rule was impracticable so far as the use of the blue flag by an air inspector was concerned, and that the superintending officer over the plaintiff in the service of the company had told plaintiff not to try to use the blue flag; that it could not be successfully used in his work. The evidence discloses that cars were being continuously shunted in upon the tracks from the lead track, and that it was plaintiff's duty to go among these cars upon the several tracks and test and couple

up the air appliances. There is also evidence tending to show the general nonobservance of this "blue flag rule." There is also evidence that there was no means provided on the cars by which warning bell or whistle could be given.

The question is: What was the duty of defendants under these facts? The duties of plaintiff required him to be among the cars standing upon the tracks. Likewise, to make up its trains defendants had to run other cars in upon the tracks when plaintiff was working. The facts of this case distinguish it from a case where a section hand is working upon an open track. Here the very duties of the plaintiff required him at times to be in position where he could not observe the shunting in of cars upon the tracks where he was working. He had to examine and repair the air appliances, and couple the same between the cars. If, through Rowie, the general foreman, he was directed (as testified to by plaintiff) not to use the blue flag to notify the parties upon the incoming cars that he was working up the cars, then it would seem that a notice or warning of some kind would be required of defendants. They cannot place a man at work between stationary cars, and without notice or warning shunt in other cars, and thus maim and cripple him. The facts of this case bring it within the line of car repairers' cases. It more nearly falls within the rule of these cases. This rule was reiterated, and in some respects, in my judgment, extended, in the more recent case of *Koerner v. St. Louis Car Co.*, 209 Mo. 141, 107 S. W. 481, 17 L. R. A. (N. S.) 292.

In this case, it will not do to say that defendants or their servants did not know that plaintiff was in a place of peril. Both defendants and their employes knew that these were stationary cars ahead of them when they shunted in these cars. They knew that the duty of plaintiff required him to be there, and they should have taken some precaution to obviate his injury. *Williams v. Wabash Ry. Co.*, 175 S. W. loc. cit. 903; *Kame v. Railway Co.*, 254 Mo. 175, 162 S. W. 240. We conclude that the facts of this case, as presented by plaintiff's side of the case, were sufficient to make out a case of negligence for failure to warn.

[5] V. Nor is there substance in the contention that plaintiff assumed the risk. The charge in the petition is not such as to bar the defense of assumption of risk, because under the Federal Act, § 4 (U. S. Comp. St. 1913, § 8660), "such employé shall not be held to have assumed the risks of his own employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé." In all other cases the defense lies, if the facts

authorize it. *Fish v. Railroad*, 263 Mo. 106, 172 S. W. 340.

Here the negligence charged was not a violation of any safety appliance act, and hence plaintiff's case does not fall within the exception made by section 4 of the federal act of 1908. But the facts of this case do not sustain the doctrine of assumption of risk. A servant never assumes the risk of the master's negligence. He assumes the usual and ordinary risk of the employment, but to these cannot be added the negligence of the master. A failure to warn was the neglect of the master. *Koerner v. Car Co.*, supra.

[6] VI. It is insisted that plaintiff's failure to comply with the blue flag rule bars his recovery. Whether or not that rule had been waived by the defendants was properly submitted to the jury and upon ample evidence to sustain their verdict. This question therefore drops from the case.

[7] VII. What we have said disposes of some contentions as to refused instructions. We think there is but one question of moment left, and that is the amount of the damages. Defendants urge that under all the facts it is excessive. We are inclined to think that it is excessive. The plaintiff testified briefly as to his injuries. The wheels of the car practically amputated his left arm between the shoulder and elbow. The doctors completed what little work was left for the amputation. The record discloses the bare fact of an amputated left arm, and no more. It showed that plaintiff was earning \$2.40 per day at the time. No aggravated case of injury is shown. We are of opinion that \$3,000 would be more nearly right in this case. If therefore the plaintiff will in 10 days remit the sum of \$4,000, as of the date of the judgment, the judgment thus left for \$9,000, as and of the date of its original entry, will for said \$8,000 be affirmed. If plaintiff declines to enter such remittitur for \$4,000, the judgment is reversed and cause remanded.

It is so ordered. All concur.

**NORTH KANSAS CITY LEVEE DIST. v.
HILLSIDE SECURITIES CO.**
(No. 17836.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916. Rehearing Denied July 3, 1916.
Motion to Transfer to Court in Banc Over-
ruled July 18, 1916.)

**1. LEVEES — DISTRICTS — ESTABLISHMENT
— PROCEEDINGS — NOTICE TO OWNERS.**

Under Rev. St. 1899, § 8362, providing that after filing articles of association for the incorporation of levee districts the same proceedings shall be taken to notify owners of real estate embraced within such articles, and all objections of such owners shall be made to and heard by the court in the manner provided by sections 8252, 8253, for the notifying, making, and hearing of the objections of owners in

like cases in the formation of drainage districts, an owner of land in the territory included in a levee district who, not being named in the articles of association, has not entered his appearance, nor has been served with summons or any notice, and who is not mentioned, nor his land described, in the decree of incorporation, is not affected by such proceedings, nor is his land taxable for the levee.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 16; Dec. Dig. ¶6.]

2. LEVEES ¶27 — ESTABLISHMENT OF DISTRICT—COLLATERAL ATTACK.

The defense, in an action to collect taxes for a levee, that the land of defendant is not taxable as included in levee district, is not a collateral attack upon the validity of the organization of the district.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 25; Dec. Dig. ¶27.]

3. LEVEES ¶27—TAXES—COLLECTION.

In such action a defendant, notwithstanding a prima facie case for plaintiff made by the offer in evidence of a certified tax bill, etc., has the right to show that he never had his day in court and an opportunity to be heard as to benefits to his land or whether it should be excluded from the levee district.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 25; Dec. Dig. ¶27.]

4. LEVEES ¶27—TAXES—COLLECTION—BURDEN OF PROOF.

Defendant not having been served with process and failed to have his day in court before the decree of incorporation of the levee district was entered, the prima facie case of plaintiff made by evidence of certified tax bills, etc., was overturned.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 25; Dec. Dig. ¶27.]

5. EMINENT DOMAIN ¶246(1)—ACQUISITION OF LANDS — DISMISSAL OF PROCEEDINGS — EFFECT.

Where a landowner was not made a party to condemnation proceedings by a levee district, and commissioners were appointed and made an award, the dismissal by the district of such proceedings as to such landowner eliminated it entirely therefrom, although it had appeared therein thinking it was appearing in a contemplated suit, which was never brought, filed exceptions to the report, and the proceedings were continued for several terms.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. ¶246(1).]

6. LEVEES ¶6 — ESTABLISHMENT — AGREEMENT TO APPEAR.

Where the owner of lands included in a levee district was not served with process in the proceedings to establish the district nor in condemnation proceedings by the district its agreement to appear in a contemplated condemnation suit did not amount to an agreement to become a party in the original condemnation proceedings.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 16; Dec. Dig. ¶6.]

Appeal from Circuit Court, Clay County; Frank P. Divilbiss, Judge.

Action by the North Kansas City Levee District against the Hillside Securities Company. From a judgment for plaintiff, defendant appeals. Reversed.

On May 18, 1909, proceedings were commenced by petition in the circuit court of Clay county, Mo., under the provisions of section 8361, R. S. 1899, to incorporate the

levee district aforesaid, as provided in article 7, c. 122, R. S. 1899 of Missouri; and the same was incorporated under the name of "North Kansas City Levee District." The defendant is also a corporation, duly organized under the laws of this state, and owns the land mentioned in petition, lying within the boundaries of said levee district, and sought to be charged with the payment of the taxes sued for herein.

The present action was commenced in the circuit court aforesaid on October 17, 1912, to recover \$1,680.84 for taxes of 1911 and interest thereon, attorney's fees, etc. Appellant did not sign the articles of association for the formation of said levee district, nor was it named as a party to said proceeding, although the tract of land sought to be charged with above tax was described as lying within said district.

The decree of the circuit court aforesaid incorporating plaintiff as a levee district was rendered on November 29, 1909. Up to said last-mentioned date the defendant had not been made a party to said proceeding, nor has it since said date been made a party thereto. No summons was ever issued in said proceedings against this defendant, nor did it enter its appearance. The defendant's name does not appear in the articles of association aforesaid, nor in the decree of said court establishing said district.

In August, 1910, plaintiff commenced negotiations with defendant to secure a right of way for a dike across defendant's property and for a ditch extending southeasterly from the easterly end of the dike. A form of deed for this right of way proposed by plaintiff was submitted to defendant, and the latter refused to grant this right of way, but offered to give plaintiff a license to enter upon said property and construct the dikes and ditches in the manner described in the proposed right of way deed, for the sum of \$2,650. Plaintiff agreed to proceed with said work under said license. Accordingly a written agreement was entered into between plaintiff and defendant, wherein it was stipulated that defendant should enter a voluntary appearance in the proceedings for the formation of the levee district, which had already been had, and that the levee district should institute condemnation proceedings at once to acquire the rights of way for the dikes and ditches, and in that manner liquidate the defendant's claim for damages on account of its property taken and accruing to the remainder of the tracts owned by defendant. The agreement also provided that, if the damages allowed by the commissioners exceeded the sum of \$2,650, the sum so paid by way of license should be credited upon the commissioners' award, and, if the latter was less than \$2,650, the defendant should refund the difference. It was also expressly stipulated that, if the condemnation proceed-

ing was not begun within six months from August 18, 1910, and thereafter prosecuted to a conclusion, the defendant should have the right to return the sum which it had received as compensation for the license, and the license itself should terminate.

Following the license agreement supra, plaintiff entered upon defendant's land, built its dike, and constructed its ditches, but neither made, nor attempted to make, defendant a party to the proceeding for the formation of the levee district, so that defendant could enter its appearance, in accordance with said agreement, and have its day in court, with the privilege of showing that its land ought not, and could not, properly be included within said district; nor did plaintiff institute a condemnation proceeding to acquire the limited rights of way, as it was required to do by the terms of foregoing agreement.

In September, 1910, the commissioners allowed defendant \$2,750, but this amount was deemed unsatisfactory, and an appeal was taken by this defendant to the circuit court of Clay county aforesaid, and exceptions to said award duly filed, etc.

In 1912 the appeal of the Hillside Securities Company from the award of the commissioners came on for trial in the circuit court of Clay county, and the Hillside Securities Company and its attorneys then for the first time became aware that no condemnation suit had been brought as agreed in the contract of August 18, 1910, and that the award from which an appeal had been taken was made by the commissioners appointed in a former condemnation proceeding; that the Hillside Securities Company had never been made a party to this proceeding in any way, and that the right of way condemned by the commissioners, as shown by their report, was a different right of way from that described in the petition in condemnation, under which they were acting. When these facts developed the levee district dismissed the condemnation suit. The defendant herein then tendered back to plaintiff the said sum of \$2,650 received as aforesaid, and terminated the license in accordance with the provisions of the contract of August 18, 1910.

It is contended by defendant that none of its lands should be included within said levee district; that the whole project is a detriment, and not a benefit, to its lands; that its lands have never been legally incorporated within said district; that it has never had the opportunity, which the statute provides should be given landowners, to show that its lands should not be incorporated within the district. Notwithstanding the foregoing, plaintiff has treated defendant's lands as within said district, and has been sustained in so doing by the judgment of the trial court herein.

Defendant filed its motion for a new trial

in due time, which was overruled, and the cause duly appealed to this court.

Martin E. Lawson, of Liberty, and Cyrus Crane and Lathrop, Morrow, Fox & Moore, all of Kansas City, for appellant. Kenneth McC. De Weese, of Kansas City, for respondent.

RAILEY, C. (after stating the facts as above). [1] I. In the recent case of *Elsberry Drainage District v. Lottie Patton Harris et al.*, 184 S. W. 89, decided December 21, 1915, by this division, Commissioner Brown, in reviewing the law concerning drainage districts, said:

"It is evident that, when their extraordinary powers are used in summary proceedings to place a pecuniary burden upon the property of individuals, all the conditions precedent which they prescribe should and must be complied with. *Nishnabotna Drainage District v. Campbell*, 154 Mo. 151, 157 [55 S. W. 276]. This principle is clearly recognized by the Legislature, in charging these powers and duties upon constitutional courts of general jurisdiction, which can only proceed upon inquiry, and condemn after an opportunity to be heard."

Section 8362, R. S. 1890, provides that after the filing of articles of association for the incorporation of levee districts the same proceedings shall be taken to notify owners of real estate embraced within such district who have not signed such articles of association, and all objections of such owners shall be made to, and heard by, the court in the manner provided by sections 8252, 8253, R. S. 1899, for the notifying, making, and hearing of the objections of owners in like cases in the formation of drainage districts, and the court shall proceed in the same manner provided in said sections.

Section 8252, R. S. 1899, provides that:

"Immediately after such articles of association shall have been filed, the clerk of the circuit court of the county in which the proposed drainage district is situate, * * * shall issue a summons, as now provided by law, returnable to the next term of the circuit court, directed to the several owners of real estate in said proposed district who may be averred to be benefited by, but have not signed said articles of association, which shall be served as summons in civil causes, * * * setting forth in said notice that the articles of association, as aforesaid, have been filed, and the purpose thereof, and that the real estate of such owner or owners situate in said district, fully describing the same, will be affected thereby, and rendered liable to taxation for the purposes of draining said district," etc.

Section 8253, R. S. 1899, reads as follows:

"All owners of real estate in said district who may not have signed said articles of association, and who may object to the organization of said drainage district, after having been duly summoned, shall, on or before the sixth day of the term of court to which they may have been summoned to appear, file their objection or objections in writing, if any they may have, why such drainage district should not be organized and declared a public corporation of this state, and why their land will not be benefited by drainage, and should not be embraced in said drainage district, and liable to taxation for draining the same; and all such objections shall be heard by the court in a summary manner,

without any unnecessary delay, and in case such objections are overruled, the circuit court shall, by its order duly entered of record, duly declare said drainage district a public corporation of this state. And in case any owner of real estate shall satisfy the court that his real estate, or a part thereof, has been wrongfully included in said district, and will not be benefited thereby, then the court may exclude such real estate as will not be benefited, and declare the remainder a district, as prayed."

In the case at bar it is conceded that defendant was not named in the articles of association filed. It did not enter its appearance, nor was it ever served with a summons or notice of any kind or description. It was not mentioned in the decree of incorporation, nor was its land described therein. It had no opportunity under the circumstances aforesaid to be heard before said district was incorporated as to whether its land would be benefited by said district, or whether it should be excluded therefrom. We are clearly of the opinion that unless defendant, by reason of its subsequent conduct, has waived its right to object to the taxation of its land, and to have the same excluded from said district, the present action cannot be sustained.

[2] II. It is not necessary in this proceeding for us to question or consider the legality of plaintiff as a levee district, and in disposing of the case we shall not do so. The authorities therefore cited by respondent to the effect that the validity of plaintiff as a levee district cannot be called in question in this collateral proceeding will not be considered or discussed.

[3, 4] Conceding that plaintiff made a prima facie case by offering in evidence a certified tax bill, etc., yet the defendant had the right to show, as it did in this case, that it never had its day in court, and was never afforded an opportunity to be heard upon the question as to whether its land would be benefited, or whether it should be excluded from said district. *Williams v. Grudier*, 264 Mo. loc. cit. 225, 174 S. W. 387; *Norton v. Reed*, 253 Mo. loc. cit. 251, 161 S. W. 842; *Hutchinson v. Shelley*, 133 Mo. loc. cit. 412, 413, 34 S. W. 838; *Cloud v. Inhabitants of Pierce City*, 86 Mo. loc. cit. 366, 367. Aside from the above authorities, it is conceded that defendant was not served with process, and failed to have its day in court before the decree of incorporation was entered, establishing plaintiff as a levee district. The prima facie case of plaintiff is therefore overturned, unless the subsequent acts of defendant conclude it.

III. It appears from respondent's statement of facts that:

"On the 14th day of July, 1910, there was instituted by the North Kansas City levee district, plaintiff herein, a certain condemnation suit in the circuit court of Clay county, Mo., wherein J. W. Perkins was, along with others, made party defendant. He was brought into this condemnation proceeding by publication. The Hillside Securities was not made a party defendant to this suit. On the 1st day of Au-

gust, 1910, the judge appointed commissioners. After the appointment of these commissioners the levee district and the Hillside Securities entered into the agreement of August 18, 1910."

The substance of said agreement is set out in the preceding statement. At the time of its execution the commissioners aforesaid had already been appointed. They filed their report on September 29, 1910, allowing defendant \$2,750. The latter filed exceptions to the report of said commissioners, which were continued for several terms. It appears from the record that those appearing for defendant in respect to above matter thought they were appearing to the new and independent condemnation proceedings which were to be instituted by plaintiff under said agreement of August 18, 1910.

On June 11, 1912, defendant filed its special motion in the original cause, which reads as follows:

"Comes now Hillside Securities Company, and, appearing for the purposes of this motion only, prays the court to enter its order dismissing this proceeding for the reason:

"(1) That the statutes under which this proceeding and work was begun and prosecuted are unconstitutional and void. * * *

"(4) Because this defendant was not served with process or lawfully notified of the pendency of this proceeding prior to the appointment of commissioners herein, and had no opportunity to object or to question such appointment, or to question the validity of this proceeding, and said commissioners were therefore not authorized to include the land of this defendant in their award.

"(5) Because the defendant is not now, nor never has been, a party to this proceeding.

"(6) Because the lands of this defendant are unlawfully included in the said district, and because said levee district has not been legally incorporated, and is not, therefore, authorized to exercise the right and power of condemnation."

This motion was overruled on the date of its filing, and, it appearing from the evidence that defendant's land was not properly described in the report of said commissioners, the plaintiff thereupon dismissed said condemnation proceeding against this defendant.

[5, 6] The dismissal by plaintiff of the condemnation suit aforesaid left the defendant entirely out of court as to every phase of the original case. The appellant could no longer litigate the issue as to whether its land was properly in the district. It had never been a party to the original proceeding for incorporation, and hence the dismissal of the above condemnation eliminated defendant entirely from said cause. But respondent strenuously insists that by virtue of the contract of August 18, 1910, it made defendant a party to the original proceedings to incorporate. That part of the contract relied upon to sustain this contention reads as follows:

"The said Hillside Securities Company has also agreed to enter voluntary appearance in the condemnation proceedings contemplated above as well as in the proceedings for the formation of the said levee district which have already been had."

The remainder of the contract clearly indicates that new condemnation proceedings

were to be commenced and defendant's appearance entered therein; and those, too, within six months, and prosecuted to a conclusion. Said contract did not contemplate that defendant was to appear in the original condemnation suit.

The plaintiff failed to comply with the terms of said agreement as heretofore shown. If it had asked leave of court to amend the petition for incorporation so as to include defendant's land, the latter could then have entered its appearance and litigated the question as to whether its land would be benefited, or whether it should be excluded from the district. If the contract had been carried out by plaintiff, the defendant would not only have been entitled to litigate the question as to whether its land should remain in the district, but it would likewise have had an opportunity to be heard upon the appointment of commissioners to be selected under the new suits contemplated by said contract, for the purpose of condemning a right of way over defendant's lands.

The defendant on June 12, 1912, gave plaintiff notice in writing to the effect that said contract was terminated and tendered back the \$2,650, which it had received under said contract on account of damages for right of way over its land. It is manifest that defendant has never had its day in court, so that it could litigate with plaintiff the question as to whether its lands would be benefited by said district, or whether they should be excluded therefrom.

In view of the conclusion reached, the judgment below is reversed.

PER CURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All concur.

YOUNG v. PENNSYLVANIA FIRE INS. CO. (No. 17889.)

(Supreme Court of Missouri, Division No. 1. March 30, 1916. Motions for Rehearing and to Transfer to Court in Banc Denied June 2, 1916. Motion in Banc to Require Division 1 to Transfer to Banc Denied July 3, 1916.)

1. INSURANCE — 640(1) — ACTIONS — DEFENSES — PREMATURE SUIT — PLEADING — SUFFICIENCY.

In an action on a fire insurance policy, the defense of premature suit (suit within 60 days after filing proof of loss) is in the nature of a plea in abatement, not a plea in bar, and to be available must be specifically pleaded; a general denial not being sufficient.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1609; Dec. Dig. — 640(1).]

2. INSURANCE — 558(4) — FIRE INSURANCE — PROOF OF LOSS — WAIVER.

Where defendant's insurance adjuster admitted liability under fire insurance policy, and after a dispute as to the amount of loss an arbitration followed, no blank proofs of loss being furnished the plaintiff as required by statute, held,

there was a complete waiver by defendant of proof of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1387; Dec. Dig. — 558(4).]

3. INSURANCE — 640(4) — DEFENSES — PLEADING — WAIVER OF PROOF OF LOSS.

Where defendant fire insurance company pleaded an arbitration, it thereby admitted a waiver of proof of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1620; Dec. Dig. — 640(4).]

4. INSURANCE — 623(1) — FIRE INSURANCE — PROOFS OF LOSS — WAIVER.

In an action on a fire insurance policy, the defense of premature suit (suit within 60 days after filing proof of loss) is not available where proofs of loss were waived by submitting to arbitration, and such arbitration was pleaded as a defense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1551; Dec. Dig. — 623(1).]

5. INSURANCE — 621 — FIRE INSURANCE — PROOFS OF LOSS — WAIVER.

The waiver of proofs of loss under fire insurance policy has the same effect as the filing of proofs of loss, and a suit commenced more than 60 days after such waiver is not premature, although proofs of loss were made as a matter of precaution less than 60 days before suit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1542, 1543; Dec. Dig. — 621.]

6. INSURANCE — 612(3) — ACTIONS — CONDITIONS PRECEDENT — VALIDITY OF CONTRACT PROVISIONS COMPELLING ARBITRATION.

Under Rev. St. 1909, § 868, provisions in contracts including insurance policies which enforce arbitration or settlement are unenforceable, and compliance therewith is not a condition precedent to a suit on such a contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1522-1528; Dec. Dig. — 612(3).]

7. INSURANCE — 610 — ACTIONS ON POLICIES — STATUTE — RETROACTIVE OPERATION.

The provisions of Rev. St. 1909, § 868 (Laws 1909, p. 347), providing that contracts containing agreements to arbitrate shall not preclude suit without submitting to arbitration held not retroactive, so that an insurance policy executed in 1907 would not be affected thereby.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. — 610.]

8. INSURANCE — 574(5) — APPRAISEMENT — EFFECT AS A BAR.

An appraisal under a fire insurance policy does not discharge the cause of action on such policy, although binding as to the amount fixed by such appraisal if not fraudulently procured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1430-1432, 1433; Dec. Dig. — 574(5).]

9. INSURANCE — 641(1) — APPRAISEMENT — FRAUDULENT APPRAISEMENT — "SETTLEMENT."

The word "settlement" has at times a broader significance than of payment and satisfaction, and often means an agreement by which disputed matters are adjusted, and, as used in Rev. St. 1909, § 1812, providing that fraud may be pleaded by way of reply to avoid a fraudulent settlement, permits the insured to set up in his reply that an appraisal of his loss was fraudulent and invalid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1626, 1628, 1629; Dec. Dig. — 641(1).]

For other definitions, see Words and Phrases, First and Second Series, Settlement.]

10. APPEAL AND ERROR ⇨171(2)—**REVIEW—TRIAL OF EQUITABLE ACTION BY JURY WITHOUT OBJECTION.**

Where plaintiff insured pleaded in his reply that the appraisal relied upon by defendant was fraudulently procured, *held*, that such plea was at least good as an equitable plea, and, where a jury trial was had without objection, the defendant cannot object on appeal that plaintiff's only relief was in equity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1161-1165; Dec. Dig. ⇨171(2).]

11. PLEADING ⇨196—**REPLY—EQUITABLE RELIEF IN ACTION AT LAW—DEMURRER.**

A reply in an action at law which sets up facts entitling plaintiff to equitable relief is not demurrable, although it may require a transfer of the cause to the equity side of the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 453-455; Dec. Dig. ⇨196.]

12. INSURANCE ⇨665(7)—**APPRAISEMENT—FRAUD—EVIDENCE—SUFFICIENCY.**

Evidence *held* sufficient to warrant a finding that appraisal of loss under a fire insurance policy was fraudulent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1723, 1724, 1726, 1727; Dec. Dig. ⇨665(7).]

13. TRIAL ⇨28(3)—**VIEW—DISCRETION OF COURT.**

Refusal of the trial court to permit the jury to visit another city for the purpose of viewing property destroyed by fire for which plaintiff seeks to recover insurance *held* not an abuse of judicial discretion, where testimony was received clearly disclosing the facts, and the view would delay trial two or three days.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 79; Dec. Dig. ⇨28(3).]

14. INSURANCE ⇨602—**VEXATIOUS REFUSAL TO PAY LOSS—ALLOWANCE OF ATTORNEY FEES—EVIDENCE—SUFFICIENCY.**

Evidence that insurance company threatened to keep case in court for five years if plaintiff did not accept fraudulent appraisal, together with other evidence, *held* sufficient to sustain an award of attorney fees under the statute for vexatiously refusing to pay fire insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. ⇨602.]

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

Action by Lulu Young against the Pennsylvania Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ryan & Thompson, of St. Louis, for appellant. Frank H. Haskins and Fauntleroy, Cullen & Hay, all of St. Louis, for respondent.

GRAVES, P. J. This is an action upon an insurance policy commenced in Audrain county. The plaintiff lives in St. Louis, and the property insured was in St. Louis. Upon a trial before a jury plaintiff had a verdict for \$7,953.69 as her damages, \$1,000 attorney's fees, and \$100 penalty, or a total of \$9,053.69. From the judgment upon such verdict, the defendant has appealed.

Distinguished counsel for appellant have made a painstaking analysis of the pleadings

in this case, and we adopt their statement of the pleadings. They say:

"The action is in the ordinary form upon a policy of insurance, claiming the full value of the insurance, as of a total loss in the sum of at least \$18,000, because of a fire that occurred May 25, 1911, at 4961 Park View place, St. Louis. This suit is for \$8,000 and attorneys' fees and damages. The cause was brought to the November term, 1911, of the Audrain county circuit court. The answer denied the premises were totally destroyed, denied the loss was \$18,000, and that there was a vexatious refusal to pay, and alleges the property was damaged not to exceed \$5,921.86. The answer further pleaded concurrent insurance for \$8,000 more (suits on the other three policies are pending at Mexico), and that defendant is only liable for one-half of \$5,921.86. The answer also alleged conditions in the policy respecting an appraisal in the event of disagreement as to the amount of the loss, that there was such an appraisal, and that the two appraisers appointed by the plaintiff and the defendant, to wit, John A. Hurster and Chas. B. McCormack, together with the umpire, F. J. Remmers, selected by the appraisers, made an award of sound value \$18,000 and loss and damage \$5,921.86, and defendant was only liable for one-half thereof, to wit, \$2,960.93.

"The reply denied the validity of the concurrent insurance clause, admitted there was such insurance, but denied it was concurrent, denied the loss was only \$5,921.86, and alleged it was total. The reply then proceeds to admit the disagreement, and the appointment of the appraisers, and selection of the umpire, and attacks the award, alleging: (a) That they did not appraise the loss, though they signed the award; (b) that they did not impartially or fairly perform their duties, and that they were not competent or disinterested; (c) that plaintiff was induced to enter into appraisal by false and fraudulent representations by defendant that McCormack was fair, competent, and disinterested and would replace the buildings as before the fire for the amount of the award; (d) that McCormack suggested Remmers as umpire, and falsely and fraudulently represented to Hurster that Remmers was competent and disinterested, and would act in a fair and proper way, and that Hurster, relying thereon, agreed to Remmers as umpire, whereas both McCormack and Remmers were not competent or disinterested, but were, and for years had been, professional and frequent appraisers in fire losses for the insurance companies in St. Louis, and were biased, prejudiced, and incompetent to act, all of that being known to defendant and the other companies; (e) that the appraisers and umpire would not, though often requested by plaintiff and his counsel, allow them to appear and be heard in connection with their determination of the matters, or the sound value of the buildings, or the loss by fire, and denied them the right to produce any witness or evidence in regard to said matters, or any matter involved in the appraisal; (f) that McCormack and Remmers privately got from outside parties evidence as to the value of parts of the insured property without the knowledge of plaintiff, or letting her know thereof, or letting her offer testimony on the subject of the value, and send parties to visit the building without parties knowing what the building had been before the fire or what had been destroyed, it being impossible for them to learn facts, and then got bids from the parties as to what they would replace parts of the building for as before the fire, when said parties did not and could not know what had been the condition before the fire or what would be the cost of replacing such parts as they were to bid on; (g) alleges such parties were incompetent and in-

capable of doing the work, or making accurate reports, or making bids, or learning the facts, and that they guessed at and incorrectly reported to the appraisers and umpire their bids, and that they were wholly inadequate and below the fair cost to replace such parts as they bid upon as they were before the fire, and that Hurster demanded of the other two that plaintiff be allowed to appear before the three of them, and be heard upon the matters, but McCormack and Remmers refused to let plaintiff or her counsel be heard before the appraisers or the umpire; (h) that the estimates and bids of said parties included different, cheaper, and inferior materials from what was in the building before the fire, and was not intended by the parties to replace the building in the condition as before the fire; (i) that the appraisers nor the umpire did not know what information said bidders had obtained or what they had figured upon in their bids, or what facts or information they used in making their bids, but nevertheless the appraisers and umpire used such false, incorrect, and inadequate bids in arriving at the award; (j) that the appraisers and umpire in arriving at the sound value and the award did not truly or correctly estimate or endeavor to estimate same, but carelessly, wrongfully, inaccurately, and fraudulently guessed at same; and (k) neither McCormack nor Remmers ever meant to make a correct award, but intended to and knowingly placed the amount of loss at a sum which was in fact, and as they well knew, far below the true loss suffered by plaintiff, and that \$5,921.86 does not represent, as they well knew, the amount of loss; (l) that before the award was signed and returned by the three men Hurster objected and protested against it, and informed the other two the loss was in excess of \$5,921.86, and at least \$18,000, but they stated and promised Hurster they would replace the building in exactly the condition before the fire for \$5,921.86 if he would sign the award, and Hurster, relying thereon, and supposing they would fulfill their promise as to so replacing, and supposing he was bound to join in the award, as they had the majority vote, signed his name to the award.

"The reply then alleges: (m) That the damage was widespread and complete, and such as to make it impossible for the appraisers, or umpire, or any one, to know what was the loss, without evidence of persons who knew the building as it was before the fire, so as to be informed as to same, and that the appraisers and umpire wrongfully and unlawfully refused to let plaintiff appear or produce any evidence on the subject, and any conclusion they arrived at was guesswork, inaccurate, and far below the actual value before the fire; (n) that neither McCormack or Remmers ever replaced, or offered to replace, the buildings in the condition they were in before the fire for the sum named in the award, and had refused, though so requested by plaintiff.

"This is a fair summary of all the allegations in the reply in a serial order, as we have endeavored to indicate the various specific charges by lettering them in this way, although they run along continuously in the reply."

Whilst numerous assignments of error are made, only eight of them are briefed and argued here. Others seem to have been abandoned. The record is a very voluminous one (nearly 1,000 closely printed pages), but the questions presented are largely questions of law. By that we mean that the facts are such as to make the verdict of the jury conclusive upon most, if not all, issues of fact. Points urged with the pertinent facts will be noted in order in the course of the opinion.

[1-3] I. The first point made is that the suit

was prematurely brought. This is based upon the theory that the suit was brought before the expiration of 60 days after the filing with the company of proofs of loss. The building was destroyed by fire May 25, 1911. The company and the plaintiff, being unable to agree upon the damages suffered, submitted the matter to three appraisers, one selected by each party, and the third selected by these two. This appraisement was completed July 25th, just 60 days after the fire. Suit was filed October 2, 1911. Seemingly as a matter of precaution, the plaintiffs made and filed proofs of loss September 23, 1911, and, 60 days not having elapsed between this date and the date of filing the suit, this question of a premature suit is raised. There is neither law nor logic in the position.

As said by Rombauer, P. J., in *Giboney v. Insurance Co.*, 48 Mo. App. 185, the question of a premature suit is in the nature of a plea in abatement, and not a plea in bar. Such matters should be specifically pleaded. The answer in this does not invoke this plea in abatement. A mere general denial is not sufficient. A plea in abatement is in the nature of an affirmative defense, and must be specially pleaded to be available. This would be sufficient to dispose of this matter, but there are several other questions just as fatal to this contention of the defendant. One of these questions is that the defendant waived proofs of loss when it entered into an arbitration of the amount of the damage under the policy. This was within 60 days after the fire, because the report of the appraisers or arbitrators was just 60 days after the fire. As said by Smith, P. J., in *Murphy v. Insurance Co.*, 70 Mo. App. loc. cit. 87:

"After the arbitration provision is set in active operation there can arise no issue in respect to proofs of loss. In order to make out a prima facie case the plaintiff was not required to produce proofs of loss timely and satisfactorily made, nor proof of waiver thereof, for the reason that the provision of the policy requiring the proofs of loss had, by the defendant's own act, been in effect stricken from the policy, and was not subject to be invoked by it."

In *Branigan v. Insurance Co.*, 102 Mo. App. loc. cit. 73, 76 S. W. 643, Goode, J., said:

"Proofs of loss were waived by the company; for its adjuster conferred with the insurance about the loss without demanding proofs, and conceded the company's liability. A written agreement to arbitrate the amount of the damage was executed, and no blank proofs were furnished the plaintiff."

In the case at bar all the facts suggested by Judge Goode appear. The adjuster admitted liability, and suggested that the total loss was about \$9,500. Mr. Young, the husband of the plaintiff, and acting for her, claimed the damages were much in excess of such sum. The arbitration followed. No blank proofs of loss were furnished by the company as required by statute. There was a complete waiver of proofs of loss. By pleading an arbitration, as the defendant

does in this case, a waiver of proofs of loss is admitted.

[4] In *Bank v. Insurance Co.*, 109 Mo. App. loc. cit. 661, 83 S. W. 535, Smith, P. J., said:

"Again, it appears that the plaintiff had brought a prior action on the policy here sued on, and in which it was obliged to suffer a nonsuit. It further appears that in the answer in that action the defendant pleaded the arbitration clause and of that requiring proofs of loss and a failure of compliance on the part of the plaintiff. This answer the plaintiff, against the objections of defendant, was permitted to read in evidence. We cannot doubt that under the authorities it was competent evidence. Its allegations of fact were declarations or admissions which the plaintiff was entitled to give in evidence. *Bailey v. O'Bannon*, 28 Mo. App. 46; *Howman v. Globe Heating Co.*, 80 Mo. App. 635; *Spurlock v. Railroad*, 125 Mo. loc. cit. 406, 28 S. W. 634, and cases there cited. In it, as has been seen, were pleaded the arbitration clause of the policy and a failure to comply therewith. This amounted to an implied admission of waiver as to the proof of loss requirement. The arbitration clause could have been invoked only on the theory that there had been a fire and consequent loss for which there was liability, but a disagreement alone as to the amount of such loss. In such cases compliance with all the other conditions must be conceded before there can be an arbitration as to the amount to which the plaintiff was entitled under his policy. *Murphy v. Insurance Co.*, 70 Mo. App. 86."

There are several other matters just as fatal to this contention as these two, but these are sufficient.

[5] Now, taking a step further, this record shows this waiver of proofs of loss to have been more than 60 days prior to the filing of this suit. The waiver took the place of the actual proofs of loss. The suit could not be prematurely brought, if not brought until after 60 days from this waiver of proof of loss. There is nothing in this contention of the defendant, and it is ruled against it.

[6] II. The second contention of the defendant is thus couched in the brief:

"The court erred in overruling the defendant's demurrer to the reply. The award was not void, but, at most, voidable, and plaintiff's relief, if any, against the appraisal, could only have been awarded in a court of equity. Section 1812, R. S. 1909, does not apply."

It is urged by the plaintiff that the clause in the contract providing for the ascertainment of the loss by appraisers is void, as being in conflict with the act of 1909 (Laws of 1909, p. 347) now section 868, R. S. 1909. In 1909 the Legislature added a new section to chapter 10, R. S. 1899, to be known as section 899a. This new section reads:

"Any contract or agreement hereafter entered into containing any clause or provision providing for any adjustment by arbitration shall not preclude any party or beneficiary under such contract or agreement from instituting suit or other legal action on such contract at any time, and the compliance with such clause or provision shall not be a condition precedent to the right to bring or recover in such action."

Chapter 10, R. S. 1899, is pertaining to "Contracts and Promises," and contained eleven sections. Prior to this amendment of 1909 the last section (section 899) of the chapter reads:

"All parts of any contract or agreement hereafter made or entered into which either directly or indirectly limit or tend to limit the time in which any suit or action may be instituted, shall be null and void."

By the act of 1909 this was followed by the new section to be known as section 899a, supra. We note this connection and the subject-matter of the chapter purposely. It helps to get the legislative intent. When we read the whole chapter, it will be noticed that it pertains solely to contracts and promises, and not especially to arbitrations. Why it was placed in R. S. 1909 in chapter 7, under the head of "Arbitration," rather than in the more appropriate place of "contracts and promises" we do not know. When section 868, R. S. 1909, is read in the connection the Legislature intended it to have, we believe its purpose was to render void provisions in contracts which enforce arbitration or settlements by means of appraisers under insurance policies. The policy in this case is such as forced an appraisal of loss if the parties could not agree. We believe that this statute struck at just such contracts. We cannot read the last section of old chapter 10, R. S. 1899, and know that the Legislature had that section before it when it added the new section, without concluding that the purpose of the new section was to kill such clauses in a contract as we have here.

[7] But all this availeth not the plaintiff in this case. This contract was entered into in 1907, and ran for a period of five years. The contract antedated the act of 1909. This act only applied to contracts "hereafter entered into," and hence did not and could not affect this contract.

But defendant's trouble is not over by the foregoing holding. The purpose of this clause of the contract was a means of getting to a settlement of the difference of the parties as to the amount of the loss. The purpose of the clause in the policy is to the amount of his loss under the policy, as if the parties had agreed to the amount of such loss, and the company had paid it. In other words, this clause of the policy was designed to procure an agreement and settlement as to the amount of the loss. In this case such settlement is set up as a bar to a full recovery on the policy. It is not a bar to the action, and is not so pleaded, but it is pleaded as a bar to a recovery in an amount greater than that fixed by the appraisers. This court has held that such assessment by appraisers of the amount of damages is not an award by arbitration, under our statutes or the common law as to arbitration. *Zallee v. Insurance Co.*, 44 Mo. 530. But in this same case we further held:

"The written agreement entered into after the fire, appointing the appraisers, and by which the parties agreed to accept their appraisal, was a practical carrying into effect of the stipulations of the policy. These stipulations having actually been complied with, and an appraisal had in conformity thereto, no good reason is perceived why the parties should not be bound by

the result. That result cannot, and ought not to, be avoided on the ground that the appraisers were not sworn. They acted as appraisers, and not as arbitrators. The reference to them was not a submission to arbitration in the legal sense, but a just and reasonable mode of fixing values—the value of the injured goods before and after the fire, the difference representing the amount of loss or damage.”

[8] The same case holds that the right to sue upon the policy is not barred by the appraisal, because it says the cause of action is not merged into an award, as in arbitrations. It does hold, however, that the appraisal is binding as to the amount. To this holding we should add “if such appraisal was not fraudulently procured.” It must be said that this appraisal is not a discharge of the cause of action, and it perhaps should be further said that it does not fall strictly within the letter of section 1812, R. S. 1909. This section reads:

“Whenever a release, composition, settlement, or other discharge of the cause of action sued on shall be set up or pleaded in the answer in bar to plaintiff's cause of action sued on, it shall be permissible in the reply to allege any facts showing or tending to show that said release, composition, settlement, or other discharge was fraudulently or wrongfully procured from plaintiff, and the issue or issues thus raised shall be submitted with all the other issues in the case to the jury, and a general verdict or finding upon all the issues, including the issues of fraud so raised, shall be sufficient.”

This section really contemplates things done by the parties themselves, and things which, if done knowingly and without fraud, would discharge the cause of action.

[9] It is pretty generally held that these appraisements under clauses of an insurance policy such as we have here do not discharge the cause of action. But we do say that it is conclusive as to the amount of damages. To that extent it is a partial release or discharge of the cause of action. And, whilst it is not the direct action of the parties, it is the action of the parties through their selected agents.

These two matters are so similar in force and effect that, in our judgment, if this appraisal, which is of itself a partial release and discharge of the cause of action, is procured by fraud of any kind upon the part of one of the parties, and such party set up the appraisal, as here, in bar of a full and complete recovery, the other party can under this statute plead by way of reply the fraud, and have such fraud determined by a jury; in other words, the statute is broad enough to cover a partial release as well as a full release. In so holding we are not unmindful of the contrary ruling by the St. Louis Court of Appeals in *Shoe Co. v. Insurance Co.*, 178 S. W. loc. cit. 248. That court passes the question with a mere statement. There is no discussion of the reason of the rule. The statute specifically goes to releases made by one party to another. A release may be in full or it may be a partial release. If in full, it can be pleaded as a complete bar to the action. If a partial

release, it can be pleaded as a partial bar to the action. In either case, if fraud taints the release, the remedy should be the same in both cases, and we believe the spirit of this statute covers the appraisal in this case.

Take the facts. The policy says the company and the insured shall try to agree upon the loss, but that, if they cannot agree, then each party shall select an appraiser, and these two shall select an umpire, and the report of two of them shall be binding. In this particular case the evidence in the record tends to show that defendant's adjuster was of opinion that the damages to the building was about \$9,500, and Mr. Young, agent for plaintiff, was asserting damages much in excess of that sum. Under these circumstances the policy forced an appraisal, the effect of which, if it stands, is to give the insurance companies covering this loss a release of all claimed damages, except about \$6,000. We believe the statute broad enough to cover such case as is here presented. In other words, the report of the appraisers is a release of a part of plaintiff's claim or cause of action, and, if not fraudulently procured, binds the plaintiff as to the amount of damages.

It should be further noted that the statute uses the word “settlement” in addition to the word “release.” The word “settlement” has at times a broader significance than of payment and satisfaction. It may and often does mean an agreement by which parties having disputed matters between them reach or ascertain what is coming from one to the other. In this sense this appraisal may also be considered as a settlement agreement between the parties, and, if procured by fraud, it falls within the statute. It is a settlement of the amount of damages made by the agents of the parties under and perforce of the contract. The fraud of either party or their agents should avoid it, and under the statute the question of fraud should be tried by jury.

[10] III. But there is another sufficient answer to the claims of the defendant. This reply was at least good in equity. It charged the procurement of this particular appraisal to have been in fraud of plaintiff's rights. Concede for the purpose of this point that the reply was equitable in nature, and that it would thrust the case from the law side to the equity side of the court; yet this does not help the defendant. The defendant sat by and made no objection to the trial of the case before a jury. The defendant proceeded to try the case as one at law, without objection, and the question comes too late in this court.

[11] The demurrer was properly overruled even under defendant's contention here. That part of the reply stricken out by the demurrer set up facts which in equity would have entitled the plaintiff to relief from this appraisal. At most, the reply could only change the issue to one in equity rather than

at law, and the demurrer should have been overruled. This ruling properly made, then, when defendant without objection proceeded to try the case as one at law, he is estopped here.

[12] IV. It is next asserted that appraisements of this character will not be set aside save on clear and convincing evidence of fraud, misconduct, or mistake. For the purpose of this point we may concede this as a proposition of law.

We shall not go into the details of the vast volume of evidence offered in support of plaintiff's reply. Suffice it to say that it shows some shocking conduct upon the part of the appraiser selected by the company and the umpire agreed to by the two other appraisers. Practically all the allegations in this reply were well sustained by the evidence. There was ample evidence upon which the jury could find fraud, and we are powerless to disturb their verdict upon that question. If it was a question in equity, and the judgment here was one in equity setting aside this appraisal, we would heartily concur in the judgment. We need not go further on this contention.

[13] V. It is next urged that the court erred in refusing to have the trial jury go to St. Louis and view the property. It is true that the evidence as to the condition of this building after the fire was conflicting. But it must also be said that the evidence upon each side was clear and fully descriptive of the respective claims of the adverse parties. The trial court had all the facts before him, and we cannot say as a matter of law that he abused his discretion in refusing this request of the defendant. Such things are largely discretionary, and it is only when there has been a flagrant abuse of this discretionary power that this court will interfere. Whilst it is true the trial court seems to have put his refusal upon the ground that he was not empowered to make such an order, yet, although he put it upon that ground, his refusal amounted to nothing more than a denial to defendant of a mere discretionary right, and if under the facts there was no abuse of a sound legal discretion in the refusal, the defendant is not harmed by the statement of an erroneous ground by the court. The refusal, upon whatever ground put, was not an abuse of a sound legal discretion. The court should not have stopped the trial of this case for practically two or three days to permit a jury to go from Mexico, Mo., to St. Louis, Mo., to examine the wreckage of this house. The witnesses had given the jury the facts clearly.

VI. It is next insisted that there was error in admitting evidence on a vexatious refusal to pay the loss. The statute reads:

"In an action against any insurance company to recover the amount of any loss under a policy of fire, life, marine or other insurance, if it appear from the evidence that such company has

vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not exceeding ten per cent. on the amount of the loss and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict."

[14] There is evidence in this case that the defendant's own adjuster estimated the damages at \$9,500. There is further evidence that they threatened to keep the case in court for five years if plaintiff did not accept the known fraudulent appraisal. These and other matters in the record were sufficient to submit the matter to the jury, and its finding is binding upon us as to the fact.

The foregoing cover the substantial contentions of the defendants, as found in the brief.

The judgment should be affirmed; and it is so ordered. All concur; BOND, J., in result.

FAY v. AETNA LIFE INS. CO. (No. 17914.)
(Supreme Court of Missouri, Division No. 1.
June 2, 1916. Motion to Transfer to Court
in Banc Overruled July 3, 1916.)

1. APPEAL AND ERROR §1002—QUESTIONS OF FACT—VERDICT.

Verdict in an action on an accident insurance policy on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.]

2. INSURANCE §527—ACCIDENT INSURANCE—RISK—"PASSENGER."

Under such policy the insured, who started to enter a street car which was standing still with its doors open for the admission of passengers, with the intent to ride thereon, was a passenger, giving the word "passenger" in the policy the ordinary accepted meaning, notwithstanding those in charge of the car closed the door before he had fully entered the car.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1312, 1313; Dec. Dig. § 527.

For other definitions, see Words and Phrases, First and Second Series, Passenger.]

3. APPEAL AND ERROR §1066—HARMLESS ERROR—INSTRUCTION.

In an action on an accident policy providing double indemnity if insured was injured while a passenger in or on a public conveyance, including the platform, steps, etc., an instruction the first part of which attempted to state what was necessary to make insured a passenger as between himself and the carrier, but which further required the jury to find that he had actually got on the steps of the car and was standing thereon when the door was closed, and he was caused to fall therefrom before the jury could find for the plaintiff, could not have prejudiced defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.]

4. INSURANCE §638 — ACTION ON POLICY FOR DAMAGES FOR VEXATIOUS DELAY—PLEADING.

Under Rev. St. 1909, § 7068, providing that in an action on an insurance policy, where it appears that the insurer has vexatiously refused to pay such loss, plaintiff may be allowed damages not exceeding 10 per cent. on the amount of the loss and a reasonable attorney's

fee, the plaintiff, desiring to recover such damages, must by his petition show that he claims and is entitled thereto.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1607; Dec. Dig. ¶638.]

5. INSURANCE ¶645(4)—ACTION ON POLICY—DAMAGES FOR VEXATIOUS REFUSAL TO PAY—PROOF.

Where such damages are appropriately alleged, they may be proven by any competent evidence whether such evidence tends to establish the main issue, the right to recover the amount of the policy or not.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1554; Dec. Dig. ¶645(4).]

6. INSURANCE ¶668(10)—ACTION ON POLICY—DAMAGES FOR VEXATIOUS REFUSAL TO PAY—QUESTION FOR JURY.

Where the issue as to damages for vexatious delay is not made out by proof, the court should take such issue from the jury by appropriate instruction, but if there is any evidence of vexatious refusal, the issue should be submitted to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1744, 1762; Dec. Dig. ¶668(10).]

7. INSURANCE ¶648(1) — ACCIDENT INSURANCE—ACTION ON POLICY—DAMAGES FOR VEXATIOUS REFUSAL TO PAY—EVIDENCE.

An action to recover under accident policy for double indemnity where insured was injured while a passenger on a public conveyance was brought after a settlement for the amount of the policy, and after the insured had received a receipt in full for all liability, given when the plaintiff had no knowledge of the existence of such double indemnity provision. Defendant first pleaded settlement, and, after a replication, alleging that such settlement had been fraudulently procured and tendering the amount received in settlement, then moved the court to compel plaintiff to pay into court the amount received in settlement upon a return of the receipt therefor. After such motion was overruled an answer framed so as to obviate the question of fraud in the release, but denying liability, was filed. *Held*, evidence as to the various charges in the pleadings and the avoidance of the issue of settlement, was competent to show a vexatious delay in payment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1669, 1676; Dec. Dig. ¶648(1).]

Appeal from Circuit Court, Jackson County; William O. Thomas, Judge.

Action by Nellie Fay against the Aetna Life Insurance Company. Judgment for plaintiff with attorney's fees, and defendant appeals. Affirmed.

J. C. Rosenberger, R. E. Talbert, and F. R. Wolfers, all of Kansas City, for appellant. T. J. Madden and Bird & Pope, all of Kansas City, for respondent.

GRAVES, P. J. Plaintiff is the widow of William H. Fay, deceased. Defendant issued to Fay an accident insurance policy on January 17, 1907. This policy was for \$5,000, and issued for one year, but was kept in force to the time of Fay's accidental death, January 10, 1912, by annual renewals thereof. The policy provided for accumulations, and by a "rider" or subsequent agreement entered into by the company at the date of Fay's death the policy would and did amount to \$7,500.

The policy was payable to plaintiff, and for the accidental death of her husband she under the terms of the policy as modified by this subsequent agreement or rider of date February 12, 1907, was entitled to \$7,500. In this policy was a double liability clause which entitled plaintiff to recover double the amount, if Fay was accidentally killed whilst a passenger "in or on any railway passenger car propelled by mechanical power." This clause as originally found said nothing about a passenger riding upon the steps or platform of a car. The defendant, still bidding for business, in June, 1910, broadened this double liability clause of its contract so that thereafter the policy of Fay had incorporated therein the following:

"Double Indemnities.

"(7) If such injuries are sustained by means as aforesaid while the insured is a passenger in or on a public conveyance provided by a common carrier for passenger service (including platform, steps, or running board of railway or street railway cars), * * * the amount to be paid under sections 1, 5, and 6 should be double the sum otherwise payable for such injuries."

So that, in the language of the distinguished counsel for appellant, as found in the brief:

"On January 10, 1912, the date of insured's death, the amount of his policy had increased from \$5,000 to \$7,500 through continuous renewal in case of his death from ordinary accident, and to \$15,000 in case the injuries were sustained by him while the insured is a passenger in or on a public conveyance provided by a common carrier for passenger service (including platform, steps, or running board of railway or street railway cars)."

This amendment to the original policy (in insurance language called a "rider") was not found by Mrs. Fay when she came to adjust the matter with defendant. It was not with the policy, but was afterward found in some of Mr. Fay's private papers at his office. Mrs. Fay, through her counsel, settled with defendant for \$7,500, and gave defendant a receipt in full for all liability, without the knowledge of the existence of this supplemental agreement or rider of June, 1910, by which the terms of the policy were amended as aforesaid. Shortly after the settlement this rider or amendment to the policy was discovered, and plaintiff demanded of defendant the additional sum of \$7,500, on the theory that deceased was a passenger upon the steps of a Metropolitan Street Railway car at the time of his accidental death. The defendant declined to pay this additional sum, and the instant suit followed. It should be noted that this change in the double liability clause, as above indicated, was one being made on policies generally by defendant, and defendant had full knowledge of this amendment to the policy when it settled with Mrs. Fay for \$7,500.

The course of the pleadings may be of importance. Counsel for appellant has thus

described the various steps in the pleadings before issue was finally made:

"In her petition: (1) Plaintiff pleads the provisions of the double indemnity clause which limits its benefits to accidental injuries sustained 'while the injured is a passenger'; (2) and alleges that Wm. H. Fay was accidentally killed by falling from a street railway car of the Kansas City Elevated Railway Company 'on which he was a passenger'; (3) alleges that thereby the company became liable to her for \$15,000, 'but said defendant, instead of paying to this plaintiff the sum of \$15,000, to which she was entitled, paid her only the sum of \$7,500, instead of said full amount of \$15,000.'

"To this petition defendant pleaded in bar of plaintiff's action the settlement and release executed by her in consideration of \$7,500, and as a further defense denied that Fay, the insured, was a passenger on the street car, or that the plaintiff was entitled to any double indemnity, or that defendant was in any way indebted to the plaintiff.

"Thereupon plaintiff filed an amended petition with substantially the same allegations, but adding the allegation that 'defendant has vexatiously refused to pay the additional sum of \$7,500 to this plaintiff,' and prays judgment for \$7,500, and interest, and also for \$750 damages as a penalty for said vexatious refusal of defendant to pay plaintiff said \$7,500, and for the further sum of \$2,500 as attorney's fees.

"To this petition defendant filed its former answer.

"Thereupon plaintiff filed her reply charging in general terms that the release had been obtained by fraud, making free use of the words 'fraud and fraudulent,' but setting forth no facts from which fraud could be inferred. The gist of these allegations is that at the time the company paid Mrs. Fay the \$7,500 she did not know she was entitled, as she claims, to \$15,000, but that defendant did know this and fraudulently concealed said fact."

In her reply plaintiff also offered to return to the defendant the sum of \$7,500 received by her; said offer being set forth in the reply as follows:

"The plaintiff here now offers and tenders to said defendant said sum of \$7,500 alleged as such full satisfaction and discharge of plaintiff's said claim and demand, as set forth in said second amended petition herein, and offers to comply with any order of the court with reference thereto."

Plaintiff did not, however, with her reply, making offer of restitution, pay the money into the court or tender it to the defendant, or do anything else to make her offer good.

Accordingly, on September 13, 1912, defendant filed in the court its formal motion in which it accepted plaintiff's offer to rescind the release and to return the \$7,500, and praying that an order be made requiring plaintiff to make good her offer by paying said \$7,500 into court; otherwise that her petition be stricken from the files. Defendant's motion last above referred to was overruled by the court on November 9, 1912, and it took a term bill of exceptions.

Later, on December 10th, the defendant filed an amended answer in which it formally of record withdrew its plea of settlement and release and narrowed the controversy down to the single issue as to whether or not Fay at the time he was injured was a passenger on the car, and therefore, whether he was entitled to the single indemnity of \$7,

500 already admittedly paid to plaintiff, or whether she was entitled to a further payment of \$7,500 by way of the double indemnity.

The company by this answer in effect expressed its willingness to litigate with Mrs. Fay her right to recover the additional \$7,500, notwithstanding defendant had already paid her \$7,500 in full settlement, and although she had executed a release fully discharging the company, so that she was thereby restored to her original cause of action, while at the same time retaining the fruits of the settlement. But the plaintiff was not to be denied in her charges of fraud. Although the release had been withdrawn as a defense by the amended answer, and was no longer being pleaded as a defense, plaintiff filed a reply renewing the charge that defendant had procured the release by fraud. This reply was filed after the trial began, and under it and over defendant's objections the court allowed plaintiff to introduce evidence in the effort to support such charges of fraud in the release, although no such issue was properly in the case; the court ruling:

"I think, Mr. Rosenberger, that the character of the testimony referred to would be admissible under the reply which was filed in this case."

And in arguing for the reception of this class of evidence plaintiff's counsel said:

"The object and purpose of this testimony is to show the vexatious conduct of this defendant in refusing to pay this woman's claim."

Fruitless objections were made throughout by defendant to the reception of this class of evidence and proper exceptions saved. We quote the foregoing because it is a short and concise statement of the steps taken to get this case to an issue. The argumentative part of the statement as to the substance of the allegations of fraud need not be strictly taken. On this the reply will best speak. Plaintiff obtained the following verdict:

"We, the undersigned jurors, find the issues in favor of the plaintiff and assess the amount of her recovery under said policy the sum of (\$7,500.00) seventy-five hundred dollars and (\$337.50) three hundred and thirty-seven and $\frac{50}{100}$ dollars, interest, and also assess the amount of (\$1,250.00) twelve hundred and fifty dollars as attorney's fees. [Here follow the signatures of ten jurors.]"

From a judgment entered upon such verdict, the defendant has appealed.

[1, 2] I. Defendant first insists upon its demurrer to the testimony, as we gather the contentions made. As the issues were finally made, the sole question on the merits of the case was whether or not the deceased was a passenger upon the street car at the time of the fatal accident. This question turns upon the facts.

The sole question of fact was whether or not the deceased was boarding a street car before the car started, and whilst the door was yet open for the admission of passengers. The evidence for plaintiff tended to show that the car stopped at the usual place

for the passengers to alight from such car and to get on said car; that whilst the car was in this position the deceased attempted to enter such car, but whilst he was on the step or partially on the step the conductor closed the door (previously standing open) and gave the signal for the car to go forward, and it did go forward, with plaintiff clinging to the handholds, with foot on step, until he was knocked to the street below by a structure on the side of the tracks. This structure was not far from where the car stopped and started. It was an elevated railroad passing over the street. For defendant there was much evidence to the effect that plaintiff ran and tried to board a moving car after the door through which passengers were admitted had been closed. The evidence for plaintiff made him a passenger, whilst that for the defendant did not. Much stress is placed upon the character of the two witnesses upon whom the plaintiff relied to prove that deceased had done the things required by the law to make him a passenger. Likewise counsel for plaintiff attacks some of the evidence for the defendant. The weight and credibility of this evidence was for the jury, and they have determined it against the defendant. The matter was submitted on the following instruction:

"If the jury believe and find from the evidence that on January 10, 1912, the Kansas City Elevated Railway Company was a carrier of passengers for hire and used the railroad and car mentioned in the evidence for such purpose, and if you further find and believe from the evidence that on said day the employees of said Kansas City Elevated Railway Company in charge thereof stopped said car at or near a point where the tracks of said railway company cross the state line between the states of Missouri and Kansas for the purpose of receiving passengers, and, if you further find that William H. Fay, with the intention in good faith to become a passenger (if you so find), had gone up the steps and through the station at said state line and before the doors of said car were closed, and before said car had started, he was in the act of stepping upon the steps of said car to become a passenger thereon, then the court instructs you that said Fay was a passenger on said car. And, if you further find and believe from the evidence that said Fay was a passenger as above defined and had actually gotten onto the steps of said car and was standing thereon when he was caused to fall therefrom and to be killed by falling from the said steps of said car at said point to the street below (if you so find), then said Fay was a passenger on said car within the meaning of the terms of said insurance policy and the additional benefit indorsement extending the benefits under said policy, and which are in evidence in this case. And, if the jury further believe and find from the evidence that said Fay was caused to be so injured and he died as a direct result of said injuries, if any, received at said time and place, then the plaintiff is entitled to recover. And you are further instructed if you find for the plaintiff you will find for her in the sum of \$7,500, together with interest thereon at the rate of 6 per cent. per annum from the date of demand of payment, if any, as shown by the evidence. And, if you further believe and find from the evidence that defendant has vexatiously, that is, without reasonable cause,

refused to pay such amount or loss, then you may, in addition to the above amount and interest, allow the plaintiff damages not to exceed 10 per cent. on the above amount, and a reasonable attorney's fee, but the amount which you may allow plaintiff, if any, for such attorney's fee must not in any case exceed the sum of \$2,500."

In so far as this instruction undertakes to outline the facts necessary to make deceased a passenger, it is correct. If, as a fact, the car was standing still, with its door open for the admission of passengers, and whilst it was so standing the deceased started to enter the same, with the intent to ride thereon as a passenger, he was a passenger within the eyes of the law, although the employee of the railway closed the door upon him before he had fully entered such car. The stopping of the car and the opening of the door was an invitation by the company to deceased to become a passenger, and when he (if he did) attempted to board such car whilst it was yet standing with door ajar, for the purpose of riding thereon, he at that moment became a passenger. 6 Cyc. p. 539.

The word "passenger" in the policy has the ordinary accepted meaning. In other words, if the deceased would be classified as a passenger in an action against the carrier, he should likewise be deemed a passenger under the terms of an accident insurance policy, unless the terms of the policy added some conditions. This policy required such passenger to at least be on the steps of the car.

We shall not further follow the counsel upon either side in their assault upon witnesses. The jury weighed the testimony of these witnesses. It was shown that deceased had been crippled a few days before the fatal accident, and had to use a cane in walking. This cane was found near him when picked up after the accident. The jury were evidently loth to believe that a cripple had run and caught hold of a moving car in an attempt to ride.

The question of passenger or no passenger was fairly submitted for determination by the jury, and their verdict is conclusive here upon that question.

[3] II. This instruction supra given for plaintiff is criticized by counsel for appellant thus:

"This instruction was self-contradictory and misleading. It first erroneously told the jury that Fay was a passenger on this car if with the intention to become a passenger he approached the car and was in the act of stepping on the steps of said car, intending to become a passenger thereon. This was erroneous. By the terms of the policy plaintiff could not recover in this case unless the injuries were sustained 'while the insured is a passenger in or on a public conveyance' (see policy). In other words, by the terms of the contract it was essential that Fay should not only be a passenger, but that he should be either in or on the car. Neither his presence at the station nor the fact that he was in the act of stepping on the steps of the car made him a passenger on the car. His mere intention to get on the car was not equivalent to his being on the car. His actual presence on the car as a passenger was

essential to a right of recovery. In the next sentence the court tells the jury that, if they find that Fay was a passenger 'as above defined,' and had actually gotten onto the steps of the car, then insured was a passenger, and plaintiff was entitled to recover. In other words, the court first told the jury that Fay was a passenger on the car if he was in the act of stepping upon it, which was erroneous, and the court then tells the jury that, if he was in the act of stepping on the car, and had actually gotten upon the step, then he was a passenger and to find for the plaintiff, and this latter regardless of whether the car by that time had then started, its door was closed or not. The jury could very well have understood from this instruction that the plaintiff had the right to recover if Fay was in the act of getting on the car, even though he had not in fact gotten on it.

"We submit that the court tried this case upon a wholly erroneous theory in admitting affirmative and independent evidence of vexatious refusal to pay; that in no event should that fatally prejudicial evidence have been admitted as part of the plaintiff's case in chief; that the evidence abundantly justified the defendant in contesting this claim, and therefore the court was not warranted in even submitting the question of vexatious refusal to the jury; that the court erred in refusing to withdraw that issue from the jury; that the errors committed permeated the whole trial and inhere in the verdict itself, not merely with respect to attorneys' fees, but with respect to the whole verdict. "The judgment should accordingly be reversed."

It does not appear that defendant could have been harmed by this instruction, because the instruction requires the jury to find that deceased "had actually gotten on the steps of said car and was standing thereon when he was caused to fall" before the jury could find for the plaintiff. The writer of the instruction evidently had in mind what acts were necessary to make deceased a passenger, as between him and the railroad company, and thus the first clause of the instruction. Technically, as between deceased and the railway, he was a passenger, whether he got on the steps or not, provided the other assumed facts were true. But, as the policy required the passenger to be "in or on the car," the writer added the clause last quoted above which required the jury to find that this technical passenger was actually on the car, as required by the policy. There is no substance in the complaint, and this contention of appellant is not sustained.

[4-6] III. The most vehemently argued error in this record is thus stated in the conclusion of counsel's able written argument in the brief. The contention is that under section 7068, R. S. 1909, the plaintiff should not be allowed to introduce evidence as tending to show vexatious refusal to pay a policy of insurance, unless such evidence was necessary and proper for the purpose of establishing plaintiff's right to recover under the policy itself. To couch the question in counsel's language, we quote the brief thus:

"The whole test of the good faith of the company's refusal is the strength or weakness of its case as presented at the trial, and it is erroneous to receive extrinsic and collateral evidence disconnected with the merits, directed solely to the issue of vexatious refusal. This is

mere 'side-wind evidence' preventing a fair trial."

The statute reads:

"In any action against any insurance company to recover the amount of any loss under a policy of fire, life, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not exceeding ten per cent. on the amount of the loss and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict."

Whilst there may be some authority from other states, under statutes of those states, which would lend some support to appellant's contention, our statute cannot be so construed. Under our statute, if the plaintiff desires to recover the damages named therein, i. e., the 10 per cent. on the amount of the loss and the attorney's fees, there must be appropriate allegations in the petition showing that plaintiff claims and is entitled to these damages, and such allegations must be sustained by the proof. Numerous things done by the defendant might be evidence of a vexatious refusal to pay, and yet not have any bearing upon the right of plaintiff to recover on the policy. Thus in *Young v. Insurance Co.*, 187 S. W. 856, not yet officially reported, we held that the threat to litigate through the Supreme Court, if a settlement offered was not accepted, tended to show a spirit of vexatious delay. This threat did not prove plaintiff's case, but it did prove an intent to vexatiously delay payment. But we need not mention instances. It stands to reason that under this statute plaintiff must have in the petition allegations showing that he is entitled to these damages, and these damages become a triable issue in the case. As it is a triable issue, any evidence which tends to prove this particular issue is competent, whether such evidence tends to prove the main issue in the case or not. By main issue we mean the plaintiff's right to recover under the policy. Of course, if this issue as to these statutory damages is not made out by proof, it is the duty of the court, as in other cases, to take such issue from the jury by appropriate instruction. But, if there is evidence by proof direct of vexatious refusal to pay, or if from all the evidence, facts, and circumstances in the case the jury has the right to infer a vexatious refusal to pay, then the issue should be submitted to the jury. The statute leaves the jury as the arbiter, if there are facts sufficient to carry the issue of vexatious delay to the jury. Nor could the plaintiff be precluded from introducing any competent evidence tending to show a vexatious delay in payment. Such plaintiff is not confined upon this issue merely to matters and things which would tend to show defendant's liability for the principal sum of the policy, but he may offer any competent evidence upon this one issue, whether such evidence supports the main issue of lia-

bility on the policy or not. Certainly there can be no recovery upon the issue of vexatious delay, if there is no recovery under the policy, but, if there is recovery on the policy, then there may be a recovery of these statutory damages, if the jury so find, under evidence sufficient to support their verdict upon that issue. This particular question—I. e., whether extrinsic evidence is admissible to sustain the allegation of vexatious delay—is one of first impression in this state. The statute has been frequently under review, but not from this angle. In the very early case of *Brown v. Ins. Co.*, 45 Mo. loc. cit. 227, we said:

"The whole question of vexatious refusal or delay is a matter of fact to be determined by the jury. They must make up their verdict on this issue by a general survey of all the facts and circumstances in the case; and if, upon a full consideration, they conclude that the refusal was unjustifiable and vexatious, the law authorizes them to assess the damages. The statute will not admit of the construction contended for by the counsel for the plaintiff in error that before damages are allowed it must be explicitly proven by the plaintiff that the delay or refusal was vexatious."

And this doctrine has the later express approval of this court in *Keller v. Insurance Co.*, 198 Mo. 440, 95 S. W. 903. In the *Brown Case* there was no extrinsic proof on the question of vexatious delay, as we gather it from the opinion, but Judge Wagner did not by the language used undertake the rule that proof on the question of vexatious delay must be limited to proof tending to show the right of plaintiff to recover upon the merits. It is there simply ruled that the jury should determine this question from the facts and circumstances in the case. In that case there was a wholly untenable defense made upon the question of the validity of the policy, and it was evidently upon this matter that the court ruled there was sufficient evidence to submit the question to the jury.

In the case at bar we rule that the allegation of vexatious delay in payment of the policy may be shown by any competent evidence, whether such evidence tends to establish the right to recover the policy amount or not. This leaves but one question of serious import left, and that is the competency of the evidence offered in the trial upon the issue. That question we take next.

[7] IV. Recalling the statement of facts, it will appear that defendant first pleaded settlement, to which plea plaintiff replied by alleging such settlement was fraudulently procured, and tendering in the reply the \$7,500 received in settlement. Later the defendant moved the court to compel plaintiff to pay into court the \$7,500 upon a return of the receipts taken in settlement. This motion was overruled, and the defendants so framed their answer as to obviate the question of fraud in the release, if they could obviate that issue. In this last answer they did not plead settlement, but denied liability. The plaintiff proved these pleadings on the theory

that they tended to show a vexatious delay in payment. We think this evidence competent. It will not do to say that defendant magnanimously withdrew the issue of settlement merely to save plaintiff the trouble of trying to prove fraud in the execution of the releases. We use the term "releases" instead of "release" purposely, because, when plaintiff brought in her policy and released all claims upon it for the \$7,500, she was asked about the annual renewals issued by the company, and, she not having them, they took a further release as to them. The officer of the company also said that they had in mind the last rider pertaining to double liability when this settlement was made. The jury were entitled to all these facts. They might conclude that the issue of fraud in the settlement was skillfully withdrawn by defendant's last answer to obviate a trial of an issue, which defendant feared in the case. The jury might reasonably conclude that this was but another link in the chain of vexatious delay.

Not only was this evidence proper, but, if plaintiff could show that the defendant purposely delayed the payment of the last \$7,500 by fraudulently procuring the release, that evidence would also be proper upon the issue of vexatious delay. In *Young v. Insurance Co.*, supra, we held that the fact of a fraudulent appraisal had been procured by defendant was a proper matter to be considered upon the issue of vexatious delay. So in this case the procuring of a fraudulent release (if such was done) for less than the full liability of defendant was a proper circumstance to be shown upon the issue of vexatious delay, and this is none the less true because the showing of such fact might tend to prejudice the jury upon the main issue. If, as a fact, a fraudulent release was procured, it was the act of the defendant, and defendant should be estopped from saying that proof of its wrongdoing would prejudice the jury, if such proof is competent upon any issue in the case.

Plaintiff also showed that defendant went to the railway company to get the facts as to whether or not the deceased was a passenger, and that the railway company usually husbanded the witnesses who would testify to facts showing that such relation did not exist between it and deceased, and that defendant's agent making the investigation knew that such was the course of conduct upon the part of the railway company.

We see no error in this evidence. Before refusing to pay on the ground that deceased was not a passenger, the defendant should have made a fair investigation of the facts. It should not have confined its investigation, as it seemingly did, to such facts as might have been given it by the railway company, which was vitally interested in the fact whether or not deceased was a passenger. Whether the railway was in the habit of getting one

side of the controversy in such case, if such was a fact, and defendant knew of this habit, was certainly competent. Other points are raised, all of which we have examined, but the foregoing are all that we deem worthy of note in the opinion. We believe that there were facts sufficient to carry the issue of vexatious delay in payment to the jury, and its finding thereon is binding here.

The judgment should be and is affirmed. All concur; BOND, J., in result.

BARBER v. HARTFORD LIFE INS. CO. (No. 17664.)

(Supreme Court of Missouri, Division No. 1, March 30, 1916. Rehearing Denied and Motion to Transfer to Court in Banc Overruled July 3, 1916.)

1. CONSTITUTIONAL LAW \S 165 — INSURANCE \S 4 — OBLIGATION OF CONTRACT — PRIVATE CONTRACTS — IMPOSITION OF PENALTY.

Rev. St. 1909, \S 7068, providing that insurance companies vexatiously refusing to pay losses may be assessed punitive damages and attorney's fees, does not unconstitutionally impair the policy contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 460; Dec. Dig. \S 165; Insurance, Cent. Dig. \S 4; Dec. Dig. \S 4.]

2. CONSTITUTIONAL LAW \S 247 — EQUAL PROTECTION OF LAWS — PENALTY AND FEES.

The above statute does not deny the insurance company the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 703; Dec. Dig. \S 247.]

3. CONSTITUTIONAL LAW \S 303 — DUE PROCESS — PENALTY AND FEES.

The statute does not deny the insurance company due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 863-866; Dec. Dig. \S 303.]

4. CONSTITUTIONAL LAW \S 326 — RIGHT TO JUSTICE — PENALTY AND FEES.

The statute does not violate Const. Mo. art. 2, \S 10, providing that justice shall be administered without sale, etc.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 959, 960; Dec. Dig. \S 326.]

5. JUDGMENT \S 816 — FOREIGN JUDGMENT — JUDGMENT OF STATE COURT — CONSTITUTIONAL PROVISION.

The record of a Connecticut suit between a policy holder suing on behalf of himself and other policy holders against defendant insurance company wherein the policy contract was modified, is admissible under the full faith and credit clause of the federal Constitution (article 4, \S 1), in an action on a similar policy.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1444; Dec. Dig. \S 816.]

6. JUDGMENT \S 949(1) — PLEADING AS DEFENSE — IDENTITY OF ISSUES.

Where the effect of a foreign judgment upon the pending litigation is generally stated, the answer is sufficient against an objection first raised at the trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1795, 1802; Dec. Dig. \S 949(1).]

7. INSURANCE \S 646(3) — ACTIONS — BURDEN OF PROOF — VALIDITY OF UNPAID ASSESSMENT.

An insurance company, seeking to avoid payment of a policy because forfeited by nonpayment of an assessment, must prove that the assessment was levied in accordance with the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1653; Dec. Dig. \S 646(3).]

8. INSURANCE \S 362 — FORFEITURE — NON-PAYMENT OF ASSESSMENT — EXCESSIVE ASSESSMENT.

Forfeiture of an insurance policy cannot be predicated upon nonpayment of an assessment which was excessive, both under the contract itself and as modified by a foreign judgment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 925-930; Dec. Dig. \S 362.]

9. INSURANCE \S 186(2) — CONTRACTS — MODIFICATION.

Where the policy provides that annual dues should be paid on a certain date, the insurance company cannot, without the consent of the policy holder, change the date of payment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 396; Dec. Dig. \S 186(2).]

10. INSURANCE \S 191 — ASSESSMENT — POWER TO LEVY.

Where an insurance company's charter intrusted all its affairs to a board of directors and the making of by-laws to the stockholders, held, that its executive officers lacked power to levy assessments unauthorized by the directors or the by-laws.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 416; Dec. Dig. \S 191.]

11. INSURANCE \S 665(1) — ACTIONS — SUFFICIENCY OF EVIDENCE — VEXATIOUS FAILURE TO PAY.

Under Rev. St. 1909, \S 7068, a jury may assess punitive damages and an attorney's fee against an insurance company upon concluding, from a general survey, that its refusal to pay the claim was vexatious and no explicit proof to that effect is necessary.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. \S 665(1).]

Appeal from Circuit Court, Johnson County; C. A. Calvird, Judge.

Action by Rosa Barber against the Hartford Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action at law on policy No. 174,416 issued by the defendant September 4, 1893, insuring the life of Frank Barber for \$2,000 for the benefit of the plaintiff, who was then his wife and is now his widow, and for damages for vexatious refusal to pay the loss under the provisions of section 7068 of the Revised Statutes of 1909. Mr. Barber died June 5, 1910. There was a judgment in the circuit court for \$2,976, including \$200 damages and \$500 attorney's fee awarded by the jury for vexatious refusal to pay, from which this appeal is taken. The defendant is a life insurance company of Connecticut. It had a business department called the "Safety Fund Department," which was again divided into the "Men's Division" and "Women's Division," which issued policies payable on the assessment plan, and this policy was

of course in the "Men's Division," and was called a "Certificate of Membership Safety Fund Department."

The answer pleads that this certificate was conditioned upon the payment of periodical assessments; that on January 29, 1910, an assessment designated as "Call 126" was levied on it against Barber for \$13, with dues amounting to \$1.50, which became due by the terms of the certificate on March 1, 1910; that Mr. Barber failed to pay it on or before March 20th, to which time it had been extended; and in consequence thereof the insurance was, by the terms of the certificate, forfeited. The issues in the case grow out of this circumstance. It also pleads, in effect, that an action had been brought in the New Haven county superior court of Connecticut, by one Dresser, holding a similar certificate of membership in the safety fund department of defendant on his own behalf, as well as on behalf of all others similarly situated, including the plaintiff, wherein the rights of plaintiff were fully adjudicated; that the mortuary fund of said department and the trust thereby created is being administered strictly in accordance with the terms of said certificate and trust as construed and adjudicated by said court, whereby defendant is without authority to pay out of said mortuary fund the amount of any certificate of membership where, as in this case, the member has failed or refused to pay the assessment levied against him to maintain said fund. It also denied the right of plaintiff to recover the damages and attorney's fee sued for, because the provisions of said section 7068 authorizing the imposition of such damages and attorney's fee are unconstitutional and void as being in violation of section 10, article 1 of the Constitution of the United States, and of section 1 of the Fourteenth Amendment thereto, and of section 30 of article 2, and of section 10 of article 2 of the Constitution of Missouri; and because the construction thereof by the courts of this state constitutes a rule of judicial construction violative of said provisions of the state and federal Constitutions, and because said section 7068, if applied to this case, and in its application to the facts of this case, denies the defendant due process of law as guaranteed by the state and federal Constitutions. These matters were all put in issue by replication.

The defendant on the trial offered in evidence the record in the Dresser Case duly certified under the act of Congress in such cases made and provided, which was, on plaintiff's objection, excluded, to which defendant duly excepted.

The policy sued on, so far as applicable to the questions in this case, is as follows:

"In consideration of the representations, agreements, and warranties made in the application herefor, and of the admission fee paid; and of \$3 per annum on each \$1,000 of the indemnity herein provided for, for expense dues, to be paid as hereinafter conditioned, and of

the further payment of all mortality calls proportioned to the said indemnity, levied against the herein-named member to form a mortuary fund for the payment of all indemnity matured by deaths of members, and to create a safety fund as hereinafter described, which mortality calls, to be levied upon all the members in the department wherein this certificate is issued whose certificates are in force at the date of such deaths, shall be made according to the table of graduated mortality ratios given hereon, and as further determined by their respective ages and the aggregate indemnity of the dates of such deaths, with due allowance for discontinuance of membership (one-third of the proceeds of such mortality calls to be applied toward said safety fund until the sum of \$10 on each \$1,000 indemnity aforesaid shall have been thus applied, when the basis of all subsequent mortality calls shall be two-thirds only of the table given hereon) does hereby issue this certificate of membership in its safety fund department to Frank Barber (herein called the member) of St. Louis county, of city of St. Louis, State of Missouri, with the following agreements:

"That 90 days from the receipt by the president or secretary of said company of satisfactory proofs, in accordance with forms furnished upon notice of death and with full information as to the manner and cause of the death of the herein-named member while this certificate is in force, all the conditions hereof having been conformed to by the member, upon presentation and surrender of this certificate properly receipted, there shall be due and payable, out of the aforesaid mortuary fund and not otherwise, the indemnity of \$2,000 (less the balance unpaid, if any, of the stipulated contribution to said safety fund, with 50 per cent. added, together with the unpaid installments of annual expense dues and any mortality or other charge against the member payment of which is not matured), to his wife, Rosa Barber, if living, otherwise to his legal representatives. All such payments to be made at the home office of said company in lawful money of the United States.

"That said company will deposit said sum of \$10, when received, with the trustee, named in a contract with it (of which a copy is printed hereon), as a safety fund in trust for the uses and purposes expressed in said contract; and shall make a semiannual division of the net interest received therefrom by it pro rata among all the holders of certificates in force in said department at such times, who shall have contributed five years prior to the date of any such division their stipulated proportion of said fund, by applying the same to the payment of their future dues and assessments; and that, whenever said fund shall amount to \$1,000.00, all subsequent receipts therefor shall be divided by the said company in like manner as the interest."

The department in which this certificate was issued was organized about 1879, on the following plan: Each person applying for insurance under the plan was to pay an admission fee of \$8 for \$1,000; \$12 for \$2,000; \$15 for \$3,000; \$18 for \$4,000; \$20 for \$5,000; \$40 for \$10,000, and the medical examination fee estimated at \$3 to be paid to the physician; also to pay annually for the sole purpose of paying all expenses of said insurance \$3 for each \$1,000 of insurance; and also to pay, as mortuary payments assessed to pay death losses, an amount graduated according to the policy holder's age at the time of the assessment, the amount of his policy, and the aggregate indemnity in force with the com-

pany at the time of each death, with due allowance for discontinuance of membership, one-third on each call to be applied toward a safety fund until the sum of \$10 per \$1,000 had been paid "when the basis of all subsequent mortality calls shall be two-thirds only" of the amount named in the table indorsed on the certificate. This safety fund was to be deposited with the "security company," a corporation formed to take care of it for an additional compensation out of this income. The earnings of this fund after it should reach \$300,000 and all contributions to it after it should reach \$1,000,000 in United States bonds par value were to be divided among certificate holders of five years' standing in proportion to the amount of their certificates; and if the aggregate amount of the certificates should fall below \$1,000,000 the principal of the fund should be similarly divided. The fund accumulated rapidly, and in 1889 the Security Company had ceased to buy United States bonds, and in that year, notwithstanding its contract with policy holders, the appellant secured the passage of a resolution by the Legislature of Connecticut authorizing the investment of the fund in other securities. Under this permission the fund was invested in other securities, including stocks of the New York, New Haven & Hartford and St. Joseph, Denver City & Southern railroad companies and of Hartford banks. In 1899 they ceased the issue of certificates in this department and thus practically put an end to the influx of \$10 contributions which, the fund having reached its maximum of \$1,000,000, must be divided among the certificate holders. Things were in this condition when the Dresser Suit was instituted in 1907 and went to final judgment March 23, 1910. The court ruled that the act of 1889 (10 Sp. Laws Conn. p. 968), was unconstitutional and void as impairing the obligation of the contract of the company with the certificate holders and found that as a result of investments in other securities than United States bonds losses had been incurred so that the actual value of the fund remaining was somewhat less than \$1,000,000; that excessive charges had been made by the Security Company for its management, so that the court required over \$40,000 of this compensation to be returned and distributed to the certificate holders. It also found that, although the company had levied assessments to cover the full amount of the certificates for each death during the previous quarter, they deducted, in making payment, from the face of such certificates a certain proportion of the assessment that would have been due from the holder had he survived the quarter, so that there was a margin arising between the amount of the losses paid and the amount of losses assessed for, which had accumulated in the mortuary fund and had been used for the payment of losses in advance of the receipt of the assess-

ments by which it was reimbursed. This accumulation amounted to "many thousands of dollars," which belongs to the certificate holders. The court held that it was proper that the defendant should hold some such fund for the purpose of enabling it to pay losses promptly, but that it was not necessary that the company should hold more than the amount of one average quarterly assessment for the previous year.

After reciting these facts the judgment proceeded:

"Whereupon it is adjudged and decreed that said mortuary fund of the men's division arising from the excess of the amount received for quarterly assessments over the amount necessary for the payment of losses for said quarter, as above described, or from any other sources, together with all income or interest thereon, belongs to the certificate holders in the men's division of the safety fund department, and the Insurance Company is reasonably entitled to hold the same as a necessary and proper fund for the settlement of death claims on the certificates of insurance in said department."

It then ordered that—

"any excess in said fund above the average of the four preceding quarterly assessments in said men's division shall be distributed to the certificate holders in diminution of assessments."

The call in question is as follows:

"Hartford Life Insurance Company.

"Hartford, Conn., January 29, 1910.

"Special Notice of Quarterly Call No. 126.

"Your next quarterly call will fall due and be payable June 1, 1910.

"Frank Barber, 4201 Pleasant St., St. Louis, Mo.

"2-174416

"This call which will be due March 1, 1910, is made to meet 119 deaths (as shown by accompanying list), benefits, \$322,378.48 expenses on your policy, as follows:

For mortality call.....	\$13 09
For quarterly dues to June next.....	1 50

Credit	\$14 59
Dividend to be applied if payment be made....	1 40

Amount due	\$13 19
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"Payment will not be accepted later than Mar. 5, 1910, unless residence is on or west of the meridian of Salt Lake, Utah, in which case payment will be accepted up to and including Mar. 15, 1910.

"Unless the payment called for by this notice shall be paid to the company at its home office by or before the day it falls due the policy and all payments thereon will become forfeited and void.

"Return this notice with remittance payable to Hartford Life Insurance Company.

"Make all remittances by draft, check, P. O. or express money order when possible. Letters containing currency must be registered.

"See over for special notice.

"Special Notice.

"If the payment of the above quarterly call is not received at this office on or before Mar. 5, 1910, the last day allowed for payment in the above notice, a second notice will be mailed to the policy holder by registered letter, giving until Mar. 20, 1910, to remit, and the same charge will be made for this second notice as is fixed by the law of Massachusetts, namely, 50 cents.

"Every member whose payment does not reach

this office on or before Mar. 5, 1910, will be obliged to pay 50 cents fee in order to have the policy unconditionally reinstated.

"After Mar. 20, 1910, the limit allowed for payment under the registered notice, the company reserves the right to require a medical examination as a condition of reinstatement."

The credit of \$1.40 is Barber's share of the excessive compensation taken by the Security Company for the care of the safety fund. The amount of this fund, for which charges were being made up to and at the time of the Dresser trial, was more than \$1,000,000.

The assessment in question was made as of December 31, 1909. At that time all of the 119 death losses enumerated in the notice had been paid except 15, aggregating \$41,000, and there was remaining in the mortuary fund \$74,938.92; and the interest on the safety fund was paid into it on the same date, making an aggregate of \$94,386.31 then in the fund. The defendant introduced evidence showing that there were unpaid death losses amounting to \$128,166.67 or more than \$87,000 in addition to those included in this assessment still unpaid, and accounted for this fact by saying that the time of payment of losses included in the previous assessment had been extended, so that the collections for the payment of these losses had not yet been made.

The appellant asked upon the trial and the court refused an instruction to the effect if there was no evidence that the refusal of the defendant to pay the sum sued for was vexatious, and for that reason they should not allow any sum for damages or attorney's fees should they find for the plaintiff. It also, both upon the trial and in its motion for a new trial, contended that the action of the court in excluding the record in the Dresser Case violated section 1, article 4 of the Constitution of the United States, providing that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Such further reference will be made to the record as seems to be necessary.

Jones, Hocker, Hawes & Angert, of St. Louis, J. W. Suddath & Son, of Warrensburg, and James C. Jones, Jr., of St. Louis, for appellant. Nick M. Bradley, of Warrensburg, and Robert Kelley and Charles E. Morrow, both of St. Louis, for respondent.

BROWN, C. (after stating the facts as above). [1-4] 1. The defendant pleaded in its answer that the provision of section 7068 of the Revised Statutes of Missouri 1909 was unconstitutional and void and therefore could not be made the basis of any recovery for damages and attorney's fees in this suit. This claim has been rejected by this court and the Supreme Court of the United States until it has become too stale to serve as a foundation for our jurisdiction. *Keller v. Home Life Insurance Co.*, 198 Mo. 440, 95 S. W. 908; *Fidelity Mutual Life Association*

v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; *Iowa Life Insurance Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204; *Farmers' etc., Ins. Co. v. Dobney*, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. Ed. 821; *Fraternal Mystic Circle v. Snyder*, 227 U. S. 497, 33 Sup. Ct. 292, 57 L. Ed. 611. It is probably in view of these repeated decisions and others to the same effect that the appellant has not favored us with a brief or argument upon this point.

[5, 6] Our jurisdiction rests solely upon the point that the trial court erred in rejecting the record of a judgment of the superior court of Connecticut for New Haven county in the case of Ibs and others, holders of like certificates in the safety fund department of defendant, suing on behalf of themselves and of all others similarly situated, against this defendant, the Security Company named in the certificate here sued on, together with the members of the board of directors of defendant for the time being. This case went to final judgment in the Connecticut court March 23, 1910. By this judgment the court attempted to make some radical changes in the contract here sued on and this attempt, applicable to this case in some respects which we shall notice, has received the indorsement of the Supreme Court of the United States in *Hartford Life Insurance Co. v. Ibs*, 237 U. S. 662, 35 Sup. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765.

The grounds upon which the plaintiff objected to the admission of this record were many, but its exclusion fairly raised the constitutional question whether or not, in that action, full faith and credit was given to the record of a judicial proceeding in the Connecticut court as required by the federal Constitution. Among these objections were some relating to its certification and completeness, but these are shown to have been groundless by an additional abstract. Objection was also made that the judgment was not properly pleaded as an adjudication by the Connecticut court of the matter involved. This objection would probably have been well taken had it been directed against the answer before trial, but its effect, so far as applicable to the case, was generally stated and ought not to have been allowed to interfere with the trial by forcing an amendment during its progress. We think the constitutional point was well taken and shall consider the case in the light of the rejected evidence.

[7] 2. The legal maxim that the law abhors a forfeiture carries with it its own reasons. One who, like this respondent, has for 17 years regularly contributed to a fund for the indemnity of others ought not to be deprived of all the benefit which he himself was to receive as his compensation otherwise than by the honest performance of all the conditions upon which he had agreed to surrender it. He has placed himself in the hands of others who for their own profit have assumed the

duty of his protection, and they can have no right to take his money and refuse the protection other than the right which grows out of the strict performance of their own undertaking; and where, as here, they seek after his death to appropriate to themselves the benefit of the insurance for which he has stipulated because of his failure to pay an assessment against him, it is but just that they should show that there was such an assessment, and that it is a liability which he had bound himself by his contract to pay. The burden falls justly upon them to show a performance as strict and literal as the performance they seek to exact from him. This is not a favor which the law grants him, but simply the fair and equal treatment to which every one is entitled before the law, which abhors an injustice. The assessment is the ground of his liability, and until it is shown to have been made in accordance with the contract he cannot be deprived of the indemnity which the contract gives him. *Hannum v. Waddill*, 135 Mo. 153, 36 S. W. 616; *Settle v. Insurance Association*, 150 Mo. App. 520, 528, 131 S. W. 136; *Wayland v. Indemnity Co.*, 166 Mo. App. 221, 148 S. W. 626; *Earney v. Modern Woodmen*, 79 Mo. App. 385; *King v. Hartford Life Insurance Co.*, 133 Mo. App. 612, 114 S. W. 63; *Craig v. Insurance Co.*, 136 Mo. App. 5, 116 S. W. 1113; *Baker v. Insurance Co.*, 51 Mich. 243, 16 N. W. 391; *Insurance Co. v. Comfort*, 50 Miss. 662; 2 Cooley's Briefs on Insurance, pp. 1871, 1872.

[8] 3. The defendant does not contend that an assessment should be made for the payment of a death loss until a death has occurred. *Bacon on Benefit Societies and Life Insurance*, § 377. But it says that this rule was modified by the decree of the Connecticut court in the *Dresser Case*. It is therefore necessary to examine the policy in connection with that decree to ascertain the powers of appellant in this respect; and in doing so we must consider the various funds involved in the inquiry. The defendant company seems to have had a checkered career. It was organized under an act of the Connecticut Legislature, in 1866 (6 Sp. Laws, p. 113), as the "Hartford Accident Insurance Company." The next year its name was changed to the "Hartford Life & Accident Insurance Company" (6 Sp. Laws, p. 127); and the next year (1868) it was again changed to the Hartford Life & Annuity Insurance Company (6 Sp. Laws, p. 333) and authorized to "make contracts, upon any and all conditions appertaining to or connected with life risks, annuities and reversionary interests of whatever kind and nature." It then became a full-fledged life insurance company. Its business kept pace with these changes, and in 1879 it reduced its capital stock and organized the safety fund department in which these policies were issued, and continued to write that kind of insurance until 1899 when it ceased to issue such policies, but has contin-

ued to administer the funds created under their terms. The plan was the same as that expressed in the policy sued on. Each certificate holder contributed \$10 per \$1,000 of insurance to form the "safety fund," which was to be held and administered by a corporation formed by themselves, called the "Security Company." When the fund reached \$300,000 its income was to be distributed among the policy holders according to the amount of insurance held by each, by applying it in reduction of their future assessments. It was to be invested in United States bonds and when it reached the sum of \$1,000,000 "in United States bonds" no further accumulation was to be made, but all future payments by policy holders of the \$10 per \$1,000 required for that fund were to be divided among policy holders of five years' standing and applied to reduce assessments the same as the interest. Although the fund reached the magnitude of \$1,000,000, it never reached that amount in United States bonds but was invested in other securities, including railway and bank stocks and irrigation bonds. At the time of the assessment here in question the principal of this fund amounted to \$1,106,354.29. How much it had been depleted by losses up to that time does not appear. The income of it is, under the contract contained in the policies, paid into the mortuary funds semiannually, and distributed in reduction of mortality assessments.

There is one more fund which is material in this controversy. It will be seen from the terms of this certificate that upon payment of a death loss "any mortality or other charge against the member payment of which is not matured" is to be deducted. In other words, if he died after the close of the assessment quarter and before payment of the assessment was due, the entire assessment was to be deducted; if before the end of the quarter only, the pro rata amount up to the time of his death was to be deducted from the amount of the indemnity paid. In this way each assessment was excessive to that extent, and the excess, amounting to "many thousands of dollars," together with the surplus resulting from the over estimate of probable lapses, all of which was applicable to the payment of mortality assessments, had, at the time of the *Dresser* judgment, been kept in the mortuary fund for the payment of death losses in advance of the assessments, and this constituted the fund for the prompt payment of losses which the Connecticut court had in view when it entered the judgment. It was a fund being continually replenished at the occurrence and payment of each death loss, and the same fund about which it said in its judgment:

"The plaintiffs claim it was improper and wrongful to accumulate these margins and to carry this balance in said mortuary fund, and claimed that said balance of margins should be distributed amongst the outstanding certificate holders, but it held that it is proper and reasonable that the company should hold some such

fund for the purpose of enabling it to pay losses promptly, but that it was not necessary for that purpose that the company should hold more than the amount of one average quarterly assessment for the previous year."

It is plainly seen from an attentive reading of this judgment that the court did not have any idea of undertaking to make a new contract for these certificate holders or to change the old one. It had no more right to do this than did the Legislature, and asserted no such right but it found this fund present in the mortuary fund; it was a flexible one because replenished by each death loss, and considered it proper that it should be used for any lawful purpose connected with the fund from which it had been taken by a slight and perhaps necessary safety margin in the assessment for each loss; and it was proper, in the estimation of the court, that such part of it as should be reasonable and necessary, not to exceed the amount of the average assessment for the next preceding year, should be used for the prompt payment of losses and that the remainder should be used in reduction of the succeeding assessment.

In the light of these three funds, that is to say (1) the fund proceeding directly from the regular quarterly assessments to pay the losses for which they are made; (2) the interest on the safety fund and (3) the "margins" referred to in the Dresser judgment, we will examine the assessment for the last quarter of 1909 embodied in call 126. The average amount of the quarterly assessments for the preceding year had been \$300,000, to which amount the defendant was limited by the judgment in maintaining this emergency fund. The assessment was levied by its express terms to pay 119 death losses therein enumerated, amounting, in benefits, to \$322,378.48. On December 31, 1909, the last day of the quarter for which it was levied, all these losses except 15, amounting to \$41,000, had been paid out of the fund on hand and there remained \$74,938.92. On the same day there had been paid into the fund from the income account of the safety fund \$19,417.39, making the amount left on hand \$94,386.31. Deducting from this \$41,000, the amount of the 15 unpaid losses, left \$53,386.31. In other words, the payment of all losses for which this was to be made left the last-mentioned amount on hand in the fund, to be "replenished" by the \$322,387.48. This left a permanent fund on hand to the amount of \$375,764.79, or nearly \$76,000 in excess of the amount authorized by the Connecticut court and which represents the amount of excess above that authorized by the contract as modified by the judgment.

When this appeared in its evidence, the defendant attempted to explain by the statement that there were other death losses which had accrued up to and including that day, bringing the total amount unpaid up to \$128,000 in round numbers. Were this true,

and the proofs in the hands of the company, they should have been included in that assessment, but no claim is made that they belonged there. If the death had occurred before that date and no proof had been furnished the company, the fund would be "replenished" to that amount in the next assessment, so that they would have no influence whatever in determining the amount of call 126, but could be promptly paid out of the surplus that call would leave on hand. It is intimated however that the \$87,000 of these losses not included in call 126 had been included in previous assessments the payment upon which had been extended out of kindness to the certificate holders; and this suggestion is given color by the report of defendant filed in the insurance department of Missouri as of that day, in which the following item appears: "Net premiums in course of collection safety fund department \$155,000." And as this included both the men's and women's division of that fund it would probably account for the proportion of such pending collections in the men's department. For this an assessment had already been made which should be added to the amount of call 126 as a means of replenishing the fund. Its inclusion in this transaction in any other form would be in plain violation of the terms of both the policy and judgment.

It follows that the appellant, instead of sustaining the burden of proving a valid assessment as a foundation for the forfeiture of this policy, has shown a grossly excessive one made without authority either in the contract or the judgment in the Dresser Case, and in pursuance of a policy which runs like a sordid thread through the record, of accumulating large funds at the expense of the policy holders, and withholding them as long as possible from distribution. When we consider that, in addition to what it received out of the income of these funds, it was collecting at the time this assessment was made, and receiving as compensation for the conduct of this remnant of an abandoned business, about \$85,000 per year from the policy holders, we can see no excuse for extortion. We do not think a forfeiture can stand on the foundation of this assessment.

[8] 3. The appellant in argument contends that the policy was properly forfeited for nonpayment of 10 cents, a balance which it claims to have been due on the following figures. It charged Mr. Barber one-fourth of his annual dues under the policy for expenses—\$1.50. The court in the Dresser decree had ordered that \$40,046.36 illegally withheld from the policy holders on account of excessive fees exacted for the care of the safety fund should be returned to them. On this account \$1.40 was credited as the share running to this policy, leaving 10 cents due in addition to the assessment for mortuary purposes. The policy, in this respect, runs as follows:

"In consideration of * * * \$3 per annum on each \$1,000 of the indemnity herein provided for, expense dues, to be paid as hereinafter conditioned."

The policy is dated September 4, 1893. On the next page are the "conditions" which, with respect to this payment, are as follows:

"The member agrees to pay to said company, for expenses, dues of \$3 per annum on each \$1,000 indemnity on the first day of the month after date of issue hereof, and at every anniversary thereafter, so long as this certificate shall remain in force; or by pro rata installments of the same, in advance, for periods of less than a year."

We have searched this voluminous record carefully for any evidence of any other arrangement. This was by the terms of the policy due on October 1st of each year and we see nothing in the provision we have quoted which gave the appellant the right at its own election, and without the consent of the policy holders, to make it otherwise payable. The forfeiture cannot stand on this 10 cents.

[10] 4. In all the mutations which the appellant has undergone at the hands of the Legislature, there are some things in its original charter which seem to have remained intact. One of them provides: "All the affairs of said corporation shall be managed and controlled by a board of not less than seven directors (the number of said directors to be determined by the by-laws of said Company)" and the other vests the power to make by-laws in the stockholders. It is not contended by the appellant that this assessment was made by the directors or by any committee appointed by the directors, or in accordance with any rule prescribed by them, or that it ever passed under their observation as a board, or was ever spread upon the corporate records. Nor is it contended that there is any by-law prescribing the method of levying the assessment. The action of the company in making assessments involved the use of the highest discretion. It claimed the right, in the performance of that act, to determine an amount to be kept on hand for the payment of all such losses as might occur immediately upon the receipt of the proof and independently of any assessment therefor. The levying of these assessments and the determination of the amount of this fund which was limited only by circumstances of which it was required to judge, subject only to the maximum prescribed in the Dresser judgment, were the highest and most important acts, and involved the largest discretion of any which related to the class of insurance to which its activities were mainly directed during the 20 years preceding 1899. If the legisla-

tive direction that all its affairs were to be managed and controlled by their direction did not include this, it would be difficult to say what it did include. It evidently means more than the appointment of the usual officers of such corporation. Under these circumstances we think the executive officers of the company were without power to determine these things and to levy these assessments otherwise than under their direction to be shown by its records. Bacon on Benefit Societies and Insurance, § 377; Farmers' Milling Co. v. Insurance Co., 127 Iowa, 314, 103 N. W. 207; Insurance Co. v. Chase, 56 N. H. 341; Garretson v. Equitable M. L. Ass'n, 93 Iowa, 402, 61 N. W. 952.

We have examined the cases referred to by appellant, and note that the Fee Case, 110 Iowa, 271, 81 N. W. 483, is necessarily overruled by the Mill Owners Case, supra, 127 Iowa, 314, 103 N. W. 207; and Miles v. Life Ass'n, 108 Wis. 421, 84 N. W. 159, construed a charter so different from the one we are considering as to make it entirely inapplicable to this case. The same may be said of Insurance Co. v. Brinbaum, 116 Pa. 505, 11 Atl. 378. There is nothing in either of these cases tending to disapprove the position we have taken.

[11] 5. The submission of the question of damages and attorney's fees to the jury was proper under the rule stated by this court in Keller v. Home Insurance Co., 198 Mo. 440, 95 S. W. 903, and Brown v. Assurance Co., 45 Mo. loc. cit. 227, where it is said that:

"The whole question of vexatious refusal or delay is a matter of fact to be determined by the jury. They must make up their verdict on this issue by a general survey of all the facts and circumstances in the case; and if, upon full consideration, they conclude that the refusal was unjustifiable and vexatious, the law authorizes them to assess the damages. The statute will not admit of the construction contended for by the counsel for the plaintiff in error, that before damages were allowed it must be explicitly proved by the plaintiff that the delay or refusal was vexatious."

We think that under this rule the evidence was ample to justify the submission of that question, and that the instruction of the court properly defined the duty of the jury. There having been no error in this and the appellant having failed to sustain the burden of showing, or presenting evidence tending to show, the levy of a legal assessment in the matter of call 126 for the nonpayment of which it seeks to forfeit the policy sued on, the judgment of the circuit court is affirmed.

RAILEY, C., not sitting.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

BARBER v. HARTFORD LIFE INS. CO.
(No. 17663.)

Supreme Court of Missouri, Division No. 1.
March 30, 1916. Rehearing Denied and Motion to Transfer to Banc Overruled July 3, 1916.)

Appeal from Circuit Court, Johnson County;
C. A. Calvird, Judge.

Action by Rosa Barber against the Hartford Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones, Hocker, Hawes & Angert, of St. Louis, J. W. Suddath & Son, of Warrensburg, and James E. Jones, Jr., of St. Louis, for appellant. Nick M. Bradley, of Warrensburg, and Robert Kelley and Charles E. Morrow, both of St. Louis, for respondent.

BROWN, C. This is a suit on a policy or certificate of insurance for \$1,000 in the safety fund department of defendant, dated February 14, 1890. The defense rested upon the alleged forfeiture of the indemnity by failure to pay the same assessment in issue in the case between the same parties. No. 17,664, and decided by us at this term, 187 S. W. 807. Although there were separate trials, the records are the same in all respects, except that in case No. 17,664 an additional abstract was filed showing the due authentication and offer of the entire record in *Ibs v. Hartford Life Insurance Co.*, decided by the superior court of Connecticut for New Haven county, while in this case the final judgment only was offered and excluded by the trial court. We consider that case as if the judgment had been in evidence, and applying the same rule to this appeal the judgment of the circuit court will have to be affirmed, which is done.

RAILEY, C., not sitting.

PER CURIAM. The foregoing opinion of **BROWN, C.**, is adopted as the opinion of the court. All concur.

WEBER IMPLEMENT CO. v. ACME HARVESTING MACH. CO. (No. 17904.)

(Supreme Court of Missouri. Division No. 1.
June 2, 1916. Opinion Modified and Motion for Rehearing Denied July 3, 1916.)

1. APPEAL AND ERROR \S 1018 — **REVIEW — FINDINGS OF FACT — EFFECT.**

In an action which is neither an equitable action nor one wherein a reference of the issues would have been compulsory under the statute, findings of fact by a referee, if supported by any substantial evidence, are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4006, 4007; Dec. Dig. \S 1018.]

2. APPEAL AND ERROR \S 878(2) — **REVIEW — MATTERS NOT APPEALED FROM.**

The refusal of respondent to appeal from a judgment of the trial court, affirming the report of a referee on issues of fact, closes the door to any reinvestigation of the facts at the instance of respondent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 8578; Dec. Dig. \S 878(2).]

3. DAMAGES \S 23 — **BREACH OF CONTRACT — CONTEMPLATION OF PARTIES.**

Damages for breaches of contract are only those which are incidental to, and directly caused by, the breach and may reasonably be sup-

posed to have entered into the contemplation of the parties.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 58, 62; Dec. Dig. \S 23.]

4. DAMAGES \S 40(2) — **BREACH OF CONTRACT — SPECULATIVE DAMAGES.**

Damages for breach of contract do not include speculative profits or accidental or consequential losses or the loss of a fancied good bargain.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 74-78; Dec. Dig. \S 40(2).]

5. SALES \S 418(15) — **ACTION BY BUYER FOR BREACH — DAMAGES FOR LOSS OF PROFITS — PROBABLE RESALE.**

In action for breach of contract to deliver goods, damages for loss of profits of probable resale of such goods are not recoverable; these being but problematical future profits.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1196; Dec. Dig. \S 418(15).]

6. SALES \S 418(15) — **ACTION BY BUYER FOR BREACH — DAMAGES FOR LOSS OF PROFITS ON RESOLD GOODS.**

A contract for mowers, providing for shipment direct to subvendees and for fixed time of delivery and postponed payments to allow buyer to collect on resales before paying, so appraised the seller of contemplated resales that on breach of contract to deliver he was liable in damages for profits on goods resold.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1196; Dec. Dig. \S 418(15).]

7. SALES \S 418(7) — **ACTION BY BUYER FOR BREACH — DAMAGES FOR LOSS OF PROFITS ON RESOLD GOODS — PREVENTION OF DAMAGES.**

In such case, the mowers to be delivered being a kind specially manufactured under the contract, the buyer was not bound to minimize his loss by buying mowers for cash from defendant to fill its resale orders, especially where it had not the pecuniary ability to pay cash for them; since the mowers were not a commodity that could be purchased under its trade-name in the marts of the country.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1188; Dec. Dig. \S 418(7).]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by the Weber Implement Company against the Acme Harvesting Machine Company. From a judgment for plaintiff for a nominal amount, it appeals. Reversed and remanded, with directions.

Morton Jourdan, of St. Louis, and Sparrow, Page & Rea, of Kansas City, for appellant. New, Kennish & Krauthoff, Maurice H. Winger, Arthur Miller, and P. E. Reeder, all of Kansas City, for respondent.

BOND, J. I. This cause was appealed to the Kansas City Court of Appeals and transferred to this court for the reason that the amount involved exceeded the jurisdiction of that court (155 S. W. 1116).

The plaintiff, the Weber Implement Company, a Missouri corporation located at St. Louis, Mo., and doing a jobbing business in farm machinery, on November 7, 1905, entered into a written contract with defendant, the Acme Harvesting Machine Company, an Illinois corporation, manufacturing farm machinery at Peoria, Ill., whereby the latter agreed to manufacture certain mowing ma-

chines to be specially branded "Koenig Buckeye," and the former agreed to purchase same at specified prices and dates of delivery during the years 1906, 1907, and 1908. By said contract it was agreed that plaintiff should order 1,000 of the above mowers yearly, which were to be manufactured and ready for shipment not later than May 1st of each year. In the clause setting out the manner and time of payment, the plaintiff agreed, upon receipt of a shipment of mowers, to execute notes, without interest before maturity, payable one-third September 10th, one-third October 10th, and the final third on November 10th, of each year, and which should be subject to a discount of 3 per cent. for cash, if paid by July 1st of that year. Defendant did not manufacture, nor did plaintiff receive, the specified number of mowing machines during the years 1906 and 1907; but there is no controversy here as to the damages growing out of the failure in this regard; for plaintiff limits its demand to a recovery of such damages as it sustained by reason of the failure to manufacture and deliver the 1,000 machines covered by the contract for the third year, 1908. On November 25, 1907, defendant wrote plaintiff, declining to furnish any of the thousand mowers which it had agreed to furnish during 1908, claiming that the contract of November 7, 1905, had been mutually abandoned and a new or modified contract entered into under date of October 12, 1907, and that plaintiff had violated the terms of the latter contract. Plaintiff insisted that the contract of November 7, 1905, had not been abandoned nor modified, and instituted this action to recover damages in the sum of \$7,940, sustained by reason of defendant's failure to manufacture and deliver the thousand mowers during the year 1908. Plaintiff also alleged in its petition that it had suffered a further loss because of defendant's breach of its contract in being prevented from making profits on the sale of kindred goods which of necessity would have been used with said mowers, including extras, repairs, fixtures, etc., and which would reasonably have amounted to the sum of \$5,250.

Defendant's answer contained two counts, the first averring that the contract of November 7, 1905, had been abrogated and a new or modified contract entered into, and that plaintiff had violated this latter contract, thereby releasing defendant from any liability. The second count was a counterclaim in which it was alleged the contract of 1905 had been abandoned; that plaintiff had violated the terms of this new contract, and as the result thereof defendant had been damaged in the sum of \$15,093. In its last-amended answer this counterclaim was abandoned and no evidence was offered in support of it.

By agreement of the parties the cause was

referred to Judge Henry C. Timmonds to hear and report on the facts and the law.

The referee thus stated the issues:

"The pleadings admit the execution of the contract of November 7, 1905, but they present the following primary issues: (1) Was said contract mutually abandoned and a new or modified contract entered into in lieu thereof as alleged in defendant's answer? (2) Did defendant violate the contract of November 7th, as alleged in plaintiff's petition?"

He then found as a fact:

"That the contract of November 7, 1905, was not mutually abandoned and that no new contract was entered into in lieu thereof. That the defendant violated and broke said contract of November 7, 1905."

On the question of damages the referee found that on November 25, 1907, defendant violated its contract by announcing to plaintiff its refusal to deliver any of the thousand mowers in 1908, but that defendant manifested a disposition to assist plaintiff in filling any reasonable orders it might have taken up to that time, and proposed to furnish the required number of mowers for cash, provided plaintiff would give specifications and shipping directions at once. The referee also held that, as a matter of law, it was plaintiff's duty to have accepted this offer, notwithstanding the fact that the contract itself provided that said machines were to be sold on credit. The referee then found the loss at \$1,828.50, being what plaintiff would have profited on the contemplated resale of 230 mowers which defendant's default prevented, and reduced it to the sum of \$399.10, the difference being the amount plaintiff could have saved had it accepted defendant's proposition to fill certain orders for cash.

Plaintiff filed its exceptions to the report of the referee, and on the hearing of these exceptions the trial court approved the referee's findings of fact but disapproved his conclusions of law, and rendered judgment in favor of plaintiff for \$1. Plaintiff, after unavailing motions for new trial and in arrest of judgment, brings this cause here for review.

[1, 2] II. This being neither an equitable action nor one wherein a reference of the issues would have been compulsory under the statute (Reed v. Young, 248 Mo. loc. cit. 613, 154 S. W. 700, and cases cited), the findings of fact by the referee, if supported by any substantial evidence, are conclusive on appeal. Moreover, the refusal of the respondent (defendant below) to appeal from the judgment of the trial court, affirming the verdict of the referee on the issues of fact, closes the door to any reinvestigation of the facts at the instance of respondent. This confines the inquiry on the present appeal to the errors assigned by appellant (plaintiff below).

Appellant claims that, under the issues and proofs, it was entitled to recover: First, for loss of profits of a probable resale of the whole 1,000 mowers which respondent fail-

ed to deliver in the year 1908; second, that in any event it was entitled to loss of profits on 230 mowers which it had contracted to resell during that year, but was unable to deliver because of respondent's breach of its contract to supply them. These questions will be determined in order.

[3, 4] III. The principle, upon which profits prevented by a breach of a contract are recoverable, took root in the case law of England and America, in a decision of 1854 (*Hadley v. Baxendale*, 9 Exch. L. c. 353), where it was said:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally; that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

Shortly following (1859) in *Smeed v. Foord* (1 El. & El. L. c. 613, 120 Eng. Rep. Reprint, L. c. 1039), it appeared that a farmer was delayed in threshing his wheat by the failure of the promisor to deliver a threshing machine on a fixed date. In consequence of the delay the stacked wheat was substantially injured by rain. There was a verdict for £500. The court (Lord Campbell, Chief Justice) discharged a rule on the plaintiff to show cause why the judgment should not be reduced, and affirmed the full recovery for the reason that the case was governed by the ruling in *Hadley v. Baxendale*, supra, which, he said, "was in accordance with the Code Napoleon, with Pothier, with Chancellor Kent, and with all other authorities." This observation of Lord Campbell was quoted by the Supreme Court of Maine (Virgin, J.) in *Grindle v. Eastern Express*, 67 Me. loc. cit. 322 et seq., citing the authorities supporting the statement and also adopting the ruling in *Hadley v. Baxendale*, which has now become the accepted statement of the law in America (8 Rul. Cas. Law, p. 455, § 25, and cases cited), where it had been previously announced by the learned author of the Commentaries on American Law, in his note to star page 480 (12th Ed.) in the following terms:

"Damages for breaches of contract are only those which are incidental to, and directly caused by, the breach, and may reasonably be supposed to have entered into the contemplation of the parties and not speculative profits or accidental or consequential losses, or the loss of a fancied good bargain."

[5] This is a perfect legal and logical statement of the principal governing breaches of contract, and is a moral imperative in every case embraced within its terms. It was only paraphrased in the case of *Hadley v. Baxendale*, supra, and limits the reach of redress, on the breach of the contract, to the proximately caused or reasonably contemplated losses and excludes the problematical profits of future bargains. Hence there is

no merit in appellant's first assignment of error.

[6] In the matter in hand, the contract contemplated resales by the jobbing purchaser of the products agreed to be manufactured and delivered to it, and for that purpose a fixed time was prescribed within which the articles should be ready for delivery to the purchaser in order that it might turn them over in the performance of agreements for resales to the users of the machines. It was further agreed by the parties that such anticipatory resales by the buyer might be consummated through the delivery of the mowers by a direct shipment from the manufacturing plant in Peoria to the subvendees. This and the further fact that the payments were postponed so as to allow the original purchaser to make them after having made delivery under resales are sufficient to have apprised respondent of the specific object and purpose of the contract made with it for the supply of machines of a particular kind. Hence it was impossible for the defendant to have been unaware that the mowers it agreed to manufacture were to be resold by the buyer on the faith of its agreement to manufacture and deliver them to the order and direction of the appellant. Evidently it was in the minds of the parties so contracting that a breach of the promise to deliver on the fixed date would entail a loss on the purchaser of all profits on all resales actually made by it in the meantime; and the learned referee correctly stated the law, on the facts showing a resale of 230 mowers made by the appellant in reliance on the agreement of the respondent that 1,000 would be delivered on or before May 1, 1908. The facts bring this transaction clearly within the ruling made in *Hadley v. Baxendale*, supra.

[7] The record shows, and the referee found, that the net profit which appellant would have received on such resales would have been \$1,828.50, and in this sum judgment should have been recommended by the referee in favor of appellant. While admitting that this was the measure of appellant's damages, the referee deducted therefrom an amount by which appellant could have lessened the loss to itself, if it had accepted a new contract proffered by respondent when it refused to carry out its original agreement for the year 1908. This was error.

It is the unquestioned law that it is the duty of a party, injured by the breach of a contract or by a tort, to take reasonable steps to minimize the loss; but the rule has never been carried, in any well-considered case, to the extent of requiring such party to alter its agreement under circumstances like those in the present case, which disclose that it did not have the pecuniary ability to make the cash payment prescribed by the delinquent party, and under the further circumstance that the article, whose delivery was omitted,

was not a commodity which could be purchased under its trade-name in the marts of the country.

In the final analysis of this transaction, it is clear that the terms of their contract, and the conduct of the parties performing it, necessarily informed them the direct consequence of a failure to deliver the "Koenig Ruckeye" mowing machines on time would be the infliction of a loss of whatever profits were realizable on an intervening sale by the buyer. This loss was not lessenable as to this particular product under the facts of this record and the findings of the referee, which were only in fault as to that conclusion.

The judgment is therefore reversed and the cause remanded, with directions to the trial court to enter a judgment in favor of the appellant for \$1,828.50, being the profits actually prevented by respondent's breach of its contract. All concur. WOODSON, J., in result.

RYAN et al. v. RUTLEDGE et al.
(No. 17566.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916. Rehearing Denied
July 3, 1916.)

1. APPEAL AND ERROR §866(3) — REVIEW — EVIDENCE—SUFFICIENCY.

In proceedings to contest a will on the ground of undue influence, the question on appeal from a judgment entered upon a peremptory instruction for defendants is, not as to the weight of the evidence, but whether there is any evidence, positive or presumptive, tending to prove undue influence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3474, 3475; Dec. Dig. § 866(3).]

2. WILLS §163(2) — VALIDITY — UNDUE INFLUENCE—BURDEN OF PROOF.

Where a person occupying a fiduciary relation to testator is made a devisee or legatee or a scheme for his enrichment provided by the will, the presumption of undue influence arises, and the burden of proof is on him to negative such presumption.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 390-394; Dec. Dig. § 163(2).]

3. WILLS §166(2)—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show undue influence exercised by a trustee over the testator, where such trustee derived no benefit from the provisions of the will except his legal fees as trustee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 422-426; Dec. Dig. § 166(2).]

4. WILLS §324(3)—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to warrant a directed verdict for defendant in an action by plaintiffs to set aside the provisions of a will for undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 769; Dec. Dig. § 324(3).]

Appeal from St. Louis Circuit Court; George C. Hitchcock, Judge.

Proceedings by Caroline Bradford Ryan and others against Robert Rutledge and oth-

ers to contest a will. Judgment for defendants, and plaintiffs appeal. Affirmed.

Walter B. Douglas, of St. Louis, for appellants. Schnurmacher & Rassieur and Robert A. Holland, Jr., all of St. Louis, for respondents.

BOND, J. I. This is a contest by the surviving sister, Caroline Ryan, née Bradford, of the will of Frank E. Bradford, who died on the 18th day of February, 1909, at the age of 51 years, unmarried and childless. The defendants are Robert Rutledge, executor and trustee named in the will, and the devisees and legatees.

At the time of his death, the testator owned a one-half interest in property on Eighth and Pine streets, St. Louis, the whole valued at \$250,000, under lease for 99 years, earning \$10,000 annual rental, and other real estate of the value of \$170,000. By the terms of his will, dated September 27, 1907, and the codicil thereto, dated December 31, 1908, the beneficial interest in the Pine street property, for her life, was devised to the plaintiff Caroline Ryan, and to that end the legal title was vested in Robert Rutledge, as trustee, with full powers to sell, mortgage, or lease the same for any term, including 99 years, and extending beyond the period of the trust, to invest the proceeds in case of sale, and to pay the net income of the trust estate to plaintiff. The trustee was excused from giving bond. The testator devised the residue of his estate to Robert Rutledge and the respective presidents of the boards of trustees of the Third Baptist Church and the Delmar Baptist Church and to their successors, as such, forever, as trustees for the Baptist Orphans' Home, specifying their duties as such trustees. Robert Rutledge was also named as executor of the will of the testator, without bond.

The foregoing will was contested on the ground that the testator was an epileptic and mentally weak and infirm and subjected, when executing his will, to the undue influence of Robert Rutledge, who was his "agent and confidential friend and adviser and the manager of his property," and who fraudulently procured the execution of said will "in order to obtain the benefits and privileges given to him by said alleged will." The defendants answered, denying any undue influence, and averred that plaintiff, having taken certain bequests under the will, was thereby estopped from contesting its validity. On the trial the defendants, as proponents of the will, made formal proof of its execution and the testamentary capacity of the testator. Plaintiff adduced evidence that the testator had been afflicted with epilepsy since his childhood, and that such attacks were preceded and followed by dullness, apathy, and mental weakness, and rendered him unconscious while actually seized; but that, upon recovery from the seizure, he gradually attained

mental normality and practical ability to attend to the ordinary affairs of life. This evidence was introduced on the theory that such affliction rendered the testator susceptible to the influence and dominance of his agent, adviser, and business manager, Robert Rutledge, at the time he executed his will. Plaintiff gave no evidence that said Rutledge in any way dictated the terms of the will or had any interest therein other than the provisions thereof giving him the trusteeships described in the will and the compensation incident to the performance of the duties imposed on him. The evidence further disclosed that Robert Rutledge was the agent and confidential adviser of plaintiff and the manager of his property and the collector of its income, and showed, also, that the plaintiff, upon the formal probate of the will, accepted a bequest of books and a release of an indebtedness amounting to \$2,716.80, which was relinquished to her in the will. The trial court directed a verdict establishing the will and codicil. From a judgment in accordance, plaintiff duly appealed.

[1] II. The question presented by this appeal is, not as to the weight of the evidence on the issue of undue influence, but whether there is any evidence, positive or presumptive, tending to prove that respondent Robert Rutledge exerted undue influence on the mind of Frank Bradford when making his will, so that the provisions of the instrument reflected the mind and purposes of said Rutledge, and not the intentions and designs of the testator. *Hayes v. Hayes*, 242 Mo. loc. cit. 168 et seq. and cases cited, 145 S. W. 1155.

To sustain the affirmative of this view, it is insisted that Rutledge was the trusted agent and adviser of the testator and controlled the management and disposition of his property and took advantage of that relation to influence the testator, whose debilitated condition made him peculiarly sensitive to advice from that quarter, to make a will creating trusts in all the real estate devised so that, in the performance thereof, large sums would be received by the fiduciary for a long period of time.

[2] In considering this theory, it may be assumed that Robert Rutledge occupied a fiduciary relation to the testator, for the record is replete with proof of the existence and continuance, until the death of the testator, of that relation between the parties. Hence, if the will of the testator simply provided a scheme for the enrichment of Robert Rutledge or made him a devisee or legatee, then the presumption of undue influence in its execution would arise, and plaintiff would be entitled to have that issue submitted to a jury, where the laboring oar would be put upon the proponents of the will. *Mowry & Kettering v. Norman*, 204 Mo. loc. cit. 189 et seq., 103 S. W. 15, and cases cited.

But, under this will, nothing was devised or bequeathed to the fiduciary. All the pos-

sible advantages which could inure to him from its execution were the legitimate compensations of executor and trustee. Every testator who disposes of his property in a manner requiring the services of an executor and of a trustee in order to effectuate his intentions must of necessity appoint one or more functionaries to discharge those duties, and the law fixes the compensation that shall be paid. Neither office is one giving an unrestricted right to plunder or pillage the estate, and, if such practices are resorted to, ample redress will be afforded by the courts when their aid is invoked by the parties affected. It cannot, therefore, be held that the appointment of a fiduciary to discharge the duties of executor and trustee gives him any advantage which would not be reaped by a stranger if so designated by the testator. This exact point was disposed of by the Supreme Court of Connecticut in the following language (*Livingston's Appeal*, 63 Conn. loc. cit. 78, 28 Atl. 470):

"The will was drawn by the attorney of the testatrix, Edward B. Whitney of New York, who was named therein as executor and trustee, without bond, and the appellants asked the court to charge the jury as follows: 'That it having been shown in evidence that Mr. Whitney, one of the executors appointed under the provisions of the will, was a confidential friend of Mrs. Gibbons, the testatrix, and had acted as her attorney in various transactions, the burden of proof was upon the appellees to show that no undue influence was exercised upon the testatrix to procure the will.' This the court declined to charge, saying in substance that it was not a case where Mr. Whitney profited by the will at all; that he was not a legatee; that as executor and trustee he simply fulfilled the duty which the testatrix imposed and had a right to impose upon him, assuming that she had a right to make a will at all and that the will was valid; and that the rule which, because of the existence of a confidential relation, reverses the ordinary presumption of freedom of action, and substitutes the inference of undue influence, applies only when the person sustaining such confidential relation takes beneficially under the instrument. This we think correct and in accordance with the decisions in this state."

To the same effect, *Linton's Appeal*, 101 Pa. 228.

Under this correct statement of the rule, it is clear to a demonstration that the appointment of Robert Rutledge under the present will has not affected, in law, the rights of the devisees and beneficiaries thereunder in any manner which would not have happened had another individual or trust company been delegated to perform the same duties.

It follows that the present case is not one falling within the limits of the rule casting upon the proponents of the will the burden of proving the absence of undue influence, where the prior evidence has shown a fiduciary relation between a beneficiary of the will and the testator, and that in this case the burden of proving undue influence continued to rest on the plaintiff, despite the fact of the evidence showing the relation between the testator and the executor and trustee of his will.

[3] III. An examination of the record discloses that there is not a scintilla of evidence which tends to show that the provisions of the will under review, as to the devolution of his property, reflect the wishes or purposes of any other than the maker of the testament, or that his volition was destroyed by the substitution therefor of the designs and objects of Robert Rutledge. *Hayes v. Hayes*, supra, 242 Mo. loc. cit. 169, 45 S. W. 1155. Indeed, there is no evidence in the present record which has the least tendency to prove that he knew of the making or the terms of the will.

[4] The testamentary capacity of Frank Bradford was neither questioned in the pleadings nor on the trial. He had an absolute right to create this cumbrous trust in favor of the plaintiff, or to exclude her altogether from any participation in his estate if he so desired. *Berberet v. Berberet*, 131 Mo. loc. cit. 411, and cases cited, 33 S. W. 61, 52 Am. St. Rep. 634. The plaintiff had not a semblance of legal claim upon his bounty and is not entitled to set aside his will because of its distasteful dispositions, in the absence of any showing that they were caused by the undue influence alleged in her petition. The case therefore stood, in the trial court, upon the proof by proponents of the testamentary capacity of the testator and the due execution of his will, without any affirmative showing by plaintiff in sustention of the allegation of undue influence upon which her contest is based. In such cases a verdict may be directed by the trial court, or judgment may be entered here probating the will. *Hayes v. Hayes*, supra.

Hence there was no error in the peremptory instruction complained of on this appeal, and the judgment of the trial court is affirmed. All concur.

MEENACH v. CRAWFORD. (No. 17849.)
(Supreme Court of Missouri, Division No. 1.
June 2, 1916. Motion for Rehearing
Overruled July 3, 1916.)

1. APPEAL AND ERROR ⇨927(7)—PRESUMPTION—DIRECTED VERDICT—EFFECT OF EVIDENCE AND INFERENCES.

In passing upon a peremptory instruction for defendant, the plaintiff's evidence, and every reasonable inference therefrom, will be accepted as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. ⇨927(7).]

2. MUNICIPAL CORPORATIONS ⇨703(1)—USE OF STREET—USE AS HIGHWAY—CROSSING IN MIDDLE OF BLOCK.

A pedestrian has a right to cross a street in the middle of a block.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1509; Dec. Dig. ⇨703(1).]

3. MUNICIPAL CORPORATIONS ⇨705(1)—USE OF STREETS—USE AS HIGHWAY—REGULATION AS TO SPEED.

Under Laws 1911, p. 327, § 8, subd. 2, and at common law, the driver of a motor car must

slow down or stop upon approaching a street car discharging passengers, and must slow down and signal upon approaching a pedestrian.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. ⇨705(1).]

4. MUNICIPAL CORPORATIONS ⇨706(4)—USE OF STREETS—LIABILITY FOR INJURIES.

In determining whether defendant was exercising due care when he ran down plaintiff's intestate on the street with his automobile, the fact that automobiles are dangerous instrumentalities must be considered.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⇨706(4).]

5. HIGHWAYS ⇨172(1)—LIABILITY FOR INJURIES—CARE REQUIRED.

Laws 1911, p. 330, § 12, subd. 9, requires automobile drivers to exercise the highest degree of care while operating upon public highways.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 459, 460; Dec. Dig. ⇨172(1).]

6. MUNICIPAL CORPORATIONS ⇨705(1)—USE OF STREETS—REGULATION AS TO SPEED—FOR WHOSE PROTECTION.

Laws 1911, p. 327, § 8, subd. 2, requiring motor car drivers to slow down or stop upon approaching a street car discharging passengers, is for the protection, not only of such passengers, but of all those who may be near the street car.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. ⇨705(1).]

7. MUNICIPAL CORPORATIONS ⇨706(6)—USE OF STREETS—ACTIONS—QUESTION FOR JURY.

Where plaintiff's intestate passed in front of a standing street car, but was killed by defendant's automobile before reaching the curb, *held*, that defendant's negligence was a jury question in view of Laws 1911, p. 327, § 8, subd. 2, and page 330, § 12, subd. 9, requiring automobile drivers to slow down, signal, and exercise the highest degree of care in such situations.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⇨706(6).]

8. MUNICIPAL CORPORATIONS ⇨706(6)—USE OF STREETS—ACTIONS FOR NEGLIGENCE—QUESTION FOR JURY.

Where plaintiff's intestate passed in front of a standing street car and could be seen from defendant's automobile for about 60 feet before it struck him near the curb, *held*, that defendant's negligence was a jury question.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⇨706(6).]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Maud A. Meenach against O. T. Crawford. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

This suit was instituted in the circuit court of the city of St. Louis by the plaintiff against the defendant, to recover \$10,000 damages sustained by her through the alleged negligence of the defendant in killing her husband by striking him with an automobile. The sufficiency of the pleadings has not been drawn in question and consequently will receive no consideration.

The injury occurred at the intersection of

Jefferson and Park avenues, in the city of St. Louis. The former runs north and south, and the latter east and west. The sidewalks on Jefferson avenue east and west of Park avenue are 12 feet wide and the roadway is 66 feet between the curbs; and the sidewalk on the north side of Park avenue, east of Jefferson, is 35 feet wide, and that on the north side, west of Jefferson, is 15 feet in width. Upon each of those avenues there is a double track street railway, with switches connecting all of said tracks, north, south, east, and west. The distance from the eastern rail of the north-bound track on Jefferson avenue, north of Park avenue to the east curb, is 25 feet and 7 inches, and the distance from the south line of Park avenue east of Jefferson to the north line of Park east of Jefferson is 120 feet, and the roadway on Park avenue east of Jefferson is 50 feet wide.

There was no dispute as to the fact that George S. Meenach and the plaintiff were husband and wife at the time of his injury and death; and that he was killed by being struck by the automobile of the defendant while he was riding therein and being operated by his agent.

The plaintiff's evidence further tended to show that her husband was injured on November 22, 1911, about 8:30 p. m. on Jefferson avenue, by a north-bound car, just north of the north line of the north sidewalk of Park avenue, had it been extended east to the east line thereof. Both of said avenues were among the principal thoroughfares in the city, and there was a great deal of travel on both by means of street cars, ordinary vehicles, automobiles, and pedestrians, but not so heavy at the time of the injury as earlier in the evening.

Paul S. Banta testified for plaintiff, substantially as follows:

That he was a motorman on a car of the United Railways Company on the Jefferson avenue line on the 22d day of November, 1911, and had been such motorman for three years; that on November 22, 1911, his car had stopped on Jefferson avenue on the north side of Park, at the regular stop, for the purpose of receiving and discharging passengers; that he received a bell to stop there.

"Q. Did you see Mr. Meenach that evening before he met with the injury? A. I saw him crossing in front of my car. Q. In what direction was he going? A. East from the west side of the street. Q. Now, tell the jury what happened. You say you saw him pass in front of your car. Now, what happened after he left the car track? A. After he passed in front of the car he walked directly towards the curb, but before he got there Mr. Crawford's machine struck him and knocked him down. Q. Had there been any signal or blow of the horn or anything else? What signal, if any, had you heard from this automobile? A. I heard no signal at all. Q. Can you tell us how far the automobile went after it struck Meenach? A. About its length. Q. What did you do after Meenach was struck? A. Why, Mr. Herrick and I got off and went over to the machine. Q. While you were on the ground did you receive any signal to go on with your car? A. Yes, sir. Q. Had you received any signal to go on

with your car prior to that? A. No, sir. Q. What was your car doing at the time Meenach passed you and when he was struck? A. Receiving and discharging passengers. Q. Was it moving or not? A. No, sir; standing perfectly still.

"The Court: Q. State whether the car passed over him or not? A. No, sir; I don't think it did; we took him out from between the front and rear wheels. Q. On which side? A. Right-hand side of the machine, right underneath the seat where the chauffeur was sitting. Q. And the right-hand side of the machine was nearest the curb? A. Yes, sir. Q. How far would you say this was from the curb? A. Well, we had room enough to get down there to get Mr. Meenach out from under the machine."

On cross-examination: "Q. Those cars, or that car you had there, including the platform, was about 36 or 40 feet long? A. Yes, sir, they ran that, if not more."

Witness states that after he had come to a stop on Jefferson avenue on the north side of Park with his car he saw the man who afterwards turned out to be Mr. Meenach going from the west side of Jefferson avenue to the east side, and he passed in front of witness' car while the car was standing at that place.

"Q. I suppose he walked two or three feet in front of your car? A. Like anybody. Q. About two or three feet in front or one or two feet? A. I don't know just how far. Q. Give your best estimate. A. I don't know. Q. Would it be approximately two or three feet from your car? A. Something like that. Q. At that time you were not paying any attention to signals of automobiles or wagons, were you? You were looking ahead? A. We always hear those if they are given. Q. You wouldn't always hear them whenever they were given? A. Yes, sir; on these open cars. Q. What do you mean by that? A. Not a pay-as-you-enter. Q. You don't mean to say that every time you stopped on the north side there you would hear every signal that was given in the neighborhood of that crossing? A. Why wouldn't I? Q. Well, did you? A. Sure we did. Q. Every signal? A. We are supposed to listen for all signals. Q. Did Mr. Meenach have an umbrella over his head? A. No, sir. Q. How did he walk? A. Brisk. Q. You saw him go past; then, just after he passed in front of you, you say that the machine hit him. Did you hear it? A. I kind of heard it and saw it at the same time. Q. But it happened instantly after he passed beyond your car? A. It didn't happen instantly, because he had time to walk across the street. Q. He didn't get across, did he? A. He got awful near it. Q. When the machine stopped, how far was the eastern part of it from the eastern curb? A. Well, we had room enough to go in between the curb and the machine to get the man. Q. Two or three feet between the machine and curb? A. Yes, sir. Q. Suppose that is the front platform, and Mr. Meenach is crossing over here in a brisk walk; did you see him or follow him as he went beyond the car? A. Yes, sir; we always watch them. Q. What did he do as he went beyond the car? A. Walked towards the sidewalk. Q. Did he look straight ahead? A. I don't know how he looked; I didn't notice it; I noticed the man walking across the street."

Witness states that Mr. Meenach passed across the street like anybody would; he wasn't stooping; witness saw him walk briskly toward the curb, and before he could get to the curb he was struck by this automobile. Witness saw the machine had lights on it and they were burning, but cannot say whether it had two headlights on it, as indicated by counsel for defendant.

T. L. Herrick testified that he was a motorman for the United Railways Company, and on the evening of November 22, 1911,

at the time Meenach was hurt, he was a passenger standing on the front platform of the car mentioned by the last witness; that the witness did not see Meenach until just as he was struck by the machine; that he did not see Meenach cross in front of the car; that he helped take him out from under the machine, between the front and rear wheels, just about under the chauffeur's feet; witness had not observed the automobile before it hit Meenach; that the automobile went about its length after it hit Mr. Meenach; that at the time the accident happened the street car was discharging and loading passengers; that the automobile had given no warning of its approach; that he helped Mr. Meenach into the drug store and saw his injuries; that the defendant's automobile was a touring car; the defendant had a colored chauffeur, and defendant got out of the automobile after it struck Meenach. On cross-examination witness stated that he heard the conductor give the stop signal to the motorman on this street car, and the car stopped on Jefferson avenue on the north side of Park, the front of the car being something like 40 feet north of the north line of the north sidewalk on Park avenue; that, when the automobile stopped after it hit Mr. Meenach, the back end of the automobile was a little past, a few feet past, the front end of the street car.

"The Court: Q. Where was the deceased struck with reference to the front end of the car? A. About even with the front end of the car."

Oscar Ehrhardt testified that he was a conductor for the United Railways Company and was on the car spoken of by the other witnesses which had stopped at Jefferson avenue on the north side of Park avenue on the night of November 22, 1911; that it stopped on his signal to receive and discharge passengers; that he saw an automobile pass his car on the east side, going north on Jefferson while the street car was standing still and went between the car and the east side of the street, going north.

"Q. Where were you when you first observed the automobile? A. I was on the rear platform on the south side of Park avenue. Q. As it came along and passed your car, where were you? A. Still on the rear platform."

Witness did not see the automobile strike Meenach, but saw it after it struck him; that when he got off the car the automobile had stopped; it was about its full length in front of the car and was about two or three feet from the curb on the east side of Park avenue. Witness states that, after he gave the signal for the car to start and it did not, he discovered that there had been an accident. On cross-examination witness stated that the accident happened while passengers were stepping off and people were getting on his car; that none of the passengers were touched; witness states that the automobile was passing the car about the speed a man would run; that the automobile was the

width of an ordinary automobile; that the space between the west side of the automobile and the east side of the street car as the automobile passed alongside of the car was probably sufficient for a wagon to go between the car and the automobile.

Oscar Ehrhardt on direct examination testified that he was the conductor on the street car mentioned in the evidence at the time of the injury, and that the automobile mentioned, when it passed the car he was on, was running about 10 miles per hour; he testified also to substantially the same facts to which the witness Banta testified. On cross-examination he testified:

" * * * Q. Isn't it a fact that it stopped—the automobile stopped with the front part of it about even with the front part of your car? A. The front part of the automobile stopped even with the front part of our car? Q. Yes, sir. A. No, sir. Q. It run about to the front end of your car? A. Yes, sir, that is all the further it ran. Q. Now, that is a fact, isn't it, the automobile only ran to the front end of the car, didn't it? A. That is all I saw of the automobile after he had passed my car. Q. You didn't notice this automobile in particular, did you, until you learned that the accident had happened, did you? A. I noticed it coming along passing my car, but after I gave those two signals to go ahead— Q. No, I am asking you this question: You were not watching this automobile particularly? A. No, sir. Q. You were attending to your duties? A. Yes, sir. Q. You gave the stop signal, and the car stopped to let somebody get on or off the car, didn't you? That is what you were attending to? A. Yes, sir. Q. Watching to see whether it was time to start again; and you were inside of the car, were you not? A. Not at that time; I didn't go inside of the car until I had given two signals to start, until I had seen the passengers were all safe on and off. Q. You were on the rear platform and you gave the signal and the car stopped? A. Yes, sir. Q. Then somebody got on or off, and after they had done that you went inside of the car; is that right? A. Yes, sir. Q. Up to that time the accident hadn't happened? A. It had happened while they were stepping off. Q. But those people, whoever they were that got on or off the car, got on or off all right? A. Yes, sir. Q. They were not touched? A. No, sir. Q. And just at the time when those persons got on, we will say, the automobile was passing in the rear of the platform? A. Yes, sir. Q. Was it a person getting on or a person getting off, or persons; do you remember? A. I can't state whether one or more were getting on or off. Q. You said, when your testimony was taken before the coroner, that the machine wasn't moving rapidly; didn't you? A. Not while it was passing the car. Q. That is what I am talking about. You testified before the coroner that the machine wasn't running rapidly, didn't you? A. Yes, sir. Q. That is true, isn't it? A. It wasn't running rapidly by the car, that is, so far as I could see, while it was going by me. Q. That is what I am talking about, it wasn't passing rapidly as it went past the car? A. No, sir. * * * Q. You can't give the exact rate it was moving as it passed by the car? A. I can't. Q. You don't know the rate? A. I don't know the rate of speed of an automobile. Q. You don't know the rate of speed it was going as it passed the car, do you? A. No, sir. Q. But you do know it wasn't going rapidly as it passed your car? A. Well, it was going about— Q. Listen to my question. You do know it wasn't going rapidly as it passed your car?

"The Court: Answer the question."

"Mr. Holland: Do you know that is a fact or not?"

"The Court: Answer the question in your own way. A. It was going about the—"

"Mr. Holland: Answer my question."

"The Court: The court has directed the witness. He has a right to answer your question in his own way. If he does not answer it properly, we will have him answer it properly."

"Witness: It was passing about the speed a man would run."

"By Mr. Holland: Is it true or not what you said at the inquest, that it wasn't moving rapidly as it passed the car? A. What I mean by rapidly— Q. What I want to know is—"

"The Court: Let him answer the question. A. What I mean by not moving rapidly, I mean as a man would run; I don't mean the car was running at full speed. Q. You said before the coroner that the automobile was moving slowly, didn't you?"

"The Court: He has already answered that and admitted he did. You have wasted a great deal of time with this question."

"Mr. Holland: I know I asked him before the question whether it was moving rapidly; I am now asking him whether he said before the coroner that the car was moving slowly, an entirely different question."

"The Court: Very well."

"Witness: By the car moving slowly, I mean by that going slowly compared to what an automobile is going at its regular speed. Q. What do you mean by an automobile running slowly? A. As a general rule they go at a good gait; when they are going slowly is what a man would run in; that is what I call slow. Q. About how fast does a man run? A. Some men run faster than other men. What I mean by a man running, is so he could keep up with an automobile. Q. About how fast would a man be going when he was running? What do you mean by that? When you refer to as fast as a man runs, do you mean a fast runner or a moderate? A. An ordinary man running, not an athlete. Q. Ordinarily as a man would run in town if he was getting a car? A. Yes, sir. Q. Did you notice the lights on this automobile? A. I noticed that there were lights; I saw there were lights on the automobile. Q. Headlights? A. Yes, sir. Q. Can you say whether there were headlights like the one in front of you (indicating)? A. I can't identify the headlight the man had. Q. You are acquainted with the acetylene headlights commonly used on automobiles? A. I noticed there was one; I don't know whether it was acetylene or coal oil. Q. You know what I mean by a headlight? A. Yes, sir. Q. You know what a headlight is? A. Yes, sir. Q. You recall that this machine had headlights burning, do you? A. He may have had acetylene for headlights, I can't say. Q. You recall this automobile had headlights burning? A. Yes, sir; I can't recollect whether they were acetylene. Q. You do recollect it had headlights burning? A. Yes, sir. Q. It was raining at that time? A. Yes, sir."

The evidence further tended to show that the right front end of the automobile struck the deceased on the right side and knocked him down. The street car was about 40 feet long, standing still, with the rear end on the crosswalk. The car was receiving and discharging passengers at the time the automobile passed and struck Meenach. The automobile passed between the street car and the east curb of Park avenue, at about 10 miles an hour, or as fast as a man would run. It had been following the street car for some distance back, with no signal of any kind given indicating its approach. The distance between the west side of the automo-

bile and the east side of the car was six or seven feet. That the curtains between the body of the street car and the front vestibule were down, which obstructed the view of persons at the rear looking forward through the car, and vice versa.

At the close of the plaintiff's case, counsel for defendant requested and the court gave a peremptory instruction telling the jury to find for the defendant, to which action of the court the plaintiff duly excepted, and immediately took a nonsuit with leave to move to set aside the same, etc.; and in due time counsel for plaintiff filed a motion to set aside the nonsuit, which was by the court overruled. Exceptions thereto were duly saved, and the cause was properly appealed to this court.

Smith & Percy, of St. Louis, for appellant. Holland, Rutledge & Lashly, of St. Louis, for respondent.

WOODSON, J. (after stating the facts as above). I. Counsel for plaintiff insist that the action of the court in giving the peremptory instruction for the jury to find for the defendant was erroneous. In approaching this instance it may be well to mention one or two well-known rules of law governing the matter, before discussing the concrete question presented for determination.

[1] (a) In the first place, in passing upon a demurrer to the plaintiff's evidence or a peremptory instruction for the jury to find for the defendant, the court must consider the evidence introduced by plaintiff as true, and draw therefrom every reasonable inference which the law warrants in her favor. *Williams v. Railroad*, 257 Mo. 87, loc. cit. 112, 165 S. W. 788, 52 L. R. A. (N. S.) 443, and cases cited.

[2, 3] (b) In the second place, the law of this state is well settled to the effect that the deceased was lawfully upon the street at the time and place where he was injured and killed. Pedestrians have the same rights as drivers of vehicles to use and traverse a highway at all points and are not restricted in crossing streets at the intersection of two streets or avenues; such fact, however, might have some bearing upon the question of contributory negligence.

The last clause of paragraph 2 of section 8 of Laws of Missouri, 1911, pages 326, 327, reads as follows:

"* * * In approaching or passing a car of a street railway, which has been stopped to allow passengers to alight or embark, the operator of every motor vehicle shall slow down, and, if it be necessary for the safety of the public, he shall bring said vehicle to a full stop. Upon approaching a pedestrian, who is upon the traveled part of any highway and not upon a sidewalk, and upon approaching an intersecting highway or a curve or a corner in a highway, where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn, or other device for signaling."

This is not only the statutory law of the state, but is the common law also. *Vaughn v. Scade*, 30 Mo. 600, loc. cit. 605; *Ostermeier v. Implement Co.*, 255 Mo. 128, loc. cit. 135, 164 S. W. 218, and cases cited; *Aronson v. Ricker*, 185 Mo. App. 528, loc. cit. 532, 172 S. W. 641; *Purtell v. Jordan*, 156 Mass. 573, 577, 31 N. E. 652; *Raymond v. Hill*, 168 Cal. 473, 143 Pac. 743; *Minor v. Mapes*, 102 Ark. 351, 144 S. W. 219, 39 L. R. A. (N. S.) 214; *Fox v. Tea Co.*, 84 N. J. Law, 726, loc. cit. 729, 730, 87 Atl. 339; *Elliott on Roads and Streets* (3d Ed.) vol. 2, § 1068 et seq.

[4-7] In the light of these two fundamental rules of law, let us briefly review the evidence introduced by the plaintiff in this case. Her evidence tended to prove that, on the evening of November 22, 1911, about 8:30 o'clock p. m., it being rather dark and raining, one of the cars of the United Railways Company, on the east track of the Jefferson avenue line, approached Park avenue from the south, and crossed the same, and stopped with the rear end thereof resting upon the crosswalk on the north side of Park avenue; that said stop was made for the purpose of receiving upon and discharging passengers from said car; that the distance between the east track on Jefferson avenue to the east curb thereof was 25 feet and 7 inches, if I correctly understand the plat filed in the case, and not 17 feet and 9 inches, as stated by counsel for respondent. Under those conditions, while Meenach was walking across Jefferson avenue from the west to the east side thereof, just in front of said street car, the defendant drove his automobile through said space at about 10 miles per hour, or about 15 feet per second, without sounding the horn or giving any other signal of its approach, and that, too, while passengers were getting upon and alighting from said car, within said space of 25 feet, less the distance occupied by the side of the car projecting over the east rail of said track.

There is another important factor which must be reckoned with in the discussion of this case, and that is an automobile is a highly dangerous piece of machinery. *Ex parte Kneedler*, 243 Mo. 632, 147 S. W. 983, 40 L. R. A. (N. S.) 622, Ann. Cas. 1913C, 923; *Savoy v. McLeod*, 111 Me. 234, loc. cit. 237, 88 Atl. 721, 48 L. R. A. (N. S.) 971. In fact, automobiles are more dangerous to travel upon the streets than street cars; the latter are confined to permanently fixed tracks, while the former are not restricted to any particular portions of the streets; they run as fast, and on account of their great weight, collisions with them are just as disastrous to man and property as are collisions with the cars. All that vehicles and pedestrians have to do in order to avoid injury from the latter is to keep off of the car tracks, but not so with automobiles; one can never tell in what part of the street they will appear, nor what course they will take in the presence of

apparent or threatened collision. A person in trying to diverge from the course of one may step in front of another, or the same automobile may turn in the same direction the pedestrian takes and run him down, he having no knowledge of the course the former will take.

In the light of these facts, was the defendant guilty of negligence when he drove his automobile through said space of twenty-odd feet, at a speed of 15 feet per second, without warning, while persons therein were getting on and off of said car? Had the defendant hit one of said passengers instead of Meenach, I apprehend it would not be seriously contended but what the law would declare he was guilty of actionable negligence, especially under section 12 of paragraph 9, page 330, of Laws of Missouri 1911, which reads:

"Any persons owning, operating, or controlling an automobile running on, upon, along, or across public roads, streets, avenues, alleys, highways, or places much used for travel, shall use the highest degree of care that a very careful person would use, under like or similar circumstances, to prevent injury or death to persons on, or traveling over, upon, or across such public roads, streets, avenues, alleys, highways, or places much used for travel. Any owner, operator, or person in control of an automobile, failing to use such degree of care, shall be liable to damages to a person or property injured by failure of the owner, operator, or persons in control of an automobile, to use such degree of care, and in case of the death of the injured party, then damages for such injury or death may be recovered, as now provided for or may hereafter be provided by law, unless the injury or death is caused by the negligence of the injured or deceased person, contributing thereto."

The mere fact that the automobile struck Meenach instead of one of said passengers does not relieve the conduct of the defendant of negligence, for the obvious reason that the law imposed upon him to perform the duties mentioned in section 8, paragraph 2, pages 326, 327, Laws of Missouri of 1911, for the protection of not only the passengers who were getting on and off the car, but also for the safety of all persons who might be about it. The state is just as much interested in protecting the lives and limbs of non-passengers as it is in protecting those of the passengers; and the former are in no better position to see and protect themselves against approaching dangers obstructed by the car than are the latter.

The most that can be attributed to the conduct of the deceased is that it might bear upon the question of contributory negligence, and whether that be true or not, the fact remains that, under the law, the jury might very well have found that the death of Meenach was caused by the negligence of the defendant. In other words, from the facts shown, a jury would be warranted in finding that the defendant did not exercise that high degree of care imposed by the statute last quoted. The deceased was at a point where he had the legal right to be, and it was the plain duty of the defendant to be on the

lookout for him and to use all reasonable means to avoid his injury. *McFarn v. Gardner*, 121 Mo. App. 1, loc. cit. 10, 11, 97 S. W. 972; *Berry's Automobile Law*, page 114. This he did not do; he ran past the street car at 10 miles per hour, without giving any signal or warning of his approach, notwithstanding the fact that the defendant could not see plaintiff's husband, nor he the defendant, on account of the car being between them.

The statutes before quoted provide that drivers of motor cars on a highway shall use the highest degree of care, and that while passing a street car the driver must slow down the machine, and, if necessary, bring his vehicle to a full stop, and when approaching a pedestrian who is upon a traveled part of the roadway, not upon a sidewalk, or upon approaching a point where the view of the operator is obstructed, that he shall slow down and give a timely signal with his bell, horn, or other signaling device. The evidence in this case tended to show that the defendant did not slow down the speed of the automobile below 10 miles per hour, and that he gave no signal of its approach whatever. This evidence tended to show a direct violation of the duty imposed upon him by the statutes mentioned, and for that reason the case should have been submitted to the jury. This was expressly so held in the case of *Grouch v. Heffner*, 184 Mo. App. 365, 171 S. W. 23.

[8] II. Counsel for plaintiff state their next ground for a reversal of the judgment of the circuit court, and the reasons assigned therefor in the following language:

"The undisputed evidence in the case shows that it is 25 feet 7 inches from the eastern car track upon which the north-bound Jefferson avenue car was standing to the eastern curb. The plaintiff's husband passed some feet in front of the car, which was 40 feet long. He was walking at a brisk walk, or at about four miles an hour, and he walked at this rate until he was struck by the automobile and had arrived some two or three feet from the curb. In other words, he had walked some 20 feet after he was in full view from the automobile approaching from the south, and had almost reached the curb before he was struck. The automobile was going at the rate of 10 miles an hour; that is, it was going $2\frac{1}{2}$ times as fast as Mr. Meenach was walking, and must therefore have gone at least 60 feet from the time that Mr. Meenach came in full view until it struck him. Under such circumstances the case is one for the jury to determine as to the negligence of the parties."

In support thereof we are cited to the following authorities: *Dieter v. Zbaren*, 81 Mo. App. 612, loc. cit. 615; *Ginter v. O'Donoghue*, 179 S. W. 732; *Grouch v. Heffner*, 184 Mo. App. 365, 171 S. W. 23; *Wyler v. Ratican*, 150 Mo. App. 474, 131 S. W. 155; *Meyers v. Lewis*, 43 Mo. App. 417; *Ostermeier v. Implement Co.*, 255 Mo. 128, 164 S. W. 218; *Aronson v. Ricker*, 185 Mo. App. 528, 172 S. W. 641; *Minor v. Mapes*, 102 Ark. 351, 144 S. W. 219. 39 L. R. A. (N. S.) 214; *Fox v.*

Tea Co., 84 N. J. Law, 726, 87 Atl. 339; *Diamond v. Cowles*, 174 Fed. 571, 98 C. C. A. 417; *Brewster v. Barker*, 129 App. Div. 724, loc. cit. 726 to 728, 113 N. Y. Supp. 1026; *Huddy's Law of Automobiles*, § 12, p. 63. I adopt the foregoing as a part of this opinion, and the authorities cited clearly hold that under the evidence the defendant was guilty of actionable negligence.

We have carefully considered all of the suggestions made by counsel for defendant in support of the ruling of the circuit court, but we are not able to adopt those views because they are not supported by the evidence.

Under this view of the case, the action of the court in giving the imperative instruction telling the jury to find for the defendant was clearly erroneous; and the judgment must be reversed and remanded for a new trial, which is accordingly done. All concur.

STONE et al. v. McCONNELL et al. (No. 17644.)

(Supreme Court of Missouri, Division No. 1.
March 30, 1916, and June 2, 1916.
Rehearing Denied July 3, 1916.)

1. PARTIES ⇐96(1)—NONJOINDER OF PLAINTIFF—MODE OF OBJECTION—GENERAL DENIAL.

Under Rev. St. 1909, § 1800, providing that defendant may demur if a defect of parties appears on the face of the petition and section 1804, relating to raising objections by answer, a defect in parties plaintiff is waived by going to trial upon a general denial.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 167, 169, 170; Dec. Dig. ⇐96(1); Pleading, Cent. Dig. § 1405.]

2. PLEADING ⇐237(8)—AMENDMENT—LEAVE OF COURT—CONFORMITY TO PROOF—NEW CAUSE OF ACTION.

Where a petition to recover real estate commissions alleged defendants' promise to directly pay one McCollough his share thereof and the fixing of this share, an amendment alleging defendants' promise to pay a sum fixed does not change the cause of action and may be allowed under Rev. St. 1909, §§ 1840-1848, when conforming to the proof.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 608; Dec. Dig. ⇐237(8).]

3. BROKERS ⇐88(9)—ACTION FOR COMPENSATION—INSTRUCTIONS.

An instruction in a real estate commission case that plaintiffs were entitled to a verdict if the evidence showed a contract to pay a certain amount per acre was proper when within the issues and supported by plaintiffs' evidence, though defendants' evidence tended to show a different agreement, as to which defendants might have requested an instruction.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 127; Dec. Dig. ⇐88(9).]

4. BROKERS ⇐63(1)—COMPENSATION—DEFECT IN PRINCIPAL'S TITLE.

Real estate commissions become due, when no other time is specified, upon the intending purchaser and defendant executing the contract of purchase, although defendant's defective title prevents him from completing the transaction.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. ⇐63(1).]

5. BROKERS \S 88(6)—ACTIONS FOR COMPENSATION—QUESTION FOR JURY.

Where a contract for real estate commissions provided that, if defendant owners became liable to other agents, such liabilities should be deducted from the amount due plaintiffs, and there was evidence of such liabilities, a peremptory instruction for plaintiffs on the amount of damages was error.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 128, 129; Dec. Dig. \S 88(6).]

6. APPEAL AND ERROR \S 1140(2)—DETERMINATION—POWER TO MODIFY JUDGMENT.

The Supreme Court cannot affirm a judgment by eliminating an item of damages where conflicting evidence renders it a jury question unless the plaintiffs consent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4463; Dec. Dig. \S 1140(2).]

7. APPEAL AND ERROR \S 1140(3)—MODIFICATION—REDUCING AMOUNT OF VERDICT.

Where a verdict for plaintiffs is proper except as to items of damages which plaintiffs agree to eliminate, judgment will be entered in the Supreme Court for the reduced amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4465; Dec. Dig. \S 1140(3).]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by Robert S. Stone and others against Frederick R. McConnell and others. Judgment for plaintiffs, and defendants appeal. Affirmed as modified.

Metcalf, Brady & Sherman, of Kansas City, for appellants. Walsh, Ayiward & Lee and George L. Davis, all of Kansas City, for respondents.

GRAVES, P. J. Plaintiffs are suing defendants for commissions claimed to be due them for the sale of certain real estate belonging to the defendants. Several questions urged here require a discussion of the pleadings. The petition is not long, and the safest course is to set it out in full. It reads:

"Plaintiffs for their cause of action state that they are engaged in the real estate business, and that their principal office and place of business is located in Kansas City, Mo.

"Plaintiffs further state that on or about the 5th day of May, 1911, defendants were the owners of a certain tract of real estate situated in De Soto county, Fla., and known as the Indian Prairie tract, and containing one hundred eighty thousand (180,000) acres more or less, and while the owner of said real estate and on or about April 1, 1911, solicited plaintiffs to act as their agents in and for the purpose of procuring persons to purchase the same to enter into a contract of purchase thereof, upon such terms and conditions as the defendants and the purchasers procured might agree.

"Plaintiffs further state that it was orally agreed between the defendants at said time that the agents procuring purchasers as aforesaid should be paid a commission for procuring same of fifty (50) cents per acre for each acre of real estate sold as aforesaid.

"Plaintiffs further state that it was also orally agreed that the aforesaid commission of 50 cents per acre should be divided among the agents as follows, to wit: One-third to be paid to what the parties hereto termed the "Florida End," and two-thirds to what was termed the "Kansas City End." That the plaintiffs and

Perry McCollough constituted the Kansas City end; that Perry McCollough was to be paid for his services, in connection with the aforesaid sale, such amount of that portion which was to be paid to the Kansas City end as the plaintiffs and said Perry McCollough might agree upon; that plaintiffs and Perry McCollough have agreed that defendants should pay the said Perry McCollough the sum of \$12,833; and that plaintiffs have advised defendants of the said amount to be paid to said Perry McCollough. [And that defendants agreed to pay said sum of \$12,833 to said McCollough.]

"Plaintiffs further state that it was also orally agreed that defendants were to deduct from the aforesaid commission the sum of 10 cents per acre for each acre sold, which amount deducted was to be paid to one named McCloughlin, provided the defendants were or became liable to the said McCloughlin for commission on account of the aforesaid sale; and plaintiffs further state that the defendants did not become liable to the said McCloughlin for commission as aforesaid.

"Plaintiffs further state that it was also orally agreed that the defendants were to deduct \$20,000 from the aforesaid commission, which amount was to be paid to Jacksonville, Fla., agents for the land, provided that the defendants were or became liable to said agents on account of said sale; but plaintiffs further state that the defendants did not become liable to Jacksonville, Fla., agents as aforesaid.

"Plaintiffs further state that they acted upon the aforesaid solicitation and became the agents of defendants for the aforesaid purpose; that, in pursuance of and in full compliance with said agency, they procured Robert J. Martin and Joseph H. Borders as purchasers thereof, who were and still are ready, willing, and able to purchase and pay for said property as aforesaid; that the said Robert J. Martin and Joseph H. Borders and the defendants entered into a contract of purchase therefor on or about May 5, 1911, upon terms mutually agreeable to them and the defendants; that the said Robert J. Martin and Joseph H. Borders were and still are ready, willing, and able to perform said contract of purchase as aforesaid, but that, after said sale and agreement of purchase and sale, said Robert J. Martin and Joseph H. Borders caused an examination of the records to be made whereby it was disclosed that the defendants did not have good title to the said tract and could not carry out the terms of said sale of the contract of sale, and, for that reason and no other, said Robert J. Martin and Joseph H. Borders refused to consummate said sale and said contract of purchase.

"Plaintiffs further state that on account of the premises defendants are indebted to plaintiffs for the sum of \$47,166, and that plaintiffs have demanded payment of defendants of the aforesaid sum, but that defendants have refused and still refuse to pay the same.

"Wherefore, plaintiffs pray judgment against defendants in the sum of \$47,166, and for interest thereon at the rate of six per cent. (6%) from May 5, 1911, and for the costs of this action."

The answer was a general denial in the very shortest form. The clause in brackets and underscored in the foregoing petition was an amendment to the petition permitted by the court after the close of all the evidence, so as to make the petition conform to the proof, as claimed here by the plaintiffs.

Under the instructions of the court the jury returned a verdict for plaintiffs in the sum of \$49,336.15, and from the judgment en-

tered on such verdict, the defendants have appealed. The assignment of error here is:

"(1) The court erred in overruling the defendants' objection to the introduction of any evidence under the petition.

"(2) The court erred in overruling the defendants' demurrer to the evidence at the close of plaintiffs' case.

"(3) The court erred in overruling the defendants' demurrer to all the evidence at the close of the case.

"(4) The court erred in permitting the plaintiffs to amend their petition as it was amended at the close of the case.

"(5) The court erred in overruling the defendants' motion to strike the petition as amended from the files.

"(6) That the court erred in giving instructions Nos. 1, 5, and 6, as asked by the plaintiffs."

Clauses 1, 2, and 3 of the above assignment of error go to the same question. Counsel for appellants so state in their brief. They say in their statement of the case:

"Upon plaintiffs' offer to introduce testimony at the opening of the case, the defendants objected to any evidence under the petition, for the reason the petition, upon its face, shows a suit pending upon a joint contract where all the joint obligees were not parties, plaintiff or defendant, and that the plaintiffs had no legal capacity to sue. (Record, 26.) At the close of plaintiffs' case (Record, 266) and again at the close of the whole case (Record 559) the defendants offered demurrer to plaintiffs' evidence upon the same ground. This objection and these demurrers were overruled by the court, who immediately thereafter, and over defendants' objection, permitted plaintiffs to amend their petition by interlineation as follows."

The fourth and fifth clauses go to a single question, as is evident from a reading thereof. The sixth goes to error in giving instructions. Upon these assignments we have but three questions for consideration. This sufficiently outlines the case.

[1] I. The first three assignments of error, as will appear from our statement, go to the one question, i. e., that there is a defect in the parties plaintiff. This was the chief battle line pitched below, but in our judgment pitched too late. It should be noted that the defendant answered by a simple general denial. A defect of parties plaintiff or defendant is not suggested in this answer. Section 1800, R. S. 1909, so far as applicable, reads:

"The defendant may demur to the petition, when it shall appear upon the face thereof, either: * * * or, fourth, that there is a defect of parties plaintiff or defendant."

Under this section, if the defect appears upon the face of the petition it must be raised by demurrer, and if an answer is filed it is waived, unless preserved in the answer. This section 1800, supra, is supplemented by section 1804, R. S. 1909, which reads:

"When any of the matters enumerated in section 1800 do not appear upon the face of the petition, the objection may be taken by answer. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject-matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action."

In our statement of the case we have quoted in full from appellants' statement of the case, which shows the exact objections to this petition. These objections do not go to the jurisdiction of the court over the subject-matter of the action, nor do they go to the point that the petition states no cause of action. In other words the parties did not undertake to bring themselves within the exceptions stated in section 1804, supra. This was no doubt for the very good reason that the petition did not fall within either of the exceptions contained in the statute. Under the statutes aforesaid, and under an unbroken line of cases in this state, even if there was a defect of parties, the matter was waived by the action of the defendants in filing a general denial, and proceeding to a trial upon such an answer. *Crenshaw v. Ullman*, 113 Mo. loc. cit. 637, 638, 20 S. W. 1077; *Hudson v. Wright*, 204 Mo. loc. cit. 424, 103 S. W. 8; *Gardner v. Robertson*, 208 Mo. loc. cit. 606, 106 S. W. 645; *McKee v. Downing*, 224 Mo. loc. cit. 129, 124 S. W. 7; *Barnard v. Keathley*, 230 Mo. loc. cit. 222, 130 S. W. 306; *Norton v. Reed*, 253 Mo. loc. cit. 254, 161 S. W. 842.

[2] II. This brings us to the second proposition raised in the assignment of error: Was there error in permitting the amendment to the petition at the close of the evidence? The plaintiffs had sued as if upon a severable contract. They proceeded upon the theory that their commission, by the contract, had been separated definitely from commissions going elsewhere. They had charged in the petition that, under the contract with defendants, the defendants were to pay McCollough the sum of \$12,833, which was to be deducted from two-thirds of the whole commission, and the remainder of such two-thirds was to be paid to plaintiffs. The evidence in the case tends to show that this trade was hanging fire for some time. It further tends to show that Stone and the members of his crowd were not satisfied with the conduct of McCollough. That, whilst the negotiations were going on, the plaintiffs had a clear understanding with defendants and McCollough that McCollough was to receive only \$12,833 for his services, and the plaintiffs the remainder of two-thirds of the whole commission of 50 cents per acre, provided the other matters mentioned in the petition did not have to be taken care of by the defendants. The evidence of the plaintiffs tends to show that the defendants expressly agreed to pay this sum of \$12,833 to McCollough in the event of the sale. With this character of evidence before the court, the court permitted one paragraph of the petition to be amended by adding the words "and that said defendants agreed to pay said sum of \$12,833 to said McCollough," so that said paragraph when amended thus read:

"Plaintiffs further state that it was also orally agreed that the aforesaid commission of 50 cents per acre should be divided among the

agents as follows, to wit: One-third to be paid to what the parties hereto termed the "Florida End," and two-thirds to what was termed the "Kansas City End." That the plaintiffs and Perry McCollough constituted the Kansas City end; that Perry McCollough was to be paid for his services in connection with the aforesaid sale amount of that portion which was to be paid to the Kansas City end as the plaintiffs and said Perry McCollough might agree upon; that plaintiffs and Perry McCollough have agreed that defendants should pay the said Perry McCollough the sum of \$12,833; and that plaintiffs have advised defendants of the said amount to be paid to said Perry McCollough and that defendants agreed to pay said sum of \$12,833 to said McCollough."

The underlined clause is the one added. This amendment simply made the pleading conform to the facts proven. The statutes of the state (sections 1846, 1847, and 1848, R. S. 1909) expressly authorize such amendments to be made, unless the amendment changes the cause of action. We have set out the whole petition in this case, as well as the amendment, and it cannot be said that the amendment changed the cause of action. The original petition alleged that defendants agreed to divide the two-thirds of the commission between plaintiffs and McCollough, paying to McCollough such part thereof as plaintiffs and McCollough might agree upon, and further alleged that they (plaintiffs and McCollough) had agreed upon \$12,833 and notified defendant of that fact. From this it will be observed that the petition as first drawn charges that some definite sum should be agreed upon for McCollough, and that defendants promised to pay such sum to McCollough. Here is an alleged promise to pay by defendants to McCollough direct, and a further promise to pay to plaintiffs direct the remaining portion of two-thirds of the commission. The added words only emphasize the agreement already pleaded. It does not change the cause of action. I doubt very much whether there was necessity for the amendment, but the evidence clearly supported it, and the discretion of the trial court in permitting it under our statutes should not be disturbed.

III. The instructions complained of by appellants are as follows:

"(1) The court instructs the jury that if they find and believe from the evidence that the defendant Graham, one of the owners of the Indian Prairie tract, acting for himself and his codefendants, McConnell, Dean, McMillan, Catlett, and King, having authority from his said codefendants to do so, stated to the witness, McCollough, that said land was for sale; that the net price placed upon the same by the owners was \$3.50 per acre; that, if said sale was made for the sum of \$4 per acre, said owners would pay 50 cents per acre to the agents procuring a purchaser upon terms of payment satisfactory to the owners; that thereafter said McCollough communicated this proposition to the plaintiffs; that thereupon Robert S. Stone with his coplaintiffs did introduce said McCollough to R. J. Martin, representing the firm of Martin & Borders as a purchaser; that negotiations for the sale of said land to Martin & Borders were then commenced, which resulted in the making of the contract of sale introduced in evidence between said Martin & Borders and the

owners of the land, and that said Martin & Borders were financially able to carry out the terms of said contract, then your verdict should be for the plaintiffs."

"(5) The court instructs the jury that if you find the issues for the plaintiffs, as submitted in the other instructions, and further find that nothing was said between plaintiffs and the defendants as to the time the commissions, if any, were to be paid, then the same were due and payable immediately upon the execution of the contract introduced in evidence.

"(6) If you find a verdict for the plaintiffs it should be for the sum of \$47,166.67, with interest thereon at the rate of 6 per cent. per annum from the 5th day of July, 1911."

[3] Instruction No. 1 is well within the pleadings in this case, and it is well within the evidence offered by the plaintiffs. The testimony in behalf of plaintiffs is that the whole commission was to be 50 cents per acre, if the land was sold for \$4 per acre. This of course was to include also the payment of 10 cents per acre to McColloughlin and \$20,000 to the Jacksonville, Fla., agents, if defendants became liable therefor. This instruction does not undertake to go further than to say to the jury that they should find for the plaintiffs, if the evidence showed a contract between the parties as therein stated. For defendants there was some evidence that the commission should be the difference between the amount of \$3.60 per acre net to defendants and the selling price, and that this was the contract. Had they desired to submit this theory of the contract to the jury, they should have asked an appropriate instruction. The instruction given, as stated, is well within the pleadings and the evidence offered by plaintiffs. It was their theory of the contract. We see no error in it. On the other hand, if the jury did not find such to be the contract they could not have found for the plaintiff. Plaintiffs do not sue in quantum meruit, but on a specified contract for two-thirds of a commission of 50 cents per acre, less \$12,833 which they plead was to be paid to McCollough.

[4] IV. Instruction No. 5 is not erroneous. The evidence shows that the defendants had Stone, one of the plaintiffs, bring a representative of the purchaser to Florida, and, after this representative viewed the lands, the defendants entered into a written contract of sale for the property, fixing the terms thereof. By entering into this written contract they accepted the purchasers brought to them by the plaintiffs in this case, and the commission thereupon became due to plaintiffs. This question was thoroughly threshed out in *Knisely v. Leathe*, 256 Mo. loc. cit. 372 et seq., 166 S. W. 257. The instruction seemingly was bottomed upon the *Knisely Case*, although it may have been gathered from some of the many cases cited in the *Knisely Case*. At any rate it properly declares the law. When Stone (for the plaintiffs) took his proposed purchasers, or their agents, to the defendants (as he did) and these defendants then accepted such purchases by entering into a written contract of sale with them,

as they did, then the commission became due, unless by special agreement a different time of payment was fixed. It should be added that the sale fell through, but by no default of the purchasers furnished, but because of defendants' inability to show title. But this is immaterial. Plaintiffs had a right to their commission when the contract of sale was entered into between the purchasers and the defendants. This instruction was proper.

[5] V. The serious question in this case is the propriety of instruction No. 6 for the plaintiffs, supra. This instruction told the jury that if they found for the plaintiffs they should find for them in the sum of \$47,166.67, with interest at 6 per cent. from July 5, 1911. The date fixed is the date this suit was originally filed, and therefore the date of demand. This is a peremptory instruction as to the amount of the verdict, if there was a finding for the plaintiffs. Should such an instruction have been given under the pleadings and evidence? In the petition the plaintiffs say that there were two contingencies which might have reduced the amount to which they were entitled. In the petition they concede that, if the defendants became liable to one McCloughlin for 10 cents per acre, this should be first deducted, thus leaving the plaintiffs only entitled to two-thirds of 40 cents per acre, less the \$12,833 to McCollough. They next say in their petition:

"Plaintiffs further state that it was also orally agreed that the defendants were to deduct \$20,000 from the aforesaid commission, which amount was to be paid to Jacksonville, Fla., agents for the land, provided that the defendants were or became liable to said agents on account of said sale; but plaintiffs further state that the defendants did not become liable to Jacksonville, Fla., agents as aforesaid."

As to the 10 cents per acre, this turns out to be a man by name of Mulholland, instead of McCloughlin, as stated in the petition. The title to the land stood in the name of McConnell. He testifies that he engaged Mulholland to try to sell the land, but reserved the right for the owners to sell. He says that, inasmuch as Mulholland was to take all of his immediate time in an effort to sell, he told him that he would allow him 10 cents per acre, if they sold the land, whilst he had it. It appears that McConnell, after the sale to Martin & Borders, involved in this suit, notified Mulholland not to go further in his efforts to sell, as the land had been sold. Mulholland came to Jacksonville, and McConnell settled with him for \$1,250. Of this sum Mulholland owed McConnell \$1,000, and McConnell canceled the debt and gave him \$250 in cash. This is the 10 cents per acre mentioned in the petition. There was a liability of at least \$1,250 on this matter, or at least evidence tending to show such a liability. This instruction cut off this evidence from the jury.

There is evidence in the case from both Mc-

Connell and Graham that Graham, although a part owner, was authorized to sell at a fixed figure, and given the privilege of keeping or disposing of all he could get above that figure as he saw fit. Under this evidence Graham was to pay all expenses of his efforts to sell. The evidence tends to show that this is the \$20,000, spoken of in plaintiffs' petition. With this evidence in the record, this instruction No. 6 was error. Even on plaintiffs' theory of the case, both these matters, the \$1,250 to Mulholland and the claim of Graham, should have been presented to the jury by proper instructions and the jury left to determine the question as to whether or not these sums should be first deducted from the 50 cents per acre commission, before it was divided into the one and two thirds. We can see no theory upon which the court can be justified in giving this peremptory instruction.

[6] If these sums, with interest thereon, could be lopped off of the judgment, we might see our way clear to affirm as to the remainder; but we have no right to so do as to the \$20,000 items, a disputed matter, unless plaintiff should waive this matter.

For the error in giving instruction No. 6, the judgment will have to be reversed and the cause remanded. It is so ordered. All concur.

PER CURIAM. In this case we have two matters pending: (1) A motion by respondents for a rehearing, and (2) in the event that such motion is overruled, then respondents ask leave to waive the sum of \$21,250, and interest on same from May 5, 1911, and that the judgment be affirmed for the remainder. To the latter step the appellant objects. We see nothing in the motion for rehearing upon which to change our former views as in the opinion expressed, and such motion is therefore overruled.

[7] When the former opinion was written, it appeared to us that there was an undoubted right of recovery in plaintiffs except as to two disputed items. On one of these disputed items the liability was shown by defendants to be only \$1,250. The other item was for \$20,000. These two items the plaintiffs now offer to waive, in pursuance of a suggestion in our opinion. Plaintiffs sued for \$47,166, which amount included these two items, aggregating \$21,250. The date of demand was May 5, 1911. The jury calculated interest on \$47,166 at 6 per cent. from May 5, 1911, and returned a verdict for \$49,336.15. With the waiver of these two items, this verdict should be reduced by the sum of \$21,250, with interest thereon at 6 per cent. from May 5, 1911 to April 11, 1912, gives the aggregate of \$22,440. This aggregate should be taken from the verdict of \$49,336.15, which leaves \$26,896.15. With the waiver of the two disputed items, the amount due plaintiff on April 11, 1912, was \$26,

\$96.15, which should bear 6 per cent. from that date. The application of respondents to waive the two disputed items above stated is sustained, and, to the end that the matter may be closed, we will enter judgment here for the said sum of \$26,896.15, together with interest thereon from April 11, 1912, at the rate of 6 per cent. per annum.

Our former opinion is therefore modified as herein indicated and judgment ordered here as above indicated, which judgment shall be satisfied upon the payment of the aggregate sum of \$26,896.15, and 6 per cent. interest added thereto from April 11, 1912, to the date of the payment of our judgment. It is so ordered. All concur.

HEAGY et al. v. MILLER et al. (No. 17360.)
(Supreme Court of Missouri, Division No. 1,
June 2, 1916. Rehearing Denied
July 3, 1916.)

1. QUIETING TITLE § 30(2)—PARTIES DEFENDANT—STATUTE.

Under Rev. St. 1909, § 2535, authorizing the court to determine in suits to quiet title all rights, etc., affecting the property, where appellants were the only remaining active parties defendant in such a suit when they went to trial, their claim being to the same land and under the same title and as tenants in common, there was no misjoinder of parties defendant, fatal to judgment for plaintiff, though there were numerous other defendants.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 65; Dec. Dig. § 30(2).]

2. APPEAL AND ERROR § 714(1)—REVIEW—EVIDENCE.

On appeal in suit to quiet title, the Supreme Court was warranted in turning to a compromise agreement, not formally in evidence, upon which defendants based their objection that the patent under which plaintiff claimed was void.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2958, 2959; Dec. Dig. § 714(1).]

3. EVIDENCE § 83(4)—PRESUMPTIONS—COMMISSIONER—EXECUTION OF AUTHORITY.

On appeal in suit to quiet title, where plaintiffs claimed under a special commissioner to convey for a county lands described in a compromise agreement, it will be presumed that such commissioner properly executed his authority.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 106; Dec. Dig. § 83(4).]

4. QUIETING TITLE § 15—PATENT FROM COUNTY—AUTHORITY TO MAKE—PRECLUSION FROM RAISING QUESTION.

Where plaintiff claimed under a county through the patent of a special commissioner, and the county abided the effect of his conveyance for 40 years, defendants could not raise the question that the patent was void because the compromise agreement under which it was made did not empower the commissioner to convey to the particular grantee, except upon proof that the commissioner deviated from his power.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 47; Dec. Dig. § 15.]

5. QUIETING TITLE § 44(4)—BURDEN OF PROOF.

In suit to quiet title between parties claiming under a county, plaintiffs must make a prima facie showing of title in themselves before they

can have a decree declaring defendant's claim invalid.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 91; Dec. Dig. § 44(4).]

6. EVIDENCE § 366(11)—AUTHENTICATION—PATENT FOR LAND—AUTHORITY OF GRANTOR.

In suit to quiet title between parties claiming under a county, the patent offered by plaintiffs was ineffectual to prove a conveyance by the county, in the absence of showing, by proof, admission, or reasonable inference, that the county court appointed the grantor to execute the patent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1534–1538; Dec. Dig. § 366(11).]

7. EVIDENCE § 83(4)—PRESUMPTION—EXECUTION OF AUTHORITY BY COMMISSIONER.

No presumption of authority attends the execution of a patent for a county by one describing himself therein as commissioner; there being no commissioner until the county court appoints one.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 106; Dec. Dig. § 83(4).]

8. APPEAL AND ERROR § 882(7)—REVIEW—INVITED ERROR.

In suit to quiet title between parties claiming under a county, where defendant's counsel treated a certain compromise agreement, on which the authority of the commissioner who executed the county's patent to plaintiffs' predecessor depended, as before the court, basing objections on it, and asking for a ruling involving its construction, counsel for defendant invited the court to consider and rule upon the agreement, and will not be heard to say on appeal that the trial court erred in accepting his invitation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3597; Dec. Dig. § 882(7).]

Appeal from Circuit Court, Stoddard County; W. S. C. Walker, Judge.

Action by Louis W. Heagy and others against Joseph J. Miller and others. From a judgment for plaintiffs, defendants appeal. Judgment affirmed.

Andrew W. Hunt, of Bloomfield, for appellants. Wammack & Welborn, of Bloomfield, for respondents.

BLAIR, J. Defendants appeal from a judgment of the Stoddard circuit court quieting in plaintiffs the title to 157.96 acres of land in Stoddard county. This suit was begun against Joseph J. Miller and 32 others and their unknown widows, widowers, heirs, and devisees. All defendants except Isaac G. King, Jacob A. Berry, and Ida K. Berry, widow of Pinkney J. Berry, defaulted, and final judgment went against them. King answered, and then appeared no further, and judgment went against him. The Berrys went to trial on a joint answer, claiming as tenants in common title to a part of the land, lots 6 and 7, section 6, township 27, range 12, and setting up misjoinder of parties, averring that the several original defendants claimed distinct parcels of land described in the petition.

It was admitted the lands involved are swamp lands and that the title thereto passed to the state under the act of Congress of September 28, 1850 (9 Stat. p. 519, c. 84), and

thereafter passed from the state into Stoddard county. Stoddard county is the common source of title. Respondents claim title, by mesne conveyances, under John J. Crytes, whose title depended upon the validity and effectiveness of a patent, dated June 19, 1869, executed to him by Alfred Elzroth which patent is identical in form and substance, except with respect to the land described and grantee named, with those set out in *Keaton v. Hamilton*, 264 Mo. loc. cit. 570, 571, 175 S. W. 967, and *Simpson v. Stoddard County*, 173 Mo. loc. cit. 441, 73 S. W. 700. To support their claim, appellants offered in evidence an order of the county court of Stoddard county of date February 11, 1869, directing its clerk to certify to the state register of lands that Wm. G. Phelan and David J. Hicks had made full payment for 50,000 acres of land, including that now in suit. This order included a recital that Phelan and Hicks were employed, as attorneys, to recover 140,000 acres of land sold under execution in favor of Lewis M. Ringer, and that they were to receive the land as their fee for prosecuting suits therefor in their own name and at their own cost. This order was excluded from evidence.

It was agreed the officials of Stoddard county annually had, since 1869, assessed for taxes the land involved, and that respondents and those under whom they claim had paid all taxes thereon excepting for one year, and that the land involved was in 1882 sold for taxes of that year. It was further agreed that respondents owned whatever title was conveyed by the Elzroth patent introduced in evidence.

[1] 1. Appellants contend there was a misjoinder of parties defendant which is fatal to the judgment. The inartificial manner in which the point was made in the trial court will be waived and the matter disposed of on its merits. Appellants cite *Chaput v. Bock*, 224 Mo. 73, 123 S. W. 16, as supporting their position on this question. The trial in that case was had under section 650, R. S. 1899. In 1909 that section was amended for the express purpose of permitting all persons asserting claims adverse to a plaintiff to be joined in one suit. Section 2535, R. S. 1909; Laws 1909, p. 343. The language of the act of 1909 is clear enough. If it admitted of doubt, resort to the title discloses an express statement of the purpose above mentioned. Further, appellants were the only remaining active parties defendant in this case when they went to trial. Their claim is to the same land, and under the same title, and as tenants in common. The contention is overruled.

[2-4] 2. Appellants objected to the patent on the ground that:

"The compromise of April 23, 1869, in respect to this land and other lands, if it empowered Elzroth to convey this land at all, did not empower him to convey it to John J. Crytes, who was not a party to that compromise, and that the patent is absolutely void on its face."

The compromise referred to in the objection made is that set out in *Simpson v. Stoddard County*, supra, 173 Mo. loc. cit. 439, 440, 73 S. W. 700. The objection is thus based upon an instrument, not formally offered in evidence, and yet brought before the trial court by appellants for the purpose of grounding an objection thereon. To answer that objection we are warranted in turning to the compromise agreement, though not formally in evidence. The agreement referred to constitutes Elzroth special commissioner to convey the lands therein described, including these appellants now claim, to named persons or their assigns. Assuming, for the purpose of this question, Elzroth's appointment as commissioner, it will be presumed he properly executed his authority. At most, appellants are in no position to raise the question now presented, except upon proof Elzroth deviated from his power; the county having abided the effect of the conveyance for 40 years. *Swartz v. Page*, 13 Mo. loc. cit. 611, 612.

[5-7] 3. The most serious question presented arises out of the failure of respondents formally to offer the order appointing Elzroth commissioner, contained in the compromise agreement of April, 1869. Both respondents and appellants claim under Stoddard county, and the question is who has the better title from the common source. *Williams v. Sands*, 251 Mo. loc. cit. 160, 158 S. W. 47. It is apparent from what is said in *Tucker v. Wadlow et al.*, 184 S. W. 69 (not yet officially reported), that Phelan and Hicks acquired no title by the transaction evidenced by the order appellants attempted to introduce in evidence, and that, consequently, appellants neither showed nor offered to show any sort of valid claim or title to the land in suit. It was incumbent upon respondents, however, to make a *prima facie* showing of title in themselves before they could become entitled to a decree declaring appellants' claim invalid. *Senter v. Lumber Co.*, 255 Mo. loc. cit. 602, 603, 164 S. W. 501. It must be held that the patent offered by respondents is ineffectual to prove a conveyance by the county, in the absence of a showing of some kind that the county court appointed Elzroth to execute the patent. The order appointing him was not actually introduced. There is no statute providing that a patent executed by one describing himself therein as commissioner shall be evidence of such person's appointment as commissioner. Neither can any presumption of authority attend the execution of such patent, there being no such thing as a commissioner until the county court appoints one. The statute (section 3744, R. S. 1909) authorizes county courts to appoint commissioners to sell county lands, and the act in force in May, 1869 (Laws 1869, p. 67, § 6, made this provision (then section 4, p. 441, Gen. Stats. 1865) applicable to swamp lands.

Under these statutes the court had power to appoint commissioners, but no such commissioner had any official existence except by special appointment. Such an order was essential to such a commissioner's power to act. It was necessary, therefore, in order to give the patent upon which respondents rely any legal force, that Elzroth's appointment be proved or admitted, or that facts appear from which it could be reasonably inferred, unless appellants have estopped themselves to question it. Respondents made no proof of any appointment of Elzroth as commissioner. They now urge that this court has often held these Elzroth patents good. *Simpson v. Stoddard County*, supra, *Keaton v. Hamilton*, supra, and numerous other cases show this to be true. In those cases, however, the order appointing Elzroth was in evidence, or, as in *Niel v. Granger*, 177 S. W. 644, the point was not preserved. It is pointed out the costs were taxed against respondents in this case, and the briefs and record suggest the only actual relief a remand of the cause would yield appellants would be a retrial, the costs of which they would doubtless be permitted to pay.

[8] Despite all this, however, it would be necessary to reverse this judgment and remand the cause, except for the fact that on the trial counsel for appellants treated the compromise of April, 1869, as before the court in this case. He based objections upon it, and asked for a ruling involving its construction by the trial court. By that action he invited the court to consider it and rule upon it, and he will not now be heard to say the trial court erred in accepting his invitation. That compromise order contains the appointment of Elzroth, and has heretofore been held to have conferred authority upon him to execute patents invulnerable to an attack, such as that now made by appellants, the circumstances in evidence being considered.

The judgment is affirmed. All concur; BOND, J., in result.

CHICAGO, R. I. & P. RY. CO. v. LYDIK.
(No. 16811.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1916. Rehearing Denied
July 3, 1916.)

1. APPEAL AND ERROR \S 692(1)—RECORD—NECESSITY OF EXCLUSION OF EVIDENCE.
Rulings sustaining objections to questions where the record did not disclose what the testimony would have been were not reviewable.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905, 2906; Dec. Dig. \S 692(1).]

2. EMINENT DOMAIN \S 262(5)—PROCEEDINGS—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In condemnation proceedings an instruction limiting damages to actual damages and stating that "such inconveniences, if any, as are common to other persons and lands in the same

neighborhood are not to be taken into such estimate," was not prejudicial error, as excluding damages incident to the division of a tract into two parts by the right of way.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 686; Dec. Dig. \S 262(5).]

3. EMINENT DOMAIN \S 102—DAMAGES—DIVISION OF TRACT BY RIGHT OF WAY.

Damages incident to the division of a tract into two parts by a right of way, such as crossing from one tract to the other, are a proper element of damages in condemnation of the right of way.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 271, 272; Dec. Dig. \S 102.]

4. TRIAL \S 252(5)—INSTRUCTIONS—APPLICATION TO CASE.

An instruction that "a mere possibility that electric railroads may be built to or near said property at some time in the future, and that said property may become at some time in the future available as subdivision property," could not be considered in estimating the value of land taken or damages to the remainder, was proper as applying to the evidence, since it neither authorized nor excluded damages on the theory that the land was ripe for subdivision.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 600; Dec. Dig. \S 252(5).]

5. APPEAL AND ERROR \S 171(1)—TRIAL THEORY—ABANDONMENT.

The trial theory cannot be abandoned on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1053; Dec. Dig. \S 171(1).]

6. TRIAL \S 191(4)—INSTRUCTIONS—ASSUMPTION AS TO FACTS.

In railroad condemnation suit an instruction as to benefit to land from the owner's statutory right to switch connections after building of railroad was not error because not warranted by evidence, and because it assumed that the facilities would be a benefit, whereas the owner would have to pay their cost.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 427; Dec. Dig. \S 191(4); Railroads, Cent. Dig. §§ 1383, 1644, 1748.]

Appeal from St. Louis Circuit Court; John W. McElhinney, Judge.

Condemnation proceedings by the Chicago, Rock Island & Pacific Railway Company against Marshall Lydik. From a judgment for the railroad on exceptions to commissioners' award, defendant appeals. Affirmed.

Fauntleroy, Cullen & Hay, of St. Louis, for appellant. Jones, Hocker, Hawes & Angert and Vincent L. Boisabuin, all of St. Louis, for respondent.

BLAIR, J. Respondent began this proceeding in the St. Louis county circuit court to condemn a right of way over three tracts of land, one of which belonged to appellant. This tract was about 16½ acres in extent, of which the right of way taken occupies about 1½ acres, and severs about two-thirds of an acre from the remaining parcel. The commissioners assessed the damages at \$2,200. Exceptions were filed by both parties and sustained. On a trial by jury there was a verdict for \$2,000. Judgment for respondent was rendered for the difference between the amounts assessed by the verdict and the

commissioners' report, and this appeal followed. The evidence as to the damage inflicted was conflicting, but there is substantial evidence tending to support the jury's finding on that question. The errors assigned relate to instructions and to rulings on questions of evidence.

[1] I. Numerous objections were sustained to questions designed to elicit testimony as to the value of the property before and after the taking of the right of way. Usually no exception was saved, and in no instance does the record disclose what the testimony of the witness would have been. The rulings cannot be reviewed.

II. It is contended evidence of prices paid for other tracts in the neighborhood was wrongfully excluded. The same rule applied in paragraph 1, *supra*, applies to this contention. Much evidence of this kind was admitted. We find no reviewable ruling supporting this assignment.

III. Objections are made to rulings on instructions.

[2, 3] (a) One instruction given for respondent in substance directed the jury to allow appellant, among other things, whatever damages he had sustained by reason of the taking of some of his land through which the railroad ran, but that the damages allowed should be actual damage to the land through which the road ran "at the time of taking the same with reference to what it was then worth for sale, in view of the uses to which it might be put in the immediate future, and not based upon matters speculative or fanciful, which might or might not happen; and such inconveniences, if any, as are common to other persons and lands in the same neighborhood are not to be taken into such estimate." Then follows a clause as to the deduction of special or peculiar benefits. The argument is that the clause "such inconveniences, if any, as are common to other persons and lands in the same neighborhood are not to be taken into such estimate" is not limited to lands not taken, and therefore appellant was denied recovery for "inconveniences common to" lands taken. It is argued specifically that this clause excluded damages incident to the division of the tract into two parts, such as crossing from one tract to the other. Of course, this last is a proper element of damage. *Railway v. Shambaugh*, 106 Mo. loc. cit. 569, 17 S. W. 581. *Railway v. Dawley*, 50 Mo. App. 480, is not just in point, since the instruction therein condemned expressly excluded inconvenience in passing from one part to another of land severed by a right of way. In this case the instruction would have been better if the criticized clause had been expressly qualified to apply to "lands not taken." In the circumstances of this case, however, the jury could not well have been misled. There was no evidence, so far as the record shows, that the right of way divided any other tract.

Appellant requested no instruction defining more exactly the words "common to other persons and lands in the same neighborhood," and another instruction given directed the jury to allow appellant the fair market value of the property taken and also the difference in value of defendant's remaining property before and after the appropriation by plaintiff of the strip taken, "in view of the uses to which said strip condemned was to be thereafter applied, less," etc. Another instruction was substantially to the same effect. We do not regard the instruction, in the circumstances, as prejudicially erroneous.

[4] (b) Instruction 10 is as follows:

"The jury are instructed that they must not consider in estimating either the value of said land taken or the damages to the remainder thereof a mere possibility that electric railroads may be built to or near said property at some time in the future, and that said property may become at some time in the future available as subdivision property."

There was evidence warranting an instruction of this character. It seems self-evident that a mere possibility of some future change in the situation ought not to be made the basis of damages. This instruction neither authorizes nor excludes damages on the theory that the land was ripe for subdivision. It does not deal with that subject. Whatever is the true rule with respect to that, the instruction is correct.

[5] (c) It is stated in the brief that there was no evidence tending to show appellant's property derived any peculiar benefits from the construction of the road. An examination of the record shows that, without objection, witnesses were allowed to state the conditions and give their opinions that the building of the road benefited the tract and state how it did so. *Railroad v. Brick Co.*, 138 Mo. loc. cit. 709, 96 S. W. 1011. Counsel do not argue the matter. Neither shall we. Further, the trial theory cannot be abandoned here.

[6] (d) Instruction 11 set out, in full, the section of the statutes providing that in case, "in the opinion of the Railroad Commissioner," the business justifies it, owners of mines, sawmills, and other industries may construct a switch and connect it with any railroad track within a reasonable distance. The instruction further directed the jury that, if the owner of the tract here in question established a business coming within the terms of the statute, he could have the benefit of the statute and connect a switch with the road; that the road's duty under the statute, when it arose, was "obligatory." It further instructed them that from the damages to appellant's tract "the jury should deduct the value, if any, of such switching facilities to defendant's land on account of any such purposes for which you believe it may be used in the immediate future, if you believe from the evidence it will be so used and there will be a benefit thereby peculiar to that land arising," etc. The specific ob-

jections are that there was no evidence warranting the instruction, and that the instruction "assumed that switching facilities would be a benefit, whereas the cost of all such matters are borne by the defendant."

An examination of the record discloses evidence, admitted without objection, tending to show the tract was or would be available for switching and manufacturing purposes. The evidence is not clear as to whether this would be true in the immediate future, and left that question for the jury, and the instruction submitted that question to them. The instruction sets out the statute, and the statute expressly states how the cost is to be defrayed. The latter part of the instruction did not depart from the statute, but made frequent references to it. The instruction is not open to the objections made. It is said it is "involved and misleading." We do not perceive in what respect this is true, if true, and counsel do not discuss the matter further.

The judgment is affirmed. All concur.

In re ZIEGENHEIN. (No. 15314.)

(St. Louis Court of Appeals. Missouri. July 31, 1916.)

1. BILLS AND NOTES \S 296—LIABILITY OF INDORSER—"FOR COLLECTION."

An indorser of a draft "for collection" warrants that the instrument is genuine, that he has good title to it, etc., both under Rev. St. 1909, \S 10034, as to indorsements, or the law merchant.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. $\S\S$ 667-679; Dec. Dig. \S 296.]

For other definitions, see Words and Phrases, For Collection.]

2. PRINCIPAL AND AGENT \S 105(9)—AUTHORITY TO RECEIVE PAYMENT.

Without special authority, an agent for collection can receive payment only in legal currency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. $\S\S$ 302-305, 374; Dec. Dig. \S 105(9).]

3. CONTEMPT \S 21—ORDER VIOLATED—VALIDITY—TO COMPEL INDORSEMENT OF DRAFTS.

Where certain heirs of an estate refused to indorse for collection drafts payable to the estate in payment of a fire loss on property of the estate, they could not be compelled by court order to do so, or sign receipts attached thereto, there being no showing that the agent for the adjustment of the loss was authorized to accept drafts in payment of the insurance, or that all the heirs agreed to indorse the drafts, and Rev. St. 1900, \S 9980, providing that an instrument "when the name of the payee, does not purport to be the name of any person," is payable to bearer and such an order, if made, does not sustain commitment for contempt for its violation.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. $\S\S$ 84, 68-66; Dec. Dig. \S 21.]

Original petition for habeas corpus by Fred W. Ziegenhein. Petitioner ordered discharged.

Petition under Habeas Corpus Act by Frederick W. Ziegenhein for release from imprisonment, he having been committed to jail for contempt of court, as it is alleged. The petition for the writ sets out that one Katherine Nietert and others commenced suit against Fred W. Ziegenhein and others in the circuit court of the city of St. Louis, by the petition in which it is alleged, in substance, that one of the defendants Mangson, Weiss, Harding & Dowdall Adjustment Company, hereafter referred to as the Adjustment Company, is a corporation organized and existing under and by virtue of the laws of this state; that the plaintiffs Katherine Nietert, Anna L. Walker, Emma Z. Jostes and Clara De Haan, and the defendants Fred W. Ziegenhein (petitioner here), Henry Ziegenhein and Adela Blank are brothers and sister and are the children of Henry Ziegenhein, deceased, who died March 17th, 1910, leaving a will, which was duly admitted to probate; that letters of administration with the will annexed were issued, the estate duly administered and settled, all debts paid, and the administrator discharged on June 26th, 1912; that plaintiffs and the individual defendants are the only heirs at law of Henry Ziegenhein and sole distributees under his will of his estate; that as such heirs and distributees plaintiffs and the individual defendants were jointly the owners of certain improved real estate situated in the county of St. Clair in the state of Illinois, and that the improvements on this real estate were destroyed by fire; that at the time of the occurrence of the fire these improvements were insured by various insurance companies, the policies being payable "to the estate of Henry Ziegenhein;" that plaintiffs and the individual defendants being jointly interested in the property so destroyed and in the proceeds of the insurance policies, employed the defendant Adjustment Company as their agent to adjust the loss with the insurance companies and that the Adjustment Company, acting under the authority of plaintiffs and the individual defendants, and with their consent, made a settlement with the insurance companies and adjusted the loss on or about September 3rd, 1915; that the Adjustment Company received from the various insurance companies 18 certain drafts or checks, each of them payable "to the estate of Henry Ziegenhein." These several drafts are described. Several of them are drafts by insurance companies drawn on themselves, payable, some at Pittsburg, Pa., others at New York City. Others drawn on various banks and trust companies at Pittsburg, Pa.; one drawn on itself by an insurance company, payable by it at Albany, New York; another drawn by an insurance company of London, England, on itself, payable by itself at Chicago, Ill.; others drawn on insurance companies and payable at Boston,

Mass. In brief, all of them are drawn either on the insurance companies themselves or on banks or trust companies, all payable at different points outside of the state of Missouri. They total \$40,460.84. It is further averred in the petition in the principal case, that these drafts or checks, as they are called, are in possession of the defendant Adjustment Company in St. Louis and are jointly owned by plaintiffs and the individual defendants, each owning an undivided one-seventh interest as heirs of Henry Ziegenhein, deceased; that the Adjustment Company held these drafts as trustee for the use and benefit of plaintiffs and the individual defendants and has no interest therein and that they cannot be cashed or turned into money except upon the joint indorsement of plaintiffs and the individual defendants; that plaintiffs are willing and have offered to sign and indorse these drafts but that the individual defendants, although duly requested, have refused to indorse them for the purpose of turning the same into money for distribution between the parties entitled thereto, and it is averred that plaintiffs are entitled to have partition made of the drafts and proceeds arising therefrom according to the respective interests of the parties therein as before set out. Wherefore it is prayed that the defendant Adjustment Company be ordered to turn over possession of these drafts or checks to the clerk of the circuit court of the city of St. Louis to be indorsed by plaintiffs, and that the individual defendants, among them petitioner Fred W. Ziegenhein, be ordered to also indorse them; that the drafts or checks be turned into cash by the clerk of the court and the proceeds of the same be partitioned by the clerk among plaintiffs and the individual defendants according to their respective interests.

It is further averred in the petition for the writ of habeas corpus, that the cause was duly assigned to the Hon. George H. Shields, sitting as judge in Division 13 of the circuit court of the city of St. Louis, and that thereafter the cause was heard by the judge upon evidence adduced by the plaintiffs; that the cause being heard by the judge on the petition and the evidence produced by plaintiffs in support thereof, was taken under advisement by the court and that the court thereafter entered a decree against Fred W. Ziegenhein and the other individual defendants to this effect:

"That the said defendant Mangson, Weiss, Harding & Dowdall Adjustment Company is hereby ordered to turn over the possession of said drafts or checks to the clerk of this court, taking the receipt of the clerk for same, describing the same; that after said drafts or checks are indorsed by the plaintiffs in this action, and the receipts attached thereto are signed by plaintiffs, that the defendants Fred W. Ziegenhein, Henry Ziegenhein and Adela Blank, are hereby ordered by this court to indorse the same for the purpose of collection, and to sign the receipts attached thereto; that upon said drafts or checks being indorsed that the clerk of this court is hereby ordered to collect

the proceeds thereof and divide the same among the plaintiffs and the defendants Fred W. Ziegenhein, Henry Ziegenhein and Adela Blank, share and share alike, each thereof receiving one-seventh ($\frac{1}{7}$) interest therein. It is further ordered that the defendants Fred W. Ziegenhein, Henry Ziegenhein and Adela Blank pay the costs of this proceeding, for which let execution issue." (Italics ours.)

This order appears to have been signed by the circuit judge.

It is further set out in the petition for the writ of habeas corpus that the petitioner, Fred W. Ziegenhein, on the _____ day of July, 1916, in open court and in the presence of said court, refused to indorse the drafts described in the petition and in the decree and upon said refusal and for no other reason whatsoever the circuit judge adjudged the petitioner Fred W. Ziegenhein guilty of contempt of court and issued an order committing him to the custody of the sheriff of the city of St. Louis. The order of commitment is set out in full and is entitled in the cause and in the name of the State of Missouri, is addressed to the sheriff of the city of St. Louis, and is as follows:

"Whereas in the above entitled cause the circuit court of the city of St. Louis, did on the 29th day of June, 1916, enter its decree, whereby it was ordered, adjudged and decreed as follows: 'That the said defendant, Mangson, Weiss, Harding & Dowdall Adjustment Company should turn over the possession of certain drafts or checks held by it to the clerk of this court, taking the receipt of the clerk of this court, describing the same,' as before set out.

The commitment proceeds:

"That thereupon the plaintiffs in this suit should indorse the said drafts or checks and sign the receipts attached thereto; that thereupon the defendants Fred W. Ziegenhein, Henry Ziegenhein and Adela Blank should, likewise indorse said drafts or checks and sign the receipt attached thereto for the purpose of having said drafts or checks cashed by the clerk of this court and distributed among the parties to said cause as fully set forth in said decree of the court; and whereas said drafts or checks described as aforesaid have been turned over to the clerk of this court by the defendant Mangson, Weiss, Harding & Dowdall Adjustment Company; and whereas said drafts or checks together with receipts attached thereto have been indorsed by the plaintiffs herein; and whereas the said defendant Fred W. Ziegenhein has this day in open court in the immediate view and presence of the said court during its setting refused to obey the order of the court as set forth in said decree by refusing to sign and indorse the aforesaid drafts or checks together with receipts attached thereto, which said conduct on the part of the said defendant Fred W. Ziegenhein, constitutes wilful disobedience of the order of this court lawfully issued and made by it, and which said refusal and conduct on the part of said defendant Fred W. Ziegenhein tends directly to interrupt the proceedings of this court and impair the respect due to its authority, and which said conduct in so refusing to obey the order of this court is calculated to impair and defeat the rights of the plaintiff in the aforesaid action; and whereas the said defendant Fred W. Ziegenhein for the causes aforesaid is adjudged to be guilty of contempt of the said court:

"Now, therefore, you are hereby ordered to take the body of said defendant Fred W. Ziegenhein and commit him to the jail of the city of St. Louis and there keep him in prison for the

space of 30 days, or until he be sooner discharged according to law.

"Witness, the hand and seal of the circuit court of the city of St. Louis.

"[Seal.] Geo. H. Shields, Judge."

The petition for habeas corpus then sets out that the above commitment having been placed in the hands of the sheriff, by virtue of the same and not otherwise, the sheriff arrested the petitioner and holds him in custody thereunder.

The petitioner avers that the

"imprisonment is illegal in this, to-wit:

"(1) That the petition in said cause wherein said order of commitment was made does not state facts sufficient in law to constitute a cause of action against your petitioner or to authorize said court to issue an order commanding your petitioner to indorse the negotiable paper described in said petition, or to issue any other order or command against your petitioner.

"(2) That said circuit court of the city of St. Louis had no right or authority to order or compel the petitioner to indorse the said paper described in said petition for the reason (a) that the petition shows on its face that said paper which this petitioner was commanded to indorse is in legal effect payable to bearer and indorsement thereon is unnecessary by any person: (b) said court had no right or authority at law to undertake to compel this petitioner to indorse said paper, and thereby compel him to enter into contracts with any person or persons who shall thereafter take said paper for value, which contracts by virtue of said indorsement this petitioner would become liable for under the law merchant, and under the statutes of this state governing negotiable paper.

"(3) Your petitioner further says that said imprisonment is illegal for the reason that the commitment set out aforesaid, by virtue of which this petitioner is held, is illegal and void in that it does not set out the circumstances of your petitioner's alleged offense sufficiently to show that the court in issuing said order of commitment, had jurisdiction of the subject-matter in said suit, or of the person of your petitioner."

With the usual averment that no petition for writ of habeas corpus had been presented to or refused by any court or officer superior to the judge of our court to whom it was presented, the petitioner prays that the writ of habeas corpus issue and that he be discharged from the unlawful imprisonment.

By agreement of parties a stipulation was filed embodying with the return the decree referred to. We do not think it necessary to repeat it here as we have given the substance as appears above in the other orders.

The sheriff producing the body of the defendant, filed a return justifying under the commitment, which is copied in full in the return.

To this return, the petitioner demurred, assigning as ground for demurrer, that neither by the return nor the judgment of contempt nor the commitment therein recited, are set forth facts and circumstances sufficient in law to justify the imprisonment of the petitioner.

The writ was issued in the first instance by one of the Judges of our court in vacation and made returnable upon the court.

Frumberg & Russell and Brownrigg & Mason, all of St. Louis, for petitioner.

REYNOLDS, P. J. (after stating the facts as above). [1] The case was argued orally before us and briefed by counsel for the respective parties. It will be noticed that the petitioner is ordered not only to indorse these several drafts, 18 drafts or checks, totalling, as before said, \$40,460.84, "for the purpose of collection," but also "to sign the receipts attached thereto." The receipts are not before us in any shape, either in full or in substance or effect, and we have no means of knowing what is in them. The clerk is ordered to collect the amounts of the drafts and divide it among the parties according to the several interests. What kind of an indorsement is required of the petitioner is not specified. The order is to indorse them "for the purpose of collection." That means nothing. How they are to be indorsed is not stated. Assuming, however, as argued by counsel for respondent, that it is a mere indorsement "for collection," it is clear that by making such indorsement, the petitioner, defendant in the action, would render himself liable for the whole amount of those drafts or for any one of them in several contingencies. Thus by indorsement "for collection," he warrants that the instrument is genuine; that he has good title to it, etc. This is so whether his liability is under our statute (section 10,034, Revised Statutes 1909), or under the law merchant. As the indorsement is required to be made in this state it would seem, that being a new and a separate contract from the contract of drawing (1 Daniel, Neg. Inst. [6th Ed.] § 669; Maddox v. Duncan, 143 Mo. 613, loc. cit. 618, 45 S. W. 688, 41 L. R. A. 581, 65 Am. St. Rep. 678), it is governed, as other contracts are, by the law of the place where it is made; not merely the place where it is written or where it is delivered. 7 Cyc. par. H. p. 836, and authorities there cited (1 Daniel, Neg. Inst. [6th Ed.] § 678).

Our negotiable instrument law, by section 9980, Revised Statutes 1909, provides that an instrument is payable to bearer, "(4) when the name of the payee does not purport to be the name of any person." That is the case here. These drafts are payable "to the estate of Henry Ziegenhein," and not to any person. Hence in requiring any indorsement by the petitioner or any one else on these drafts, it was requiring an unnecessary act.

[2] But as going to the very root of the case, we are aware of no law, or of any authority under which a court of equity has ever compelled any one to enter into a contract when he has never agreed to do so or when by force of law he is not obligated to do so. This is not the case of an action to compel the performance of a contract; its aim is to compel petitioner and the other defendants to make a new contract, and that is exactly what the learned trial judge attempted in this case. It is not pretended that by any contract whatever, made by the

petitioner, he had undertaken or obligated himself to indorse any of these checks or drafts, much less is there any authority, even in a court of equity, to compel a party to sign a receipt, especially when, as here, it seems that the receipt accompanied the several drafts and was to be signed by the parties on the delivery of the drafts. In effect it was to acquit the insurance companies before they paid over the money. Nor do we find any facts on which it can be held that the Adjustment Company was authorized to accept drafts in payment of the loss. The only authority pleaded was authority to adjust. It is true that it is averred that the adjustment that it made was accepted, but that is far short of authority to collect, much less of authority to accept drafts in lieu of money. Nothing appearing to the contrary, it must be assumed to be an authority to collect in money, not by drafts, which here, as to many of these drafts or checks, were mere drafts by the insurance companies on themselves. Without special authority an agent for collection can only receive payment in legal currency. 1 Daniel, Neg. Inst. (6th Ed.) § 335. We know of no different rule as to an agent authorized merely to adjust, even assuming he was authorized to collect, of which there is no evidence here.

There is no recital in the commitment of the very material fact, if it be a fact, that the petitioner authorized the Adjustment Company to receive drafts or that he did any other act which could in any manner be construed as obligating himself to indorse drafts if received. This omission is in itself a fatal defect in the commitment.

[3] Ordinarily an indorsement "for collection" is a restrictive indorsement. While our Negotiable Instrument Act defines the effect of a "qualified" indorsement and liabilities thereunder, we find no definition of liability on a "restrictive" indorsement there. Our court in *Rosal v. National Bank of Commerce*, 71 Mo. App. 150, loc. cit. 160, speaking through Judge Bond, has said:

"By such an indorsement the indorser assumes ownership of the draft, and the drawee who pays it to the indorsee for collection is entitled to hold the indorser to the extent which an unrestricted indorsement would bind him as warrantor of prior indorsements."

Naturally, if there are defects in the paper or in the prior indorsements the following indorser is liable for the whole amount not merely for his individual share. The general rule is, that an indorsement "for collection" indicates that the indorsee is merely an agent to receive the money (see 1 Daniel, supra, § 698, and *National Bank of Rolla v. First National Bank of Salem*, 141 Mo. App. 719, 125 S. W. 513. So by indorsement "for collection" petitioner would constitute the clerk of the court such agent. By what right or under what contract can a court compel one to accept another as his agent. We know

of no such right or power. It is no answer to this to say that the clerk making the collection and failing to pay over the money to the parties in interest, could be held on his bond. The collection of the draft by the clerk and his failure to pay it over would leave the petitioner and his brother and sister without a remedy over against the companies who had paid to the clerk, for by the very force of this order made by the court the clerk is made the agent for collection for petitioner and the other individual parties to the action.

We do not think that this order of commitment can be justified. Our court in *Re Heffron*, 179 Mo. App. 639, 162 S. W. 652, has very carefully and thoroughly considered the subject of commitment for contempt. There we held that a lawful order is essential to sustain a commitment for contempt for its violation. In the case at bar we find no such order—that is to say, no lawful order commanding petitioner to sign the drafts or receipts. It nowhere appears that this petitioner had ever agreed to accept or indorse these drafts much less to sign receipts as for money when mere drafts were tendered but no money. See, also, *In re Shull*, 221 Mo. 623, 121 S. W. 10, 133 Am. St. Rep. 496.

Without going further into the discussion of the case, our conclusion is that the learned circuit court erred in making the order which it did as one not warranted and authorized in the first place by the petition in the case, and having made an unlawful order it had no power or authority to punish as for contempt, disobedience of that order. Moreover, the commitment itself is lacking in very material recitals, as above pointed out.

For these reasons we hold that the petitioner is entitled to his discharge and it is so ordered.

NORTONI and ALLEN, JJ., concur.

STATE ex rel. and to Use of MISSOURI
POULTRY & GAME CO. v. NOLTE
et al. (No. 14865.)

(St. Louis Court of Appeals. Missouri. Feb. 8, 1916. On Motion for Rehearing, July 14, 1916.)

1. PENALTIES — 32 — STATUTES — PLEADING.

Though an action be one to recover a penalty imposed by statute, a party desiring to avail himself of the provisions of the act is required to state only such facts as will bring his case clearly within it.

[Ed. Note.—For other cases, see Penalties. Cent. Dig. §§ 28-30; Dec. Dig. 32.]

2. SHERIFFS AND CONSTABLES — 163(1) — OFFICIAL BOND — ACTION — PETITION — SUFFICIENCY.

In an action on a sheriff's official bond for refusal to sell stock levied upon, it was not essential to the statement of a cause of action that plaintiff allege anything more as to the judge

ment debtor's interest in the stock than that the sheriff had levied and seized upon all of his right, title, and interest therein.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 398, 399; Dec. Dig. § 168(1).]

3. PLEADING § 403(2) — OBJECTIONS — PETITION — AIDED BY ANSWER.

In an action on a sheriff's official bond for refusal to sell stock levied upon, failure to fully allege the judgment debtor's interest was aided by an averment in the answer that the judgment debtor did have some interest in the stock.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1344-1347; Dec. Dig. § 403(2).]

4. SHERIFFS AND CONSTABLES § 168(1) — OFFICIAL BOND — ACTION — PETITION — SUFFICIENCY.

In a suit on a sheriff's official bond for refusal to sell stock levied upon, being for the penalty of the statute and not for the recovery of damages actually contained, it was not necessary to allege the value of the judgment debtor's interest in the stock.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 398, 399; Dec. Dig. § 168(1).]

5. SHERIFFS AND CONSTABLES § 168(1) — BOND — ACTION — PETITION — SUFFICIENCY.

Under Rev. St. 1909, § 2240, imposing a liability upon an officer to whom an execution shall be delivered if he shall refuse and neglect to proceed with an execution according to law, in an action on a sheriff's official bond for refusal to sell stock levied upon, a petition, which failed to allege that the sheriff "wrongfully" failed and refused to make the sale, was not insufficient, since an allegation that the sheriff's act was wrongful, or that he did not proceed according to law, would be an allegation of a conclusion of law.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 398, 399; Dec. Dig. § 168(1).]

6. PLEADING § 433(5) — DEFECTS — CURE BY VERDICT.

On appeal the petition can only be assailed for vital defects going to its utter insufficiency to state a cause of action; all minor imperfections being cured by the verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1459, 1469-1471, 1476; Dec. Dig. § 433(5).]

7. SHERIFFS AND CONSTABLES § 90 — OFFICIAL BONDS — THIRD PARTY CLAIM.

Although a sheriff is entitled to demand an indemnifying bond upon the filing of a third party claim to property in his possession under execution, a claim which fails to conform to the statutory requirements is in law no claim, and does not justify the officer in demanding an indemnifying bond.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 129, 130; Dec. Dig. § 90.]

8. SHERIFFS AND CONSTABLES § 78 — STATUTES — CONSTRUCTION.

Under Rev. St. 1879, pp. 1516, 1517, providing that special laws applicable to the sheriff of the county of St. Louis shall apply to the city of St. Louis, which had been separated from the county of St. Louis by the adoption of the Scheme and Charter of 1876, the "Sheriffs and Marshals Act" (Rev. St. 1899, pp. 2550-2553) remained applicable to the city of St. Louis.

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 78.]

9. SHERIFFS AND CONSTABLES § 78 — STATUTES — REPEAL.

Under Rev. St. 1879, § 3160, providing that general acts revised, amended, or re-enacted at

the present session repealed all prior laws relating to the same subject, but provisions of revised statutes remaining the same are continued and not re-enacted, and section 3153, that acts specially applicable to the city of St. Louis, not repealed, are continued in force to be published as an appendix, the revision amendment and re-enactment of the general act regarding third party claims (Rev. St. 1909, § 2204) did not operate to repeal the "Sheriffs and Marshals Act" (Rev. St. 1899, pp. 2550-2553), a special act applicable only to the city of St. Louis; there being nothing to make it manifest that the Legislature intended such result.

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 78.]

10. STATUTES § 146 — REPEAL — EFFECT OF REPRINT BY REVISORS.

The acts of the revisors in continuing to include a statute which had been repealed in subsequent revisions of the statutes would not operate to keep it in force.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 215; Dec. Dig. § 146.]

11. SHERIFFS AND CONSTABLES § 120½, 139(4) — OFFICIAL BONDS — STATUTE — CONSTRUCTION.

Under Rev. St. 1909, § 2240, making an officer liable for the full amount specified in a writ of execution delivered to him on failure to execute the same according to law, where a sheriff refused to sell stock taken on execution, because of the filing of a third party claim, which did not comply with the statute, although the officer acted in good faith under legal advice, thinking that the claim was properly filed, he acted at his peril, and he and his surety are liable for the full amount of the execution debt, regardless of the actual damage to the plaintiff because of the failure to sell the stock.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 206, 302; Dec. Dig. § 120½, 139(4).]

Reynolds, P. J., dissenting.

Appeal from St. Louis Circuit Court; Karl Kimmel, Judge.

Action by the State of Missouri, at the relation and to the use of the Missouri Poultry & Game Company, against Louis Nolte and another. Judgment for plaintiff, and defendants appeal. Affirmed. Certified to Supreme Court.

Chas. A. Houts, of St. Louis, for appellants. Chas. B. Stark, of St. Louis, for respondent.

ALLEN, J. This is an action upon the official bond of Louis Nolte, former sheriff of the city of St. Louis. Relator, the Missouri Poultry & Game Company, a corporation, having obtained a judgment against one Joseph Filler, sued out an execution thereon and caused a levy to be made by the defendant sheriff upon certain shares of stock of the Joplin Mercantile Company, a corporation, as the property of said Filler. The sheriff duly advertised this stock for sale under the execution, but prior to the day of sale Filler's wife filed a third party claim there-to, whereupon the sheriff demanded of relator an indemnifying bond, and, upon relator's refusal to give such bond, declined to proceed with the sale. Relator thereupon instituted this action against the sheriff and

the surety upon his official bond, the United States Fidelity & Guaranty Company, seeking to recover the entire amount of the judgment debt under the provisions of section 2240, Rev. Stat. 1909. The trial was before the court, without the intervention of a jury, and at the close of all the evidence the court gave a declaration of law, to the effect that under the pleadings and evidence plaintiff was entitled to recover. Judgment thereupon went for plaintiff for the penalty of the bond, to wit, \$50,000, to be satisfied upon the payment to relator of the sum of \$2,565.35, the amount of its judgment against Filler, with interest and costs. From this judgment defendants have appealed.

The petition alleges the execution of the bond sued upon, and that defendant, Nolte was sheriff of the city of St. Louis, and acting as such, at the times mentioned in the petition; that on April 3, 1912, relator obtained judgment against one Joseph Filler, in the circuit court of the city of St. Louis, for the sum of \$2,161.37 and costs, and that on August 8, 1912, an execution was duly issued thereon, directed to the defendant Nolte, as sheriff, returnable to the October term, 1912, of that court, and was delivered to said defendant. And it is averred that on August 26, 1912, defendant Nolte, under and by virtue of this execution, and at relator's instance, "levied on and seized all the right, title, claim, and interest of the said Joseph Filler of, in, and to 98 shares of the capital stock of the Joplin Mercantile Company," which were in value greatly in excess of relator's judgment, took such shares of stock into his possession and control to satisfy the execution, and advertised the same for sale; that defendant Nolte, however, committed a breach of the bond sued upon, in that he "neglected, failed and refused to make sale of the property as taken in execution by him, as aforesaid," to relator's damage in the sum of \$2,161.37, with interest and costs. It is also averred that defendant Nolte committed a further breach of the bond in failing to return the execution to the circuit court at the return term thereof. Defendants interposed a demurrer to the petition, which was overruled. A motion to elect, filed by defendants, was also overruled. Defendants then answered, and plaintiff filed a motion to strike out parts of the answer, which motion was in part sustained. Defendants thereupon filed an amended answer, upon which the cause went to trial. The amended answer admits the issuance and delivery of the execution to defendant Nolte, as sheriff, and the levy upon the shares of stock as alleged by plaintiff. It is then averred that on September 27, 1912, one Pessie Filler filed with the defendant Nolte a third party claim to all of the 98 shares of stock levied upon, duly verified by affidavit, claiming to be the absolute owner of 50 shares thereof, by title acquired prior to the levy, and claiming, further, that prior

to the levy the remaining 48 shares had been pledged and delivered to her by Joseph Filler as collateral security for a loan of \$5,000, made by her to the Joplin Mercantile Company, and also to secure her against loss by reason of her indorsement of certain notes of that company to the amount of \$6,000; that thereupon defendant Nolte delivered a copy of this claim to relator's attorney, and demanded of relator a bond of indemnity "as required by law," and notified relator that if such bond were not given, the levy would be released; and that relator refused to give such bond, basing its refusal solely upon the ground that the third party claim had not been filed in time. The amended answer further avers that the shares of stock levied upon were worthless; that 50 of the shares in fact belonged to the claimant, and that the judgment debtor had no interest therein; that the remaining 48 shares were pledged to the claimant as collateral security for loans far in excess of the actual value thereof, and the interest of the judgment debtor therein was valueless; and that relator was in no wise damaged by the release of the levy or by the failure of said defendant Nolte to return the execution at the return term of the writ. The reply puts in issue the allegations of new matter set up in the answer.

At the trial plaintiff, after unsuccessfully moving for judgment "on the admissions contained in the answer," introduced in evidence the bond sued upon, the judgment against Filler, the execution issued thereupon, and a copy of the sheriff's advertisement, advertising for sale the stock levied upon, and rested. To sustain the issues on their part defendants introduced in evidence the third party claim, a certificate of Pessie Filler, as secretary of the Joplin Mercantile Company, the sheriff's return indorsed upon the unsatisfied judgment, and certain oral testimony.

As to the third party claim it is sufficient to say that it complied with section 2204, Rev. Stat. 1909, the general statute relating to third party claims to property levied upon, but did not comply with the special law known as the "Sheriffs and Marshals Act," upon which plaintiff relies as being in force in the city of St. Louis. See Revised Statutes 1899, p. 2550 et seq. For one thing, it failed to state the value of the property levied upon as required by that act. The other writings mentioned need not be noticed.

The testimony is that the sheriff's deputy delivered a copy of Pessie Filler's claim to relator's counsel (other than counsel here representing appellants), and demanded an indemnifying bond, which relator refused to give; that the deputy thereupon submitted the matter to the sheriff's attorneys, who advised that if relator persisted in such refusal, the sheriff could decline to sell the property; that relator did persist in such refusal, and the sale was "called off."

The evidence shows that the Joplin Mercantile Company had a capital stock of \$25,000, divided into 100 shares of the par value of \$250 each. Its headquarters were at Joplin, Mo., and the evidence discloses that its business had been, for the most part, illegal. It had been engaged in shipping intoxicating liquors into "dry territory," and prior to this levy the company and its officers had been indicted, tried, and convicted in the federal courts. The stock had no market value. The company's books, produced at the trial, showed that at the time of the levy the company's total assets exceeded its liabilities by \$1,891.18. Included in the assets were certain accounts receivable of the face value of \$4,731.69. It is said that some of these accounts were afterwards lost. The stock therefore had little, if any, actual value.

At the close of defendant's evidence plaintiff adduced testimony to the effect that the sheriff's deputy demanded a bond in double the par value (\$250 per share) of the 98 shares of stock levied upon. The deputy, on cross-examination, said that he did not think that he demanded a bond in this amount.

[1-4] I. The point is made by learned counsel for appellant that the petition, which was attacked by demurrer below, wholly fails to state a cause of action. It is urged that since the action is predicated upon a penal statute, the allegations of the petition cannot be aided by intendment, but every fact essential to a recovery must be affirmatively pleaded. It is said the petition does not allege that Joseph Filler had any interest in the stock levied upon, nor that his interest, if any, was of any value. Though the action be one to recover a penalty imposed by statute, a party, desiring to avail himself of the provisions of the act, is required only to state such facts as will bring his case clearly within it. *Emerson v. Railway Co.*, 111 Mo. 161, 19 S. W. 1113. It was not, we think, essential to the statement of a cause of action that plaintiff allege anything more as to Filler's interest in the stock than that the sheriff had levied and seized upon all of his right, title, and interest therein; but, in any event, the petition in this respect was aided by the answer, which avers that Filler did have some interest in the stock. Nor, since the suit was for the penalty of the statute, and not for the recovery of damages actually sustained, was it necessary to allege the value of Filler's interest.

[5] Another ground of attack upon the petition is that it does not allege that the sheriff wrongfully failed and refused to make sale of the stock; and it is pointed out that the statute imposes a liability upon the officer only if he shall neglect and refuse to proceed with the execution "according to law." But to allege that the sheriff's act was "wrongful," or that he did not proceed

"according to law," would be to allege mere conclusions of law and not issuable facts.

Other questions suggested relative to the sufficiency of the petition need not be discussed.

[6] We have carefully examined the petition before us, and we think that beyond doubt it states a cause of action for the statutory penalty sought to be recovered. It can now only be assailed for vital defects going to its utter insufficiency to state a cause of action; all minor imperfections being cured by the verdict.

[7] II. We come then to the crucial questions involved, which pertain to the merits of the action and the amount recoverable, if any. As said, the action is predicated upon a violation by the sheriff of the provisions of section 2240, Rev. Stat. 1909, and seeks to recover the penalty of the statute, to wit, the full amount of the judgment named in the execution delivered to the sheriff. This section (2240) is as follows:

"If any officer to whom any execution shall be delivered shall refuse or neglect to execute or levy the same according to law, or shall take in execution any property, or any property be delivered to him by any person against whom an execution is issued, and he shall neglect or refuse to make sale of the property so taken or delivered, according to law, or shall make a false return of such writ, then, in any of the cases aforesaid, such officer shall be liable and bound to pay the whole amount of money in such writ specified, or thereon indorsed and directed to be levied; and if such officer shall not, on the return of such writ, or at the time the same ought to be returned, have the money which he shall become liable to pay as aforesaid before the court, and pay the same according to the exigency of the writ, any person aggrieved thereby may have his action against such officer and his sureties upon his official bond, or may have his remedy by civil action against such officer in default."

It is conceded that the defendant sheriff refused to make sale of the shares of stock levied upon because of the appearance of the third party claim and relator's refusal to give an indemnifying bond upon demand therefor. But in order that this may afford any defense to plaintiff's action, the third party claim must be one filed in accordance with the provisions of the statute applicable to the filing of such third party claims in the city of St. Louis. Though the sheriff is entitled to demand an indemnifying bond upon the filing of a third party claim pursuant to the statute in force in the jurisdiction, a claim which fails to conform to the statutory requirements is in law no claim, and does not justify the officer in demanding an indemnifying bond and in refusing to perform the duties imposed upon him by law because of the failure to give such bond. See *Bradley v. Holloway*, 28 Mo. 150; *Smith v. White*, 48 Mo. App. 404. It is a question of vital importance, therefore, to determine whether the general statute (section 2204, Rev. Stat. 1909) or the special act known as the "Sheriffs and Marshals Act" is applicable to

the city of St. Louis with respect to such third party claims.

[8] III. The Sheriffs and Marshals Act upon which plaintiff relies, and with which it is said that the third party claim should have complied, but did not, was enacted by the Legislature in 1855. See Laws 1854-55, p. 464 et seq. It applied only to the county of St. Louis, which then, of course, included the city of St. Louis. The act was amended by an act approved March 14, 1859. See Laws 1858-59, p. 439. As amended, it will be found in the appendix to the respective revisions of 1879, 1889, and 1899. See Revised Statutes 1879, pp. 1554-1557; Revised Statutes 1889, pp. 2178-2180; Revised Statutes 1899, pp. 2550-2553. Pursuant to the provisions of section 8085, Rev. Stat. 1909, this act, together with other local or special laws which had been published in the appendix to the Revision of 1899, was omitted from the appendix to the statutes of 1909. The act, therefore, nowhere appears in the last revision of our statutes.

Following the separation of the city of St. Louis from the county of St. Louis, by the adoption of the Scheme and Charter of 1870, special laws applicable to the sheriff of the county of St. Louis were made to apply to the city of St. Louis. See Laws 1877, p. 188; Rev. Stat. 1879, pp. 1516, 1517. There is some contention that this particular act did not remain applicable to the city of St. Louis, but we think it entirely without merit.

[9] It is contended, however, that the act was repealed in 1879 by virtue of the enactment of section 3160, Rev. Stat. 1879, which provides as follows:

"All acts of a general nature, revised and amended and re-enacted at the present session of the General Assembly, so soon as such acts shall take effect, shall be taken and construed as repealing all prior laws relating to the same subject, but the provisions of the Revised Statutes, so far as they are the same as those of the prior laws, shall be construed as a continuation of such laws and not as new enactments."

At this same session the Legislature "revised and amended and re-enacted" the general act of 1877, regarding third party claims to be properly levied upon (Laws 1877, p. 251), which is now section 2204, Rev. Stat. 1909, referred to above, with which the third party claim here complied; and it is argued that by virtue of section 3160, Rev. Stat. 1879, supra, this operated to repeal the Sheriffs and Marshals Act "relating to the same subject," though applicable only to the city of St. Louis. But the fault with this argument is that section 3160, Rev. Stat. 1879, upon which appellant relies, applies only to "acts of a general nature;" whereas section 3158 of the same article of the Revision of 1879 provides as follows:

"All acts and parts of acts specially applicable to the city of St. Louis, and in force at the commencement of or passed during the present session of the General Assembly, and not repealed by some act of the present session, shall

be and the same are continued in force according to their respective provisions and limitations, and shall be published as an appendix to the revised statutes."

And accordingly the Sheriffs and Marshals Act of 1855, as amended in 1859, was published in the appendix to the Revision of 1879. And it was thereafter published in the appendix to the succeeding Revisions of 1889 and 1899, but, as said above, was omitted from the appendix to the revision of 1909 pursuant of section 8085 of that revision.

The general statute of 1877, which has become section 2204, Rev. Stat. 1909, cannot be held to have operated to repeal the special act in question unless there is something to make it manifest that the Legislature intended such result; and nothing to this effect appears. This phase of the matter does not warrant further discussion; but see State ex rel. Baker v. Flala, 47 Mo. loc. cit. 320; Manker v. Faulhaber, 94 Mo. 430, 6 S. W. 372; State ex rel. v. School Board, 131 Mo. 505, 33 S. W. 3.

The act has frequently been before our courts. See Dodd v. Thomas, 69 Mo. 364, and cases cited; State, to Use, v. O'Neill, 170 Mo. 7, 70 S. W. 121; Elchelmann v. Weiss, 7 Mo. App. 87, loc. cit. 91, 92; State, to Use, v. Smit, 20 Mo. App. 50. In State v. O'Neill Lumber Co., supra (decided in 1902, though the cause of action accrued in 1897), the Supreme Court recognized it as being in full force and effect in the city of St. Louis. And it was held that since the act was in force at the time of the adoption of the Constitution of 1875, it was not affected by the provisions of section 53, art. 4, thereof. No contention was made in the case that it was repealed by section 3160, Rev. Stat. 1879.

[10] We are forced to the conclusion that the Sheriffs and Marshals Act, applicable to the city of St. Louis, has not been repealed, but remains in force. It is true that had it been repealed in 1879, as contended, the acts of the revisers in continuing to include it in subsequent revisions of the statutes would not have operated to keep it in force. See Meriwether v. Love, 167 Mo. 514, 67 S. W. 250. But it does not appear that it was repealed in 1879. And it is in no wise affected by the failure to publish it in the Revision of 1909. See section 8085, Rev. Stat. 1909; State ex rel. v. Slover, 134 Mo. 10, 31 S. W. 1054, 34 S. W. 1102; Bird v. Sellers, 122 Mo. 23, 26 S. W. 668.

[11] IV. As the third party claim here filed did not comply with the provisions of this special act, but with section 2204 (1909) supra, which we must hold not to be applicable within the city of St. Louis, the claim was invalid in law, and afforded the sheriff no lawful excuse for refusing to sell the property levied upon, though plaintiff refused to give the indemnifying bond demanded. The case stood as though no claim had been filed. Bradley v. Holloway, supra. But it is argued for appellant that the

sheriff and his surety ought not to be penalized under the provisions of section 2240, Rev. Stat. 1909, since the sheriff acted in good faith in declining to sell the property, and was guilty of nothing more than an error of judgment in the premises, and that in no event ought the liability to plaintiff be for more than the actual damages sustained. It is urged that it was therefore error to give the declaration of law referred to above, wherein the court declared that "the statute fixes the measure of damages." The section upon which this action is predicated (2240, supra), as it now stands, has been upon our statute books since 1845. Rev. St. 1845, c. 61, § 58. As it stood prior to 1845, it inflicted the penalty mentioned for the failure of the officer to return the writ at the return term thereof, as well as for his neglect or failure to execute the writ or to make sale of the property levied upon, and for making a false return. See Revised Statutes 1825, p. 371, § 24; Rev. Stat. 1835, p. 260, § 52. Since the Revision of 1845 the liability for failing to make return of an execution has been limited to the damages actually sustained thereby.

In *Douglass v. Baker*, 9 Mo. 41, the court held a sheriff liable for the penalty of the statute for failing to execute a writ of *capias ad satisfaciendum* against the body of the judgment debtor. This was shortly prior to the abolishment of imprisonment for debt. One of the plaintiffs pointed out to the sheriff the execution debtor, and demanded that the sheriff take him into custody. The sheriff replied that he had heard that the Legislature had abolished, or was about to abolish, imprisonment for debt, and did not execute the writ as demanded. Among other things, the court said:

"This section of the act [section 52, p. 260, Rev. Stat. 1835] does not require the plaintiff to show that he has sustained damages by the failure of the sheriff to levy or execute the writ according to law, nor does it seem to leave it to a jury to decide the point. * * * When our statute declares that the sheriff on failure or neglect to do his duty shall pay the whole, it would seem that the courts cannot leave it to a jury to decide what damage the plaintiffs in the execution have sustained."

In *Milburn v. State*, 11 Mo. 188, 47 Am. Dec. 148, decided under the statute as it stood prior to 1845, the sheriff was held liable for the penalty of the statute, to wit, the full amount of the debt, for failing to return the execution at the term to which it was returnable. In the course of the opinion, it is said:

"The hardship of the case is most manifest; but it grows out of the statute, which inflicts a penalty upon the sheriff greatly disproportioned in many cases to the delinquency."

In *State ex rel. Ross v. Case*, 77 Mo. 247, the sheriff was held liable for the full amount of the debt as a penalty for making a false return. The court, through Hough, J., said:

"The statute cited declares that any officer who shall make a false return of any execution

which shall be delivered to him 'shall be liable and bound to pay the whole amount of money in such writ specified, or thereon indorsed and directed to be levied,' regardless of the real extent of the injury occasioned by such false return. The penalty imposed by the statute cited was by the Statutes of 1835 imposed upon the officer for failing to make return of an execution according to law, and while this provision was characterized by this court, in the case of *Milburn v. State*, 11 Mo. 188 [47 Am. Dec. 148], as an exceedingly harsh one, inflicting, in many instances, a penalty greatly disproportioned to the delinquency of the officer, it was nevertheless enforced. Since the Revision of 1845, however, the liability of the officer for failing to return an execution has been limited to the damages actually sustained in consequence of such default. But the penalty of making full payment of the amount of the execution still remains for making a false return."

On principle the case before us cannot be distinguished from the *Ross Case*. The penalty remains for the officer's neglect or refusal to levy or sell property levied upon, without lawful excuse, just as for making a false return. For default in any one of these particulars the liability, affixed by the express terms of the act, is the full amount of the execution debt.

In *Stevenson v. Judy*, 49 Mo. 227, one of the cases relied upon by respondents, the action was against a sheriff for failing to make a levy, and also for failing to make return of the execution at the proper term. There was no showing that the execution defendant had any interest in the property; and it was held that plaintiff made no case as for the sheriff's failure to levy. It is argued that in the case before us it did not appear that the execution debtor had any interest in the property upon which the levy was made. But this argument is clearly unsound. A portion of the stock in question stood in *Filler's* name. He had title to it, subject, at most, to his wife's liens or incumbrances thereon. Regardless of the amount of the latter, it is quite clear that *Filler* had an interest in the stock subject to execution and sale, and that, under the circumstances, relator was entitled to have that interest sold for whatever it might bring at a sheriff's sale.

In *Kiskaddon v. Jones*, 63 Mo. 190, also relied upon by respondent, the action was against the sheriff for releasing property levied upon, without making a sale thereof, and for making a false return. Among other things, it was said:

"Before the plaintiff could recover it would devolve upon him to show that he had sustained damages in consequence of defendant's wrongful neglect to do his duty. Wagn. Stat. p. 614, §§ 63, 64; *Stevenson v. Judy*, 49 Mo. 227."

Neither the statute nor the case cited support this, except in so far as they apply to a default of an officer in failing to make return of an execution. This language was evidently inadvertently used. In any event it is not controlling or persuasive, in view of the later and pointed decision in the *Ross Case*, supra.

Other authorities cited by appellant need

not be discussed. The latest decision of our Supreme Court directly here in point is evidently that in *Ross v. Case*, supra, and we regard it as controlling upon us. And we think that there can be no doubt as to the meaning of the statute. It abrogates the common law, which afforded a remedy in such cases only for the amount of damages which the plaintiff could show that he had actually sustained by reason of the default. The only inference that can be indulged is that the lawmakers deemed the common-law remedy inadequate.

It is true that the statute is a harsh and penal one; but the case appears to fall directly within both the letter and the spirit thereof. The sheriff unlawfully refused to proceed with the sale. And though it is clear that this was done in the utmost good faith, upon advice of counsel, he nevertheless acted at his peril; and he and his surety cannot escape the consequences of the violation of the statute invoked.

It follows that the judgment must be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

On Motion for Rehearing.

ALLEN, J. Respondent's learned counsel urgently insists that the case of *State ex rel. Ross v. Case*, 77 Mo. 247, is not controlling upon the question involved herein respecting the effect of section 2240, Rev. Stat. 1909, when applied to the facts of this case. It is true that the ruling in the *Ross Case* was upon the question of the sheriff's liability under the statute for making a false return. But we regard the case as pointed authority here, for it is clearly held that the officer becomes liable for the penalty of the statute upon violation of its terms as amended.

Our attention is directed to *Metzner v. Graham*, 66 Mo. 653, as supporting the view that the officer should not be here held liable for the whole amount of the judgment debt. It is true that in the course of the opinion (66 Mo. loc. cit. 660) it is said:

"It cannot be that every mere technical breach of duty, or abstract remissness, unaccompanied by resulting injury, can form the basis for a substantial recovery, not at all proportionate to the actual damage sustained."

But this was said with reference to the particular facts of that case, which need not be here stated, and without reference to the statute now under consideration. It appears that the statute was not invoked, and it is in no way referred to in the opinion.

It is argued at length that appellant did not here "neglect or refuse" to make sale of

the property levied upon, within the meaning of these terms as used in the statute. And stress is laid upon what is said in *Gallemore v. Gallemore*, 115 Mo. App. 179, 91 S. W. 406, and in *State v. Burton*, 178 S. W. 219, respecting the use of the same words in another statute. But the argument thus advanced does not appear to help appellant's position. The record before us shows that appellant did refuse to proceed with the sale because of the failure of plaintiff to give an indemnifying bond demanded by appellant. While it is true that this was done in the utmost good faith, the officer believing it to be his duty, and acting under legal advice, it was nevertheless a refusal to sell; and we see no way for appellant to escape the penalty of the statute. Under the circumstances of the case it is with reluctance that we so hold; but, in view of the state of the law governing the matter in hand, we feel compelled to do so.

The motion for a rehearing is therefore overruled.

NORTONI, J., concurs. REYNOLDS, P. J., withdraws his concurrence in the original opinion, and dissents therefrom and from the order overruling the motion for rehearing, for the reasons stated in a memorandum filed by him; and, as he deems the decision herein to be contrary to the decision of the Supreme Court in *Metzner v. Graham*, 66 Mo. 653, he requests that the cause be certified to the Supreme Court, which is accordingly done.

REYNOLDS, P. J. (dissenting). I concurred in the opinion of affirmance originally entered in this case but on more careful consideration I am in grave doubt as to the correctness of that judgment. As said by my learned Associates, it seems harsh to hold the sheriff for the full amount of the execution. It seems to me, under all the facts and circumstances in this case, that it falls within what was said by Judge Sherwood in *Metzner v. Graham*, 66 Mo. 653, where at page 660, he says:

"It cannot be that every mere technical breach of duty, or abstract remissness, unaccompanied by resulting injury, can form the basis for a substantial recovery, not at all proportionate to the actual damages sustained."

It is true that in that case the statute here under consideration does not appear to have been presented to, and certainly was not referred to by our Supreme Court. This remark of Judge Sherwood, however, seems so eminently fair that I feel warranted in asking that this cause be certified to the Supreme Court as in conflict with what is held by that court in *Metzner v. Graham*, supra.

ALBERS v. MOFFITT et al. (No. 10451.)

(St. Louis Court of Appeals. Missouri. Nov. 2, 1915. Rehearing Denied July 14, 1916.)

1. EXCHANGES \Leftrightarrow 9—TRANSACTIONS BETWEEN MEMBERS.

In suit for accounting by an exchange member to recover damages from deductions from his margin account on his settling a wheat sale contract, such settlement being attacked as based upon a conspiracy to "corner" the wheat market, where the petition did not allege what was in fact a reasonable market value of the wheat, but merely that the settlement price was a fictitious one in excess of the reasonable value, and the only evidence in the record was that the contract provided on its face that it was subject to the rules and regulations of an exchange, and that the exchange, in passing upon a dispute of like character between other members had fixed the price on which this settlement was based as the reasonable market value, neither petition nor proof warranted recovery.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. §§ 12, 13; Dec. Dig. \Leftrightarrow 9.]

2. CANCELLATION OF INSTRUMENTS \Leftrightarrow 10—ADEQUATE REMEDY AT LAW — RECOVERY OF DAMAGES.

Where the remedy at law by way of action for damages is adequate, complainant is not entitled to cancellation, although respondents default, and thus confess the averments of the petition.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 7, 9, 18-22; Dec. Dig. \Leftrightarrow 10.]

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

"Not to be officially published."

Action by C. H. Albers against Nat. L. Moffitt and others. From a decree for respondents, complainant appeals. Affirmed.

Barclay, Shields & Fauntleroy and Barclay & Wallace, all of St. Louis, for appellant. Richard A. Jones, of St. Louis, for respondents.

ALLEN, J. This is a suit in equity. The appeal now before us, viz., that of plaintiff from a decree dismissing his bill as to certain defendants, was originally taken to this court, but the cause was transferred to the Supreme Court upon the theory that that court had jurisdiction thereof. The Supreme Court held otherwise and retransferred the case here. See *Albers v. Moffitt*, 262 Mo. 645, 172 S. W. 11, from which we quote the following statement, by Bond, J.:

"There were two appeals in this case, both primarily to the St. Louis Court of Appeals. One was taken by the Merchants' Exchange from that portion of a decree of the trial court which enjoined it from enforcing a resolution suspending plaintiff, C. H. Albers, for a definite period from any and all privileges of the Board of Trade conducted by the Merchants' Exchange. The other appeal was taken by said Albers from that portion of the same decree of the trial court which dismissed his suit as to the individual defendants. These two cross-appeals were pending in the St. Louis Court of Appeals, and one of them, that taken by the Merchants' Exchange, was disposed of in 140 Mo. App. 446 [120 S. W. 139]. The other appeal, as is shown by a file mark on the record before us, was on March 30,

1900, transferred to this court, on the motion of the respondents, for the following reason: 'Because the amount involved is more than \$4,500.' This latter appeal was argued and submitted in this court on the 19th day of October, 1914 (at its October term). Other phases of this controversy have been before this court: *C. H. Albers Com. Co. v. Spencer*, 205 Mo. 105 [103 S. W. 523, 11 L. R. A. (N. S.) 1003]; *Id.*, 245 Mo. 368 [150 S. W. 712].

"The substance of the petition culminating in the judgment from which these two cross-appeals were taken is that C. H. Albers, plaintiff, on behalf of the Albers Commission Company, of which he was president, entered into contract with the defendant, Moffitt, on behalf of the Commission Company, of which he was likewise president, for the sale for future delivery of certain grain, such contracts to mature and delivery to be made before the 31st of December, 1903; that to secure his engagement about \$20,000 was put up with said purchaser as a margin; that thereafter said purchaser formed a secret agreement with his codefendants, Spencer & Milliken, to 'forestall the market in wheat in St. Louis,' to the end that said Spencer & Milliken should be able to dictate the price of wheat in transactions upon the Board of Trade; that for this purpose the grain contracts executed by plaintiff had been transferred to said Spencer & Milliken, in order to assist them in their conspiracy to corner the wheat market; that thereafter, to wit, March, 1904, the said Hubbard & Moffitt Commission Company returned to plaintiff the sum of \$1,790.25, being the amount of difference between the contract price of the grain which plaintiff had agreed to sell them, and the 'fictitious price of 92 cents per bushel,' which the defendants (Spencer & Milliken and Hubbard & Moffitt Commission Company) by means of their corner of the market had created and fixed for the price of said grain on and before December 31, 1903; that when this was done, plaintiff refused to return to said Hubbard & Moffitt the reciprocal paper memoranda evidencing the original contracts of purchase of said grain executed at the time by the said Moffitt & Co.; that for such refusal the defendant Merchants' Exchange passed a resolution suspending him from the privileges of membership in that body; that said resolution was invalid. The prayer of plaintiff's petition is, to wit: 'Wherefore, the premises considered, plaintiff prays the court to enjoin and restrain said Merchants' Exchange of St. Louis from further enforcing said resolution or order of suspension of plaintiff and that said order or resolution be canceled and decreed to be void, and that the said contracts between the C. H. Albers Commission Company and the Hubbard & Moffitt Commission Company be canceled and declared void, and that said plaintiff have accounting of damages sustained by him, in this behalf (so far as the same may be ascertained), including therein damages for the oppressive, fraudulent, and unlawful and wrongful acts aforesaid of said defendants and each of them, and that plaintiff recover such damages aforesaid as may be so found to be justly due to him by each of said defendants respectively, and have such other and further relief as may be just, and that plaintiff have a temporary restraining order to the effect first above prayed, pending the litigation and until the further order of this court, upon such terms as may be just and equitable.'

"All the defendants named in this petition were made parties by personal service. The defendant Merchants' Exchange duly answered. The other defendants, not having answered within a year after said service, a default was taken against them. The case came on for trial upon the petition, the default, the answer of the Merchants' Exchange, the evidence taken, and an agreement as to certain facts, whereupon the

trial court decreed a temporary injunction hitherto awarded by him against the Merchants' Exchange to be perpetual, and found in favor of the defaulting defendants on the other issues presented by the petition, and dismissed plaintiff's petition as to them. Thereafter the two cross-appeals were taken as above stated."

[1] Appellant's contention is that inasmuch as the defendants, other than the Merchants' Exchange, made default, and an interlocutory judgment pro confesso was entered some months prior to the final hearing, the chancellor below should not have dismissed the bill as to such defaulting defendants, after having found in plaintiff's favor on the injunctive feature of the case. Appellant asserts that, since the allegations of the petition stood confessed as to these respondents, plaintiff was entitled to a decree for an accounting, and that the judgment should now be reversed, with directions to the trial court to institute an inquiry touching the extent to which plaintiff is entitled to recover. An examination of the record, however, has convinced us that the judgment should not be disturbed. The record before us does not warrant a recovery of damages. The petition does not allege what in fact was the reasonable market value of the wheat in question, but merely that 92 cents per bushel was a fictitious price in excess of the reasonable value thereof. It in no way furnishes any basis by which to ascertain and fix any damages in plaintiff's favor. And the only evidence in the record touching the matter goes to prove that 92 cents per bushel was the reasonable value of the grain at the time mentioned. Each contract upon its face provided that it was "subject in all respects to the rules and regulations of the Merchants' Exchange of St. Louis." The evidence is that the Merchants' Exchange, pursuing its usual course in such matters, first through its "committee on contracts for future delivery," in passing upon a dispute of like character between other members of the Exchange, found that 92 cents per bushel was in fact the reasonable market value of wheat of the character and at the time here involved.

And a rule of the Merchants' Exchange, put in evidence, provided that such a finding should be "accepted and recognized as establishing said value as the equitable basis for all settlements and adjustments of similar defaults by members of the Exchange on that day." It thus appears that neither the petition nor the proof afforded ground for any monetary recovery by plaintiff.

[2] It is further argued that as against the defendants who defaulted, and thus confessed the averments of the petition, plaintiff is entitled in equity to have these contracts declared null and void and canceled. The petition is quite lengthy, much of it dealing with matters not pertinent to this appeal, but its substance has been heretofore shown, and it does not appear to warrant the exercise of equity jurisdiction beyond the granting of the injunctive relief which has heretofore been awarded plaintiff. There are no allegations of fraud such as to entitle plaintiff to cancellation in equity. Respecting the alleged "corner" in the wheat market, nothing is averred as to the true market value of the wheat at the time in question. And in any event, if plaintiff's rights were violated, it appears that there was an adequate remedy at law, making rescission and cancellation in equity wholly unnecessary. Respecting the contracts sought to be canceled, the petition at most charges merely the violation of plaintiff's legal rights such as to afford him redress by way of damages upon proper allegation and proof thereof. Something more must appear to entitle him to invoke the extraordinary power of a court of equity for the purpose of rescission and cancellation. In this connection see *Commission Co. v. Spencer*, 205 Mo. loc. cit. 120, 121, 103 S. W. 523.

Other questions are suggested, but under the circumstances it is unnecessary to discuss them.

The judgment should be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

COTTEN v. HUGHES et al., Commissioners.
(No. 100.)

(Supreme Court of Arkansas. July 3, 1916.)

1. MUNICIPAL CORPORATIONS — 407(1) — STATUTES—IMPROVEMENT DISTRICT—CONSTITUTIONAL PROVISIONS.

Acts 1915, p. 831, § 1, purporting to ratify and validate all acts performed by municipalities under special statutes raising their grades, and to confirm in office the de facto officers until an election could be held to elect their successors, enacted after such special statutes had been held unconstitutional, as to subsequent acts of the city council in passing an ordinance creating an improvement district for the installation of waterworks, and appointing defendants commissioners, and in passing an assessment ordinance against the property in the district, after the consent of the majority of the owners of the district had been obtained in accordance with the general statutes respecting improvement districts, Kirby's Dig. § 4664 et seq., in view of the fact that the claims of an improvement district was within the statutory power of the incorporated town before the special act, did not violate Const. art. 19, § 27, declaring that special assessments for local improvements must be based upon the consent of the majority in value of the property owners adjoining the locality, and that such assessment shall be ad valorem and uniform.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1008; Dec. Dig. 407(1).]

2. STATUTES — 90(1)—SPECIAL OR GENERAL STATUTES—IMPROVEMENT DISTRICT—VALIDATING ACT.

Such act did not violate Const. art. 12, §§ 2, 3, providing that the General Assembly shall pass no special act conferring corporate power, and shall provide by general laws for the organization of cities and incorporated towns.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 98; Dec. Dig. 90(1).]

Appeal from Saline Chancery Court; J. P. Henderson, Chancellor.

Action for injunction by M. M. Cotten against George Hughes and others, Commissioners, etc., of an improvement district. Decree for defendants, dismissing the complaint for want of equity, and plaintiff appeals. Affirmed.

Hal L. Norwood, of Little Rock, for appellant. Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, for appellees.

McCULLOCH, C. J. Benton, the county seat of Saline county, has been an incorporated town for many years, and was organized under the general statutes of the state, but the General Assembly of 1911 passed a special statute, attempting to raise its classification so as to constitute it a city of the second class. It was decided, however, by this court that the special statute was void, for the reason that it constituted a violation of those sections of the Constitution which provide that "the General Assembly shall pass no special act conferring corporate powers," except in certain instances, and that the General Assembly "shall provide by general laws for the organization of cities and in-

corporated towns." Article 12, §§ 2, 3, Const. 1874; Cotten v. City of Benton, 117 Ark. 190, 174 S. W. 231. The decision declaring the special statute void was rendered by this court on February 22, 1915, and the General Assembly enacted a statute, which was approved March 23, 1915 (Act No. 212, p. 831, Acts of 1915), attempting to ratify and validate all acts performed by municipalities under special statutes raising their grades, and also confirming in office the de facto officers in those municipalities until an election could be held to elect their successors. The statute, after a recital in the preamble to the effect that the grade of many incorporated towns had been raised by acts of the Legislature to cities of the second class, and that the Supreme Court had held that all such special statutes were void, reads as follows:

"Section 1. It is declared that the constituted governments of municipalities, which the Legislature has declared to be cities of the second class, have been and are the de facto governments of such municipalities, and all their acts heretofore done, which would be valid if they were cities of the second class, or which would be valid if they were incorporated towns, are hereby ratified and confirmed, and declared to be valid as the acts of de facto governments; and, inasmuch as some time must elapse before a government can be organized in such municipalities as incorporated towns, the present officers of such municipalities are hereby confirmed in office until their successors are elected and qualified, and are hereby declared to be the de facto and de jure officers of said municipalities, and all their acts as such shall be valid until their successors have been elected and qualified in the manner hereinafter provided."

The second section of the statute directed the Governor, at the earliest practical date, to call a special election in all such municipalities for the purpose of electing a mayor, recorder, and five aldermen as the officers of said municipalities as incorporated towns. The section also provided how the election should be held, and the returns thereof made and declared, etc. The statute contained an emergency clause, and therefore went into immediate effect.

On April 16, 1915, an ordinance was passed by the council creating an improvement district for the purpose of installing a system of waterworks, and appellees were appointed commissioners of the district, and on July 5, 1915, an ordinance was passed, levying the assessments against the property in the district. The improvement was undertaken, and the assessments were levied, after obtaining the consent of the majority of the property owners of the district in accordance with the general statutes of this state with respect to improvement districts in cities and towns. Kirby's Digest, § 5664 et seq.

[1, 2] The only thing urged as a defect in the organization of the district is that all acts of the city council of Benton were absolutely void, and that the Legislature had no authority to validate any acts which had already been performed, nor to authorize any

further acts to be performed by the city council. We need not concern ourselves at present with that part of the statute which undertook to validate acts which had already been performed by the council of Benton as a city of the second class; for, as has already been shown, everything that was done affecting the organization of this improvement district was done after the passage of the statute, and we need only consider that portion of the act which declared that:

"The present officers of such municipalities are hereby confirmed in office until their successors are elected and qualified, and are hereby declared to be the de facto and de jure officers of said municipalities, and all their acts as such shall be valid until their successors have been elected and qualified in the manner hereinafter provided."

Appellant is a property owner in the improvement district, and undertakes to restrain the board of commissioners from issuing bonds and carrying forward the construction of the improvement. The creation of the improvement district was entirely within the statutory power of an incorporated town, as much so as within the powers of cities of either class, and the Legislature did not attempt to confer any new power in authorizing the council to perform acts for and on behalf of the incorporated town. The only constitutional limitation upon the creation of improvement districts in cities and towns is that the special assessments for local improvements must "be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected," and that "such assessments shall be ad valorem and uniform." Article 19, § 27. Pursuant to that provision of the Constitution, the Legislature provided by general laws for the organization of improvement districts in cities and towns, upon the consent being obtained of a majority in value of the owners of property to be affected. Nor is there any constitutional restriction upon the power of the Legislature with respect to determining how the corporate power conferred under general statutes shall be exercised, the only limitation being that contained in the two sections, to the effect that the General Assembly shall provide by general laws for the organization of cities and towns, and that "the General Assembly shall pass no special act conferring corporate power." All that the Legislature has done in the special statute now under consideration, so far as it relates to the question before us, is to declare that the corporate functions, pursuant to the original organization of the incorporated town of Benton, should be exercised by the officers elected for the municipality as a city of the second class, and we are of the opinion that that statute does no violence to the constitutional authority of the lawmakers.

It must be remembered that the incorpo-

rated town ceased to exercise its functions through the agencies then existing, when the General Assembly of 1911 passed the statute raising the municipality to a city of the second class. The terms of those officers had expired when the act of 1915 was passed, and at most they could only have been deemed as holding over until their successors could be elected, and we see no constitutional objections to the Legislature providing other agencies, namely, the officers which had been put into authority pursuant to the supposed power of the special act raising the municipality to that of a city of the second class, to execute the corporate authority until a new election could be held. The differences between the two classes of municipalities are purely statutory. An incorporated town has, under the statute, a mayor, a recorder, and five aldermen, who constitute the city council, whereas the statute provides that the council of a city of the second class shall be composed of a mayor and two aldermen from each ward. While the members of the city council were elected under a void statute, and possessed no valid authority to act, yet it was within the province of the Legislature to authorize them to act for the incorporated town until the proper officers could be elected under general statutes. This was not an attempt to confer corporate authority by a special act. The authority was conferred under general statutes which provided for the organization of incorporated towns, and the Legislature in this special statute only designated the agencies through which that corporate power, which had already been conferred, could be exercised.

We are of the opinion, therefore, that, the acts of the city council in creating this improvement district and levying assessments, being acts that were performed subsequent to the passage of the statute of March 23, 1915, and before the election was held to elect new officers, it was a valid exercise of power, and that the improvement district has been legally created, and the assessments levied pursuant thereto are valid.

The chancellor was correct in his decree dismissing appellants' complaint for want of equity, and the decree is therefore affirmed.

DUNCAN v. STATE. (No. 108.)

(Supreme Court of Arkansas. July 3, 1916.)

1. CRIMINAL LAW §274—PLEA OF GUILTY—WITHDRAWAL—DISCRETION.

It is within the discretion of the trial court to refuse to permit a defendant to withdraw his plea of guilty and to substitute a plea of not guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 632, 633; Dec. Dig. § 274.]

2. CRIMINAL LAW §274—PLEA OF GUILTY—WITHDRAWAL—DISCRETION.

Where one accused of several misdemeanors pleaded guilty in each of the cases and both the

justice of the peace and the deputy prosecuting attorney denied accused's claim that they had made him an offer of compromise which induced his pleas of guilty, there was no abuse of discretion in the trial court's refusal to allow him to withdraw his pleas.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 632, 633; Dec. Dig. ☞ 274.]

3. INDICTMENT AND INFORMATION ☞110(3)—MISDEMEANOR—LANGUAGE OF STATUTE.

Upon a charge of a statutory misdemeanor, an information in the general language of the statute, which apprises accused of the nature of the accusation made against him, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 291-294; Dec. Dig. ☞110(3).]

4. CRIMINAL LAW ☞260(8)—RIGHT OF APPEAL FROM JUSTICE COURT—PLEA OF GUILTY.

After accused had entered pleas of guilty to sufficient misdemeanor information, and judgments had been entered thereon and leave to withdraw pleas had been refused, his appeal to the circuit court was properly dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 569-571, 583; Dec. Dig. ☞260(8).]

Appeal from Circuit Court, St. Francis County; J. M. Jackson, Judge.

Will Duncan pleaded guilty to misdemeanors before justice of the peace, and judgment was entered on the pleas, and he appealed to the circuit court. From a judgment dismissing his appeal, he appeals. Affirmed.

M. B. Norfleet and J. M. Prewett, both of Forrest City, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

HART, J. On January 3, 1916, Will Duncan was arrested upon warrants issued by a justice of the peace upon informations filed by the deputy prosecuting attorney. He was placed in jail, and on the next day was brought before the justice of the peace and entered his plea of guilty in five separate misdemeanor cases. He was charged with running a disorderly house, with Sabbath breaking, with running a blind tiger, and in two cases with gaming. Judgments were entered upon his plea of guilty. On January 6, 1916, Duncan prayed and was granted an appeal in each case to the circuit court. At the next term of the circuit court the prosecuting attorney filed a motion to dismiss the appeal of the defendant in each case. On the part of the state it was shown by the justice of the peace that Will Duncan entered his plea of guilty in five misdemeanor cases before him, and that judgment was rendered against him in each case. The justice stated that he made no offer whatever of compromise to the defendant, and that the pleas of guilty were voluntarily entered by the defendant and were unconditional. His testimony was corroborated by the testimony

of the deputy prosecuting attorney. The defendant testified for himself as follows:

"Nine cases were pending against me before the justice of the peace. Five of them were misdemeanors and the rest were felonies. They took me out of jail and brought me before the justice of the peace. They asked me several times how much money I had, and I told them \$75. They asked me if I would waive examination in the felony cases and plead guilty in the misdemeanor cases. I understood they were to let me off in the misdemeanor cases upon the payment of the \$75 and with that understanding I entered a plea of guilty in each case."

Both the justice of the peace and the prosecuting attorney denied that they made any offer of compromise whatever to the defendant, or offered to let him off upon the payment of \$75. The circuit court dismissed the appeal of the defendant. From the judgment rendered the defendant has appealed to this court.

[1] It is within the discretion of the trial court to refuse to permit a defendant to withdraw his plea of guilty and to substitute a plea of not guilty. *Greene v. State*, 88 Ark. 290, 114 S. W. 477.

[2, 3] Under the testimony of the justice of the peace and the deputy prosecuting attorney there would have been no abuse of discretion in the trial court refusing to allow him to withdraw his plea of guilty. *Greene v. State*, supra, and *Barwick v. State*, 107 Ark. 115, 153 S. W. 1106. Moreover, the informations filed by the deputy prosecuting attorney against the defendant were in the general language of the statute, and were sufficient to apprise him of the nature of the accusations made against him. Nothing more than that is required upon a charge of a statutory misdemeanor.

[4] The defendant's plea of guilty before the justice of the peace was an admission of his guilt; and, unless it was withdrawn by leave of the court, the state was entitled to have sentence passed. *Stokes v. State*, 182 S. W. 521. Under the authority just cited, the circuit court was right in dismissing the appeal of the defendant.

The judgment will therefore be affirmed.

SELLS v. BREWER. (No. 115.)

(Supreme Court of Arkansas. July 3, 1916.)

1. LANDLORD AND TENANT ☞108(1) — FORFEITURE CLAUSE.

A forfeiture clause for nonpayment of rent is valid in a lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 333, 334, 339; Dec. Dig. ☞108(1).]

2. LANDLORD AND TENANT ☞103(1)—FORFEITURE CLAUSE—ENFORCEMENT.

To enforce a forfeiture clause in a lease, the landlord must bring himself within its strict provisions.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 321, 324-327, 337-342; Dec. Dig. ☞103(1).]

3. LANDLORD AND TENANT \S 291(16)—UNLAWFUL DETAINER—QUESTIONS FOR JURY—WAIVER.

In unlawful detainer suit, it was error not to submit to jury question of waiver of clause, forfeiting lease upon nonpayment of rent when due; there being conflicting evidence on that question.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 1252; Dec. Dig. \S 291(16).]

Kirby, J., dissenting.

Appeal from Circuit Court, Lee County; J. M. Jackson, Judge.

Action by Mary E. Sells against L. M. Brewer. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

H. F. Roleson, of Marianna, for appellant.

SMITH, J. Appellant instituted an action of unlawful detainer against appellee to recover the possession of a certain tract of land which she had leased him for the period beginning June 1, 1908, and ending May 31, 1918. The rent was \$30 per year, payable quarterly, and rent for one quarter was due on September 1st, but was not paid at that time. The lease contained the following clause:

"It is further agreed that the rent hereinabove provided for is to be paid quarterly, and if any quarter's rent shall remain due and unpaid, after due date thereof, then and in that event party of the first part may declare this lease at an end, and take immediate possession of this property, together with the appurtenances."

On September 5, 1913, the rent remaining unpaid, the appellant served on appellee the following notice:

"You are notified that I have in default of your payment of rent canceled your lease dated June 2, 1908, and demand possession of the premises."

This action followed this notice.

Appellee denied the allegations of the complaint that appellant was entitled to the possession of the land, or that the same was unlawfully detained. A tender of the rent was made on September 13th.

There was conflicting evidence in regard to appellant's custom in the collection of the rent, and there was evidence on appellee's behalf which tended to show that appellant would not insist on the forfeiture clause because of a failure to pay rent on the day it was due. This evidence was in conflict with that of appellant on the subject. However, the question of waiver was not submitted to the jury, and we must therefore treat that question as not having been passed upon by the jury. Upon the contrary, the court gave, over appellant's objection, the following instruction:

"You are instructed that if you find from the evidence that the rent due for the property in question was tendered within three days after demand for possession was made by the plaintiff, then it is your duty to find your verdict for the defendant."

It is said this instruction is based upon the opinion of this court in the case of Geary v.

Parker, 85 Ark. 521, 47 S. W. 238, 53 S. W. 567. It will be observed, however, that the opinion in that case mentions the fact that "there was no condition of forfeiture in the lease for nonpayment." But in this case we have this express condition, and the authorities recognize the right of parties to contract for a forfeiture. 2 Taylor, Landlord and Tenant, \S 469. In 24 Cyc. p. 1352, it is said:

"While a provision in a lease for a forfeiture or re-entry is necessary to authorize the lessor to terminate the tenancy on the failure to pay rent, except where the statute otherwise provides, yet when the lease contains such a provision, the lessor may proceed to end the lease on the breach of such covenant, notwithstanding the failure to pay was not willful. Of course the landlord cannot terminate the lease until the expiration of the whole of the day on which the rent is payable; and, if the lease provides that the rent shall not be payable until a certain time after it accrues, he has no right to re-enter until the expiration of that time."

[1, 2] While the cases on the subject hold that the landlord who desires to enforce the forfeiture of the lease for the nonpayment of the rent must bring himself strictly within the provisions of the contract which gives him this right, still the validity of the stipulation and the right to enforce it is recognized when he has done so. In the recent case of Williams v. Shaver, 100 Ark. 565, 140 S. W. 740, it was said:

"Ordinarily, where a forfeiture is desired in a contract, it is by the express terms thereof provided that a forfeiture may be declared in event of some breach thereof. This is especially true of leases. The forfeiture of the term of a lease is usually provided for in the contract by express words, and generally occurs upon or in consequence of a breach of some agreement therein stipulated."

The opinion in that case quoted from both the majority and the dissenting opinions in the case of Buckner v. Warren, 41 Ark. 532, in both of which opinions, as shown by the quotations there made, nonpayment of rent was recognized as a ground of forfeiture of a lease when it was so expressly provided.

[3] The court should therefore have given effect to the language of the contract, and under the evidence in the case should have submitted the cause to the jury upon the question of waiver.

For the error indicated, the judgment will be reversed, and the cause remanded.

KIRBY, J., dissents.

THOMAS v. TOWN OF DES ARC. (No. 113.) (Supreme Court of Arkansas. July 3, 1916.)

LICENSES \S 51½—POLICE POWER—ORDINANCE LICENSING BILLIARD AND POOL TABLES.

Under Kirby's Dig. \S 5438, granting general powers to cities and incorporated towns and specifying that "they shall have power to license, regulate, tax or suppress," among other things, "billiard tables or other instruments used for gaming," an incorporated town has power to pass an ordinance, requiring the payment of

a license of \$5 per annum for the privilege of operating or keeping each billiard and pool table, although they were not used for gaming or as gambling devices, since the power to "suppress" applies when billiard and pool tables are used for gaming and the power to "license, tax or regulate" applies when they are used only for amusement and diversion, and not for gaming.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. ¶5½.]

Appeal from Circuit Court, Prairie County; J. G. Thweatt, Special Judge.

S. A. Thomas was convicted of violating an ordinance of the Town of Des Arc, and appeals. Affirmed.

W. A. Leach, of Lonoke, for appellant. Emmet Vaughan, of Des Arc, for appellee.

KIRBY, J. This appeal challenges the validity of an ordinance of the town of Des Arc, prescribing a tax or license on billiard and pool tables. Appellant was convicted in the mayor's court on a charge of violating the ordinance and on appeal in the circuit court. The agreed statement of facts shows that appellant kept a billiard and pool hall during the time for which license was required to be paid by the ordinance, with billiard and pool tables therein, none of which were used as gambling devices. The ordinance was duly passed, and requires the payment of a license of \$5 per annum for the privilege of operating or keeping each billiard and pool table. The court refused to declare the law as requested by appellant that an incorporated town was without power to enact a valid ordinance, licensing either billiard or pool tables, and had authority only to suppress the keeping of same when used for gambling, and declared the law as requested by appellee, that the town under the police power delegated to it could impose a license or tax or regulate either or both pool tables and billiard tables, whether the same are used for gaming or not, and suppress same if kept or used for gaming.

Appellant contends that the ordinance prescribing the payment of a license or tax is void, the town being without authority to enact same. The law granting general powers to cities and incorporated towns (sec. 5438, Kirby's Digest) provides:

"They shall have power * * * to license, regulate, tax or suppress * * * hawkers, peddlers, brokers * * * fortune tellers, * * * corn doctors * * * museums and menageries * * * muscle developers, * * * billiard tables or other instruments used for gaming."

It has been held that authority is expressly given to towns to suppress gambling devices. *State v. Lindsay*, 34 Ark. 372.

In *Town of Dardanella v. Gillespie*, 118 Ark. 390, 172 S. W. 1036, it was held that the town was without authority to declare a pool hall a nuisance and suppress it unless the tables were used for gaming; and, the evidence there showing they were not kept for

gaming, but only for amusement and diversion of the players, and that no gambling was allowed, the ordinance was held void. It was recognized, however, that pool halls and billiard parlors are uniformly held to be proper subjects for police regulation, and places which may become nuisances and liable to suppression. It was not decided there that billiard and pool tables are not the proper subject of regulation unless used for gaming purposes. *Bryan v. City of Malvern*, 183 S. W. 957.

The statute expressly empowers towns to license, regulate, tax, or suppress the various occupations and devices mentioned, among the number "billiard tables, or other instruments used for gaming"; and, since it has the power only to suppress such tables and appliances when used for gaming, a fair construction of the language used necessarily gives the town the power to license, tax, or regulate said tables and instrumentalities that can be, and are, used for gaming or for pleasure and diversion of the players when used for the latter purpose only and not for gaming. In other words, the town is given power to suppress billiard tables and pool tables which are only a particular kind of billiard table when used for gaming and to license, tax and regulate said instrumentalities when used only for the amusement and diversion of the players and not for gaming.

Since the town had the power to pass the ordinance and no complaint is made against the tax or license prescribed as unreasonable, the judgment will be affirmed. It is so ordered.

DICKINSON, State Auditor, et al. v. CLIBOURN. (No. 114.)

(Supreme Court of Arkansas. July 3, 1916.)

1. STATES ¶130—APPROPRIATION OF PUBLIC MONIES.

Under the provisions of Const. art. 5, § 289, article 16, § 12, and Kirby's Dig. §§ 3409, 3415, 3441, that no money shall be drawn from the state treasury except in pursuance of specific appropriation made by law, the purpose of which shall be distinctly stated in the bill, a specific appropriation is an absolute prerequisite to the drawing from or payment out of the state treasury of any money therein required to be appropriated, and no money for payment of general, ordinary, special, contingent, or other expenses can be legally drawn except under the forms of law in accordance with an appropriation properly made, since the primary object of these provisions is to prevent the expenditure of the people's money without their consent, expressed in the organic law or constitutional acts of the Legislature.

[Ed. Note.—For other cases, see States, Cent. Dig. § 128; Dec. Dig. ¶130.]

2. STATES ¶131—GAME AND FISH LAW—APPROPRIATING SALARY OF GAME WARDEN—"APPROPRIATION"—"MONEY."

The Game and Fish Act (Acts 1915, pp. 471, 472, 474) §§ 11, 12, 20, providing that license fees, fines, and forfeitures shall be paid

to the state treasurer, and shall constitute a separate fund to be known as the "Game Protection Fund" to be sued for no other purpose than paying the necessary expenses of enforcing the game and fish laws, and that the pay of the game and fish commission's employes shall be paid out of that fund and from no other fund, etc., does not sufficiently appropriate specific moneys to the payment of game wardens' salaries so that they may be paid from the state treasury, since "appropriation" denotes the setting apart or assigning to a particular use a certain sum of money for a specified purpose in such a manner that the public officials are authorized to draw and use the sum so set apart, and no more, for the purpose specified and no other, and since all funds required by the statute to be paid into the state treasury are "money" within the meaning of the constitutional requirements relating to appropriations thereof.

[Ed. Note.—For other cases, see States, Cent. Dig. § 129; Dec. Dig. ¶131.

For other definitions, see Words and Phrases, First and Second Series, Appropriation; Money.] Hart and Smith, JJ., dissenting.

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Mandamus by Wash Clibourn against M. F. Dickinson, as State Auditor, and another. From a judgment for applicant, respondents appeal. Reversed and remanded, with directions.

Wallace Davis, Atty. Gen., Hamilton Moses, Asst. Atty. Gen., and Walter J. Terry, of Little Rock, for appellants. Moore, Smith, Moore & Trieber and Miles & Wade, all of Little Rock, and D. G. Beauchamp, of Paragould, for appellee.

KIRBY, J. Appellee brought this suit against the state auditor and treasurer for a mandamus to compel the auditor to issue a warrant on the treasurer on a voucher drawn by the game and fish commission in his favor as a game warden, and the treasurer to pay same out of the game and fish protection fund. It was alleged that the voucher was duly issued for services rendered, and that the auditor and treasurer refused to issue a warrant thereon and cash same, claiming no appropriation had been made of said fund for such purposes. The court, having overruled a general demurrer to the complaint and appellants declining to plead further, entered a judgment, granting the relief prayed, from which this appeal is prosecuted.

Appellants contend that no appropriation was made by the Legislature of the moneys raised under the act creating the fish and game commission out of which the claim could be paid, and that the court erred in not so holding. The state game and fish commission was created by Act No. 124 of the Acts of the General Assembly of 1915, which requires the payment of certain license fees for the privilege of hunting and fishing, and that all moneys received from such license fees and fines for violation of the game laws, shall be paid into the state treasury. It is contended by appellee that a

sufficient appropriation of all the moneys paid into the treasury under the provisions of the act within the meaning of the Constitution is made by sections 11, 12, and 20 thereof as follows:

"Sec. 11. All license, fines and forfeitures provided for in this act shall be paid in lawful money of the United States to the state treasurer, and shall constitute, be and remain a separate fund to be known as the 'Game Protection Fund.' Such fund shall be used for no other purpose than paying the necessary expense of enforcing the game and fish laws of the state.

"Sec. 12. The expenses of the commission and the pay of its employes shall be paid out of the game protection fund, and out of no other fund. * * *

"Sec. 20. That all money arising from fines, forfeitures, or licenses under any law for the protection of game and fish, now existing or hereinafter enacted, shall be collected in lawful money of the United States and be paid immediately by the collecting officer to the state treasurer, and said moneys shall be set aside, to be known as the game and fish protective fund, and shall be available for expenses in enforcing the various provisions of the law for the protection of the game, the birds and the fish."

The provisions of the Constitution and other laws necessary to be considered are:

"No money shall be drawn from the treasury except in pursuance of specific appropriation made by law, the purpose of which shall be distinctly stated in the bill; and the maximum amount which may be drawn shall be specified in dollars and cents; and no appropriation shall be for a longer period than two years." Section 28, art. 5, Const.

"No money shall be paid out of the treasury until the same shall have been appropriated by law; and then only in accordance with said appropriation." Section 12, art. 16, Const.

"No warrants shall be drawn by the auditor or paid by the treasurer, unless the money has been previously appropriated by law, nor shall the amount drawn for or paid under any one head ever exceed the amount appropriated by law for that purpose." Section 3415, Kirby's Digest.

"The treasurer is prohibited from paying any money out of the treasury on any account whatever, except upon the lawful warrants of the auditor." Section 3441, Kirby's Digest.

"In all cases where the law recognizes a claim for money against the state, and no appropriation shall be made by law to pay the same, the auditor shall audit and settle such claim, and give the claimant a certificate of the amount thereof, under his official seal, if demanded, and report the same to the Governor, who shall lay the same before the General Assembly." Section 3409, Kirby's Digest.

[1] The primary object of these provisions of the Constitution and Statutes in aid thereof is to prevent the expenditure of the people's money, without their consent, expressed in the organic law or constitutional acts of the Legislature. A specific appropriation is an absolute prerequisite to the drawing from or payment out of the state treasury of any money therein required to be appropriated. No money for general, ordinary, special, contingent, or other expense, no money at all, can be legally drawn therefrom, except under the forms of law in accordance with an appropriation properly made. In *Moore v. Alexander*, 85 Ark. 171, 107 S. W. 395, the

court held that the capitol fund, collected pursuant to a special tax levied for the purpose of building a state capitol, could not be paid out unless there had been a biennial appropriation, specifying the money to be used, notwithstanding it was beyond the power of the General Assembly to divert the fund collected therefor to use for any other purpose under section 11, art. 16, of the Constitution. In *Dickinson, Auditor, v. Edmondson*, 120 Ark. 80, 178 S. W. 930, the court held that the common school fund was appropriated by article 14 of the Constitution, which is self-executing, providing for its creation and collection, and that no appropriation thereof was required by the General Assembly, and in discussing said provision of the Constitution (article 5, § 28), after stating that it refused to hold in *Moore v. Alexander*, supra, that it had no application to the fund raised from a special tax and applied at least to all revenues raised for state purposes, said:

"We are unwilling to recede from the position taken in that case, for it is plain that the framers of the Constitution intended to place an unmistakable limitation upon the authority of public officials in paying out public funds and to declare that all the state funds which are within the purview of that provision must be held in the treasury until a specific appropriation thereof has been made by the Legislature. The power of the General Assembly with respect to the public funds raised by general taxation is supreme, and no state official, from the highest to the lowest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation. The Constitution provides, too, that no appropriation shall be for a longer period than two years, and thus a period is fixed over which the lawmakers hold complete control over the purse strings of the state."

An unmistakable purpose is shown, in said provisions of the Constitution and statutes quoted, to prevent the payment out of, or drawing from, the state treasury any money raised under the operation of any statute until the same is appropriated by law, which appropriation is required to be specific, and the purpose distinctly stated in the bill, and the maximum amount which can be drawn specified in dollars and cents. No appropriation shall be for a longer period than two years, and all appropriations not expended during the period are required covered into the treasury at the end thereof, the manifest intention being to give each succeeding Legislature a comprehensive and exact view of the state's financial condition from the appropriations made and expended, and to require it to make such appropriations for the next two years in accordance with the constitutional limitations as will meet the needs

of the state government and pay the expenses of its administration.

[2] Appellee insists that said sections of the act under consideration make a sufficient appropriation of the fund within the constitutional requirements, but we do not think so. It is true that all the moneys arising from the operation and execution of the law paid into the state treasury are required set apart into a particular separate fund to be used only "for paying the necessary expense of enforcing the game and fish laws of the state," which it is said "shall be available for expenses in enforcing the various provisions of the law for the protection of the game, the birds and the fish," but no maximum amount is specified in dollars and cents, and it cannot be said that the appropriation is specific when the amount that would probably be raised from the operation of the law was entirely contingent and altogether unknown, nor does the said language sufficiently manifest an intention to authorize the drawing of the money out of the treasury until after an appropriation properly made. The framers of the Constitution intended that each Legislature shall fix a maximum amount, specified in dollars and cents in every appropriation made, beyond which the fund cannot be used during the period, in language so clear as to manifest an intention that it is set aside and authorized to be drawn and used for the purpose distinctly stated. "Appropriation" denotes the setting apart or assigning to a particular use a certain sum of money for a specified purpose in such a manner that the public officials are authorized to draw and use the sum so set apart and no more, for the purpose specified and no other. *Clayton v. Berry*, 27 Ark. 129; *State v. Moore*, 50 Neb. 88, 69 N. W. 373, 61 Am. St. Rep. 538; *Stratton v. Green*, 45 Cal. 149. The said provisions of the act do not constitute an appropriation of the funds, paid into the state treasury, through the operation thereof, in accordance with the constitutional requirements, and the court erred in holding otherwise. All funds required by statute to be paid into the state treasury are money within the meaning of the constitutional requirements relating to appropriations thereof, and no money coming into such treasury by operation of our laws can be legally drawn therefrom, or paid out of the treasury, except in pursuance of specific appropriations made in accordance with said constitutional requirements.

The judgment is reversed, and the cause remanded, with directions to sustain the demurrer to the complaint.

HART and SMITH, JJ., dissent.

BLAKEMORE v. EDMONDSON et al.
(No. 107.)

(Supreme Court of Arkansas. July 3, 1916.)

1. FRAUDULENT CONVEYANCES ⇨95(1)—CONVEYANCE TO WIFE.

Where a conveyance by a husband to his wife left the former without any property subject to execution for his debts and the wife paid only a part of the agreed consideration, *held* that the part retained by her was equivalent to a voluntary gift, and rendered the conveyance voluntary, fraudulent, and void as to creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 243-247; Dec. Dig. ⇨95(1).]

2. FRAUDULENT CONVEYANCES ⇨277(3)—CONVEYANCES TO WIFE—PRESUMPTION AND BURDEN OF PROOF.

Where evidence showed that insolvent husband conveyed land to his wife for \$1,000, only part of which was paid by her, *held* the transaction was presumptively in fraud of creditors, and the burden was on the defendants to show good faith.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 799, 814; Dec. Dig. ⇨277(3).]

3. FRAUDULENT CONVEYANCES ⇨277(3)—CONVEYANCE TO WIFE—EVIDENCE—SUFFICIENCY.

Evidence *held* insufficient to rebut the presumption that a transfer, whereby an insolvent husband conveyed property to his wife, who paid only part of the agreed consideration, was in fraud of creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 799, 814; Dec. Dig. ⇨277(3).]

Appeal from Prairie Chancery Court; Jno. M. Elliott, Chancellor.

Suit by George T. Blakemore against G. W. Edmondson and others. Judgment for defendants, and complainant appeals. Reversed and remanded, with directions.

This suit was instituted in the chancery court of Prairie county by the appellant against the appellees, to set aside a deed executed by G. W. Edmondson and wife to W. B. Jackson and a deed from Jackson and wife to Fannie C. Edmondson. The consideration mentioned in each deed was \$1,200. The appellant alleged that Edmondson was indebted to him in the sum of \$249, evidenced by a promissory note executed on the 14th day of February, 1911, and payable January 1, 1912. The complaint alleged that the conveyances were voluntary and made for the purpose of defrauding appellant, and that if the consideration named was paid, it was inadequate, the property conveyed being worth the sum of \$2,000. The appellees G. W. and Fannie C. Edmondson, in their answer, admitted the execution of the note and admitted that on the day of its execution G. W. Edmondson was the owner of the property conveyed. They admitted the execution of the deeds alleged in the complaint, but denied that they were made for the purpose of defrauding appellant, but alleged that the transaction was bona fide and was made for the purpose of paying certain debts, and that

the money realized from the sale was used for such purpose.

Emmet Vaughan, of Des Arc, for appellant. Thweatt & Thweatt, of De Valls Bluff, and W. A. Leach, of Lonoke, for appellees.

WOOD, J. (after stating the facts as above). The testimony of appellee Edmondson shows that on the 14th of February, 1911, the date on which the note in suit was executed, he owned oilmill stock of the par value of \$7,500, stock in what is designated as the Hayley-Beine Company, \$7,500, a $\frac{5}{12}$ interest in 440 acres of land, and several lots, in addition to the property conveyed to his wife. For the year 1911 he assessed his personal property at the sum of \$1,405. His testimony further shows that at the time of the conveyance of the land in controversy to his wife on the 20th of February, 1912, he had become denuded of all this property, for the record shows the following:

"Q. How much property did you have in your own name unincumbered at the day you deeded the property in controversy to Mrs. Edmondson? A. Personal or real? Q. All together. A. I don't think I had anything after I sold this. My stock was all incumbered. Q. Did you pay everybody what you owed them except Mr. Blakemore? A. No, sir. Q. You have nothing now in your own name, nothing subject to sale under execution? A. I have nothing in my name, or out of my name either, except that is incumbered."

It thus appears from Edmondson's own testimony that, after the conveyances here sought to be set aside, appellee had no property that could be subjected to the payment of his debts by execution. His own testimony shows that if he was not insolvent before, this conveyance rendered him so. In the recent case of Simon v. Reynolds-Davis Gro. Co., 108 Ark. 164, 169, 156 S. W. 1015, 1016, we said:

"This court has often held that 'conveyances made to members of the household and near relatives of any embarrassed debtor are looked upon with suspicion and scrutinized with care, and when they are voluntary, they are prima facie fraudulent, and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors' " (citing cases).

Concerning the consideration for these conveyances, Edmondson testified as follows:

"I had to raise some money, and had to do it quick, and I made her (his wife) the proposition that if she could raise the money, I would sell her those lots for \$1,000; she to assume the \$200. She assumed the \$200 mortgage and paid me \$1,000 in cash."

He was asked what he did with the money received from his wife, and stated that he—

"paid a debt he owed an insurance company and finished up his daughter's education generally, that is, as far as she went."

Mrs. Edmondson testified concerning this immediate transaction, on her direct examination, as follows:

"It was my understanding that if I secured the loan I would buy the property. I got the check in February. I got the deed to the property about the time that I got the check. The deed was not made and turned over until I got the check and turned it over to Mr. Edmondson. I borrowed the money on the land willed to me by my aunt. I discussed the value of the property with Mr. Edmondson before buying it, and paid him all that I thought it was worth. I still own the property."

And on cross-examination she says:

"I did not borrow it (the money) for Mr. Edmondson altogether. There were some things that I wanted as well as some things he wanted. I gave him part of it."

She was asked how much she gave him, and replied:

"I don't know, sir; he was my agent, and I gave him what he wanted of it."

It was shown that Mrs. Edmondson borrowed the money from Geo. M. Foreman & Co. through their agent J. G. Thweatt. Edmondson conducted the negotiations for her, and the security for the loan was the land of Mrs. Edmondson. In *Miles v. Monroe*, 96 Ark. 531, 132 S. W. 643, we said:

"A voluntary transfer of property by one in debt is presumptively fraudulent as to creditors, * * * and if the debtor is at the time of such gift insolvent, or if the gift is of such an amount or made under such circumstances as that it will necessarily hinder, delay, or defraud the existing creditors of such donor, then such voluntary transfer becomes conclusively fraudulent * * * as to such existing creditors. But if the donor owes no debts at the time of such gift, or [if such gift is] of such small amount in comparison with his assets that he retains property amply sufficient to pay such antecedent debts, then the gift will be perfectly valid."

[1] Now Edmondson's own testimony shows that the conveyance to his wife left him without any property that was subject to execution for his debts. It also showed that he had other debts besides the one sued on. So much, therefore, of the consideration for the conveyance as was retained by Mrs. Edmondson and not paid directly to her husband was but tantamount to a gift by him of that sum to her, and rendered the conveyances voluntary and fraudulent and void as to creditors. In *Waters v. Merit Pants Co.*, 76 Ark. 254, 88 S. W. 879, speaking of a conveyance from an insolvent husband to his wife, we said:

"But such transactions between husband and wife are viewed by the courts with suspicion, and the perfect good faith of the transaction must be established by proof."

This language was also quoted in the recent case of *Scott v. McCraw, Perkins & Webber Co.*, 119 Ark. 492, 497, 179 S. W. 329.

Now Edmondson being insolvent, and, after this conveyance, having no property subject to the debt of the appellant, could not permit his wife to retain a part of the consideration that his creditors would be justly entitled to. He could not make generous gifts to his wife and let his creditors go unpaid. While the testimony of Edmondson

himself shows that he received all the purchase money, the testimony of his wife shows that she did not turn over all the money to him, but retained a part of it for her own use.

[2, 3] The testimony shows that the property was worth at least the amount named as the consideration in the deeds. Indeed there was testimony that would have warranted a finding that it was worth \$1,700. Therefore whatever amount of the \$1,000 that Mrs. Edmondson kept out for herself was, as we have stated, a gift to her, and the conveyances therefore to the extent of the amount of the consideration retained by Mrs. Edmondson were but voluntary transfers on Edmondson's part, and they were presumptively fraudulent to that extent. These facts being established, it devolved upon the appellees to show the good faith of the transaction, which they have not done. It devolved upon them to show how much Mrs. Edmondson retained and how much she gave to her husband. Their testimony is conflicting. They have failed, therefore, to overcome the presumption of fraud and to show that good faith that the law exacts under such circumstances.

The issues presented by the record are principally issues of fact, and it could serve no useful purpose to set out and discuss further in detail the evidence. The above facts, as disclosed by the testimony of the parties to the conveyances, are sufficient to show that the finding of the chancellor is clearly against the preponderance of the evidence.

The judgment is therefore reversed, and the cause is remanded, with directions to set aside these conveyances and to subject the property to the payment of the appellant's judgment.

GORDON v. STATE. (No. 116.)

(Supreme Court of Arkansas. July 3, 1916.)

1. ROBBERY — 24(3)—EVIDENCE—SUFFICIENCY—IDENTITY OF ACCUSED.

In trial for assault with intent to rob, evidence by the assaulted party that while he was driving home, about 11 o'clock at night, accused climbed on the back of his wagon and pulled him back, turning over the seat, and snatched out of his pocket a pocketbook containing money, and that he looked accused square in the face and recognized him in moonlight, although combated by evidence of accused that the assaulted party was under the influence of liquor, was sufficient to support verdict based on identification of accused.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 34; Dec. Dig. — 24(3).]

2. ROBBERY — 3—"MALICE AFORETHOUGHT."

As used in the statute regarding assault with intent to rob, making malice aforethought an element of the crime, "malice aforethought" is the voluntary and intentional doing of an unlawful act, with the purpose, means, and ability to accomplish the reasonable and probable consequence of it, done in a manner showing a heart regardless of social duty and fatally bent on mischief, by one of sound mind and discretion, the evidence of which is inferred from acts

committed or words spoken. (Quoting from Words and Phrases.)

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 3; Dec. Dig. ¶3.]

3. ROBBERY ¶24(6)—FORCE—EVIDENCE.

Evidence held to show the exercise of sufficient force to support, not only the charge of assault to rob, but a charge of robbery.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32, 36; Dec. Dig. ¶24(6).]

4. ROBBERY ¶6—FORCE.

To constitute the offense of robbery, the law does not require that one be beaten up before he submits. It is sufficient that he yields because of fear of the robber, and no one is required to resist to the uttermost.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 6; Dec. Dig. ¶6.]

Appeal from Circuit Court, Prairie County; Thos. C. Trimble, Judge.

John Gordon was convicted of assault with intent to rob, and appeals. Affirmed.

J. F. Wills, of Argenta, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was indicted and convicted upon a charge of assault with intent to rob, alleged to have been committed upon and against the person of one T. H. Reed. By this appeal he questions the sufficiency of the evidence to support the verdict and the failure of the court to give instructions which in effect told the jury that the crime could not be committed without the use of force or intimidation, and that unless force or intimidation was used in the attempt to commit the crime a conviction could not be had. The court, however, read the statute defining the crimes of assault with intent to rob and of robbery, and, in addition, told the jury that, while appellant was not indicted for the crime of robbery, yet force was an essential ingredient of the crime with which he was charged, and that a conviction could not be had unless the proof showed that appellant had committed an assault on Reed with "the felonious intent then and there him, the said T. H. Reed, to forcibly and feloniously rob," and that "there must be a felonious intent to rob, and it must be done by force before you can convict the party as charged in the indictment."

[1] On the question of the sufficiency of the evidence it may be said that Reed testified that he had lived two miles northeast of Hazen for 44 years; that he had known the appellant ever since he was a little boy, and had seen him often and knew him well; that in November, 1915, he went to Hazen to sell some cotton; that he sold the cotton about sundown for \$10.50; that he remained in town until about 10 o'clock that night, when he stopped in a restaurant, where he heard some music and stayed about 15 or 20 minutes; that appellant and another negro named Daniels were there, and that he gave Daniels some money and asked him to get

him some whisky, but that Daniels later returned the money, saying that he had been unable to procure any; that he started home about 10:30 at night, and as he was driving along the road his team became frightened, and as he checked it and looked back he saw some one climbing in the wagon; that appellant came up behind him and ran his right hand in his right pocket, and appellant then drew him back, when the seat turned over, and that appellant then went in his other pocket and snatched out a pocketbook containing about \$8, and that he lost his cap in the scuffle; that the moon was shining, and as appellant turned the seat over he looked squarely in his face and recognized him. He testified that he tried to keep appellant from getting his pocketbook, and that "he jerked his hand out of my pocket and jerked me backwards," but that appellant never succeeded in getting his pocketbook until he fell, at which time he placed his hand in his pocket and pulled out the pocketbook.

The evidence on the part of appellant was to the effect that Reed was drinking and was under the influence of liquor; that he stopped in a colored restaurant, where he heard some musicians playing some waltz music, and that he proceeded to dance with appellant, who is a colored man, and that he gave another colored man money with which to buy whisky, but he was unable to procure it. Appellant argues that Reed's condition was such, and the circumstances under which the robbery was committed were such, that Reed could not have identified appellant. Reed testified, however, that he did identify appellant, and the jury has resolved the conflicts in the evidence against appellant.

[2] It is further contended that the statute under which appellant was indicted contemplates a malicious striking or beating of the person with the intent to rob him, and it is argued that as "there is not one scintilla of evidence in this record to indicate, either expressly or impliedly, that the party had the slightest ill feeling or was in any manner angry towards Reed at any time," the jury was not warranted in finding that the act was committed with "malice aforethought." The phrase "malice aforethought" has been many times defined, and a number of these definitions are found under that title in Words and Phrases. Among the definitions there found is the following one:

"The phrase 'malice aforethought' was properly defined as 'the voluntary and intentional doing of an unlawful act, with the purpose, means, and ability to accomplish the reasonable and probable consequence of it, done in a manner showing a heart regardless of social duty and fatally bent on mischief, by one of sound mind and discretion, the evidence of which is inferred from acts committed or words spoken.' Barr v. State, 120 S. W. 422, 56 Tex. Cr. R. 372."

We think this phrase, as employed in our statute, has the meaning given it by the Texas court. This is not a case like that of *Roult v. State*, 61 Ark. 594, 34 S. W. 262, in which case the crime charged was committed by snatching money from another's hand, and where it was held that that action did not constitute the crime of robbery. In the case cited, however, it was said:

"Robbery, as defined by the text-books and the previous decisions of this court, is a felonious and forcible taking of the property of another from his person or in his presence, against his will, by violence, or putting him in fear. And this violence must precede or accompany the taking of the property. *Clary v. State*, 33 Ark. 561; 1 Wharton's Crim. Law, § 846. The taking must be done through force or fear. 'If force is relied on in proof of the charge, it must be the force by which another is deprived of, and the offender gains, possession. If putting in fear is relied on, it must be the fear under duress of which the possession of the property is parted with.' * * * The fear of physical ill must come before the relinquishment of the property to the thief, and not after; else, the offense is not robbery."

[3] We think the proof shows the exercise of sufficient force, not only to support the charge of assault to rob, but that it is sufficient to support the charge of robbery.

[4] The law does not require that one be beaten up before he submits to the robbery to constitute the offense. It is sufficient if he yields because of this fear. Nor is one required to resist to the uttermost. The crime is committed if one exerts sufficient force to overcome the resistance encountered where the property is not taken surreptitiously. When there is manifested a present purpose to take from the person of another his property, not clandestinely, but openly, and by means of the exercise of such force as may be necessary to overcome any resistance offered, the crime of assault to rob is committed. This is not a case where the property was snatched from one's hand, or obtained by artifice or trick, but one where there was the actual exercise of sufficient physical violence to overcome the resistance offered, and we must hold the evidence sufficient to sustain the conviction, and the judgment of the court below will therefore be affirmed.

BREINING v. LIPPINCOTT. (No. 105.)

(Supreme Court of Arkansas. July 3, 1916.)

LIMITATION OF ACTIONS §39(1)—SEDUCTION OF DAUGHTER—CRIMINAL CONVERSATION.

An action by mother for debauchery of her daughter is not barred by Kirby's Dig. § 5065, limiting to one year after accrual of the cause of action the time for bringing action for "criminal conversation," since the words "criminal conversation" have a well-defined meaning, and do not include such action, but is governed by the express provision of section 5074 that all other actions not included in the foregoing provisions shall be commenced within five years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 190; Dec. Dig. §39(1).]

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Action by Mrs. G. W. Breining against J. W. Lippincott. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

Appellant instituted this suit January 25, 1915, against the appellee, to recover damages for the alleged debauchery by him of appellant's daughter. Among other things, appellant alleged that she was a widow; that she had a daughter who was of the age of 17, who was employed by the appellee to work for him in connection with his business in operating picture shows; that appellee took advantage of his position as her employer and of her youth and inexperience, and "seduced her by threats, force, flattery, and promises of money to have sexual intercourse with him," and that he did have sexual intercourse with her on or about the 1st day of April, 1913, and as a result of such intercourse there was the birth of a child; that such acts of the appellee caused great and untold humiliation to the appellant, and deprived her of the services, companionship, and society of her daughter, and caused her to expend the sum of \$200 for medical services, drug bills, and nurse hire in connection with the birth of the child. Other elements of damages are also set forth in the complaint. She alleged that the acts of appellee were wantonly, willfully, and maliciously done. She prayed for compensatory damages in the sum of \$50,000, and punitive damages in the sum of \$25,000. Appellee answered, denying the allegations of the complaint, and setting up, as part of his answer, the one-year statute of limitations. The court treated the plea of the statute of limitations as a special demurrer to the complaint, and sustained it, finding that the complaint on its face shows "that this action was not brought within one year after the cause of action accrued." The court thereupon entered judgment in favor of the appellee, dismissing appellant's complaint, and this appeal followed.

Bradshaw, Rhoton & Helm and Gardner K. Oliphant, all of Little Rock, for appellant. Jno. D. Shackleford and Gus Fulk, both of Little Rock, for appellee.

WOOD, J. (after stating the facts as above). In 1862 this court, in *Patterson v. Thompson*, 24 Ark. 55, held that the right of a father to maintain an action for the seduction of his daughter was barred in one year from the time the cause of action accrued. The statute of limitations under which that case arose and was decided was as follows:

"The following actions shall be commenced within one year after the cause of action shall accrue, and not after: First, all special actions on the case, for criminal conversation, assault and battery, and false imprisonment; second, all actions for words spoken, slandering the character of another; third, all words spoken,

whereby special damages are sustained." Gould's Digest, c. 106, § 11.

The effect of the holding in *Patterson v. Thompson*, supra, is that an action for seduction was a special action on the case, under the one-year statute, and in the same class with actions for criminal conversation, assault, and battery, false imprisonment, and the other actions named in the section. The court did not hold, and it was not necessary to the conclusion there reached to hold that seduction and criminal conversation were the same, and that an action for seduction would be the same as an action for criminal conversation. The court construed the words "all special actions on the case" to include other special actions on the case besides those specifically enumerated, and decided that seduction and criminal conversation were in the same class so far as the one-year statute of limitations was concerned. But in 1868 the Code of Civil Practice was adopted, which abolished the forms of all actions, and provided that there should be but one form of action, which shall be called a civil action. After this the digesters, acting under the authority of the statute "to omit redundant and tautological words and to condense the law into as concise and comprehensive a form as might be consistent with a full and clear expression of the will of the Legislature," omitted the words "all special actions on the case." So that the statute now reads as set forth in section 5065 of Kirby's Digest, as follows:

"The following actions shall be commenced within one year after the cause of action shall accrue * * *: First, all actions for criminal conversation, assault and battery and false imprisonment. Second, all actions for words spoken, slandering the character of another. Third, all words spoken whereby special damages are sustained."

This court in *Emrich v. Little Rock Trac. & Elec. Co.*, 71 Ark. 71, 70 S. W. 1035, shows that the construction of the digesters, in omitting these words from the statute, had been approved, inferentially at least, by several decisions of this court, citing them. But, even if these words had been retained, as held in *Emrich v. Little Rock Trac. & Elec. Co.*, supra:

"The meaning of the clause would then be the same as if the language used had been that: 'The following actions shall be barred in one year after they accrue: First, all special actions on the case for criminal conversation, all actions for assault and battery and for false imprisonment.'"

The court in *Emrich v. Little Rock Trac. & Elec. Co.*, supra, thus expressly overruled the holding in *Patterson v. Thompson*, supra, that the one-year statute of limitations applies to other special actions on the case than those for criminal conversation, etc., expressly named therein. This court has approved the construction given the statute in *Emrich v. Little Rock Trac. & Elec. Co.*, supra, in *St. L., I. M. & S. Ry. Co. v. Mynott*, 83 Ark. 9, 102 S. W. 380; *St. L., I. M. & S.*

Ry. Co. v. Robertson, 103 Ark. 366, 146 S. W. 482. It follows that the one-year statute, as it has been construed by this court, is applicable only to those actions that are specifically enumerated therein. Actions for criminal conversation therefore are barred within one year. Is the present action one for criminal conversation? Since the Legislature has specifically designated that an action for criminal conversation, assault and battery, etc., shall be brought within one year and has also expressly provided that all actions not included in the foregoing provisions shall be commenced within five years (Kirby's Digest, § 5074), it is not within the province of the court to include within the term "criminal conversation" actions "of a like nature." The statute is plain, and the intent of the Legislature must be gathered from the words used, and where the words used are unambiguous, courts cannot add to or take from them their obvious meaning. The Legislature used the specific term, "criminal conversation," which had a well-defined meaning. In *Gill v. Railroad Company (C. C.)* 160 Fed. 260, 263, it is said:

"One of the well-recognized rules of construction of statutes is that we are to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute, and another is that it is not to be presumed that the statute was intended to displace the former law, whether it be statute or common law, further than was first necessary to give it place and operation."

Mr. Sutherland says:

"The best construction of a statute is to construe it as near to the rule and reason of the common law as may be, and by the course which that observes in other cases." Sutherland on Stat. Const. § 290.

Says Mr. Blackstone:

"Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts, yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis*, against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased and diminished by circumstances: as, the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction, or otherwise, of the wife, founded on her previous behavior and character; and the husband's obligation, by settlement or otherwise, to provide for those children, which he cannot but suspect to be spurious." 2 Lewis' Blackstone's Com. 139, 140.

Now the relation of husband and wife is entirely different from that of master and servant, or parent and child. In *Woodward v. Walton*, 2 Bosanquet & Puller, 476, Lord Mansfield stated that he could not distinguish between an action by a father for the debauchery of his daughter and an action by a husband for criminal conversation. This language was used in determining whether the form of action by a father for the debauchery of his daughter should have been one upon the case instead of trespass *vi et armis*, and the opinion of Chief Justice Mans-

field that the form of action by a father for the debauchery of his daughter was the same as that of a husband for criminal conversation with his wife is far from a holding to the effect that the causes of action were the same. On the contrary, the opinion shows that the causes of action were different. Our Code as already stated has abolished the different forms of action. Under our statute of civil procedure there is but one form of action. But a form of action and a cause of action are entirely different things. The Legislature has not undertaken to, and could not, make all causes of civil action the same. In prescribing the limitation of one year for the designated actions the Legislature had reference to causes of action and not to the forms of action. A cause of action by a parent for a debauchery of a daughter by adultery or fornication is altogether different from a cause of action by a husband for criminal conversation with his wife. The causes of action grow out of entirely different relations, and are not in any sense the same. In *Prettyman v. Williamson*, 1 Pennewill (Del.) 224, 236, 39 Atl. 731, 732, it is said:

"Criminal conversation, as above stated, is an action for damages caused by adultery with the wife, and the husband's injury by the wrong consists in his mental suffering from the dishonor of the marriage bed, and the loss of the affection of his wife, and the comfort of her society, as well as the pecuniary loss of her services. * * * According to the modern doctrine and the later decisions, the action is based mainly on what is termed the 'loss of the consortium'—that is, the loss of the conjugal society, affection, and assistance of the wife—and it is not essential to the maintenance of the action that there should be any pecuniary loss whatever."

In *Simpson v. Grayson*, 54 Ark. 406, 16 S. W. 4, 26 Am. St. Rep. 52, Chief Justice Cockrill, speaking for the court, said:

"The common law regarded the father's action for the seduction of his daughter as an action of trespass for assaulting a servant, whereby he lost her services. It was based upon the relation of master and servant, and not upon that of parent and child; and the measure of damages was such only as a master would recover for a disabling physical injury to his servant. * * * The theory of an injury to the master is pertinaciously retained as the essential basis of the father's action, * * * used as a peg to hang a substantial award of damages upon as compensation, not to the master, but to the head of the family. It is a logical sequence from that state of the law that proof of the mere nominal relation of master and servant should be sufficient to give the parent a footing in court to recover damages commensurate with his injury. It is accordingly established, in this country at least, that the father may maintain his action for the seduction of his minor daughter, although she is not a member of his household, but is in the actual employment of another, enjoying the fruits of her own labor with her father's consent, if he has not relinquished past the power of recall his right to control her services."

The cause of action for criminal conversation is based upon the relation of husband and wife, and not that of master and servant or of parent and child, and the measure of damages for the two causes of action would be entirely different. Inasmuch as the

Legislature prescribed in specific terms that the one-year statute of limitations should apply to actions for criminal conversation, and did not deem it wise or expedient to apply the same bar to an action by a parent for the debauchery of a child, the court should not place such limitation upon the latter cause of action by construction. *Bennett v. Worthington*, 24 Ark. 487-494. This was purely a legislative function. The Legislature has used terms having well-defined meanings, and it must be presumed that they understood the distinction between the causes of action enumerated and others not mentioned.

Furthermore, the rule of law which only permits a parent to recover damages for the debauchery of a minor daughter because of his relation as master, and not as that of parent, is, as stated by Chief Justice Cockrill in *Simpson v. Grayson*, supra, "but little more than a fiction," and, being such, it should be and is no longer recognized by the best of modern judicial thought as the essential basis of a parent's action for the debauchery of a minor child. The real and substantial basis for the recovery should be the personal injury which the parent sustains in his capacity as parent and not as master. The fiction really grew up out of the emphasis and importance placed upon forms of action at the common law and the necessary technicalities indulged in by the courts in an effort to square the forms of actions to the principles of natural right and justice. But under the reformed procedure there is no longer any reason for preserving by judicial construction this fiction, for under the liberal rules of such procedure all fictions growing out of the mere forms of pleadings have been abolished. It was held in *Anthony v. Norton*, 60 Kan. 341, 56 Pac. 529, 44 L. R. A. 757, 72 Am. St. Rep. 360:

"The common-law rule in actions by a parent for damages for the seduction of his daughter, which requires him to sue in the capacity of a master, for the loss of her services as a servant, although in fact permitting a recovery by him in his parental relation, was the rule of a legal fiction which no longer obtains, under the reformed procedure, because of the abolition by the Code of fictions in pleadings, and its requirement to state the actual facts in controversy."

The opinion is an able and exhaustive discussion of the reasons why the legal fiction should no longer obtain under the reformed procedure, and we are in full accord with all that is therein expressed. We approve the language of the Chief Justice rendering the opinion in that case, in which he said:

"The rule which requires a parent suing for the seduction of a daughter to plead loss of her services as his servant, but which obligates him to only nominal proof of the cause of the action stated, is an empty and senseless legal fiction, a pretense and sham, which does discredit to the law, and with which it were highly desirable to dispense."

We now hold that the adoption of the Code of Civil Practice did dispense with it. The digesters correctly omitted the words "special" and "on the case." The action is one

sounding in tort for personal injuries to which the one-year statute of limitations does not apply. For other cases holding that the right of action for debauchery and seduction is one in tort for personal injuries, see *Hollday v. Parker*, 23 Hun (N. Y.) 71; *Hutcherson v. Durden*, 113 Ga. 987, 39 S. E. 495, 54 L. R. A. 811; *May v. Wilson*, 164 Mich. 26, 128 N. W. 1084, Ann. Cas. 1912B, 654, and case note.

The judgment is therefore reversed, and the cause remanded, with directions to overrule appellee's demurrer, and for further proceedings according to law and not inconsistent with this opinion.

STATE ex rel. McDANIEL, Treasurer, v. GAUGHAN. (No. 97.)

(Supreme Court of Arkansas. June 26, 1916.)

1. WILLS §439—CONSTRUCTION—INTENTION OF TESTATOR.

The purpose of all rules for the construction of wills is to ascertain and effectuate the intention of testator, but they are ordinarily only resorted to where there are ambiguous, inconsistent, or repugnant clauses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. §439.]

2. WILLS §600(1)—ESTATE DEVISED—LIFE ESTATE—ENLARGEMENT BY POWER OF DISPOSITION.

Where testator's will gave his wife a life estate with power of disposition which she must exercise, if at all, in her lifetime, the wife's estate in the land was not enlarged into a fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1335, 1339; Dec. Dig. §600(1).]

3. WILLS §481—TIME OF TAKING EFFECT.

A will is effective from testator's death, so that one cannot dispose of property by will during his natural life.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1005-1007; Dec. Dig. §481.]

4. WILLS §608(1)—ESTATE DEVISED—RULE IN SHELLEY'S CASE — "RESPECTIVELY" — "DISTRIBUTIVELY."

Where testator's will provided that all the property of which his wife might not dispose during her life should be divided equally in two parts, one part to go to his heirs of the first stirpes under the laws of the state, and the other part to go to the heirs of the wife of the first stirpes, a codicil providing that in case his wife survived him and died any portion of the property of his estate devised her undisposed of should go to "our heirs at law respectively," the only effect of the change in the language employed in the codicil was to enlarge the class of heirs who might inherit the two parts of the estate, so that the devise created an estate in fee simple in testator's wife in an undivided half of the realty remaining undisposed of at her death under the rule in Shelley's Case; "respectively" meaning as relating to each, and "distributively" being synonymous.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1372; Dec. Dig. §608(1).]

For other definitions, see Words and Phrases, First and Second Series, Distribute; Respectively.]

5. WILLS §476—CONSTRUCTION—CODICIL.

A codicil must be construed in connection with the will and its language harmonized therewith where there is no repugnancy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 997; Dec. Dig. §476.]

Appeal from Circuit Court, Ouachita County; C. W. Smith, Judge.

Proceedings to collect an inheritance tax by the State, on the relation of R. G. McDaniel, State Treasurer, against T. J. Gaughan, as executor of the estate of Martha Bross, deceased. From a judgment for the State only for an amount for which the executor admitted his liability, the State appeals. Cause remanded, with directions to assess the tax in accordance with the opinion.

Wallace Davis, Atty. Gen., Hamilton Moses, Asst. Atty. Gen., A. N. Meek, of Camden, and Wingo & Meek, of Stuttgart, for appellant. Gaughan & Sifford, of Camden, for appellee.

SMITH, J. This proceeding was brought by the state against the executor of the estate of Mrs. Martha Bross, for the purpose of collecting the inheritance tax alleged to be due on said estate. The executor admits his liability for the tax on all personality passing under the will, but denies liability for any tax on the realty on the ground that, under the will of William Bross, the husband of Mrs. Bross, under which she claimed title to the estate in question, she became vested with only a life estate in such realty, and that therefore her will, in so far as it attempted to convey same, was inoperative, and that such property, upon her death, descended in remainder according to the provisions of the William Bross will, and not by devise or descent from Mrs. Bross. Mrs. Bross died testate August 1, 1915, and by her will undertook to devise one half of the estate to her heirs, and the other half to the heirs of her husband.

The state contends: (1) That, under the will of William Bross, his widow became vested with a fee-simple estate in the devised property; (2) that, even if the William Bross will did not have the effect of vesting a fee simple in his widow, still it contained a power of disposition broad enough to permit her to dispose of the estate by will; and (3) that, under the William Bross will, his widow took a fee-simple estate in at least one-half of the portion remaining undisposed of at her death by virtue of the operation of the rule in Shelley's Case.

William Bross died, and his will was probated before the passage of the inheritance tax law. Mrs. Bross died, and her will was probated subsequent to the passage of that law.

The trial court gave judgment only for the amount of the tax accruing on the personality passing under Mrs. Bross' will, and the state has appealed.

The provisions of the William Bross will and of the codicil thereto under which these questions arise are as follows:

"First. I will and bequeath and devise all my property, real and personal, moneys, rights and credits, which I now possess or may die seized and possessed of, and entitled to, in law or equi-

ty, to my beloved wife, Martha Bross, to have and to hold, use and enjoy, for and during her natural life. Provided, nevertheless, that her ownership and estate in the same is limited to a life only, as to such as may be undisposed of by her at the date of her death, and that as to any such property which she may think proper and choose to dispose of in any manner during her natural life, the same I do hereby will and bequeath and devise to her in fee simple and absolutely.

"That my said beloved wife shall have the power and authority to sell and in any other way or manner dispose of as she may choose, during her natural life, any and all of said property, and when so sold and disposed of she is authorized to make deeds of conveyance, bills of sale and delivery, for and of the same to the grantee or grantees, purchaser or purchasers, and donee or donees of the same, as the case may be, conveying and passing to such title in fee simple and absolute; and as to all such property so disposed of by her, the same is hereby willed, bequeathed and devised to her absolutely and in fee simple.

"That all of my said property which my said wife may not dispose of as aforesaid, and all which may be undisposed of at her death, shall be divided equally in two parts. One equal part to go to my heirs of the first stirpes under the laws of this state, and the other equal part to go to the heirs of my said beloved wife, of the first stirpes.

"That none of the heirs herein referred to shall in any wise interfere with my said beloved wife, either acting as executrix or individually, in the management, control or disposal of any or all of said property under any pretense whatever."

This will was dated April 2, 1877, and attached thereto was the following codicil of date June 29, 1888:

"Being still of sound mind and disposing memory, I make this, a codicil to the foregoing will, dated 2d of April, 1877; that is to say, in the case of my death it is my wish that my beloved wife, Martha Bross, the executrix named in the foregoing will, be permitted to administer on my estate without being required to give bond or other obligation, and the court having jurisdiction is asked to grant the necessary letters testamentary without her having given bond or other obligation, and in case my beloved wife should survive me and afterwards die, any portion of the property of my estate devised to her, undisposed of, then that portion is to go equally to our heirs at law, respectively."

It is first contended that Mrs. Bross was seised in fee simple under the will of her husband of the lands there devised her. Attorneys for appellant concede, in the very excellent brief which they have filed, that, when a life estate is expressly devised and the life tenant is given the power of disposition or appointment over the fee, this power does not enlarge the life estate into a fee. This is the effect of our decision in the case of *Archer v. Palmer*, 112 Ark. 527, 167 S. W. 99. It is said, however, this will presents an exception to the rule because a fair construction of its provisions makes it appear that the application of the rule would defeat the intention of the testator; it being insisted that its entire language manifests the intention of the testator for his wife to take a fee, although the phraseology employed literally creates only a life estate with the power of appointment attached, and that it should be con-

strued to enlarge the apparent life estate into a fee.

[1] The purpose of all rules for the construction of wills is to ascertain and effectuate the intention of the testator; but these rules are ordinarily only resorted to where there are ambiguous, inconsistent, or repugnant clauses.

[2] We think the provisions of this will in this respect are not inconsistent or ambiguous. Here the testator gave his wife a life estate with the power of disposition which she might exercise during her lifetime, and, while Mrs. Bross was given the power to make any disposition she pleased of the land, the right was one which she was required to exercise, if it was exercised at all, during her lifetime, and therefore her estate in the land was not enlarged.

[3] The second contention is that the will conferred upon Mrs. Bross the power of disposition under her will, and, inasmuch as she disposed of it by her will, the property thereby passing is liable for the inheritance tax. We have just expressed, however, our dissent from this view. Coupled with the grant of the power of disposition is the limitation that it shall be exercised "during her natural life." One cannot dispose of property by will during natural life, for the will is effective from death, and the disposition is not effectuated until the testator is dead.

[4] It is finally insisted by counsel for the state that the devise of William Bross created an estate in fee simple in Mrs. Bross in an undivided one-half of the realty remaining undisposed of at her death by virtue of the operation of the rule in *Shelley's Case*; and we agree with counsel in this respect. The body of the will contains the following provision:

"That all my property which my said wife may not dispose of as aforesaid, and all which may be undisposed of at her death, shall be divided equally in two parts. One part to go to my heirs of the first stirpes under the laws of the State and the other equal part to go to the heirs of my said beloved wife of the first stirpes."

The codicil to the will, among other things, provides:

"And in case my beloved wife should survive me and afterwards die, any portion of the property of my estate devised to her undisposed of, then that portion is to go equally to our heirs at law respectively."

Appellee insists the rule in *Shelley's Case* does not have application because under the codicil the undisposed of portion of the estate "is to go equally to our heirs at law respectively." Mr. Bross and his wife had no common heirs. His heirs were his brothers and sisters and descendants of brothers and sisters, and the same thing was true of Mrs. Bross. Appellee argues that the language quoted does not mean that the estate is to be divided into two equal parts, one of which is to go to the heirs of the testator, and the other to the heirs of his wife; but that the language means that the estate as

a whole is to go to the heirs of William Bross and Martha Bross, and therefore the rule does not apply because the estate granted to Mrs. Bross is not granted to her heirs; in other words, the estate granted to Mrs. Bross for life was not granted in remainder to her heirs, but to his heirs and her heirs equally. We think, however, this is not the proper construction of the language employed.

The devise is not to his heirs and her heirs equally, but "is to go equally to our heirs at law respectively." And we attach some, though not controlling, importance to the use of the word "respectively." Webster's New International Dictionary defines the word "respectively" as follows:

"As relating to each; in particular; as each belongs to each; each to each; as, let each man respectively perform his duty."

And gives the word "distributively" as its synonym; and in defining the word "distributively" the distinction is drawn between the synonyms of that word, and it is there pointed out that "respectively distributes by particularizing."

We agree with appellant in his interpretation of the meaning of this codicil. It did not change the provision of the will which divided the property into two parts. The will contained a limitation both as to the testator's heirs and those of his wife "of the first stirpes under the laws of the state." We have been unable to find a definition of the term "first stirpes"; but evidently it is a term of restriction, and is narrower than that employed in the codicil, the language of which is "heirs at law." We think the only purpose and effect of this change in the language employed is to enlarge the class of heirs who might inherit. If it does this, the rule applies. *Maynard v. Henderson*, 117 Ark. 24, 173 S. W. 831.

[5] It is our duty to construe the codicil in connection with the will and harmonize its language with the will, where there is no repugnancy, and when we do so we see no intention on the part of the testator to change the disposition plainly expressed in the will to divide his estate into equal moieties. We agree with appellant, therefore, that the operation of the will as amended by the codicil is to make the following conveyance: An estate to Mrs. Bross for life (with power of appointment annexed); upon her death one moiety of the undisposed of estate to go in remainder to her heirs, the other moiety to pass in remainder to the heirs of William Bross. And as, therefore, all the requisites for the operation of this rule are present, we must hold that it applies.

The will of Mrs. Bross undertakes to dispose of the entire estate, its manifest purpose being to dispose of the estate in accordance with the intentions of her husband;

that is, that her heirs should take one half of the property and those of her husband the other half. However, as the husband's heirs take the title under his will, that interest is not subject to the tax; but, as the other half passes through Mrs. Bross and under her will, it is subject to the tax, and it is therefore the duty of her executor to pay the tax on this half interest, and charge the same against the share of her heirs only, and the cause will be remanded, with directions to assess the tax accordingly.

ST. LOUIS, I. M. & S. R. CO. v. STEWART. (No. 48.)

(Supreme Court of Arkansas. June 12, 1916.)

1. MASTER AND SERVANT §289(29)—NEGLIGENCE OF SERVANT—JURY QUESTION.

In an action for personal injuries, evidence held sufficient to warrant submission to jury of question whether plaintiff, an engineer, was guilty of contributory negligence in not having his engine under control, and whether he exceeded the speed limit fixed by railroad rules.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1121; Dec. Dig. § 289(29).]

2. MASTER AND SERVANT §281(9)—FEDERAL EMPLOYERS' LIABILITY ACT—NEGLIGENCE OF SERVANT—RULES OF RAILROAD—MODIFICATION OF SUCH RULES.

In an action for personal injuries, evidence of the acquiescence of the yardmaster in the habitual violation of a rule, requiring trains to run through yards under control, held sufficient to warrant a finding that such rule had been modified or abrogated, so that engineer's violation thereof would not be contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 993, 996; Dec. Dig. § 281(9).]

3. MASTER AND SERVANT §278(19)—FEDERAL EMPLOYERS' LIABILITY ACT—NEGLIGENCE OF SERVANT—RULES OF RAILROAD—MODIFICATION OF SUCH RULES.

Evidence that a railroad rule, requiring trains not to exceed 10 miles per hour through yards, had been violated by employes held not sufficient to show abrogation or modification of rules, since such rules could be abrogated or modified only by acquiescence in the habitual violation of such rules, of which there was no evidence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 969; Dec. Dig. § 278(19).]

4. NEGLIGENCE §101—COMPARATIVE NEGLIGENCE—FEDERAL EMPLOYERS' LIABILITY ACT—NEGLIGENCE OF SERVANT—VIOLATION OF RULES.

The violation of rules limiting the speed of trains is negligence per se, which bars a recovery by an engineer injured as a consequence thereof, except as to such compensation as is allowed by the federal statute for the proportion attributable to the negligence of the railroad company.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. § 101; Damages, Cent. Dig. § 371.]

5. TRIAL §253(9)—FEDERAL EMPLOYERS' LIABILITY ACT—INSTRUCTIONS IGNORING ISSUES.

Instruction, in an action by a railroad engineer under the federal Employers' Liability Act

(Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), allowing a recovery if the jury found that defendant's yardmaster signaled the engineer to go ahead, *held* erroneous as ignoring the material question whether the engineer was negligent in violating rules as to the speed of his train in the yard where he was injured.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 620; Dec. Dig. ¶253(9).]

6. MASTER AND SERVANT ¶296(13)—FEDERAL EMPLOYERS' LIABILITY ACT—INSTRUCTIONS.

An instruction that plaintiff, an engineer, could not recover under the federal Employers' Liability Act if he violated the rule requiring his train not to exceed 10 miles per hour through yard limits *held* improperly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1190; Dec. Dig. ¶296(13).]

7. MASTER AND SERVANT ¶296(13)—FEDERAL EMPLOYERS' LIABILITY ACT—INSTRUCTIONS.

In an action for personal injuries under the federal Employers' Liability Act, an instruction, properly charging the jury that plaintiff's violation of railroad rules was negligence, and requiring the jury to determine whether the rules were in force or had been abrogated or modified by custom, *held* improperly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1190; Dec. Dig. ¶296(13).]

8. MASTER AND SERVANT ¶293(20)—FEDERAL EMPLOYERS' LIABILITY ACT—INSTRUCTIONS.

In an action for personal injuries under the federal Employers' Liability Act, an instruction, properly stating the law as to abrogation of railroad rules by custom, *held* improper as misleading the jury by not informing them as to what extent violations would constitute abrogation of such rules.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1158, 1159; Dec. Dig. ¶293(20).]

Appeal from Circuit Court, Lincoln County; A. H. Rowell, Special Judge.

Action by Charles Stewart against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

E. B. Kinsworthy and R. El. Wiley, both of Little Rock, for appellant. Pace, Seawell & Davis, of Little Rock, for appellee.

MCCULLOUGH, C. J. The plaintiff, Charles Stewart, was engaged in the service of the defendant as a locomotive engineer, and received personal injuries while he was running a train through the railroad yards at Little Rock. This is an action against the company to recover compensation for his injuries, which are alleged to have been caused by negligence of other servants of the company. It is conceded that the service being performed by the plaintiff at the time of his injury was connected with interstate traffic so as to bring the case within the operation of the federal Employers' Liability Act. Plaintiff was bringing an extra freight train from Pine Bluff to Little Rock, and as he came through the Little Rock yards, his

fireman discovered a switch engine on the track ahead, and when plaintiff discovered that a collision was impending, he shut off the throttle and put on the emergency brakes and jumped from the engine; and in doing so he fell upon the edge of the track and received serious injuries.

Plaintiff's testimony was that he was coming along at a speed of 8 or 9 miles an hour, and that as he approached a curve of the track the yardmaster came out from the yard office and first looked around the curve, and then turned and gave him the "high-ball" signal, which meant that the track was clear, and that he could proceed expeditiously, and that as the engine started around the curve the fireman discovered the switch engine ahead and called out to him "jump!" which he did, after having, as before stated, shut off the throttle, put on the brakes, and opened the sand. Plaintiff's train was running north, and the switch engine was coming south. Plaintiff's fireman stepped from the engine when it lacked a few feet of striking the switch engine, and was not injured. The engineer on the switch engine and the other operatives also escaped unhurt. The testimony of the plaintiff tends to show that his engine would have come to a stop before it reached the switch engine if the latter had been properly controlled, but that the switch engine was allowed to run on and produce the collision. On the other hand, all the other eyewitnesses testified that the switch engine came to a stop and turned backward and ran about 35 feet before plaintiff's engine struck. The testimony of the plaintiff also tended to show that the yardmaster could have seen the switch engine from the point where he was standing when plaintiff says that the "high-ball" signal was given.

Mr. Brown, the yardmaster, was introduced as a witness, and testified that he did not give the plaintiff any signal at all, but that the plaintiff's engine came along, running a speed of at least 15 miles an hour, and that just before it reached the yard office he heard the switch engine whistle back up the track, and he looked around, and it was in sight and appeared to have come to a stop, and that when he looked toward plaintiff's engine again he saw the plaintiff making the jump. Other testimony adduced by the defendant tends to show that the plaintiff was running his engine at the rate of from 15 to 20 miles an hour when he approached the curve and jumped from the engine.

Certain rules of the company, regulating the handling of trains through the yards, were introduced in evidence, and they are relied on as establishing negligence on the part of the plaintiff in violating those rules. Rule A-12 reads in part as follows:

"Freight trains will not exceed a speed of ten (10) miles per hour between Argenta and south yards limits East Little Rock yard."

Rule A-16 reads as follows:

"Second and inferior class trains and extras must run under control through yard limits at Little Rock, Argenta, East Little Rock, Pine Bluff and McGehee. In case of accident, responsibility rests with the approaching train."

Those rules were in force at the time of the injury, and plaintiff had a copy of the book of rules with him on his engine, and was familiar with them.

It is agreed that running "under control" means to run trains so as to stop within vision, or, in other words, to keep the engine under such control that it can be stopped within vision of any object which may appear ahead on the track. Plaintiff's train was "the approaching train" within the meaning of the rules. It was also conceded that the switch engine belonged to the same class of trains and had equal right of way, that the switch engine was rightfully on the main track at the time of the collision, and that the only limitations upon the right to operate it there were those prescribed by the rules herein mentioned. In order, however, to obviate the force and effect of the rules as written, plaintiff undertook to show that a custom had been built up, whereby the giving of the "high-ball" signal by the yardmaster was construed to be an assurance that the track was clear, and as a direction to hurry on without regard to the rule requiring that the engine be kept under control. There is a sharp conflict in the testimony on this branch of the case. Several witnesses introduced by plaintiff testified as to that custom. In view of the controversy concerning the effect of the testimony, it is well to set out that which appears to be the strongest in favor of the plaintiff. The following extracts are taken from the testimony of witness Smith, who had worked for defendant as a locomotive engineer and showed familiarity with the customs and the operation of trains:

"Q. Now what do you mean by 'under control'? A. Why you would handle your train in a way that you could stop it within the distance that you could see. That is what I consider under control, and what railroads generally consider to be under control. Q. Within the distance of your vision down the track? A. Yes, sir. Q. State whether or not in passing through the yards how one proceeds—do you proceed under control? A. Yes, sir. Q. Now, who has charge of the yards? A. The yardmaster. Q. What power has the yardmaster in the yards? A. Relative to the handling of trains through the yards, he has power to stop you, and hold you any place he wants you, or head you in on any track he sees fit to, or tell you to proceed. Q. Now, then, suppose you are proceeding through the yards, and are approaching a curve, and as you approach the curve the yardmaster gives you what is called a 'high ball'—what does that mean to the engineer? A. That means for him to go ahead, and go through the yards; that he wants to occupy that track, or wants you to get off that track, and through the yards. Q. Whenever he gives you a high ball it is an order to you to hurry through the yards? A. Yes, sir; that the track ahead of you is clear. Q. That is a rule that has obtained wherever you have worked as an engineer, in coming through the yards of the various sys-

tems you have worked for? A. Yes, sir; that is the rule that is practiced. Q. And it means that the track is clear? A. Yes, sir. Q. Now, it is true that switch engines have a right to occupy the main line—that is, as against second and third class trains—but who has a right to put them on there? A. The yardmaster or some one directly under the yardmaster. Q. Then if the yardmaster gives him the high ball, and indicates the track is clear, it is the duty of the yardmaster to know it is clear, isn't it? A. Yes, sir; absolutely."

Cross-examination:

"Q. Mr. Smith, a second and third class freight train passing through the yard limits at East Little Rock, or any other yard for that matter, when it enters the yards, it is the duty of the engineer to pass through that yards with the engine under control, isn't it? A. Yes, sir. Q. That means that he must travel under such speed as to be able to stop within vision. If he goes into the yards, and does not see the yardmaster at all, it is his duty to proceed through the yards with his engine under control? A. Yes, sir. Q. The yardmaster has no right, or no signal given by him would authorize the engineer to proceed with his engine out of control, would it? A. No; I will answer, No, to that question. Q. That would violate the printed rules, wouldn't it? A. Yes, sir; but if he received a signal from that yardmaster—what is commonly called a 'high ball' by the railroad men—that would give him a right to hurry through that yard. That would be the same thing as telling him to hurry through this yard. Q. Do you mean to tell this jury that any kind of a signal would obviate or do away with the printed rules about going through that yard with your engine under control? A. I do. Q. Mr. Smith, suppose a man comes along there with a freight train under control, and should see the yardmaster, and the yardmaster would high-ball him, wouldn't he still have to continue under control? A. No; not absolute control. Of course, he wouldn't go 50 miles an hour through the yards, but he would hurry through and would increase his speed and get through. On a curve like that you would have to proceed slow around that curve if you didn't get a signal—any man with ordinary intelligence, of course, would know that—but when a yardmaster comes out there, and gives you a signal, what does he give you that signal for if he wasn't wanting you to hurry along, because he knows you will proceed under control anyway. Q. He knows you will proceed under control when you get the signal? A. Yes, sir. Q. And even after you get the signal, it is your duty to proceed under control? A. No, sir."

Other witnesses testified to the same effect. Plaintiff testified that he was running under control at the time he received the "high-ball" signal from the yardmaster, and also when the fireman notified him that the switch engine was ahead, and that a collision was imminent. The plaintiff's engine ran only a short distance, after the "high-ball" signal was received, before the fireman discovered the switch engine ahead and gave the alarm.

[1] It is earnestly insisted that, according to the undisputed evidence, plaintiff's injuries resulted solely from his failure to observe the rules of the company promulgated for the use of himself and other engineers for their own protection, and that for that reason a peremptory instruction ought to have been given to the jury to return a verdict in defendant's favor. We are of the opinion that the evidence was sufficient to warrant the submission of certain issues to

the jury, and that the court did not err in refusing to give a peremptory instruction. The switch engine, with which plaintiff's engine collided, was rightfully on the main track, and there is no negligence shown in that regard, nor does it appear that the men in charge of the switch engine were guilty of any negligence which contributed to the plaintiff's injury. There is some conflict whether or not the switch engine was brought to a stop before the collision occurred, but the plaintiff was not injured in the collision itself, but by reason of being compelled, for his own safety, to jump from the engine when he discovered the switch engine on the track, and that the collision was imminent. Even if those in charge of the switch engine were negligent in failing to stop their engine in time to prevent the collision, that negligence did not contribute in any degree to the plaintiff's injury. Therefore the only act of negligence which the testimony tended to establish, if any at all, was the act of Mr. Brown, the yardmaster, in giving a signal to proceed which constituted, according to evidence adduced, an assurance to the plaintiff that the track ahead was clear. Now, with that issue decided in favor of the plaintiff, he was entitled to have the jury determine whether or not he was guilty of negligence in failing to keep his engine under control as he approached the curve. The other issue in the case is whether or not he was exceeding the 10-mile limit of speed at the time.

[2] The rules of the company are unambiguous and call for no construction. It is contended that the testimony adduced by the plaintiff only tends to show the interpretation of those rules by the witnesses, and is not sufficient to show an abrogation of the rules. While it is true that the rules are too plain to admit of any doubt about the proper construction, yet the testimony of the witnesses tends to show that there had been built up a custom in disregard of the rule to the effect that, whenever the yardmaster gave the signal to proceed, which amounted to an assurance that the track was clear ahead, then the engine was run without being kept under control. If this testimony was true, it amounted to an abrogation of the rule to that extent so as to permit an engine to be run otherwise than under control when the proper signal had been given by the yardmaster. This is not merely an interpretation of the rule by the witnesses, but it amounts to substantive proof that the rule had been habitually disregarded to that extent for a sufficient length of time to constitute a modification of the rule. The yardmaster had no authority to make or unmake those rules which had been promulgated by the company for the guidance of all of its servants, but it was his duty to enforce them or to report infraction thereof, and his continued acquiescence in the violation of one of the rules con-

stituted, pro tanto, an abrogation. St. L., I. M. & S. R. Co. v. Caraway, 77 Ark. 405, 91 S. W. 749.

[3] The testimony does not, however, warrant a conclusion that any custom had been built up in disregard of the rule which limited the rate of speed through the yards to 10 miles per hour. The testimony of the plaintiff himself and, possibly, that of another of the witnesses which he introduced, tends to show that the rule had been interpreted to mean that when the "high-ball" signal was given by the yardmaster, the speed could exceed 10 miles per hour, but there was not the slightest evidence that the rule had been habitually violated. An erroneous interpretation of this unambiguous rule by the employees who were in duty bound to obey it would not constitute a modification or abrogation thereof; for it is only acquiescence in habitual violation of such rules that amounts to abrogation. So we think that there was enough testimony to justify a submission to the jury of the question whether the rules had, to the extent indicated, been abrogated, and whether or not the plaintiff was proceeding within the rules as thus modified when he was injured.

[4] The effect of a violation by an employee of the rules prescribed for his own protection is too well settled by decisions of this and other courts to call for citation of authorities. The cases are cited on the briefs of counsel. If the rule was violated by plaintiff, it constituted negligence per se, which will prevent his recovery of damages except such as are allowed by the federal statute for the comparative proportion attributable to the negligence of the company.

The instructions given and refused are too long to admit of their being set out in full in this opinion, but we quote such as are essential to a proper consideration of the case. The court gave instruction No. 1, at the request of plaintiff, which reads as follows:

"1. The jury is instructed that, if you believe from a preponderance of the evidence that plaintiff was engaged as engineer in running an engine and caboose from Pine Bluff to Argenta, Ark., and that while passing through East Little Rock yards of the defendant, on its main track, Yardmaster Brown signaled him to proceed; and, if you find it was plaintiff's duty to obey said signal, and that plaintiff did so, and that Brown had the authority to give it, and, obeying the same, the engine upon which plaintiff was riding, while yet in the East Little Rock yards, collided with the switch engine of the defendant that was occupying said main line, and that plaintiff jumped from said engine before said collision and injured himself; and if you find that the defendant, in permitting said main line to be occupied with a switch engine and giving the plaintiff, through its yardmaster, a signal to proceed, if you find that said signal was given, failed to exercise ordinary care for the reasonable safety of plaintiff, and that its act in permitting said main line to be occupied at said time and place by the switch engine, and in giving the signal, if any, to plaintiff to proceed was negligence and the proximate cause of the injury; and if you find that plaintiff, at the time, was exercising ordinary care for

his own safety, and had not assumed the risk—you will find for the plaintiff, and assess his damages at such a sum as you may find, from the evidence, will be a reasonable compensation for the injuries received, if any; provided, you further find that at the time the plaintiff jumped from the engine he, in good faith and without fault or negligence on his part to cause it, believed that he was in a perilous position, and that he acted as a reasonably prudent person would have done under similar circumstances and conditions for his own safety."

The court also gave, at the request of the defendant, the following instruction:

"(7) The court instructs you that the evidence in this case shows that the defendant company had certain rules regulating the operation of trains and switch engines in the yards in East Little Rock, where plaintiff was injured, and that these rules were known to the plaintiff; that one of these rules gave switch engines switching within the yards in East Little Rock the right to use the main track upon the time of all trains except first-class trains. The evidence further shows that the engine upon which plaintiff was riding, and which he was operating, was not a first-class train, and was subject to the rules giving the switch engine the right to be upon the main line upon the time of the engine being operated by plaintiff. The evidence also shows that there was a rule which required the plaintiff to operate his engine through the yards where he was injured so as to have it under control, so that, if an engine or other obstruction should show upon the track of the main line, he could stop his engine before striking the same. You are instructed that, if you believe from the evidence that the plaintiff was not operating his engine under control at the time of the accident, and was operating it in violation of said rules, then the court tells you, as a matter of law, that the plaintiff himself was negligent; and if you believe that his injury was caused solely on account of his not operating his engine under control, or on account of his not keeping a proper lookout, or on account of his not taking due care in operating the same, then your verdict should be for the defendant, although you may believe that previous to that time he had been high-balled by the parties mentioned in his complaint."

[5] It is insisted that instruction No. 1 is erroneous in omitting all reference to the issue as to whether or not the plaintiff was acting in violation of the rules at the time the collision occurred. We think that contention is well taken. The instruction does, in fact, leave it open for the jury to determine whether or not it was the plaintiff's duty to obey the signal which was given by the yardmaster, but it does not make any reference to the other rules, which require that an engine be kept under control, and that the rate of speed should not exceed 10 miles per hour. Instruction No. 7 is all that the defendant could have desired so far as concerns the rule requiring the engine to be kept under control, but that instruction was in direct conflict with the one given at the instance of the plaintiff. The jury might have found, under the first instruction, that it was plaintiff's duty to obey the signal, and that it meant for him to proceed, and the jury could have found in plaintiff's favor even though they concluded that he had violated the rule in failing to keep the engine under control. If there had been no con-

flict in the testimony concerning the partial abrogation of the rule by the custom said to have been built up with regard to the signal, then the effect of this instruction might have been different, but there was a serious conflict on that, and there was enough testimony to warrant the jury in finding that there was no such custom in existence which amounted to a modification or abrogation of the rule to any extent. Therefore it was erroneous to tell the jury that the plaintiff was entitled to recover if he was proceeding in obedience to the signal, without also submitting the question whether or not the rule which required him to keep his engine absolutely under control had been abrogated. If the rule was in force, its observance was the measure of his care for his own safety, and it was improper to leave it to the jury to determine whether or not he was exercising ordinary care. In addition to that, there was, as has already been pointed out, no testimony at all to the effect that the rule had been abrogated with respect to the 10-mile limit of speed, and the instruction was certainly erroneous in ignoring that feature of the case. There was a sharp conflict as to whether or not the plaintiff was violating the maximum speed limit, and if the jury found that he was running more than 10 miles an hour, it constituted negligence on his part which would prevent full recovery.

[6] Error is also assigned in the refusal of the court to give the following instruction, requested by defendant:

"(A) You are instructed that the plaintiff admits in his evidence that there was a rule of the railroad company in force, at the time of his injury, that prohibited the running of a freight train over 10 miles per hour, at any point in the yards where he was injured, so if you believe from the evidence in this case that the plaintiff was running his engine at a speed exceeding 10 miles per hour, at the time he discovered or was told that there was an engine ahead of him, then the court tells you as a matter of law that the plaintiff would be guilty of negligence."

That instruction should have been given, for, as we have already pointed out, there is no evidence whatever tending to show an abrogation of the rule mentioned in that instruction, and if the jury found that it had been violated, it prevented full recovery. Defendant was entitled to have that issue specifically submitted to the jury, and it was error to refuse this instruction.

[7] Instruction No. B, which reads as follows, should also have been given:

"(B) You are instructed that although you may believe that the yardmaster, Brown, gave the plaintiff a 'high ball,' and although you may believe this indicated that the track ahead was clear, and indicated plaintiff could proceed, this did not give the plaintiff any authority to proceed with his train at any greater speed than the rules of the defendant permitted, if you find these rules were in force and known to the plaintiff."

That instruction submitted to the jury the whole contention of plaintiff with respect to

both rules, that fixing the maximum limit and the one requiring the engine to be kept under control. It told the jury that, if those rules were in force and known to the plaintiff, a violation thereof by him would constitute negligence. It was a question for the jury to determine from the evidence adduced whether or not the rules were in force, or whether they had been to any extent abrogated.

[8] Another instruction, the refusal of which is assigned as error, reads as follows:

"(F) You are instructed that, since the rules of the company introduced in evidence were made for the protection of the plaintiff and were known to him, any usage or practice, either on the part of the plaintiff or other employees, or on the part of the railway company, tending to mislead the plaintiff in violation of same, if you should find that he was misled, would not relieve the plaintiff of the consequence of his negligence in violation of the rules if you find he was negligent, and would not excuse him therefor, and unless you believe from the testimony that the rules were abrogated, the plaintiff was negligent if he violated the same."

That instruction seems to have been especially framed to meet the rule of law laid down by this court in the case of *St. Louis, I. M. & S. Ry. Co. v. Steel*, 119 Ark. 349, 178 S. W. 320, where it was said:

"If the rule was abrogated by proof of a custom of its long-continued violation with the knowledge and acquiescence of the master, the violation of it by the deceased would not prevent a recovery for the injury, but since the rule was made for his protection and known to him, any usage and practice of the defendant tending to mislead him in the violation of it, short of its abrogation, would not relieve from the consequence of his negligence in violating it nor excuse him therefor."

While the instruction follows closely the language of this court, we do not think that it was appropriate as an instruction to the jury, for the reason that it was calculated to mislead. In laying down that rule of law, we were discussing the effect of the testimony, and it was not intended as a statement of the law for use in an instruction to a jury. Of course, defendant was entitled to a submission of the question whether or not the rule was abrogated, but this instruction left no guide for the jury in determining to what extent violations of the rule would constitute an abrogation, and therefore we are of the opinion that this instruction was properly refused, not because it does not state correctly the law on the subject, but that it is not such a statement as was calculated to place the issues clearly before the jury.

There are other assignments of error argued with respect to giving and refusing instructions, but it is believed that the foregoing discussion is sufficient to indicate our views of the law applicable to the case, and will be a sufficient guidance for the trial court when the case is again presented for trial.

For the errors indicated, the judgment is

therefore reversed, and the cause remanded for a new trial.

HART, J., concurs on the sole ground that the trial court erred in refusing to give instruction A.

LIVINGSTON et al. v. PUGSLEY. (No. 46.)

(Supreme Court of Arkansas. June 12, 1916.)

1. JUDGMENT \S 587—RES JUDICATA—FORECLOSURE OF CHATTEL MORTGAGE.

The judgment, in an action to recover possession of mortgaged chattels, based entirely on the right to foreclose the mortgage without furnishing an itemized account in accordance with the statute, on which issue the verdict was for plaintiff, was not *res judicata* as to defendant's right to foreclose the mortgage, and so did not bar his right of action for foreclosure.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1089; Dec. Dig. \S 587.]

2. EVIDENCE \S 458—PAROL EVIDENCE AFFECTING WRITING—MORTGAGE.

While the terms of a mortgage cannot be extended by parol testimony, such evidence is admissible to show the circumstances of the execution in order to construe the language thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 2083; Dec. Dig. \S 458.]

3. CONTRACTS \S 182(1)—JOINT PROMISE—ENFORCEMENT AS SEPARATE OBLIGATION.

A promise made to several jointly cannot be enforced as a separate obligation to one of the obligees.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 780-786; Dec. Dig. \S 182(1).]

4. CHATTEL MORTGAGES \S 108—CONSTRUCTION—INDEBTEDNESS COVERED.

A chattel mortgage, given to two parties, the mortgagor's landlord, a farmer, and to a merchant, who were not jointly interested in their business relations with the mortgagor, reciting that it was given as security "for all other moneys, advances, goods, wares, merchandise, supplies, services, etc., furnished by the parties of the second part to the parties of the first part," was broad enough to embrace an indebtedness to either the landlord or the merchant, or a joint indebtedness to both.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. \S 189; Dec. Dig. \S 108.]

Appeal from Benton Chancery Court; Wm. A. Falconer, Chancellor on Exchange.

Action by J. B. Pugsley against O. L. Livingston and others. From a decree for plaintiff, after transfer to the chancery court, defendants appeal. Decree affirmed.

G. B. Oliver, of Corning, for appellants. T. J. Crowder, of Corning, for appellee.

McCULLOCH, C. J. This is an action instituted at law originally by appellee against appellants to recover possession of certain personal property for the purpose of foreclosing a chattel mortgage executed by appellants, and on motion of appellants the cause was transferred to the chancery court and there proceeded to a final decree in appellee's favor foreclosing the mortgage. Appellee was a merchant engaged in business at

was dated March 6, 1913, and was made to secure a note of that date for \$474.55. Embraced in the mortgage was certain machinery described as follows:

"4-70 saw Murray plain single steel gin; 4-70 saw steel feeder; 1 Murray 4-70 saw steel lint flue complete; 4-70 saw steel elevator," etc., "said machinery located at Danville, Ark., and to be located in Yell county, state of Arkansas."

And the mortgage contained a clause which specified that the machinery—

"is clear of liens, conveyances, and incumbrances, and is to remain personalty, however and wheresoever located."

The mortgage was duly recorded on May 9, 1913. Mortgage, Exhibit B1, was executed August 11, 1914, recorded September 12, 1914. Mortgage, Exhibit B3, was executed October 30, and recorded December 3, 1914.

Satterfield answered the intervention, setting up that his mortgage was prior to that of the Murray Company, and alleging that he had furnished the money to Dacus & Fulton to purchase the gin stands claimed by the intervener and on which Dacus & Fulton had given him a mortgage, which was to be a first lien on the mill plant, including the gin stands claimed by the Murray Company, and that he had no knowledge that the Murray Company claimed the gin stands at the time he advanced the money to Dacus & Fulton and they executed their mortgage to him on same; that the Murray Company was notified by Dacus & Fulton that the purchase money for the gins was borrowed of him, and that he was to have a first lien on same. He also set up that the Murray Company was a foreign corporation, and that it had failed to comply with the laws of Arkansas regarding such corporations.

Dacus testified on behalf of the appellees that at the time he executed the mortgage to Satterfield he had a contract with the Murray Company for the purchase of gin stands; that at the time he made the first contract in January he told the Murray Company that he was borrowing the money from a farmer in Arkansas to pay for the gin stands, and that he was to give him a mortgage on all the stuff that he was buying as well as what was already on the land; that at that time he contracted for three gin stands, and later changed the contract by buying another gin stand, and a new contract was drawn up at the time they got the four gin stands. When witness got the money from Satterfield, witness told him that he wanted enough money to pay for everything, so that he would owe it all to one man.

On cross-examination he testified that the contract he referred to as the first contract, made in January at Dallas, Tex., was abandoned and never carried out; that the contract under which the shipments were made and the machinery delivered was afterwards made at Dardanelle, Ark. Witness made the mortgage to Satterfield a few days after they

had contracted for the stuff. On arrival of the machinery they made a mortgage to the Murray Company before it would deliver the same. Witness made the purchase under a contract that the title to the machinery was to remain in the Murray Company until the purchase money was paid and secured by a mortgage. This they had to do before they could get the machinery.

Satterfield testified that he loaned the money to Dacus & Fulton, which the mortgage in suit was given to secure; that at the time the note and mortgage were executed he had no knowledge of any one else having a claim or lien against the gin stands. He understood he was paying for them from the factory. Dacus & Fulton represented to witness that the machinery would be free of liens; otherwise, he would not have loaned them the money. Witness did not know that the Murray Company had a lien or claim on the property until they filed their intervention. Dacus & Fulton told witness that the money they were borrowing from him would pay for all the machinery and give them a clear title. Witness then testifies that the gin stands and all the machinery incident thereto and connected therewith and necessary for their operation were intended to be permanent when put upon the plant; that the machinery of the plant was attached to the plant by concrete foundation, and its removal would damage the remaining property.

The testimony on behalf of the appellant, which is not disputed, tended to prove that the machinery in controversy embraced in the mortgages was sold to Dacus & Fulton under a regular contract, which provided that the title to the property was to remain in the vendor until paid for in full, or until notes and mortgages for the purchase money were executed and a cash payment made. The contract also provided that until this was done the property was to remain personal property and was not to become a part of the realty.

The court found that Satterfield had a valid first lien on the property described in Exhibit B2, and also found that the appellant had a valid first lien on the property described in Exhibits B1 and B3, and entered a decree accordingly for the respective parties. Appellant duly prosecuted this appeal, and the appellee has taken a cross-appeal in this court.

Harry H. Myers, of Little Rock, for appellant. John M. Parker, of Dardanelle, for appellee.

WOOD, J. (after stating the facts as above). [1] At the time Dacus & Fulton executed the mortgage to Satterfield on the machinery in controversy they had no title to such machinery, for the undisputed evidence shows that they purchased under a written contract in which the title to the

machinery was to remain in the Murray Company until notes for the purchase money and a mortgage to secure the same were executed, and a cash payment made. The mortgage to Satterfield was dated February 11, 1913, and the mortgage, Exhibit B2, to the Murray Company and part payment of the purchase money was of date March 6, 1913. Dacus & Fulton acquired no absolute title to the property until the latter date. At that date, however, by complying with the condition of the contract of sale in executing the notes and mortgage and paying part of the purchase money, they did acquire title to the machinery. *Andrews v. Cox*, 42 Ark. 473, 48 Am. Rep. 68; *Butler v. Adler-Goldman Com. Co.*, 62 Ark. 450, 35 S. W. 1110; *Starnes v. Boyd*, 101 Ark. 473, 142 S. W. 1143.

[2] In the mortgage to appellee the property in controversy, on which the court granted appellee first lien, was definitely described, and was also included under the words, "all machinery that may hereafter be added to said premises." It is a well-settled rule that:

"A mortgage may be made to cover future acquired property of a mortgagor when an intention to that effect clearly appears from the face of the instrument, and it will be enforced against the mortgagor and all others except purchasers for value without notice." 27 Cyc. 1040; *Kline v. Ragland*, 47 Ark. 111, 14 S. W. 474; *Williams v. Cunningham*, 52 Ark. 439, 12 S. W. 1072; *Morton v. Williamson*, 72 Ark. 390, 81 S. W. 235.

Therefore, when Dacus & Fulton acquired title to the property in controversy, that title inured to the benefit of Satterfield under his mortgage. But the mortgage to the Murray Company was simultaneous with the vesting of the title to the machinery in Dacus & Fulton. In *Western Tie & Timber Co. v. Campbell*, 113 Ark. 570, 169 S. W. 253, we held (quoting syllabus):

"A purchase-money mortgage must be given simultaneously with the execution of the deed of conveyance in order to take precedence over prior liens; for, if there is any intervening space of time during which the title rests in the purchaser, the prior liens attach to it in preference to the mortgage."

[3] There was no intervening space of time here in which the title to the property rested in Dacus & Fulton before they conveyed the same, under their mortgage, to the Murray Company; but the latter company allowed the title to rest in Dacus & Fulton for over two months before recording its mortgage. The case we have, therefore, under the facts, is that of two independent mortgages on the same property, given to different mortgagees. While both the mortgages were good as between the parties, neither of the mortgagees acquired a lien as against third parties until the mortgages were filed for record. *Kirby's Digest*, § 5396.

[4] In the absence of countervailing equities, the rule as to priority as between two independent mortgages on the same prop-

erty, given to different mortgagees, is that the one first filed for record is a superior lien to the other, whether it was executed before or after such other. See 27 Cyc. 1192-1194. But this rule is so qualified as to allow a vendor, who executes a deed and simultaneously takes a mortgage, a reasonable time in which to file his mortgage for record. See *Beers v. Hawley*, 2 Conn. 467.

[5] Under the peculiar facts of this record, the issue as to the priority of these mortgages should be determined by the diligence displayed by appellant to comply with the statute in order to give third parties notice of the existence of its mortgages. Satterfield filed his mortgage for record nine days after it was executed, whereas the Murray Company waited from one to two months before recording its mortgages. Therefore, if the mortgages were treated as having been made to the respective mortgagees on the same day, it is undoubtedly true that Satterfield appears to have exercised the greater diligence in complying with the statute in perfecting his lien and giving notice to others of the existence thereof, and his mortgage should be treated as prior in time to the mortgages of appellant.

No special circumstances are shown on the part of the appellant to excuse or justify it in waiting for so long a time to have its mortgages recorded. It allowed the title to remain in the mortgagor for an unreasonable length of time before perfecting its lien by having its mortgages recorded. In the meantime Satterfield had placed his mortgage upon record and should be entitled to priority of lien. In *Thornton v. Findlay*, 97 Ark. 432, 487, 134 S. W. 627, 629 (33 L. R. A. [N. S.] 491), we used this language:

"For, if the title rests even for a short time in the vendee, with no valid lien thereon in favor of the vendor, then the prior lien secured by another on such property will have precedence over a mortgage subsequently secured by the vendor."

That is the principle that controls here, and determines the issue in favor of the appellee Satterfield; for, as we have already observed, the Murray Company allowed the title to rest in the vendee Dacus & Fulton an unreasonable time before recording its mortgages.

[6] While the property on which the court decreed a first lien in favor of the appellant was not in existence at the time the mortgage to the appellee was executed, yet this property was added to the premises of the mortgagors, and a lien was thereby created in equity in favor of the appellee under that clause of his mortgage which specifies, "also all machinery that may hereafter be added to said premises." The lien was good and enforceable as between the parties to the mortgage. *Apperson v. Moore*, 30 Ark. 56, 21 Am. Rep. 170; *Jarratt v. McDaniel*, 32 Ark. 598; *Delta Cotton Co. v. Ark. Cotton Oil Co.*, 80 Ark. 431, 97 S. W. 440; *Howell v. Walker*, 111 Ark. 362, 372, 164 S. W. 748.

When appellee's mortgage was placed on record, this gave notice to the world of all of his rights, legal and equitable, under the mortgage. His mortgage created an equitable lien on the property when it was attached to the premises, and as it was placed on record before appellant gave notice or had its mortgage recorded, it follows from what we have already said that appellee acquired a superior lien to appellant in the property described in the decree as lot 3, to wit: One Murray cleaner complete, with transitions and pulley; 4-70 saw huller, gin breasts complete; one hydraulic ram complete; one Burnham hydraulic pump, and one set hydraulic pump fittings.

The decree, therefore, in favor of the appellee, on the appeal of the Murray Company, is affirmed, while the decree in favor of the Murray Company against the appellee is reversed, on appellee's cross-appeal, and the cause is remanded, with directions to enter a decree in favor of the appellee, giving him a superior lien to the appellant on the property mentioned in the decree as property known as lot 3, as above described, and for further proceedings not inconsistent with this opinion.

PFEIFFER STONE CO. v. SHIRLEY.
(No. 140.)

(Supreme Court of Arkansas. July 10, 1916.)

1. EVIDENCE —121(12)—RES GESTÆ.

In a servant's action for injuries received while carrying a heavy shafting, plaintiff was properly allowed to detail certain profane exclamations made, both by himself and his fellow servant helping him carry the shafting, at the time of the injury, the purport of which was to show carelessness on the fellow servant's part, the evidence being competent as part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 330-331; Dec. Dig. —121(12).]

2. EVIDENCE —243(4)—ADMISSION BY THIRD PARTY.

In a servant's action for injuries received while carrying a heavy shafting, plaintiff's testimony, relating to his fellow servant's admission that such servant threw down his end to save himself, which admission was made some days after the injury, was incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 912; Dec. Dig. —243(4).]

3. EVIDENCE —477(2)—OPINION—MEDICINE.

In a servant's action for injuries, the court should not have permitted a nonmedical witness, a farmer, to express the opinion that plaintiff did not have appendicitis when he examined him, though the witness stated the facts on which he based his opinion; there being no contention that he had any special information or training that enabled him to form a just opinion on the facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2238; Dec. Dig. —477(2).]

4. EVIDENCE —477(2) — DESCRIPTION OF PHYSICAL CONDITION.

In a servant's action for injuries, it is proper to permit a nonmedical witness, such as a farmer, to describe the physical condition he

observed plaintiff to be in when he examined him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2238; Dec. Dig. —477(2).]

Appeal from Circuit Court, Independence County; Dene H. Coleman, Judge.

Action by D. Y. Shirley against the Pfeiffer Stone Company. From a judgment for plaintiff, defendant appeals. Judgment reversed, and cause remanded for new trial.

McCaleb & Reeder, of Batesville, for appellant. Ira J. Matheny, of Hot Springs, and Samuel A. Moore, of Batesville, for appellee.

SMITH, J. Appellee recovered judgment for damages to compensate an injury sustained by him as a result of the negligence of one Joe Brickie, a fellow servant. In support of his cause of action appellee testified that he and Brickie were engaged in carrying one of the blacksmith shop of the appellant company for which they were working a heavy iron shafting, which was shown to be of as great weight as they were able to carry, when Brickie dropped his end of the shafting, and thereby inflicted upon appellee the injuries to compensate which he sues.

[1] Over appellant's objection appellee was permitted to detail certain profane exclamations used by both himself and Brickie at the time of the injury, the purport of which was to show carelessness on Brickie's part. This evidence we think was competent as a part of the res gestæ, the exclamation being a part of the transaction and explaining the conduct of each of the parties at the time. In addition, upon his direct examination the court permitted appellee's counsel to ask him the following questions, and the witness to give the testimony quoted:

"Q. I will ask you this, Mr. Shirley: Did Mr. Brickie, after he had dropped the shafting, while you all were talking about it there, did he tell you why he dropped it? A. Yes, sir. Yes; he told me he threw it down to save himself. Q. Well, did he explain why it would save himself? A. Yes; he had a broken leg. He had a broken leg, and he said that he got it such shape that he couldn't go any further without throwing the shafting down, and he said he would not have broken his leg over for what the company was worth."

Upon his cross-examination it developed that the conversation detailed above occurred some days after the injury. Thereupon the following colloquy occurred:

"Judge McCaleb (of counsel for appellant): Now, your honor, we ask that all that evidence about Joe Brickie dropping that shaft to save himself be excluded from the jury, for the reason that he says now that the conversation he had with Brickie occurred here in town long after this thing occurred.

"Court: I think the defendant would be bound by any statement he (Brickie) would make about it.

"Judge McCaleb: That the defendant would be bound by any statement that Brickie would make? Does the court hold that defendant is bound by anything Brickie said about two or three months after it occurred?

"Court: With reference to this injury, I think so."

Exceptions were duly saved to this ruling of the court.

There was a sharp conflict in the evidence as to the nature, cause, and extent of the injuries from which appellee claimed to be suffering. On the part of appellant there was expert evidence to the effect that appellee was suffering from chronic appendicitis, and that this condition existed prior to the time of his injury. In contradiction of this theory the court permitted a Mr. Brewer to testify, over appellant's objection, as follows:

"Why, some time about Christmas—I think it was in February—Mr. Stone was up to my house and said, 'Well, I heard that he (Shirley) had appendicitis and was bad sick.' So I went down there to see him after supper. It is just about a quarter down to his house. And I examined to see whether he had appendicitis or not, and I discovered that he didn't have any appendicitis, but I found the hurt above the hip, right up here (indicating to the jury). The appendix is about halfway from the corner of the hip here (indicating to the jury) to the penis. I found that hip swollen there and I told him not to let the doctors cut any on him for appendicitis. I told him it was not his appendix that was hurt at all, and he seemed to be mighty sore there; that is, for me to press on it."

The witness was appellee's uncle, and, upon being asked on his cross-examination if he was a doctor, stated that he "had studied medicine some," and, upon being asked if he had ever practiced medicine, answered, "Not only in my own family." He admitted, however, that he had never attended any school. Other answers given by the witness indicated that his occupation was that of a farmer.

[2] Appellee's evidence in regard to Brickley's admission was incompetent and necessarily prejudicial. In the recent case of *River, Rail & Harbor Construction Co. v. Goodwin*, 105 Ark. 247, 151 S. W. 267, the plaintiff in a personal injury case was permitted to prove an admission of negligence on the part of a fellow servant which caused the injury complained of. It was there said that, inasmuch as the declaration was not made by an officer of the defendant company having the right to speak for it and bind it by declarations of that kind, the evidence was improperly admitted, and constituted prejudicial error, and in that connection we quoted with approval the following statement of the law from Jones on Evidence, § 357:

"The declaration of an employé or officer as to who was responsible for an accident, or as to the manner in which it happened, when made at the time of the accident or soon after, have been held incompetent, as against the company, on the ground that his employment did not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which he had performed his duty, and that his declaration did not accompany the

act from which the injuries arose, and was not explanatory of anything in which he was then engaged, but that it was a mere narrative of a past occurrence."

[3] We think, too, the court should not have permitted the witness Brewer to express the opinion that appellee did not have appendicitis at the time of his examination of him. It is true the witness stated the facts upon which he based his opinion, but there is no contention that he had any special information or training that enabled him to form or express an opinion upon these facts. The rule in such cases is stated in 5 *Encyclopedia of Evidence*, 530, as follows:

"2. *Requisite Knowledge, Skill and Expertise.*—A. *In General.* While undoubtedly it must appear that a witness called as an expert has enjoyed some means of special knowledge or experience upon the subject as to which he proposes to testify, no hard and fast rule can be laid down as to the extent of such knowledge or experience. The reason for allowing an expert to testify, and the object of his testimony, indicate, to some extent, the qualifications he should possess in order to make him a competent witness. His competency depends upon either his actual experience with respect to the subject under investigation, or his previous study and scientific research concerning the same, and sometimes on both combined. A witness should not be permitted to testify as an expert unless he has such knowledge or experience with reference to the science, art, or trade as to which he is called to testify, as will enable him to speak intelligently and enlighten the court. Where a witness is not called upon for an opinion, but simply for a statement of a fact—e. g., whether such and such a thing was done—this rule is not applicable, and there is no necessity to show the qualifications of the witness as an expert, even though he may happen to be a professional man."

Numerous cases are cited in support of the text, among others certain Arkansas cases. In addition, see, also, *Wigmore on Evidence*, §§ 555-560; *Railway v. Lyman*, 57 Ark. 512, 22 S. W. 170; *Railway v. Bruce*, 55 Ark. 65, 17 S. W. 363; *Arkansas Southwestern Ry. Co. v. Wingfield*, 94 Ark. 75, 126 S. W. 76.

[4] It would have been entirely proper to permit the witness to describe the condition he observed, but it was improper and prejudicial to permit him to express an opinion upon a subject which necessarily required a knowledge of anatomy and a skill in diagnosis when the witness was not shown to have possessed such knowledge.

Appellant also complains of the action of the court in giving certain instructions and in refusing certain others. But no error prejudicial to appellant was committed in this respect, as the instructions were as favorable as it had the right to ask.

For the errors indicated, the judgment of the court below will be reversed, and the cause remanded for a new trial.

CITIZENS' BANK & TRUST CO. et al. v. RAINES. (No. 124.)

(Supreme Court of Arkansas. July 10, 1916.)

1. BANKS AND BANKING ⚡71—DISSOLUTION—STATUTE.

Acts 1913, p. 462, concerning the organization and control of banks, and providing in section 53 that, when the state bank commissioner takes charge of an insolvent bank upon the orders of the chancery court in the county in which the bank is doing business, he may sell all its real and personal property upon such terms as the court shall direct, governs the sale of an insolvent bank's assets not under mortgage or other lien, and Kirby's Dig. § 6236, providing the manner of foreclosure of mortgages and other liens, and the sale of property under such foreclosure, has no application.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 143-147; Dec. Dig. ⚡71.]

2. BANKS AND BANKING ⚡71—INSOLVENCY AND DISSOLUTION—STATUTE—DISCRETION OF COURT.

Under Acts 1913, p. 462, relating to the organization and control of banks, and leaving the chancery court without limitation as to the terms upon which it may order the disposition of the assets of an insolvent bank, where the court ordered the assets of an insolvent bank to be sold at private sale, and the deputy commissioner held a public sale, but recommended to the court that it be not approved, because of a larger offer subsequently made, the court's approval of the public sale was an abuse of its discretion, since the sale was not in accordance with the orders of the court nor to the best interest of those directly concerned.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 143-147; Dec. Dig. ⚡71.]

3. BANKS AND BANKING ⚡71—INSOLVENCY AND DISSOLUTION—SALE OF ASSETS—STATUTE.

Where the probate court ordered the sale of the assets of an insolvent bank at private sale under Acts 1913, p. 462, although a public sale was made, in considering the question of confirmation it should be treated as a private sale, and the rule that inadequacy of price in the absence of fraud does not afford grounds for withholding confirmation of a public judicial sale does not apply.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 143-147; Dec. Dig. ⚡71.]

Appeal from Nevada Chancery Court; James D. Shaver, Chancellor.

Proceedings Under Acts 1913, p. 462, for the settlement of the affairs of the Citizens' Bank & Trust Company in which the chancery court confirmed a sale of the bank's assets by Thomas C. McRae, Jr., special deputy bank commissioner; E. E. Raines excepting. From the order of confirmation, the Bank and others appeal. Decision reversed, and cause remanded for further proceedings.

The Citizens' Bank & Trust Company, of Prescott, Ark., on the 27th day of July, 1915, went into liquidation under the bank commissioner, under the provisions of Act 113, approved March 3, 1913 (Acts of 1913). Thomas C. McRae, Jr., was designated as special bank commissioner. He applied to

the chancery court for an order as to the disposition of certain of the bank's assets. The court made an order directing McRae to sell all of the bank's real and personal property at private sale. The order provided "that all of such sales shall be submitted to the court for its approval before the sale is consummated."

McRae, after consulting with the stockholders and others interested in the assets of the bank, on the 12th day of October, 1915, gave notice by regular advertisement in a newspaper that he would, on the 20th day of November, 1915, offer the real estate, which was described in the notice of sale, at the north door of the courthouse in the city of Prescott, upon terms of one-half cash and the balance on credit of three months. The notice specified that the purchaser would be required to give bond with approved security, and that a lien would be retained on the property until the same was paid. He made the sale, and in his report stated that he attended and offered the property for sale at public outcry. He gives the names of the purchasers and a list of the lands sold, and among the purchasers was one E. E. Raines, the appellee. The land was struck off to him at \$6,447.67. He purchased subject to a mortgage for \$5,200, and paid the balance, \$1,247.67, in cash.

In the commissioner's report he states that the attendance was good, and many of the stockholders of the bank were present; that on the 30th of November, 1915, at a meeting of the stockholders of the Citizens' Bank & Trust Company, Geo. F. Kress and A. H. Smith agreed to increase the bid made by E. E. Raines for the lands purchased by him \$752.33, thus giving to the bank a net sum above the incumbrance amounting to \$2,000. Instead of \$1,247.67, the amount bid by Raines.

McRae recommended the approval of all the sales except the ones made to Raines, Jake Suckle, and W. V. Tompkins, and recommended that the property sold to Raines and Tompkins be resold. Raines filed exceptions to the report of the receiver, setting up that he had purchased at the sale and had complied with the requirements of the receiver by putting up the amount of his bid. He stated that the directors of the bank and trust company were present at the sale, and had an opportunity to bid, but refused to do so, and that Kress and Smith were also present at the sale and did not bid.

Kress and other stockholders of the bank and trust company replied to the exceptions of Raines, in which they set up that they were given to understand by the bank commissioner before the sale that any figures that were unsatisfactory would be reported adversely and the property again offered for sale; that immediately following the offering of the property for sale and the bid of Raines

Kress, for himself and other stockholders, proposed to raise the bid of Raines from \$1,247.67 to \$2,000 for the bank's equity, which offer they were ready to make good; that the offer of \$1,247.67 made by Raines was only \$3.10 per acre; and that the land was reasonably worth 7 per acre.

The court heard the testimony of the commissioner on the exceptions of Raines and the reply thereto. McRae testified substantially to the effect that, after consulting with the stockholders of the bank, they doubted the wisdom of offering the body of land for sale at that time; that he told them that if the bids were unsatisfactory the sale would not be approved and the property would be reoffered. He understood that, if the offers of bids were not satisfactory, he could report against the approval, and the court would not approve the sale; that after the sale the stockholders held a meeting, and the increased bid was made as set forth in his report, and therefore he recommended that the sale to Raines be not approved. He exhibited a letter from the state bank commissioner, written before the sale took place, suggesting that he could go ahead and make it, but that unless the lands brought a good price that the department would not recommend that the court approve the sale.

The president of the bank testified, among other things, that he was present at the sale and permitted the bids of Raines and others to pass at the prices offered by the bidders, believing that the deputy commissioner would be permitted to reoffer the property if the bid was not satisfactory.

There was also testimony to the effect that \$3 per acre was the assessed value of the land, which was about 50 per cent. of its actual value. The testimony showed that the auctioneer announced to the crowd present at the time the lands were sold that all bids would be submitted to the court for approval before the sale would be consummated.

The court, after hearing the evidence, found that the sale was fairly and legally conducted, and declined to disapprove the sale. The offer of Kress and others to guarantee the bank the sum of \$2,000 for its equity, instead of the sum of \$1,247.67 which it would have received under the bid of Raines, was rejected. The court entered judgment confirming the sale to Raines, and the appellants duly prosecute this appeal.

Carmichael, Brooks, Powers & Rector, of Little Rock, for appellants. Hamby & Hamby, of Prescott, for appellee.

WOOD, J. (after stating the facts as above). [1] When the state bank commissioner takes charge of an insolvent bank for liquidation under Act 113, supra, "upon the order of the chancery court of the county in which it (the bank) is doing business, * * * may sell all its real and personal

property on such terms as the court shall direct." Section 53. The act is special statutory proceedings for the disposition of the assets of insolvent banks under the directions of the chancery court. Section 6236 of Kirby's Digest, providing the manner of foreclosure of mortgages and other liens, and the sale of property under such foreclosure, has no application to sales of the assets of an insolvent bank that are in process of liquidation under the above act.

It is not shown that the real estate in controversy was sold under any mortgage or other lien. The purpose of Act 113, supra, was to enable the chancery court to make such disposition of the insolvent bank's assets as would best subserve the interests of all concerned, and the court is unfettered by any limitations as to the terms upon which it may order the disposition of such assets.

[2] Section 6236 of Kirby's Digest and section 53 of Act 113, supra, relate to different subjects, and there is no conflict between them. The sale of an insolvent bank's assets not under mortgage or other lien, when in process of liquidation under Act 113, must be governed alone by that act. It appears that the deputy commissioner, instead of acting under the orders of the court to make a private sale, proceeded to advertise the land and sold the same at public sale. The court, however, found that the sale as made by the deputy commissioner was fairly and legally conducted and confirmed and approved the sale, thus treating the sale as having been made in compliance with the orders of the court. This finding of the chancellor was clearly against the undisputed testimony.

The undisputed testimony of the deputy commissioner who conducted the sale was to the effect that he understood that he had the authority to offer the lands in the manner which he did, and, if the bids made upon the lands were not satisfactory, that he would so report to the court, and that the court would not approve the sale; that he so advised members of the stockholders committee with reference to the sale. The testimony of the president of the bank was to the effect that the deputy commissioner consulted with him about the sale, and that he was opposed to it, but withdrew his objections when given to understand by the deputy commissioner that any bids would be turned down if the same were unsatisfactory, and upon his representation that the property would be reoffered; that he attended the sale under this impression and permitted the bids of the parties who bought these lands to pass, believing that the lands would be reoffered for sale as the bids were not satisfactory. The parties who purchased the lands a few days before had offered the sum of \$1 per acre at private sale for the bank's equity, whereas at the sale their bids were 40 cents per acre less. The testimony showed that the bid of appellee was \$3.10 per acre, or about the as-

sessed value of the land, which was reasonably worth \$6 or \$7 per acre.

The court should have adopted the recommendation of the deputy commissioner in his report and disapproved the bid of Raines. The court's order directing the sale did not specify any terms further than that the commissioner should sell the real property at private sale. In the order the court provided that "all such sales shall be submitted to the court for its approval before the sale is consummated." Under the law and under the order of the court the sale was not consummated until the chancery court approved the same. The plain purpose of the law was to enable the chancery court to conserve the best interests of all concerned in the assets of the insolvent bank and to make the most advantageous disposition of same possible. While the court is thus given large discretion in the manner in which it may dispose of these assets, yet it is not an unlimited judicial discretion, but one that can be controlled when abused.

It clearly appears that it was not to the best interest of those who were directly concerned in the manner of the disposition of the bank's assets to approve this sale. On the contrary, instead of husbanding the resources of the bank, so as to preserve and protect the interests of those who are directly concerned, the order of the court approving this sale would have precisely the opposite effect. The court therefore abused its discretion in confirming the report of the commissioner and treating the acts of the commissioner with reference to the sale of the lands as a completed sale to the appellee.

[3] Appellee invokes the rule stated in previous decisions of this court that mere inadequacy of price in the absence of fraud does not afford grounds for withholding confirmation of a public judicial sale. *Colonial & United States Mortgage Co. v. Sweet*, 65 Ark. 152, 45 S. W. 60, 67 Am. St. Rep. 910; *George v. Norwood*, 77 Ark. 216, 91 S. W. 557, 113 Am. St. Rep. 143, 7 Ann. Cas. 171. That rule does not, however, apply in the present case, for the reason that the court ordered a private sale (of which fact the purchaser was fully advised), and in considering the question of confirmation it should have been treated as a private sale. The reason for the rule has been stated by this court in the following language:

"Courts have adopted, as a wise public policy, the rule that confidence in the stability of judicial sales should be maintained, so that competitive bidding may be encouraged by the assurance that, in the absence of fraud or misconduct, the highest bidder will be accepted as the purchaser of the property offered for sale." *George v. Norwood*, supra.

The reasons thus given do not apply to a private sale; for there is no such thing as competitive bidding in conducting that kind of sale which constitutes mere negotiations

ending in the final approval or disapproval by the court.

It does not follow, however, that the court should have accepted the increased bid of Kress and others and treated their bid as a final offer and a consummation of the sale. The undisputed testimony clearly shows that there was no intention upon the part of the commissioner by what he did to complete a sale to any one. The deputy commissioner recommended that the property which he had sold to Raines be resold. The court should have found that the commissioner had not proceeded to make the sale in the manner directed by its order, and should have adopted the recommendation of the deputy commissioner and ordered the land resold.

The decree of the court is therefore reversed, and the cause is remanded for further proceedings according to law, and not inconsistent with this opinion.

RANKIN, Humane Officer, v. ALLNUTT, Constable, et al. (No. 118.)

(Supreme Court of Arkansas. July 3, 1916.)

1. SHERIFFS AND CONSTABLES § 18—CONSTABLE'S DEPUTIES—STATUTE.

Acts 1915, p. 354, § 26, providing in part that in a township within which is situated any larger city subject to the act the constable may have five deputies, merely authorizes the constable to appoint five or a smaller number of deputies, but does not require such appointment.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 32, 33; Dec. Dig. § 18.]

2. SHERIFFS AND CONSTABLES § 18—CONSTABLE'S DEPUTIES—APPOINTMENT—CONDITION PRECEDENT—STATUTE.

Under Acts 1915, p. 354, § 26, providing in part that in a township within which is situated any larger city subject to the act the constable may have five deputies, the approval of the county court is a condition precedent to the validity of the appointment made by the constable.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 32, 33; Dec. Dig. § 18.]

3. SHERIFFS AND CONSTABLES § 18—CONSTABLE'S DEPUTIES—HUMANE OFFICER—STATUTE.

A proper construction of Acts 1915, p. 354, § 26, providing in part that in a township within which is situated any larger city subject to the act the constable may have five deputies, one of which shall be the Arkansas humane officer, is that, where the constable appoints five deputies, one of them should be charged specially with enforcing the duties of the humane officer, and does not render the agent of the humane society ex officio a deputy.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 32, 33; Dec. Dig. § 18.]

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Petition for mandamus by W. M. Rankin, Arkansas Humane Officer, against R. R. Allnutt, Constable, and Joe Asher, County Judge. From an order dismissing the petition, petitioner appeals. Judgment affirmed.

Appellant seeks by mandamus to compel appellee Allnutt, as constable of Big Rock township, Pulaski county, Ark., to appoint him a deputy constable for said township. He also makes the county judge of Pulaski county a party defendant, that he may be required to confirm the appointment so prayed to be made by said constable. He alleges that he is the humane officer, and has his office in the city of Little Rock, in said township, and that he was appointed as the agent of the humane society by the president thereof; that said society was reorganized in 1909 under Act No. 170 of the Acts of the General Assembly of 1909, p. 518, when he was duly reappointed agent of said society. Appellant predicates his cause of action upon the provisions of section 26 of Act No. 87 (Acts 1915, p. 340), entitled:

"An act for the establishment of municipal courts in certain cities of the first class, prescribing their jurisdiction and the jurisdiction of justices of the peace in certain townships, fixing the compensation of certain officers in such cities and townships, and for other purposes."

The relevant portion of that section reads as follows:

"Sec. 26. Constables in townships subject to this act shall perform the same services in the municipal court as are required of them before justices of the peace by the general laws. * * * In a township within which is situated any larger city subject to this act the constable may have five deputies, one of which shall be the Arkansas humane officer. * * *"

Appellant in his complaint recites the fact to be that after its introduction the bill for this act was amended by inserting after the words "may have five deputies" the phrase "one of which shall be the Arkansas humane officer." Both the constable and the county judge demurred to the petition, and their demurrers were sustained, and the petition dismissed, and this appeal has been duly prosecuted from that order.

Mehaffy, Reid & Mehaffy, of Little Rock, for appellant. Hal L. Norwood, of Little Rock, for appellees.

SMITH, J. (after stating the facts as above). It is insisted that the amendment set out above, embraced in the phrase "one of which shall be the Arkansas humane officer," is void for uncertainty.

It is certainly a very ambiguous phrase, and to ascertain its meaning resort must be had to a study of the legislation which defines the duty of the officer there designated as the Arkansas humane officer. In doing this, we of course have in mind those cardinal rules of statutory construction that the interpreter of a statute is not called upon to improve it, but to expound it, and that, while he is to seek the intention of the Legislature, that intention is not to be ascertained at the expense of the clear meaning of the words employed. The question for him is, not what the Legislature meant, but "What does the language mean, which it

has employed?" Endlich on Interpretation of Statutes, § 7.

The antecedent legislation on the subject of humane officers is found in sections 1638-1645, inclusive, Kirby's Digest; and in Act No. 170 of the Acts of 1909, p. 518. The purpose of the sections of Kirby's Digest above mentioned was to prevent and to punish cruelty to animals. These sections provide that societies may be incorporated for this purpose, and that the president of such society in any county in this state may appoint agents and officers of such society, who shall have authority to arrest persons found violating the provisions of the act which became sections 1638-1645 of Kirby's Digest. Section 1642 provides that all fines, forfeitures, and penalties imposed and collected in any county in this state under the provisions of any act passed or which may be passed relating to or in any wise affecting animals shall inure to such society in aid of the purpose for which it was incorporated. It was evidently contemplated that a society might be organized in each of the counties of the state, and the same powers were conferred upon the officers, agents, and members of each of these societies.

The act of 1909 referred to above is entitled "An act to prevent and punish cruelty to children," and a study of its provisions leads to the conclusion that the Legislature there intended to extend the beneficent provisions of the prior act for the protection of animals to children. Section 7 of this last act is identical with section 1639 of Kirby's Digest, except that the word "child" is used for the word "animal." And section 8 of this last act is substantially the same as section 1644 of Kirby's Digest; the word "children" being substituted for the word "animals." This last act contemplates the organization of societies in each of the counties of the state to enforce its provisions, and designates the society so to be formed as the Arkansas Humane Society. This last act confers certain enlarged powers upon this society, and its officers have the custody and care of abandoned children. In both acts the society is given the right to appoint agents, with certain powers incident to the enforcement of the respective acts, and all of these agents would have the same authority under the law.

[1, 2] The act of 1915 above mentioned applies to all cities having a population exceeding 45,000 according to the latest preceding federal census, and all smaller cities of the first class situated in the same or another county and lying contiguous to any of the said larger cities, and of the smaller cities separated from any of such larger cities only by a river being contiguous thereto, and all townships, counties, and judicial districts within which are situated any of such larger or smaller cities. In its practical operation the act may apply only to Pulaski

county, but there is nothing in the act which so limits it. The manifest purpose of this act was to reduce the expense of the administration of the criminal law in the enforcement of those laws of which the courts there created were given jurisdiction. The act does not require the constable to appoint five or a smaller number of deputies. It only authorizes him to appoint that number. It therefore confers a power, and does not impose a duty. This right of appointment, however, is not an absolute one, but is subject to the approval of the county court, and this approval is, of course, a condition precedent to the validity of the appointment.

Appellant says this act designates him as one of the constables by virtue of his appointment as an agent of the Arkansas Humane Society for Pulaski county. If this is true, he would also be a deputy constable for Hill township of Pulaski county; this being the township in which the city of Argenta is located. But more than one agent might be appointed by the humane society, and in that event there would be no certainty as to the one to appoint, and there is nothing in the act which gives the appointing officers of the society the right to confer authority upon one agent which is denied another.

This amendment does not appear to be a well-considered piece of legislation; but we must assume the Legislature did not intend any absurd results. If appellant's contention is correct, we would have the possibility of several persons being eligible, and all entitled to an appointment, which only one could receive. Even though there was only one person eligible, his appointment would be subject to the approval of the county court, and we would have the useless formality of a person being appointed and confirmed when neither the appointing nor the confirming officer had any discretion about the appointment. A person might be appointed who would not be a resident of the township in which his principal was elected, and such would be the case here if appellant was appointed for both Big Rock and Hill townships. The humane officer's appointment is without any reference whatever to the term of office of the constable, and the constable would be responsible for the acts of a deputy over whose appointment he had no control whatever, and this deputyship would be wholly uncertain, both as to the incumbent and the tenure of office, as the society could change its agents at any time.

[3] We think the more reasonable construction of the act is that it gave the constable the right to appoint as many as five deputies, subject to the approval of the county court, and if this number was appointed one of them should be charged specially with enforcing the duties of humane officer. But the right to appoint this deputy, as well as the others, abides in the constable only, and

is to be exercised by him, subject to the approval of the county court.

It follows, therefore, that appellant's prayer for a mandamus was properly denied, and the judgment of the court so ordering will be affirmed.

GROCE v. STATE. (No. 120.)

(Supreme Court of Arkansas. July 10, 1916.)

1. CRIMINAL LAW §941(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE.

An order denying a new trial in a prosecution for murder for newly discovered evidence which was merely cumulative held not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328, 2330; Dec. Dig. § 941(1).]

2. HOMICIDE §255(2) — EVIDENCE — SUFFICIENCY.

Evidence held sufficient to sustain a conviction of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 540; Dec. Dig. § 255(2).]

Appeal from Circuit Court, Union County; Chas. W. Smith, Judge.

Dave Groce was convicted of voluntary manslaughter, and from the judgment and an order denying new trial, he appeals. Affirmed.

Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. Appellant was indicted by the grand jury of Union county for the crime of murder in the first degree, alleged to have been committed by shooting and killing one Reginald White. The killing occurred on one of the streets of El Dorado, about the hour of 3:30 in the afternoon of February 17, 1916. Appellant lived in Prairie county, Ark. Deceased was reared in Prairie county, and lived there at the time of the killing, but was working in the railroad shops at El Dorado at the time he was killed. Appellant came from his home in Prairie county to El Dorado, reaching there on the day the killing occurred. He went to the railroad shops and made inquiry whether or not deceased was still working there. Upon being told that deceased was not working in the department in which he made the inquiry, he left the shop, about 30 minutes before the killing occurred.

Appellant walked up the street, and, according to the testimony of two eyewitnesses introduced by the state, he concealed himself behind an old iron safe, and when deceased came along he walked out from behind the safe and drew his pistol and began firing at deceased, shooting him in the back. He fired five times, and then continued to follow deceased, snapping his pistol. The testimony of these witnesses is that deceased did nothing to provoke the difficulty, and that he did

not see appellant until after the latter began firing. They stated that as deceased ran off he called out to appellant, asking him not to shoot him any more, and ran out into the middle of the street. Deceased ran and jumped in a hack that was standing on the street and was carried to a drug store where surgical aid was rendered, but he died in a short time. A post mortem disclosed the fact that deceased was shot twice in the back and once in the arm. Another witness for the state, who lived in Prairie county, testified that the day before the killing he met appellant, who had a gun in his hand, and inquired where deceased was, and remarked, "You can bet your boots I will get him."

Appellant introduced as a witness his daughter, a young woman, who testified that she had been keeping company with deceased, that they were engaged to be married, and that deceased had induced her, by promise of marriage, to have sexual intercourse with him. She testified that when she found that she was pregnant, she importuned deceased to comply with his promise of marriage, but he refused to marry her, and told her that if she informed her father of the circumstance he would kill both her and her father. She testified that on the day before the killing she informed her father of her condition and of the fact that deceased was the author of her fall from virtue, and also informed her father of the threat the deceased had made against his life and her own.

Appellant testified that he went to El Dorado for the purpose of inducing deceased to marry his daughter to protect her from dishonor, and that when he met deceased on the street and asked him to marry the girl, the deceased asked: "Did she tell you what I told her to tell you?" And that when he (appellant) replied in the affirmative, deceased thrust his hand in his pocket as if to draw a weapon. Appellant testified that he thought deceased was about to put into execution the threat made to his daughter, and that he drew his pistol and began firing, and continued to fire as long as there were loads in his pistol. Appellant denied that he hid himself behind the old safe, but claimed that he met deceased as he walked along the street, after having inquired for him at the railroad shops.

The trial jury found appellant guilty of voluntary manslaughter, and assessed his punishment at two years in the state penitentiary. Appellant's counsel filed a motion for a new trial containing numerous assignments of error—27 in all—but no brief has been filed in support of any of these assignments. We have, however, examined all of the assignments of error but find none that has any merit in it. The court gave a complete set of instructions covering every phase of the case, including the law of all the degrees of homicide. The court also gave a number of

instructions requested by appellant, and modified in a very slight degree others. Two of his requested instructions were refused. It appears to us that the case was submitted to the jury upon correct instructions, and we are unable to discover any prejudicial error.

[1] The last assignment relates to newly discovered evidence, but it is cumulative, and we cannot say that there was an abuse of the court's discretion in refusing to grant a new trial in order to give the appellant an opportunity to present it at another trial.

[2] The evidence in support of the verdict of the jury was abundant. In fact, the evidence was legally sufficient to support a judgment of conviction for a higher degree of homicide. It is evident that the jury rejected appellant's contention that he acted in self-defense when he shot deceased, but for other considerations they reduced the degree of the homicide to a lower one.

The judgment is therefore affirmed.

WILSON et al. v. STATE. (No. 123.)

(Supreme Court of Arkansas. July 10, 1916.)

1. SUNDAY §29(3)—CRIMINAL PROSECUTIONS FOR UNLAWFUL LABOR—JUSTIFICATION—BURDEN OF PROOF.

In a prosecution for unlawfully laboring on the Sabbath day, the burden is on the defendant to show the existence of the necessity which justified nonobservance of the Sabbath.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 70; Dec. Dig. §29(3).]

2. SUNDAY §7 — CRIMINAL PROSECUTIONS FOR UNLAWFUL LABOR—JUSTIFICATION.

Only in cases of extreme emergency is one justified in disregarding the Sabbath, in order to make preparations for work, or to continue work done on other days of the week.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 14-20; Dec. Dig. §7.]

3. SUNDAY §7 — CRIMINAL PROSECUTIONS FOR VIOLATION OF LAW—JUSTIFICATION.

That the work of defendants, members of a logging crew, on Sunday was necessary to provide a sufficient number of logs to prevent a shutdown of the sawmill on week days held not a justification of the violation of the Sabbath law.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 14-20; Dec. Dig. §7.]

4. SUNDAY §7 — CRIMINAL PROSECUTIONS FOR VIOLATION OF LAW—JUSTIFICATION.

Where a sawmill furnished light and water to the town, using sawdust and refuse for engine fuel, the fact that labor of defendants on Sunday was necessary to furnish sufficient logs in order that enough refuse be available for fuel to furnish such light and water was not sufficient justification of the violation of the Sabbath law.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 14-20; Dec. Dig. §7.]

Appeal from Circuit Court, Mississippi County; W. J. Driver, Judge.

Will Wilson and others were convicted of unlawfully working on the Sabbath day, and they appeal. Affirmed.

Coleman & Lewis, of Little Rock, and C. A. Cunningham, of Blytheville, for appellants. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. Appellants were employes of Lee Wilson & Co., a corporation which operated a sawmill at Wilson, Mississippi county, Ark. They were members of a log train crew, and were indicted for working unlawfully on the Sabbath day, in violation of the statute which makes it a criminal offense for any one to labor on the Sabbath unless the labor performed is a work of charity or necessity. The case was tried before the court sitting as a jury, upon an agreed statement of facts, and the court adjudged the appellants to be guilty, and assessed against each of them a small fine, and they have prosecuted an appeal to this court.

The sawmill of Lee Wilson & Co., situated at Wilson, is used, not only for the manufacture of lumber, but the power which operates the mill is also used in supplying light and water to the inhabitants of Wilson, which is a town of about 1,000 population. There are about 250 men employed at the mill, and they work six days in the week. The fact that water and light are supplied from the power generated at the mill makes it necessary to continuously keep up steam, and, of course, a few men are employed on Sunday for that purpose. Appellants, however, belonged to the log crew, and were not directly engaged in the work of operating the plant. The defense tendered is that it was necessary for the members of the log crew to work on Sunday in order to provide sufficient logs to prevent a shutdown of the mill during work days, and also to furnish enough fuel to keep the mill running continuously. The agreed statement of facts contains the following stipulation with respect to the fuel proposition:

"The boilers at the sawmill are so equipped that they use as fuel the sawdust and refuse which results from the manufacture of logs into lumber. Other fuel cannot be used in them without extensive and expensive alterations."

The other stipulation with respect to the necessity for furnishing logs reads as follows:

"The sawmill by operating six days per week uses more logs than the log loader, log train, and entire logging resources of Lee Wilson & Co. could furnish in a like period. At the time mentioned in the information Lee Wilson & Co.'s entire reserve supply of logs and fuel had become exhausted, and it was necessary for the log loader and log train crew to work on Sunday to keep the mill in operation."

It is also stipulated that during a period of several weeks, including the time appellants are charged with having violated the Sabbath laws—

"there was such an excess of rainfall in Mississippi county that the ground in the woods surrounding Wilson, Ark., for long distances, and in all the woods from which Lee Wilson & Co. did and could obtain a supply of logs, became so soft that it was impossible to get logs from the woods to the railroad. It is impossible to handle

logs from the woods to the mill by wagon, or to get them in any other manner than that in use by Lee Wilson & Co."

[1] Appellants attempt to make a showing of necessity on two grounds: One that the fuel ran out, and that it was necessary to get the logs on Sunday in order to furnish the mill enough logs, the sawing of which would afford enough refuse to use for fuel on Sunday as well as the other days in the week; and also that it was necessary at this particular time for the log crew to work seven days in the week in order to furnish sufficient logs to keep the mill running six full days, and thus prevent a shutdown. The burden of proof was on appellants to show the existence of necessity which justified their nonobservance of the Sabbath. *Shipley v. State*, 61 Ark. 216, 32 S. W. 489, 33 S. W. 107.

Counsel for appellants rely mainly upon the case of *Turner v. State*, 85 Ark. 188, 107 S. W. 388, but we do not think that there is sufficient similarity in the facts of that case to make it controlling in the present case. The accused in that case worked at a large sawmill, which also furnished the power for supplying light and water to the town where the mill was located. The accused was fireman at the mill, and it was his duty to keep up steam to generate enough power to run the machinery which supplied the water and light. Incidentally he cleaned out the boilers and did that work on Sunday in order to prevent a shutdown of the mill on work days, which would have thrown 300 or 400 men out of employment. It was conceded that the work of operating the plant to furnish light and water was a work of necessity, and we held, under those circumstances, the incidental work of cleaning out the boilers in order to prevent a shutdown of the mill on a work day was not a violation of the law, where it appeared that to prevent that it would have been necessary for the mill company to put in four more boilers at a large expense. The effect of that decision was that where the work was only incidental to that which was necessary, and the expense of providing means to obviate the work was considerable, the labor would be treated as necessary within the meaning of the law which justified its prosecution on the Sabbath day.

[2] Now, the contention in the present case that it was necessary for the men to work on Sunday to secure enough logs to keep the mill going on Monday is untenable, for if that be true, it would justify almost any kind of Sabbath work. The policy of the law is to stop all kinds of labor on the Sabbath day except things of real necessity, and all men are expected to conform their business arrangements accordingly. If it was reasonable to provide means to keep the work going on without laboring on the Sabbath, the duty rested upon every one to do so, as it is only in case of extreme emergency that one is justified in disregarding the Sabbath in order to make preparations for work or to continue

work begun on other days of the week. For instance, in *State v. Goff*, 20 Ark. 290, the court held that:

"The husbandman should look forward to the ripening of his grain as an event which must happen, and should make such timely provision for the harvest as not to violate the Sabbath."

And in *Shipley v. State*, supra, it was held that the fact that it was necessary to keep the pumps and fan at work in a coal mine, in order to keep the mine in shape for operation on other days, did not constitute a defense to a charge of violating the Sabbath, and that it was the duty of those engaged in operating the mine to provide such means and appliances as would obviate the necessity of labor on the Sabbath.

[3] So in the present case, it was the duty of Lee Wilson & Co., if it expected to operate its mill six days in the week, to make reasonable provision for supplying logs in emergencies of this kind so as not to require the members of the logging crew to work on Sunday in order that the other men could be given employment on week days.

[4] Nor is it any excuse that it was necessary to furnish fuel, for the appellants have not shown that it would have been unreasonably expensive to procure additional fuel to run the boilers on Sunday so as to keep enough steam to furnish water and light to the town. It is true it is stipulated that other fuel could not be used without "extensive and expensive alterations," but it does not appear from this that the company could not, at reasonable expense, have procured other fuel of the same kind as that which was ordinarily used. Sawdust and slabs were used for fuel, according to the stipulation, and for aught that appears to the contrary other wood fuel might have been obtained at reasonable expense. The burden was, as before stated, on the appellants to show that there was a real necessity for the Sunday work, and we cannot say that the trial court was not warranted in drawing an inference from the agreed statement of facts that no real necessity for the work was proved.

The judgment is therefore affirmed.

CLINTON v. MODERN WOODMEN OF AMERICA. (No. 117.)

(Supreme Court of Arkansas. July 3, 1916.)

INSURANCE \S 720—FRATERNAL INSURANCE—DELIVERY OF CERTIFICATE—NECESSITY.

Where the by-laws of a fraternal benefit society contained the provision that a member's certificate should not be effective until delivery to insured while in sound health, etc., and there was no delivery of the certificate by the clerk of the applicant's lodge, and no attempt made to ascertain the applicant's health, who had been taken ill with appendicitis immediately upon receipt of the certificate by the clerk from the home office, and died the next day, the society was not liable for the death benefit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1856; Dec. Dig. \S 720.]

Appeal from Circuit Court, Yell County; Marcellus L. Davis, Judge.

Suit by Mrs. Maud G. Clinton against the Modern Woodmen of America. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

Jno. B. Crownover, of Dardanelle, for appellant. Truman Plantz, of Warsaw, Ill., George G. Perrin, of Rock Island, Ill., and Jas. A. Gray, of Little Rock, for appellee.

SMITH, J. Appellant brought suit to recover upon a certificate of insurance issued in her favor upon the life of Walter W. Clinton, her husband. The company against which judgment was prayed is a fraternal beneficiary society, and defended the suit upon numerous grounds. Among other defenses interposed was that Clinton, in his written application to become a member of the defendant society, had given his assent that his application should be governed by the by-laws of the society, and that no claim of benefit should be made by himself, or his beneficiary, until his application for membership had been approved, and he had been regularly adopted into the society in accordance with the ritual thereof, and his certificate of membership manually delivered to him by the camp clerk while he was in sound health. These by-laws were offered in evidence, and contained the provisions that the liability of the society for the payment of benefits upon the death of a member should not begin until the applicant had received and signed his certificate while in good health, and that the certificate should not be of any force or effect until the adoption ceremony provided in the ritual of the order had been performed, and that upon the adoption of such member he should pay the dues for the current month, which included the per capita tax and the sanatorium tax, and that the payment of these dues should be made before the policy should be effective. Section 39 of the by-laws provides that no officer of the society, nor any local camp officer or member thereof, is authorized or permitted to waive any of the provisions of the by-laws of the society which relate to the contract between the member and the society. The proof shows that Clinton's application to become a member was made in March 20, 1915, and that the application was accepted, and that the benefit or membership certificate was issued thereon March 31, 1915, and was mailed on that day to L. C. Adams, clerk of the local camp at Dardanelle, and was received by that officer on Friday night after supper. Clinton became ill Thursday night or Friday morning, and called a physician to see him about noon Friday, April 2d, when it was discovered that he was suffering from an attack of appendicitis, and he was carried to Little Rock the following day for an operation, and died on the following Mon-

day. The clerk of the local camp never saw Clinton after the receipt of the certificate, and the certificate was never delivered to nor signed by Clinton. Clinton never paid the first assessment, nor the camp dues, nor was he adopted into the order in accordance with its ritual, nor was any attempt made to deliver the policy by the camp clerk. There was proof, however, that the camp clerk had the certificates of several members in his possession, and that the certificate of at least one of these members had never been delivered to that member, but had always been retained in the possession of the camp clerk. At the conclusion of the evidence the court directed a verdict in favor of the defendant insurance company, and this appeal has been prosecuted from the judgment pronounced thereon.

There appears to be a great many cases which discuss the legal principles which control the decision of this case, and we have been cited to a number of them in the briefs. We find no occasion, however, to go beyond the decisions of our own court for cases which announce these principles. Two cases, which are apparently exactly in point, are *Woodmen of the World v. Hall*, 104 Ark. 538, 148 S. W. 526, 41 L. R. A. (N. S.) 517, and *Peebles v. Eminent Household of Columbian Woodmen*, 111 Ark. 435, 164 S. W. 296. In the first cited case there is set out the provisions of the application and of the by-laws, which are almost identical with those involved in this litigation. It was there held that compliance with these rules and by-laws was a condition precedent, and that there was no valid contract of insurance until they had been complied with.

The question of waiver was raised there, as it is here, but the court there said:

"But it is well settled by the weight of authority that the officers and subordinate lodges of a mutual benefit association have no authority to waive the provisions of its by-laws and constitution which relate to the substance of the contract between the applicant and the association."

In the case of *Peebles v. Eminent Household of Columbian Woodmen*, supra, the by-laws contained the provision that the certificate should not be effective until its delivery to the insured while in good health. We discussed there the meaning and object of this provision, and we there said that this condition was placed in the policy for the benefit of the insurance association, and that it was intended thereby that the representative of the order should ascertain for the order whether the proposed member was, in fact, in good health, and while it was there held that subordinate officers and lodges might become the agent of the governing body in the discharge of administrative duties, and might, in the discharge of these duties, estop the company to deny that they had been performed, it was there recognized that the pro-

vision for the performance of these duties was valid, and compliance with the terms thereof a condition precedent. But it was there held that the conduct of the officer of the local lodge, whose duty it was to ascertain whether the member was in good health at the time of the delivery of the certificate to him, was such as to make a question for the decision of the jury as to whether the company was estopped from denying that the local officer had discharged that duty. But it was there held, in effect, that the certificate was not in force until that duty had been performed. The duty there to be performed by the officer of the subordinate lodge was to ascertain that the member was in good health at the time of the delivery of the certificate, and the evidence in that case presented a question of fact for the decision of the jury as to whether the duty had been discharged. Here there was no delivery of the policy, nor attempt to ascertain the health of the applicant. Indeed, such effort would have disclosed that the applicant was not in good health, and it would therefore have been the duty of the local officer to refrain from making the delivery.

It appears, therefore, that the verdict was properly directed, and the judgment of the court below will be affirmed.

EQUITABLE SURETY CO. v. WILSON et al. (No. 50.)

(Supreme Court of Arkansas. June 12, 1916.)

1. PARTIES \S 96(1) — IMPROPER JOINDER — WAIVER.

Where the complaint states a cause of action within the jurisdiction of the court and there is no answer or demurrer for improper joinder or incapacity of parties, such issues are deemed waived, under Kirby's Dig. §§ 6093-6096.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 167, 169, 170, 172, 173; Dec. Dig. \S 96(1).]

2. APPEAL AND ERROR \S 281(1), 544(1) — SCOPE OF REVIEW—PRESERVATION OF EXCEPTIONS.

On appeal the court can consider, in the absence of motion for new trial and bill of exceptions, only errors apparent on the face of the record, so that, where the record shows that evidence was taken before default judgment, defendant would not be heard to complain that no evidence was taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1650, 1654, 1657, 3281, 2412, 2417; Dec. Dig. \S 281(1), 544(1).]

Appeal from Circuit Court, Yell County; M. L. Davis, Judge.

Action by T. E. Wilson and others against the Equitable Surety Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

A. N. Falls and T. E. Wilson, as commissioners of public buildings for Yell county, Ark., entered into a contract with the firm of R. L. Wright & Co., of Dallas, Tex., to

erect and complete a courthouse and jail building for the Dardanelle district of Yell county. Among other provisions of the contract the contractor agreed to provide all materials used in the building and to complete the building according to the plans and specifications prepared by a certain architect employed by the commissioners. The contractor, as principal, and appellant, as surety, executed a bond to T. E. Wilson, one of the commissioners, one of the provisions of which was that:

"If the said principal shall perform said contract according to the terms, covenants and conditions thereof * * * then this obligation shall be void, otherwise to remain in full force and effect."

This suit was instituted by the appellees in the Yell circuit court. It was alleged, among other things, that the contractor was a nonresident of this state and insolvent; that the commissioners had fulfilled all the conditions required of them by the contract and bond. They alleged that the contractor had failed to complete the building according to the contract "by refusing to build a concrete coal room in the basement thereof, which would cost \$300," and that the contractor had put on the roof of the building "in such a negligent manner that it has caused a leakage, which has damaged said building in the sum of \$500"; that the contractor had refused to pay for the damage and to repair the roof; that the contractor had entered into a contract with the Cole Manufacturing Company to furnish materials and articles required under the provisions of the contract, and had purchased and received from the Cole Manufacturing Company materials used in the construction of the building of the aggregate value of \$695.50, and was due the Cole Manufacturing Company the sum of \$328.30 as a balance on materials furnished according to the statement attached to the complaint and marked "Exhibit B"; that the contractor, although requested, had refused and neglected to pay the account. Appellees alleged that they had notified appellant of the failure of its principal, the contractor, to pay for the materials used in the construction of the courthouse and the failure to perform the contract in the particulars alleged in the complaint as under the terms of the contract they were required to do. Appellees prayed for judgment for the respective sums alleged to be due, aggregating \$1,128.30. Summons was duly served on the appellant. The judgment recites:

"And, it further appearing to the court that the said defendant, the Equitable Surety Company, has wholly failed to plead, answer, or demur, although the time allowed by law for the filing of the said answer or demurrer is passed, this cause is then heard by the court upon the complaint, with the amendment thereto and the exhibits filed and the oral testimony of A. N. Falls, one of the commissioners, and one of the

plaintiffs herein, from which testimony and proof the court doth find that A. N. Falls and T. E. Wilson, as building commissioners for the Dardanelle district of Yell county, Ark., regularly entered into a contract with L. R. Wright & Co., of Dallas, Tex., for the construction of a courthouse building in the city of Dardanelle, Ark., according to the plans and specifications furnished them; that the said R. L. Wright & Co. executed to the commissioners a bond, guaranteeing the faithful performance of their contract with the Equitable Surety Company, the defendant herein, surety thereon."

Then follow recitals that the contractor had been declared a bankrupt; that he was a nonresident of the state, and had no property therein subject to execution; that the contractor had failed to comply with the terms of its contract, specifying the particulars, to the damage of the county in the sum of \$800, and had failed to pay the Cole Manufacturing Company the sum of \$328.30, the balance due it for material, as shown by the itemized statement of account filed as a part of the evidence in the cause. Then follows a recital showing the entry of the judgment in favor of the commissioners for the sum of \$800, and in favor of the Cole Manufacturing Company in the sum of \$328.30. Appellant prayed an appeal, and same was granted by the clerk of this court.

John M. Parker, of Dardanelle, for appellant. L. C. Hall, of Dardanelle, for appellees.

WOOD, J. (after stating the facts as above). [1] The appellant contends that, inasmuch as the claims sued on were held by different persons, they could not be joined in one complaint; that the complaint therefore, upon its face, shows a misjoinder of parties. Appellant also contends that appellees Wilson and Falls were not proper parties, that they had no interest in the matter complained of, and that the suit should have been brought in the name of the state of Arkansas for the use of Yell county. The complaint states a cause of action within the jurisdiction of the court; and, as there was no answer or demurrer raising these issues now insisted on by appellant, same "shall be deemed to have been waived." Sections 6093-6096, Kirby's Digest.

[2] Appellant also contends that no proof was taken as to the amount and justness of appellee's claim. But the judgment recites that the cause was heard upon the exhibits and the oral testimony of A. N. Falls. There was no motion for a new trial and no bill of exceptions, and we can only consider errors in the rendition of the judgment which are apparent on the record. Haglin v. Atkinson-Williams Hdw. Co., 93 Ark. 85, 124 S. W. 518.

As no errors appear on the face of the record showing the judgment to be erroneous, it must be affirmed.

DREW COUNTY TIMBER CO. et al. v.
BOARD OF EQUALIZATION OF
CLEVELAND COUNTY. (No. 89.)

(Supreme Court of Arkansas. June 26, 1916.)

1. JURY \S 10—RIGHT TO TRIAL BY JURY.
The statutory right of trial by jury is confined to cases which at common law were so triable before the adoption of the Constitution.

[Ed. Note.—For other cases, see Jury, Cent. Dig. \S 15, 16, 27½; Dec. Dig. \S 10.]

2. TAXATION \S 466—BOARD OF EQUALIZATION—POWER—STATUTE.

A county board of equalization, being created by statute, can perform no act not specially authorized by the statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 829, 830; Dec. Dig. \S 466.]

3. TAXATION \S 493(1)—BOARD OF EQUALIZATION—WRONGFUL ASSESSMENT—REVIEW.

A taxpayer, aggrieved at the action of the board of equalization in valuation of property, may apply to the county court for relief, and in turn appeal to the circuit court.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 876; Dec. Dig. \S 493(1); Appeal and Error, Cent. Dig. \S 141.]

4. JURY \S 19(17)—RIGHT TO TRIAL BY JURY—ACTION TO REDUCE VALUATION OF PROPERTY.

In an action for reduction of valuation of timber lands by the county board of equalization, a taxpayer has no right to trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. \S 125; Dec. Dig. \S 19(17).]

5. TAXATION \S 40(8)—CONSTITUTIONAL REQUIREMENTS—EQUALITY—DISCRIMINATION AS TO VALUATION.

Under Const. art. 16, \S 5, providing that property shall be taxed according to value, and that one species shall not be taxed higher than another of equal value, which shall be ascertained in such manner as the General Assembly shall direct, and Kirby's Dig. \S 7008, providing that the county board of equalization shall raise or lower valuation as compared with average valuation, having regard to the relative situation, soil, improvements, and natural or artificial advantages, the quality of standing timber, and other elements entering into and constituting the value of the land, or the value of agricultural lands worth as much or more, which were given a lower value, a valuation being essential for taxation of land, although the assessment was less than the actual market value, and the board considered logging conditions and everything necessary to value timber lands among themselves, there was an unlawful discrimination between the valuation of plaintiff's lands and other real property of the county.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 79, 80; Dec. Dig. \S 40(8).]

Appeal from Circuit Court, Cleveland County; Turner Butler, Judge.

Action by the Drew County Timber Company and others against the Board of Equalization of Cleveland County. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

Williamson & Williamson, of Monticello, for appellants. Wallace Davis, Atty. Gen., Hamilton Moses, Asst. Atty. Gen., and E. L. Compere, of Hamburg, for appellee.

HART, J. Appellants own 5,741 acres of timber land in Cleveland county, Ark. The board of equalization raised the assessment on their lands to \$5 per acre. Appellants applied to the county court for a reduction to \$3 per acre. Their application was denied by the county court, and they appealed to the circuit court. The circuit court denied them relief, and they have appealed to this court.

[1-4] They first contend that the circuit court erred in refusing them a trial by jury. There is no merit in this contention. The statutory right of trial by jury is confined to cases which at common law were so triable before the adoption of the Constitution. *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880; *Wheat v. Smith*, 50 Ark. 266, 7 S. W. 161. Boards of equalization are creatures of the statute, and they can perform no act except such as they are specially authorized to do. The taxpayer aggrieved at the action of the board of equalization may apply to the county court for relief, and in turn appeal to the circuit court, but he has no right to a trial by jury. *Clay County v. Brown Lumber Co.*, 90 Ark. 413, 119 S. W. 251; *Board of Equalization Cases*, 49 Ark. 518, 6 S. W. 1.

[5] It is next contended by counsel for appellants that the board of equalization acted on a fundamentally wrong principle in valuing their lands, and that the values placed upon them were arbitrary and capricious as compared with the average valuation of the other real property situated in the county or in the townships where their lands are situated. Article 16, section 5, of our Constitution, provides that all property subject to taxation shall be taxed according to its value, and that no one species of property shall be taxed higher than another species of property of equal value. The section provides that the value shall be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the state. Section 7008 of Kirby's Digest provides that the county board of equalization shall raise the valuation of such tracts of real property as in the opinion of the board have been returned below their true value to such price as may be deemed to be the true value thereof, agreeably to the requirements of the statute in regard to the valuation of real property. The section also provides that the board may reduce the valuation of such tracts as in the opinion of the board have been returned above their value as compared with the average valuation of the real property of such county, having due regard to the relative situation, qual-

ity of soil, improvements, and natural and artificial advantages.

It is the contention of counsel for appellants that the undisputed evidence shows that the board discriminated against their lands within the meaning of the rule laid down in *Ex parte Mt. Smith & Van Buren Bridge Co.*, 62 Ark. 461, 36 S. W. 1060, and *Am. Bauxite Co. v. Board of Equalization of Saline County*, 177 S. W. 1151, construing the section of the Constitution and statutes above referred to. Appellants owned timber lands in three townships in the county. Their holdings comprised 5,741 acres; Bradley County Lumber Company owned 3,018 acres; Warren Vehicle Stock Company owns 837 acres; Southern Lumber Company owns 281 acres; and the Gates Lumber Company owns 180 acres. All these lands are timber lands and are of the same general character. Most of these timber lands were assessed at \$5 an acre. Appellants endeavored to have their lands assessed at \$3 an acre, but the board of equalization placed the assessment at \$4, except 184 acres, which they raised to \$1 an acre. All the other lands in the three townships were assessed at a uniform value of \$2.25 per acre. The appellants and the other companies above mentioned were the only owners of extensive tracts of timber lands in the county. The other lands were agricultural lands, and the three townships in which appellants' timber lands are situated are thickly settled. The board, in placing a value upon the timber lands, took into consideration the logging conditions and everything else that would tend to affect the value of timber lands. This was right. It was shown that large tracts of timber lands, situated in a body and owned by the same person were of much greater value than smaller tracts owned by separate persons and which do not lie in a body. The reason is that the only practical way to log the lands is to build tramroads into the timber, and this can only be successfully done when one person or corporation owns a large body of land. It may be stated here that the evidence shows that all the lands were assessed at less than their market value. Our statutes provide that the board may actually enter upon and view the property when they are not fully satisfied of its true value, but the board is not required to make the valuation from actual view. The board however, is required, in making the valuation to have due regard to the relative situation, quality of soil, improvements, and natural or arti-

cial advantages. In short, it must consider the advantages or disadvantages of location, the quality of soil, the quantity and quality of standing timber, as well as all other elements which enter into and constitute the value of the land. These are the plainly expressed rules and principles upon which our Constitution and statutes contemplate that the valuation shall be made.

The undisputed evidence shows these principles were ignored and disregarded, and an arbitrary classification was applied to timber lands as compared to the average valuation of the real property of the county. A valuation is essential to laying the foundation for taxing land, and the board has no authority to discriminate against one tract and favor all other property of the same kind in the county. The members of the board attempted to fix the value of all the timber lands on the same basis, but they adopted a wholly different basis of value for agricultural land. It is true one of the members of the board testified that cut-over lands were not worth more than \$2.25 per acre as compared with timber land, but on cross-examination it developed that what he meant was that lands from which all merchantable timber had been cut and removed, and which were not susceptible of cultivation, or which had not been put in cultivation, were not worth more than \$2.25 per acre. The undisputed evidence, however, shows that the three townships in which the timber lands of appellants were situated were thickly settled, and that a greater majority of the lands therein were agricultural lands. The undisputed evidence is that the agricultural lands were worth as much or more than the timber lands. The board, therefore, placed a valuation upon the timber lands which would necessarily operate unjustly and unequally. Real estate must be valued in the manner and upon the principles prescribed by our Constitution and statutes. While all the lands were assessed at a value lower than their true market value, still, in our opinion, the undisputed evidence shows that the lands of appellant were returned above their true value as compared with the average valuation of the real property of the county.

The assessor and board had no right to make discrimination in the assessment and equalization of values of real estate. It follows that the judgment will be reversed, and the cause remanded, with directions to the circuit court to make the reduction asked for by appellants.

HOLLAND v. STATE. (No. 4102.)

(Court of Criminal Appeals of Texas. May 31, 1916. On Motion for Rehearing, June 21, 1916. Dissenting Opinion July 8, 1916.)

1. CRIMINAL LAW §982 — SUSPENSION OF SENTENCE—BURDEN OF PROOF OF PRISONER'S REPUTATION.

Under Vernon's Ann. Code Cr. Proc. 1916, arts. 865b, 865c, providing that in no case shall sentence be suspended except when the proof shall show and the jury shall find that the defendant has never before been convicted of a felony, the burden of proving that accused has never been convicted of a felony is upon accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.]

2. CRIMINAL LAW §982 — SUSPENDED SENTENCE—EVIDENCE.

When accused properly pleads for suspended sentence, the state may introduce testimony as to the general bad reputation of accused, and also prove specific instances of crimes, even minor misdemeanors and the general conduct, habits, etc., of accused, so that the jury, from all the testimony, even if accused has never before been convicted of a felony, can determine whether or not in their discretion they will recommend a suspension of sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.]

3. CRIMINAL LAW §982 — SUSPENDED SENTENCE—EVIDENCE.

Upon application for suspended sentence, purely hearsay testimony, as distinguished from general reputation or specific acts of accused within the knowledge of the witness, is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.]

4. CRIMINAL LAW §982 — SUSPENDED SENTENCE—EVIDENCE.

The court should be liberal in allowing testimony by the state upon question of accused's reputation, habits, and commission of previous felony, and such proof may be introduced at the time of proving the offense itself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.]

5. CRIMINAL LAW §982 — SUSPENDED SENTENCE—EVIDENCE.

Upon application by accused for suspended sentence if when the state offers proof of his habits, reputation, etc., he withdraws his application, the court should permit no such proof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.]

6. CRIMINAL LAW §982 — SUSPENDED SENTENCE—EVIDENCE.

Under Vernon's Ann. Code Cr. Proc. 1916, arts. 865b, 865c, upon application for suspended sentence, where accused fails to prove that he has never been convicted of a felony, the jury may not pass on the question of recommending a suspended sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.]

On Motion for Rehearing.

7. CRIMINAL LAW §1169(1) — APPEAL AND ERROR—HEARSAY TESTIMONY.

On application for suspended sentence in burglary trial, where evidence of guilt was clear and accused offered no testimony as to good

reputation or not having been convicted of felony, and the jury assessed the lowest punishment, the admission of hearsay testimony as to accused's photograph being in a rogues' gallery was harmless error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. § 1169(1).]

Davidson, J., dissenting.

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Herschall Holland was convicted of burglary, and appeals. Affirmed.

H. Reed Williams, of Dallas, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of burglary, and assessed the lowest punishment. The evidence was amply sufficient to sustain the verdict. We see no necessity of reciting it.

Appellant, on the eve of the trial, filed his sworn plea, seeking a suspension of his sentence in case he was convicted. When this is the case, the statute enacts (article 865c, Vernon's C. C. P.) that:

"The court shall permit testimony * * * as to the general reputation of defendant to enable the jury to determine whether to recommend a suspension of sentence, and as to whether the defendant has ever before been convicted of a felony."

The statute also enacts (article 865b):

"That in no case shall sentence be suspended except when the proof shall show, and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this state or any other state."

[1] We have repeatedly construed these statutes in our previous decisions. It is unnecessary to collate them here. In the particular mentioned, we think the statute means what it says and says what it means; that is, that it is incumbent upon an accused himself when he pleads for a suspended sentence to prove that he has never before been convicted of a felony in this or any other state. Under the statute, no presumption is indulged in his favor that he has not so committed a felony. He must prove it. If there is no proof of this fact, then the court should not submit the issue of suspended sentence to the jury for a finding at all, and that was the case in this instance.

[2, 3] Whenever an accused pleads for a suspended sentence by proper sworn plea in time, the statute is clear when it says that the court shall permit testimony as to the general reputation of the accused, to enable the jury to determine whether or not to recommend a suspension of the sentence. We think this is clear, and means what it says. And, taking the whole statute and the object and purpose of it, we have held, and still hold, that not only can the state introduce testimony as to the general bad reputation of an accused, but can also prove specific instances of crimes, even minor misdemeanors

and the general conduct, habits, etc., of an accused, so that the jury, from all the testimony, even if he has never before been convicted of a felony, can determine whether or not in their discretion they will recommend a suspension of his sentence. The court should not permit purely hearsay testimony as contradistinguished from general reputation or specific acts within the knowledge of the witness testifying.

[4, 5] Practically in all records coming before this court where an accused has pleaded for a suspended sentence, such plea, as in this instance, is filed on the very eve of the trial. The state cannot, and does not, know that the accused will file such plea, and is therefore frequently ill prepared, if prepared at all, to offer proof on such plea to disprove it. Hence it is more necessary, in order to reach the real intent of the law, that the court shall be liberal to the state in admitting testimony on this issue. The state is not bound to wait until after an accused himself offers proof that he has committed no felony and of his good reputation, habits, etc., but may introduce such proof at the time of proving the offense itself. However, of course, if when the state offers such proof the accused should then withdraw his plea for a suspended sentence, the court should permit no proof on the subject.

Appellant has some bills of exceptions to the introduction by the state of some testimony along this line. They are qualified in a very lengthy statement by the trial judge. We think it unnecessary to recite this here, and we think it unnecessary to discuss the said suspended sentence law in a general way other than we have done, but think it necessary only to discuss it to the extent to decide the questions raised herein. We think the testimony in this case, without contradiction, affirmatively shows that appellant's general reputation as a peaceable and law-abiding man, and in some particulars also, was bad, and he offered no proof to show that he had never before been convicted of a felony. Hence it was proper, as the court did, to refuse to submit that issue to the jury for a finding. Even if the court on that issue admitted pure hearsay testimony, it became harmless, in the light of all the testimony and the fact that the jury assessed the lowest punishment.

[6] The court correctly answered the inquiry of the jury when he told them that, under the circumstances, they had no right to pass on the question of recommending a suspended sentence.

There is no reversible error shown by this record.

The judgment is affirmed.

On Motion for Rehearing.

[7] In his motion for rehearing appellant again urges that it was reversible error for
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the court to permit the question and answer by the state of the witness Harry Kendall, as follows:

"Q. I will ask you if you don't know it to be a fact that his mug appears in the detectives' office up here, where they mug desperate characters, and that his mug is in other places that you know of? A. I heard Mr. De Witt say in there awhile ago that he was mugged, but I could not say that I know he was mugged"—claiming that this was hearsay.

We considered this question fully at the time the opinion was prepared and handed down, and held the court should not permit hearsay testimony as contradistinguished from general reputation or specific acts within the knowledge of the witness testifying, and, further, that even if the court on the issue of suspended sentence admitted pure hearsay testimony, it became harmless, in the light of all the testimony and the fact that the jury assessed the lowest punishment. All of appellant's bills are along the same line. We then thought it unnecessary to take up this particular question and discuss it alone, as it was embraced within the discussion of all of them together. Neither did we then make any statement of the testimony. We will now do so.

Appellant pleaded for a suspended sentence. He neither testified himself, nor offered any witness or other testimony in his behalf. This testimony objected to, as the record clearly shows, was offered solely to let the jury determine whether or not it would suspend his sentence. It was not offered nor admitted for any other purpose.

The uncontradicted testimony by the state showed that "just prior, two or three days before," February 5, 1916, Sammy Williams called the witness Harry Kendall into Graves' tailoring shop in Dallas, and Kendall swore:

"At that time I had a conversation with Hershall Holland and Sammy Williams, * * * and Sammy Williams said that they were going to 'make' the Crowdus Drug Company, and that he would have some dope on hand, and asked me if I could dispose of it in any way. * * * I told them this: That if they made the joint, it could be very easily disposed of, and that they could get a good price for it."

Mr. Mitchell, the manager of the Crowdus Drug Company, swore: That the drug company's house was burglarized on the night of February 5, 1916. The store building was five stories and a basement. That the entry was made up the fire escape and by raising a window. They broke an iron bar, and the window was locked on the inside with a padlock. This padlock they also prized open. That the narcotics of the company were kept on the third floor, in a room partitioned off and locked to itself. That they used the same instrument that they entered the building with to open that padlock to the room where they kept these narcotics. That in addition to opening the window, they had to break two locks, that on the inside of the window and the door to where these nar-

cotics were kept, so as to reach them. That they stole 130 bottles of morphine, 16% ounces, worth at wholesale \$7.50 an ounce, and 11 bottles of cocaine, containing a half ounce each, and 1 bottle containing 1 ounce, all together worth \$156 at wholesale. That the drug company recovered 95 bottles only of the stolen morphine and none of the cocaine.

Lane Wilson testified: That a little after midnight on the night of February 5, 1916, Sammy Williams phoned him and procured from him his automobile. That that night about 1:30 said Williams and appellant together came to his house in said car. That he went out to where they were, and found them with over a hundred bottles of morphine—he counted over a hundred. He got in the car with them, and they went down to his room in his mother's house and carried the stuff into his room. He swore:

"I bought 50 bottles from Hershall Holland and paid him \$125 for it. I paid that money to Hershall Holland."

He further swore that the three then went to Harry Kendall's residence. Harry Kendall and his wife swore that they came there that night together. Kendall swore that on that occasion Hershall Holland or Sammy Williams—

"one or the other, while they were both present there said, 'We made the Crowdus Drug Company; that we climbed up the fire escape and jimmied the lock.'"

That they left 4 bottles of the morphine there with him, intended as a gift to him. They tried to get him to go with them to Ft. Worth to sell the "dope," but he advised against this. It seems that Lane Wilson was arrested for having said part of said morphine in his possession. While in jail, he told Burford Jetty to get this "dope" and take it away from his house, which Jetty did. The officers caught onto this, and recovered that much of the morphine from Jetty, which was identified as stolen from the drug company and returned to it.

From this uncontradicted testimony, no one can doubt the guilt of appellant. It establishes his guilt beyond a doubt. With this clear guilt of appellant established, the state sought to prevent the jury from suspending his sentence, and on the question of suspended sentence solely introduced the testimony above objected to. The state sought to prove by said witness Harry Kendall that appellant's general reputation was bad as a peaceable, law-abiding citizen and honest man, but he said he could not say whether his reputation was good or bad, "but he had got a pretty rough name to be a kind of fighter, and that is all"; that he could not say he is an honest man, but he was honest with his fellow citizens—with the boys that he dealt with. On recross-examination by the appellant, he swore:

"He has got a bad reputation for fighting; he gets drunk and shoots and things like that."

Mr. De Witt, the detective, swore he knew appellant's general reputation for being a peaceable, honest, law-abiding citizen, and that it was bad. This, together with the objected to testimony, was all the testimony on this subject.

The admission, over appellant's objection, of what the witness swore Mr. De Witt had told him, was error, but, as shown, the witness as a part of his answer expressly stated, "But I could not say that I know he was mugged." As stated, the jury assessed the lowest punishment, and we think that the admission of this testimony, under the circumstances of this case, does not present reversible error. Judge Hurt, in *Post v. State*, 10 Tex. App. 594, said:

"If this court must reverse for every irregularity, though objected to, whether it tended to injure defendant or not, it would be almost impossible in a great many cases to legally convict. The action of the court in this matter was wrong, but, no injury appearing therefrom, we cannot make it a ground for reversal."

To the same effect is *Bond v. State*, 20 Tex. App. 438; *Saddler v. State*, 20 Tex. App. 196; *King v. State*, 42 Tex. Cr. R. 109, 57 S. W. 840, 96 Am. St. Rep. 792; *Tinsley v. State*, 52 Tex. Cr. R. 95, 106 S. W. 347. A great many other cases to the same effect could be collated, but we think it unnecessary.

The motion is overruled.

DAVIDSON, J. (dissenting). When the original opinion was announced, I did not then enter my dissent. When the court overruled the motion for rehearing, I noted my disagreement. I cannot agree with some statements and conclusions found in the opinion of the majority, so I shall follow the record in such quotations as I think necessary.

Bill of exceptions No. 1, as contained in the record, is as follows:

"Be it remembered that upon the trial of the above entitled and numbered cause, while Henry Kendall, a witness for the state, was in the witness stand in behalf of the state, the state introduced the following testimony, to wit: 'Q. I will ask you if you don't know it to be a fact that his mug (meaning defendant's picture) appears in the detective's office (meaning rogues' gallery) up here, where they mug desperate characters, and that his mug is in other places that you know of? I want you to tell me whether or not you have heard that? A. I heard Mr. De Witt say in there awhile ago that he was mugged.'"

This is the testimony to which many objections were urged. These objections were all overruled, and the testimony went before the jury. In the original opinion the majority of the court held that, inasmuch as appellant had filed his plea for suspended sentence:

"It is incumbent upon an accused himself, when he pleads for a suspended sentence, to prove that he had never before been convicted of a felony in this or any other state. Under the statute, no presumption is indulged in his favor that he had not so committed a felony. He must prove it. If there is no proof of this fact, then the court should not submit the issue of

suspended sentence to the jury for a finding at all, and that was the case in this instance. Whenever an accused pleads for a suspended sentence by proper sworn plea in time, the statute is clear when it says that the court shall permit testimony as to the general reputation of the accused to enable the jury to determine whether or not to recommend a suspension of the sentence. We think this is clear and means what it says. And taking the whole statute and the object and purposes of it, we have held, and still hold, that not only can the state introduce testimony as to the general bad reputation of an accused, but can also prove specific instances of crime, even minor misdemeanors and the general conduct, habits, etc., of an accused, so that the jury from all the testimony, even if he has never before been convicted of a felony, can determine whether or not in their discretion they will recommend a suspension of his sentence. The court should not permit purely hearsay testimony as contradistinguished from general reputation or specific acts within the knowledge of the witness testifying."

This quotation lays down two propositions: First, that it is incumbent upon the defendant, when he files his plea for suspended sentence, to prove it. If he does not prove it, it is not an issue in the case, and the court should not submit the matter to the jury. Other decisions have so held. The second proposition is that purely hearsay testimony shall not be admitted on this issue, and yet this judgment is affirmed when the defendant introduces no testimony on his plea of suspended sentence. If the defendant does not file his plea for a suspension of the sentence, it cannot be an issue in the case, and no testimony should be admitted bearing upon his reputation. Defendant alone can put his reputation at issue under the suspended sentence act. The state cannot do it. If he files his plea and offers no testimony, it is not an issue before the jury, because he does not tender any evidence on that question. Special matters to become issues in a case when authorized must be supported as to burden of proof by the party tendering such issues. Inasmuch as appellant did not offer any testimony in regard to this plea, the court was not authorized to submit the issue to the jury. This court, as well as the trial court, recognized that as the law, and the trial court refused to so charge the jury on the matter, and at their request expressly told them they could not consider it, and yet this hearsay testimony was permitted to go before the jury and remain before them. That it is purely hearsay is not the subject of debate. The witness Kendall, answering the question as to whether he had ever heard that appellant's picture was in the rogues' gallery, stated that he had heard Mr. De Witt say so awhile ago. It was not even attempted to be shown that his picture was in the rogues' gallery, but this witness was permitted to state that he had heard Mr. De Witt say so. This is hearsay evidence of the veriest type. It could not be introduced either upon the plea of suspended sentence, if testimony had been offered in support of that plea, much less could it be introduced in evidence to affect the defendant's standing

and reputation. I feel justified in making the statement that no opinion has been written that would hold this character of testimony admissible otherwise than as the merest hearsay. In the opinion on rehearing the majority opinion does not fully copy the matter as set forth in bill of exceptions, but refers to the original opinion, in which it was held that the court should not permit purely hearsay testimony as contradistinguished from general reputation or specific acts within the knowledge of the witness testifying, and, further, even if the court on the issue of suspended sentence admitted hearsay testimony, it became harmless in the light of all the testimony and the fact that the jury assessed the lowest punishment. The opinion on rehearing concedes the error, but puts the affirmance on the ground that it was harmless, especially so because appellant received the lowest punishment. Appellant was on trial for burglary, which is a serious felony in its nature and punishment under the Penal Code. To be convicted of this offense is a serious matter to the defendant, whether he be justly or unjustly convicted. If the conviction should be proper, under the facts and law it renders a man infamous, bars him of all rights and privileges as a citizen of Texas; he cannot vote, testify, and do other things that the citizen unconvicted of a felony can do. It is necessarily of serious moment to him whether he be guilty or innocent. If he be innocent or if he be convicted when he should not be, there are other serious matters added to what has been stated where a just and legal conviction is obtained. He is made to suffer punishment in addition to the infamy engendered by reason of the conviction which he ought not to endure.

In Texas we have at least two leading propositions with reference to the trial of criminal cases: First, the legitimate facts must show guilt; second, only legitimate facts and legitimate methods shall be indulged to obtain the conviction. He may be guilty but if methods and means are resorted to, to obtain a conviction not authorized or justified by the law, the law has been prostituted beyond its purpose and beyond the authority invested in the court by legislative enactment. We do not legally convict men in Texas on illegitimate testimony or for offenses not denounced by the statute. All crimes in Texas are statutory. In fact, there can be no violation of law in Texas unless the Legislature has defined the offense before the man is tried or commits the act for which he is being tried. Recognizing this to some extent at least, the majority of this court in the instant case held that, inasmuch as appellant received the lowest punishment, therefore this illegal testimony was harmless error. As before stated, this testimony was not admissible on the plea of suspended sentence. The issue was not before the jury.

Defendant offered no testimony, and the court expressly so instructed the jury, and this court in the majority opinion says the trial court was correct. Now we have the testimony set out in a bill of exceptions, or rather the statement of the witness recorded in the bill, which is purely hearsay, and the court says that the statement of the witness, although hearsay, was harmless. I do not understand how this statement of the majority opinion can be justified. The law presumes the defendant innocent until his guilt is established by legal testimony to the exclusion of the reasonable doubt. Here is a case where the guilt is not conceded. The defendant is fighting for his liberty. The burden is on the state to prove his guilt beyond a reasonable doubt to the exclusion of the presumption of innocence. The state is permitted to prove by the witness Kendall that a man named De Witt told him that defendant's picture was in the rogues' gallery, which, of course, means that he belongs to the confirmed criminal class. What becomes of the presumption of innocence? If the rogues' gallery does not mean he is a confirmed criminal, then the writer does not understand what it does mean. When a picture of a man is placed in the rogues' gallery, it publishes that he is a criminal. The fact that the picture was in the gallery was not even proved by the witness, but he stated that Mr. De Witt told him it was there. Now we have a case sharply presented that the defendant is not legally guilty. The law says he is presumed innocent until his guilt is established by legal testimony beyond a reasonable doubt. The state is permitted to introduce testimony of the witness Kendall that Mr. De Witt told him the defendant was such a confirmed criminal that they had placed his picture in the rogues' gallery. If this is not damaging, the writer does not understand what sort of testimony or what sort of illegitimate evidence would be damaging, but the "antinomian cloak" of "harmless error" is thrown over the transaction, and the defendant, in the face of this record, must serve a term in the penitentiary. There may be cases of harmless error, but in a case like this it ceases to be harmless error.

There are two rules the writer has always understood to be fundamental with reference to this question, and to which the doctrine of harmless error cannot apply: First, if the ruling of the court is error, or if the introduction of the evidence would probably lead to or assist the state in getting a conviction when the guilt was in doubt, or the jury may or could take the opposite view and acquit, then the error cannot be harmless. But for this ruling of the court the jury may have taken a different view and acquitted. It was a fact of damaging force and effect that the defendant's picture was in the rogues' gallery, and therefore a confirmed criminal, even if it had been proved as a fact, which

even then ought not to have been permitted, but where it is purely hearsay that somebody else said that they had his "mug" or picture in the rogues' gallery, the error becomes doubly intensified. It may have turned the scale in the minds of the jury. The jury came before the court and asked with reference to an instruction as to the plea of suspended sentence, and the court declined to give it. This shows the bent of the jurors' minds, and this identical testimony may have been the turning point in their minds. They wanted to give the defendant the benefit of the suspended sentence. The court informed them they should not consider it, but this testimony remained before that jury, and whatever else may be said about it, there is no escaping the statement and conclusion that the defendant's guilt was declared by the verdict of the jury and affirmed by this court. He is in the penitentiary, or soon will be upon the issuance of the mandate of this court. That he has been damaged is not to be questioned. Then I restate this rule: That wherever the error is of such a nature as may have probably influenced the jury to a conviction, when it might not possibly have occurred, it is reversible error. This is not debatable, and ought not to be in Texas. The second rule is that where the testimony admitted may have led the jury to assess a higher punishment than the minimum, then it is reversible error.

There is another view that might be presented in this particular case. The testimony upon which the state relied was practically all from accomplices. The jury, of course, was instructed under those circumstances that if there is any evidence in the record tending to connect the defendant with the offense committed, it would be sufficient to justify the jury in a verdict of guilt, provided they believed the testimony of the accomplices. The jury does not understand or appreciate as a rule close questions of that sort; they take a broader view, and do not generally understand what fact tends to connect the defendant with the offense about which the accomplice testified. This is so well recognized by the courts and bar that I do not care to discuss it. Then where a matter of this sort comes, and hearsay evidence of the fact that a man is such a notorious criminal that they have placed his picture in the rogues' gallery at different places, or even as in the place testified by Kendall, it may have been taken by the jury as such evidence of his guilt that he was connected with the offense of burglary charged in the indictment.

Much might be written along these lines, but I have written as above because I believe this conviction was unjustly and illegally obtained; that defendant has not had a fair trial accorded him by the law of the land. For these reasons I respectfully enter my dissent.

BAKER v. STATE. (No. 4061.)

(Court of Criminal Appeals of Texas. May 17, 1916. On Motion for Rehearing, June 21, 1916. Dissenting Opinion July 3, 1916.)

1. CRIMINAL LAW §304(16) — EVIDENCE — JUDICIAL NOTICE—CONVICTION.

The trial court may take judicial notice of convictions in its own court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 711, 2951½; Dec. Dig. § 304(16).]

2. CRIMINAL LAW §315 — PRESUMPTION — CONTINUANCE OF CONDITION—INCOMPETENCY OF WITNESS.

A witness, proven to be incompetent because of a felony conviction, presumably remains incompetent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 748; Dec. Dig. § 315.]

3. WITNESSES §78 — INCOMPETENCY — PARDON—EVIDENCE.

A copy of the pardon is the best evidence to show that a witness previously convicted of a felony was competent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 195-200; Dec. Dig. § 78.]

4. CRIMINAL LAW §594(1) — HARMLESS ERROR—INTERLOCUTORY PROCEEDING—CONTINUANCE.

There is no reversible error in refusing a continuance for an absent witness, who would have testified to facts which could have been established by other parties who were not called to the stand.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1321; Dec. Dig. § 594(1).]

5. CRIMINAL LAW §366(6) — EVIDENCE—RES GESTÆ—STATEMENT OF INJURED PERSON.

Deceased's declaration that accused stabbed him is admissible as part of the res gestæ, when made from three to five minutes after the stabbing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 820; Dec. Dig. § 366(6).]

6. HOMICIDE §203(3) — DYING DECLARATION — SENSE OF IMPENDING DEATH—SUFFICIENCY OF SHOWING.

Deceased's declaration that accused stabbed him, that he was turning blind, and would fall, is admissible as a dying declaration, where he did fall and die within a few minutes.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 432; Dec. Dig. § 203(3).]

7. HOMICIDE §187 — EVIDENCE — SELF-DEFENSE—DECEASED'S POSSESSION OF WEAPON.

Under a self-defense plea, evidence that when deceased, stabbed by his wife's father, staggered from his store, his wife put up a sign "Closed to-day," is admissible to determine whether a revolver found hidden there was one used by deceased, or whether, as claimed by the state, it had been there always, and the store was closed in order to prepare self-defense evidence for the father.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 390, 390½; Dec. Dig. § 187.]

8. CRIMINAL LAW §413(1) — EVIDENCE—CONFESSION—ADMISSIBILITY—STATUTE.

A statute making certain confessions inadmissible does not render accused's denial that he stabbed deceased, made at the time of his arrest, inadmissible, where he defended on the ground of self-defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-932, 935; Dec. Dig. § 413(1).]

9. CRIMINAL LAW §364(6) — EVIDENCE—RES GESTÆ—STATEMENT OF ACCUSED.

Accused's denial that he stabbed deceased is admissible as part of the res gestæ, when made a few minutes after the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 808, 817; Dec. Dig. § 364(6).]

10. WITNESSES §370(6) — IMPEACHMENT — BIAS—UNFRIENDLY RELATION—PARTY KILLED BY ACCUSED.

Testimony that deceased's wife, who was an important witness for the defense, did not visit her husband's body for some time after his murder, is admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1189; Dec. Dig. § 370(6).]

11. WITNESSES §379(11) — CONTRADICTION—INCONSISTENT STATEMENTS—STATEMENT OF OPINION.

Where deceased's wife testified that the killing was done in self-defense, her statement, made soon after the crime, that the killing was uncalled for, is admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1221; Dec. Dig. § 379(11).]

12. WITNESSES §337(5) — IMPEACHMENT — CHARACTER OF ACCUSED—INDICTMENT.

Where accused testified in his own behalf, the state could show that he had been indicted for a felony within the past seven years.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1132, 1140-1142, 1146-1148; Dec. Dig. § 337(5).]

13. WITNESSES §360 — IMPEACHMENT—EVIDENCE TO SUSTAIN CHARACTER—ACQUITTAL.

Where the state developed that accused had been indicted for a felony within the past seven years, he could show his acquittal of the charge.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1165, 1166; Dec. Dig. § 360.]

14. CRIMINAL LAW §1172(6) — APPEAL—REVIEW—HARMLESS ERROR—REFUSAL TO GIVE INSTRUCTION.

Refusal to instruct that accused had a right to visit the place of the murder is not prejudicial error, where the right was not disputed at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3159; Dec. Dig. § 1172(6).]

On Motion for Rehearing.

15. CRIMINAL LAW §417(18) — EVIDENCE — DECLARATION BY THIRD PERSONS.

The statements and acts of deceased's wife are not inadmissible as those of a bystander, where she took an active part in the quarrel preceding the murder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 950; Dec. Dig. § 417(18).]

16. CRIMINAL LAW §1144(6) — APPEAL—RE-SERVING GROUND FOR REVIEW—VENUE.

Under Code Cr. Proc. 1911, § 938, providing that the Court of Criminal Appeals shall presume that venue was proven, the point that it was not proven cannot be first raised on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2757, 3021; Dec. Dig. § 1144(6).]

17. CRIMINAL LAW §304(6) — EVIDENCE — JUDICIAL NOTICE—GEOGRAPHICAL FACTS.

The Court of Criminal Appeals takes judicial notice that Kerrville is in Kerr county, where the act creating the county provided that

the point selected as the county seat should be called Kerrville.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 705, 2951½; Dec. Dig. 304(8).]

Davidson, J., dissenting.

Appeal from District Court, Kerr County; R. H. Burney, Judge.

Henry Baker was convicted of murder, and appeals. Affirmed.

Jno. R. Storms, of San Antonio, and Gilbert C. Storms, of Kerrville, for appellant. H. C. Geddie and Lee Wallace, both of Kerrville, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of murder, and his punishment assessed at 25 years' confinement in the state penitentiary.

[1-3] The first bill complains of the action of the court in refusing to grant a continuance. By the bill it is shown that the attendance of all the witnesses named was secured except two, H. A. Furman and Claude Abblecrumlie. The facts stated which appellant expected to prove by Furman would be material to his defense, and the question arises: Did the state in its contest show that the witness was an incompetent witness and could not testify, were he in attendance on court? In the contest the state swears that Furman had been convicted of a felony and sentenced to the penitentiary, in the district court of Kerr county. The defendant contends that the only competent proof of this fact was a certified copy of the judgment and sentence. Generally this is true, and if Furman had been convicted in any other court than the district court of Kerr county there might be merit in his contention. But a judge takes judicial notice of all judgments and decrees entered in his court, and when he had his attention called to the fact that Furman had been convicted of a felony, he judicially knew that fact to be true, and no proof, oral or otherwise, was required. *Mayhew v. State*, 155 S. W. 197; *Savage v. State*, 151 S. W. 531; *Blum v. Stein*, 68 Tex. 608, 5 S. W. 454; 16 Cyc. p. 915. And where the incompetency of a witness had been shown, it is presumed that he continues incompetent, and if a pardon is relied on to re-establish his competency, a copy of the pardon must be produced by the party so contending. *Schell v. State*, 2 Tex. App. 30; *Cooper v. State*, 7 Tex. App. 194.

[4] As to the witness Abblecrumlie, as appellant set up in his application the same facts by Bess and Nailor, both of whom were in attendance, and neither used as a witness, there was no error in overruling the application for a continuance.

[5, 6] In the next two bills appellant objected to Dr. A. A. Roberts and E. A. Wied being permitted to testify that from three to five minutes after the time deceased was stabbed deceased came from the front door of his place of business and ran rapidly to him and

said, "Doctor, do something for me quick; I have just been stabbed; Mr. Baker stabbed me; old man Baker stabbed me; I am turning blind right now; catch me, I am going to fall;" that Dr. Roberts caught deceased, Dudley Laurie, as he fell; that deceased was perfectly sane, and died in a few minutes. The testimony was admissible, both under the *res gestæ* rule and as dying declarations.

[7] An objection was made to permitting the state to ask Mrs. Etwell Laurie on cross-examination if, shortly after the killing, she did not close the door of the confectionery and place thereon a placard, "Closed To-day." Many objections were urged to this testimony; the defendant not being present when the act was done. Mrs. Laurie was not a bystander, in a strict sense, in this transaction, according to her own testimony. Mrs. Laurie was a most material witness for the defendant, and testified to her husband being drunk, cursing and abusing her, and when her brother asked him to desist deceased cursed him and drew a gun on him; that she then picked up a shotgun, drew it on him, and told him not to shoot her brother; that deceased laid his gun down, and she laid hers down; she says she went to hunt for an officer, but, failing to find the officer, she found her father and asked him to hurry to the confectionery; that her husband, deceased, was trying to shoot Ivy, her brother, when her father replied, "He must not do that; can't you all get along?" that her father, Furman, and herself returned to the store; that after a few words passed deceased grabbed a gun and said, "I will kill all three of you;" that Furman grabbed the gun, and in the scuffle it looked like deceased was about to get the gun away from Furman, when her father struck deceased; that deceased then turned the gun loose and went out the front door, and this is the time Dr. Roberts says deceased made the statement—appellant's testimony making such statement clearly *res gestæ* of the transaction. It was right after the deceased left that Mrs. Laurie was seen to close the door and put up the placard, "Closed To-day." The court, under the evidence of defendant, necessarily was required to charge if deceased assaulted appellant, or from his acts and conduct led appellant to believe he was about to assault Mrs. Laurie, or her brother, to acquit appellant. When the officers got in the house no guns were on the table, nor in sight, but were found lying under the mattress of the bed. The state's contention was that deceased had no gun and drew no gun; but the gun was all the time under the mattress on the bed, and the store was closed up, so that matters might be arranged, but the officers got in the store too quickly. Of course, the defendant claimed that Mrs. Laurie had placed the guns under the bed after her father had stabbed deceased. Such being the issue in the case the evidence was clearly admissible, and the court did not err in so holding.

[8, 9] In bills 8 and 9 it is made to appear

that the deputy sheriff, Henry Staudt, was permitted to testify that shortly after the cutting he approached appellant with the intention of arresting him, but before doing so, or saying anything that would lead appellant to believe he intended doing so, he called appellant to one side and said to him, "I understand you had a little trouble awhile ago," and appellant replied, "I haven't had a d—n bit of trouble." Witness then made a further statement, "Somebody cut or stabbed Dudley Laurie pretty bad," appellant replying, "I don't know a d—n thing about Dudley Laurie;" that he then arrested appellant. Appellant was also questioned about this matter on cross-examination, and it is to the testimony of Mr. Staudt and the cross-examination of appellant that the exceptions were reserved. Appellant had testified on this trial, and to a most vigorous case of self-defense, and the defense of his daughter and son; and why should not his statements made a few minutes after the cutting be admissible to show he made no such claim at that time? He was denying all knowledge, and would be still denying it, we suppose, but for the fact that, with his dying breath, Henry Laurie had told Dr. Roberts and Mr. Wied who had cut him. It is true, if his statement had been a confession that he committed the deed, our statute, if he was under arrest, would exclude it; but under no construction of the language can his words be construed into a confession that he committed the act, but instead is a most emphatic denial that he did so, and is wholly exculpatory. We examined this question in the cases of *Whorton v. State*, 152 S. W. 1082, and *Mason v. State*, 74 Tex. Cr. R. 256, 168 S. W. 115, and we do not deem it necessary to again discuss the question. In the *Whorton Case* we reviewed the authorities, and while our own decisions had not theretofore been uniform, yet the great weight of authority was that an exculpatory statement was not a confession within the meaning of the statute, and therefore the statute did not inhibit the testimony, and under the common-law rules the evidence was clearly admissible. It is made clear that appellant was not under arrest when he made the statements, nor does his testimony make it plain that the officer intended to arrest him. Aside from this, under the evidence in this case, the time elapsing and the facts and circumstances would render the testimony admissible as *res gestæ*, under the authorities cited in section 341 of *Branch's Criminal Law*.

[10, 11] As Mrs. Laurie was so material a witness for the defendant, her conduct on the occasion was admissible to prove the fact she did not go to the body of the deceased until late that night. This was admissible as affecting the credit to be given the testimony of Mrs. Laurie. It was unnatural conduct, if she cared anything for her husband; and while, perhaps, under the facts in evidence in this case, it would have but little weight,

yet it was admissible, to be given such consideration as the jury deemed proper. It was also permissible to prove by W. C. Coleman that immediately after the killing Mrs. Laurie had said to him, "The killing was uncalled for." On this trial she testified to a state of facts which authorized and rendered imperative the killing of her husband by her father to save his own life, her life, and the life of her brother; and as she was called as a witness by defendant to prove those facts, she could be impeached by contradictory statements made at a time near the killing.

[12, 13] As appellant testified in his own behalf, it was permissible, as affecting his credit, to prove that he had within less than seven years prior to this trial been indicted for a felony. Of course, the court should have and did permit him to testify that he was acquitted of the charge.

[14] There were no exceptions reserved to the charge of the court, and the court gave four of the six special charges requested by appellant. One of them was fully covered by the main charge of the court, as well as by two of the special charges given. The other one refused was also fully covered in all its features, except that portion which would have instructed the jury "that appellant had a right to go to the place of the cutting." This was not an issue in the case. The state's testimony and the defendant's testimony both show that appellant boarded at the place, and it was his home, and had been ever since deceased and his wife had moved back to Kerrville, and he had lived with them when they resided in Houston, before returning to Kerrville. As no such issue was in the case, nor could the jury have inferred from any evidence heard that appellant did not have the right to go to the place, but the whole case proceeded on the theory this was his home, the fact the court failed to so instruct the jury presents no error.

Appellant makes a strong case of self-defense, and if this is not true, then the killing would take place under such circumstances as to reduce the offense to manslaughter. The state's case, to meet this, was mainly circumstantial; but we cannot say that the evidence will not sustain the finding of the jury, when the jury and the trial judge, who heard the testimony, find the state's theory to be the true one.

The judgment is affirmed.

DAVIDSON, J., dissents.

On Motion for Rehearing.

HARPER, J. [15] Appellant has filed a motion for rehearing in this case, and an exhaustive brief on one or two questions. In the first instance he contends that Mrs. Laurie was but a mere bystander, and her acts and conduct not admissible. If it be

conceded that she was but a mere bystander, there would be strength in the contention of appellant, and the authorities cited by him applicable. But if, as we conclude, she was not a mere bystander, having no part or parcel in the transaction, then the authorities cited by him and quoted from so copiously have no bearing on the case. Was she a bystander, or a participant in the tragedy? When this is determined, the question is easy of solution. She testified, at appellant's instance, that her husband (deceased) was drunk on the occasion he had assaulted her by kicking her on the legs, twisting the skin off of her arms, etc.; that he then drew a pistol on her, and said if she did not stop fussing at him he would shoot her; that she told him she was going to leave, and began to pack her trunk, when some words were had about her drawing the money out of the bank; that they were fussing when her brother came in, and deceased cursed her and called her a crazy s—n of a b—h; that her brother remonstrated, when deceased drew a gun on him, and she drew a gun on deceased, and told him, if he did not lay the gun down, she would kill him, and deceased, her husband, laid the gun down. Certainly she was not a bystander up to this time, but a very active participant in the transaction. She says, when her husband laid the gun down, she went to look for an officer, but, failing to find one, she went to her father (appellant), and reported the circumstances to him, and told him that deceased would shoot Ivy, her brother, and had been trying to shoot her; that, when they all got back to where deceased was, there was cursing going on, and her brother told her father (appellant) that deceased had called her a "crazy s—n of a b—h," and deceased replied, "she is that," and grabbed a gun, and said, "I will kill all three of you," meaning herself, her brother Ivy, and her father (appellant), and at this time her father struck the fatal blow.

Regardless of her cross-examination, and the other testimony in the case, we are at a loss to understand how, under this testimony, he can claim that she was but a mere bystander, or that the law applicable to acts and conduct of mere bystanders could or would have any application to her. In Century Dictionary "bystander" is thus defined:

"One who stands near; a chance looker-on; hence one who has no concern with the business being transacted."

See, also, Webster's Dictionary. And this definition has received judicial approval. Gay Oil Co. v. Atkins, 100 Ark. 552, 140 S. W. 739; State v. Jones, 102 Mo. 305, 14 S. W. 946, 15 S. W. 556.

The reason we did not discuss the decisions cited by appellant is because they referred to persons who were on-lookers, and were in no sense interested in or a party to the

transaction, and when we held, as we do hold, that she was not a mere bystander, the rules of law applicable to bystanders were and are wholly inapplicable, and the rules of law as announced in Cox v. State, 8 Tex. App. 254, 34 Am. Rep. 746, Blain v. State, 38 Tex. Cr. R. 247, 26 S. W. 63, Baker v. State, 45 Tex. Cr. R. 292, 77 S. W. 618, Smith v. State, 48 Tex. Cr. R. 241, 89 S. W. 817, and White v. State, 60 Tex. Cr. R. 559, 132 S. W. 790, become and are applicable, and rendered the testimony of the acts and conduct of Mrs. Laurie admissible. The court made no holding that a material witness for the defendant could not be a bystander, but the acts and conduct and active participation in the transaction by Mrs. Laurie were such as showed that she was not a mere chance looker, but a participant in the entire difficulty.

Appellant also insists that, taking into consideration the testimony as to the way deceased treated his wife, Mrs. Laurie, the fact she did not go to his bedside until in the night ought to have but little weight, if any. This may be true. We are not passing on the weight to be given this testimony by the jury, but merely hold it admissible as showing the real condition of affairs, and to affect her credit as a witness, if it did so. The facts were all before the jury, and doubtless they gave it only such weight as it was entitled to receive at their hands under the evidence.

The case of Marsh v. State, 54 Tex. Cr. R. 144, 112 S. W. 320, instead of holding the statement of Mrs. Laurie made to Mr. Coleman inadmissible, is authority for its admissibility. Mrs. Laurie had testified that deceased said, "I will kill all three of you," and grabbed a gun, and those present were scuffling with him over the gun, when appellant struck deceased. This made a case of acting in self-defense. Now, immediately after the shooting, Mr. Coleman says Mrs. Laurie told him "the killing was uncalled for." In the Marsh Case, supra, it was held: "We think the testimony complained of in bill No. 3 was admissible as a circumstance to rebut and throw discredit on the original statement made by appellant. It was a legitimate subject of cross-examination, in that this fact, if true, was at variance with her statement of an insult by Baggett."

The testimony was held inadmissible. The court says:

"It formed no part of the transaction, or conversation, or matter inquired of from Mrs. Marsh on her original examination. It wholly related to another transaction subsequent to the killing."

In this case the testimony related wholly to this transaction, and was admissible to show she made a different statement immediately after the homicide to the one she testified to on the trial. We recently discussed this question in the case of McDugal v. State, and cited the authorities, and do not deem it necessary to do so again.

[16, 17] Appellant in his motion contends that the date of the death of deceased was not shown by the evidence, and that it was not shown that the killing occurred in Kerr county, Tex. H. W. Vowell and Clayt Love testified to his death occurring on the "8th day of last March." The case was tried in January, 1916, and this necessarily fixed the time as March 8, 1915, and appellant is mistaken in his contention that the record does not disclose that the tragedy occurred prior to the presentment of the indictment. If the evidence did not show venue in Kerr county, it would be too late to raise that question for the first time in this court, by virtue of the provisions of article 938, C. C. P.; no issue as to venue having been raised in the trial court. The entire record shows that the killing occurred in Kerrville, and the act creating Kerr county in 1856 provided that the place selected as the county seat should be called Kerrville; therefore we take judicial notice that Kerrville is in Kerr county.

We have discussed all questions appellant insists upon in his motion. The others were disposed of in the original opinion, and the motion for rehearing is overruled.

DAVIDSON, J. (dissenting). This case ought not to have been affirmed. In writing what I purpose to say I shall not go into the merits of the case so far as the sufficiency of the evidence is concerned. The jury allotted appellant 25 years in the penitentiary. I do not, however, believe that a fair inspection of this record and legitimate conclusion reached therefrom will justify the verdict.

In my judgment the continuance should have been awarded for the absent witness Furman. The overruling of this proposition by the majority is based upon the idea that the trial court knew judicially that Furman had been years ago convicted of a felony, and therefore he was not a competent witness. If it be conceded that the court judicially knew of Furman's conviction, it would not, therefore, follow that the court judicially knew that he was an incompetent or disqualified witness. A record of conviction has been considered a necessary step to disqualify a witness. This witness was absent, and his testimony was, as stated, of a very material nature. He was present and an eyewitness to the homicide, and would have testified, as shown by the application, to a clear case of self-defense. The trial court disqualifies this witness, and this court sustains him in such disqualification because of a previous conviction of which it is said the trial court had knowledge. There was no issue tried by the court on this question. He may have been a competent witness, restored to citizenship, so far as the record goes. In settling a serious issue of this sort against an accused, it certainly ought to be heard, and the testimony ought to be clear that the

witness was not, at the time of the application for continuance, a disqualified witness.

Another bill recites that shortly after and on the same day of the homicide the wife of deceased, over objection of appellant, was permitted to testify that she had placed a placard upon the outer door of the confectionery store owned by herself and her deceased husband, upon which was written the words, "Closed To-day," and further she was permitted, over objection, to testify that she was at the front of the confectionery building and had the door closed and had a placard of pasteboard in a round shape, upon which were written or printed the words "Closed To-day" in large letters, and that she was trying to paste or fasten said placard upon the front door shortly after the killing. Various and sundry objections were urged to this, but the court admitted it, as he states in his explanation, because it "appeared to be *res gestæ*." Another bill on the same question recites that, while the widow of the deceased was upon cross-examination, she stated that she did not go to see her husband at the undertaking parlor until the night after the killing in the daytime, and that she had placed a placard upon the front door of the confectionery store which had the words "Closed To-day" on it. To this all sorts of objections were urged. The court admits this with the explanation that the state, in offering this testimony, stated it was for the "sole" purpose of affecting the credibility of the witness, and it was admitted for such purpose, as stated at the time, and counsel for the defendant did not ask for a written charge limiting the purpose for which the jury might consider the same. In one bill the court admits the testimony on the ground that it was *res gestæ*; in the second he sustains the purpose of the state in offering it, and admitted it for the purpose of affecting the credibility of the witness, and for that purpose only, and emphasizing this he qualifies, further, that appellant did not ask a written charge limiting this testimony. If it was *res gestæ*, a charge limiting the testimony was not required, because in that instance it would be original evidence. If offered for the purpose of affecting her credibility as a witness, it was the duty of the court to limit it to that purpose, and see that it was not used as original testimony against defendant. Appellant was not present and had nothing to do with it, and knew nothing about it; in fact, the record shows he was in the hands of the officers under arrest.

There are so many reasons why, this testimony was not admissible it would seem almost superfluous to state them. This was the act, not of the defendant, but of the wife of deceased. Defendant knew nothing of it, had no concern with it, was not aware of it, and it was the act of a party in his absence, closing the door of her confectionery, which was owned by her husband and herself. It

was their residence, the confectionery being in the front part of the house; they residing in another part of the edifice. Whether this be the act of a bystander or not, it is the act of a third party, with which defendant had no concern and no connection. It could not be introduced on the theory that it was the act of a coconspirator, for from that standpoint the object of the conspiracy, if one existed, had been accomplished. The deceased was dead. The act or statement of a conspirator, made after the completion of the conspiracy, is not admissible against one of the other coconspirators in his absence. He was unaware of the act or statement of the other conspirator after the transaction had ended. This I understand to be the settled rule. It, therefore, could not be original testimony, so far as defendant was concerned. The parties after the homicide had all scattered and gone. They were not at the house where the killing occurred, which was in a bedroom in the rear part of the confectionery store. The business was carried on in the name of the wife of deceased. Deceased had just been killed and carried to the morgue, or at least was not in this confectionery or any other part of the house occupied by himself and his wife. It is, therefore, not *res gestæ*. It was the act of third parties in the absence of the defendant, without his knowledge, consent, or concurrence.

But when the matter came again in the second bill of exceptions, the court qualifies it by stating that it was admitted to affect the credibility of the witness. Wherever testimony is introduced to affect the credibility of a witness, which might be damaging or illegal, it is the duty of the court to guard the jury against using it for illegitimate purposes; in other words, instruct the jury that it can be considered only for the purpose for which it was introduced—that is, to affect the credibility of the witness. This testimony should not have been admitted, either as *res gestæ*, or to affect the credibility of the witness. Here was the widow of the deceased, closing the house where the business of her deceased husband and herself was carried on, where they had been living, in part of which they resided as their home. Shortly after the death of her husband she closed the doors of the house against the curious and the outside world, and as evidence of the fact that the business was that day suspended. It is the first time, so far as the writer is aware, that the closing of a business house where one of the interested parties had died should be taken as evidence of a want of veracity, which would subject one of the owners of the house to impeachment for want of truth. It is a custom, which is a part of the current history of our race and people, that business houses and private residences are closed to the outside world when a member of the business house or a member of the family has died. It is not

only expedient, but it is regarded by all right-thinking people as being the ethical and proper thing to do. Had she carried on her business with wide-open doors, with her husband lying near by dead but a short time, there might have been some reason for saying there was something wrong and unnatural that a wife would so act under such circumstances. This might have been the subject of criticism, showing that she was indifferent to the fact that her husband was so recently dead. But now we have solemnly adjudicated, and sustained by a court of last resort, that proper respect for the memory of the dead husband should be taken as evidence of impeachment of the truth and veracity of his wife, who with sorrow upon her life and in the shadow of bereavement had closed the doors to the outside world. The writer does not understand this character of reasoning, or how such charge should be imputed under such circumstances. Evidence of proper ethical act by the wife of the deceased ought not to be solemnly adjudicated to be evidence of her want of veracity. I do not believe such ruling should have been held by this court or made by the trial court.

There is a fact or two thrown into the case which I suppose was done to aid the state and the record in this case. The widow testified that there had been trouble that morning between herself and her husband, and he threatened to kill her, got a pistol, and not only that, but tried to kill her brother, and that she went for the sheriff, and, failing to find him, informed her father, who was also a resident of the same house, of conditions, and the father went to where the parties were. She further testified that deceased got a gun with a view of killing her father, and while Furman and deceased were scuffling over the gun, deceased was trying to point the gun towards her father to shoot him, and that her father jerked out a small pocketknife and inflicted one wound upon deceased from which he died. This testimony placed a couple of guns and a pistol in sight in the room. When the officers entered the room some time afterward these guns had been put between some mattresses, or at least were so found. Of course, the state's contention was that the story about the guns being used in the difficulty was not true, and that this evidence of the guns being between the mattresses was evidence of the fact that her testimony was not true. This was legitimate testimony to show, if they could, before the jury that with reference to this matter she may have been mistaken or testified falsely. She explains this by stating that after the difficulty, and after all the parties had left the room, she took the guns and put them between the mattresses, where they were subsequently found. These facts went before the jury for what they were worth, to be weighed by them.

They could attack her testimony that the guns were in sight and sought to be used during the difficulty by showing they were not so used. She explained in consonance with her other testimony that she hid the guns; but, be that as it may, this testimony was of benefit to the state, it occurs to the writer, and it put her in the attitude, or it might have been so argued, of placing the guns where she placed them, a fact favorable to the state, both to contradict her as to her first statement, and to show her sympathy for the state by placing the guns where they could not be used, and therefore impugning the question of self-defense, so far as that phase of the evidence is concerned. But how this could justify the introduction of evidence that the widow closed the business and private residence subsequently by placing a placard on the door announcing the house was closed I do not understand.

"Harmless error" seems not to have been thought worthy of consideration in this case, because appellant received a verdict of 25 years for murder. He did not receive the minimum punishment of 5 years for that offense. That there was manslaughter in the case under the facts is not to be disputed, and the majority opinion admits it was a strong case of self-defense, and yet appellant received 25 years, which, at his age of 56, means more than his lifetime. The record shows that he is lame and sick, and suffering with rheumatism and other ills to which flesh is heir.

I do not care to go into other matters of the case and discuss them. It is useless to have said what I have said, but it occurs to me as being so novel, and so out of the ordinary, and so unjust, that the evidence of the sorrow of the widow, closing the business house and private residence against the outside world, should be held as evidence of a want of credibility from the standpoint of veracity or truth, that I could not sanction the affirmance of this case from that standpoint. That it was damaging is manifested by the verdict. I do not believe it should be entertained that a surviving relative of a deceased member of the family should have his or her veracity and standing in the community attacked and held up to scorn because of the ordinary everyday respect paid to the memory of a deceased relative. This is not our civilization. It does not belong to our people, and I would not subscribe to that. I would have dissented on that proposition, if on no other. There are other questions in the case, but I simply desired to make the few above remarks. This judgment ought not to have been affirmed. It ought to have been reversed, and appellant awarded another trial. I do not believe a man should be sent to the penitentiary except upon what ought to be a legal trial.

SHORT v. STATE. (No. 4049.)

(Court of Criminal Appeals of Texas. April 26, 1916. Dissenting Opinion July 3, 1916.)

1. HOMICIDE \S 300(7)—INSTRUCTIONS—SELF-DEFENSE.

Where accused's evidence merely tended to show that he shot deceased in the heat of passion, induced by deceased's gossip regarding accused's cousin, requested charge on self-defense was properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 622; Dec. Dig. \S 300(7).]

2. HOMICIDE \S 300(7)—INSTRUCTIONS—SELF-DEFENSE.

If the evidence raises the issue of self-defense, such issue should be fairly and affirmatively presented to the jury; but, if there is no evidence thereon, it is properly withheld.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 622; Dec. Dig. \S 300(7).]

3. WITNESSES \S 392(1)—IMPEACHMENT—CONFLICTING STATEMENTS—EVIDENCE—ADMISSIBILITY.

In a prosecution for murder, where a witness for the defense testified at variance with a statement made on the day of the murder, it was proper for the district attorney, who elicited such statement, to testify that he wrote it as nearly in the witness' language as he could, using narrative form, and that he explained the nature of the inquest before taking the statement, which witness signed after he read it to her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1249, 1250; Dec. Dig. \S 392(1).]

4. CRIMINAL LAW \S 695(6)—APPEAL—PRESERVATION OF EXCEPTIONS.

On objection to testimony, part of which is admissible and part perhaps inadmissible, specific objection must be made to the inadmissible portion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1637; Dec. Dig. \S 695(6).]

5. CRIMINAL LAW \S 1170½(6)—HARMLESS ERROR—IMPEACHING EVIDENCE—CURE OF ERRORS.

Where the court instructed the jury to consider only relevant impeaching testimony, and excluded from consideration irrelevant statements of the witness, there is no available error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3134; Dec. Dig. \S 1170½(6).]

6. HOMICIDE \S 181—EVIDENCE—ADMISSIBILITY.

Where accused's evidence merely tended to show that he shot deceased in the heat of passion, induced by deceased's gossip regarding accused's cousin, it was permissible to show accused's own alleged illicit relations with his cousin, as tending to disprove his claim of passion, by either circumstantial or positive evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 383-385; Dec. Dig. \S 181.]

7. CRIMINAL LAW \S 1170½(6)—TRIAL—CONDUCT OF PROSECUTING ATTORNEY.

Where an alleged improper question was objected to and excluded, and the answer, if given, was not heard by the jury, and the court instructed them to disregard the question, there was no available error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3134; Dec. Dig. \S 1170½(6).]

8. CRIMINAL LAW \S 706—TRIAL—CONDUCT OF OFFICERS.

Prosecuting attorneys are officers of the state, whose duty it is to see that justice is

done, and they should never attempt to get before the jury evidence they know to be inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.]

Davidson, J., dissenting.

Appeal from District Court, Jones County; John B. Thomas, Judge.

Hamby H. Short was convicted of murder, and he appeals. Affirmed.

W. H. Murchison, of Haskell, E. T. Brooks, of Anson, and J. C. Randel, of Hamlin, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of murder, and his punishment assessed at confinement in the penitentiary for life.

[1, 2] The first question raised by appellant is that the court erred in failing to submit the issue of self-defense. We agree with appellant that, where there is evidence raising that issue, it should be fairly and affirmatively submitted to the jury; therefore it is unnecessary to discuss the authorities cited by him. But it is equally well settled that, when there is no testimony raising such an issue, it should not be submitted. The state's evidence would make a case of murder, while the defendant's testimony raises the issue that he is only guilty of manslaughter; but in no instance does he testify to any facts that deceased had or was about to attack him. He says that Mrs. Ruth Foster was his third cousin, and on the morning of the homicide she told him that deceased was claiming that he was the father of her baby, and said that no grounds existed for such claim; that deceased had attacked her on the road one time, and dragged her from her buggy, but did not accomplish his purpose. He says he told Mrs. Foster he would see deceased, and see if he had any explanation to make; that he went to Nugent, and had his horse shod, and as he came out of the blacksmith shop he saw A. D. Blackwell, deceased, and asked him why he (Blackwell) had treated Mrs. Foster the way he had, when Blackwell replied, "Damn Mrs. Foster," and he shot him. This was his testimony on direct examination. On cross-examination he said:

"I was six or seven steps from Blackwell when I spoke to him. I did not speak in a loud tone of voice. I spoke loud enough for him to hear me. I asked him for an explanation. I says, 'I want an explanation of why you have treated Mrs. Foster the way you have.' That was all I said, and he just sort of frowned up and said, 'Damn Mrs. Foster' and it just flew over me in an instant, and I shot him."

It is thus seen that neither in his direct nor cross examination does appellant contend that deceased made any demonstration of any character, while the state's evidence is that appellant walked out of the blacksmith shop and shot deceased without even speaking. It is thus seen that there is not the

slightest testimony to raise the issue of self-defense.

Mrs. Ruth Foster testified in behalf of appellant, and testified on this trial that Mrs. Bessie Delap had told her deceased was claiming to be the father of her baby, and that she told appellant about it on the morning of the homicide; that she also told him that some seven months prior to the homicide deceased had met her on the road and made indecent proposals to her, and when she refused to accede to his requests he caught hold of her, and jerked her out of the buggy, and threw her down in the road, but she screamed and hollered, when he left her, saying, "Well, d—n you, go on;" that she told appellant this but a few hours before the homicide. On cross-examination it is made to appear that this witness had testified at the inquest held over the body of the deceased on the day of the killing, and her testimony was reduced to writing and signed by her. In this statement she said:

"I did not know that A. D. Blackwell was killed until the time Mr. Berryhill came to bring me here. H. H. Short told me about three weeks ago that Arthur Blackwell was telling it around that he (Blackwell) was the father of my baby, which was four months old the 7th of this month. Short said Blackwell had told this to him two or three months ago, but that he had never said anything about it. Short and myself were at home when he told me this. A. D. Blackwell never had sexual intercourse with me in his life. I never in my life was with him (A. D. Blackwell) without some one else being present. I was in Mr. Blackwell's store in January, 1915, when Bessie Delap was with me. I never bought a thing myself at the time I was in the store. Hamby Short had told me about what Mr. Blackwell had said at this time. Mr. Blackwell had never been to my house, only when Sol was there, my husband. * * * Hamby Short and I had talked two or three times before this time about Hamby going to Mr. Blackwell and having the talk straightened up. I proposed to Hamby that he go to straighten the talk up, instead of my husband, the first time he talked to me about it. Hamby and I talked about him going to see Blackwell this morning. Hamby Short told me this morning that he was going to go see Mr. Blackwell today and have him (Blackwell) straighten the talk up, or he (Short) would kill him (Blackwell). The last thing Hamby Short said to me this morning, when he left my house, was that he was going to see Blackwell and have him take back what he had said, or he was going to kill him. * * * Blackwell never hugged nor kissed me in my life. He never made love to me. He never made proposals of any kind whatever to me that were improper. I was never with him, except when some one else was present."

In regard to making this statement she testified:

"I don't remember making a statement about this matter to Judge Stinson, which was taken down in writing. I don't remember making a statement to him the day Mr. Blackwell was killed. I did not make a statement in writing before Judge Arnold that I remember of. I don't remember making a statement at Esquire Arnold's residence there in Nugent the day of the killing. I don't remember seeing Judge Stinson, or him telling me to be careful what I said. I don't remember him telling me to read the statement over and see if it was what I meant to say. I don't remember him asking me

if I would be willing to swear anywhere that that was my testimony in the matter. I don't remember him saying to me that I might be asked to change my testimony. I guess that is my signature (referring to signature to statement); that is my name to it. I didn't do that writing. I don't remember signing my name to that. I don't remember writing that at all. I have no recollection whatever of making a statement to Judge Stinson and Judge Arnold at Judge Arnold's residence the day of the killing. I don't remember anything about Judge Stinson telling me he didn't want me to be scared, but wanted me to be careful, and be sure and make the statement I wanted to make. I don't remember saying in the statement before Judge Stinson and Judge Arnold that 'Hamby Short told me about two weeks ago that A. D. Blackwell was telling it around that he (Blackwell) was the father of my baby, which was four months old the 7th of this month.' That is not true. I did not say that Short said Blackwell had told him that two or three months ago, and that he had never said anything about it. I did not say in that statement that Short and myself were at home when he told me that. I did not say in that statement, 'I never in my life was with A. D. Blackwell without some one else being present.' If I made that statement I didn't know anything about it. I did not say in a statement before Judge Stinson that I told him about that on Tuesday night, the 9th of February. Hamby did not talk with me about what Blackwell had said. I did not make the statement to Judge Stinson that 'it was two or three days Hamby had been at my house and had talked with me about Mr. Blackwell, and I had talked with him about going to Blackwell to have the talk straightened up.' I did not have that talk with Hamby Short. Hamby had never talked about it with me. I didn't make that statement that Hamby and I had talked two or three times before this about Hamby going to Blackwell and have this talk straightened up. If I made that statement, I don't remember it. * * * Since I have thought the matter over, I do not have any recollection of going down to Nugent the day Mr. Blackwell was killed. I can't remember anything about going to Esquire Arnold's and making that statement. I don't know whether I wrote my name to that statement or not. I can't write my name on that paper for you. I guess I could write it, but I couldn't write it so you could read it."

After she had so testified, if the state desired to offer the statement in evidence, it became necessary to prove that she had made the statement and signed it on the day of the homicide; and the state in rebuttal called the justice of the peace, Judge F. M. Arnold, who testified that he took the statement of Mrs. Ruth Foster on the day of the homicide; that it was read over to her after it was written, and she signed it. The district attorney, Judge James P. Stinson, was also called, and testified that Mrs. Foster made the statement and signed it before Judge Arnold. In bill No. 4 it is shown he testified:

"My name is James P. Stinson. I am district attorney of the Thirty-Ninth judicial district of Texas. I visited Nugent the day Blackwell was killed and assisted in taking the testimony of parties, I think about 11. I took the testimony of Mrs. Ruth Foster under the following conditions: We went to Nugent that day in response to a telephone call; the sheriff, myself, and Mr. Cearley, the county attorney, and Mr. Keifer, the reporter, and I believe Mr. Reeves or Mr. Hudson, but Mr. Register anyway, and we got down there just a little after 12 o'clock and entered immediately into holding the inquest. We had met the defendant at the end

of the 11-mile lane, and the sheriff sent him on with Archer, and we began summoning the witnesses and issued a subpoena for Sol Foster and his wife, and Mr. Register sent the auto. Mr. Berryhill and Jess Holmes were the drivers. They got there about 4 o'clock in the afternoon, and quite a number of witnesses had been examined when they got there. When Mrs. Foster came we were waiting for them, they were both sworn as witnesses in the case and a statement taken from both of them. The statement of Mrs. Ruth Foster I wrote as near as I could in her own language, to connect it and make a narrative statement. After I took the statement— Before I took it, I explained to her what the proceeding was, and then I took her evidence, and she signed it after it was read over. Before she signed it I read it over to her carefully word by word, in order that she could not possibly make any claim of misunderstanding, and she listened to it carefully. I asked her if that statement was true, and she said it was absolutely true, and says: 'I will never change it.' I told her I wanted a statement she was going to swear to when the case was called for trial. I says: 'When the defendant's lawyer gets to you, he is going to want you to make another statement.'"

[3] The bill shows that the testimony in its entirety was objected and excepted to. The bill does not undertake to point out any specific part of the testimony as objectionable, but the objection is made to all of it. Certainly that portion of Mr. Stinson's testimony in which he testified:

"The statement of Mrs. Ruth Foster I wrote as near as I could in her own language, to connect it and make a narrative statement. After I took the statement— Before I took it, I explained to her what the proceeding was, and then I took her evidence, and she signed it after it was read over"

—was admissible. Mrs. Foster had testified to a wholly different state of facts on the trial of this cause, and it was permissible, under the rules of law, to show that she had made a different statement prior thereto, when first questioned in regard to the matter. *Huffman v. State*, 28 Tex. App. 178, 12 S. W. 588; *Levy v. State*, 28 Tex. App. 200, 12 S. W. 596, 19 Am. St. Rep. 826; *Fuller v. State*, 30 Tex. App. 563, 17 S. W. 1108; *Campos v. State*, 50 Tex. Cr. R. 292, 97 S. W. 100; *Gonzales v. State*, 35 Tex. Cr. R. 35, 29 S. W. 1091, 30 S. W. 224; *Newman v. State*, 70 S. W. 953; *Gallegos v. State*, 48 Tex. Cr. R. 61, 85 S. W. 1150; *Clanton v. State*, 13 Tex. App. 153; *Gibson v. State*, 45 Tex. Cr. R. 813, 77 S. W. 812; *Underhill on Crim. Ev. secs. 238 and 239*; *Wharton's Crim. Ev. § 482*, and cases cited; *Branch's Penal Code*, vol. 1, page 106.

[4] And it is the rule that if an objection is directed at all of the testimony of a witness, a part of which is admissible and a part perhaps inadmissible, specific objection must be made to that part of the testimony which is inadmissible. In the case of *Ortiz v. State*, 68 Tex. Cr. R. 526, 151 S. W. 1057, this court, speaking through Judge Davidson, held.

"A great deal of this testimony was clearly legitimate, and some of it may or may not be objectionable, owing to the purpose for which it was introduced. * * * The objections are general. * * * A bill of exceptions is too general for consideration if it includes a number

of statements, some of which are clearly admissible, and there is nothing in the objection directly pointing out the supposed objectionable portions of the evidence [citing Branch's Crim. Law, sec. 47; Payton v. State, 35 Tex. Cr. R. 508 (34 S. W. 615); Tubb v. State, 55 Tex. Cr. R. 606 (117 S. W. 858); Cabral v. State, 57 Tex. Cr. R. 304 (122 S. W. 872)]. Where evidence is introduced over objection, some of which is admissible, and some of which is on doubtful grounds, or which might be objectionable, it is the duty of the objector to specify in the bill the particular portion to which objection is urged."

In this case, as in that case, the objection as shown by the bill was to all the testimony, and the ground, as in that case, was that it was introduced—

"for the purpose of prejudicing the jury and inflaming them against the defendant, and improperly reflecting on the credibility of the witness Mrs. Ruth Foster."

In Branch's Ann. Penal Code, § 211, vol. 1, p. 135, the authorities are collated, and the rule is stated to be:

"A bill of exception is too general to be considered, if it includes a number of statements, some of which are admissible, and there is nothing in the objections to directly challenge or single out the supposed objectionable evidence."

[5] However, in the bill it is shown that the court, without objection, further than objection to all the witness' testimony—

—"instructed the jury not to consider said evidence of the district attorney relative to his reasons for careful inquiry, and his said statement with reference to what the defendant's attorney might do, and to stay within the bounds of relevant testimony while upon the stand."

Under such circumstances the bill presents no error.

[6] The only other bill of exceptions in the record relates to a question propounded to the witness Mrs. Bessie Delap, who was called as a witness by the state in rebuttal. It will be seen from the above that appellant's contention was that deceased had made improper remarks concerning and to his third cousin Mrs. Ruth Foster. The state's contention was that appellant himself was criminally intimate with Mrs. Foster, and called Mrs. Delap, who had been an inmate of Mrs. Foster's home, to prove certain circumstances from which a jury could deduce such relations between appellant and Mrs. Foster. This testimony was legitimate and proper as tending to show the interest and friendly relations of Mrs. Foster to appellant, she being his most important witness, tending to raise the issue of manslaughter. And as said by this court in Redman v. State, 52 Tex. Cr. R. 598, 108 S. W. 305, if appellant's third cousin was unchaste, and he knew that to be true, by having had sexual intercourse with her himself, this fact was admissible, if it could be proven by either positive or circumstantial testimony, as he was claiming that slanderous remarks to and concerning this relative so inflamed his mind as to reduce the offense to manslaughter.

[7, 8] By the bill, however, it is shown

that after the court had warned the district attorney not to ask the question, at appellant's instance, the assistant counsel for the prosecution asked the witness Mrs. Delap "if the defendant, Hamby Short, ever got in bed with you." The question was at once objected to, and objection sustained. It is rendered questionable by the record whether or not the witness answered the question, she saying she did say "yes"; but the evidence of the jurors placed on the stand, when the motion for a new trial was heard, shows they heard the question, but did not hear the answer, and the court in approving the bill says no answer was made to the question, or if one was made it was in too low a tone to be heard. As the answer was not heard by the jury, the only question presented is: Does the asking of the question present such error as to call for a reversal of the case?

Appellant relies on the recent case of Bullington v. State, 180 S. W. 681, and we would again emphasize that no question should be propounded which the prosecutors know to be inadmissible, for if it is done, and the circumstances are such that the person on trial may have been injured thereby, the case should be and will be reversed. But this record is wholly different from that in the Bullington Case, for in this case it is made manifest by the bill that the court promptly sustained an objection to the question, and at once instructed the jury not to consider the question, and permitted no answer to be heard by the jurors, and the Bullington Case, supra, was not reversed on that question alone, but there were other questions in the case which necessitated a reversal. In this case it is made to appear that had Mrs. Delap been permitted to answer the question she would not only have testified that appellant did get in the bed one night while she was residing at the home of Mrs. Ruth Foster, but that she complained to Mrs. Foster about appellant doing so, and Mrs. Foster, appellant's principal witness, failed and refused to take any steps to protect her, and failed and refused to remonstrate with appellant because of this conduct. The relation existing between Mrs. Foster and appellant was a seriously contested issue in the case, and we are not prepared to hold that such testimony would not have been admissible on this issue.

If a chaste woman is staying at the home of another pure and chaste woman, and a man, even her third cousin, should seek to outrage the visitor in her home, certainly if she made no remonstrance, and permitted this man to continue to visit at her home, both when her husband was present and absent, and spend the nights there, it would have some bearing on the relationship existing between the two, when there is other evidence introduced tending to show improper relations. At least, taking into con-

sideration the action of the court; the bill presents no reversible error.

The judgment is affirmed.

DAVIDSON, J. I cannot agree to this affirmation.

DAVIDSON, J. (dissenting). In disagreeing with my Brethren about the affirmation of the judgment and overruling of the motion for rehearing, it may not be of service to make a statement of some of the reasons. The question or doctrine of "harmless error" does not enter into the disposition of this case, because defendant received the life sentence when there was ample testimony to authorize a conviction of the lower offense of manslaughter. The doctrine of "harmless error" and lower punishment are not discussed by the majority opinion. The jury took the harshest view that could have been taken of the testimony. "Harmless error" is discussed as a question where the punishment is the minimum, it seems.

I do not believe that the majority opinion deals with the bill of exceptions in regard to the district attorney's testimony as it should have done legally. The whole bill is predicated upon the fact, and the objection announced in the bill was to the statements of the district attorney laying a predicate to impeach the witness Mrs. Foster. This was all before the jury, and much of it was very damaging, and cannot be held as properly laying the predicate. The district attorney was permitted to state all his acts and conduct, not only of his relations to the witness Mrs. Foster, after seeing her and hearing her testify before the court of inquiry or magistrate, but he gave a detailed account of his trips and other matters that had no connection with Mrs. Foster or her testimony, and what he discovered, as well as statements reflecting upon her and the attorneys who might be subsequently employed, indicating they were going to induce her to commit perjury by making an entirely different statement from what she made to him. This was the predicate offered by the state, and objection was urged to it. It was all before the jury, and under the guise of laying a predicate to impeach Mrs. Foster the district attorney was permitted to put in the record and before the jury quite a lot of things that should not have been even in the predicate. If Mrs. Foster made different statements to him to what she testified on the trial, the predicate could have been laid, and evidence offered to sustain it; but the predicate must be so laid as to justify a legal and proper contradiction or impeachment of the witness. I think, therefore, my Brethren misunderstood this bill of exceptions and the purport of the objection stated by appellant. It was treated from the standpoint of evidence introduced before the jury, and not as a predicate. It is a safe rule, at least usually so, that where a bill of exceptions

recites testimony some of which is admissible and some not, the inadmissible testimony should be pointed out in the bill, but in my judgment this bill was sufficient to present the matter and show error as indicated in the bill.

The district attorney, claiming to lay a predicate to impeachment, got before the jury those damaging facts from standpoint of original testimony. I do not care to follow this further.

The other question that I desire to mention is the testimony of the witness Mrs. Delap. Substantially Mrs. Delap was permitted to state that appellant went to her bed and undertook to crawl into it one night while she was residing at the home of Mrs. Foster, and that she complained to Mrs. Foster about appellant's conduct, etc. Mrs. Foster was a cousin of appellant, about whom much appears in the record, and on account of the conduct of the deceased towards Mrs. Foster appellant killed him. Of course, within the statute Mrs. Foster was a female relative. The state's theory was that appellant had been intimate with Mrs. Foster, and therefore he was cut off from the issue of manslaughter under the Redmond Case, cited by the majority opinion upon the idea that, if appellant was intimate with Mrs. Foster, he could not become excited under the law of manslaughter for killing the deceased on account of slandering her reputation for virtue. This was a seriously disputed issue.

The Redmond Case is not even in point. Whether that be true or not, I do not now purpose to discuss. If that proposition is correct, as urged by the majority opinion, then I cannot understand why the fact that appellant undertook to have sexual intercourse with Mrs. Delap should have been used against him for killing a man whom he says slandered his female relative, Mrs. Foster. The issue was sharply raised in the record, and most strenuously denied by appellant, that he and Mrs. Foster had ever been guilty of any immoral conduct. What the evidence in regard to an insult by appellant to Mrs. Delap would have to do with the issue of manslaughter on account of insulting conduct of deceased towards Mrs. Foster, as it bore upon the defendant, is hardly explainable upon any legal line. He had not placed his reputation in issue as to being a virtuous man or otherwise. Mrs. Delap had nothing to do with any amours between Mrs. Foster and appellant, if any such occurred; but this testimony was introduced against appellant, and it is of the most serious and damaging character.

The majority seemed to justify the introduction of this testimony and its effect upon the case by stating that Mrs. Delap was a guest, or at least was in the house owned by Foster and Mrs. Foster, and therefore Mrs. Foster was winking at the amours or attempted amours of appellant with Mrs. Delap. The state, as well as the majority of

this court, seem to overlook one fact of human nature: That, if Mrs. Foster and appellant were carrying on amours through illicit love; Mrs. Delap would hardly be taken under the protection of Mrs. Foster by Mrs. Foster. Such a statement by the majority opinion is hardly to be verified on the theory of woman nature. But, in any event, the testimony of Mrs. Delap that appellant tried to crawl in bed with her was not legitimate testimony to show that appellant either was intimate with Mrs. Foster or that he killed the deceased because of the deceased's intimate relations with Mrs. Foster. This testimony should not have gone to the jury. Appellant was contending for the issue of manslaughter and innocent relations with his relative, Mrs. Foster. She was denying strenuously that there had been any illicit relations between them, and when she informed appellant of the conduct and statements of the deceased the defendant killed him. This testimony as to Mrs. Delap had a tendency to do so, if it did not completely cut him off from the issue of manslaughter. Any illicit relations with Mrs. Delap could not even tend to affect his relations with Mrs. Foster, so as to deprive him of the issue of manslaughter. It did, however, do so, and this to the result of life sentence for murder. It therefore necessarily affected the case seriously against appellant.

The judgment should have been reversed. I do not care to further discuss the matter. This judgment ought to have been reversed, and appellant awarded another trial.

MCKINNEY v. STATE. (No. 4133.)

(Court of Criminal Appeals of Texas. June 21, 1916.)

1. JURY §131(15)—VOIR DIRE EXAMINATION—FORM OF QUESTION.

Refusal to permit the question to a juror, "If after hearing the evidence * * * you have a reasonable doubt of the intent of defendant to kill. * * * would you give * * * [him] the benefit of that doubt?" is proper, he being allowed to ask, and having asked, "If after hearing the evidence * * * you have a reasonable doubt of the guilt of accused, will you give him the benefit of that doubt and acquit him?"

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 579; Dec. Dig. §131(15).]

2. HOMICIDE §216—DYING DECLARATIONS—FOUNDATION.

The requisites prescribed by Code Cr. Proc. 1911, art. 808, for admission of a dying declaration, need not be established by direct and positive statement of deceased at the time, but the proper proof may be inferred from his evident danger, or the opinions of attendants stated to him, or from his conduct or other circumstances.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 457; Dec. Dig. §216.]

3. HOMICIDE §204—DYING DECLARATIONS—TIME BEFORE DEATH.

If dying declarations are made under a consciousness of impending death, without hope of

recovery, length of time thereafter before death is immaterial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 438; Dec. Dig. §204.]

4. CRIMINAL LAW §1169(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Erroneous admission of evidence is not ground for reversal if the fact testified to be proved by other evidence not objected to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138; Dec. Dig. §1169(2).]

5. CRIMINAL LAW §695(6)—APPEAL—OBJECTION TO EVIDENCE.

Admission of evidence, over objection to the whole of it, when part only of it is inadmissible, presents no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1637; Dec. Dig. §695(6).]

6. CRIMINAL LAW §1170(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of evidence was harmless, when other evidence established without controversy the facts sought to be proved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3146; Dec. Dig. §1170(2).]

7. CRIMINAL LAW §404(4)—EVIDENCE—DEMONSTRATIVE EVIDENCE.

The bloody clothing of deceased was admissible in connection with testimony as to whether wounds were inflicted by one bullet or more.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891, 893, 1457; Dec. Dig. §404(4).]

8. CRIMINAL LAW §918(10, 11)—NEW TRIAL—MATTER NOT OBJECTED TO AT TRIAL.

Remark of state witness while leaving the stand, when near defendant, not understood by the judge, not shown to have been heard by the jury, and not complained of by defendant at the trial, cannot avail for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2163; Dec. Dig. §918(10, 11).]

9. CRIMINAL LAW §1170½(5)—HARMLESS ERROR—LIMITING CROSS-EXAMINATION.

Limiting cross-examination of state's witness was not reversible error, where it appears certain defendant had in substance got all he could by a longer cross-examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3133; Dec. Dig. §1170½(5).]

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

George McKinney was convicted, and appeals. Affirmed.

C. C. Todd, of San Antonio, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of the murder of a negro woman, Alice Parrish, and the death penalty assessed.

His defense was accidental shooting. This question was specifically submitted to the jury for a finding in the very language of appellant in his special charge which was given. The jury found against him on it. They could not have done otherwise under the testimony. No complaint is made of the charge of the court. He has several bills of exceptions. We will discuss each.

[1] He complains that the court refused to

permit him, on the objection of the state, to ask this question of each venireman:

"If, after hearing the evidence in this case, you have a reasonable doubt of the intent of the defendant to kill deceased, would you give the defendant the benefit of that doubt?"

The court made this explanation in allowing the bill:

"The objection stated was directed to the question as asked in the form asked, and the defendant was never denied the right to ask each and every venireman, and in fact did ask each venireman, the question:

"If, after hearing the evidence in this case, you have a reasonable doubt of the guilt of the accused, will you give him the benefit of that doubt and acquit him?"

"It was the judgment and opinion of the court that the question as asked fully protected the rights of the defendant, while the question desired to be asked was directed to one single element of the offense of murder, and, if it had been allowed, other questions covering each and every other element of the case, both for the state and defense, must likewise have been allowed. If this had been done, the trial would have been unreasonably extended; and, further, the defendant never exhausted all his peremptory challenges."

The court's action in refusing to permit appellant to ask said question was correct. *Ellis v. State*, 69 Tex. Cr. R. 468, 154 S. W. 1010; *Merkel v. State*, 171 S. W. 740, and authorities therein cited.

[2] In his next bill he shows that the district attorney asked its witness Edna Bowman if she heard deceased make any statement on the night she was shot. She answered she did, and stated that no one was present at the time but herself. That she (the witness) was the only one in the room with the deceased at the time. He then asked:

"What, if anything, did she say in regard to who it was [referring to who shot her]?" Quoting from the bill: "To which question the defendant then and there objected, which objection was by the court overruled, and the defendant excepted because it does not appear that the precedent required by statute that the deceased was conscious of approaching death, had no hope of recovery, and was fully conscious of what she was saying and doing at the time said statement was made; said testimony being material, because the deceased answered said question that 'George shot me because I wouldn't go with him. He ought to be hung, oughtn't he?'"

The bill then states that the defendant further excepts, because the answer called for a conclusion of the deceased, and did not state the conversation that occurred between the defendant and the deceased which led to the conclusion testified to, that George shot her because she would not go with him. The court before approving this bill explains and qualifies it as follows:

"Before the witness Edna Bowman was asked the question and gave the answers complained of, it had been established by other witnesses that at the time or within a few minutes of the speaking of the words recited by the witness Edna Bowman, that the deceased was sane, fully conscious, and knew that she was going to die and had no hope of recovery, as will be seen from the testimony of Fannie Thompson, Dr. H. H. Ogilvie, and Curtis Parrish; also all three of those witnesses testified to dying declarations of substantially the same words as testified to by

the witness Edna Bowman, without objection on the part of the defendant. The testimony of the witnesses Fannie Thompson and Dr. H. H. Ogilvie shows the proper predicate to the introduction of dying declarations, and no change in the condition of the deceased from the time at which they saw her until she spoke to Edna Bowman was shown or suggested.

"The objection was to the question and not to the answer or any portion thereof, and no objection was made, and no motion was made to strike out the answer nor the words: 'He ought to be hung, oughtn't he?'"

The statute (C. C. P. art. 808) expressly prescribes what the proof shall show before a dying declaration of a deceased is admissible. This statute has been in force for many years and has frequently been discussed, construed, and applied in many cases. The rules applying thereto are well established by the decisions both of this court and our Supreme Court when it had criminal jurisdiction. And while all the requisites prescribed by the statute must be shown in order that the dying declaration be admissible, it is held that it is not necessary that all these requisites shall be established by direct and positive testimony of the deceased at the time. It is enough if it satisfactorily appear that the proper proof was made whether it be directly proved by the express language of the declarant or others, or be inferred from his evident danger, or the opinions of the medical or other attendants stated to him, or from his conduct or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind and the facts to make the dying declaration admissible. *Hunnicut v. State*, 18 Tex. App. 516, 51 Am. Rep. 330; *Cook v. State*, 22 Tex. App. 526, 3 S. W. 749; *Miller v. State*, 27 Tex. App. 81, 10 S. W. 445; *King v. State*, 34 Tex. Cr. R. 237, 29 S. W. 1086; *Connell v. State*, 46 Tex. Cr. R. 261, 81 S. W. 746; *Thomas v. State*, 49 Tex. Cr. R. 642, 95 S. W. 1069; *Sims v. State*, 36 Tex. Cr. R. 165, 36 S. W. 256; *Douglas v. State*, 58 Tex. Cr. R. 122, 124 S. W. 937, 137 Am. St. Rep. 930; *Johnson v. State*, 67 Tex. Cr. R. 441, 149 S. W. 165; *Christian v. State*, 71 Tex. Cr. R. 566, 161 S. W. 101; *Sorrell v. State*, 74 Tex. Cr. R. 505, 169 S. W. 299; *Marshall v. State*, 182 S. W. 1106.

[3] It is also established that if the dying declarations were made under a consciousness of impending death, without hope of recovery, the length of time deceased lived after making them is immaterial. *Fulcher v. State*, 28 Tex. App. 472, 13 S. W. 750; *Crockett v. State*, 45 Tex. Cr. R. 280, 77 S. W. 4; *Hunter v. State*, 54 Tex. Cr. R. 229, 114 S. W. 124, 30 Am. St. Rep. 887; *Brookins v. State*, 71 Tex. Cr. R. 101, 158 S. W. 522; *Francis v. State*, 170 S. W. 779. On these propositions see 2 Branch's An. P. C. p. 1035; 2 Vernon's Cr. Stat. p. 746.

[4] Another principle of law is applicable, and that is:

"The erroneous admission of testimony is not cause for reversal if the same fact is proven by other testimony not objected to." *Wagner v. State*, 53 Tex. Cr. R. 307, 109 S. W. 168, and

cases cited therein. *Bailey v. State*, 69 Tex. Cr. R. 484, 155 S. W. 536; *Christie v. State*, 69 Tex. Cr. R. 602, 155 S. W. 541; *Tinker v. State*, 179 S. W. 573; and many other cases.

[5] And there is still another well-established principle applicable, and that is: Where an objection is made to the whole of certain testimony, a part of which is admissible and a part of which is inadmissible, such objection and the admission of such testimony presents no reversible error. In order to present error, specific objections must be made to that part which is inadmissible and not to the whole, a part of which is admissible. *Ortiz v. State*, 68 Tex. Cr. R. 524, 151 S. W. 1056; *Payton v. State*, 35 Tex. Cr. R. 510, 34 S. W. 615; *Gaines v. State*, 37 S. W. 333; *Tubb v. State*, 55 Tex. Cr. R. 623, 117 S. W. 858; *Cabral v. State*, 57 Tex. Cr. R. 304, 122 S. W. 872; *Hughes v. State*, 68 Tex. Cr. R. 584, 152 S. W. 914; *Pinkerton v. State*, 71 Tex. Cr. R. 203, 106 S. W. 87; *Boyd v. State*, 72 Tex. Cr. R. 521, 163 S. W. 69; *Lopez v. State*, 73 Tex. Cr. R. 624, 166 S. W. 155; *Francis v. State*, 170 S. W. 782; *Zweig v. State*, 74 Tex. Cr. R. 306, 171 S. W. 751; *Ghent v. State*, 176 S. W. 568; *Aven v. State*, 177 S. W. 82. If appellant had objected at the time to that part of the deceased's statement, "He ought to be hung, oughtn't he?" or if he had later made a motion to exclude it, and the court had overruled such objections or such motion, then reversible error might have been presented. But, as shown, he made no objection to that part of the answer only, and made no motion to exclude it at all; so that, under no contingency, does his bill present any reversible error.

[6] By his bill No. 3 it is shown that he was cross-examining Hugh Lindsey, a state's witness, and asked him:

"Q. You have known George (McKinney) three years? A. Yes, sir; I have heard tell of him before. Q. Are you friendly with George? A. Yes, sir; I am acquainted with him. Q. Did you know at the time that the Parrishes were—"

At this point the district attorney interrupted the question, and objected that the witness could have heard it from hearsay only, and it would throw no light on the transaction, would have no bearing on the question—it would not serve to show any motive, his knowledge or lack of knowledge. The court sustained the objection. The bill shows that appellant then excepted, in that he was not permitted to finish his question, which he states would have been:

"Did you know at the time that the Parrishes were unfriendly towards the defendant, and objected to Alice Parrish going with the defendant?"

He claims in his bill that all the Parrishes had testified against him, and it was important for him to show their animosity against him, and he was deprived of the right not only of asking the question, but having the answer "to show that the Parrishes were unfriendly with the defendant."

The court explained and qualified this bill as follows:

"The question sought to be asked by the defendant, through his attorney, called for hearsay and the conclusion of the witness, and was inadmissible for the further reason that, if admitted, the answer would have been material for one purpose only; that is, it would have been material to show the animus, interest or bias of the Parrish family. The animus, interest, and bias had already been freely admitted by each member of the Parrish family who testified, and the identical information sought to be elicited by this question had already been admitted by each one of them; consequently, there being no denial of their animus and interest, it was not proper for the defendant to prove same from any other source."

As thus qualified, the bill shows no error. What the answer of the witness would have been is not stated, except, inferentially, that the Parrishes were unfriendly to him. Whether his knowledge was such as that it would or would not be hearsay is not disclosed. But, at any rate, when the evidence, as stated by the court, established without controversy the very facts that he wanted to prove, of course no injury was done him by the action of the court.

[7, 8] His next two bills (4 and 5) will be stated and considered together. In the fourth he objected to the introduction of the blood-stained garments of the deceased, claiming that they were introduced for the purpose and with the intention to inflame the minds of the jury against him, and that it did so. In the fifth he claims that the mother of deceased, after she left the stand, said in the hearing of the jury: "He murdered my daughter and ought to be hung." These grounds were also set up in appellant's motion for a new trial. The motion on both these grounds was expressly contested and denied by the sworn affidavit of the district attorney.

The court, in approving these bills, fully qualified and explained them. The qualification to the fifth is embraced in that to the fourth, and, while it is quite lengthy, we regard it as of sufficient importance to justify the quotation of the whole of it. It is:

"The state introduced the doctor in attendance (Dr. H. H. Ogilvie) and the undertaker (George Williams), both of whom testified to the location of the wounds. The undertaker stated that there were three wounds, grouped together in such a manner as to form a triangle, indicating the triangle by holding up three of his fingers so that the tips of his fingers formed a triangle. The physician testified that there were three holes in a straight perpendicular line up and down the throat, and that each was a small bullet hole, and that the spaces between them were about three-fourths of an inch. Upon cross-examination he expressed the opinion that all three of them could have been made by one bullet entering the top hole first, emerging at the second, and re-entering at the bottom.

"They both testified to one exit at the back of the neck, but neither testified to the exact location of the point of exit. The declared purpose of the district attorney in offering the dress (the only bloody garment) was to meet the opinion of the witness (Dr. H. H. Ogilvie) that one bullet could have made all three wounds by showing that the bullet hole in the collar of the dress was

opposite the lower hole in the throat; that it would have been a physical impossibility for a bullet encountering only fleshy tissues in the throat, ranging downwards, to have been deflected at a right angle in its downward course, so as to make an exit at the point at which it penetrated the dress in the rear. The coat offered in evidence had no blood on it, and was offered both for the purpose of showing the location of the point of exit by holes in the collar thereof, and for the purpose of identifying a button, both by its absence from the coat and its exact correspondence with other buttons on the coat, which button had been found at the place of the homicide, and was offered as a circumstance indicating a struggle, which fact was denied by the defendant who claimed accident. There is nothing in the record to sustain counsel's conclusion that the dress (the only bloody garment offered in evidence) or the coat (which had no blood on it) was offered for the purpose of inflaming the minds of the jury or that it did so. The facts in reference to this matter, and to the claimed outburst of the deceased's mother, just after leaving the witness stand, do not show in the record, but are as follows:

"At the time of the trial counsel for the state and defendant were seated at a table in the courtroom, which table was four feet two inches broad, and eight feet two inches long, and was placed a long ways in front of the jury box, and with its narrow end facing the witness box and the judge's rostrum, and its long side parallel with the jury box. The edge of the table nearest the jury box was seven feet from the nearest juror, and the edge that was nearest the judge's rostrum and the witness stand was some eight feet from said witness stand and rostrum. Counsel for defendant was sitting on the far side of the table from the jury, and therefore some eleven feet from the nearest juror. Counsel for the state was sitting on the near side of the table toward the jury, and therefore not more than seven feet from the nearest juror. The witness Mary Parrish, mother of the deceased, was placed upon the witness stand by the state to establish facts known to her alone, as will appear by the record, and was cautioned by the district attorney, when placed upon the stand, to answer questions asked only. After having testified, and whilst the witness was leaving the witness stand, and whilst proceeding away from the jury around the end of the table nearest the witness stand, and therefore with her back or left side face toward the jury, at the moment when she was just around the end of the table, and was by the side of defendant's counsel, and not more than a foot or so from him, but fully eleven or twelve feet from the state's counsel and four or five feet from the nearest juror, she said something. The words she spoke were not intelligible, and could not be understood either by the judge trying the case, the stenographer taking the testimony, or state's counsel, as will appear as to state's counsel from an affidavit of the district attorney and his assistant, controverting the defendant's amended motion, for a new trial. On the hearing of the amended motion for a new trial no effort was made by the defendant to overcome this controverting affidavit, and no evidence was offered from any source to show that the jury had noticed the fact that the witness had spoken at all after leaving the stand, nor heard any word or words that the witness may or may not have stated at this time, and nowhere is it shown that any one save defendant's attorney, who was nearer to the witness than any other person in the courtroom, ever heard what she said. Moreover, the defendant did not at the time of the incident, or at any other time, object to the conduct of the witness after she had so left the witness stand, nor did he move to have the jury instructed not to consider her said conduct and remarks, if any, nor did he except to any act or omission of the court in con-

nection therewith, and the stenographer's record of the whole trial is totally silent upon this subject, and does not show that any incident such as complained of by defendant ever in fact occurred, and this bill of exception is approved only because it contains a matter with reference to objection to the introduction of the clothing to which an exception was properly reserved, and is thus qualified with reference to this matter outside of the record, in order that the appellate court may know the facts as they actually transpired and the conditions surrounding the incident."

The authorities are abundant that the bloody dress, under the circumstances, was admissible. *Burgess v. State*, 181 S. W. 465, and a large number of cases collected in 2 Branch's An. P. C., p. 1031. Neither of these bills as qualified by the judge shows any error.

[9] By his bill No. 6 he shows that Curtis Parrish, Jr., after having testified at first, was later recalled by the state and testified to an occurrence to which he did not testify when first on the witness stand nor at a previous trial of the case. Appellant's attorney in cross-examination of him asked him:

"Q. You did not testify to this occurrence at the last trial? A. No, sir. Q. This gun play was not testified to by you in the last trial?"

Upon the objection of the district attorney, he was not permitted to further cross-examine him on this point. In his bill appellant claims that he had the right and strove to cross-examine him to impeach his testimony, and as to why he did not testify to this same occurrence at the previous trial, in spite of the fact that he had then testified that he related all the troubles between defendant and deceased, in order that the jury might determine his credibility and the weight to be given to his evidence. The court explained and qualified this bill, saying:

"The objection stated was sustained to the question as asked, because it was not in proper form to lay a predicate for the impeachment sought as shown by the bill. The 'gun play' referred to did not refer to any trouble between the deceased and defendant, but to trouble between the father of the deceased and the defendant."

This bill as presented is not full enough to show any error, nor is it full enough to be intelligible without stating further as shown by the record, which we will now do. Besides the bill nor record otherwise shows what the witness would have testified.

The state introduced said witness in at first making out its case before the jury. His testimony then was solely to the effect that he saw his sister, the deceased, and appellant together at a ball on the night previous to the time she was shot and killed. "He was quarrelling with my sister, at least I thought he was; he was in an angry manner, he was standing looking at my sister. Nothing occurred, because I told him not to bother my sister," and he said he was not going to bother her at the ball or elsewhere; that he had some sense. This witness further testified that he next saw his sister that

night at his home, where she was lying shot, and he asked her who shot her, and she said: "George McKinney shot me because I did not go with him." This is, in substance, the whole of his testimony given at that time. Of course, the jury saw and heard and knew this. The state soon after rested. Thereupon appellant testified in his own behalf, and introduced, it seems, two other witnesses on other matters, unnecessary to state, having no connection with this matter. Thereupon the state, after introducing other witnesses on other subjects, later introduced the mother of the deceased, who, among other things, testified, in substance, that one night shortly before the homicide her daughter, the deceased, out in the street near her home, called for her for protection against appellant, when she, her husband, and said son went out to where she was; that she ran up to appellant, and asked him what he meant by meddling and quarreling with her daughter; that he ran his hand in his pocket to pull a gun on her, the witness. Thereupon the state introduced said Curtis Parrish, Jr., who then testified to this occurrence, to the effect that appellant said to him not to come towards him; that he would shoot, and that he had a gun; and while his father had gone and gotten a gun, his mother would not let his father shoot appellant, but prevented it. His father testified to substantially the same thing. It was on his cross-examination of Curtis Parrish, Jr., that the trouble arose as complained of in the bill.

We think it certain from the record and bill that, without any controversy or dispute, appellant succeeded in getting from the witness on this cross-examination, in substance and effect, all he could have gotten by any lengthy cross-examination. The bill nor record does not show what else he could have gotten from the witness. It would have been better perhaps for the court not to have cut him off from his further claimed cross-examination. When the witness testified positively as he did, as shown by the bill, that he did not on the previous trial testify to this occurrence between his sister and appellant and his mother, father, and himself, there was nothing to impeach him upon. He admitted that he had not sworn to this on the previous trial. The jury positively knew at that time that he had not done so in his testimony, when first introduced by the state on this trial. This bill presents no reversible error.

Appellant's seventh bill complains that the court permitted, over his objections, the officer who arrested him to state that appellant when he first saw him, asked the officer if she was dead. His objection was this was made after he was arrested. The court's qualification shows the reverse of this, and, as qualified, the bill shows no error.

The only other bill is to the overruling of

his motion for a new trial. This presents no error.

This being a death penalty case, we have given the record, appellant's brief, and the clear and forcible argument of appellant's able attorney, thorough consideration and investigation. We think the evidence is amply sufficient to sustain the verdict, but see no necessity of reciting it, and that no error is shown which would authorize or justify this court to reverse this judgment. It will therefore be affirmed.

CLARK et al. v. HALLAM et al. (No. 8562.)

(Court of Civil Appeals of Texas. Ft. Worth. July 1, 1916.)

SCHOOLS AND SCHOOL DISTRICTS —39—FORMATION OF HIGH SCHOOL DISTRICT—REVIEW BY DISTRICT COURT.

Under Acts 84th Leg. c. 36, providing for organization of public high schools in common school districts, by section 4a giving the district court "general supervisory control of the actions of the county board of school trustees in creating, changing and modifying school districts," and by section 10 providing that appeals from the county superintendent of public instruction shall lie to the county school trustees and from them to the state superintendent of public instruction, and thence to the state board of education, appeals to the district court may be made direct from action of the county board of school trustees in consolidating districts, since the specific provisions of section 4a, construed with section 10, control the general provisions of the latter.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 68, 69; Dec. Dig. —39.]

Appeal from District Court, Young County: Wm. N. Bonner, Judge.

Suit by J. A. Clark and others against R. G. Hallam and others. From an order of dismissal, complainants appeal. Reversed and remanded.

Arnold & Arnold, of Graham, for appellants.

CONNER, C. J. On May 19, 1916, J. A. Clark, S. J. Kelly, and G. W. Rose, resident taxpaying citizens of common school district No. 10 of Young county, Tex., presented their petition to Hon. Wm. N. Bonner, judge of the Thirtieth judicial district, which includes Young county, seeking to enjoin R. G. Hallam, V. M. Burkitt, G. B. Underwood, Walter Long, and S. H. Thomas, composing the board of county school trustees of Young county, from a threatened consolidation of common school districts Nos. 10 and 39 of said county, and from building therein a high school, with an issuance of bonds for its payment. Said district judge indorsed upon the petition so presented his order setting the case down for hearing at Graham, Young county, on the 3d day of June, 1916, with direction for the issuance of a temporary writ of injunction restraining said proceedings in the

consolidation of the school districts named pending the hearing provided for. On the day set for the hearing, as appears from the recitations of the judgment, all parties appeared in person and by counsel and announced ready for trial, "whereupon the defendants filed their plea to the jurisdiction of the court, and the court, after hearing said plea to the jurisdiction and having fully considered the same, is of the opinion that said plea should be sustained, and that the district court of Young county, Texas, has no jurisdiction to hear and determine said cause." It was accordingly adjudged that the cause be dismissed from the docket of the court, and it is from this order of dismissal that the appeal herein has been prosecuted.

A free copy of the plaintiffs' petition will be unnecessary, we think. In substance, the allegations in effect are that the petitions upon which the board of county school trustees acted and entered its order of consolidation had not been signed by the requisite number of electors of the district; that no necessity existed for the creation of a high school, in that neither district contained children entitled to public free school education of a grade higher than the seventh; that the consolidated district as proposed is some 10 miles long and from 4 to 10 miles wide, and that the location of the proposed high school building would make it necessary for a large proportion of the students residing in the districts named to travel from $2\frac{1}{2}$ to 6 miles in order to attend the school. These particular complaints are elaborated in the petition, but, as already indicated, in the view we have taken of the case, it will be unnecessary to further notice them, inasmuch as the only question presented to us is whether the district court of Young county had jurisdiction to determine the matter in controversy; the sufficiency of the petition not being questioned, if otherwise said court did have jurisdiction.

No brief or argument has been presented in behalf of appellees. Appellants suggest, however, that the theory upon which the trial court acted is that the appeal from the action of the board of county trustees, in the first instance at least, should have been to the county superintendent, and from him to the state superintendent, and from the state superintendent to the state board of education. This it appears was the approved practice under former laws, and doubtless also as to certain matters relating to the management of public free schools under existing laws. *Thomas v. Taylor*, 163 S. W. 129; *Wier v. Hill*, 58 Tex. Civ. App. 370, 125 S. W. 366; *McCollum v. Adams*, 110 S. W. 526; *Caswell v. Fundenberger*, 47 Tex. Civ. App. 456, 105 S. W. 1017; *Stephens v. Buile*, 57 S. W. 312; section 10 of the existing law approved March 5, 1915 (see Gen. Laws 1915, p. 68 et seq.). By a reference to the act just cited, it will be seen that it is an amendment by the Leg-

islature which vests in a board of five county school trustees the power theretofore existing in commissioners' courts to change the lines and consolidate common school districts into which their counties may have been subdivided. Section 4 of this amendment specifically provides, among other things, that:

"The county school trustees shall have authority to consolidate two or more common school districts into a larger common school district where a majority of the qualified electors of each common school district at interest shall petition the county school trustees for consolidation, in order that a high school may be established for the children of high school advancement in the common school district so consolidated."

In relation, however, to the matter of consolidating school districts, it is specifically provided in section 4a of the act that:

"The district court shall have general supervisory control of the actions of the county board of school trustees in creating, changing and modifying school districts."

It is true that section 10 of the same act provides, as had been done under previous laws, that:

"All appeals from the decisions of the county superintendent of public instruction shall lie to the county school trustees, and from the said county trustees to the state superintendent of public instruction, and thence to the state board of education."

But harmonizing, as it is our duty to do, section 4a with section 10, we think it should be held that the latter section only applies to other proceedings comprehended within the general management and control of the public free schools of the county which is vested by the act in the five school trustees mentioned, such as classifying the schools, arranging for free transportation of school children under certain circumstances, prescribing courses of study, approving contracts with teachers, etc. This view is emphasized by the fact that in no previous law relating to the subject do we find express supervisory control over the actions of the county school board of trustees given to the district courts, as provided in section 4a, and by the further fact that section 4a, for the first time conferring such control, is specific in its character, while section 10 is general in character. In accordance with a familiar rule of construction, both must stand, if they can be made to do so. But the specific controls in the matter to which it is made to relate. *Warren v. Shuman*, 5 Tex. 441, 442; *Erwin v. Blanks*, 60 Tex. 583; *Howard Oil Co. v. Davis*, 76 Tex. 630, 13 S. W. 685; *National Bank v. Hanks*, 104 Tex. 320, 137 S. W. 1120, Ann. Cas. 1914B, 368. As applied to the case we have before us, both sections, we think, may stand and be given appropriate operation. Construing the law as a whole, we think it should be held, generally speaking, that in proceedings relating to the general management and control of the public free schools in a county appeals from the decisions of county superintendents or county school trustees

tees should, in the first instance at least, be made as prescribed in section 10, thus, as to such subjects, limiting the jurisdiction or power of control on the part of the district courts to such power as is vested in them by general principles of equity, such as where it is alleged that the action of the superintendent or trustees is wholly without authority, or corruptly exercised, etc., but that in the matter of consolidating districts section 4a controls, and appeals may be made to the district court direct.

We conclude that the district court of Young county erred in holding that it was without jurisdiction; and it is accordingly ordered that the judgment be reversed, and the cause remanded for a hearing and determination by that court of the questions at issue as presented in the plaintiffs' petition, thus leaving the temporary writ of injunction effective until otherwise lawfully ordered.

Reversed and remanded.

CITY OF TERRELL v. TERRELL ELECTRIC LIGHT CO. et al. (No. 7735.)

(Court of Civil Appeals of Texas. Dallas.
July 1, 1916.)

1. MUNICIPAL CORPORATIONS — 680, 681(1) — GRANTING LICENSES—POWER TO REGULATE.

Municipalities may not, under the grant of exclusive control of streets under direct provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 854, legislate on everything connected with the subject over which they possess limited authority, such as the manner and means of the business permitted the use of the streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1459; Dec. Dig. 680, 681(1).]

2. MUNICIPAL CORPORATIONS — 682(4) — GRANTING LICENSES—CONDITIONS.

If a municipality, although without power to do so, annexes a condition to a grant to enter upon its streets, a grantee, voluntarily accepting the grant, cannot thereafter refuse to be bound by the condition.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1470; Dec. Dig. 682(4).]

3. ELECTRICITY — 4 — FRANCHISES—FORFEITURE—"CONDITION"—"MANUFACTURE."

In an ordinance, granting to an electric company the "right to manufacture and vend" electricity to the city and the citizens, "subject to the provisions and conditions hereinafter contained," which conditions were to furnish certain lights and not to erect an ice plant on a certain lot, it was not a "condition" that the company "manufacture" its own electricity rather than purchase it from another, since the grant should be construed according to Vernon's Sayles' Ann. Civ. St. 1914, art. 5502, providing that the ordinary signification should be applied to words not technical, and since a condition ordinarily is any qualification, restriction, or limitation modifying or destroying the full enjoyment or use of a right, and under the maxim that the "expression of one thing is the exclusion of another," the word "manufacture" cannot be construed as more than mere description of the extent of the permit.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 1; Dec. Dig. 4.

For other definitions, see Words and Phrases, First and Second Series, Condition.]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Suit by City of Terrell against the Terrell Electric Light Company and another. From an order refusing temporary injunction, complainant appeals. Affirmed.

M. F. Cate, Morris Brin, and Bumpass & Crumbaugh, all of Terrell, for appellant. Robt. L. Warren and Bond & Bond, all of Terrell, and Templeton, Beall & Williams, of Dallas, for appellees.

RASBURY, J. This is an appeal from an order of the district judge, refusing in vacation appellant's application for a temporary injunction to restrain appellees from consummating the acts hereinafter specified. The primary purpose of the suit was to forfeit the charters of the Terrell Electric Light Company and the Texas Power & Light Company, to cancel the franchise granted by appellant to Terrell Electric Light Company over its streets, and for the appointment of a receiver for both companies. No issue arises upon the pleadings or the right of appellant to maintain the suit for its primary purpose, and hence it is unnecessary to a disposition of the issues that are raised on appeal to recite the one or discuss the other. At the hearing the following essential and undisputed facts were adduced: The Terrell Electric Light Company is a private corporation, chartered by the state December 19, 1902, and authorized by its charter to manufacture and supply gas and to supply light, heat, and electric motor power to the public in the town of Terrell by any means. When the present controversy arose it was operating an electric light plant in said town for profit and by authority of an ordinance enacted by the authorities of the town of Terrell, which, omitting the enacting clause and the signatures of officials, is as follows:

"Whereas, a company has been formed under the name of 'The Terrell Electric Light Company' for the purpose of building and operating an electric light, heat and power plant for the purpose of supplying light, heat and power by electricity to the public, and the manufacture and the sale of electric light material and electric supplies in the city of Terrell, Texas: Therefore be it ordained by the city council of the city of Terrell, Texas:

"Section 1st. The said Terrell Electric Light Company shall have the right and privilege and the same is hereby granted of erecting, establishing, buying, selling, maintaining and operating electric light and electric power works in the city of Terrell, Texas, and shall have the right to manufacture and vend to the city of Terrell and the citizens thereof and to other persons, electricity for motors, light, heat or power purposes for the term of forty-five years from the date of the passage of this ordinance, provided however, that this franchise is subject to the provisions and conditions hereinafter contained and set forth, provided that nothing in this ordinance shall be construed as granting to said company the exclusive privileges for the purpose herein set forth.

"Sec. 2. To enable said company to construct, maintain, extend and operate its plant in said city, the said company is authorized to erect

and maintain along any of the streets or alleys or other public highways of said city for the purpose of carrying on its business poles, lines, guy posts and braces and such other things as are necessary to the safe and economical construction and operation of its property all to be under the direction of the street committee of the city council of said city of Terrell, Texas, and in accordance with the laws and ordinances of said city now in force.

"Sec. 3. In consideration of the above grant the said Terrell Electric Light Company, agrees to furnish during the continuation of its franchise to the said city of Terrell the following electric lights: Four arc lights of not less than one thousand c. p. each, to be placed on Moore avenue at points where lights have heretofore been stationed, provided however that the city of Terrell shall take from said company two other arc street lights of the same kind, and agree to pay therefor the sum of twelve dollars and fifty cents per month for each of said two lights. Six incandescent lights at city fire station, one of which shall be thirty two c. p. To light the building known as the 'City Hall' and used as the city public school building. One incandescent light at mayor's office in said city.

"Sec. 4. It is furthermore expressly understood and agreed by and between parties hereto that in the event that the Terrell Electric Light Company or its assigns shall construct a plant herein provided for at site where electric light plant formerly stood, that is to say on lots twelve and thirteen in block seventy-four, then and in that event the Terrell Electric Light Company and its assigns agrees and binds itself not to erect or operate in any manner any ice plant in connection with said light and power plant, and it is expressly provided herein that in the event said Terrell Electric Light Company does erect its electric light plant on the lots heretofore described, and does undertake to run or operate an ice plant in connection therewith then this franchise is thereby made wholly void.

"Sec. 5. Provided furthermore that this ordinance to be effective shall be signed by the mayor and secretary of said city and by the Terrell Electric Light Company."

Incidentally the foregoing ordinance is dated more than a year prior to the time the company was chartered, but inasmuch as it was probably passed in contemplation of the creation of the corporation, and inasmuch as counsel make no point on that fact, we merely record it as such. The town of Terrell, when the present controversy arose, was also operating within its corporate limits a municipal light plant for profit and for the purpose of lighting its own streets. Such fact does not appear from the statement of facts, but counsel assume it to be so, and in like manner we do. M. A. Joy is president of the Terrell Electric Light Company and owns all of the corporate stock therein, save four or five shares. Prior to the present controversy, and on January 10, 1916, the commissioners' court of Kaufman county upon the application of Joy, granted him the right or franchise to erect poles or towers and all necessary wires, devices and arrangements on all the public roads and highways of Kaufman county, for the transmission and use of electricity for light, heat, power and other purposes for a period ending in 1966. Thereafter, and on February 12, 1916, the Terrell Electric Light Company entered into a contract with the Texas Power & Light Com-

pany agreeing to take from it, at prices enumerated and agreed upon, whatever of electric power or energy it should require for any of its corporate uses or for the uses of its customers. Subsequent to the foregoing contract and in furtherance thereof the Terrell Electric Light Company, on March 15, 1916, entered into a contract with the Texas Construction Company, by which the latter for a recited consideration agreed to construct and equip for the Terrell Electric Light Company at or near the corporate limits of the town of Terrell a station for transforming electric current, and to build as well a line of poles and wires, etc., for the transmission of electricity from the transforming station to a point at or near the corporate limits of the town of Forney in Kaufman county. The transmission line so agreed to be built was under authority of the grant by the commissioners' court to M. A. Joy, and when built it was Joy's purpose to there connect his transmission line with that of the Texas Power & Light Company at said point in order to secure from said company electric current under the contract detailed, and in turn transmit the same back to the transforming station at Terrell, and there, after properly transforming it in turn, transmit same over the wires of the Terrell Electric Light Company for sale and delivery to its customers supplied thereby. It was to prevent the Terrell Electric Light Company from thus obtaining electric current and the Texas Power & Light Company and M. A. Joy from thus furnishing it that the temporary injunction was sought, and the refusal of which is the sole issue on appeal, although other grounds were urged in the petition.

The contention of appellant is, in substance, that the ordinance permitting appellee Terrell Electric Light Company to use its streets provides that such use is on condition that the electric current furnished by the company to its customers shall be manufactured by it, and that as a consequence the supplying of current in the manner proposed would be in violation of the ordinance, and would entitle appellant to the injunction.

[1-3] The appellee Terrell Electric Light Company, as we have shown, is authorized by its charter to supply electric light, etc., to its customers by any means, which clearly would include the right to purchase current from another and distribute and sell same to its customers as proposed by the contract with Texas Power & Light Company. And while the Legislature has committed to incorporate towns and cities "exclusive control and power over" its streets, alleys, etc. (article 854, Vernon's Sayles' Civ. Stats.), and while, as a consequence, the Terrell Electric Light Company could not enter upon the streets of appellant without its consent reasonably exercised, such consent may not limit or restrict the corporate authority conferred by the state. For, the paramount right to regulate public highways being primarily

in the Legislature, municipalities may not, under the grant of exclusive control of its streets, legislative on everything connected with the subject over which they possess limited authority, such as the manner and means of conducting the business so permitted the use of the streets. *Galveston & Western Ry. Co. v. City of Galveston*, 90 Tex. 398, 39 S. W. 97, 36 L. R. A. 83. However, a limitation of the general rule stated is that if the municipality annexes to a grant to enter upon its streets a condition, although without authority to do so, and the grantee voluntarily accepts the grant with the annexed condition, it cannot afterwards refuse to be bound thereby or be heard to deny the authority to impose same. *Athens Tel. Co. v. City of Athens*, 182 S. W. 42. The rule stated was adhered to in the case cited, and was a controlling issue. Writ of error was denied by the Supreme Court. Accordingly, the issue, on the record as submitted, narrows to whether the ordinance constituting the basis of Terrell Electric Light Company's right upon appellant's streets was granted upon condition that the electric current to be distributed and sold by the company in the conduct of its business should be manufactured by that company. Obviously the question is one of law arising upon the provisions of the ordinance as a whole. Upon a careful consideration thereof we conclude that the ordinance is not fairly susceptible of such construction. In reaching that conclusion we have not been unmindful of the rule that grants of public rights by municipalities are to be strictly construed in favor of the public and against the grantee, but have proceeded in the light of that rule. The construction sought to be placed upon the ordinance is based upon the use therein of the term "manufacture and vend." This term is found in section 1 of the ordinance. The substance of section 1 is that the town of Terrell will permit the Terrell Electric Light Company to erect therein a plant for the purpose, among other things, of manufacturing and vending electric current to the citizens of the town. If the consent of the city to erect the plant was necessary to the exercise of that right, nevertheless it cannot reasonably be said that the language of the section includes more than a bare permit or assent to the erection of the company's plant within the corporate limits of the city, free from condition or restriction. The language of the section by its common and ordinary meaning imports no more, and by that rule we are controlled in construing it. Article 5502, Vernon's Sayles' Civ. Stats. Section 2, when in like manner carefully and fairly analyzed, discloses no more than a similar bare permit, which as we have shown was necessary to the right to use the city's streets for the erection of poles, wires, etc., for the purpose of enabling the company to conduct its business. Sections 3 and 4 of the ordinance do, however,

in our opinion, contain conditions which the Terrell Electric Light Company are bound by under rule in *Athens Tel. Co. v. City of Athens*, *supra*. By section 3 it is provided, in substance, that the consideration for or the condition upon which the ordinance was enacted and that grant extended was that the company would, during the continuation of its franchise, furnish free to the city four arc lights at designated points upon the public streets, six incandescent lights at the city fire station, one at the mayor's office, and in addition light the city hall and the public school building. By section 4 it is provided, in substance, that in the event the company's plant is erected on certain city lots, it shall not, in connection with the light plant, operate as well an ice plant, and shall forfeit its rights under the ordinance if it violates such provision.

The foregoing are clearly conditions upon the observance of which the company's right to use the streets with its poles and wires depends. However, so far as the record discloses, such conditions are being observed, and any violation thereof is not urged as ground for the relief sought. The provisions are cited and attention directed thereto solely that the ordinance as a whole may be considered, and in order to illustrate our conclusion that the other sections relied upon by appellant do not contain conditions. A condition ordinarily is any qualification, restriction, or limitation modifying or destroying the full enjoyment or use of a right, etc. As by the ordinance under consideration the full use and enjoyment of the permit to manufacture and vend electric current and set poles and wires upon the streets of Terrell and transmit current over the same to its customers was subject to the qualification, limitation, or restriction that the Terrell Electric Light Company would furnish free the specified electric current, and would not maintain an ice plant upon the designated lots. It is an ancient maxim that the "expression of one thing is the exclusion of another," and it seems to us that the observance of that rule excludes the construction sought to be placed upon the ordinance by appellant, since the only condition found in the ordinance does not regulate the manner and means of securing the electric current. While we think it is probably certain that the Terrell Electric Light Company did intend to generate its own current when the ordinance was enacted, at the same time, in the light of the conditions actually imposed upon it by the appellant, it was not, in our opinion, contemplated by either party that it must do so as a condition precedent to its use of the streets. To do so would be to construe into a condition that which is at most a permit, and would be to attach to language used, in our opinion, more as matter of description or explanation than otherwise, an importance and significance not warranted

by the context and other provisions of the ordinance.

What we have said indicates that we are of opinion that the judgment of the trial court should be affirmed. We take occasion, however, to say that our disposition of the appeal determines only the issues and facts as presented, and is not to be considered as foreclosing any rights which may arise upon final trial as the result of other or different facts.

The judgment of the court below is affirmed.

ST. PAUL FIRE & MARINE INS. CO. v. LASTER. (No. 7593.)

(Court of Civil Appeals of Texas. Dallas.
June 10, 1916. Rehearing Denied
July 1, 1916.)

1. INSURANCE — 639 — ACTION — COMPLAINT.

A complaint in an action on fire insurance policy need not allege that the fire did not result from causes for which insurer was not liable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1593, 1598; Dec. Dig. — 639.]

2. TRIAL — 141 — QUESTION FOR JURY — LACK OF EVIDENCE.

It is proper to refuse to submit to the jury issues as to which there is no dispute, and on which only one conclusion could be reached by reasonable minds.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. — 141.]

3. INSURANCE — 665(4) — PROOF OF LOSS — STATUTORY PROVISION.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4874, providing that, in case of a total loss by fire, the claim shall be considered a liquidated demand against the company for the full amount of the policy, where the insured premises are a total loss, no showing or proof of the amount, etc., of the loss is necessary, for, since the policy sum is by the statute converted into a liquidated demand, suit may be commenced on it as on any other demand where the amount due has been ascertained.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1722; Dec. Dig. — 665(4).]

Error from District Court, Freestone County; A. M. Blackman, Judge.

Action by G. W. Laster against the St. Paul Fire & Marine Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Elliott Cage, of Houston, for plaintiff in error.

RASBURY, J. Defendant in error sued plaintiff in error in the lower court, alleging in substance that in consideration of the payment of the premium demanded plaintiff in error insured defendant in error against all direct loss or damage by fire to his dwelling in the town of Teague, not in excess of \$800; that while said policy was in force and while defendant in error was the owner of the premises, which were of the value of \$1,500, they were totally destroyed by fire, by which the amount of the insurance became a liquidated demand; that after the fire defendant

in error performed all conditions required of him by the policy, giving notice of the fire to plaintiff in error more than 90 days before commencement of suit, and demanded payment of the sum of insurance, which was refused.

Plaintiff in error's answer, so far as necessary to state, consisted of a general demurrer; general denial, and special pleas denying the performance by defendant in error of all conditions required by the policy, and alleging that the policy was void because the fire originated by the act, design, or procurement of defendant in error.

Upon conclusion of the evidence the court peremptorily directed the jury to return verdict for the defendant in error for the full amount of the policy, which was done and upon which verdict was accordingly entered. From such entry this appeal is prosecuted.

[1] The first assignment complains of the overruling of plaintiff in error's general demurrer. In connection with the demurrer it is provided by the policy, which is attached to and made a part of the petition, that the plaintiff in error shall not be liable for loss by fire occasioned by invasion, insurrection, riot, etc. The petition did not aver that the fire resulted from causes other than those from which plaintiff in error was exempted. The proposition advanced is that as a consequence of such omission the petition did not state a cause of action and the general demurrer should have been sustained. In support of its contention plaintiff in error cites *Pelican Ins. Co. v. Troy Co-op. Ass'n*, 77 Tex. 225, 13 S. W. 980, and *Phoenix Ins. Co. v. Boren*, 83 Tex. 97, 18 S. W. 484.

The general and apparently the uniform rule is that:

"Where a policy insures generally against a particular peril, and contains a further clause exempting the company from liability for loss caused in a certain manner, which would otherwise have fallen within the general terms of the policy, the burden is upon the insurer to allege and prove that the loss fell within the exemption." 4 Cooley's Briefs on Insurance, 3025.

Another eminent authority states the rule to be that:

"The plaintiff need not aver the * * * performance or nonperformance of conditions subsequent, nor negative prohibited acts, nor allege that he is within the excepted risks." 2 May, Insurance, § 490, p. 1377.

By another accepted authority it is said:

"It is not necessary to negative the occurrence of facts which would constitute a breach of condition subsequent, nor to aver that the loss is not within exceptions contained in the policy, * * * and in general plaintiff need not negative facts which might be set up by the company as a defense." 19 Cyc. 921, 922.

Accompanying the texts quoted are many cases from many jurisdictions cited in support of the rule.

Recurring, then, to the cases from the Supreme Court cited by plaintiff in error in

support of its contention, which, it must be conceded, tend to support the contention, we conclude they are not controlling, because the holdings in those cases have been in effect modified by the Supreme Court itself. In *Burlington Insurance Co. v. Rivers*, 9 Tex. Civ. App. 177, 28 S. W. 453, in referring to the holding in the Supreme Court cases, supra, it was said that:

"While the precise question now under consideration does not appear to have been decided in either of those cases, it must be conceded that both of them * * * tend strongly to support the proposition upon which they are cited. Still * * * believing that the weight of authority supports a different and better rule, * * * we decline to follow them."

Many cases are cited in the *Rivers* Case in support of the rule as we have stated it, and as it is stated in the *Rivers* Case, and the opinion closes with a quotation from *East Tex. Fire Ins. Co. v. Dyches*, 56 Tex. 566, wherein on the present issue it is, in effect, held that matters of contract in the nature of conditions subsequent, or exemptions from liability, or the prohibition of certain acts by the parties thereto, are matters of defense, and need not be noticed by plaintiff in his petition. The *Rivers* Case did not and could not, because of want of jurisdiction, reach the Supreme Court. However, in the subsequent case of *Hartford Fire Ins. Co. v. Watt*, 39 S. W. 200, where the identical question was involved, and which was decided in consonance with the *Rivers* Case, and which did reach the Supreme Court, that court refused a writ of error, thereby approving the departure from the rule announced in former cases. For the reasons stated, we conclude that the court below correctly overruled the general demurrer.

[2] The action of the court in refusing to submit to the jury whether the insured property was a total loss is assigned as error. We have carefully read all the evidence adduced on the issue of the extent of the damage to the property, and every witness, in effect, stated that the house was a total loss. Some of the witnesses stated that inconsiderable portions of the framework were left standing, and some that portions of the foundation remained. Neither fact, however, would, under article 4874, *Vernon's Sayles' Civil Stats.*, render the house any the less a total loss, and hence a liquidated demand. *Murphy v. Am. Cent. Ins. Co.*, 25 Tex. Civ. App. 241, 54 S. W. 407. That being true, the record contains no evidence save that which shows the building to have been a total loss, and from which it further follows that there was on that issue nothing to be submitted to the jury.

It is also urged that the court erred in not submitting to the jury whether or not the fire originated by any act, design, or procurement of defendant in error. There is in the record no work or circumstance which could have supported such a finding. Plaintiff in error offered no testimony of any char-

acter on the issue which it is claimed should have been submitted, or on any other issue in the case so far as the record discloses. Defendant in error, while on the stand, testified at the instance of his counsel that he did not set the fire which destroyed the house, or procure another to do so. Plaintiff in error declined to cross-examine defendant in error on that issue, but permitted his statement in that respect to stand unchallenged. It is therefore palpable, we think, that the issue was not made, and should not have been submitted to the jury.

It is also urged that the court erred in refusing to submit to the jury whether or not defendant in error was the sole and unconditional owner of the premises destroyed by fire. On the issue of ownership defendant in error testified that he was the owner of the premises at the time same were destroyed. Plaintiff in error did not cross-examine defendant in error on that issue. Nor was any original evidence tendered on such issue by defendant in error. Accordingly it was in evidence without dispute that defendant in error was the owner of the property.

In reference to the three preceding assignments of error, in connection with which it is urged that the case should have been submitted to the jury, notwithstanding the evidence on the several issues was without dispute or contradiction, on the theory that the jury was not compelled to accept as true the facts testified to by defendant in error, we understand the rule to be, not that the jury can return a verdict contrary to the undisputed and uncontradicted facts proven in evidence, but that the court cannot withdraw or refuse to submit the case to the jury, save in cases where the evidence is so conclusive of the issues that "reasonable minds, seeking to arrive at a proper conclusion, could not differ as to the effect of the testimony." *T. & P. Ry. Co. v. Taylor*, 103 Tex. 367, 126 S. W. 1117, 1200. After reviewing the evidence in the instant case, we conclude that it is of that character and force which excludes all difference of opinion as to the facts deducible therefrom, and that hence the court properly instructed verdict for defendant in error.

[3] The two remaining assignments of error relate to the introduction of a letter offered for the purpose of proving waiver of proofs of loss and to the refusal of the court to submit to the jury the issue of whether proofs of loss were in fact furnished as required by the policy. At another place in this opinion we hold that the evidence shows that the insured premises were a total loss, which by statute converted the sum of the policy into a liquidated demand, which made a showing or proof of the amount, etc., of the loss unnecessary, since suit could be commenced on the policy as on any other demand ascertaining the amount due. *Continental Ins. Co. v. Chase*, 83 S. W. 602; *Ham-*

burg-Bremen, etc., Ins. Co. v. Ruddell, 37 Tex. Civ. App. 33, 82 S. W. 827; Georgia Home Ins. Co. v. Leaverton, 33 S. W. 580; London & L. Fire Ins. Co. v. Schwulst, 46 S. W. 91.

Finding no error in the record the judgment is affirmed.

ÆTNA CLUB v. JACKSON. (No. 645.)
(Court of Civil Appeals of Texas. El Paso.
June 29, 1916.)

1. MANDAMUS \S 1—PURPOSE.

The purpose of mandamus is to require some inferior court or officer, etc., to do some particular thing specified in the writ which appertains to their office or duty, in aid of the jurisdiction of the court issuing the writ.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 1-3; Dec. Dig. \S 1; Action, Cent. Dig. \S 115.]

2. APPEAL AND ERROR \S 458(3)—SUPERSEDEAS—INJUNCTION.

Under Rev. St. 1911, arts. 2078, 2084, 2097-2101, providing for appeal to the Court of Civil Appeals from every final judgment of the district court in civil cases, stating how appeal may be perfected, and providing for appeal bonds or affidavits and supersedeas bonds, a prohibitory injunction may be suspended during appeal by supersedeas bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2223; Dec. Dig. \S 458(3); Injunction, Cent. Dig. \S 413.]

3. MANDAMUS \S 35—JUDICIAL ACTS—FIXING SUPERSEDEAS BOND.

Under such statutes, it is the duty of the trial court to fix the amount of such supersedeas bond, and it may be enforced by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 67; Dec. Dig. \S 35.]

Original application for mandamus by the Ætna Club against Dan M. Jackson. Application granted.

Weeks & Owen, of El Paso, for relator. P. H. Marcum and C. W. Croom, both of El Paso, for respondent.

HARPER, C. J. This is an original application for writ of mandamus to require the trial judge to fix the amount of bond necessary to supersede the final judgment granting an injunction restraining appellant from operating its club under substantially the following allegations: Upon April 25, 1916, respondent, as judge of the Thirty-Fourth district, issued a temporary restraining order, enjoining defendant from dispensing liquor, and from keeping liquor upon its premises for sale, until May 1, 1916, at which time the court heard the cause upon its merits, and upon the verdict of a jury rendered judgment, perpetuating said temporary injunction, and made the same final. A motion for new trial was overruled, whereupon the Ætna Club filed motion, praying that the court enter an order fixing the amount of supersedeas bond necessary to suspend the execution of the said judgment, pending appeal; that the said Jackson, judge of the Thirty-Fourth district, in open court refused

to fix any amount of bond, and refused to enter any order permitting defendant to supersede the said judgment and though the defendant offered to file any bond required. The respondent answered by exceptions to the sufficiency of the petition, and specially pleaded that relator was found guilty, by a jury of selling liquor without license, that upon the verdict of the jury, the temporary order was perpetuated, and that in the exercise of his judicial discretion, he refused to fix bond prayed for.

[1, 2] The purpose of this writ is to require some inferior court or officer, etc., to do some particular thing therein specified, and which appertains to their office or duty, in aid of this court's jurisdiction. Article 2078, Revised Civil Statutes 1911, provides that:

"An appeal may be taken to the Court of Civil Appeals from every final judgment of the district court in civil cases."

Article 2084 provides how an appeal may be perfected. Article 2097, Revised Statutes, reads:

"The appellant or plaintiff in error, as the case may be, shall execute a bond, with two or more good and sufficient sureties, to be approved by the clerk, payable to the appellee or defendant in error, in a sum at least double the probable amount of the costs of the suit in the Court of Civil Appeals, Supreme Court and the court below, to be fixed by the clerk, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect, and shall pay all costs which have accrued in the court below, and which may accrue in the Court of Civil Appeals and the Supreme Court."

Article 2098, Revised Statutes, reads:

"Where the appellant or plaintiff in error is unable to pay the costs of appeal, or give security therefor, he shall nevertheless be entitled to prosecute his appeal; but, in order to do so, he shall be required to make strict proof of his inability to pay the costs, or any part thereof. Such proof shall be made before the county judge of the county where such party resides, or before the court trying the case, and shall consist of the affidavit of said party, stating his inability to pay the costs; which affidavit may be contested by any officer of the court or party to the suit, whereupon it shall be the duty of the court trying the case, if in session, or the county judge of the county in which the suit is pending, to hear evidence and to determine the right of the party, under this article, to his appeal."

Article 2099, Revised Statutes, reads:

"When the bond, or affidavit in lieu thereof, provided for in the two preceding articles, has been filed and the previous requirements of this chapter have been complied with, the appeal or writ of error, as the case may be, shall be held to be perfected."

Article 2100, Revised Statutes, reads:

"The bond, or affidavit in lieu thereof, provided for in the three preceding articles, shall not have the effect to suspend the judgment, but execution shall issue thereon as if no such appeal or writ of error had been taken."

And article 2101, Revised Statutes, reads:

"Should the appellant or plaintiff in error, as the case may be, desire to suspend the execution of the judgment, he may do so by giving, instead of the bond or affidavit in lieu thereof mentioned in the four preceding articles, or in addition

to such bond, a bond with two or more good and sufficient sureties, to be approved by the clerk, payable to the appellee or defendant in error, in a sum at least double the amount of the judgment, interest and costs, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect; and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against him, he shall perform its judgment, sentence or decree, and pay all such damages as said court may award against him."

Whilst the latter statute is denominated "supersedeas bond," it is in fact the kind of appeal bond to be executed when the appellant desires to suspend the enforcement of a judgment rendered against him. That it is simply an appeal bond is apparent from the first lines:

"Should the appellant or plaintiff in error, as the case may be, desire to suspend the execution of the judgment, he may do so by giving instead of the bond or affidavit mentioned in the four preceding articles, etc., * * * a bond," etc.

When given, it entitles appellant to his appeal or writ of error, and also suspends the enforcement of the judgment.

It will be noted that the first quoted statute provides for an appeal from all final judgments, and that the latter provides for suspending the enforcement of all final judgments. Respondent urges that the latter statute does not apply to prohibitory injunctions, and that it was a matter within the discretion of the trial court to allow or refuse to permit the suspension of the judgment pending appeal. Cases outside of Texas support this contention of the respondent, but we have found none in Texas which support it. But, on the other hand, the Legislature of this state has provided a way for an appeal "from all final judgments in civil cases," and when appellant or plaintiff in error complies with the statutes, the trial court has no say, discretionary or otherwise. The Supreme Court in *Waters-Pierce Oil Co. v. State*, 106 S. W. p. 330 (several cases cited therein), in passing upon the latter statute quoted above, said:

"This is plain language that cannot be construed, because its meaning is as definite as could be expressed, to the effect that, when the appellant or plaintiff in error complies with the law, the judgment cannot be enforced during the pendency of the appeal."

[3] The latter statute quoted provides for the amount of the bond in cases of moneyed judgment, and the next statute provides for the amount of bonds in cases of judgments for lands, but does not provide an amount in any other case, so we come now to the real question and object of the application, How is the amount of the bond to be determined? Unless it is the duty of the trial court to fix it, clearly, the writ prayed for will not issue. Where there is a right there must be a remedy. We having concluded that the statutes give the right to appeal from and the right to supersede all final judgments in civil cases by a compliance with the law, we

must look for a way for appellants to comply with the law. The appellate courts of this state have declared in many cases that where the statute prescribes no bond, then it is proper and necessary for the court to fix the bond. *Hill v. Halliburton*, 32 Tex. Civ. App. 22, 73 S. W. 21. See note 22 L. R. A. (N. S.) 1909, p. 316. The principle of judicial discretion does not apply in this sort of case. It was therefore the duty of respondent to fix the amount of the bond to be given upon appeal, and it is the duty of the clerk to approve same as to the sufficiency of the sureties and then to file it, and the court has no authority to order or direct the clerk to do otherwise.

For the reason given, the application is granted, and the clerk of this court is directed to issue the writ of mandamus, requiring respondent, Dan M. Jackson, Judge of the Thirty-Fourth District Court of Texas, to fix the amount of the bond for appeal and stay of judgment as prayed for.

Justice Walthall is of the opinion that this court is without jurisdiction to hear and determine the matters presented in this application for mandamus, no character of appeal bond having been filed with the clerk of the district court or tendered for filing.

WIGWAM BOWLING & ATHLETIC CLUB
v. ESCAJEDA et al. (No. 651.)
(Court of Civil Appeals of Texas. El Paso.
June 29, 1916.)

MANDAMUS \S 154(7) — APPLICATION — DEMAND AND REFUSAL.

On application for mandamus to require a clerk of court to approve and file a supersedeas bond, where the application does not show the clerk refused to perform his duty, the writ will not issue against him.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 308; Dec. Dig. \S 154(7).]

Original application for mandamus by the Wigwam Bowling & Athletic Club against J. A. Escajeda and another. Application granted in part, and denied in part.

W. D. Howe, of El Paso, for relator. P. H. Marcum, of El Paso, for respondents.

HARPER, O. J. This is an original application for writ of mandamus to require the trial judge of the Thirty-Fourth district to fix the amount of the bond upon appeal necessary to supersede the final judgment granting an injunction, and to require the clerk of the court to approve and file the same.

As to the district judge, this application is the same as to allegations as cause No. 645, *Etna Club v. Jackson*, 187 S. W. 971, this day handed down, and this application is granted for the reasons given in said cause.

As to the clerk, the application does not show that he has refused to perform his duty, so the writ will not issue against him.

SOUTHWESTERN OIL & GAS CO. v. DENNY.
NY. (No. 8421.)(Court of Civil Appeals of Texas. Ft. Worth
June 24, 1916.)APPEAL AND ERROR \Leftrightarrow 773(2)—BRIEFS—FAILURE TO FILE—DISMISSAL.

Under rules 42 and 43 (142 S. W. xiv), providing that, if appellant has failed to prepare his case for submission, appellee may, before the call of the case, file in the appellate court a brief on which the court may affirm the judgment, upon failure of appellant to file brief and of appellee to file brief before submission of case, an appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108; Dec. Dig. \Leftrightarrow 773(2).]

Appeal from District Court, Montague County; C. F. Spencer, Judge.

Action by Charles Denny against the Southwestern Oil & Gas Company. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

W. S. Jameson, of Montague, for appellant. J. H. Harper, of Waurika, Okl., and H. C. Goodloe, of Ryan, Okl., for appellee.

BUCK, J. In this cause the appellant has filed no brief. On the day of, but subsequent to, the submission of the case, appellee filed his brief and motion, consisting only of a statement of the nature and result of the action, and calling our attention to the failure of the appellant to file briefs, and praying for an affirmance with 10 per cent. damages.

Rules 42 and 43 (142 S. W. xiv), for the government of Courts of Civil Appeals, provide, in effect, that if appellant has failed to prepare his case for submission, the appellee may, *before the call of the case* (italics ours) file in the appellate court a brief in the manner and form therein prescribed, and thereupon the court may, in its discretion, regard the statement by appellee as a correct presentation of the case and affirm the judgment. But, the appellee having failed to comply with the provisions of the rules as to the time of filing his brief, we are of the opinion that we cannot consider it as a sufficient invocation of our authority to affirm, either with or without damages. We think, under the circumstances, the proper disposition of the case is to dismiss the appeal for want of prosecution, and it is so ordered. Suderman-Dolson Company v. Carson et al., 122 S. W. 401.

Moreover, it may be noted with propriety that a motion to affirm with damages requires of an appellate court a careful examination of the record in order to determine whether or not the appeal was apparently for delay only. In the instant case, by reference to the record it appears that there were raised in appellant's motion for new trial, and preserved in bills of exceptions,

some questions which would be rather serious if properly presented and here urged, or if we were required to consider them by virtue of appellee's motion to affirm with damages. But we do not think we are required to give such questions consideration, as presenting fundamental error, and have concluded that the dismissal of the appeal is the proper order.

Appeal dismissed.

HOPE et al. v. SHIRLEY. (No. 8438.)

(Court of Civil Appeals of Texas. Ft. Worth.
July 1, 1916.)1. FRAUD \Leftrightarrow 47—ACTION FOR DAMAGES—PLEADING—DAMAGES.

A petition in an action for damages for fraud and deceit alleging that plaintiff employed a broker to sell land for \$35 an acre and agreed to pay 5 per cent. of the amount to be realized on a sale at that price; that the broker negotiated with defendant regarding a sale of the land at such price; that defendant then knew of the broker's employment and the price at which the land had been listed for sale and the commission to be paid, and conspired with his codefendants to defraud the broker of his commission and buy the land for a price less than the listed price, and offered plaintiff \$32.50 per acre net, which offer plaintiff accepted, and that the land was sold at that price; that plaintiff at the execution of his deed had no knowledge that the broker was the procuring cause of the sale and was compelled to pay the broker's commission, and that but for defendant's representations he would have demanded \$35 per acre in order to pay the commission, but not alleging that defendants, in addition to the price, would pay any money which plaintiff might be liable to pay the broker, or that defendants would have purchased the land for \$35 per acre, or that the price was less than its full market value, did not show that plaintiff sustained any damage from the defendants' acts, and hence stated no cause of action.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 42; Dec. Dig. \Leftrightarrow 47.]

2. FRAUD \Leftrightarrow 25—DAMAGE AS ELEMENT—NECESSITY.

No action for fraud arises unless damage results therefrom.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 24; Dec. Dig. \Leftrightarrow 25.]

Appeal from Wichita County Court; Harvey Harris, Judge.

Action by B. F. Shirley against Alex W. Hope and others. Judgment for plaintiff, and defendants appeal. Reversed, and cause remanded for another trial.

W. Lindsay Bibb, of Wichita Falls, for appellants. T. R. Boone, of Wichita Falls, for appellee.

DUNKLIN, J. Alex W. Hope, Joseph Long, and Charlie Word, defendants in the trial court, have prosecuted this appeal from a judgment rendered against them in favor of B. F. Shirley, plaintiff, for \$261.50. On a former day of the present term of court all their assignments of error were, on motion of appellee, stricken out, except such as chal-

lengé the sufficiency of plaintiff's petition to support the judgment.

[1] In his petition, plaintiff alleged that he employed J. L. Jackson, a real estate broker, to sell a tract of 136 acres of land for \$35 per acre, agreeing to pay the broker for such services 5 per cent. of the amount to be realized by a sale at that price, which commission was the customary commission for such services and was reasonable.

According to further allegations, Jackson then began negotiations with defendant Hope, looking to a sale of the land to him for \$35 per acre, Hope knowing, at the time, of Jackson's employment and the price at which the property had been listed with him for sale and the amount of commissions which plaintiff had agreed to pay Jackson for negotiating a sale, and knowing further that 5 per cent. was a reasonable commission to the broker for negotiating such a sale. Thereafter, defendants Hope, Long, and Word conspired together for the purpose of defrauding the broker of his commissions on said sale, and for the purpose of buying the land for a price less than that at which it had been listed with the broker, and in pursuance of such conspiracy offered plaintiff the "sum of \$32.50 per acre net" for the land, which offer was made in the name of defendant Charlie Word for the sole use and benefit of Hope, and was accepted by plaintiff, and the land was sold at that price.

According to further allegations in the petition, the efforts of the broker to sell the land to Hope were the procuring cause of the sale, but, at the time of the consummation of the sale by the execution of the deed, plaintiff had no knowledge or notice of that fact. The deed so made was to Charlie Word who took title in his name, but in fact for the sole use and benefit of Hope, who paid the purchase price and for whom he acted as agent in the transaction; and defendant Joseph Long also as the agent of Hope aided and assisted in the purchase so made, which facts were likewise unknown to plaintiff at that time.

Following are additional allegations in the petition:

"Plaintiff further alleges that he has been forced and compelled to pay to his agent, J. L. Jackson, of Wichita Falls, Tex., the sum of \$221, together with \$40.50 court costs.

"Plaintiff further alleges, but for the acts and representations on the part of these defendants, he would not have sold his land for \$32.50, but would have requested of this defendant, Alex W. Hope, to pay him the sum of \$35 per acre in order to pay the commission of his agent, J. L. Jackson.

"Plaintiff further alleges that all of these facts concerning the agency of J. L. Jackson and concerning the reasonable value of the services for the agent J. L. Jackson were, at the time of said deed, known to these defendants.

"Plaintiff further alleges that these defendants by virtue of the above facts are justly entitled to pay to this plaintiff the sum of \$261.50."

It thus appears that the suit was an action for damages for fraud and deceit. While it is alleged that the price offered and accepted was "\$32.50 per acre net," there are no allegations of any character that thereby it was understood and agreed that either of the defendants would pay to the plaintiff. In addition to the price of \$32.50 per acre, any sum of money that he might be required to pay to Jackson by reason of said sale, and that defendants thereby became liable to plaintiff upon such a contract, either expressed or implied. The fact that Long was made a party defendant and a judgment sought against him and also against Word, as well as against Hope, the real purchaser of the property, by reason of an alleged fraudulent conspiracy of those two defendants with Hope, precludes any idea that the suit was predicated upon any other theory than that of fraud and deceit. Appellee has cited the cases of *Mitchell v. Zimmerman*, 4 Tex. 79, 51 Am. Dec. 717, and *Texas El. & Com. Co. v. Mitchell*, 7 Tex. Civ. App. 222, 28 S. W. 45, which announce—

"as a general rule, each party is bound, in every case, to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation."

Appellee insists that that rule is applicable to the facts of this case as alleged, and under its operation the defendants owed the plaintiff the duty to disclose the fact that Jackson had already negotiated with Hope to sell him the land, and that his efforts already made would be the procuring cause of the sale in the event the offer of \$32.50 made by Hope, through Word, should be accepted by the plaintiff.

[2] The petition contains no allegation that Hope would have purchased the land for \$35 per acre if plaintiff had not agreed to accept the offer of \$32.50, nor any allegation that the price for which the property was sold was less than its full market value, nor any allegation whatever relative to such market value. In the absence of such allegations, it does not appear that plaintiff sustained any damages by reason of the alleged fraud and deceit on the part of the defendants, and hence it is unnecessary for us to determine whether or not Hope owed any legal duty to the plaintiff to make such a disclosure prior to his purchase; for it is well settled by the authorities that, even if a fraud be practiced, no cause of action arises unless some damages, which are legally recoverable as a result thereof, are alleged and shown. In 12 R. C. L. bottom p. 239, § 10, the following is said:

"The ground of the action of deceit is fraud and damage, and when both concur the action will lie. Moreover, both must concur to constitute actionable fraud; a common statement of the rule being that neither fraud without damage, nor damage without fraud, is sufficient to support an action."

For the reasons noted, we are of the opinion that the plaintiff's petition was insufficient to support the judgment rendered, and accordingly the judgment is reversed, and the cause remanded for another trial.

GULF COAST TRANSP. CO. v. DILLARD.
(No. 23.)

(Court of Civil Appeals of Texas. Beaumont.
April 6, 1916. Rehearing Denied
July 3, 1916.)

COURTS \Leftrightarrow 170 — JURISDICTION — COUNTY COURT—AMOUNT CLAIMED—INTEREST.

While interest prayed for in a suit for damages is a part of the cause of action and included in determining the amount in controversy, where the county court properly acquired jurisdiction by the filing of the original petition in which the damages prayed for including interest was less than \$1,000, the maximum jurisdiction of the court, it retained jurisdiction over an amended petition on remand of the case, although the amended petition asked for an amount, including interest, in excess of \$1,000, because it is the same cause of action originally filed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. \Leftrightarrow 170.]

Appeal from Liberty County Court.

Suit by G. S. Dillard against the Gulf Coast Transportation Company. Judgment for plaintiff, and defendant appeals. Affirmed.

A. W. Marshall, of Anahuac, for appellant.
E. B. Pickett, Jr., of Liberty, for appellee.

MIDDLEBROOK, J. This is a suit filed in the county court of Liberty county June 7, 1912, plaintiff alleging in his petition that he was damaged in the sum of \$313.07, with interest thereon from January 1, 1911, at 6 per cent. for damages to a shipment of rice which he delivered to appellant, a common carrier, about November 14, 1910, to be transported from Mont Belvieu to Houston, Tex.; alleging that, had the rice been properly and safely transported to Houston, its value would have been \$2.75 per barrel, there being 608 barrels of rice in the shipment, worth \$1,662, but that by reason of appellant's negligence, the rice was damaged in transit, so that when it reached Houston, on or about December 20, 1910, it was worth only \$1,358.93 on the market, the damages alleged being the difference in the market value of the rice at the time it was delivered to the railroad company and the time it was delivered by the railroad company in Houston. The case was tried upon those pleadings, and judgment was rendered for the plaintiff in the sum prayed for. The defendant appealed from that judgment, and the cause was reversed and remanded. See 163 S. W. 635.

When the case came on to be tried a second time in the trial court, plaintiff, appellee herein, on the 19th day of October, 1914, filed his first amended original petition,

which contained the same allegations that were contained in the original petition with reference to the shipment of the 608 barrels of rice, and with reference to their being damaged by appellant in transit, but alleged the market value of the rice to be \$2.86 per barrel, and of a total value of \$1,738.88, and that when the rice reached Houston, the market value thereof was not more than \$1.50 per barrel, or the sum of \$912, being \$826.88 less than its market value at the time it was delivered to appellant, and in this supplemental petition, plaintiff prayed for \$828.88 damages, with interest thereon from January 1, 1911, at 6 per cent. per annum. The appellant answered the amended petition by general demurrer and general denial. The case was tried on January 11, 1915, before the court, without the aid of a jury, and judgment was rendered in favor of the appellee for the sum of \$379.95, with interest thereon from January 1, 1911, at 6 per cent. per annum, the total judgment being for the sum of \$471.75.

The undisputed facts show that appellee received the sum of \$1,358.93 for the rice in its damaged condition from the milling company. It shows also that \$2.86 per barrel was the correct value of the rice in good condition, as received by the railroad company, and that the 608 barrels of rice were worth \$1,738.88, and the judgment of the trial court is the difference between \$1,738.88, original market value of the rice, and \$1,358.95, the amount received by appellee for the rice in its damaged condition, to wit \$379.95, with 6 per cent. per annum interest thereon from the 1st day of January, 1911, making the sum of the judgment \$471.75.

The appellant assigns only one error in his brief, which is:

"The county court should have granted a new trial herein for the reason that the court had no jurisdiction to hear and determine this cause."

His proposition of law under this assignment is as follows:

"The pleadings of the plaintiff must be looked to, to determine the jurisdiction of the court. The maximum jurisdiction of the court is \$1,000. In a damage suit, or any case except where by contract interest is provided for, if interest is recoverable at all, it is recoverable as a part of the damage itself, and is included in the amount determining the amount in controversy, and when plaintiff asked for judgment by pleading filed October 19, 1914, for the sum of \$828.88, with 6 per cent. interest thereon from January 1, 1911, it amounting, at the time of the filing of the amended petition to the sum of \$1,015.45, he was asking for judgment beyond the jurisdiction of the county court."

Appellant's assigned error is well taken, if the facts and proceedings in the trial court will sustain the assignment, and his proposition of law, as quoted above, is a correct and terse statement of the law governing petitions originally filed, in which the amount sought as damages, together with 6 per cent. per annum interest from any date prior to

the filing of the suit, would make an amount, at the time of the filing of the suit, in a sum greater than the jurisdiction of the county court, to wit \$1,000.

In none of the cases cited by appellant, nor, so far as we have been able to find, is it held by our appellate courts, nor the Supreme Court, that accrual of interest in a cause of action, while the case is pending in the courts, will defeat the jurisdiction of the trial court; on the other hand, the rule is well established that if the trial court had jurisdiction at the time of the filing of the suit, for the amount prayed for in the petition, with legal interest added thereto up to the time of the filing of the petition, and a judgment is rendered for an amount within the jurisdiction of the trial court, that the trial court had jurisdiction of the cause of action. On the day this suit was filed, June 7, 1912, the amount sued for in the amended petition, \$826.88, with interest from January 1, 1911, at 6 per cent., to June 7, 1912, would have amounted to the sum of \$898.15. Our courts have always held that interest prayed for in a suit for damages, although pleaded in verbiage and terms as interest, is in fact a part of the cause of action, and the interest pleaded in the instant case, as stated by appellant, is a part of the cause of action; but the 6 per cent. added to the original amount pleaded at the time of the filing of the petition, as has already been shown, does not increase the original amount prayed for to a sum greater than the jurisdiction of the county court. We think, therefore, the trial court did not err in overruling appellant's general demurrer, and in refusing a new trial on the grounds set out in appellant's assigned error. *S. A. & A. P. Ry. Co. v. Barnett*, 27 Tex. Civ. App. 498, 66 S. W. 474; *Rotan Grocer Co. v. M., K. & T. Ry. Co.*, 142 S. W. 623; *St. L. S. W. Ry. Co. v. Dolan*, 84 S. W. 393; *Gulf, W. T. & P. Ry. Co. v. Fromme*, 98 Tex. 459, 84 S. W. 1054.

The doctrine announced above, and in the authorities cited, is not vitiated on account of an amended petition filed during the pendency of the suit. The county court having acquired jurisdiction by the filing of the original petition, it retained jurisdiction over the amended petition, which was filed October 19, 1914, because it is the same cause of action originally filed, the pleadings so determined it, and the cause of action that was reversed by the Court of Civil Appeals hereinbefore cited. *Ft. Worth & D. Ry. Co. v. Underwood*, 100 Tex. 284, 99 S. W. 92, 123 Am. St. Rep. 806; *Tolbert v. McBride*, 75 Tex. 95, 12 S. W. 752. See, also, authorities cited in these cases. It would necessarily follow that after a court has once acquired jurisdiction, it must retain such jurisdiction, and render the judgment that is proper and just under the facts and pleadings of the case: *Ablowich v. Greenville Nat. Bk.*, 95

Tex. 429, 67 S. W. 70, 881; *Nashville, C. & St. L. Ry. Co. v. Grayson Co. Nat. Bk.*, 100 Tex. 17, 93 S. W. 431.

Appellee cites a number of other authorities in his brief, but for all issues presented to us for consideration, we think what we have said, and the authorities cited, make a full and complete disposition of the case, as it is presented before us.

No error appearing, the case should be affirmed; and it is so ordered.

ROBERTS et al. v. McKINNEY. (No. 115.)
(Court of Civil Appeals of Texas. Beaumont.
May 11, 1916. Rehearing Denied July 8, 1916.)

MINES AND MINERALS §97—PARTNERSHIP—SHARING PROFITS AND LOSSES.

Persons contributing labor, material, and cash to driving an oil well under agreement to incorporate and issue stock in proportion to their contributions, if the well comes in, otherwise each to lose what he puts in, are partners.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 222; Dec. Dig. § 97.]

Appeal from Jefferson County Court; D. P. Wheat, Judge.

Action by Frank H. McKinney against L. D. Roberts and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. W. Cruse, of Beaumont, for appellants.
David E. O'Fiel, of Beaumont, for appellee.

MIDDLEBROOK, J. This is a suit originally filed in justice court, precinct No. 1, Jefferson county, Tex., by Frank H. McKinney against B. F. Bowles, I. D. Roberts, J. Long, and Ed Wintz for the sum of \$102 for 34 days work at \$3 per day, the plaintiff alleging the defendants to be a partnership. The trial in the justice court resulted in a judgment for the amount sued for in favor of the plaintiff, and in due time appeal was taken to the county court, and upon a trial in that court the same judgment was secured, and the case is now properly before this court upon appeal.

Briefly stated, the facts pertinent to the assignments in this appeal are that B. F. Bowles, one of the defendants, about September or October, 1911, secured a lease from John W. Henderson and others for about one acre of land on Spindletop and was going to bore for oil. He was not able to put down the well himself, and went to some of his friends and explained to them about the lease which he had, and told them he was sure of making a paying well, but that he would need some money to pay for oil and other small matters in the way of expenses which came up; that he had lumber for a derrick and machinery and labor already paid for, that is, they were to take stock in the well for their labor and material when the well was finished, and came in, at which time they were to incorporate a

company with the well and the lease as the capital stock, and issue stock to every one that was entitled to same, in proportion to the money, labor, etc., furnished. I. D. Roberts put \$300 into the undertaking with the understanding that, when the well was brought in, it would be incorporated, and he was to have stock in proportion to the amount of money he furnished. Mr. Wentz put in \$200, and Mr. Long put in \$100, and they each worked on the well while it was being bored, and it was agreed among the parties that if they got a well they would form a company and issue stock, and that if they did not get a paying well that each would lose the money and labor he put into the undertaking. They never did incorporate, because the well was worthless, terminating in a salt water well. Mr. Roberts, while the work was in progress, bought some pipe and sent it out to the well, and it seems from the statement of facts that he loaned the pipe, and was to get the pipe back, and he was not to have any stock issued for the pipe loaned, but the pipe was left in the well. During the progress of the work, Bowles called on Mr. Roberts to pay for a fishing tool, which cost \$28, and he paid for it. He also bought fuel oil and paid for it, and the testimony of all of the witnesses agrees that they were taking a chance when they put in their money of losing it if no paying well was brought in, and if a paying well was brought in that each would share in the property in proportion to the amount of money or its equivalent put into the undertaking by each of them. There was some testimony to the effect that McKinney was to take stock for his work, but he disputed that, and said that Bowles tried to pay him off in stock at about the time the proposition was shown to be a failure, but he declined to take it. The judgment of the trial court disposes of this issue, and it is not necessary to notice it here, nor is there any assignment of error raising it. The labor, for which suit was brought by McKinney, was performed by his minor son.

The first assignment of error is as follows:

"The court erred in finding that B. F. Bowles, I. D. Roberts, J. Long, and E. Wentz were partners at and during the time plaintiff's son performed the labor for which this suit is maintained, because the evidence before said court fails to establish by a preponderance of the evidence that such parties were partners."

The proposition following it is:

"The judgment in this case is not supported by a preponderance of the evidence, proving the partnership and employment of plaintiff's son."

The second assignment of error is:

"The court erred in rendering judgment against I. D. Roberts, J. Long, and E. Wentz as partners, because in law the facts proved upon the trial of this cause are insufficient in law to make them partners of B. F. Bowles, and that such judgment is contrary to and against the law."

The third assignment of error is:

"The court erred in not rendering judgment or the defendants (appellants) upon a special

plea of defense, because the great preponderance of evidence, undisputed, showed that the defendants advanced to B. F. Bowles money and labor on the well, which was being drilled on Spindletop, with the distinct agreement and understanding between them that if an oil well was made on said lease, producing oil, at the time of the bringing in of such well a company would be organized, or incorporated, with said lease and well as the capital stock, and each of these defendants, with other parties interested, would be issued stock in said company, in proportion as the amount of money and labor advanced by each, and if said well failed they would get nothing for their money and labor, and that said well did fail."

The proposition of law presented under this assignment is:

"A mere understanding or agreement between two or more persons, even though money is advanced, that they will at a future time organize or incorporate, will not of itself create a partnership."

It is clear that a disposition of either of these assignments contrary to the view of appellants will be a substantial disposition of all three of the assignments. In short, the only thing presented to this court for determination is: Do the facts presented make the parties defendant a partnership? If they do, the case should be affirmed. If they do not, the case should be reversed.

The undisputed facts show that Bowles was undertaking to put down a well, using his skill at such business, and that the other defendants, some of them were furnishing money and material, and some of them furnishing part money and part labor on the well, and that they had a common interest in the outcome of the undertaking; i. e., that if they brought in a successful well they would share in the stock to be issued by a company to be incorporated when the well was finished, in proportion to the amount of money, material, and labor furnished by them, and, if no paying well was brought in, then each would lose what he had put into the undertaking. In *Kelley Island Lime & Transportation Co. v. Masterson*, 100 Tex. 38, 93 S. W. 430, Justice Brown, speaking for the Supreme Court, tersely lays down the rule determining partnerships under such conditions in this language:

"If one person advances funds, and another furnishes his personal services and skill in carrying on the business and is to share in the profits, it amounts to a partnership. It would be a valid partnership, notwithstanding the whole capital was in the first instance advanced by one partner, if the other contributed his time and skill to the business, and although his proportion of gain and loss was to be very unequal. It is sufficient that his interest in the profits be not intended as a mere substitute for a commission, or a lien of brokerage, and that he be received into the association as a merchant and not an agent"—citing *Goode v. McCartney*, 10 Tex. 193; *Ball v. Britton*, 58 Tex. 57.

In his opinion in this case, Justice Brown distinguishes the case of *Buzard v. Bank*, 67 Tex. 83, 2 S. W. 54, 60 Am. Rep. 7.

We think, clearly, under the facts of this case and the law applicable to partnerships,

as announced by our Supreme Court, the defendants (appellants) constituted a partnership, and, so thinking, the judgment of the court should be sustained, and the case is therefore affirmed.

**SANTA FÉ TOWN-SITE CO. et al. v.
NORVELL. (No. 149.)**

(Court of Civil Appeals of Texas. Beaumont.
June 1, 1916.)

1. HIGHWAYS —155—ENJOINING OBSTRUCTION—PRIVATE PARTY—RIGHT UNDER JUDGMENT.

Plaintiff, having by the judgment in a prior suit against defendant been granted an easement in a road, need not have suffered injury or inconvenience differing from that suffered by other individuals and the public generally to maintain a suit in his own name to enjoin defendant's interference therewith.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 432-436; Dec. Dig. —155.]

2. HIGHWAYS —156—OBSTRUCTION—PERSONS ENJOINED.

That plaintiff in a suit against T. had judgment requiring T. to lay out a road, and giving plaintiff an easement therein, gives plaintiff no right to have S. enjoined from obstructing the road where it passes through his property; it not being shown that title thereto was acquired against him.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 420-422; Dec. Dig. —156.]

3. INJUNCTION —143(2)—EX PARTE ORDER—PETITION.

To authorize the granting of an injunction on an ex parte hearing, the petition must not only show just grounds for relief, but must expressly negative any possible hypothesis on which defendant might lawfully do the act complained of, so that, not only the acquisition by plaintiff under a judgment of rights interfered with by defendant should be alleged, but it should be alleged that they are still existing or in force, or that plaintiff has not forfeited or otherwise relinquished them.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 315; Dec. Dig. —143(2).]

4. INJUNCTION —143(2)—EX PARTE ORDER—CHANGING STATUS—NECESSITY.

Granting an ex parte mandatory injunction changing the status quo is authorized only where great and irreparable injury might follow delay for notice and hearing, and therefore not by inconvenience in having to travel by a less direct route.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 315; Dec. Dig. —143(2).]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Action by W. J. Norvell against the Santa Fé Town-Site Company and others. From adverse orders, the named defendant and another appeal. Reversed and remanded.

Oliver J. Todd and W. G. Reeves, both of Beaumont, for appellants. V. A. Collins, of Beaumont, for appellee.

CONLEY, C. J. This was a suit filed on the 19th of April, 1916, in the district court of Hardin county by W. J. Norvell against the Santa Fé Town-Site Company, J. L. Seibert, J. G. Reeves, and Sam Littlepage, for an injunction, and upon presentation of the application therefor to the judge of said court, and without previous notice or a hearing, a temporary injunction was granted, which injunction was subsequently modified and supplemented, also without notice, and from this action of the court the defendants Santa Fé Town-Site Company and J. L. Seibert appealed.

The petition, in substance, contains the following allegations: That plaintiff is the owner of property in what is known as South Silsbee, or Woodrow, in Hardin county, and therefore is interested, along with other citizens owning property and residing at Woodrow, in maintaining a public highway from said Woodrow to the nearest railroad station, which is the railroad station at Silsbee; that plaintiff and others had secured a decree of the district court of Hardin county against the defendant Santa Fé Town-Site Company, which decree was set forth in the petition, and which required said company to lay out a road, and that said road was laid out by said company and accepted by the commissioners' court, and that the commissioners' court assumed charge and control of the highway, appointing overseers therefor, which acts were alleged to have had the legal effect of effectually dedicating it as a public highway, and to all intents and purposes made said road a public highway of Hardin county; that said road had been graded, except through the property of the defendants John G. Reeves and Sam Littlepage, and it was alleged that they, by threats of violence, had prevented the grading of the road through their property, and that the defendant J. L. Seibert, acting for himself, or for himself and the Santa Fé Town-Site Company, in utter disregard of the rights of the plaintiff and other citizens at Woodrow, had taken possession of the road and had obstructed the same, and, although often requested by the plaintiff and other citizens to remove said obstacles, had refused to do so. The petition also contains a meager allegation that by reason of the judgment that he (plaintiff) had acquired an easement in and to said road perpetual in its nature. An injunction was prayed for restraining further obstructions and preventing interference with the road, as well as a mandatory order commanding the removal of the alleged obstructions placed in the road by the defendant J. L. Seibert.

The court made an order ex parte that upon the plaintiff filing bond in the sum of \$500 that the clerk was ordered to issue process restraining the defendants from further obstructing the road, and upon motion of plaintiff said order was supplemented by a peremptory mandatory injunction entered ex parte against the Santa Fé Town-Site Company and J. L. Seibert, which is as follows:

"That the Santa Fé Town-Site Company and J. L. Seibert and both of them, their agents and servants, are hereby directed and commanded by the court immediately to remove from and off of said road the fences and obstructions placed thereon by them, or either of them, or their agents or servants, and to restore said road to the status and condition in which it was when they so obstructed it."

These proceedings all being *ex parte*, the defendants did not appear or answer, and the appeal is based solely on plaintiff's petition and the orders entered thereon.

[1] Appellants' first assignment of error attacks the orders of the trial court upon the ground that the petition showed no right to the relief granted, in this: That the suit purports to enjoin an alleged interference with and to compel the opening of an alleged public highway, and avers no fact showing any injury peculiar to the plaintiff and different from that suffered by the public generally.

While it may be conceded as a general proposition of law that a private individual suffering no injury or inconvenience differing from that suffered by other individuals and the public generally cannot maintain a suit in his own name to redress an alleged interference with a public easement, still this suit is not entirely one of that nature. From the judgment set out in the petition it would appear that the plaintiff in this cause had obtained in a prior suit in the district court of Hardin county against the Santa Fé Town-Site Company an easement in said road, and therefore his rights are not dependent upon any special injury suffered by him or an injury other than that suffered by the public generally. His right in and to said road is not based upon the right of citizens generally to use public roads dedicated by the duly constituted authorities for that purpose, but finds its support in the judgment of the court theretofore rendered, giving him a personal right to the use of said road. Any breach of that right by the Santa Fé Town-Site Company would be the basis for a suit.

The first assignment of error is therefore not well taken, and it is overruled.

[2] Under the second assignment of error appellants contend that there were no allegations warranting the relief against the defendant J. L. Seibert, because it specially appears from the petition that he is not charged as having been a party or privy to the alleged judgment, by which the alleged road is averred to have been laid out, and it is not alleged that, in so far as his property is concerned, the same was ever condemned or otherwise acquired legally, or that he was compensated therefor. And he therefore had the right to fence his own property and exclude the public, and thereby prevent his title being acquired or claimed by prescription.

An examination of the petition discloses that the plaintiff merely alleged that the de-

fendant Santa Fé Town-Site Company was compelled by a judgment entered in 1908 to lay out a road, and that under that judgment plaintiff had acquired a perpetual easement, that it did lay out the road, and that the commissioners' court had assumed jurisdiction over it, and the public has used it since it has been laid out by the defendant Santa Fé Town-Site Company. It expressly appears from the judgment set forth in the petition that J. L. Seibert was not a party to that judgment, nor does it appear that he acquired the land from the Santa Fé Town-Site Company with notice of the easement fixed thereon by said judgment. No authority is shown on the part of the Santa Fé Town-Site Company by which it could have laid out a road to cross the defendant Seibert's property. No condemnation proceeding, purchase, or other act acquiring his property is alleged, and, if the alleged adverse use had commenced and been continuous since the 28th day of April, 1908, when the alleged judgment was entered, no prescriptive right could have been acquired before the full expiration of the ten-year statute. There is no allegation of any kind in the petition which states any reason why the defendant J. L. Seibert should have been enjoined from inclosing his property and obstructing the road in controversy. Therefore appellants' second assignment of error is well taken, and is sustained.

[3] In the third assignment of error the contention is made that the court erred in granting the injunction against the Santa Fé Town-Site Company because the allegations are insufficient to show the legal laying out or acquiring by the public of any valid easement as against said Santa Fé Town-Site Company, and because the allegations do not negative the fact that said road may have been abandoned by the commissioners' court in Hardin county, and does not allege a continuation or existence of the alleged rights if plaintiff had any rights under said judgment.

As heretofore stated, we think the judgment in favor of the plaintiff rendered in 1908 had the effect of granting to the plaintiff an easement in the road, and for that reason plaintiff's rights are not dependent upon the legal laying out or acquiring by the public of any valid easement therein. However, the law seems to be well settled under the authorities in this state that in order for courts to lawfully grant an injunction upon an *ex parte* hearing the allegations must not only show just grounds for relief, but must expressly negative any possible hypothesis upon which the defendants might lawfully do the act complained of. *Gillis v. Rosenhelmer*, 64 Tex. 243; *Carter v. Griffin*, 32 Tex. 213; *Weaver v. Emison*, 153 S. W. 923; *King v. Driver*, 160 S. W. 415; *Kell Milling Company v. Bank of Miami*, 168 S. W. 46.

In the case of *Gillis v. Rosenhelmer*, supra, the Supreme Court said:

"The petition for injunction should state all and negative all which is necessary to establish a right. The rule is correctly stated in *Harrison v. Crumb*, White & Wilson Circuit Court Appeals, § 992, as follows: 'The rule of pleading that the statements of a party are to be taken most strongly against himself is reinforced in injunction suits by the further requirement that the material and essential elements which entitle him to relief shall be sufficiently certain to negative every reasonable inference arising upon the facts so stated, and from which it might be deduced that he might not, under other supposable facts connected with this subject, thus be entitled to relief.'"

The rule is further illustrated in the case of *King v. Driver*, 160 S. W. 416. In that case the court said:

"Appellees in their petition nowhere allege that the passage was or had not been used by them 'in a way to injure' appellant's property 'or to annoy them or their tenants.' The rule in Texas now is established that in petitions for injunction the allegations 'must negative every reasonable inference arising upon the facts so stated from which it might be deduced that the petitioner might not under other supposable facts connected with the subject be entitled to relief.' *Schlinke v. De Witt County*, 145 S. W. 665, and cases cited. This writ of injunction was granted without a hearing, and must be here determined upon the pleadings alone. The above clause in the contract, set out in the petition itself, reveals the fact from which it is easily supposable that appellees were not entitled to the extraordinary relief sought, and the trial court should have refused the writ."

Nowhere is it alleged in the petition that the rights acquired under the judgment of 1908 are still existing and in force and effect, or that plaintiff has not forfeited or otherwise relinquished his rights thereunder. Under the authorities above referred to this was a necessary and vital allegation.

It is also contended under this assignment of error that the facts alleged in the petition of the plaintiff do not show a valid easement against the Santa Fé Town-Site Company, because the district court, in rendering the judgment of 1908, was without jurisdiction to lay out a road, and the laying out of said road under compulsion could not amount to a valid dedication or the creation of a contract, and the alleged use is insufficient to have created an easement, even as against the Santa Fé Town-Site Company.

An inspection of the recitations in the judgment of 1908 supports the inference that it was rendered on a breach of a contract existing between the Santa Fé Town-Site Company and the plaintiff in this cause, and that the court was simply adjudicating individual rights based upon said contract, and was not usurping the jurisdiction of the commissioners' court in laying out a public highway. However, the allegations in the pleading on this subject, being meager, and the view which we take of the case making it unnecessary to decide the question involved, we do not at this time think it necessary to consider it. However, for the reasons

herein stated, the third assignment of error is well taken, and the same is sustained.

[4] Under the fourth assignment of error, it is contended:

"That the action of the learned trial court was further erroneous in this, that the said court, without citation or notice to the defendants without their appearance or answer, and without hearing said defendants, or giving them an opportunity to be heard, pronounced, in a preliminary ex parte hearing, a judgment divesting the possession of the defendant Seibert and commanding him to remove a fence inclosing his property, without either allegation of any right on the part of the plaintiff as against said Seibert, or any allegation showing a wrong on the part of said Seibert, and without any allegation whatsoever showing any immediate necessity or irreparable injury to said plaintiff, if action had been postponed pending a hearing, and the effect of said judgment is to try the merits of the case prior to service and without a hearing."

It is the spirit of our laws not to condemn a man without giving him his day in court. In many jurisdictions it is the settled rule that the right to grant an ex parte injunction is limited to the preservation of the status quo pending a hearing, and that the court is always without jurisdiction to grant ex parte and mandatory orders changing the status quo. This rule, however, in Texas has been modified to some extent, which allows the granting of such order under extraordinary circumstances, and where great and irreparable injury might follow if delay was incurred by reason of giving notice and fixing a hearing on such order.

In the case of *Chalson v. McFaddin*, Wiess & Kyle Land Company, 56 Tex. Civ. App. 611, 121 S. W. 716, an irrigation canal was cut and obstructed, and through which canal the crops were to be irrigated, and, if such crops had not received water during the time pending a hearing, they would have been destroyed, and irreparable injury done. Under such circumstances it was held that the court was justified in entering an ex parte order mandatory in its nature, commanding the removal of the obstruction.

All of the subsequent cases involving the issuance of such injunctions have declared in no unmistakable terms that such injunction can only be issued "in strong and mischievous cases of pressing necessity." *Holbien v. De la Garza*, 59 Tex. Civ. App. 125, 126 S. W. 43; *Cartwright v. Warren*, 177 S. W. 197; *I. & G. N. Ry. Co. v. Anderson County*, 150 S. W. 239.

The petition in this case does not disclose any reason why notice should not have been given before the issuance of so sweeping a writ as was ordered. It was aptly said by Judge Reese in the case of *Holbien v. De la Garza*, supra, that:

"'Andi alteram partem' is one of the maxims of the old civil law, and the doctrine that a man should not be condemned without a hearing is not only the instinct of justice, but this spirit breathes through the old system of common law, and especially through our system of equity, as distinguished from law, which seeks to temper the harshness of the common law and

bring it more in harmony with the principles of abstract justice. It is rarely, under our equity procedure in regard to the issuance of injunctions, that it becomes necessary to issue a temporary writ of injunction, even a merely prohibitory writ, without a hearing. If it appears necessary from the allegations of the petition that a defendant be stopped at once and without the delay necessary to give notice and an opportunity to be heard, a temporary restraining order may in all cases be issued compelling immediate cessation of the threatening injury until such time as may be reasonably required to allow the defendant to present his side of the case, which may change the whole aspect of the controversy."

The only "strong and mischievous case of pressing necessity" set forth in this petition calling for the issuance of so drastic a writ is simply the inconvenience that the plaintiff might suffer by reason of having to travel a road to the Silsbee depot, or other place or places by a route not as direct as the one in controversy. This inconvenience, we believe, is not of such vital importance and so destructive of the plaintiff's rights and so irreparable in its nature as to justify the learned trial court in granting all the relief prayed for ex parte and without permitting the defendants to present their side of the controversy.

The orders of the lower court heretofore entered in this cause are set aside and vacated, and this cause is remanded to the trial court; and it is so ordered.

TEXAS CENT. R. CO. et al. v. DRIVER
et ux. (No. 8396.)

(Court of Civil Appeals of Texas. Ft. Worth.
June 10, 1916.)

1. TRIAL ~~350~~(6)—INJURIES TO PASSENGERS
—SPECIAL ISSUES.

Where the railroad offered evidence that its train stopped a few hundred feet from the station for an intersecting train, and that the conductor told all passengers to keep their seats unless they were changing to such train, and put down the step and assisted such passengers to alight, and waited ten minutes for others to do so, and then removed the step and went up to talk to the engineer, whereupon plaintiff tried to alight and was injured, the railroad was entitled to submission of the special issue whether a very prudent person under the circumstances would have foreseen the plaintiff's act and her injury, since if the road employes exercising the highest degree of care could not have foreseen the result, the road was not liable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 830; Dec. Dig. ~~350~~(6).]

2. TRIAL ~~314~~(1) — CONDUCT OF COURT —
COMMENTS.

Where the jury in a civil case announced that it was divided nine to three and could not agree, it was improper for the court to emphasize the difference between civil and criminal cases, as to deprivation of liberty and money judgments, thus minimizing the importance of the case on trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 472, 473, 747; Dec. Dig. ~~314~~(1).]

Appeal from District Court, Erath County;
W. J. Oxford, Judge.

Action by E. D. Driver and wife against the Texas Central Railroad Company and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

C. C. Huff, of Dallas, J. B. Keith, of Stephenville, Spell & Sanford, of Waco, and A. H. McKnight, of Dallas, for appellants. E. E. Solomon, of Dublin, and Chandler & Pannill, of Stephenville, for appellees.

CONNER, C. J. Mrs. Willie Driver, joined by her husband, E. D. Driver, instituted this suit to recover damages for personal injuries to Mrs. Driver, alleged to have been proximately caused by the negligence of the railroad company at Waco, Tex., when and where Mrs. Driver was a passenger upon one of appellant's passenger trains. Briefly stated, it was alleged that when the train upon which Mrs. Driver was a passenger arrived at Waco, at which point the necessities of her further journey required her to alight, she attempted to get off the train, and that in doing so she fell to the ground and received the injuries specified in her petition. It was charged that the company was negligent in failing to provide a step placed upon the ground at the passenger coach upon which she might alight with safety, and also negligently failed to have any one stationed at the coach steps to assist her in alighting. The defendant pleaded the general denial and also that the plaintiff was guilty of contributory negligence in attempting to get off the train at the time and under the circumstances. The case was submitted to the jury upon special issues, in answer to which the jury found that the defendant was guilty of negligence as charged in the plaintiff's petition. They further found that Mrs. Driver was not guilty of negligence, and assessed her damages at the sum of \$1,000, for which the judgment was rendered, and the defendant has appealed.

[1] A number of assignments of error have been presented, but we have found but two that, as we think, present errors for which the judgment must be reversed. Among other things, the defendant requested the court to submit the following special issues:

"Would the employes of defendants in the exercise of that degree of care and caution which a very prudent and cautious person would have exercised under the same or similar circumstances have foreseen that Mrs. Driver, under all the circumstances, and at the time and place in question, would attempt to alight from defendant's train and fall and be injured?"

The court submitted in general terms the issue of whether the plaintiff was guilty of a want of ordinary care at the time and under the circumstances in attempting, as she did, to alight from the train, but, as it seems to us, under the evidence the special instruction requested should have been given. The defendant was entitled to have presented in an affirmative form the issue, and the evi-

dence in behalf of appellant was to the effect that the train in stopping did so at a point a few hundred feet before it had reached the depot platform, because of the presence of a north-bound train; that when the train stopped upon which the plaintiff was riding, the conductor went through the train and informed the passengers generally that all persons who desired to take the north-bound train should then get off, but that others should remain where they were seated until the train pulled into the depot; that a number of passengers then did alight from the train, the conductor at the time going to the steps of the coach with a stool and assisted a number of passengers, who were desiring to take the north-bound train, to alight; that he remained at the steps for the purpose of assisting passengers to alight for some ten minutes, and until all passengers intending to do so, as he supposed, had alighted, whereupon he placed the stool upon the platform of the car and went forward to speak to the engineer; and that it was during such absence on the part of the conductor that the plaintiff came out of the coach and attempted to alight, as she did, with the step removed.

In determining whether or not the defendant was guilty of actionable negligence as charged, a necessary element was whether the employés of the defendant in charge of the train could have foreseen, by an exercise of the highest degree of care, whether Mrs. Driver would, under the circumstances, attempt to alight from the train. Unless they could have done so, it cannot be said that the negligence charged was the proximate cause of Mrs. Driver's injuries, and, as it seems to us, defendant's evidence raises this issue, and that therefore it was entitled to have the issue presented in its special request submitted. See *T. & P. Ry. Co. v. Reed*, 88 Tex. 439, 31 S. W. 1058; *Washington v. M., K. & T. Ry. Co.*, 90 Tex. 314, 38 S. W. 764; *Mex. Nat. Ry. Co. v. Mussette*, 86 Tex. 708, 26 S. W. 1075, 24 L. R. A. 642.

[2] The majority are also of the opinion that the court committed error, as assigned, in his remarks to the jury pending the jury's consideration. The remarks will not be set out in full, but, in substance, it appears that after the jury had retired and deliberated from 3 o'clock p. m. on July 27, 1915, until 9:30 o'clock on the next morning, at which latter time they reported to the court that they were unable to agree, and that interrogatories on the part of the court developed the fact that the jury stood nine to three, and that the jurors were divided "on everything in the case," including the issue of liability and the weight to be given to the testimony, the jury further stated that they had gone over the case several times, and that they did not think they could ever agree. The court thereupon submitted to the jury a number of remarks emphasizing the differ-

ence between a criminal and a civil suit like the one before them, stating that in the one case it was a question of dollars and cents, while in the other a man's liberty was at stake, etc. We are not agreed that of themselves the remarks indicated were sufficient to cause a reversal, but, as stated, the majority are of opinion that they gave too great an emphasis to the differences between a criminal and civil case and in their nature tended to minimize the importance of the issue in the case on trial; thus, perhaps, inducing a surrender of convictions on the part of one or more of the jurors that of right should not have been so surrendered. See *G., C. & S. F. Ry. Co. v. Johnson*, 99 Tex. 337, 90 S. W. 164; *Pecos & N. T. Ry. Co. v. Finklea*, 155 S. W. 612.

All other assignments of error are overruled, but for the errors indicated it is ordered that the judgment be reversed, and the cause remanded.

SELF v. ALBANY NAT. BANK OF ALBANY. (No. 8890).*

(Court of Civil Appeals of Texas. Ft. Worth.
June 3, 1916. Rehearing Denied
June 24, 1916.)

1. GUARANTY \S 36(3) — CONSTRUCTION — SCOPE OF LIABILITY—GUARANTY OF DRAFT.

Where one Strong checked on defendant banker in favor of Williams, who indorsed the check to plaintiff, held that defendant was liable for the amount under a letter to plaintiff, promising to take care of Williams' drafts on Strong up to \$1,800.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 39; Dec. Dig. \S 36(3).]

2. EVIDENCE \S 461(1)—SURROUNDING CIRCUMSTANCES—PAROL EVIDENCE.

Parol evidence of surrounding circumstances is admissible in determining whether a written guaranty is continuing or affects merely a single credit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2129; Dec. Dig. \S 461(1).]

3. GUARANTY \S 38(1)—CONSTRUCTION—CONTINUING GUARANTY.

A banker's letter that he would take care of one Williams' drafts on Strong up to \$1,800 held to be a continuing guaranty, where he had financed Strong's business for several years.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 47; Dec. Dig. \S 38(1).]

Appeal from District Court, Erath County; W. J. Oxford, Judge.

Action by Albany National Bank of Albany, Texas, against A. L. Self and others. Judgment for plaintiff, and defendant Self appeals. Affirmed.

E. E. Solomon, of Dublin, and Speer & Brown, of Ft. Worth, for appellant. A. A. Clarke and Walter L. Morris, both of Albany, for appellee.

BUCK, J. The Albany National Bank sued W. E. Williams and C. H. Strong, doing business under the trade-name of Dublin Produce Company, and A. L. Self, doing

business under the trade-name of Farmers' Exchange Bank of Dublin (unincorporated), to recover the sum of \$1,673.32, represented by a check drawn by Strong in favor of Williams, upon the Farmers' Exchange Bank of Dublin, which check was indorsed by Williams, and upon presentation was cashed by plaintiff bank. Upon the check's presentation to the Dublin bank payment was refused. Thereupon suit was filed against the defendants named at Albany, but upon Self's plea of privilege, the cause was transferred to the district court of Erath county. Upon a trial before the court, the jury having been waived, judgment was rendered for plaintiff bank against all of the defendants, jointly and severally, in the sum of \$1,736.74, including \$63.42 interest. Judgment was also rendered in favor of W. E. Williams, as an indorser, against Self and Strong, jointly and severally, for whatsoever sum he might be compelled to pay under this judgment. Self alone appeals.

Plaintiff pleaded, upon information and belief, a certain agreement, arrangement, and course of business, between the defendant Strong and the defendant Self, originating as early as the first part of the year 1913, and continuing up to the occurrence of the transactions upon which this suit was predicated; that Self would pay all checks that Strong, or the Dublin Produce Company would draw against him, or the Farmers' Exchange Bank of Dublin, in the course of the former's business as a dealer in the buying and selling of poultry, eggs, and other like products, and that this agreement and understanding between Strong and Self was generally and publicly known, and that Self held himself out to the public as willing and able to cash all such checks as the said Strong should find it necessary to draw in the usual and ordinary conduct of his said business; that Strong, being a man of small means and no property subject to execution, would not have been able to carry on his said business and to obtain the credit necessary without this arrangement and understanding that he should have such credit with the defendant Self and his bank; that Williams also was a man of small means and no property subject to execution, and that in cashing the check presented to plaintiff bank by Williams, the plaintiff did so, relying, not upon the financial responsibility of Williams or of Strong, but upon the promise and agreement of Self to pay such checks as Strong should draw in the course and conduct of his business, and upon the special promise to the plaintiff bank on the part of Self, as hereinafter set out; that on or about January 14, 1914, plaintiff bank wrote a letter to the Farmers' Exchange Bank of Dublin, the trade-name under which Self was doing business, asking if checks of the Dublin Produce Company or the drafts of the defendant Williams drawn on said produce company, would be honored by Self, or said

Farmers' Exchange Bank, and that in reply thereto Self wrote the following letter to W. G. Webb, cashier of the plaintiff bank, to wit:

"The Farmers' Exchange Bank of Dublin
(Unincorporated) Dublin, Texas.

"January 14, 1914.

"Mr. W. G. Webb, Cash., Albany, Tex.—Dear Sir: Replying to yours of even date, herewith, beg to say that we will take care of Mr. W. E. Williams' chicken drafts on Dublin Produce Company up to eighteen hundred dollars.

"Respectfully, [Signed] A. L. Self,

"President."

Relying upon the promise contained in said letter, plaintiff was led to believe, and did believe, that the defendant Self would pay all such debts as the defendant Strong, acting under the said trade-name, might incur with the defendant Williams up to the sum mentioned; that said letter and the authority therein given, and the promise therein made, were never at any time recalled, revoked, or canceled by said Self until the dishonor of the check for the sum of \$1,673.32, which check was dated November 25, 1914, and payment thereon refused some days thereafter. Plaintiff pleaded that defendant Self was estopped from denying his liability because of the facts pleaded in plaintiff's petition.

Defendant Self answered by general demurrer and general denial, and further specially demurred to plaintiff's petition because it did not allege the acceptance of said check by the defendant Self or his bank. He further denied that he had, either verbally or in writing, ever agreed with C. H. Strong, or made any contract with said Strong, as an inducement for the said Strong to continue in business with him or his bank, to pay any and all checks that might be drawn by said Strong in the course of the latter's business, but set out in his answer a copy of a certain mortgage lien contract made by said Dublin Produce Company, or said Strong, in favor of defendant Self, dated November 19, 1914, which was, in effect, a mortgage given by Strong, or the said Dublin Produce Company, to the said Farmers' Exchange Bank, on certain tools, coops, pens, fixtures, turkeys, chickens, eggs, etc., then owned and held by said Strong, and on any other such property that might be acquired by said Strong during the continuance and operation of said mortgage, to secure to said Farmers' Exchange Bank the payment of a certain note for \$465, due December 1, 1914, and signed by said Strong under his said trade-name, and to secure the payment of any other indebtedness which might be thereafter owing by said Strong or the Dublin Produce Company to said Self or his bank.

[1-3] But if the conclusions we have reached upon the issues presented are correct, it will not be necessary for us to further consider or discuss the nature and effect of this mortgage given by Strong to the defend-

ant Self and his bank, for said letter was a specific promise on the part of the defendant Self to honor and pay "W. E. Williams' chicken drafts on the Dublin Produce Company up to eighteen hundred dollars." There is no defensive plea that this promise had ever been withdrawn, nor is there any evidence to such effect. Therefore we have concluded that the plaintiff bank, in cashing the check of W. E. Williams to the amount of \$1,673.32, had the right to rely on the written promise of defendant Self that such check would be paid. We are further of the opinion that the trial court was justified from the evidence in concluding, as he did and as in effect expressed in his fourteenth finding, that the letter of January 4th to the cashier of plaintiff bank constituted a continuing guaranty. Baylies on Sureties and Guarantors (1881) p. 124, uses this language:

"The line of distinction between continuing and noncontinuing guaranties cannot always be drawn with precision or accuracy; and in construing such contracts the courts look well to the object for obtaining the credit and the intent of the parties, as evidenced by the language of the guaranty and the surrounding circumstances. Parol evidence of surrounding circumstances is always admissible to aid in determining the question whether the obligation in dispute was intended as a continuing guaranty, or as a guaranty of a single credit, if the language of the instrument itself is ambiguous" (citing *Bank of Buffalo v. Myles*, 73 N. Y. 335, 29 Am. Rep. 157).

In the case cited by the author, the court said that where the intent cannot be ascertained by a mere perusal of the letter of credit, a resort may be had to the surrounding circumstances, the nature of the business in which the credit was to be used, the situation and relation of all the parties and their previous dealings, and the negotiations which led to the giving of the letter, to enable the court to ascertain what was meant by the letter. The terms of the letter cannot be changed by such evidence, and no additional language can be imported into it, but the evidence is proper to enable the court to understand the meaning of the language used. In the cited case, the plaintiff demanding more security, the debtor obtained from his father-in-law the following letter:

"Please discount for Mr. Cramer to the extent of four thousand dollars. He will give you customer's paper as collateral. You can also consider me as responsible to the bank for the same."

This was held to be a continuing guaranty. In 20 Cyc. p. 1440, it is stated:

"When the amount of the liability is limited and the time is not expressly limited, the courts lean toward construing the guaranty as a continuing one" (citing *Mathews v. Phelps*, 61 Mich. 327, 28 N. W. 103, 1 Am. St. Rep. 581; *Kimball Co. v. Baker*, 62 Wis. 526, 22 N. W. 730).

"The liability under the guaranty will be regarded as continuing when by the terms of the contract it is evident that the object is to give a standing credit to the principal debtor to be used from time to time either indefinitely or

until a certain period. So a guaranty may be construed as continuing where attendant circumstances strongly indicate that more than a single transaction was contemplated, especially if the right to recall the guaranty is expressly reserved. The use of the word 'may' with reference to the proposed transactions between the principal parties is held usually to indicate a continuing guaranty. So words guarantying payment for 'any goods' which may be purchased by the third person; or the payment of 'any debt' which may be contracted, up to a certain amount, are almost invariably held to indicate that the liability is intended to be continuing."

The evident conclusion of the trial court that Self, himself, so regarded the guaranty made in the letter to the plaintiff bank is supported by the fact that on November 19, 1914, only six days before the giving of the check by Strong to Williams, the nonpayment of which is the subject of this controversy, the chattel mortgage heretofore mentioned was given by Strong to defendant Self; that a line of credit had been extended by Self to Strong for a period of some three years prior to this, during which checks and drafts aggregating many thousands of dollars were drawn by Strong on the defendant Self and cashed by the latter, in many instances such checks causing an overdraft, but Self charging Strong 10 per cent. interest on such overdrafts. It is further shown by the testimony of Williams, as well as other witnesses, that the transactions between him and Strong began back in 1912 or 1913, Strong purchasing from Williams turkeys, chickens, and other products and paying him therefor in checks and drafts drawn on the Farmers' Exchange Bank, said shipments amounting in one instance to \$2,500, and all of these checks were honored by Self's bank, except the one in dispute; one check for \$81.27 being drawn by Strong in part payment to Williams for the carload of turkeys for which the check in controversy was given, was also paid by Self's bank. The cashier of the plaintiff bank testified that he would not have paid the check except for the letter from Self heretofore mentioned, and because of the fact that the checks drawn by Strong and made payable to Williams and deposited in the Albany bank had been theretofore honored by defendant Self's bank. It is further in evidence that transactions of this character were conducted between the defendant Strong and the defendant Self for several months subsequent to the giving of the check in controversy, and that at the time of the trial Strong had paid Self the full amount of any overdrafts made. Hence we are of the opinion that, in view of the evidence stated and other evidence of similar import, the trial court did not err in holding appellant liable for the amount of the check in controversy with legal interest thereon. We hereby adopt the court's findings of fact.

We think what we have hereinabove said disposes of the questions presented in all of appellant's seven assignments, and said as-

signments are overruled, and the judgment of the trial court is hereby, in all things, affirmed.

TANKERSLEY v. JACKSON et al.
(No. 8419.)

(Court of Civil Appeals of Texas. Ft. Worth.
June 24, 1916.)

1. MORTGAGES ~~295~~(4) — **EQUITY OF REDEMPTION — MERGER — ELECTION BY MORTGAGEE.**

Where a mortgagee took a deed of the mortgaged land from the mortgagor in satisfaction of the secured note, and in ignorance of the existence of a vendor's lien upon the land, made since the execution of the mortgage, the mortgage lien did not merge with the equity of redemption, but remained in effect and superior to the vendor's lien, since the rule that the purchase by a mortgagee of the equity of redemption merges the two estates if an estate in fee simple would result is not invariably applied in equity; the mortgagee having an election in equity to prevent a merger and keep the equity alive.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 821; Dec. Dig. ~~295~~(4).]

2. APPEAL AND ERROR ~~934~~(2)—**REVIEW—JUDGMENTS.**

It is the duty of the court in reviewing proceedings to indulge in support of the judgment every reasonable inference arising from the facts proven.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3777; Dec. Dig. ~~934~~(2).]

Appeal from District Court, Young County; J. W. Akin, Judge.

Suit by R. L. Tankersley against W. E. Jackson and others. From a judgment for plaintiff, but in favor of the defendant John Pohlman, plaintiff appeals. Affirmed.

Arnold & Arnold and Fred T. Arnold, all of Graham, for appellant. C. F. Marshall, of Graham, for appellees.

CONNER, C. J. The appellant instituted suit in the district court to recover upon six certain notes dated December 30, 1909, maturing December 1, 1910, 1911, 1912, 1913, 1914, and 1915, respectively, and all aggregating \$537.50. The notes had been executed by one W. E. Jackson as part of the consideration for a tract of land described in the petition sold by appellant, Tankersley, to Jackson on the same day the notes were executed. To secure the notes the vendor's lien was retained. As a further part of the consideration, Jackson also assumed the payment of a note for \$200, executed by a former owner of the land and secured by a deed of trust thereon for the benefit of an insurance company. The plaintiff made, among others, John Pohlman, one of the appellees in this case, a party defendant, alleging that Pohlman was the present owner of the land which was subject to the lien the plaintiff sought to foreclose.

Pohlman answered, among other things, to the effect that he had in due course of trade

acquired the \$200 note executed for the benefit of the insurance company, as above stated, and he sought to have foreclosed the mortgage lien given to secure the same, which was alleged to be prior in point of time and right to the vendor's lien set up by the plaintiff. To this plea the plaintiff replied by supplemental petition to the effect that the note and debt evidenced thereby had been wholly canceled and extinguished.

The trial was before the court without a jury, and resulted in a judgment for the plaintiff for the amount of his debt, principal, interest, and attorney's fees, with a foreclosure of the vendor's lien as prayed for. It was further adjudged that the defendant John Pohlman was the owner of and entitled to recover upon the \$200 note claimed by him, and the judgment established and foreclosed the mortgage lien referred to, making the same superior to that of the plaintiff. From the judgment so rendered, the plaintiff has appealed.

There is but little controversy in the facts. The evidence shows the execution of the notes declared upon by the plaintiff and the assumption of the \$200 note by Jackson as the plaintiff alleged. It also shows that the \$200 note and mortgage declared upon by the appellee John Pohlman had also been executed and acquired by Pohlman as he alleged in his answer; the assignment to him being upon the 5th day of January, 1914. It further appears that after Jackson's purchase, to wit, on August 9, 1911, Jackson conveyed the land in controversy to one R. J. Johnson "subject" to all of the outstanding notes hereinbefore mentioned. It further appears that on March 8, 1915, Johnson conveyed the land to Pohlman, the deed containing the following recitation:

"It is especially understood and agreed by the grantor and grantee herein that this conveyance is for the purpose of cancellation of a certain deed of trust coupon note dated 28th day of January, 1909, in the sum of \$200, given by W. G. Graham to Austin Fire Insurance Company in the city of Dallas, Tex., bearing 8 per cent. interest per annum from date and 10 per cent. additional as attorney's fees, due November 1, A. D. 1913, and, further, that this deed of conveyance is for the purpose of satisfying said lien created by said deed of trust, and for the purpose of clearing any defect of title and to perfect the record title to the above-described land and premises, and to divest all of the right, title, and interest of the grantor herein."

On the same day that this deed from Johnson to Pohlman was executed, to wit, on March 8, 1915, Pohlman dismissed a suit he had theretofore instituted in the district court to recover upon the \$200 note owned by him, and to foreclose the mortgage given to secure the same on the land in controversy. It further appears that later, to wit, in September, 1915, Pohlman reinstituted his suit in the district court against said R. J. Johnson and others, again declaring upon his \$200 note and mortgage. Pohlman also set forth

in his pleadings in that suit the deed from Johnson to him, and prayed for its cancellation, and on September 7th judgment was rendered in favor of Pohlman in accordance with his prayer, decreeing a foreclosure of the mortgage lien in favor of Pohlman and the cancellation of the deed from Johnson. In this suit, however, the plaintiff in the present action was not made a party.

[1] Appellant's contention upon this appeal is that the court erred in failing to find that the Pohlman note was not paid, and the Pohlman mortgage lien not canceled. It is evident from the evidence that these contentions have their basis upon the recitations above quoted in the deed from Johnson to appellee Pohlman. Pohlman in relation to this matter testified, among other things, to the effect that his note had never been paid; that he had never surrendered or canceled the note; that he did not so intend when his suit was dismissed; that at the time he accepted the deed from Johnson he did not know that Johnson had no right to convey the land; and that he did not then know of the existence of the notes declared upon by the plaintiff in this suit. Johnson is not shown to have assumed the payment of the \$200 note, and there is no proof tending to show that at the time appellee accepted the deed from Johnson any additional consideration was paid to Johnson. These facts, when considered in connection with the recitation in the Johnson deed that one of the purposes of its execution was to clear the title to the land in controversy and to divest Johnson of all his right, title, and interest, tend to show, as we think, that the conveyance from Johnson to Pohlman was intended, not as a bargain and sale, but as a short method of foreclosing the lien held by Pohlman to secure the \$200 note owned by him. This inference is strengthened by the fact that Pohlman, upon the same day, dismissed the suit he had theretofore filed to foreclose his mortgage, and specifically testified that at no time did he surrender or intend to cancel his note or mortgage, and did not know of the existence of the appellant's lien, never having examined his title in fact. So that he may have reasonably supposed a conveyance from Johnson of all the right or title he had in and to the land would, in legal effect, extinguish all outstanding title and accomplish all that could be effected by a successful prosecution of the suit which he dismissed. It is evident that Johnson owned, as against appellee Pohlman, the equity of redemption in the land under consideration, and ordinarily, where one holding a lien or mortgage upon premises purchases the equity of redemption, there is a merger of the two estates. Ordinarily in such case the conveyance by the one holding the equity of redemption vests in the mortgagee complete title, and puts an end

to his right or title under the mortgage. But, as said in 27 Cyc. p. 1377, par. 2:

"To this end it is necessary that, holding the mortgage already, he should acquire nothing less than the complete legal title in fee, and that the two estates or interests should unite in the same person in the same right. Further, this rule (the rule of merger referred to) is not invariably applied in equity, but may be disregarded, and the fusion of the two estates prevented when, in the particular case, this is required by justice, the well-established principles of equity, or the intention of the parties; the mortgagee having an election in equity to prevent a merger and keep the mortgage alive."

It is further said in the same authority (page 1370, par. "d"):

"The technical doctrine of merger will not be applied contrary to the agreement or the express or implied intention of the parties; and therefore, in equity, there will be no merger of estates when a mortgagee receives a conveyance of the equity of redemption, when such a result would be contrary to his real intention in the transaction or to the bargain made by the parties at the time. This is the case where the mortgagee means to keep the security alive for his own protection as against other liens or incumbrances, and also where the conveyance is not intended by the parties to be in satisfaction of the mortgage debt, but only as additional security for it."

[2] The author cites numerous cases in support of the text which we will not take the time to scrutinize. But the principle embodied in the quotation was applied in the case of Hapgood Shoe Co. v. First Nat. Bank, 23 Tex. Civ. 503, 56 S. W. 995, with citation of numerous authorities. From all of which we feel unable to say, under the evidence, that the court erred in giving priority to appellee's debt and mortgage.

It is our duty in reviewing the proceedings to indulge in support of the judgment every reasonable inference arising upon the facts proven, and, so considering the record in this case, we conclude that the judgment must be affirmed.

Affirmed.

FRIEND v. THOMAS et al. (No. 8400.)
(Court of Civil Appeals of Texas. Ft. Worth.
June 10, 1916.)

1. PLEADING \S 46—PARTIES—DESIGNATION OF RESIDENCE—STATUTE.

Under Rev. St. 1911, art. 1827, declaring that the petition of plaintiff in a suit shall clearly set forth the names of the parties and their residence, if known, article 1850, requiring the clerk upon the filing of a petition to issue a writ of citation for the defendant, and article 1852, providing that such citation shall be directed to the sheriff of any county where the defendant is alleged to reside, a petition wholly failing to allege the residence of either of the defendants did not authorize the clerk of the county court to command the sheriff of the county to execute citation against the defendants therein.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 101-108; Dec. Dig. \S 46.]

2. JUDGMENT \S 17(10)—PROCESS—RETURN OF SERVICE—IMPOSSIBLE DATE.

Under Rev. St. 1911, art. 1864, requiring the return of an officer executing a citation to

be indorsed thereon, and that the writ shall state when the citation was served, a return upon a citation that it came to hand the 19th day of July, 1915, and was "executed the 19th day of July, 191," showing its execution upon an impossible date, would not support a judgment by default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 81; Dec. Dig. ¶17(10).]

3. COURTS ¶32—DEFAULT JUDGMENT—RECORD—JURISDICTION.

In case of a judgment by default the court's jurisdiction over the defendant must affirmatively appear.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 134, 137, 139; Dec. Dig. ¶32.]

Error from Wichita County Court, Harvey Harris, Judge.

Suit by J. T. Thomas against E. M. Friend and T. F. Morrow, with answer by defendant Morrow praying that, if plaintiff had judgment, he have judgment over against his co-defendant. Judgment by default against defendant Friend, and he brings error. Reversed, and cause remanded.

Ed Yarbrough, of Electra, and Fitzgerald & Cox, of Wichita Falls, for plaintiff in error. T. R. Boone, of Wichita Falls, for defendants in error.

CONNER, C. J. The defendant in error J. T. Thomas instituted this suit in the county court of Wichita county against the plaintiff in error, E. M. Friend, and T. F. Morrow to recover actual damages in the sum of \$140 and exemplary damages in the sum of \$250, for an alleged wrongful levy upon and conversion of certain personal property charged to be exempt to the head of a family.

The defendant Morrow answered with a general denial, and also pleaded that, if the levy charged had in fact been made, it was done by him at the instance of E. M. Friend, and he prayed that, if the plaintiff recovered a judgment he (Morrow) have judgment over against his co-defendant.

The plaintiff in error, E. M. Friend, failed to appear or answer, and the judgment against him was taken by default for the full amount of actual and exemplary damages claimed, and from this judgment a writ of error has been prosecuted.

Plaintiff in error by his assignments complains of the insufficiency of the petition upon which the judgment rests, and of the action of the trial court in refusing to consider the motion for new trial presented by him during the term at which the judgment was rendered, and defendant in error urges objections to all of these assignments. Inasmuch, however, as we think the judgment must be reversed for error fundamental in nature, as hereinafter pointed out, and inasmuch as the deficiencies in the plaintiff's petition below may easily be corrected by amendment, and inasmuch as the action of the court in refusing to consider plaintiff in

error's motion for rehearing is immaterial in the view we have taken of the case, we will not stop to discuss the sufficiency of the assignments of error.

[1, 2] The record discloses that the petition of the plaintiff below wholly fails to allege the residence of either of the defendants. It further discloses that a citation was issued to Wichita county on July 17, 1915, commanding service thereof upon the defendants E. M. Friend and T. F. Morrow. The sheriff's return upon this citation is as follows:

"Came to hand the 19th day of July, A. D. 1915, at 9 o'clock a. m., and executed the 19th day of July, A. D. 191, by delivering to T. F. Morrow and E. M. Friend, the within named defendants, each in person a true copy of this writ. G. A. Hawkins, Sheriff Wichita Co., Texas, by J. B. Moore, Deputy."

Revised Statutes 1911, article 1827, among other things, specifically provides that the petition of a plaintiff in a suit "shall set forth clearly the names of the parties and their residence, if known"; article 1850 makes it the duty of the clerk, upon the filing of a petition, to forthwith issue a writ of citation for the defendant; and article 1852 directs, among other things, that "such citation shall be directed to the sheriff or any constable of the county where the defendant is alleged to reside or be." The authority, therefore, of the clerk to direct the writ to the sheriff or constable of a named county rests upon the allegations of the petition relating to the residence of the defendant. If, as here, no allegation of the residence of the defendant is made, it cannot be said that upon the face of the record the clerk was authorized to command the sheriff of Wichita county to execute the citation appearing in the record. *Tyler v. Blanton*, 34 Tex. Civ. App. 393, 78 S. W. 564.

Again, Revised Statutes, article 1864, provides that the return of the officer executing a citation shall be indorsed on or attached to the same, and that the writ, among other things, "shall state when the citation was served"; and it has been held that an officer's return showing its execution upon an impossible date will not support the judgment by default. Thus, in the case of *Llano Improvement & Furnace Co. v. Watkins*, 4 Tex. Civ. App. 428, 23 S. W. 612, the return of the officer was:

"Came to hand the 24th day of September, A. D. 1891, at 12 o'clock a. m., and executed the 24th day of —, A. D. 189."

It was held that the return was fatally defective, and could not support the judgment by default in that case rendered.

[3] The statutory proceedings noted, and to which the law exacts a close adherence, are all steps necessary to be successively taken in order to show the court's jurisdiction over the defendant, and in cases of judgment by default such jurisdiction must affirmatively appear. *Bates v. Casey Swasey*, 61 Tex.

592; *Railway v. Rawlins*, 80 Tex. 579, 16 S. W. 430; *Davidson v. Heldenheimer*, 2 Posey, Unrep. Cas. 490; *Harrell v. Mex. Cattle Co.*, 73 Tex. 612, 11 S. W. 863; *Thomason v. Bishop*, 24 Tex. 302, 303; *St. Louis & S. F. Ry. Co. v. English*, 109 S. W. 424; *Lazarus v. Barrett*, 5 Tex. Civ. App. 5, 23 S. W. 822.

We conclude that the judgment below should be reversed, and the cause remanded, for errors apparent upon the face of the record.

DAVENPORT v. RUTLEDGE. (No. 1001.)

(Court of Civil Appeals of Texas. Amarillo. May 24, 1916.)

1. JUDGMENT \S 335(2)—SERVICE BY PUBLICATION—BILL OF REVIEW.

Under Rev. St. art. 2026, providing that where judgment has been rendered on service of process by publication, and defendant has not appeared in person or by attorney, he may have a new trial within two years, defendant was entitled to a bill of review and to be heard upon the merits of an action against her in a justice court on service by publication requiring her to appear at the second term after publication, in which judgment was rendered by default at the first term, although she had actual notice of the pendency of the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 648, 649; Dec. Dig. \S 335(2).]

2. JUDGMENT \S 119—DEFAULT JUDGMENT—SERVICE BY PUBLICATION.

Under Rev. St. art. 2330, providing that, where service is made by publication, the first day of the second term after publication shall be appearance day, a judgment by default at the first term after publication, whether void or voidable, will ordinarily be set aside on appeal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 208, 209, 211-220; Dec. Dig. \S 119.]

3. PROCESS \S 153—SERVICE BY PUBLICATION—VALIDITY—ERROR IN NAME.

The erroneous statement of defendant's name in process served by publication will reverse the case.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 207, 208; Dec. Dig. \S 153.]

4. JUDGMENT \S 335(1)—SERVICE BY PUBLICATION—BILL OF REVIEW.

Under Rev. St. art. 2026, giving defendant two years in which to file a bill of review and obtain a new trial after service by publication, the remedy given is cumulative, or an additional remedy to an appeal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 647, 650-654, 659, 661; Dec. Dig. \S 335(1).]

5. PROCESS \S 103—CONSTRUCTION OF STATUTE—SERVICE BY PUBLICATION.

The statutes relating to citation by publication are strictly construed, requiring strict compliance with the essential requirements of the statute.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 129, 131; Dec. Dig. \S 103.]

6. JUDGMENT \S 335(2)—VACATION—DEFECT IN SERVICE BY PUBLICATION.

Under Rev. St. art. 2026, where a judgment was rendered against defendant by default at the first term after service by publication, there not being proper service, defendant was entitled to vacate the judgment, which was void, al-

though the facts might warrant another judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 648, 649; Dec. Dig. \S 335(2).]

7. PROCESS \S 84—SERVICE BY PUBLICATION—ACTUAL KNOWLEDGE—EFFECT.

Under Rev. St. art. 2026, actual knowledge of the existence of a suit will not supply the want of service.

[Ed. Note.—For other cases, see Process, Cent. Dig. \S 98; Dec. Dig. \S 84.]

8. HUSBAND AND WIFE \S 19(15), 23 $\frac{3}{4}$ —NECESSARIES—PHYSICIAN'S SERVICES—WIFE'S LIABILITY.

A wife is not personally liable for the debt due a physician for necessary services rendered to her child, unless the debt was contracted by her personally, since, if she merely calls in a physician, it is presumed that she does so as the agent of her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 135, 142, 145, 146; Dec. Dig. \S 19(15), 23 $\frac{3}{4}$.]

9. FRAUDS, STATUTE OF \S 14—PROMISE TO ANSWER FOR DEBT OF ANOTHER.

A parol promise by a wife to pay a debt due a physician by her husband for necessary services rendered to her infant child would not render her separate estate liable.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. \S 14; Dec. Dig. \S 14.]

10. HUSBAND AND WIFE \S 23 $\frac{3}{4}$ —ACTIONS FOR SERVICES—ADMISSIBILITY OF EVIDENCE.

In a physician's action against wife for services rendered her infant child, parol testimony of a verbal promise to pay was admissible, if at all, only to show a contract for such services in the first instance.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 145, 146; Dec. Dig. \S 23 $\frac{3}{4}$.]

Appeal from Grayson County Court; Dayton B. Steed, Judge.

Action by W. C. Rutledge against Mrs. Lona Davenport. From judgment for plaintiff in the county court, declaring void a judgment for plaintiff by default in justice court, but rendering judgment for plaintiff on the merits, defendant appeals. Reversed and remanded, with instructions.

John T. Suggs and R. W. Stoddard, both of Denison, for appellant. James S. Kone, of Denison, for appellee.

HUFF, C. J. The appellee instituted suit against appellant in the justice court, precinct No. 2, Grayson county, upon an account for services rendered as a physician to the minor son of appellant, who was injured by a railroad. In this suit service was had by publication, the appellant being a nonresident of the state. A writ of garnishment was sued out, against a national bank of Denison, who had on deposit funds belonging to appellant. She was sued and cited as Laura Davenport. Her name is Lona Davenport. The bank answered it had no funds belonging to Laura Davenport. The justice court, however, rendered judgment against the bank on its plea, and also at the first term after publication rendered judgment against the appellant in the original

cause by default. There are several defects in the record shown in obtaining process, which were alleged and set out. Under the judgment against the bank in the garnishment the appellee collected from it the amount sued for as due him, and the costs, amounting to \$199.40. In that suit, about six months after judgment, and under article 2026, R. C. S., appellant filed a bill of review and sought therein a recovery of the sum so collected by appellee. The trial court finds that the judgment was void, and proceeded to hear and determine the question whether appellant had a valid defense to the alleged cause of action of appeal, and determined that she had no defense, and rendered judgment that she was not entitled to recover anything by reason of the appropriation of the sum obtained from the bank upon the judgment and costs.

[1] The appellee files a cross-assignment, asserting that the trial court erred in holding the judgment and proceeding void, because it is shown that the appellant had actual notice of the pendency of the suit. Whether the court was correct or not in holding the judgment void, we think he was correct in holding that appellant had the right to file her bill of review under the statute and to be heard upon the merits.

[2, 3] The appellant was not required to answer until the second term of the court after the required publication. The case should have been continued to perfect service. If this was a jurisdictional matter, the judgment would be void. *Harris v. Hill*, 54 Tex. Civ. App. 437, 117 S. W. 907; *Insurance Co. v. Milliken*, 64 Tex. 46. Whether void or voidable, a judgment so obtained would ordinarily be set aside upon appeal. Article 2330, R. C. S.; *Irion v. Bexar County*, 28 Tex. Civ. App. 527, 63 S. W. 550. The process giving the name of appellant erroneously would also reverse the case. *Railway Co. v. Bloch Bros.*, 84 Tex. 21, 19 S. W. 300.

[4] Upon service by publication, under article 2026, the defendant has two years in which to file a bill of review and obtain a new trial. The remedy given thereby is cumulative, or an additional remedy to an appeal, and peculiar to suits by publication. *Kruegel v. Cobb*, 58 Tex. Civ. App. 449, 124 S. W. 723.

[5] The statutes relating to citation by publication are not liberally interpreted, but strictly construed, and a strict compliance with the essential requirements of the statute is required. Authorities supra; *Fowler v. Simpson*, 79 Tex. 611, 15 S. W. 682. In the case of *Oden v. Vaughn*, 34 Tex. Civ. App. 115, 77 S. W. 967, a default judgment, rendered before the time defendant was commanded to appear and answer, was held absolutely void. In *Lash v. Warren* (Sup.) 14 S. W. 694, a judgment was held erroneous entered the day after acceptance of service. *Railway Co. v. Eastham*, 54 S. W. 648.

[6] Under the statute, the appellant had until the first day of the succeeding term to answer. The judgment was therefore improperly entered at the first term; in other words, there was no proper service had, and it has long been the rule that the defendant has the right to vacate the judgment when there was no service, even though the facts might warrant another judgment. *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863; *Fowler v. Morrill*, 8 Tex. 153.

[7] Appellee contends in this case that the appellant had actual notice of this suit and therefore a bill of review would not lie. Courts acquire jurisdiction over the person of defendant by service of process in the manner provided by law. Service may be waived by express stipulation in writing or by voluntary appearance of the party, either in person or by attorney. "But we know of no authority for holding in any case that actual knowledge of the existence of a suit or the issue of a writ will supply the want of service." *Harrell v. Mexico Cattle Co.*, supra. It appears from the facts in this case, after appellant removed from Texas to Tennessee, appellee instituted his suit against her by publication. The appellant, on a visit to Denison, was informed by the justice of the peace that such suit was pending in his court. There was no appearance made or entered, as required by statute, on the part of appellant.

Appellee cites *Roller v. Ried*, 24 S. W. 655, as authority that notice of the pendency of the suit was sufficient, or at least deprived her of the right to file a bill of review. We think appellee misconstrues the scope of that case. There was personal service by a notice upon nonresidents had in that case, and no question is made but that judgment could properly be rendered upon such notice at the time it was rendered; the court simply holding, as we understand it, that in that character of case, where notice was had, a bill of review would not lie. Even should that case hold what appellee contends, it would not apply in this case, for the reason that here the judgment was rendered when the statute did not authorize it. The appellant is only required to answer at the term at which the law fixed, and until that term no valid judgment could be rendered. The trial court properly held appellant was entitled to file her bill of review and to have a hearing upon the merits of the claim.

[8-10] By virtue of the illegal judgment, Rutledge procured and appropriated the sum of money sued for, which is alleged to be, and the court finds, was the separate property of the wife. In the court's finding of facts, he finds only that Mrs. Davenport acquiesced and consented for Dr. Rutledge to treat her minor son, who was injured, and further finds thereafter she verbally agreed to pay the bill. The funds here sued for by her the trial court finds was her separate

property. At the time of the alleged service her husband was alive, and he and appellant were living together as husband and wife. The child was their offspring and a minor, living with them, when the services were rendered. In order to make the wife personally responsible for the services, she must have entered into a contract with the appellee for services rendered necessary to her child. If there was no such contract, and she only acquiesced or consented for the doctor to treat the child, this would not bind her personally or make her separate property liable. "In order to hold the wife liable for necessities furnished herself or children, the debt should be contracted by her personally or by some one acting under her authority. Such seems to be the intention of our statute and has been the announcement of our courts." *Speer's Law of Marital Rights*, § 154, and authorities in note 19; *Menard v. Schneider*, 48 S. W. 761. It is not sufficient that she merely give an order or call in a physician, for in such case the presumption is that she does so as the agent of her husband, whose duty it is to supply such things. *Id.* After the services were rendered a mere verbal promise on her part to pay would not render her separate estate liable for the debt of the community. She would not be bound personally for the default of her husband by such verbal promise to pay his debt. *Flannery v. Chidgey*, 33 Tex. Civ. App. 638, 77 S. W. 1034. If the testimony of such verbal promise was admissible at all, it was only admissible as a circumstance on the question whether she contracted for such services in the first instance. A liability cannot be founded against her upon such verbal promise, made after the debt accrued, and if the court's judgment is based on such promise it is erroneous and without legal testimony. Her mere acquiescence or consent for the doctor to treat her child will not support the judgment.

This case will be reversed, with instructions, if the facts, upon another trial, only establish such acquiescence or consent, to render judgment for appellant for the sum shown to have been appropriated.

Reversed and remanded.

BLOUNT, PRICE & CO. v. PAYNE. (No. 103.)

(Court of Civil Appeals of Texas. Beaumont.
May 22, 1916.)

1. CHATTEL MORTGAGES — 277 — FORECLOSURE — PLEADING — ANTICIPATING DEFENSES — NECESSITY.

Where the petition sufficiently alleged execution and delivery of note and mortgage, maturity of the note, existence of the mortgage lien, refusal to pay, and a mutual mistake in execution of mortgage, and that the defendant unlawfully withheld possession of the property, it was sufficient, and the pleader need not allege and anticipate any defensive matters, since it

was incumbent upon the defendant to plead and prove them.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 564-566; Dec. Dig. — 277.]

2. CHATTEL MORTGAGES — 277 — REFORMATION OF INSTRUMENTS — 36(1) — FORECLOSURE — RECORDATION — VALIDITY AS BETWEEN ORIGINAL PARTIES.

In an action to reform and foreclose a chattel mortgage, it is not necessary for the petition to allege that it was registered; for as between the parties it was a valid and binding obligation without registration.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 564-566; Dec. Dig. — 277; *Reformation of Instruments*, Cent. Dig. §§ 141, 143, 146; Dec. Dig. — 36(1).]

3. REFORMATION OF INSTRUMENTS — 28 — GROUNDS — MUTUAL MISTAKE — RIGHTS OF THIRD PERSONS.

Equity will reform a chattel mortgage in case of mutual mistake between the parties so as to make it express the true intent, and third parties cannot complain of the reformation unless they plead and prove that they are subsequent lienholders or purchasers in good faith.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 101-111, 114-116; Dec. Dig. — 28.]

4. CHATTEL MORTGAGES — 173(3) — POSSESSION OF PROPERTY — PLEADING — SUFFICIENCY.

A petition alleging that defendant wrongfully withheld possession of mules which were the subject of the chattel mortgage given by another defendant, which failed to express the mutual intent of the parties, is sufficient as against general demurrer interposed by the defendant in possession.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 307, 309, 323; Dec. Dig. — 173(3).]

5. APPEAL AND ERROR — 742(4) — SCOPE OF REVIEW — ASSIGNMENTS OF ERROR — IRRELEVANT PROPOSITIONS.

A proposition on the admission of evidence under an assignment of error to the sufficiency of the petition is in violation of the rule as not germane to the assignment.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. — 742(4).]

6. APPEAL AND ERROR — 1170(3) — REVERSAL — HARMLESS ERROR.

Under rule 62a (149 S. W. 2d) nonprejudicial error in overruling a demurrer is not ground for reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4066, 4075, 4098, 4101, 4542; Dec. Dig. — 1170(3).]

Appeal from San Augustine County Court; T. H. Downs, Judge.

Action by J. O. Payne against John McCoy, Blount, Price & Co., and Lamar Blount. Blount disclaimed, and the suit was dismissed as to him. Judgment for plaintiff, and Blount, Price & Co. appeals. Affirmed.

W. J. Garrett, Jr., and Davis & Ramsey, all of San Augustine, for appellant. Wm. McDonald and Foster & Davis, all of San Augustine, for appellee.

CONLEY, O. J. This was a suit by J. O. Payne, instituted in the county court of San Augustine county on the 30th of March, 1915, to recover of Joe McCoy an amount due on a

promissory note, amounting to the sum of \$605.70, and foreclosure of a chattel mortgage executed by Joe McCoy on the same date to better secure the payment of said note. The chattel mortgage covered two mules. The petition is in the usual form declaring on a promissory note, and a foreclosure of the mortgage lien, and in addition thereto, in paragraph sixth, contains the following allegation:

"Plaintiff further represents that, while said mortgage on its face shows the First National Bank of San Augustine, Texas, to be the payee in said note and the grantee in said mortgage, yet in truth and in fact said bank is not the payee of said note nor the grantee in said mortgage, nor was it in any manner a party to the transaction, nor had it any interest in the same, but whatever interest in or relationship to the transaction that said bank apparently had with said paper, in truth and in fact appear by reason of a mutual mistake, accident, oversight, and inadvertence on the part of the parties to the transaction at the time of the execution of the written evidence of said agreement in this: That at the time of the execution and delivery of said note and mortgage and the agreement to reduce the evidence of the contract then made to writing, a blank form of mortgage of said First National Bank of San Augustine was used for said purpose, with the mutual intent and agreement of the parties and the defendant Joe McCoy to erase the name of said bank from said mortgage form and to insert in lieu thereof the name of the plaintiff, J. O. Payne, and to erase the name of said bank wherever it occurred in said blank form, and to insert in lieu thereof the name of the plaintiff herein, and that by mutual mistake, oversight, and inadvertence and accident of the parties to the transaction the name of the bank was not erased, nor was the name of the plaintiff, J. O. Payne, inserted in the body of said instrument, as per the agreement of the parties."

Paragraph 7 contained the following allegation:

"Plaintiff further says that the defendant Lamar Blount, either for himself or as agent of the defendant Blount, Price & Co., and the defendant Blount, Price & Co., are now in the possession of the above-described property, and are unlawfully withholding the same from this plaintiff, and are setting up some character of claim thereto, and they are made parties hereto for the purpose of determining whatever rights they may have in said property, and of obtaining any relief against them that the proof should show plaintiff entitled to by reason of the premises, and said property is now situated in San Augustine county."

The plaintiff closed with a prayer for judgment for the principal, interest, and attorneys' fees on the debt, a foreclosure of the mortgage lien upon the property, and for any and all orders necessary to enable plaintiff to subject said property to the payment of the debt, and for general and special relief in law and equity.

Defendant filed a general denial, and denied specifically all the allegations in plaintiff's petition and in the supplemental petitions, denied that Joe McCoy had executed any mortgage to J. O. Payne, that, if Joe McCoy had ever executed any mortgage on the mules, the mortgage executed by him was to the First National Bank, and not to J. O. Payne, that said Joe McCoy was not indebted

to the said bank, and further answered that said Joe McCoy had on the 25th of January, 1913, executed a mortgage to it covering the two mules in question to secure certain indebtedness due it by the said Joe McCoy, that the mortgage had been duly filed, and that it had no actual or constructive notice that said Joe McCoy had executed a mortgage previous to the one given it, and further answered that after its debt against Joe McCoy became due it filed suit in the justice court of San Augustine county against Joe McCoy, and thereafter secured a judgment for its debt, with a foreclosure of the mortgage lien, and at execution sale purchased the said mules, paying therefor a fair price, that the mortgage of the plaintiff is not and could not be a mortgage to the plaintiff, as it shows conclusively to be a mortgage to the First National Bank of San Augustine, and that therefore the registration of the mortgage was not notice in law of the fact that the plaintiff had a mortgage upon the property described, and that the defendant, being a bona fide creditor against said McCoy, was entitled to preference over the mortgage of the plaintiff, and that the defendant was in no way chargeable with notice of the mistake alleged to have been committed between the parties to that transaction.

Lamar Blount disclaimed, and was dismissed from the suit with his costs. The general demurrer of the defendant Blount, Price & Co. to plaintiff's petition was overruled, and a trial of the issues presented by the pleadings resulted in a verdict and judgment for the appellee, from which the appellant has duly perfected an appeal to this court.

There is but one assignment of error urged by appellant, and that is that the court erred in overruling the general demurrer to the appellee's petition. Under this assignment of error appellant contends that the petition is defective in that:

(a) It does not allege that the appellant had actual or constructive knowledge of the existence of the mortgage of appellee.

(b) That the court erred in admitting evidence, in the absence of proper allegations supporting it, on the question of such notice, and that this is fundamental error.

(c) That the allegation in paragraph seventh of plaintiff's petition that "Lamar Blount, either for himself or as agent for Blount, Price & Co., and the defendant Blount, Price & Co., are now in the possession of the above described property, and are unlawfully withholding the same from this plaintiff, and are setting up some character of claim thereto," is not sufficient to charge a cause of action against Blount, Price & Co.

(d) That equity will not correct such mistakes as shown in the petition, because it affirmatively appears that the mistake and

oversight in failing to properly prepare the mortgage sought to be corrected was caused by the carelessness and inattention of the appellee.

[1] An inspection of the petition in this case shows sufficient allegations charging the execution and delivery of the note and mortgage by Joe McCoy to J. O. Payne, the maturity of the note, the existence of the mortgage lien, his failure and refusal to pay the debt in accordance with the terms of the contract, the mutual mistake in the execution of the written evidence of the lien, that the appellant was in the possession of the property covered by the mortgage, unlawfully withholding the same from the plaintiff, and prayed that the appellant be made a party for the purpose of determining whatever rights it had in the property, so that appellee might obtain any relief against it that the proof would warrant. This was all the pleader was required to do. Any matters which tended to defeat, qualify, or limit the rights of appellee, as set forth in the petition, are defensive matters, and it was incumbent upon the appellant to plead and prove them. The appellant was, in substance, charged by the petition with a conversion of the property covered by the mortgage. It was not necessary for the petition, under such circumstances, to have anticipated the defenses of appellant, and to have affirmatively pleaded facts which would have avoided them.

[2] It was not necessary for the petition to have charged the registration of the mortgage; for, as between the parties to that instrument, it was a valid and binding obligation, without registration.

[3] Equity will reform an instrument of the character in this suit in case of mutual mistake between the parties so as to make it express the true intent of the parties. Third parties cannot complain of the reformation, except that they show themselves to be subsequent lienholders or purchasers in good faith. This is matter of defense, and when such parties are joined in the suit to reform the original instrument, as was done in this case, and they are declared by the petition to be in possession of the property in controversy, and to be unlawfully withholding it from the plaintiff, to defeat a recovery they must plead and prove that they are in the protected class; that is, that they have a bona fide debt, which is secured by a lien on the same property, and that at the time of the execution of the lien they had no notice, actual or constructive, of the existence of the prior mortgage which it is sought to reform.

[4] The allegations in the petition as to the possession of the two mules by Blount, Price & Co. are sufficient as against the general demurrer. These allegations can have no other meaning than that appellant

is in possession of the property and unlawfully withholding it against the superior rights of appellee, and that whatever claim it was asserting was subordinate to the claim or rights of the appellee.

On page 389 Mr. Townes, in his work on Texas Pleadings, states:

"It is also settled that it is not necessary, in a suit for personal property, to aver the fact constituting title. A general allegation that the plaintiff is the owner of the property and is entitled to the possession as against the defendant, or is entitled to damages for its injury or conversion, is all that is necessary."

See, also, 38 Cyc. 2065.

[5] Proposition (b) under this assignment of error, as above set out, is not germane to the assignment, and is therefore in violation of the rules. In this connection we will say there is no merit in the error complained of, and this assignment is therefore overruled.

An inspection of the record shows that appellant's answer elaborately denied all the allegations of the petition, and specifically set forth that it had no knowledge of the existence of the mortgage of appellee. The statement of facts shows this question to have been inquired into by the court. The defendant McCoy testified that before he executed the mortgage to Blount, Price & Co., appellant, he told an officer of that company about the existence of the mortgage to appellee, J. O. Payne, and that officer, in turn, testified that he went to the county clerk's office and found the exact mortgage herein sought to be reformed, and read it, and saw that it was indorsed on the outside as being a mortgage from Joe McCoy to J. O. Payne, although the body of the mortgage showed it to have been given to the bank.

[6] Under rule 62a (149 S. W. 2d), even though there should have been error in overruling the general demurrer, still such error was in no way, under the facts of this case, prejudicial to appellant, and the judgment should therefore, in any event, be affirmed; and it is so ordered.

SULZBERGER & SONS CO. OF AMERICA v. HILLE. (No. 129.)

(Court of Civil Appeals of Texas. Beaumont.
April 27, 1916. Rehearing Denied
July 3, 1916.)

JUSTICES OF THE PEACE §54(1) — JURISDICTION—AMOUNT IN CONTROVERSY.

Where a cause of action is such that damages may accrue pending the action, as in actions for property detained, if suit primarily is for an amount within the jurisdiction of a justice's court, the court retains jurisdiction to render judgment for an amount within its original jurisdiction, although damages accrue beyond that amount.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 190, 198; Dec. Dig. §54(1).]

Appeal from Jefferson County Court; D. P. Wheat, Judge.

Action by the Sulzberger & Sons Company of America against O. J. Hille. From a judgment for defendant on his cross-action, plaintiff appeals. Affirmed.

Crook, Lord, Lawhon & Ney, of Beaumont, for appellant. Roger L. Burgess and A. F. Jatho, both of Beaumont, for appellee.

BROOKE, J. This suit was brought in justice court, precinct No. 1, Jefferson county, Tex., by issuance of the following citation:

"You are hereby commanded to summon O. J. Hille, a resident citizen of Beaumont, Jefferson county, Tex., if to be found in your county, to be and appear before me, the undersigned H. E. Showers, justice of peace in and for said county of Jefferson, at my office in Beaumont, Tex., precinct No. 1, at the next regular term of said court, to be holden on Monday, 26th day of April, 1915, at 10 o'clock a. m., then and there to answer the suit of the Sulzberger & Sons Company of America, a corporation duly incorporated under the laws of the state of New Jersey, and doing business in Texas by permit duly issued by secretary of state, plaintiff, against O. J. Hille, defendant, filed on the 8th day of April, 1915, file No. 6374, for the sum of \$72.76, due upon open account for foreclosure of chattel mortgage lien."

Plaintiff alleges that heretofore, to wit, on the 9th day of June, 1914, and on various dates thereafter, up to and including the 17th day of December, 1914, it sold and delivered to defendant, at his special instance and request, goods, wares, and merchandise to the total value of \$38.87, on which there is a balance due of \$76.76; for the purposes of securing his purchases theretofore made and thereafter to be made from plaintiff defendant placed with plaintiff one certain dark bay mare between nine and ten years old, weighing between 800 and 900 pounds; that it was agreed and understood that said mare should be held and kept by plaintiff as security for the payment by defendant of his debt due plaintiff, thereby creating a valid and subsisting chattel mortgage lien on said dark bay mare, weighing between 800 and 900 pounds, and being nine or ten years old; that said mare is of the reasonable value of \$100. Wherefore plaintiff prays judgment for the sum of \$72.76, for foreclosure of its chattel mortgage lien on said mare above described, and general relief.

Defendant answered in said justice court by general demurrer and special exception, and general denial, and special answer, the second part of said special answer being as follows:

"Defendant denies that portion of plaintiff's petition in which it is alleged that defendant placed with the plaintiff one certain bay mare to secure the payment of said amount, and that defendant alleges that on the 4th day of November, 1914, by and through its agent, John Reagan, plaintiff entered into a contract or agreement with the defendant by the terms of which plaintiff was to purchase the bay mare described in the plaintiff's petition; that before plaintiff should close the deal for the said mare the defendant was to allow the plaintiff to take the said mare and use her for two or three days for the purpose of ascertaining her qualities; that

at the end of said time, should the plaintiff find the mare satisfactory, that the plaintiff would purchase the said mare, and that the plaintiff would give him a bill of sale for said mare, but, in the event plaintiff did not find said mare satisfactory, then plaintiff was to deliver the said mare back to the defendant, paying the defendant \$1 per day for each and every day that the plaintiff so used the said mare and kept her in his possession; that thereafter the defendant demanded the said mare from plaintiff after finding the plaintiff did not wish to purchase, and demanded his pay for the use of said mare at the rate of \$1 per day, at the same time informing plaintiff that he was so charged with \$1 per day as long as plaintiff kept said mare; that plaintiff has kept the said mare in its possession since the defendant delivered her to plaintiff on the said 4th day of November, 1914, and so continued to keep her, and refused to deliver her to plaintiff, and refused to pay him said sum of \$1 per day for each day the plaintiff has had the possession of said mare; that the mare is the personal property of the defendant and is of the value of \$150; and that the defendant has been damaged by the wrongful acts of said plaintiff in the sum of \$160, as rent up to the date of the filing of this answer. Wherefore the defendant prays judgment for the possession of his said mare, and for his damages at the rate of \$1 per day from the 4th day of November until the said mare is delivered back to the defendant."

Upon trial in the justice court the plaintiff recovered the amount prayed for, but the court was of the further opinion that the plaintiff had not established any kind of a lien upon said mare, and that the defendant was entitled to her possession, but the court refused to render judgment in any amount for the use of said animal. The case was appealed to the county court at law. When the case reached said county court, the plaintiff filed a supplemental petition, in answer to the defendant's answer above set out, which was as follows:

"Plaintiff excepts to said answer and cross-action and says same sets out no defense to plaintiff's cause of action, and sets out no cause of action against plaintiff on said cross-action and of this plaintiff prays the judgment of the court.

"Plaintiff denies all and singular the matters set out in said answer, and demands strict proof thereof, and of this he puts himself upon the country."

On the 3d day of November, 1915, upon the pleadings as above set out, a judgment was had in the said county court at law that the plaintiff recover from the defendant the sum of \$68.81, being the balance due it upon open account: the judgment further reciting that the plaintiff had no valid lien on the mare, and that the defendant has a title to said mare, and is entitled to the possession thereof, and that the plaintiff is ordered to restore the mare to defendant, and, in addition, that the defendant recover from plaintiff, upon cross-action, the sum of \$1 per day for the use of said mare from the 15th day of December, 1914, to the 1st day of July, 1915, making a period of 169 days, aggregating the sum of \$169.

The court filed his findings of fact and conclusions of law. Plaintiff filed his motion for new trial, among other things setting out

that the court erred in overruling plaintiff's exception to the jurisdiction of the court to hear and determine defendant's cross-action, because the recovery sought in such cross-action was beyond the jurisdiction of the justice court, in which this cause originated, thus raising the question of jurisdiction, which is the only question to be determined in this case. The court overruled plaintiff's motion for new trial, and the case is properly before this court for adjudication.

By the first assignment of error plaintiff assails the action of the lower court in overruling plaintiff's special exception to the jurisdiction of the court to hear and determine defendant's cross-action, because the recovery sought in such cross-action was beyond the jurisdiction of the justice court, in which court the cause originated, and it is earnestly insisted that under the pleadings of the defendant he could have recovered, upon proper proof, \$1 per day from the said 4th day of November, 1914, until the time of the trial in the county court, which was had on the 3d day of November, 1915, a period of over 300 days, and which said amount would be beyond the jurisdiction of the justice court, and the proposition is made that a justice court has no jurisdiction to try a counterclaim the items of which, taken collectively, exceed \$200, and that an appeal to the county court from a judgment in such court confers no jurisdiction.

It will be seen that the defendant did not pray, in the alternative, for the value of the horse. He merely asked that possession of the horse be restored to him, and for damages at the rate of \$1 per day from November 4, 1914, until the said mare was delivered back to him. Both courts found that the plaintiff had no valid lien.

In the case of *Klabunde v. Vogt Hdw. Co.*, 182 S. W. 715, the court, in passing on that case, said:

"Appellant sued appellee in the justice court of Bexar county for a certain gasoline engine or its value alleged to be \$185, with interest in the sum of \$11.25, making a total of \$196.25. In the event the engine should be recovered prayer was for \$15 damages. The petition was amended in the county court, where the case went on appeal, and it was alleged that the engine was worth \$185, and that the interest due to October 10, 1914, made up a total sum sued for \$196.25, and that the interest on said sum to the date of filing brought the total to \$204.85. There is no doubt that the justice court did have jurisdiction to try the cause, and it came regularly to the county court on appeal, so that the last-named court acquired jurisdiction. Having so acquired jurisdiction of the cause of action, would it lose it when the amended petition was filed praying for principal and interest, aggregating \$204.85? In a suit in tort interest is a part of the cause of action for the purposes of fixing jurisdiction, and this is such an action. This is one of those cases where damages will accumulate [italics ours]; for, if the property

is wrongfully detained so that the claimant is entitled to recover interest, the longer the suit is pending the greater will be the damages. If the suit had remained pending in the justice court, and interest had run long enough to make the amount exceed \$200, would the justice court have lost jurisdiction by reason of that fact? The amended petition in the county court does no more than ask for the same value of the converted property, together with interest up to that date, which at that time brought the amount as prayed for to \$204.85. In *Ft. Worth & Denver City Ry. Co. v. Underwood* [100 Tex. 284] 99 S. W. 92 [123 Am. St. Rep. 806], on certified question in a similar case from the Second District, *Railway Co. v. Underwood*, 98 S. W. 453, Judge Williams, speaking for the Supreme Court, said: 'The cause of action asserted was of such a nature that damages might accumulate pending the action, which is true of many actions, as for instance, those brought for the use of property detained, and the like; but the accrual of further damages in cases of that character does not take away the power of the court to give judgment for an amount claimed, which is within its jurisdictional limits. The plaintiff in such cases, with proper pleadings, may recover the entire damage which he has suffered up to the trial; but this right may be restricted by the law limiting the jurisdiction of the court in which he has seen fit to sue. Having brought his action for an amount within the jurisdiction, he is entitled to such judgment as the court has power to render.'

"In that case the suit as originally brought was for an amount within the jurisdiction of the county court, but by the third amended petition * * * was within the county court jurisdiction, but would not have been in that of the justice court. The court rendered judgment for \$163.50 or \$150, with 6 per cent. interest on that sum from October 1, 1913, to April 2, 1915, thus making the sum for which the judgment was rendered. Having regularly acquired jurisdiction of the cause, we think, under the authority of the above case, that the county court had jurisdiction to render such judgment as it entered. And this view is sustained by the following cases: *J. F. Siensheimer & Co. v. Maryland Motorcar Ins. Co.*, 157 S. W. 228; *Adair v. Stallings*, 165 S. W. 140.

"While there is more than one assignment of error, they are all predicated upon the proposition that the county court did not have jurisdiction after the amended petition was filed in that court; and, since we hold that the county court did have jurisdiction, the assignments are overruled, and the judgment is affirmed."

In the instant case the judgment of the court was for \$169, an amount within the original jurisdiction of the justice court, and within the appellate jurisdiction of the county court at law. We think, as stated in the above case, while there is more than one assignment of error, they are all predicated upon the same proposition, and, since we hold that the justice court and the county court had jurisdiction, it disposes of each assignment.

Having given careful consideration to the record, and being of the opinion that no error was committed by the trial court, the cause is in all things affirmed; and it is so ordered.

ARDEN v. BOONE. (No. 8874.)*

(Court of Civil Appeals of Texas. Ft. Worth. May 20, 1916. On Motion for Rehearing, July 1, 1916.)

1. REFORMATION OF INSTRUMENTS \S 16 — GROUNDS.

Before equity will interpose to change the terms of a written instrument as not expressing the real agreement, it must appear that the terms sought to be changed were inserted through accident, fraud, or mutual mistake, or, if the mistake is unilateral, it must be material, going to the substance of the contract, and not the result of negligence.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. \S 68; Dec. Dig. \S 16.]

2. REFORMATION OF INSTRUMENTS \S 25 — DEFENSE—WANT OF DILIGENCE.

Equity will relieve from the terms of a contract for unilateral mistake only if it arises through no want of ordinary care or diligence on complainant's part.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. \S 84-90; Dec. Dig. \S 25.]

3. REFORMATION OF INSTRUMENTS \S 25 — DEFENSES—NEGLIGENCE.

Where a party executed a preliminary contract and accepted a deed providing for his keeping open a permanent roadway on land conveyed in the absence of showing of fraud or excuse for failure to read the two instruments, reformation thereof could not be had on the ground of accident, fraud, or mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. \S 84-90; Dec. Dig. \S 25.]

4. DEEDS \S 90 — CONSTRUCTION — FAVORING GRANTEE.

Where there is doubt as to the meaning or purport of the terms used in a deed, the construction most favorable to grantee should be applied.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 234-237, 247, 248; Dec. Dig. \S 90.]

5. DEEDS \S 139 — CONSTRUCTION — REPUGNANCY.

The exception of land required to make the full acreage conveyed under general warranty deed will be rejected as repugnant to the grant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 458, 459; Dec. Dig. \S 139.]

6. EASEMENTS \S 14(2) — RESERVATION OF ROADWAY — "RESERVATION" — "EXCEPTION."

Where a certain acreage is conveyed with stipulation that grantees should keep open a permanent roadway 15 feet wide on the side of the tract conveyed, the strip of roadway being necessary to make the full acreage conveyed, the stipulation should be construed as a reservation of an easement, and not as an exception of an open lane, since a reservation is the creation in behalf of the grantor of a new right issuing out of a thing granted, something which did not exist as an independent right before the grant, while an exception operates to withdraw some part of the thing granted which would otherwise have passed to the grantee under the general description.

[Ed. Note.—For other cases, see Easements, Cent. Dig. \S 40; Dec. Dig. \S 14(2).]

For other definitions, see Words and Phrases, First and Second Series, Exception; Reservation.]

7. DEEDS \S 120 — CONSTRUCTION — FAVORING GRANTEE.

A deed will be construed to give the largest estate under the terms of the grant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 375-393, 401, 407-412, 416-454; Dec. Dig. \S 120.]

8. EASEMENTS \S 61(9) — ACTION TO ESTABLISH—EVIDENCE—"KEEP."

In a suit to require grantee to remove gates on a roadway, the deed stipulating that grantee was "to keep open for a permanent roadway 15 feet wide on the extreme east of" the tract conveyed "so that the said" grantor "may have access to the public road," evidence that gates were, for a long time prior to the sale, used at both ends of the strip as means of affording the grantor access to the public road, and that the land was in the country, warranted a decree for defendant, since under the circumstances disclosed the grantee would "keep open" such passway, although maintaining gates, since the word "keep" is properly defined "to maintain; to cause to continue without essential change of condition."

[Ed. Note.—For other cases, see Easements, Cent. Dig. \S 143; Dec. Dig. \S 61(9).]

For other definitions, see Words and Phrases, First and Second Series, Keep.]

Appeal from District Court, Baylor County; J. A. P. Dickson, Judge.

Suit by J. C. Arden against O. A. Boone. From a decree for respondent, complainant appeals. Affirmed.

Milam & Wheat, of Seymour, and Speer & Brown, of Ft. Worth, for appellant. Glasgow & Kenan, of Seymour, for appellee.

BUCK, J. On January 29, 1913, by a general warranty deed, appellant conveyed to appellee 100 acres of land off the south side of a 220-acre tract, said deed containing the following provisions, to wit:

"It is understood and agreed as a part of the consideration for this land that the said O. A. Boone, his heirs and assigns, are to keep open for a permanent roadway 15 feet wide on the extreme east of said 100-acre tract hereby conveyed, so that the said J. C. Arden and his assigns may have access to the public road from the land on the north of said 100-acre tract."

At the time of this conveyance there were gates at the northern and southern extremities of this 15-foot strip used as a passway, and appellee continued the use of these gates until June 17, 1915, when appellant filed this suit, the purpose of which was to require appellee to remove the gates, and to "keep said roadway open and unobstructed at all times in the future."

Appellee, defendant below, in his answer pleaded:

(1) That the understanding between the parties was that plaintiff for himself and his assigns was to have a passway over the east 15 feet off of said 100 acres of land for the purposes simply of ingress and egress to the land out of said tract reserved by plaintiff; that it was never in contemplation of the parties in making said deal and trade that the passway mentioned in said deed should be a passway free of obstructions

and gates, but, on the contrary, it was perfectly understood by defendant, and he supposes plaintiff so understood, that plaintiff was only to have for himself and his assigns the right for convenience to pass over said 15 feet of land for the sole purpose of ingress and egress to the land reserved by plaintiff on the north of said 100-acre tract sold by him to this defendant."

(2) That the word "open," as used in said deed and contract between the parties with reference to the passway, "if the same is to be construed as a passway free of gates and obstruction, was never at and before the time of closing the trade, or at any other time, agreed and understood between the parties, but the same was error in the reduction of the agreement to the written instrument, and said term 'open' is contrary to the common intention and understanding of the parties."

(3) Defendant further pleaded the presence of the gates at the beginning of the negotiations and before the preliminary written contract was made, and that plaintiff told defendant's agent, Eddleman (who seems to have conducted practically all of the negotiations of trade with plaintiff), that he only wanted a passway, and that no statement was used or stipulation made by plaintiff in the course of such negotiations indicating any intention to reserve and require a roadway free of gates.

(4) That for more than 12 months after the execution of the deed plaintiff acquiesced in the use of the gates and in the construction of the term "open roadway" as meaning one with gates.

Defendant further averred that the gates were maintained and would continue to be maintained in good order for the free use of plaintiff and his assigns.

The case was submitted to the jury on three special issues, and in answer to them the jury found:

(1) That neither defendant, Boone, nor his agent, Eddleman, knew of the condition in the deed that provided for an open road on the land in controversy at the time of the execution or delivery of the deed.

(2) That the deed did not express the understanding and agreement of the parties with reference to the road or passway.

(3) That it was the intention and understanding between the parties at the time of the execution of the contract of sale and at the time of the execution of the deed that a passway with gates be reserved.

Upon this verdict of the jury the court entered judgment for defendant, and plaintiff appeals.

Appellant presents in his brief some 12 assignments, all of which we have considered with due care, but we believe there is presented only one main question for our determination, to wit: Is the above-quoted language used in the deed susceptible of the construction that the roadway reserved might be one inclosed by gates? If yea, the judg-

ment should be affirmed. If nay, the judgment should be reversed.

[1,2] While the jurisdiction or power of courts of equity to relieve against mistakes has always been recognized, and where, because of mistakes, a contract is made to appear different from that intended by the parties, equity will interpose to prevent manifest injustice, yet, where parties to a contract have reduced to writing the terms thereof, before the power of a court of equity may be invoked to vary the terms of such written instrument, on the ground that the recitations do not express the real agreement of the parties, it must be made to appear: (1) That the recitation sought to be changed was inserted through accident, fraud, or mutual mistake; (2) or, if the mistake be unilateral, such mistake must be material, going to the substance or essence of the contract, and arising through no want of ordinary care or diligence on the part of him who seeks to avail himself thereof, and then may be ground only for rescission, not for reformation. 6 R. C. L. p. 623, § 42; 1 Elliott on Contracts, p. 195, § 112, citing Moffett, Hodgkins & Clarke Co. v. Rochester, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. Ed. 1108. If a contract is plain and unequivocal, the person signing it or accepting it after it is signed by the other party, as in the case of a deed, is ordinarily bound by its terms, even though he did not, in fact, read the instrument before signing or receiving it. This is particularly true where the party complaining was able and had the opportunity to read the instrument, but neglected to do so. 6 R. C. L. p. 624, § 43; Box Co. v. Spies, 100 S. W. 432.

[3] The evidence shows that the preliminary contract executed by the parties contained the same provisions as to keeping "open" a "permanent roadway," as included in the deed. No reason or excuse is shown for the defendant's failure to read the two instruments, and to discover the use of such terms. It was shown that the original contract was signed by plaintiff and defendant's agent and son-in-law, Eddleman, and delivered to Boone, who "delivered it to the clerk's office"; that the deed was delivered to defendant, who had it filed for record. No pleading or proof is made as to any fraud on the part of plaintiff in having the word "open," as applied to the roadway, inserted in the contract and deed. Therefore we are of the opinion that the judgment cannot be supported on the grounds of accident, fraud, or mistake, whether the mistake claimed be bilateral or unilateral. Hence we are reduced to the single proposition stated above.

[4-7] While the defendant does not in so many words plead that the expression "to keep open for a permanent roadway" is ambiguous, so as to make parol evidence admissible to show what, in fact, was understood and meant by the parties in its use,

yet we are of the opinion that defendant's pleading may reasonably be interpreted as alleging an ambiguity in this respect, and therefore extrinsic evidence was admissible to shed light upon the sense in which the expression was used and understood by the parties. Moreover, the intention of the parties in inserting this reservation may be gathered from the instrument itself. The reason for the reservation is recited to be "so that J. C. Arden and his assigns may have access to the public road from the land on the north of the said 100-acre tract." Certainly by the use of the roadway inclosed by gates "access to the public road" could be had. Even the word "free" or "unobstructed" was not used to limit or further determine the nature of the access to be reserved. It is a well-recognized rule of construction of deeds that, where there is doubt as to the meaning or purport of the terms used, the construction most favorable to the grantee should be applied. 8 R. C. L. p. 1088, § 145; *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53; *McBride v. Burns*, 88 S. W. 398. Likewise, since this strip of land 15 feet wide was a part of the 100 acres paid for by and conveyed to the grantee, it must be held that some right in or title to this strip was meant to be conveyed. *Wofford v. McKinna*, supra. If more than an easement over and within this strip was intended, and it required this strip to make the 100 acres conveyed under the general warranty deed, then such reservation might be rejected as a repugnancy under the authority of *Koenigheim v. Miles*, 67 Tex. 113, 122, 2 S. W. 81; *McDaniel v. Puckett*, 68 S. W. 1007; *Puckett v. McDaniel*, 96 Tex. 94, 70 S. W. 739. To sustain the stipulation, it should be, under the authorities cited, construed to be only a reservation, and not an exception.

"A reservation is the creation in behalf of the grantor of a new right issuing out of a thing granted, something which did not exist as an independent right before the grant; while an exception operates to withdraw some part of the thing granted which would otherwise have passed to the grantee under the general description." 8 R. C. L. p. 1090, § 147.

It is further a well-established rule that a deed will be construed to convey the largest estate possible under the terms of the grant. *Hancock v. Butler*, 21 Tex. 804, 811; *Cartwright v. Trueblood*, 90 Tex. 535, 537, 39 S. W. 930; *Calder v. Davidson*, 59 S. W. 300, 302, affirmed in 94 Tex. 689; *Schaffer v. Heidenheimer*, 43 Tex. Civ. App. 366, 96 S. W. 61, affirmed in 101 Tex. 658.

[§] Looking to the evidence, Eddleman testified that:

"In negotiating this deed [deal] and trade between Mr. Arden and Mr. Boone, there was not anything said by me or Mr. Arden with reference to leaving the passway there open and unobstructed by gates. * * * Mr. Arden came out to see me and wanted to close the trade with me for Mr. Boone, and said that he wanted to reserve a passway of 15 feet. I said: 'I object to that. You let Mr. Boone go down on your grass land enough to make up

for the 15 feet; you keep the 15 feet.' Mr. Arden said: 'No; I want to deed him the full 100 acres, just reserve a passway out.'"

Plaintiff testified that he sold Boone the 100 acres. E. M. Stone, who was negotiating for the land just prior to the purchase by Boone, testified that in the conversations with plaintiff the latter only stipulated that he have a passway on the east of the 100 acres; that he said "he wanted a way to get through there." Stone further testified:

"There was nothing in the negotiations between me and Mr. Arden with reference to this land, with reference to a lane, or open road on the east of this 100 acres."

Defendant testified to the same effect as to the conversations had between him and plaintiff. Both defendant and Eddleman testified that the first notice that they had of plaintiff's claim for a roadway free of gates, or a lane, was some year and a half after the deed was delivered. This is a strong circumstance tending to support defendant's alleged understanding of the contract and to show a concurrence by plaintiff in the construction of the contract claimed by defendant, or at least an acquiescence therein. It is true that plaintiff testified to a conversation claimed to have been had with defendant shortly after the sale was made in which the former broached the subject of establishing the division line, but he admits that he said nothing to defendant about any lane until about a year after the deed was passed, and then, he says, "he [Boone] seems to think I was talking about another fence."

The Standard Dictionary defines "open" as: "Easy of or affording an approach, view, passage, or access, because of the absence of something that shuts out, covers, etc.; not surrounded by barriers or prohibitive restrictions; uninclosed; free of access and use; public, as an open common; affording free passage or flow; unobstructed; also uninclosed, as an open wound, an open bottle, an open door."

We are not prepared to say that, in view of the definitions and meanings given above one who places at either extremity of a passway gates without locks or difficult fastenings does not "keep open" such passway; nor, in our judgment, can it reasonably be claimed that because a roadway is inclosed by gates, it is not a "permanent" roadway. Third class roads established by and maintained under the authority of the law may be enclosed by gates.

While we are inclined to conclude that the special issues Nos. 1 and 2 were not required or proper to be submitted, yet we are of the opinion that the judgment must be sustained, and that it was authorized by the facts of the case and by the finding of the jury in answer to special issue No. 3. All assignments are overruled.

Judgment affirmed.

On Motion for Rehearing.

While we are aware that ample authority can be found to sustain the contention, urgently insisted upon in appellant's motion

for rehearing, that the expression "open way" ordinarily means a passway without gates, and that such construction is sustained either directly or by implication in the following cases among those cited by appellant, to wit: *Boyd v. Bloom*, 152 Ind. 152, 52 N. E. 751; *Gibbons v. Ebding*, 70 Ohio St. 298, 71 N. E. 720, 101 Am. St. Rep. 900; *Mineral Springs Mfg. Co. v. McCarthy*, 67 Conn. 279, 34 Atl. 1043; *Goodale v. Goodale*, 107 Me. 301, 78 Atl. 567; *Garland v. Furber*, 47 N. H. 301; *Welch v. Wilcox*, 101 Mass. 162, 100 Am. Dec. 113; *Maxwell v. McAtee*, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409; *Methodist Protestant Church v. Laws*, 4 O. C. D. 562, 48 L. R. A. (N. S.) 87, note—yet we are still of the opinion that in view of the terms of the paragraph of the deed containing the reservation, quoted in our original opinion, parol testimony was admissible to determine the construction put upon the terms used at the time by the parties to the contract and deed, and that such parol testimony was sufficient to sustain the construction reflected by the verdict and judgment.

It will be remembered that the expression "open way" is not used in the deed, but the obligation is placed on the grantor to "keep open" for a permanent roadway" the strip described. "To keep," in the sense here used, may properly be defined, as in the *Standard Dictionary*, "to maintain; to cause to continue without essential change of condition." For a long period prior to the sale gates had been used at the termini of this strip as a means of affording the grantor access to the public road from his house. Is it not a reasonable and permissible construction to say that in the use of the expression "to keep open for a permanent road way" the grantor meant, and the grantee understood him to mean, that the passway should be maintained in the condition it was in at the time of the sale of the land? Evidently both parties traded and made that contract and acquiesced in the deed containing this reservation, with the knowledge of the conditions as they existed at the time and had existed theretofore with reference to the presence of gates. *Garland v. Furber*, supra. Moreover, in construing the terms of a deed and of a reservation therein, it is permissible to take into consideration the character of the premises conveyed, and the sense in which the word or words is or are used with a reference thereto. As said in the case of *Collins v. Degler*, 74 W. Va. 455, 82 S. E. 265, whether the grantee of a right of way is entitled to a way unobstructed by gates depends upon the terms of the grant, the purposes for which it was made, the character and situation of the property, and the manner in which the way has been opened. *Jones on Easements*, § 400. Quoting from the cited case:

"Persons in a city do not ordinarily think of an alley as a way inclosed by gates. The use of

the word 'alley' in connection with a city lot carries with it the idea of an open way, such as almost invariably pertains to city property. But not so as to the use of the words 'right of way' as applied to ingress and egress over farming lands. Nor even so as to the use of the words 'free right of way' as applied to such lands. We must give to words the meaning that they imply from their use in relation to certain subject-matter. There is freedom in the country through gates that by no means would be called freedom in the city. Conditions and usages necessarily make it so. When plaintiff took a deed for the parcel, the road referred to in the deed had gates and bars across it. Yet it appears that the public freely traveled that road. * * * The use of the words 'right of way' indicates retention of the ownership and use of the soil except as interfered with by passage over the right of way. If the parties meant a lane, why did they not use the term? The grant of a right of way merely does not deprive the grantor of uses of the way consistent with the right he has granted. It is the grant of an easement only, not of the land itself."

The motion for rehearing is overruled.

CHICAGO, R. I. & G. RY. CO. v. PAVIL-LARD. (No. 8402.)

(Court of Civil Appeals of Texas. Ft. Worth. June 17, 1916.)

1. CARRIERS §212, 218(6) — LIVE STOCK — CARE — CONSTRUCTION OF CONTRACT.

A shipping contract, providing that the shipper should take care of the stock and should unload it and should save the carrier harmless except as to damages resulting from the carrier's negligence, did not on its face exempt the carrier from damages which might result from its negligence, contrary to statute, and, when it found that the shipper was not at destination to unload his stock, it was bound to exercise at least ordinary care to preserve it from injury until he could be notified of its arrival, and if, under all the circumstances, ordinary care would have required that it be unloaded, the carrier's failure to do so would be negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 918, 919, 940-945, 949; Dec. Dig. §212, 218(6).]

2. CARRIERS §230(1) — LIVE STOCK — QUESTION FOR JURY — CARE OF STOCK.

In an action for damages to a shipment of live stock resulting from the carrier's failure to unload it or to notify the shipper of its arrival so that he might unload it, *held*, that whether the shipper, in the exercise of ordinary care, should have been present to receive and unload it, was for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 962; Dec. Dig. §230(1).]

3. CARRIERS §217(1) — LIVE STOCK — RECOVERY FOR INJURY — CONTRIBUTORY NEGLIGENCE.

Where a shipper of live stock was negligent in failing to unload it on arrival so that it was injured, he could not recover for such injury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 931; Dec. Dig. §217(1).]

4. EVIDENCE §67(1) — PRESUMPTION — CONTINUANCE OF CUSTOM.

Ordinarily, a custom once shown to exist is, in the absence of testimony showing its abrogation, presumed to continue.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 87; Dec. Dig. §67(1).]

5. CUSTOMS AND USAGES **§17**—**PAROL EVIDENCE—CONTRACT FOR CARRIAGE OF LIVE STOCK.**

In an action for damages to a shipment of live stock by the carrier's failure to unload it on arrival, evidence of a former custom to unload stock shipped to that point when unaccompanied by caretakers was incompetent to abrogate the express terms of a shipping contract requiring the shipper to unload it, if the shipper upon a sufficient consideration executed such contract.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. §17; Evidence, Cent. Dig. § 1951.]

6. CARRIERS **§228(3)**—**LIVE STOCK—NEGLIGENCE—EVIDENCE.**

Such testimony was also incompetent as against the defendant on the issue of its negligence in failing to unload the stock on arrival, where the issue was as to what, under all the circumstances of the shipment, was required of the carrier in the exercise of due care.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. §228(3).]

Appeal from District Court, Wise County; F. O. McKinsey, Judge.

Action by Sam Pavillard against the Chicago, Rock Island & Gulf Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded.

Lassiter, Harrison & Rowland, of Ft. Worth, and McMurray & Gettys, of Decatur, for appellant. M. W. Burch and R. E. Carswell, both of Decatur, for appellee.

CONNER, C. J. This suit was instituted by the appellee in the district court to recover damages in the sum of \$916, on account of alleged injuries to a shipment of 50 steers from Ft. Worth to Boyd, Tex. It was alleged that, when said cattle reached Boyd, the defendant railway company failed to unload them into its stock pens, and failed to notify plaintiff of their arrival, so as to enable him to unload them; that the delay in unloading them at Boyd caused them to become restless and fight each other and injure themselves; and that a hole was broken through the floor of one of the cars, and some of the animals got their legs through this hole, and thus injured themselves. The defendant denied the allegations of negligence, and averred that it handled the shipment under the usual printed shipping contract, which bound the shipper to load and unload the cattle; that it transported the cattle promptly and without injury; that it expected the plaintiff to unload them at Boyd, as he had contracted to do; and that therefore he (the plaintiff), and not the defendant, was responsible for the delay and consequent injuries. The defendant further alleged that the cattle were infected with disease, and that whatever injuries they suffered during the time of the shipment, or subsequently thereto, were the result of such disease, or of the inherent vice in the cattle. The case was tried on July 5, 1915, and judgment rendered in favor of the

plaintiff for the sum of \$400, from which the defendant has duly appealed.

In substance, the evidence shows that the plaintiff, assisted by one Plaxico, purchased the cattle in controversy in Ft. Worth from the Witherspoon-McMullen Commission Company; that the commission company obtained the shipping contract and billing from the railway company, and gave them to Plaxico; that the plaintiff, himself, was not in Ft. Worth when the cattle were shipped, having left for his home at 5 o'clock in the afternoon of the day, or night rather, upon which the cattle were shipped. The plaintiff, at the time he left Ft. Worth, expected the cattle to be shipped out upon a local freight which customarily arrived at Boyd at about 10 o'clock a. m., but instructions were given by Plaxico, or the commission company, for the cattle to be shipped out on the first train, and it so happened that an extra, or special, train started out at 2:30 a. m., which was the first train upon which the cattle could have been shipped, and that this train arrived at Boyd at 4:30 o'clock a. m.; that Boyd was a night station and customarily closed during the night until 7:30 o'clock a. m., which was the regular time for the agent to resume his duties. On the night in question, it seems that the cattle arrived at Boyd at 4:30 o'clock a. m. of the morning upon which they had been shipped out of Ft. Worth; that neither the railway agent or other person was present to unload them, and they were permitted to remain in the cars and standing on the side track until, as the agent says, 8:20 the next morning, or, as a Mr. Baker, who testified in behalf of the plaintiff, says, 9 or 10 o'clock a. m. The plaintiff's evidence further showed that on the morning of the cattle's arrival he phoned to said Baker to assist him in unloading the cattle, which, as already stated, he did not expect to arrive until about 10 o'clock. However, when Baker on his arrival at the station found the cattle there, he, with others, unloaded them, and the plaintiff's testimony tends to show that they were then very restless, had trampled one another, were bruised, some with their legs skinned by stepping into a hole in the bottom of one of the cars, and that on the same day the cattle were unloaded two of them died, and later four others also died. There is no evidence, other than as is possibly to be inferred from their condition, that the cattle were improperly handled or injured during the transportation between Ft. Worth and Boyd.

[1] Appellant assigns error to the refusal of the court to give a special instruction peremptorily charging the jury that it was the duty of the plaintiff, Pavillard, to unload his cattle upon their arrival at Boyd, and not to find anything against the defendant railway company on account of any failure on its part to so unload the cattle. This

requested instruction is based upon appellant's insistence that a provision of the shipping contract was controlling. It appeared that this shipping or stock contract, after its execution, was delivered to Plaxico, who forwarded it to the plaintiff, but it was not received by the plaintiff until some time after the arrival and unloading of the cattle at Boyd. The contract provided, among other things not necessary to notice, that:

"In consideration of free passage for caretakers, as hereinafter stated, and other privileges herein granted, it is mutually agreed between the parties hereto * * * that said shipper (Pavillard), at his own risk and expense, is to take care of, feed, water, and attend the said stock while the same may be in the stock yards of the carrier, or elsewhere, awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at sending and transfer points, and whenever the same may be unloaded and reloaded for any purpose whatever, and hereby covenants and agrees to hold said carrier harmless on account of any loss or damage to the said stock while being so in his charge and so cared for and attended to by him, or his agents or employes, as aforesaid, except such damages as may result from the negligence of the carrier."

The plaintiff had pleaded, among other things, that this contract, which was set forth in the defendant's answer, was without consideration, and void; but this issue was not submitted to the jury, the court in his charge assuming, in effect, that the carrier would be liable for the consequences of any negligence on its part in a failure to unload the cattle, and as it seems to us this view is correct. In fact, neither the plaintiff nor any one for him accompanied the shipment, and the billing had indorsed upon its face that no caretaker was in charge. So that it may be gravely doubted whether the provision of the contract pleaded was in any event in contemplation of the parties as an operative provision; but, whether so or not, the provision on its face did not exempt appellant from damages that might result from its own negligence, as indeed under our statute could not be legally done, and, even though it be assumed that the appellee contracted to unload his cattle at Boyd, it was nevertheless the duty of the carrier, when it found that the plaintiff was not there to receive his cattle and to unload them, to exercise at least ordinary care to preserve them from injury until the plaintiff could be notified of their arrival, and if, under all of the circumstances, ordinary care would have required the unloading of the cattle, the failure to do so would constitute negligence for the proximate results of which appellant would be liable under the law. True, the plaintiff himself may or may not have been guilty of negligence in his failure to be present and unload the cattle, and that such negligence contributed to the damages, in part at least; but that question relates to the defendant's plea of contributory negligence, which is an altogether different issue from the issue of appellant's negligence.

[2,3] We think the court, however, did err, as presented in appellant's ninth assignment, in refusing to give to the jury the following specially requested instruction, viz.:

"Gentlemen of the jury, if you believe from the evidence that the plaintiff was negligent in failing to appear and unload or take his said cattle promptly away from defendant's depot, and that the said cattle were thereby injured or damaged, you are instructed that the plaintiff cannot recover for any such injury or damage so occasioned, and you will not assess any such damage so occasioned, if any, against the defendant."

As it seems to us, the evidence raised this issue. Plaintiff's agent, Plaxico, ordered the cattle to go out on the first train leaving Ft. Worth, and they went out on that train at an hour, which in the ordinary course of transportation would bring them into Boyd at 4:30 o'clock of the same morning. The evidence tended to show that plaintiff lived near Boyd, and must have known that it was a night station, and that in following its usual course of business the appellant company would have no one there to receive the cattle. No evidence is pointed out that Plaxico, plaintiff's shipping agent, or the commission company, either did or did not notify the plaintiff, or the night agent of appellant at Boyd, of the hour of shipment. So that, as stated, we think it should have been left for the jury to determine whether, under all of the circumstances, plaintiff, in the exercise of ordinary care, should have been present to receive and unload his cattle. The issue was not otherwise submitted, and because of the court's failure in this respect we think the judgment must be reversed.

[4-6] We should, perhaps, in view of the reversal, notice some other questions not sufficiently disposed of in what we have already said. The plaintiff offered the testimony of one McGonigal, to the effect that it was the custom of the defendant company, while he was acting as its agent, from about the year 1906 until and during the year 1912, to unload cattle shipped to Boyd when unaccompanied by caretakers. The court received this testimony over the objection of the defendant that it was immaterial, incompetent, and that the testimony did not cover the period in question, which was in 1915, some two years after McGonigal ceased to be the agent at Boyd. It may be doubted whether the practice indicated by the witness can properly be designated as a "custom," in the sense in which it is ordinarily used in treating that subject. It seems more in the nature of a simple practice or regulation on appellant's part of doing business at Boyd during the period covered by the testimony of the witness. Ordinarily, a custom once shown to exist is, in the absence of testimony showing its abrogation, presumed to continue. 1 Jones on Evidence, § 58e, p. 288; 9 Encyc. of Evidence, p. 915. Appellee's insistence, therefore, that the objection that the testimony did not cover the period in controversy, goes rather to the weight of the testimony

than to its admissibility, seems well grounded. The testimony, however, was incompetent to abrogate the express terms of a contract to otherwise do, if in fact the plaintiff, upon a sufficient consideration, executed an operative contract to unload his cattle. It was likewise incompetent as against appellant on the issue of its negligence in a failure to unload the cattle at Boyd. In this respect the issue was not what had theretofore been the practice of appellant, but what, under all of the circumstances of the present shipment was required of appellant in the exercise of ordinary care. Possibly the testimony was admissible on the issue of plaintiff's contributory negligence, if any, though we need not determine this question, as the point has neither been presented nor argued.

The testimony of the plaintiff complained of in appellant's second and third assignments of error relating to the extent of the damages done to his cattle seems to us to be fairly within the rulings made in the cases of *Railway Co. v. Eastin & Knox*, 39 Tex. Civ. App. 579, 88 S. W. 530; *O. R. I. & G. Ry. Co. v. Halsell*, 35 Tex. Civ. App. 126, 80 S. W. 140; *M., K. & T. Ry. Co. v. Cauble*, 174 S. W. 880; *M., K. & T. Ry. Co. v. Word*, 51 Tex. Civ. App. 206, 111 S. W. 753. At least under the circumstances shown and under the court's charge, no reversible error in this respect is shown.

No other question is presented that we deem it necessary to notice; but the judgment will be reversed, and the cause remanded, for the error noted.

OSVALD v. WILLIAMS. (No. 123.)

(Court of Civil Appeals of Texas. Beaumont. April 20, 1916.)

1. APPEARANCE \S 9(3)—GENERAL OR SPECIAL. Under Rev. St. 1879, art. 1243, providing that when the citation or service thereof is quashed on motion of defendant, the case may be continued for the term, but the defendant shall be deemed to have entered his appearance to the succeeding term of court, a special appearance of defendant in motion to attack a service has the same effect as a general appearance.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. \S 44; Dec. Dig. \S 9(3).]

2. APPEARANCE \S 24(1) — GENERAL OR SPECIAL.

Although there has been no service of process upon him, or void service without the state, the appearance of a nonresident defendant operates as an appearance for all purposes at the succeeding term of the court under Rev. St. 1879, art. 1243, and confers jurisdiction over his person, although such appearance be expressly limited to urging plea to the jurisdiction over his person; and when a nonresident defendant answers to the merits solely in the event that the court shall overrule his plea to the jurisdiction, and the plea to the jurisdiction is overruled, the court acquires jurisdiction of his person.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. \S 118, 119, 123–125; Dec. Dig. \S 24(1).]

3. MASTER AND SERVANT \S 6 — ACTIONS FOR COMPENSATION—EVIDENCE OF CONTRACT.

In action on a contract for compensation for services, evidence held to show that such contract was made.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 6; Dec. Dig. \S 6.]

4. PLEADING \S 248(4) — AMENDMENT — NEW CAUSE OF ACTION.

A complaint, in action for services in locating timber in a certain county, is not changed to a new cause of action by an amendment alleging that the timber was to be in plaintiff's neighborhood.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 701–706, 708½; Dec. Dig. \S 248(4).]

Appeal from Sabine County Court; J. B. Lewis, Judge.

Action by M. H. Williams against George Osvald. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 169 S. W. 185.

Hamilton & Hamilton and W. F. Goodrich, all of Hemphill, for appellant. J. W. Minton, of Hemphill, for appellee.

BROOKE, J. This suit was filed by Williams, plaintiff in the lower court, against the defendant, Osvald, who resided in Sabine parish, La. The allegations were that about the 1st day of January, 1912, the defendant entered into an oral contract with the plaintiff, by which the plaintiff obligated himself to assist the defendant in locating and purchasing oak trees suitable for making staves, in Sabine county, and to furnish the defendant information as to the location of oak timber suitable for making staves, and advised the defendant of the names of the owners of such oak timber, which defendant desired to purchase for the purpose of making staves, and that the defendant agreed for such services to pay the sum of 10 cents per tree to the plaintiff. The case was tried in the lower court, and appealed to the Court of Civil Appeals at Galveston, which reversed and remanded the case (169 S. W. 185), and upon its return, the plaintiff amended his petition, as follows:

"That on or about the 1st day of January, 1912, defendant entered into an oral contract with plaintiff, by which he obligated himself to assist the defendant in locating and purchasing oak trees suitable for making staves in Sabine county in the community in which he resided (italics ours), and to furnish the defendant with information as to the location of oak timber suitable for making staves, and to advise the defendant of the names of the owners of such oak timber, in the neighborhood in which he resided (italics ours), etc., for which defendant agreed with plaintiff to accept such service and pay therefor the sum of 10 cents per tree to the plaintiff, for all the oak timber purchased by the defendant in the neighborhood in which plaintiff resided."

The case was tried before the court, and resulted in a judgment for the plaintiff, M. H. Williams, for the sum of \$123.50. From this judgment appellant has perfected his appeal. However, it may be observed that a writ of

attachment was sued out in the beginning of the suit, and levied on property of the defendant found in Sabine county, Tex.; that upon a final trial in the county court of Sabine county, the attachment was quashed. The defendant appeared, filed a motion to quash the attachment, and answered by general and special exceptions, and general denial, and cross-action, asking judgment against the plaintiff in the sum of \$125 for the illegal suing out of the attachment.

[1] By his first assignment, appellant challenges the action of the court below in forcing him to answer after the writ of attachment had been quashed, contending that the court only had jurisdiction over the person of defendant by reason of the attachment writ. It has been held when the defendant appeared and excepted to the jurisdiction of the court, and moved to quash the attachment, stating that he appeared for the purposes expressed therein alone, and in his other answer, he stated that it was filed without any intention of waiving his other plea, and that he thus answered to the merits only in the event they should be overruled, that this pleading of the defendant entered his appearance and gave the court jurisdiction over his person. *Grizzard v. Brown*, 2 Tex. Civ. App. 584, 22 S. W. 252. Article 1243, Revised Statutes 1879, provides:

"When the citation, or service thereof, is quashed, on motion of the defendant, the case may be continued for the term, but the defendant shall be deemed to have entered his appearance to the succeeding term of the court." *York v. State*, 73 Tex. 651, 11 S. W. 869.

Under this act it is held that it gave to a special appearance of defendant, for the purpose of objecting to the service of citation upon him, the effect of a general appearance to the succeeding term of the court. *I. & G. N. Ry. Co. v. Brett*, 61 Tex. 483-486; *Jones v. Keith*, 22 S. W. 773; *Texas, etc., Ry. Co. v. Childs*, 40 S. W. 41, 42. This statute introduced a change in the practice of this state. It gave to a special appearance of defendant, made in his motion attacking the service, the same effect as would have followed a general appearance, prior to its enactment. *Aetna Life Ins. Co. v. Hanna*, 81 Tex. 487, 17 S. W. 35.

It was also held that it is not the fact that the motion to quash the citation of service is sustained or overruled which operates as an appearance, but it is the fact that a defendant appears and asks an adjudication, which makes the appearance. *Fairbanks & Co. v. Blum*, 2 Tex. Civ. App. 479, 21 S. W. 1009.

It has also been held that whenever the service of a proper process will clothe the court with jurisdiction over the person of the defendant, then that which is deemed in law an appearance by the defendant will confer on the court a like power. *York v. State*, 73 Tex. 651, 11 S. W. 869.

[2] Although there has been no service of process upon him, or void service upon him without the state, the appearance of a non-

resident defendant operates as an appearance for all purposes at the succeeding term of the court, and confers jurisdiction over his person. *Schneider v. Gray*, 7 Tex. Civ. App. 25, 26 S. W. 640; *Penfield v. Harris*, 7 Tex. Civ. App. 659, 27 S. W. 762; *Loeb v. Crowe*, 15 Tex. Civ. App. 537, 40 S. W. 506; *Cassidy v. Willis*, 33 Tex. Civ. App. 289, 78 S. W. 40; *Lucas v. Patton*, 49 Tex. Civ. App. 62, 107 S. W. 1143; *Evans v. Breneman*, 46 S. W. 80.

The rule applies, although such appearance be expressly declared to be limited to the sole purpose of urging plea to the jurisdiction of the court over his person, and when a nonresident defendant answers to the merits solely in the event that the court shall overrule his plea to the jurisdiction, and the plea to the jurisdiction is overruled, the court acquires jurisdiction of his person. *Liles v. Woods & Co.*, 58 Tex. 416; *Piedmont Life Ins. Co. v. Fitzgerald*, 1 White & W. Civ. Cas. Ct. App. § 1345; *Pace v. Patter*, 20 S. W. 928.

In the case of *Green v. Hill*, 4 Tex. 465, plaintiff sued out an original attachment, but did not pray for personal service. The court having quashed the attachment on motion, the defendant, who had come in without service, and filed an answer to the petition, first, for general denial of all matters and things in the petition, and, second, set-off in reconvention, moved the court to dismiss the suit, held that, had the defendant not filed his answer, the motion should have been sustained, but, as it was, the motion was properly refused.

It was also held that, where the plaintiff and defendant were nonresidents, and the suit was commenced by attachment, the defendant having appeared and answered to the merits and obtained a continuance, afterwards the attachment was quashed, and the defendant moved to dismiss the suit for want of jurisdiction, he had submitted to the exercise of jurisdiction over his person. *Campbell v. Wilson*, 6 Tex. 379; *Primrose v. Roden*, 14 Tex. 1.

We are of the opinion that there was no error in the court's action, and that it had jurisdiction over the person of the defendant.

The third, fourth, fifth, sixth, seventh, and eighth assignments complain of the action of the court in its findings on the facts. We have examined the record closely, and find that there is evidence to support the findings of the court, and we are not disposed to disturb the same. Therefore these assignments are overruled.

The ninth assignment complains that the court committed error as a matter of law in allowing Williams commission on the 1,033 oak trees at 10 cents per tree, together with \$20 attorneys' fees and costs of suit. There is testimony to support both findings, and this assignment is therefore overruled.

[3] By the eleventh assignment of error, the action of the lower court is assailed in

rendering judgment against the defendant for the sum of \$103.50, together with interest and attorney's fees, because it is contended that the evidence was that the minds of the parties did not meet in making the contract, as alleged. The testimony of M. H. Williams, which was corroborated by Robert Williams, who was present when the alleged contract was made, was to the effect: That one Sebastian Cinkovic came to his house and told him he was the agent of Mr. George Osvald, and wanted to buy for Mr. Osvald all the oak trees suitable for making staves that he could get, and told him that he would give him 10 cents per tree for all the trees he could buy and work up into staves in the neighborhood where he lived, and asked if he would help and assist them in buying the timber and let them have the timber he had under contract, and he told them that he would accept that proposition, and help them, and let them have what timber he controlled. That he made a trade for Mr. Wright's timber, and Mr. Osvald bought it; that is, marked it up and paid him 10 cents per tree. That he also traded for some timber for Mr. Osvald for Mr. Neal, Mr. Alford, and Mr. Reeves, and that he was paid his commission promptly, ten cents per tree. That he heard later that they had cut more of Mr. Reeves' timber than he had received commission on. In making this trade with Mr. Osvald it was understood that if he bought any oak trees from Williams, he was not to pay the commission of 10 cents per tree, and that he did buy some trees from him; that is, on his land. That they also bought the timber on 236 acres of land, a part of the James Mason league, about 1½ miles from where Williams lived, from Mr. W. W. Lawson, and worked up the trees into staves, but did not pay him his commission; and that he waited some time and met Mr. Osvald and asked him if he was going to pay him for the Lawson trees, and also asked him how many trees they had worked up, and that Osvald said there were 400 trees worked up on the Lawson tract; and that Mr. Sebastian Cinkovic would be over the next week and pay him, but that he was not paid; and that he went and got Jeff Vickers; and that he and Vickers counted the trees that had been worked up, and they had cut 1,035 trees; and that he considered he owed him under the trade and contract the sum of \$103.50; and that he brought suit in the justice court of precinct No. 8, Sabine county, Tex. That he employed Mr. J. W. Minton to bring this suit, and would have to pay him.

The testimony of J. W. Minton was as follows:

"I made legal demand upon the defendant for plaintiff more than 30 days before the filing of the case in the justice court of precinct No. 8 in Sabine county for the amount sued for here, as required by law in such cases. Twenty dollars

is a reasonable fee for representing the plaintiff in this case."

It is impossible for us to know what was in the minds of the parties, except from statement of the witnesses. From the testimony of the Williamses, father and son, which the court that tried the case seems to have relied upon, the contract was plain and simple, and no apparent reason exists why any ordinary mind should not comprehend the terms of the agreement. Therefore, as the trial court gave credence to the testimony, and as the witnesses were present, and it being its province to pass upon their credibility, we are unwilling to disturb its findings. This assignment is therefore overruled.

[4] More than two years elapsed from the time of the filing of the original petition, and the first amended original petition, and it is earnestly insisted that the first amended original petition set up a new and different cause of action. It will be noted that the only difference practically between the allegations of the original and the first amended original petition is the additional allegation that the timber was not only to be in Sabine county, but that it was to be in the neighborhood in which plaintiff resided. We do not believe that either the authorities or sound reason sustain the contention of the appellant. Instead of a new and different cause of action, the first amended original petition was between the same parties, for the same consideration, and in all respects identical save and except as above set out. Therefore we are constrained to hold that it was not a new and different cause of action from that pleaded in the original petition. We are not unmindful of the opinion handed down by the Court of Civil Appeals at Galveston in this case, reported in 160 S. W. 185, and we do not understand that there is any conflict between the principles announced in that case and the principle here announced. The court in that case says:

"It is well settled that facts not alleged, though proved, cannot form the basis of a judgment, * * * and that a judgment not responsive to the pleadings will be set aside."

The proof in that case was identical as here; that is, the contract embraced oak timber in Sabine county and in the neighborhood where plaintiff lived.

In deference to appellant's able brief and argument, we have carefully considered all matters raised by appellant's assignments, and while the testimony is, perhaps, lacking in some respects, still, as before said, we are not willing on this account alone to disturb the judgment of the lower court.

Believing that no reversible error has been committed in the trial of this case, the appellant's assignments of error are overruled, and the judgment is, in all things, affirmed. It is so ordered.

HAMLET v. LEICHT. (No. 90.)

(Court of Civil Appeals of Texas. Beaumont.
April 27, 1916.

1. APPEAL AND ERROR §797(3)—RECORD ON APPEAL — MOTION TO DISMISS — TIME FOR FILING.

Under rule 8 (142 S. W. xi), as to waiver of objections to informalities, if motion to dismiss for failure to file briefs in time is not filed within 30 days after filing the transcript, it is too late, and will be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3153; Dec. Dig. §797(3).]

2. DESCENT AND DISTRIBUTION §119(1)—LIABILITY OF HEIRS—NOTE OF DECEDENT.

The surviving wife of the deceased maker of a note is not personally liable thereon, but the creditor should proceed against the property of the decedent in her hands to establish a lien thereon.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 224, 433, 434, 438, 439; Dec. Dig. §119(1).]

3. DESCENT AND DISTRIBUTION §146—LIABILITY OF HEIRS—NOTE OF DECEDENT—ACTIONS—PETITION—SUFFICIENCY.

A petition seeking recovery on a note of decedent as against his surviving wife is insufficient if it fails to show what specific property of the estate was received by her, or that the estate was solvent, or fails to seek foreclosure of a lien on specific property of the estate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 508-510; Dec. Dig. §146.]

Error from Jefferson County Court; D. P. Wheat, Judge.

Action by George H. Leicht against Mrs. Pauline Hamlet. From a personal judgment by default against defendant, she brings error. Reversed and remanded.

J. V. Fleming and J. W. O'Neal, both of Beaumont, for plaintiff in error. David E. O'Fiel, of Beaumont, for defendant in error.

CONLEY, C. J. [1] We are confronted with a motion to dismiss this appeal, for the reason that briefs of plaintiff in error were not filed within the time prescribed by law. The rules require motions of this character to be filed within 30 days after the filing of the transcript in the Court of Civil Appeals. Rule 8 (142 S. W. xi). The transcript was filed in this court November 30, 1915. The motion to dismiss the appeal, for the reason above stated, was not filed until February 23, 1916. The motion, having been filed too late, is overruled.

This suit was originally instituted in the county court at law of Jefferson county by George H. Leicht, defendant in error, against Pauline Hamlet, a feme sole, plaintiff in error. The cause of action was on a promissory note executed by W. R. Hamlet, deceased husband of the plaintiff in error, and delivered to George H. Leicht by him during his lifetime. The petition of defendant in error alleged the execution of the note and its delivery by W. R. Hamlet, and the liability and obligation of said W. R. Hamlet

to pay the same, according to the face thereof, that since the execution and delivery of the note the said W. R. Hamlet had departed this life, without leaving any lawful heirs of his body, or any other heir at law than Mrs. Pauline Hamlet, that there had been no administration and no necessity therefor, there being no other debts or obligations against the said estate, that Mrs. Pauline Hamlet was in possession of and controlling and managing all the properties of the estate; that the note was past due, and that the said Pauline Hamlet had refused to pay the same, and prayed for personal judgment against her for the amount of said note. The plaintiff in error, Pauline Hamlet, filed an answer, consisting of a general demurrer and general denial.

The case was tried before the court without a jury, and resulted in a personal judgment by default against Mrs. Pauline Hamlet for the amount of the note sued on, principal, interest, and attorneys' fees, and costs of court. From this judgment she has perfected a writ of error to this court, and the judgment is now before us for revision.

[2] The first assignment of error attacks the court's action in rendering judgment in personam against her, and in not sustaining the general demurrer to the petition. This assignment is well taken, and will be sustained.

The plaintiff in error is not personally liable on said note. Heirs, devisees, and legatees who receive property belonging to an estate against which unpaid claims exist do not thereby become personally liable to the claimants for the value of the property so received; the remedy being to enforce a lien against the property in their hands. In a case of this kind the petition should show what specific property came into the hands of the plaintiff in error, so that a lien may be fixed, if other conditions exist which authorize it, on such property, and that a proper judgment might be entered for the foreclosure of such lien. *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931.

[3] The petition in this case does not set out any specific property received by the plaintiff in error from the estate of her deceased husband, nor does it in terms allege that she received any property of any kind, nor the value of same, nor that said estate was solvent, nor does it seek to fix or foreclose a lien on such property, but prays for a personal judgment against the plaintiff in error for the full amount of the note. It is wholly lacking in the essentials necessary to authorize a suit of this character against plaintiff in error.

Although the petition alleges that W. R. Hamlet died intestate, leaving Mrs. Hamlet as sole heir, that there had been no administration on his estate, and no necessity there-

for, and that the debt sued on was the only debt against the estate, yet in the trial of this cause the defendant in error introduced the deposition of Mrs. Hamlet, in which she testified, among other things:

"W. R. Hamlet departed this life November 17, 1913. * * * W. R. Hamlet left a will at his death which made me the executrix and sole or partial devisee of all of his estate. He did not have a home at the time of his death, nor did he have any land at the time. * * * I cannot tell what debts were due by W. R. Hamlet or this estate, except from the memorandum contained in the inventory. * * * Mr. Hamlet did not leave an estate perfectly solvent, and in value amounting to more than sufficient to have discharged any and all indebtedness owed by him, without taking into account the exemptions claimed by myself as the surviving widow."

It is therefore to be seen that even such allegations as were made in the petition are not sustained by the proof.

The judgment will be reversed, and the cause remanded; and it is so ordered.

McDONALD v. AETNA LIFE INS. CO. OF HARTFORD, CONN. (No. 7182).*

(Court of Civil Appeals of Texas, Galveston. May 25, 1916. Rehearing Denied June 29, 1916.)

1. APPEAL AND ERROR ⇨1066 — HARMLESS ERROR—INSTRUCTIONS.

Where the beneficiary gave a receipt in full of two life policies which recited that she voluntarily made and understood the settlement for one-half their face value, the question whether her relatives, who negotiated the compromise, were her authorized agents, is immaterial, so that an instruction that they were her agents, even if erroneous, is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ⇨1066.]

2. INSURANCE ⇨579—LIFE INSURANCE—COMPROMISE—GOOD-FAITH CONTROVERSY.

All that is required to validate a compromise on a life policy is that the beneficiary understand the settlement and that the insurer act in good faith in disputing the claim, and the ground of dispute need not be brought home to the beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1417, 1419; Dec. Dig. ⇨579.]

3. APPEAL AND ERROR ⇨1066 — HARMLESS ERROR—INSTRUCTIONS.

Where the beneficiary gave a receipt in full of two life policies which recited that she voluntarily made and understood the settlement for one-half their face value, the question whether the controversy between the insurer and her relatives as to the cause of insured's death was to be considered as if between herself and the insurer was immaterial, and an instruction that it should be so considered was without prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ⇨1066.]

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Action by Mrs. Minnie E. McDonald against the Aetna Life Insurance Company of Hartford, Conn. Judgment for defendant, and plaintiff appeals. Affirmed.

King & Hughes, of Galveston, Harry Tom King, of Abilene, and H. C. Hughes and R. L.

Pillow, Jr., both of Galveston, for appellant. Baker, Botts, Parker & Garwood and Jno. C. Townes, Jr., all of Houston, and W. T. Armstrong, of Galveston, for appellee.

PLEASANTS, C. J. This suit was brought by appellant against the appellee to recover upon two insurance policies for the sum of \$8,750 each issued by appellee, and by which it insured appellee's deceased husband, John C. McDonald, against death by accidental means in the sums named in said policies.

The plaintiff's original petition set up the policies and set up the death of the insured on the 8th day of December, 1914, by accidental means, to wit, from gas asphyxiation. Said petition gave credit for one-half of the principal sum paid to the plaintiff, and asked judgment for the balance, \$8,750, together with 12 per cent. penalties and an attorney's fee of \$2,500.

Defendant in its first amended original answer admitted the issuance of the policies and the death of the insured, but denied the cause of the death, alleging that same was not due to an accident, but to natural causes. It also set up the insurer's right to an autopsy, the failure of the plaintiff to permit an autopsy, and the forfeiture of the policies thereby, and further alleged, among other defenses, that they had paid \$8,750 in full and final settlement of all claims due under the policies as a compromise thereof, and that there was nothing due from the defendant to the plaintiff on account of said settlement and adjustment, attacking a release to the answer which recited full settlement of the two policies for the sum of \$8,750, said release being dated January 4, 1915, and in that connection set up that the negotiations leading up to the settlement were carried on by P. B. Eyler, representing the defendant, and J. W. Carson and Capt. Robertson, representing the plaintiff; that said parties were agents of the plaintiff authorized to represent her in said negotiations; that the agent of the defendant, after investigating the facts surrounding the death of Mr. McDonald, reached the conviction that he did not die from accidental causes, and urged said defense prior to the making of said settlement in good faith believing it to be a substantial defense or a doubtful question; that a dispute or controversy as to the liability of the defendant company was raised; and that said controversy was bona fide, and was maintained in good faith upon the part of said Eyler and the said defendant. They also set up the intemperance of the deceased.

Plaintiff by first supplemental petition set up the facts in regard to the autopsy, which, however, was not made an issue in the trial of the case. She denied that there was any good faith in the contention that her husband had not died from accidental means

or that said defense was bona fide or set up in good faith. She further denied that Robertson and Carson were her agents, and stated that they were not directed or appointed by her to make any settlement with the insurance company; that she was never at any time informed as to what took place between Robertson, Carson, and Eyler, and could not and did not ratify the transaction between them and Eyler. She admitted that she signed a release, but set up that the amount due her was a liquidated demand, and that the insurance company was at the time of said settlement and at all times due her \$17,500, and that the \$8,750 was simply a payment upon same, and that there was no consideration for said release.

By first supplemental answer defendant denied the matters and things set up in the foregoing pleadings of the plaintiff, and especially denied that the plaintiff was without knowledge of the negotiations between Eyler, representing the defendant, and Mr. Robertson and Mr. Carson.

The cause was submitted to a jury in the court below upon the following special issues:

"(1) Did John C. McDonald die from gas asphyxiation? Answer 'Yes' or 'No.'

"If you answer the foregoing interrogatory 'No,' you need not answer further.

"(2) Was there any good-faith controversy between the parties as to the cause of his death at the time of settlement? Answer 'Yes' or 'No.'

"(3) At the time the settlement was made, or during the negotiations with Mr. Robertson or Mr. Carson leading up to same, was the contention of Mr. Eyler to the effect that Mr. McDonald's death was not due to gas asphyxiation made by the said Eyler in good faith in the belief that his contention was well founded or in the belief that it presented a doubtful question? Answer 'Yes' or 'No.'

"If you answer either of the second or third interrogatories 'Yes,' you need answer no further."

The jury answered "Yes" to first and second questions, and upon the return of such verdict judgment was rendered in favor of the defendant.

The following facts were shown by the evidence:

On the night of December 8, 1914 (while the policies in question were in force and effect), John C. McDonald died suddenly, in the bathroom of his home, in Galveston, Tex. There was no one present when Mr. McDonald was stricken, and he was in an unconscious and dying condition when discovered by members of the household.

J. A. Robertson, a relative of Mrs. Minnie E. McDonald, the widow, prepared proofs of death for her signature, and attended to transmitting them to the company. The proofs of death showed the contention of Mrs. McDonald to be that her husband had been accidentally asphyxiated by gas. Four or five days after the proofs of death were transmitted to the insurance company, its chief adjuster, Mr. P. E. Eyler, went to

Galveston for the purpose of investigating the claims and ascertaining, if possible, the cause of death. Upon Mr. Eyler's arrival in Galveston he was taken to the home of deceased by the said J. A. Robertson, where, after meeting Mrs. McDonald, he, in the presence of Mr. Robertson and one of the ladies of the household, made tests of the gas heater. Mr. Eyler interviewed the doctors that had been called to see Mr. McDonald on the occasion of his death, and after completing his investigation informed the said Mr. Robertson that he did not believe that the death of the deceased was due to gas asphyxiation or other accidental cause, and that his investigation had lead him to believe that death was probably due to apoplexy or other disease.

Mr. Robertson, assisted by Mr. J. W. Carson, son-in-law of the widow, and administrator of the estate of the deceased, endeavored to secure from Mr. Eyler payment of the policies in full. Mr. Eyler refused to pay the policies for the alleged reason that he did not believe the death was due to violent, external, and accidental means. Mr. Eyler further contended, in discussing the claims with Mr. Robertson and Mr. Carson, that the insurance company was entitled to an autopsy upon the body of the deceased, and that it was his purpose to demand that same be held; there being a provision in the policies providing therefor.

Mr. Robertson began negotiations for a settlement with Mr. Eyler, and the matter of compromise was discussed a number of times between Mr. Eyler, Mr. Robertson, and Mr. Carson, with the result that Mr. Eyler finally agreed to pay \$8,750 in settlement of the controversy. Mr. Robertson and Mr. Carson then took the matter up with the widow, and the claims were settled on the basis mentioned, under date of January 4, 1915. Before the payment to appellant of the \$8,750 she executed the following release:

"Galveston, Tex., January 4, 1915.

"Received from the Aetna Life Insurance Company, Hartford, Conn., the sum of eight thousand seven hundred and fifty dollars (\$8,750.00), which I hereby and now do accept in full compromise settlement and discharge of all claims I now have or may hereafter have, under accident policies Nos. B. 240360 and 785885, issued by said company on the life of my deceased husband, John C. McDonald, who died December 8, 1914, at his home in the city of Galveston, Tex.

"I clearly understand that by the acceptance of this settlement I am relinquishing to said company one-half (1/2) of my claim as made and presented for payment under the foregoing numbered policies.

"I have not been approached by any representative of the Aetna Life Insurance Company concerning this settlement, having relied upon my son-in-law, Mr. J. W. Carson, who has negotiated this settlement with your adjuster, P. E. Eyler, for me.

"I hereby surrender the above numbered policies to said company for cancellation.

"Minnie E. McDonald.

"Witnesses:

"J. W. Carson.

"J. A. Robertson."

The amount agreed upon by way of compromise was promptly paid to appellant and was accepted and retained by her, and has never been tendered back to the insurance company. Neither Mr. Eyler nor any other agent of the insurance company discussed the matter of compromise with the widow personally, nor was any one representing the insurance company present at the time the release was signed; all of the negotiations being had between Mr. Eyler, for the insurance company, and Mr. Robertson and Mr. Carson, acting in behalf of the widow. There is ample evidence to sustain each of the findings of the jury above set out.

[1] The first assignment of error presented by appellant complains of the following paragraph of the charge given the jury:

"You are instructed that in so far as Messrs. Carson and Robertson acted in Mrs. McDonald's behalf in negotiating the settlement with Mr. Eyler, the company's agent, they were authorized by Mrs. McDonald to do so. And whatever statements Mr. Eyler as such agent made to them having relation to his refusal to pay the full amount of the policies are notice to her the same as if made to her personally."

The ground of the complaint is that the evidence was conflicting upon the question of whether Robertson and Carson were the agents of appellant in negotiating the settlement with appellee, and it was therefore error for the court to instruct the jury that they were such agents. Both Robertson and Carson testified that they were not the authorized agents of appellant in the negotiations carried on by them in effecting the settlement of appellant's claim, but were volunteers acting in the matter because of their friendly interest in appellant's welfare, and that in discussing the matter with appellee's agent they told him they were not authorized to make any settlement. This evidence is uncontradicted, but the uncontradicted evidence further shows that when the offer of \$8,750 was made by appellee to Robertson and Carson they reported the offer to appellant, and she agreed to accept it, and they then returned to appellee's agent and accepted the offer for appellant, and brought her the receipt above set out, which she signed, and upon the execution of which the money was paid to her. Plaintiff testified as to the final settlement as follows:

"When Mr. Robertson and Mr. Carson came back they told me that they had had up the question of settlement of the accident policy with Mr. Eyler, and that Mr. Eyler had told them to say to me that the company would pay \$8,750 on account of the accident policies, and no more; that it was a lawsuit; take nothing or take \$8,750. That was the effect of what Capt. Robertson told me. I said in reply that, 'If that is all he will give me, if that is all they will give me, while I am entitled to all of it, if that is all they will give me, I guess I will have to take it.' Capt. Robertson and Mr. Carson then left, and later they brought back settlement papers for me to sign and I received the draft and signed the papers."

Upon these facts we fail to see how the question of whether Robertson and Carson

were especially authorized to discuss and negotiate with appellee's agent the settlement of the claim has any bearing upon the validity of the compromise of the claim, or is in any way material in determining appellant's right to recover, and, if it be conceded that the charge is erroneous, the error was clearly immaterial and harmless. The receipt before set out recites that in making the settlement and compromise appellant relied upon her son-in-law, Mr. Carson, who had negotiated the settlement for her. There is no allegation nor proof that the receipt was obtained by fraud, or that appellant did not fully understand all of its recitals, and knew that appellee was paying her \$8,750 as a compromise of her claim.

[2] Counsel for appellant insist that, unless the claim of appellee that appellant's husband did not die from accidental means was made to appellant or her authorized agent, there could have been no good-faith controversy between the parties, and the payment of one-half of the amount due on the policies cannot be regarded as a binding compromise or settlement of a disputed claim. We know of no such rule of law. All that was required to make the settlement binding was that appellant should understand that the money was paid to her in compromise of her claim, and that appellee, in claiming that it was not liable on the policies, acted in good faith. The receipt recites that the money paid by appellee was in compromise of appellant's claim. She knew that appellee had refused to pay more than one-half of the amount of the policies, and that unless this amount was accepted she would have to resort to a suit to collect anything on the policies. Now can it be said, under these facts, that appellant did not know when she accepted the \$8,750 that appellee was claiming it was not liable on the policies? If notice to appellant of the specific grounds upon which appellee denied liability on the policies was necessary to make the settlement binding, we think the evidence as a whole leads irresistibly to the conclusion that she had such notice, and she does not deny in her testimony that she knew that appellee claimed that her husband died from natural causes.

The testimony as to the cause of the death of appellant's husband was conflicting, and, while the finding of the jury that he died from gas asphyxiation is sustained by the apparent preponderance of the evidence, there is ample evidence to sustain the finding that appellee's claim that he died from natural causes was made in good faith. There is no merit in the assignment, and it must be overruled.

[3] The second assignment complains of the following special charge given at the request of appellee:

"In answering issue No. 2 submitted to you by the court you are instructed that a controversy, if any there was, between the agents of

defendant and Mr. Carson and Capt. Robertson as to the cause of the death of Mr. McDonald, shall be considered by you as a controversy between the parties to this suit."

What we have said in discussing the first assignment disposes of this assignment. The evidence shows conclusively that appellee denied liability on the policies and offered the sum of \$8,750 in compromise of the claim, and that appellant, with full knowledge of the fact that the offer was made in compromise of a disputed claim, accepted the amount offered in compromise and released appellee from all further liability. The evidence being amply sufficient to sustain the finding of the jury that appellee's denial of liability was made in good faith, which, includes a finding that there was no fraud, misrepresentation, or concealment on the part of appellee in obtaining the compromise and settlement of the claim, the question of whether the controversy between Robertson and Carson and appellee's agent should be considered a controversy between appellant and appellee was wholly immaterial. The charge complained of could not possibly have affected the finding of the jury upon the good faith of appellee in denying liability on the policies, and, as the recitals in the receipt and appellant's own testimony conclusively show that she knew when she accepted the \$8,750 that it was paid her in settlement of a disputed claim, the controversy between Robertson and Carson and appellee's agent could not affect the character of the settlement as a voluntary compromise of her claim. We think the undisputed evidence brings the case within the rule announced in the case of *Gilliam v. Alford*, 69 Tex. 267, 6 S. W. 757.

The third and fourth assignments are without merit and are overruled without discussion.

We are of opinion that the judgment of the court below should be affirmed; and it has been so ordered.

Affirmed.

KEELS v. ASHWORTH. (No. 121.)

(Court of Civil Appeals of Texas. Beaumont. April 20, 1916.)

1. PARTNERSHIP \S 296(3)—LIABILITY OF REMAINING PARTNER ON NOTE.

On the issue of liability of a remaining partner who assumed the debts of the firm on a note executed by a withdrawing partner, whether \$5.50 of the proceeds thereof was used to pay firm debts was immaterial; it appearing that the note was known by the partners at time of dissolution to be part of the firm indebtedness.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. \S 662, 673; Dec. Dig. \S 296(3).]

2. PARTNERSHIP \S 239(1)—RETIREMENT—DISSOLUTION AGREEMENT.

A dissolution agreement obligating the remaining partner to pay all the firm debts, he was liable on a note, although signed by the partner who had withdrawn, since all but \$5.50 of the proceeds of the note went to pay for a

car of flour used by the firm and the remaining partner knew of the note at the time of dissolution.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. \S 495; Dec. Dig. \S 239(1).]

Appeal from District Court, Trinity County; S. W. Dean, Judge.

Action by the First National Bank of Groveton against J. C. Keels and another. Defendant R. Ashworth answered and set up a cross-action against the named defendant. From a judgment for defendant Ashworth on his cross-action, the named defendant appeals. Affirmed.

R. E. Minton, of Groveton, for appellant. Poston & Dotson, of Groveton, for appellee.

BROOKE, J. This was a suit upon a note instituted by the First National Bank of Groveton, against J. C. Keels, appellant, and R. Ashworth, appellee, who at the time the note sued upon was executed composed a trading partnership. The note was executed in the firm name by R. Ashworth. Ashworth answered and set up a cross-action against his codefendant, Keels, alleging a partnership dissolution agreement by reason of which Keels assumed the payment of all obligations and indebtedness owing and due by the firm of Keels & Ashworth, and alleging that the note was such character of indebtedness, and asking for a judgment against his codefendant, Keels. Keels answered, denying the execution of the note by himself or by any one duly authorized by him, pleaded the want of consideration, and that said note was without the knowledge or consent of appellant, given in renewal of the note, executed by R. Ashworth individually, and further answering that, when the note sued upon was brought to his knowledge, he repudiated it. Appellant further answered that appellee, Ashworth, was given credit, as capital stock of the proceeds of the original note executed by Ashworth individually, and that said note given in the firm name was not within the contemplation of the partnership settlement, and was understood by appellant and appellee to be an individual indebtedness of R. Ashworth. Judgment was rendered in favor of plaintiff bank, against the defendants jointly and severally, and in favor of appellee, Ashworth, over against appellant. No complaint is made in this appeal of judgment in favor of plaintiff, the First National Bank of Groveton, the complaint being limited to that portion of the judgment in favor of appellee, Ashworth, against the appellant, J. C. Keels.

[1, 2] By the first assignment of error, complaint is made that the court erred in its fifth finding of fact, wherein it finds that the balance of said money so received by the said Ashworth on said note, to wit, the sum of \$5.50, was used by the said Ashworth to pay other debts of the said firm of Keels &

Ashworth, and claiming that there was no evidence to support the said finding. The view we take of this case, we do not think it a material matter whether the finding of the court on this proposition was correct or incorrect. To say the least, it was a part of the outstanding indebtedness of the firm of Keels & Ashworth, and was known so to be at the time of the dissolution of the partnership. The articles of dissolution are substantially as follows: On the 2d day of January, A. D. 1915, Keels and Ashworth entered into a contract in writing dissolving the said partnership of Keels & Ashworth, whereby the said Ashworth bargained, sold, and delivered to the said J. C. Keels all of the goods, wares, and merchandise, furniture, accounts, and fixtures, and all property, real, personal or mixed, wheresoever situated, belonging to the firm of Keels & Ashworth, and all the interest in said property, whether real, personal, or mixed, belonging to the said R. Ashworth, and in consideration for said sale the said Keels, among other things, assumed all the obligations and indebtedness owing and due or to become owing and due of the firm of Keels & Ashworth, and said J. C. Keels agreed to bind and obligate himself to pay off and satisfy all outstanding indebtedness of said Keels & Ashworth, as said indebtedness might become due and payable, and release the said R. Ashworth from liability on account of any of the indebtedness of said firm, and agreed and bound himself to protect said R. Ashworth from liability on any indebtedness and obligation of said firm. The note sued upon by the bank was a firm debt, of said Keels & Ashworth. The larger part of said note, by the undisputed evidence, went to pay for a car of flour used by the said firm. Therefore, as said above, while the testimony is very meager and circumstantial as to what became of the \$5.50, which was the excess amount in said note over that expended for the car of flour, still, for the purposes of this suit, it might be presumed, as found by the court, that the said \$5.50 was used to pay other debts of the firm of Keels & Ashworth. This assignment is therefore, overruled.

By the second assignment, the action of the lower court is challenged in finding that the original note executed by Ashworth and the second note given in renewal of the first were each indebtedness of the firm of Keels & Ashworth, as between the members of the firm, and was an obligation of the firm, within the contemplation of the dissolution contract, and such as the appellant agreed to assume the payment of by such contract. There is no question that the record shows that appellant was aware, at the time of the dissolution contract, that this note, which was first given by Ashworth, and which was afterwards renewed by the signing of the firm name, was an outstanding indebtedness

of the firm. The finding of the court that the same was so considered as between the members of the firm and within the contemplation of the dissolution contract is supported by the evidence. There was no pleading of any contract or special agreement between Keels and Ashworth, alleging that Ashworth agreed not to execute the note for or in the name of Keels & Ashworth, or any allegation, that Ashworth had agreed not to borrow money on credit of the firm. The terms of the dissolution agreement, according to the ordinary signification of the words used therein, are broad enough to cover and include the note sued on.

The third assignment assails the action of the court below in its finding of fact, wherein it concludes that Ashworth had authority to execute the notes in question. There is no question that the said finding is correct, as a matter of law, and under the evidence in this case. The assignment is therefore overruled.

In his fourth assignment of error, it is complained that the court erred in its findings of fact, wherein it concludes that Keels assumed the payment of the debt upon which this suit was brought, and is liable therefor as between himself and Ashworth. As said above, the dissolution agreement itself supports the finding, and we see no reason, from a careful inspection of this record, that would justify us in finding otherwise. The assignment is therefore overruled.

The appellant has, indeed, filed a most able, ingenuous, and plausible brief and argument in support of his contention, but after a careful examination of the entire record, we are of opinion that the case was correctly tried, and no such error is found that would authorize us to disturb the action of the court below.

The case is, in all things affirmed; and it is so ordered.

PEVITO v. SOUTHERN GAS & GASOLINE ENGINE CO. (No. 118)*

(Court of Civil Appeals of Texas, Beaumont.
April 20, 1916. Rehearing Denied
July 3, 1916.)

APPEAL AND ERROR ~~1191~~ — FAILURE TO HAVE MANDATE ISSUED—REFUSAL TO REINSTATE.

Where a cause was reversed and remanded by a Court of Civil Appeals, and no mandate issued within a year, the trial court, a district court, properly dismissed the cause and refused to reinstate it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4646; Dec. Dig. ~~1191~~.]

Appeal from District Court, Orange County; A. E. Davis, Judge.

Action by S. H. Pevito against the Southern Gas & Gasoline Engine Company. From a judgment dismissing and refusing to reinstate the action, plaintiff appeals. Judgment affirmed.

Holland & Holland, of Orange, for appellant. L. R. Bryan, of Houston, for appellee.

BROOKE, J. This is an appeal from a judgment of the district court of Orange county, dismissing and refusing to reinstate this cause, because of the failure to have a mandate issued within one year from the Court of Civil Appeals for the First District, wherein the cause was reversed and remanded. In resisting the dismissal and in support of motion to reinstate, appellant presented a statement of facts found by the trial court to clearly entitle him to the relief, and the trial court dismissed the cause and refused to reinstate the same, on the expressly limited ground that the statute was mandatory, and that the court was without discretion in the matter. The sole question to be determined is whether or not, where on appeal a cause has been reversed and remanded, and no mandate has been issued within one year, the trial court has the power to refuse to dismiss the cause, or reinstate the same upon good cause shown therefor.

The first assignment of error challenges the action of the lower court in dismissing the cause and refusing to reinstate the same, and appellant's proposition is that, where no mandate has been issued within one year after a cause has been reversed and remanded, it is within the power of the trial court to refuse to dismiss, or, after dismissal, to reinstate the cause for trial, for sufficient cause shown therefor.

The appellant filed the certificate of the clerk of the Court of Civil Appeals at Galveston in this language:

"Court of Civil Appeals, First Supreme Judicial District, Galveston, Texas.

"I, H. L. Garrett, clerk of the Court of Civil Appeals, First Supreme Judicial District of Texas, do hereby certify that on June 13, 1912, cause No. 6026, Southern Gas & Gasoline Engine Company v. S. H. Pevito, on appeal from district court of Orange county, was reversed and the cause remanded by said Court of Civil Appeals; and I further certify that on October 11, 1912, the motion for rehearing in said cause theretofore (to wit on July 1, 1912) filed in said Court of Civil Appeals was in all things overruled;

"I further certify that the costs of said appeal were taxed against the said S. H. Pevito, and that the same have not been paid, and I further certify that on account of said non-payment of costs no mandate has even been issued in said cause. I further certify that the year allowed by the statute within which costs may be paid and mandate issued has expired, the final order in said cause being the order overruling motion for rehearing, which order, as aforesaid, was entered on October 11, 1912.

"In testimony whereof, I have hereunto set my hand and affixed the seal of court, this October 14, 1913. H. L. Garrett, Clerk Court Civil Appeals, First Supreme Judicial District of Texas, at Galveston. [Seal.]"

Appellant filed verified plea, resisting the motion to dismiss, and, in the event of the cause being dismissed, then he moved in the verified plea that the cause be reinstated.

The trial court filed its findings of fact and conclusions of law, as follows:

"Findings of Fact.

"(1) This suit was for damages on account of injuries to a growing rice crop, brought by plaintiff against the defendant in this court, in which a trial on the issues was, at a prior term of this court, had resulting in a judgment in favor of the plaintiff, from which an appeal was taken by the defendant to the Court of Civil Appeals at Galveston, and on said appeal judgment was entered, reversing and remanding said cause.

"(2) No mandate was issued in said cause within one year after the final judgment therein rendered was entered.

"(3) After said cause had been reversed and remanded, this court, by agreement of the parties acting through their attorneys and upon request of the defendant's attorney, entered continuances in said cause.

"(4) For some months prior to the time the year within which the mandate should have been issued by the Court of Civil Appeals expired, until the expiration of said year the plaintiff was continuously confined to his bed with sickness, unable to attend to any character of business, and not in touch with any of the proceedings of this court, and not able physically to attend to any character of business, and was almost continuously confined to his bed with sickness, and was continuously ill during all of said time.

"(5) Plaintiff was never acquainted with the fact that provision had to be made for the costs of appeal before the mandate was returned: no execution was ever presented to him for said costs; no demand was ever made upon him for said costs; and he at no time was acquainted with the fact that he was required to pay appeal costs to preserve and protect his rights in said cause. He never received any demand for costs or notice that any costs were due by him.

"(6) This action is barred by the statute of limitation, should the same be dismissed, and no suit could be maintained upon a new action brought because of the bar of said statute, and the dismissal of this cause will result in depriving plaintiff of substantial rights of considerable value, for which he will have no redress.

"(7) The failure to have the costs paid or an affidavit in lieu thereof made and to have said mandate issued was not through any neglect or fault or carelessness on the part of the plaintiff, and he has never had an opportunity to have said costs paid and mandate issued, and he has, since ascertaining that it was necessary to pay said costs, continuously offered to pay said costs and obtain a mandate, and his offer so to do is continuous up to the present time.

"Conclusions of Law.

"The statute controlling this question is in mandatory language. It has never been passed upon by the courts so far as I have been able to ascertain. By its language it requires this cause shall be dismissed. It says nothing, nor do I find anything, applying to the motion to reinstate. Upon a statute somewhat similar, to wit, the article of the statute requiring that failure to give a cost bond in a pending cause when motion has been made that same should be given shall result in a dismissal, and that said cause shall be dismissed upon a failure to give such cost bond by the first day of the term following the granting of the order requiring the bond, it has been held that this statute, although mandatory in its language, is directory only, and that upon the showing of any reasonable excuse the court is not of necessity bound to dismiss the cause, or that the cause may be reinstated after having been dismissed. I am of the

opinion that this is the nearest authority applicable to the question here presented, but on account of the fact that the question has never been passed on by the appellate courts within my knowledge, and that a retrial of the issues in the cause would be expensive and of no avail to the parties should it be held that this court is without discretion in the matter and without power to reinstate the cause, and solely upon that ground I hold that the cause should be dismissed and not reinstated and so enter judgment.

"A. E. Davis, District Judge Presiding."

We do not understand why there should be any misconception of the holding of the Supreme Court of this state on the identical proposition, for the question was certified to the Supreme Court, and in an opinion delivered December 18, 1902, by Mr. Justice Williams, in *Scales v. Marshall*, 96 Tex. 140, 70 S. W. 945, was decided. It was certified from the Fifth district, as follows:

"*Texana Scales*, joined by her husband, brought suit in the district court of Johnson county against Elizabeth Marshall, in trespass to try title, to recover a tract of land situated in said county. A trial resulted in a judgment in favor of the defendant, and the plaintiffs appealed to this court, where on November 24, 1900, the judgment was reversed and the cause remanded; the costs of appeal being taxed against the appellee. *Scales v. Marshall*, 60 S. W. 336. A motion for rehearing was filed by the appellee, and was overruled on January 5, 1901. No further action was taken by either party until June 30, 1902, when the appellants paid the costs of appeal, and the mandate was issued on the same day at their instance and request. The mandate was filed in the trial court on July 4, 1902. On September 17, 1902, the appellee, Elizabeth Marshall, filed a motion in this court, setting up the facts above stated, and praying for the recall of said mandate. The motion was based upon article 676a, c. 54, Acts 1901, which reads as follows: 'No mandate shall be taken out of the Supreme Court, or Courts of Civil Appeals, and filed in the court wherein said cause originated, unless the same is so taken within the period of twelve months after the rendition of final judgment of the Supreme Court, or Courts of Civil Appeals, or the overruling of a motion for rehearing. The provisions of this act shall only apply to cases which are by the Supreme Court, or Courts of Civil Appeals, reversed and remanded, and if any cause is reversed and remanded by said Supreme Court, or Courts of Civil Appeals, and the mandate is not taken out within twelve months as hereinbefore provided, then upon the filing in the court below of a certificate of the clerk of the Supreme Court, or Courts of Civil Appeals, that no mandate has been taken out, the case shall be dismissed from the docket of said lower court; provided, that in any cause which has heretofore been reversed and remanded by the Supreme Court, or the Courts of Civil Appeals, the mandate in all such cases shall be taken out within twelve months from and after the passage of this act, and not thereafter.' The contention is that the statute cited applies to cases of this character, and that, as the mandate was not applied for until more than 12 months after the passage of said act, the period of limitation was complete, and the mandate was therefore illegally issued. The appellants waived service of the motion and filed an answer. The appellee did not apply to the clerk of this court for the certificate provided for by said article until after the mandate had been issued and had been filed in the district court.

"Question No. 1. Does the said act apply to a case like this, where the plaintiff in the trial court has been cast in the suit, and has appealed

and secured a reversal of the judgment against him; the cost of appeal being taxed against the other party?"

The Supreme Court, in answering this question, says:

"The case stated is clearly included in the language of the act, and the courts are not at liberty to make an exception to the rule declared, where the Legislature has made none. The broad declaration that 'no mandate shall be taken out,' etc., with the proviso that the act shall apply only to cases which are reversed and remanded, is equivocal to saying that no mandate shall be issued in any cause in which the judgment has been reversed and the cause remanded, after the expiration of the prescribed time. As, under other provisions, either party is allowed to take out the mandate, no impossible condition is imposed."

In the case of *Watson v. Boswell*, 73 S. W. 985, the court says:

"This is an appeal from a judgment dismissing the cause of action. It appears that in April, 1900, appellees recovered judgment against appellant on a plea in reconvention and for costs of suit, and a supersedeas bond was given, and the judgment was, on February 13, 1901, reversed by this court, and the cause remanded; costs being taxed against appellees. The costs were not paid by appellees, nor was any affidavit of inability to pay costs made by them. On July 14, 1902, appellant paid the costs of appeal, and a mandate was issued by the clerk of this court. Upon motion of appellees the cause was dismissed because no mandate was issued within 12 months from the date that judgment was rendered in the Court of Civil Appeals."

The court, after reciting the law, which is the act of the Twenty-Seventh Legislature, page 122, continues:

"The law in question went into effect on July 10, 1902, more than 12 months thereafter. The law declares 'that no mandate shall be taken out of the Supreme Court or Courts of Civil Appeals' unless within the period of 12 months after rendition of judgment of the overruling of a motion for rehearing, and the mandate was therefore issued by the clerk of this court, not only without warrant of law, but in the very face of the statute, and should not have been filed in the trial court. It does not matter against whom the costs were taxed. The law is mandatory that the mandate shall not issue after 12 months in causes in which the judgment is reversed and the cause remanded, and it is made the duty of the trial court to dismiss the cause from the docket upon a certificate showing that a mandate was not issued in 12 months. The mandate issued in this cause, showing on its face that it was issued more than 12 months from the passage of the act, formed a sufficient basis for the judgment of dismissal. The statute deprived appellant of no vested right, and does not violate any provision of the Constitution. It provides, in terms, that, in causes in which judgment had been reversed and causes remanded before the passage of the act, the 12 months should begin to run from and after the passage of the act. The issuance of a mandate is merely a remedy, which may be altered, and there can be no vested right in any particular remedy. *De Cordova v. Galveston*, 4 Tex. 470; *Treasurer v. Wygall*, 46 Tex. 447. The state is bound to afford adequate process for the enforcement of rights, but is not tied down to any particular mode of procedure. *Worsham v. Stevens* [66 Tex. 89] 17 S. W. 404. It does not matter against whom the costs were adjudged. Appellant was the one to be benefited by the issuance of the mandate and the duty devolved upon him to have the mandate issued within 12 months from the passage of the law,

and it was right and proper that the costs of the lower court should be taxed against him when his cause was dismissed."

In the case of *Aspley v. Hawkins*, 88 S. W. 289, the court says:

"This writ of error is prosecuted from the judgment of dismissal. The case had been tried before, and on appeal was in part affirmed and in part reversed and remanded. The judgment of the appellate court was rendered in June, 1894, and the motion to dismiss was filed in 1903. No mandate from the appellate court has been filed in the court below and that fact was made one of the grounds upon which the motion to dismiss was predicated. The act of 1901, requiring the mandate in reversed and remanded cases to be filed within 12 months after the rendition of final judgment by appellate courts, authorizes a dismissal of the suit when it is made to appear that no mandate has been issued within the time stated. We think that act is applicable to this case, and therefore the judgment is affirmed" (citing *Scales v. Marshall*, supra, and *Watson v. Boswell*, supra).

In view of the above expressions from the higher courts, which have directly passed upon the provision of the statute with reference to the issuance of mandates, there seems to be no question that the action of the lower court was correct in dismissing the suit and refusing to reinstate. The authorities cited by appellant, in view of the fact that the question has been directly passed upon, the matter of statutory construction, need not be gone into, and in the event that it were necessary to do so, and it was still an open question in our state, we are persuaded to believe that the result would be the same, and that the higher courts would hold as they have already held upon this question.

Therefore we are of the opinion that it was not error in the court below to dismiss and refuse to reinstate the case, and the action of the lower court is, in all things, affirmed. It is so ordered.

**LEAGUE et al. v. BRAZORIA COUNTY
ROAD DIST. NO. 13 et al.*
(No. 7224.)**

(Court of Civil Appeals of Texas. Galveston.
June 2, 1916. Rehearing Denied
June 29, 1916.)

1. INJUNCTION §139 — AUTHORITY OF SPECIAL JUDGE.

A special district judge of one court has no authority to grant a temporary injunction returnable to any other court, and an injunction so granted is without legal authority and void.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 311; Dec. Dig. §139.]

2. APPEAL AND ERROR §742(1)—BILL OF EXCEPTIONS—STATEMENT—SUFFICIENCY.

Assignments of error, not followed by the statement required by the rules, cannot be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3000; Dec. Dig. §742(1).]

3. HIGHWAYS §90—ESTABLISHMENT—VALIDITY—MOTIVES OF PETITIONERS.

The determination of the area of a road district, the sufficiency of the petition for the establishment of such district, and other prerequi-

sites to the establishment of a valid road district are matters within the discretion of the commissioners' court, and the motives of the petitioners cannot be considered in determining the validity of the action establishing such road district.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 301, 302; Dec. Dig. §90.]

4. HIGHWAYS §90 — ROAD DISTRICTS — BONDS.

In an action to enjoin the issue of bonds of a road district, a petition, attacking the qualification of the signers of the petition, merely alleging that some petitioners had paid no poll tax and that others had not returned their property for taxation, held not sufficient, since the non-payment of poll tax does not negative a petitioner's qualifications as a voter, nor does his failure to render his property for taxation indicate that he is not the owner of taxable property.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 301, 302; Dec. Dig. §90.]

5. HIGHWAYS §90—ROAD DISTRICTS—BONDS —UNCONSTITUTIONALITY OF STATUTE.

Injunction will not lie to restrain the holding of an election under an unconstitutional law, for the issuance of bonds of a road district, because the holding of such election is not an invasion in a legal sense of the property rights of complainant, because if the law be unconstitutional the proceedings are void and complainants have an adequate remedy at all times, and because the election is a political proceeding not subject to judicial control.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 301, 302; Dec. Dig. §90.]

6. HIGHWAYS §90—ROAD DISTRICTS—BONDS.

The holding of an election for the purpose of authorizing the issue of road bonds is a political proceeding, and not subject to interference by way of injunction by the courts.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 301, 302; Dec. Dig. §90.]

Appeal from District Court, Brazoria County; Saml. J. Styles, Judge.

Action by J. C. League and others against the Brazoria County Road District No. 13 and others. Judgment for the defendants, and plaintiffs appeal. Affirmed.

Gaines & Corbett, of Bay City, R. C. Gaines, of Angleton, and Claude Pollard and E. H. Crenshaw, Jr., both of Kingsville, for appellants. Munson, Williams & Munson, of Angleton, for appellees.

McMEANS, J. August 19, 1915, plaintiffs, J. C. League and others, appellants here, brought this suit against the county judge and county commissioners of Brazoria county and the presiding judge and the judges of election appointed by the commissioners' court, to enjoin and restrain the holding of an election by the qualified voters in road district No. 13 of Brazoria county to determine whether the bonds of said road district in the sum of \$150,000 should be issued for the purpose of constructing, maintaining, and operating macadamized, graveled, or paved roads in said district, and whether a tax should be levied upon the property subject to taxation in said district, for the purpose of paying the interest on said bonds, and to provide a sinking fund for their redemption

at maturity. The petition was presented to Hon. J. W. Woods, special judge of the Sixty-First judicial district court of Harris county, the regular judge of the district court of Brazoria county being inaccessible at that time, and the said special district judge granted a temporary injunction returnable to the district court of Brazoria county on the beginning of its September term, to wit, September 6, 1915. No appeal was prosecuted from the order granting the temporary injunction. September 23, 1915, Frank Andrews, as receiver of St. Louis, Brownsville & Mexico Railroad Company, intervened as party plaintiff, and the original plaintiffs filed an amended petition, both parties praying for a permanent injunction, and on the same day the defendants filed an amended answer, containing a general demurrer and special exceptions to the amended petition and plea in intervention. Thereafter, the case coming on to be heard at a regular term of the district court of Brazoria county, and the parties having announced ready upon the questions of law raised by the demurrer and special exceptions, the court, after due consideration, sustained the general demurrer and all special exceptions and dissolved the temporary injunction theretofore granted by Special District Judge Woods, and, as no relief other than an injunction was sought, dismissed the case. From this action of the court the plaintiffs have appealed.

Appellants' second assignment of error complains of the action of the court in sustaining the exception of defendants to the effect that the temporary injunction granted by Special Judge Woods was a nullity, for the reason that a special judge of a district court is without power to grant an injunction returnable to any other court.

[1] While we regard this action of the court as immaterial, in view of the fact that the case was up for a hearing at a regular term upon amended pleadings which prayed only for a permanent injunction, the temporary injunction having in the meantime, served the purpose for which it was sought, whether valid or not, we will say, in passing, that it seems to be well settled that a special district judge of one court has no authority to grant a temporary injunction returnable to any other court, and that therefore the injunction granted in this case by Judge Woods was without lawful authority and void. *Wynn v. Edmonson, etc., Co.*, 150 S. W. 310.

[2] The third, fourth, fifth, sixth, and ninth assignments are not followed by statements such as required by the rules to authorize their consideration, and for this reason appellees object to our considering them, and the objection must be sustained.

[3] There was no error in sustaining the seventh special exception to the sixth and seventh paragraphs of plaintiff's petition. These paragraphs attack the motives of the

persons by whom the petition for the election was alleged to have been gotten up. The determination of the area of the district, the sufficiency of the petition, and other prerequisites to the establishment of a valid road district was a matter peculiarly committed to the commissioners' court, and the motives of the persons who set the machinery in motion leading to the creation of the district cannot control nor be taken into consideration.

The eighth assignment complains of the action of the court in sustaining defendants' special exceptions to the eighth paragraph of the amended petition, which is as follows:

"The tax rolls of Brazoria county, Tex., for the year 1914 show that of the 77 persons whose names are signed to the petition for election to determine the question of said bond issue, the following named 29 persons paid no poll tax for the year 1914, viz.: Edward Riggs, J. R. Mitchell, J. F. Guger, A. J. Lundgren, G. K. Kohlman, P. J. Krause, G. D. Prewitt, S. H. Mack, G. G. Bootner, Henry Bailows, James Brown, Zebze Brown, Asa Ishmore, Andrew Mills, William Hill, J. C. Connock, D. J. Ogburn, W. Houston, Henry Hanson, Sam Gaston, H. Pink, Collin Campbell, A. Mithers, Joseph Reynolds, Pete Davis, John Scott, Lee Coleman, Jackson Davis, Jasper York. That of the persons whose names are signed to said petition for said election order, Houston Williams lives at West Columbia, and not in said district No. 13. That petitioners are informed and believe, and, so believing, charge, C. A. Seaborn renders personal property for the year 1915, valued on the county tax roll at \$115, resides in the town of Columbia and not in said district; that the name of J. O. Lindquist, another of the signers of the said petition, is on the nonresident roll for 1914 and renders no property for taxes for 1915. That the following named persons, whose names are signed to said petition, do not render any property for the year 1915: H. P. Hopkins, J. Rhodes Wright, A. J. Lundgrun, G. K. Kohlman, A. N. Nack, E. Vivla, James Brown, Zebze Brown, J. Connack, Elmer Krause, Henry Hanson, Henry Howard, Dan Gaston, L. T. Patton, Isam F. Cannell, Joseph Reynolds, John Scott, Robert Smith, Will Williams, and J. W. Watson, and that Walter Crain, Jr., one of the signers, resides at Sweeny and not in said district, and in consequence of all of which the said petition for election so ordered is not signed by the number of voters required by article 3, § 52, of the Constitution of the state, and article 628 of Sayles' Civil Statutes, and the commissioners' court of Brazoria county was without authority to order said election."

[4] We think there was no error in sustaining the special exception. The allegation attacking the qualification of the signers of the petition, which merely alleges that some of such signers had not paid their poll tax, and that certain others of them do not render any property for taxes, is insufficient to show their disqualification, or to show that a requisite number of qualified voters had not signed the petition. The allegation that a person had not paid his poll tax does not negative that he is a qualified voter, for there is a large class of persons who are exempted by law from the payment of such taxes; nor does the allegation that a person has not rendered his property for taxation negative that he is the owner of taxable property.

[5, 6] We shall not discuss the remaining

assignments of error in detail. We think that the injunction was properly refused, for the reasons: First, that the holding of the election did not, of itself, create any liability upon the appellants, nor operate as an incumbrance or charge upon their property, or in any way interfere with their property rights, and therefore they could not have been harmed in the slightest by permitting the election to be held; second, that if the law under which the election was sought to be held is unconstitutional, as appellants contend, then it is void, and any proceedings had thereunder would be void, and could be successfully attacked by appellants at any time (*Parks v. West*, 102 Tex. 11, 111 S. W. 726; *Cohen v. Houston*, 176 S. W. 814); and, third, that the election sought to be enjoined was a political proceeding, and not subject to judicial control (*Robinson & Watson v. Wingate*, 36 Tex. Civ. App. 65, 80 S. W. 1067; *City of Dallas v. Consolidated St. Ry. Co.*, 105 Tex. 337, 148 S. W. 292). The reasons why an injunction does not lie to restrain the holding of an election, such as the kind under discussion, may be summed up in the conclusion that there is in the performance of these statutory duties no invasion, in a legal sense, of the property rights of the complainants, whether the election is open to attack in other ways or not. *Robinson v. Wingate*, 98 Tex. 268, 83 S. W. 182. The reasons are elaborated in the clear and able opinions referred to, and further discussion here would only involve the statement of additional, or perhaps the same arguments in different form, tending to the same conclusion.

The judgment of the court below is affirmed.

Affirmed.

SPILLER v. W. J. MANN & CO. (No. 99.)
(Court of Civil Appeals of Texas. Beaumont.
March 9, 1916.)

1. CHATTEL MORTGAGES — 117 — CROPS — INTEREST IN RENTS.

A mortgage of crops to be grown on certain places during a certain year by mortgagor, or those in his employ or under his control, and of the rent note on one of the places for that year covers all interest of the mortgagor in the rents for that year on that place.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 202; Dec. Dig. ¶ 117.]

2. CHATTEL MORTGAGES — 48 — CROPS — DESCRIPTION OF PREMISES.

Description of the premises in a mortgage of the crops to be grown on the "Lewis place" owned by the mortgage in a certain county, it being long and notoriously so known, is sufficient to be notice.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 93-95; Dec. Dig. ¶ 48.]

Appeal from Montgomery County Court;
W. M. Williams, Judge.

Action by W. J. Mann & Co. against Charles Spiller and others. From judgment for plaintiff, the named defendant appeals. Affirmed.

W. B. Browder, of Willis, for appellant.
A. L. Kayser, of Conroe, for appellee.

BROOKE, J. There is practically an agreement between the parties as to the facts in the case. The suit is by W. J. Mann & Co., appellee, against J. F. Johnson, one of the defendants, upon his promissory note of date November 24, 1913, for the sum of \$737, due October 1, 1914, said note being executed for the purpose of obtaining goods and supplies furnished by Mann & Co. to Johnson, and the note was secured by a chattel mortgage of even date upon the crops of cotton and corn grown upon said tracts of land, rent for the year 1914, as set out in said chattel mortgage, appellee claiming by virtue thereof a lien upon said crops to secure payment of said note.

The appellant, Spiller, it is alleged, converted to his own use nine bales of said cotton, with notice of the lien thereon which appellee claimed and held against the cotton. The cotton was alleged to be of the value of \$50 per bale. Spiller denied that appellee had a lien against the cotton, and claimed ownership of the same under a rent note executed on the 29th day of January, 1914, by James Johnson to J. F. Johnson, due the 1st day of October, 1914, for rent for the year 1914 of about 100 acres of cleared land belonging to the said J. F. Johnson, and situated about two miles northwest of the town of Willis, said note being for the sum of \$300.

It was shown that Jesse Campbell, to whom J. F. Johnson originally rented the place for the year 1914, and who executed said original rent note, never went upon the farm, the Lewis place, and did not grow any crops of cotton or corn on said place during the year 1914, but that the cotton grown on said Lewis place during the year 1914 was raised by James Johnson, who rented the land after Campbell failed to go upon the same, and who gave his rent note for \$300 to J. F. Johnson on January 29, 1914, due October 1, 1914, as above set out, and that said note was transferred on February 12, 1914, to one F. A. Lichter, who thereafter transferred the same to appellant Spiller.

Trial was had before the court, which resulted in judgment against the defendant J. F. Johnson in the sum of \$701.00, and against the defendant Spiller for \$314, the value of the rent cotton raised on the Lewis place during the year 1914.

There is no controversy over the value of the nine bales of cotton, and the only question necessary to be decided is whether or not the mortgage given by the defendant J.

F. Johnson to appellee covered this cotton. The mortgage is as follows:

"The State of Texas, County of Montgomery.

"Know all men by these presents: That whereas, I, J. F. Johnson of above state and county of Montgomery, own 100 acres of J. W. Bird place, 127 acres Lewis place, 90 acres of Cook place, situated in justice's precinct No. — in said county; 87 acres of said land is cultivated and to be cultivated by me during the year 1914; said land is to be planted in corn and cotton, about 62 acres in cotton and 25 acres in corn.

"And whereas I, the said J. F. Johnson, do desire to obtain advances in goods, provisions, etc., during the year 1913, to enable me to make a crop on said premises, W. J. Mann & Co., successors to Smith & Mann, merchants of Willis, Tex., have agreed to make, to an amount of \$10 'Dollars' more or less, as the same shall from time to time be required by me and agreed to by said W. J. Mann & Co., successors to Smith & Mann.

"Now, therefore, in consideration of the premises, and the further consideration of the sum of \$1 to me in hand paid by the said Smith & Mann and to secure the payment of said advances, and also the payment of my promissory note for the sum of seven hundred thirty-seven and no/100 dollars, dated November 24, 1913, with interest thereon at the rate of 10 per cent. per annum from the 1st day of October, 1914, I have this day bargained and sold and by this instrument do bargain and sell and convey unto the said W. J. Mann & Co., successors to Smith & Mann, their heirs and assigns and legal representatives, all the crops of cotton and corn now planted or hereafter to be planted and grown on said premises, by me or those in my employ or under my control, during the year 1914, aforesaid. Also, I do by these presents, for the consideration above named, and in addition to said crops hereby bargain and sell unto the said W. J. Mann & Co., successors to Smith & Mann, their heirs, executors, administrators, and assigns the following described rent notes, etc., to wit: one year's rent on the Lewis place for 1914; one year's rent on the Lewis place for 1915. Both of the above amounts in rent note and contract given by Jesse Campbell to J. F. Johnson for 5 years, 1914, 1915, 1916, 1917, and 1918. 1 rent note given by Henry Hood and Julia McPherson for \$200 on the J. W. Bird place, to have and to hold the same, all and singular, forever: Provided, however, that if the said indebtedness above mentioned shall be fully paid and discharged on or before the 1st day of October, 1914, then this conveyance shall be null and void. But if the said indebtedness, or any part thereof, is not paid and discharged as above stipulated, the said W. J. Mann & Co., successors to Smith & Mann, their heirs or assigns or legal representatives shall have the right, with or without any legal process, to take possession of the above-described property, wherever the same may be found, or any part thereof, wherever such may be found, and for that purpose to enter upon the above-described premises, or any other premises occupied by me, the said J. F. Johnson, upon which said property or any part thereof may be found. And the said W. J. Mann & Co., successors to Smith & Mann, their heirs or assigns, or legal representatives, having taken said property in possession, shall have the right and they are hereby fully authorized and empowered to sell the same in the manner that personal property may by law be sold under execution, and apply the proceeds of said sale to the payment of the expense of said sale and the taking possession of said property, and 10 per cent. additional of the amount due for attorney's fees, and to the payment of said indebtedness, or any part thereof that may remain unpaid, to

the extent that the proceeds of said sale will pay, and the surplus, if any, pay over to the person entitled thereto.

"It is further agreed that the indebtedness secured by this instrument is due and payable in Willis, Montgomery County, Texas. And it is further agreed that if any default is made in the payment of either the note or account which this mortgage is given to secure, then 10 per cent. attorney's fees are to be added if said note or account is collected by suit.

"Witness my hand on this the 24th day of November, A. D. 1913.

"[Signed] J. F. Johnson.

"Attest:

"E. A. Watson.

"M. G. Powell."

Indorsed:

"No. 147. Vol. S, page 32.

"\$10.00.

"Note, \$737.00.

"J. F. Johnson,

"Montgomery Co.

"W. J. Mann & Co., successors to Smith & Mann. Mortgage.

"Filed for registration January 14, 1914, at 9 o'clock a. m.

"W. F. Griffin, Co. Clerk,
"Montgomery Co., Tex."

It will be seen that the said mortgage was of record in Montgomery county before the \$300 note was executed.

The court filed the following findings of fact and conclusions of law:

"Findings of Fact.

"I find that the defendant, J. F. Johnson, is indebted to the plaintiffs in the amount set out in their petition upon the promissory note executed by him on the 24th day of November, 1913, and due on the 1st day of October after its said date, and payable to plaintiffs as in their petition alleged; that there is now due, owing, and unpaid, on said indebtedness principal, interest, and attorney's fees the sum of \$701.90.

"I find that, at the time of execution and delivery of said note, the defendant, J. F. Johnson, made, executed, and delivered, for the purpose of securing the same, a certain chattel mortgage and assignment, of even date with said note, wherein and whereby the plaintiffs, W. J. Mann & Company, were given a lien upon all crops of corn and cotton grown upon the 'Lewis Place' for the year 1914, by the said Johnson or those in his employ or under his control, as well as all rent upon said place for said year, this being the place upon which said Johnson resided, and being located about a mile or a mile and a half northwest of the town of Willis in Montgomery county.

"I find that the place mentioned in said instrument aforesaid as the 'Lewis Place' is notoriously known in that community and that vicinity and has been known for the past 24 years as such; and that the said J. F. Johnson resided thereon during the years 1913 and 1914.

"I find as a fact that it was the intention of the parties to said mortgage contract, aforesaid, that said mortgage should and that the same did cover all of the interest of the said J. F. Johnson in and to the crops of corn and cotton to be grown on said 'Lewis Place' for the year 1914, including all rent due said Johnson as landlord from any person renting said place or part thereof from said year 1914. Mortgage aforesaid was duly registered in the chattel mortgage records of Montgomery county, Texas, on the 14th day of January, 1914.

"I find that the defendant, J. F. Johnson, leased to James Johnson on the 29th day of January, 1914, all or nearly all of said Lewis place upon which he then lived, describing it as 'about 100 acres of cleared lands of said J. F. Johnson at his home place about one mile northwest of

the town of Willis for the year 1914. This does not include in said cultivated lands the dwelling house and other houses used in connection therewith and about 20 acres of land next to dwelling house on north side of branch of creek through the field,' taking the note of the said James Johnson in the sum of \$300 to cover said rent on said place for said year 1914; that said note was indorsed and transferred to — Lichter, it being due the 1st of October, 1914, and was by said Lichter indorsed without recourse and was in the latter part of September, 1914, acquired by the defendant, Charles Spiller.

"I find that Dr. Charles Spiller acquired the James Johnson rent note from Lichter at a discount, crediting Lichter upon a pre-existing debt then due the said Spiller by Lichter.

"I further find that the mortgage above referred to from the defendant J. F. Johnson to the plaintiffs, W. J. Mann & Company, of date November 24, 1913, was sufficient in point of description of property and the interest of the mortgagor sought to be covered for the registration thereof to carry constructive notice to all parties subsequently dealing with the said defendant J. F. Johnson, with reference to the crops grown on said Lewis place by the defendant J. F. Johnson, or those in his employ or under his control, and also all rent due on said premises for the year 1914, and that the defendant Spiller had notice of plaintiff's claim at the time he acquired the note from Lichter.

"And I further find that said mortgage aforesaid discloses sufficient facts upon its face to put an ordinarily prudent person upon inquiry, and that such inquiry prosecuted with ordinary diligence would have disclosed all the facts as to said transaction between the defendant J. F. Johnson and the plaintiff, W. J. Mann & Company.

"I find that the Lewis place mentioned in the mortgage aforesaid and the premises mentioned in the rent note held by the owner thereof and resided thereon during the years 1913 and 1914; that the defendant Spiller has resided within five miles of said place practically all his life, and that during the years 1913 and 1914, among other things, he was engaged in furnishing farmers goods and supplies with which to make a crop.

"I further find that the nine bales of cotton sued for were grown upon said premises, being the premises mentioned in the mortgage aforesaid, which are the same premises mentioned in the James Johnson rent note held by the said Spiller, during the year 1914, the same being cotton due the landlord or his assignee, under the rent contract made by the said Jas. Johnson with the defendant, J. F. Johnson, on the 29th day of January, 1914; and I find that this was the cotton covered and intended to be covered by the mortgage given by the defendant J. F. Johnson to the plaintiffs, W. J. Mann & Co., on the 24th day of November, 1913, and duly registered on the 14th day of January, 1914.

"I further find that said nine bales of cotton were converted by defendant Spiller and appropriated by him, and sold on the open market, and cannot now be found, substantially alleged in plaintiff's petition, and that at the time of such conversion same was of the reasonable market value of \$314.

"I further find that the defendant Spiller was not an innocent purchaser of the James Johnson rent note for value and without notice of plaintiff's claim.

"Conclusions of Law.

"I conclude that the defendant J. F. Johnson is indebted to the plaintiffs in the sum of \$701.90, principal, interest, and attorney's fees, upon his certain promissory note of date November 24, 1913, due October 1st thereafter, for which

amount they were entitled to judgment against him.

"I conclude as a matter of law that the plaintiffs had a valid, subsisting, and unsatisfied lien against the nine bales of cotton sued for, which was prior to any claim or lien of the defendant Spiller thereon, and of which he was charged with notice, and that the plaintiffs are entitled to recover the value of said nine bales of cotton so converted and appropriated by the said defendant Spiller in the sum of \$314.

"I further conclude that, as the said defendant Spiller was not a purchaser for value of the said Jas. Johnson rent note, the plaintiffs are entitled to recover the value of said cotton, regardless of the question of notice of their claim."

[1, 2] The view we take of the case is that the mortgage, upon its face, was intended to cover and did cover all interest that J. F. Johnson had in the rents for the year 1914 on the Lewis place, and that the said instrument was notice to all the world of that fact. It would be useless and would serve no good purpose to go into detail as to how said conclusion has been reached, because the instrument speaks for itself; and the only reasonable construction of which it is capable is that a lien had been given, upon all of the rent due for the year 1914, the said J. F. Johnson upon said Lewis place. The conclusions reached by the trial court are, in our judgment, correct, and the appellant's first assignment of error, to the effect that the description of the property and premises in said mortgage is too general, vague, and indefinite to be notice, is without merit, and same is overruled.

Appellant's second to sixth assignments of error raise the question with reference to the sufficiency of the evidence, and what we have heretofore said disposes of said assignments. They are therefore overruled.

There being no error shown in this record to have been committed by the trial court, the judgment is in all things affirmed, and it is so ordered.

WESTERN UNION TELEGRAPH CO. v. ALEXANDER et al. (No. 104.)

(Court of Civil Appeals of Texas. Beaumont. April 20, 1916. Rehearing Denied July 3, 1916.)

TELEGRAPHS AND TELEPHONES — 71—EXCESSIVE DAMAGES—FAILURE TO DELIVER TELEGRAM ANNOUNCING DEATH.

In action against telegraph company, a verdict of \$975 is not excessive, where a telegram announcing death of addressee's favorite brother was not delivered, causing her to miss his funeral, which she had made prior arrangements to attend, and addressee lived within speaking distance of the telegraph office, and the company was so advised by the sender of the telegram.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 74; Dec. Dig. § 71.]

Error from Polk County Court; B. F. Bean, Judge.

Action by Sleetie Alexander and another against the Western Union Telegraph Com-

pany. Judgment for plaintiffs, and defendant brings error. Affirmed.

F. J. & C. T. Duff, of Beaumont, for plaintiff in error. Campbell & Campbell, of Livingston, for defendants in error.

MIDDLEBROOKE, J. This was a suit instituted by Sleetie Alexander, joined by her husband, Sandy Alexander, in the county court of Polk county, Tex., on the 21st day of May, 1915. Plaintiff alleged in the petition, in substance:

That on September 28, 1914, and prior thereto, they lived in Sour Lake, Tex.; that James Hall, a brother of Sleetie Alexander, died at Moscow, Tex., in Polk county, on September 27, 1914; that on the 28th day of September, Joe Hall, a brother, sent a telegram to Sleetie Alexander, reading as follows:

"Moscow, Texas, 9-28-14.

"Sleetie Alexander, Sour Lake, Texas. James died seven o'clock last night. Come at once. Answer. Joe Hall."

That the telegram was never delivered to Sleetie Alexander, although she resided very near the telegraph company's office in Sour Lake; that the plaintiff in error negligently and willfully failed and refused to deliver the telegram, and that thereby she was deprived of attending the funeral of her brother, and being present with her family in her bereavement; that in consequence she has suffered great mental anguish, to her damage in the sum of \$975. They allege, further, in their petition, that if the message had been delivered she would and could have gone to Moscow and have been present at the burial of her brother.

The defendant, plaintiff in error, answered by original answer filed on August 1, 1915, demurring generally to plaintiffs' petition; also filed general denial, and specially pleaded contributory negligence on the part of the sender of the message in not giving plaintiff in error sufficient information as to where or how defendant in error could be located; that it used due diligence to locate Sleetie Alexander, but on account of the negligence of the sender of the message was unable to do so; and that the defendant mailed to the plaintiff a card advising her that the message was in the office, and for her to call for same, which she failed to do.

Plaintiff filed replication to this answer, denying same generally, and specially pleading that at the time of the delivery of the message to defendant for transmission, Joe Hall, the sender of the message, told defendant's agent that Sleetie Alexander was a sister of the deceased, and lived within speaking distance of the telegraph station at Sour Lake. The case was tried before a jury on the 25th day of October, 1915, resulting in a verdict for the plaintiff in the sum sued for, \$975. Motion for new trial was duly filed, and the same was overruled by the

trial court, proper exceptions were reserved, and the case is now properly before this court for review.

Plaintiff in error's first assignment of error is:

"Because the verdict of the jury is so excessive and unreasonable in amount as to show prejudice on the part of the jury."

Its second assignment is:

"The verdict of the jury is not supported by and is against a preponderance of the evidence, in that, although the plaintiff swore that her failure to be at her brother's funeral nearly killed her, yet the record discloses that: (1) The plaintiff, although she knew her brother was sick and dying for a period of three months, and that although she had the means and ability to go to him, she did not do so. (2) That plaintiff had not seen or been with her brother for a period of three years before his death. (3) That plaintiff's mental anguish, if any, was produced by regret at not having gone to her brother before his death, and not by reason of her failure to be present at his burial.

It is admitted by the defendant that a train leaving Sour Lake for Houston not later than 9 a. m. on September 28, 1914, would have made connection with the train of the Houston, East & West Texas at Houston, which was due to arrive in Moscow about 11 at night. It is also admitted that 25 minutes would have been a reasonable time for the transmission of the message in question from the Moscow office to the telegraph office at Sour Lake.

It is not necessary to set out at length the statement of facts in this case, for a proper consideration thereof, under the assignments of error presented to this court. Suffice it to say that the facts show that the plaintiff Sleetie Alexander suffered great mental anguish on account of not having the privilege of attending her brother's funeral. The facts show also that her brother was afflicted with tuberculosis, and had been for some time; that her brother, some time previously, had lived in Louisiana, but had moved from Louisiana to Moscow, and at the time he moved back to Moscow Sleetie Alexander was living in Moscow; that she left Moscow and came to Sour Lake about three months before her brother's death. Plaintiff in error, in its brief, states this time to be three years, but we are sure that this is a clerical error. The undisputed facts show that she was with her brother about three months before his death. They show, also, that she had made arrangements with her brother to telegraph her if her brother should die, in time for her to be present at the funeral, and that she had also made arrangements with a Mr. Hudson, for whom she cooked, in case she should get word of her brother's death at an hour of the day that would preclude her taking passage from Sour Lake to Beaumont on a regular train, so as to make connection that would enable her to reach her brother in time for burial, to take her in his automobile to Beaumont to make connection. She testified, also, that deceased was her favorite brother, and if the message

had been delivered to her with reasonable dispatch she could and would have gone to her brother's funeral, and it is also shown that from the time of receiving the message after her brother's death, if it had been promptly delivered, she could have made connection on the railroad, so as to have been in Moscow about 11 o'clock, before her brother was buried the next afternoon. It shows, also, that her brother who sent the message went to the telegraph operator several times and asked as to whether he had an answer, and that the funeral was delayed until all of the trains had passed that she could have reached Moscow on at any time during the afternoon of her brother's burial, and it shows, also, that her brother who sent the message met the night train, expecting her to arrive on it. The telegraph operator at Sour Lake put the message in the hands of a negro porter or message boy for delivery, and he testified that he went to numerous persons and places, the post office, hotels, and one place and another, trying to locate Sleetie Alexander, and could not do so. The testimony also shows that Sleetie Alexander did live within speaking distance of the depot, the distance being determined at approximately three times the distance of the width of the courthouse, and it was agreed that the width of the courthouse was 65 feet.

Plaintiff in error's counsel presents a most forceful argument in his brief; but, under our view of the case, his assignments of error are not well taken. He cites *Western Union Telegraph Company v. Holcomb*, 175 S. W. 750, as supporting his contention in his first assignment of error. An inspection of that case shows that the following message was sent:

"Mt. Pleasant, Texas. March 18, 1911. Fate Hawkins, De Leon, Texas. Brother Jess sick. No chance for him. Come at once. [Signed] Lena Raney." Lena Raney was plaintiff's sister, and she and her brother, Jess Holcomb, lived in the country about nine miles from Mt. Pleasant, Plaintiff resided in the country near Downing, a small town about eight miles from De Leon. A telephone line connected De Leon and Downing, and a telephone line ran from Downing to plaintiff's residence. A person at De Leon could talk to plaintiff at his residence over the telephone, but in order to do so it was necessary to call for him at the Downing exchange, from which station direct connection could be made between plaintiff's residence and De Leon. Jess Holcomb died at 4 o'clock on the afternoon of March 19th, and was buried near his home at 4 o'clock on the afternoon of March 20th. The telegram was delivered to plaintiff at his home by telephone from defendant's office at De Leon on the morning of March 20th, too late to enable him to attend the burial."

In passing upon that case, Justice Dunklin, writing the opinion, says:

"By another assignment it is insisted that the judgment, which was for the sum of \$1,000, was excessive. According to plaintiff's testimony, he moved from Titus county to Comanche county in the year 1904. During the time plaintiff lived in Titus county, Jess Holcomb, his brother, lived with him until the latter married, and then lived about a mile and a half from plaintiff's residence. Plaintiff further testified: 'I suppose

Jess had been married about a year and a half when he left Titus county. No; Jess was not my youngest brother. Jess was 27 years old when he died. I regarded my brother Jess very highly as a brother. He and I were always very friendly. It had been something like four years at the time my brother died since I had seen him. * * * When I found out I could not see my brother in his lifetime, and then could not even attend his funeral, I could hardly describe my feelings. I felt mighty bad, and was hurt badly over it.' He further testified that he made no effort to have the burial postponed in order to enable him to attend the funeral; that he could have taken a train on Monday afternoon and reached his brother's home the following morning at about 4:40 o'clock; that his brother did not have any one to write him of his illness; that he had never been to Mt. Pleasant since his brother's death. We recognize the rule that the amount of damages to be awarded in such case as this is to be determined by the jury, and that the verdict will not be disturbed unless clearly excessive. Further, we are not unmindful of the rule that the facts of each case must be the guide in determining the amount of damages to be awarded; but we are of the opinion that the facts detailed by the plaintiff himself clearly do not warrant the amount of damages awarded."

The evidence in that case showed also that the telegram was carelessly delayed and that it reached the plaintiff too late for him to get passage that would enable him to reach his brother's home in time for the funeral. The distinction between that case and the instant case is: The undisputed testimony in the instant case shows that Sleetie Alexander could and would have attended her brother's funeral if the message had been promptly delivered, and she was so anxious to be in position to attend her brother's funeral that she had prearranged to be able to do so, regardless of train service from Sour Lake to Beaumont.

In the case of *Western Union Telegraph Company v. Johnson*, 171 S. W. 859, as we understand it, that case was decided from the standpoint of "his action for mental anguish under the law of Arkansas will not lie for the failure to deliver an interstate message," and is not applicable to the instant case, and the case of *Southwestern Telegraph, etc., Company v. City of Dallas*, 174 S. W. 636, which is a case in which a suit was brought for a reasonable sum for inspection of telegraph posts, etc., for \$2 per post, under ordinances under special charter of the city of Dallas, and in that case a judgment was rendered against the telegraph company for the amount sued for, \$2 per post, and the question of excessive damages was properly raised by the appellant, and was overruled by the court; the judgment being affirmed.

In *Western Union Telegraph Company v. Rosentreter*, 80 Tex. 406, 16 S. W. 25, the Supreme Court, answering an assignment in point with the assignment in the instant case, in which a judgment was secured for \$1,000, says:

"At last it now only remains to dispose of the twelfth assignment of error. This assignment claims that the verdict of the jury is

excessive in amount. We are unable to so hold. * * * Under a system of jurisprudence where the jurors are made the sole judges of matters of fact, they are as independent in their sphere, in legal contemplation, and presumably as fair and honest, as the judge on the bench. Where their power is thus made by law exclusive, some proof of a satisfactory nature ought to be furnished that they were influenced by passion, or prejudice, or other improper motive, in rendering the verdict, before the power of the court to annul the verdict for these reasons could be lawfully exercised. Even when a verdict is very large in amount, that affords at best but a suspicion of improper influence. But in this case the amount awarded is not unusually large, nor, indeed, so great as in many other cases where the verdicts were sustained. * * * We cannot, therefore, hold that the verdict of the jury was influenced by any improper motive in assessing the amount of damages, although the effect of the verdict is, * * * as said in the able argument for the appellant, to allow the plaintiff 'to coin his tears into silver dollars.'

In the case of *Western Union Telegraph Company v. McDavid*, 121 S. W. 893, a judgment was secured by the plaintiff in the sum of \$1,350. The facts are very similar to the instant case, and the appellate court, in passing upon an assignment that the damage is excessive, says:

"There is no fixed rule for measuring the damages to be allowed in such cases, owing to the varying conditions and circumstances, and the jury being the exclusive judges of the facts, it must clearly appear that the amount allowed is excessive before this court would be authorized to disturb their verdict upon that objection. We have carefully examined the evidence, and, while the amount of the verdict seems somewhat large, we cannot say that it is excessive"—citing *Telegraph Co. v. James*, 31 Tex. Civ. App. 503, 73 S. W. 79; *Telegraph Co. v. Houghton*, 26 S. W. 448; *Telegraph Co. v. Piner*, 9 Tex. Civ. App. 152, 29 S. W. 66, and many other authorities.

We have carefully considered all of the authorities cited in appellant's brief, as well as the able argument presented by counsel for appellant; but we do not think, as a matter of law, that the damages under the facts and surroundings of this case can be said by this court to be excessive. The first assignment of plaintiff in error is therefore overruled.

The second assignment of error is really nothing more or less than a reassertion of the first assignment of error in different form and verbiage, and is answered by our disposition of the first assignment of error. We do not think as a matter of law that the verdict and judgment in this cause is excessive, and the judgment of the lower court is affirmed.

Affirmed.

ANDERSON COUNTY v. HOPKINS. (No. 7301.)

(Court of Civil Appeals of Texas. Galveston.
June 29, 1916.)

CLERKS OF COURTS \S 33—EXTRA COMPENSATION FOR COUNTY CLERK—"COMPENSATION"—"EXCESS FEES."

Vernon's Sayles' Ann. Civ. St. 1914, arts. 3881, 3882, 3889, and 3893, as to county clerk's

fees, allowing county clerks, in counties of 25,000 inhabitants, to retain \$2,400 as "compensation," and, in counties of between 25,000 and 38,000 inhabitants, to retain as "excess fees" up to \$1,250, one-fourth of the fees in excess of the amount allowed for salaries of themselves and assistants and deputies, and allowing the commissioners' court in cases where the "compensation" and "excess fees" do not reach the maximum provided for, to allow compensation for ex officio services, not to exceed the maximum, authorize the commissioners' court to allow the clerk of the county court, in counties having between 25,000 and 38,000 inhabitants, compensation for ex officio services, provided such compensation, together with the fees retained by him under articles 3881, 3882, and 3889, does not amount to more than \$3,650, and such compensation for ex officio services cannot be regarded as "excess fees" of which officers can retain only one-fourth, article 3888, providing that in no case shall the court be responsible for the payment of any sum when the fees collected by any officer are less than the maximum compensation, not being in conflict.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. \S 58; Dec. Dig. \S 33.

For other definitions, see *Words and Phrases*, First and Second Series, Compensation.]

Appeal from Anderson County Court; P. H. Springer, Special Judge.

Action by Anderson County against J. I. Hopkins. From a judgment for defendant, plaintiff appeals. Affirmed.

Campbell & Sewell, of Palestine, for appellant. O. C. Funderburk, of Palestine, for appellee.

PLEASANTS, C. J. This suit was brought by appellant against appellee to recover the sum of \$850, claimed to have been unlawfully allowed appellee by the commissioners' court of appellant county as compensation for ex officio services performed by him as county clerk of said county. A general demurrer was sustained to the petition, and, plaintiff declining to amend, the suit was dismissed.

The only questions raised by the appeal are whether the commissioners' court of a county having more than 25,000 and less than 38,000 inhabitants is authorized to allow compensation to the county clerk for ex officio services when the fees of the office, after paying the expenses allowed by law, amount to the sum of \$2,400, and whether, if such compensation is allowed, it should be regarded as "excess fees," as that term is used in the statute, only one-fourth of which can be retained by the officer. The facts upon which these questions arise are fully pleaded in the petition. The determination of the question depends upon the construction of our statutes fixing and regulating the fees and compensation of county officers. The statutes bearing upon the question are articles 3881, 3882, 3889, and 3893, Vernon's Sayles' Civil Statutes. Article 3881, in so far as it affects the question under consideration, provides that the "maximum fees of all kinds" that may be retained by a county clerk as compensation for his services shall

not exceed the sum of \$2,250. Article 3882 provides that in counties having a population of 25,000 inhabitants the county clerk may be allowed the sum of \$2,400. Article 3889 is as follows:

"Each officer named in this chapter shall first, out of the fees of his office, pay or be paid, the amount allowed him, under the provisions of this chapter, together with the salaries of his assistants or deputies. If the fees of such office collected in any year be more than the amount needed to pay the amount allowed such officer and his assistants and deputies, same shall be deemed excess fees, and of such excess fees such officer shall retain one-fourth; and in counties having between 25,000 and 38,000 inhabitants until such one-fourth amounts to the sum of twelve hundred and fifty dollars; and counties containing a city of more than 25,000 population, or in which county the population exceeds 38,000, until such one-fourth amounts to the sum of fifteen hundred dollars, such population to be based on the United States census last preceding any given year. All amounts received by such officer as fees of his office besides those which he is allowed to retain by the provisions of this chapter, shall be paid into the county treasury of such county."

Article 3893 contains the following provisions:

"The commissioners' court is hereby debarred from allowing compensation for ex officio services to county officials when the compensation and excess fees which they are allowed to retain shall reach the maximum provided for in this chapter. In cases where the compensation and excess fees which the officers are allowed to retain shall not reach the maximum provided for in this chapter, the commissioners' court shall allow compensation for ex officio services when, in their judgment, such compensation is necessary; provided, such compensation for ex officio services allowed shall not increase the compensation of the official beyond the maximum amount of compensation and excess fees allowed to be retained by him under this chapter."

These articles of the statute seem to us to be so clear and unambiguous as to leave no room for construction. There is no doubt as to the meaning of the term "compensation and excess fees" as used in article 3893. By the provision of article 3881 the maximum amount of fees the officer is allowed to retain is retained as "compensation" for his services. This "compensation," is fixed by article 3882 at \$2,400 for clerks of the county court in counties having a population of 25,000 inhabitants. By article 3889 it is provided that, in counties having between 25,000 and 38,000 inhabitants, in addition to the compensation allowed in the preceding articles, the county officers may retain one-fourth of the "excess fees" collected by them until such one-fourth amounts to the sum of \$1,250. It is perfectly clear that these articles permit a county clerk, in counties having between 25,000 and 38,000 inhabitants, to retain as compensation and excess fees the sum of \$3,650. Article 3893 expressly authorizes the commissioners' court, when, in their judgment, such compensation is necessary, to allow compensation for ex officio services of any county officer, provided such compensation shall not increase the compensation of the official beyond the maximum

amount of "compensation and excess fees" allowed to be retained by him under the preceding articles. These articles, we think, clearly authorize the commissioners' court to allow the clerk of the county court, in counties having between 25,000 and 38,000 inhabitants, compensation for ex officio services, provided such compensation, together with the fees retained by him under the preceding articles, does not amount to more than \$3,650. We do not think article 3893 is susceptible of any other reasonable construction. We think it equally clear that the language and manifest purpose and intent of the article excludes the idea that the compensation for ex officio services thereby authorized can be regarded as "excess fees" of which officers can only retain one-fourth.

Appellant contends that article 3893 should not be construed according to the literal meaning of its language, because to do so would defeat the manifest purpose and intent of the Legislature in the enactment of the statute regulating the fees of county officers when the several articles of the statute are considered as a whole. We find nothing in the act as a whole which throws any doubt upon the meaning of article 3893. The provision of article 3888, that "in no case shall the state or the county be responsible for the payment of any sum when the fees collected by any officer are less than the maximum compensation allowed by this chapter, or be responsible for the pay of any deputy or assistant," are not in conflict with the provision of article 3893. The two articles, construed together, evidence the clear intention of the Legislature to protect the county against any claim on the part of the officers for any deficiency in the fees allowed him by law, but to authorize the commissioners' court, when, in their judgment, such compensation is necessary, to allow the officer compensation for ex officio services in an amount not to exceed such deficiency. We think such legislation is reasonable and proper. The ex officio services performed by a county officer may be much greater in one county than in another of the same population, and it is not unreasonable to leave to the judgment of the commissioners' court the question of whether a county officer should receive compensation for ex officio services, the amount of such compensation being limited by the statute.

We cannot agree with appellant in its further contention that the construction we have given this article of the statute adds to the inequality of the compensation allowed county officers, and therefore contravenes one of the primary purposes of the Legislature in the enactment of the fee bill statute. As before stated, we think the statute is plain and unambiguous, and we are not authorized to give it any construction than that which its plain language imports.

It appears from the face of the petition that Anderson county has a population, as

shown by the last United States census, of between 25,000 and 38,000 inhabitants, and that the total amount of compensation received by the defendant, including the \$850 for which this suit is brought, was less than the sum of \$3,600.

We agree with the trial judge that the petition does not show any right in the plaintiff to recover any sum from the defendant, and the general demurrer was properly sustained.

It follows that the judgment of the trial court should be affirmed; and it is so ordered.

Affirmed.

TOWNSEND v. PILGRIM. (No. 8425.)
(Court of Civil Appeals of Texas. Ft. Worth.
July 1, 1916.)

1. TRIAL \S 192 — INSTRUCTIONS — ASSUMING FACT TO BE TRUE.

An instruction assuming a fact is not erroneous, where uncontradicted testimony establishes the fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 432-434; Dec. Dig. \S 192.]

2. SALES \S 396 — ACTION BY BUYER FOR OVERPAYMENT OF PURCHASE PRICE—PLEADING AND PROOF.

In action for excess paid on purchase price of cotton by buyer, where the sale contract pleaded was that the cotton should be paid for on the basis of its grade and classification, it was unnecessary for plaintiff to allege that the contract provided for grading and classification in town to which it was to be shipped by seller, in order to admit testimony of its real grade ascertained at such place.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1134, 1135; Dec. Dig. \S 396.]

3. APPEAL AND ERROR \S 1050(1)—HARMLESS ERROR—TESTIMONY FROM BOOKS BY PERSON NOT MAKING ENTRY.

In such action, allowing expert to testify from a copy of his books as to the grade of the cotton made by him was not reversible, where he testified he was present and assisted at the grading and classification, and qualified as an expert, and there was no other dispute as to the result of the grading and classification.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1068, 1069, 4153, 4157; Dec. Dig. \S 1050(1).]

4. EVIDENCE \S 219(1)—ADMISSION—REFUSAL OF GOODS TENDERED.

In such action, refusal of defendant to take back cotton sold by him at the same price he received for it, notwithstanding an advance of \$2.50 per bale, was competent as in the nature of an admission bearing upon his claim that the grade and classification at which it was sold were the correct ones.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 762, 765, 768, 770; Dec. Dig. \S 219(1).]

5. APPEAL AND ERROR \S 1002 — REVIEW — CONFLICTING EVIDENCE.

A verdict based on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3935-3937; Dec. Dig. \S 1002.]

Appeal from Shackelford County Court; J. A. King, Judge.

Action by W. H. Pilgrim against R. H. Townsend. From a judgment for plaintiff, defendant appeals. Affirmed.

Action to recover the excess paid by the plaintiff in buying cotton at Moran, Tex., under a trade arrangement or custom whereby plaintiff paid a certain price, and if, after receipt and grading, the cotton was found to be of lower grade than paid for, the difference was to be adjusted by the defendant seller refunding the difference.

The special charge complained of was:

"If you should find and believe from the evidence and a preponderance thereof that the plaintiff and defendant agreed upon a stipulated price for 85 bales of cotton, if they did do so, and that it was understood and agreed by and between the said parties that said cotton should be classed and graded at Dublin, Tex., or if you should find or believe from the evidence and a preponderance thereof that there was a usage and custom among cotton men, in contracts of the character alleged to exist by the plaintiff, to ship cotton with bill of lading attached, and that such custom, if any, was for the out turns to be made as is shown to have been made in this case, and that such usage and custom, if any, was known to the defendant, Townsend, then and in that event you are instructed that the defendant would be liable for whatever amount, if any, that was in excess of the real grade of said cotton, unless you should find and believe that there was an agreement or stipulation to the contrary made between said parties."

The second assignment of error was:

"The court erred in permitting the witness W. H. Pilgrim, while on the stand testifying as a witness in his own behalf, to testify as to the grade and class of said cotton at Dublin, Tex., to the effect that he had graded and classed the cotton at Dublin, Tex., after it arrived there, and that it did not class as high grade as the grade and class given by the defendant, because it was not alleged in the petition that it was the contract in the purchase of the cotton by plaintiff that it was to be classed by plaintiff at Dublin, Tex., and that it was to be paid for by plaintiff upon a grade or class made by plaintiff at Dublin, Tex."

Other assignments of error referred to were:

"The court erred in permitting the witness Lewis Moore to testify before the jury as to the grade of the cotton made by him at Dublin, Tex., from a memorandum showing the class and grade of the cotton, over the objection of the counsel for defendant made at the time of testifying; the witness stating that he had not made the memorandum and had not seen it made, but that he turned the original memorandum of the grade and class of said cotton as made by him at the time of grading the cotton to a clerk in his office, and that the copy from which he was testifying was made by the clerk, and not by the witness, and that he had no independent recollection of the grade of said cotton as made by him, except as shown by the copy of memoranda made by said clerk, and from which he testified, because the same was immaterial, and could not be used by the witness to show the grade of said cotton."

"The court erred in permitting the witness W. H. Pilgrim to testify that he offered the cotton back to the defendant after he had the cotton graded at Dublin, Tex., for the same price he had paid defendant for the cotton, although cotton had advanced in price in the meantime about \$2.50 per bale, because the evidence offered, if true, was made after the controversy over

the cotton had arisen, and was made by the plaintiff, and was self-serving, and in the nature of a compromise, and was immaterial, irrelevant, and prejudicial."

Scott & Brelsford, of Eastland, for appellant. Walter L. Morris, of Albany, for appellee.

CONNER, C. J. [1] While the record in this case is not in a wholly satisfactory condition, so that we are entirely free from doubt, yet after a consideration of the whole case we find ourselves unable to say that any such error has been committed as to require a reversal of the judgment below. The special charge complained of in the first assignment of error, in some respects, at least, seems to be upon the weight of the evidence as urged; but as presented in the assignment the objection is limited to a specific part of the charge, to wit, to that part referring to the custom alleged, which assumes that the custom "was for the out turns to be made as is shown to have been made in this case." This, of course, assumes that out turns had been made in this case; but so far as we are able to determine from the record there is no doubt as to this. The appellee testified without contradiction, as we understand the record, that after the classification made by him and Moore in Dublin he returned to appellant, as usual in such cases, the result of the classification; such returns, as we understand, constituting what is designated as "out turns." We accordingly feel constrained to overrule the assignment.

[2] We think it is to be implied from the contract, as alleged in plaintiff's petition, that the grade and classification of the cotton should be its real or true grade and class. In order, therefore, to admit testimony of its real grade as found by appellee and Moore in Dublin, it was unnecessary that there be an allegation in the petition that the contract provided for a grading and classification in Dublin. The objection, therefore, to the testimony referred to, on the ground that it was not alleged in the petition that the cotton was to be "paid for on the grade and class made by the plaintiff at Dublin, Tex.," is not maintainable, and the second assignment of error must therefore be overruled.

[3, 4] There is possibly some force in the objection that Moore should not have been permitted to testify from the copy of his books as to the grade and class of the 85 bales of cotton in controversy at Dublin. The testimony of the keeper of the books himself, supplemented by further testimony that the books were correctly kept, would be the best evidence; but inasmuch as appellee testified that he was present and assisted in the grading and classification of the cotton at Dublin, and inasmuch as he further qualified as an expert to give such testimony, and there was no objection to the testimony

so given, and inasmuch as we do not otherwise find any dispute as to the result of the grading and classification at Dublin, we think the objection to Moore's testimony above noted must be overruled. What we here say also sufficiently answers appellant's assignment of error insisting that the judgment is not supported by the evidence. And the majority, at least, have concluded that appellant's refusal to take back the cotton sold by him at the same price he received for it, notwithstanding an advance of \$2.50 per bale, was in the nature of an admission on his part that was relevant to his credibility as a witness, and as a circumstance also proper for consideration in passing upon the weight of appellant's testimony that his grade and classification at Moran were the correct ones.

[5] On the issue of whether the contract was for the grading and classification to be done at Moran, we think the evidence is merely of conflicting tendencies, and we do not feel authorized to disturb the verdict of the jury in a determination of the conflict.

The judgment is accordingly affirmed.

TRINITY COUNTY LUMBER CO. v. CONNER. (No. 120.)

(Court of Civil Appeals of Texas. Beaumont. April 27, 1916. Rehearing Denied July 3, 1916.)

1. JUDGMENT \S 622(1)—JUDGMENT AS BAR.

Where a set-off is presented by defendant in his pleadings and attempted to be supported by evidence, it will, whether allowed or disallowed, become res adjudicata.

[Ed. Note.—For other cases, see Judgment Cent. Dig. \S 1136; Dec. Dig. \S 622(1).]

2. APPEAL AND ERROR \S 80(1)—JUDGMENTS APPEALABLE—JUDGMENT WHICH FAILS TO DISPOSE OF SET-OFF AND COUNTERCLAIM.

A judgment, which does not specifically dispose of a set-off and counterclaim pleaded by defendant, held a final determination of those issues as against defendant and hence appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 494-500, 503, 505-506; Dec. Dig. \S 80(1).]

3. PARENT AND CHILD \S 6—ACTIONS FOR WAGES OF CHILD.

An action for wages earned during plaintiff's minority cannot be maintained where the evidence shows that his mother is living, and there is no pleading or proof that plaintiff was emancipated at the time he performed such labor.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. \S 77-85; Dec. Dig. \S 6.]

4. PARENT AND CHILD \S 5(1)—EARNINGS OF CHILD.

A widowed mother, or a mother whose husband is imprisoned or has deserted her, is entitled to the services and earnings of a minor child to the same extent as the father would be if living.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. \S 70, 76; Dec. Dig. \S 5(1).]

Appeal from Trinity County Court; C. M. McKinnon, Judge.

Action by Ernest Conner against the Trinity County Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

R. E. Minton, of Groveton, for appellant. A. M. Campbell and C. H. Crow, both of Groveton, for appellee.

BROOKE, J. This was a suit by the appellee against appellant for the conversion of the sum of \$36.95 alleged to be current wages, and for \$20 attorney's fees, and \$25 punitive damages. Appellant pleaded a set-off of \$35.10, tendered into court \$1.85, pleaded the minority of plaintiff at the time such wages were earned and that they were the property of his mother, and set up a counterclaim for \$150. Appellee abandoned his claim for \$25 punitive damages, and judgment was rendered in his favor for \$36.95, his current wages, and \$20 attorney's fees, and no disposition was made in the final judgment of appellant's counterclaim, set-off, or the money tendered into court.

At the outset we are confronted with a motion to dismiss this appeal for the following reasons: (1) Because the judgment of the trial court is not a final judgment, such as can be appealed from, in that the cross-action of the appellant was not disposed of by the judgment of the trial court. (2) Because, if it shall be held that appellant's cross-action was disposed of by judgment of the trial court, then said judgment was adverse to the appellant, and the amount in controversy, under the assignments of error as made by the appellant, is not within the jurisdiction of this court, and that this court has no jurisdiction of the matters complained of by the appellant is manifest of record.

Upon the presentation of this motion, we were very much inclined to grant same, following a long line of decisions which we believe announce the correct doctrine. *Riddle v. Bearden*, 36 Tex. Civ. App. 97, 80 S. W. 1061; *Huggins v. Reynolds*, 51 Tex. Civ. App. 504, 112 S. W. 116; *Lewis v. Kelley*, 146 S. W. 1197; *Williams v. Bell*, 53 Tex. Civ. App. 474, 116 S. W. 837; *Railway Co. v. Stephenson*, 26 S. W. 236; *Clopton v. Herring*, 26 S. W. 1104; *Sapp v. Anderson*, 135 S. W. 1068; *Hedrick v. Smith*, 146 S. W. 305.

[1,2] But in the case of *Trammell v. Rosen*, 106 Tex. 132, 157 S. W. 1161, the Supreme Court held as follows:

"*Davies v. Thomson*, 92 Tex. 391, 49 S. W. 215, was a suit by the heirs of Thomson, deceased, against the heirs and administrator of Davies, deceased, for recovery of one-half of certain real and personal property held and controlled by Davies at the time of his death, and one-half of all increase and gains in said property since his death, and one-half of all money received from sales of any of said property since that time. If the allegations of the petition were true, plaintiffs were entitled to recover everything sued for by them. The jury found simply 'for the plaintiffs in the sum of \$14,000.' The court entered judgment accordingly. Upon appeal, this question was certified

to this court: 'Is the judgment a final judgment from which an appeal may be taken? The contention is that the verdict and judgment should have in terms made some disposition of the real estate.' In answering said question, this court quoted approvingly the foregoing excerpt from its opinion in the *Rackley Case* [89 Tex. 613, 36 S. W. 77], and added: 'The proposition there announced was directly involved in the decision of that case, and is decisive of the question certified. The judgment, in our opinion, should be construed to mean that the plaintiffs recover of the defendants the sum of \$14,000 and costs, and that they are to take nothing more either in the property claimed or in money. We answer the question in the affirmative.'

"The principle which controlled the last-mentioned two cases is, we think, applicable in great measure to this case. The rule is thus stated in *Freeman on Judgments*, § 279, and note 1: 'There is no doubt that if a set-off is presented by defendant in his pleadings, and attempted to be supported by evidence to the jury, it will, whether allowed or disallowed, become *res adjudicata*. It is settled by the judgment as conclusively, when it does not appear to have been allowed, as though there were an express finding against it.' * * * Nor is it material that the evidence to support a set-off was excluded because insufficient. * * *

"We feel constrained to hold that the judgment of the trial court, although irregular and imperfect in form, is sufficient to support the appeal. However, we feel impelled to say, also, that we think that, as a matter of practice, and to avoid confusion, every final judgment should plainly, explicitly, and specifically dispose of each and every party to the cause, and of each and every issue therein presented by the pleadings."

Therefore, on the authority of the case last cited, we overrule the motion to dismiss the appeal.

Tested by the pleadings, this case was one of conversion and for damages. The testimony, which was uncontradicted, was as follows:

"My name is Ernest Conner, and I live on Mr. Platt's place four miles from Groveton, in Trinity county, Tex. I was in the employ of the Trinity County Lumber Company and quit work on February 14, 1914. I had been working for it during January, and until the 14th day of February of that year. They agreed to pay me, and at the time I quit owed me \$36.95, which they refused to pay me. I made demand for my money upon Mr. Chandler, the timekeeper, Mr. Hughes, the cashier of the Trinity County Lumber Company, and Mr. Cox, who works for the company in the woods, but they refused to pay me. I then went to see Mr. Campbell. I remember the 14th day of February, because it was pay day. They did not pay me off in January. They had no pay day for me in January. I went to them and demanded my pay on the first pay day for me after I went to work in January. They had their pay days on the closest Saturday to the 15th of each month at that time. I made no demand for pay during January, except for coupons, which I drew. I drew coupons during February, also. I did not draw any money during January or February. I am 22 years old. I was 21 years old on May 2, 1914. I lived out at the Springs until the sheriff put me off; I don't remember the day. I never did own any property, and my mother has nothing subject to execution."

That is practically all the testimony of the plaintiff. The judgment of the court found that the plaintiff labored during the month of January and up to and including the 13th day of February, and that, for the

services rendered by plaintiff, the defendant was indebted to plaintiff in the sum of \$36.95. Judgment was entered, upon said testimony, that the plaintiff recover of defendant \$36.95, the amount of his current wages sued for.

[3] By the first assignment of error, the appellant calls in question the action of the court in rendering judgment for plaintiff, because the undisputed evidence shows that the sum sued for was earned during plaintiff's minority; that his mother is living; and that there is neither pleading nor proof that the plaintiff was emancipated at the time he performed such labor. This assignment must be sustained.

The record shows that the plaintiff was a minor living with his mother, and there is not a line of testimony even intimating that he had been emancipated, or that there was any relinquishment or gift by plaintiff's mother. It has been held that a parent is only entitled to the services and earnings of the child while the child is supported by him. Although the general principle is clear and unquestioned that the father is entitled to the services of his minor child, and to all that such child earns by his labor, yet it seems to be equally clear that, as the right of the father to the services of the child is founded upon his duty to support and maintain his child, if he should fail, neglect, or refuse to observe and perform this duty, his right to the services of his child should cease to exist; and such is held to be the law. As the father may forfeit his right to the custody and control of his child's person by abusing his power, so, by neglecting to fulfill the obligations of a father, he may forfeit his right to the fruit of his child's labor. If he provides no home for his protection, if he neither feeds nor clothes him, nor ministers to his wants in sickness or health, it would be a most harsh and unnatural law which authorized the father to appropriate to himself all the child's earnings. It would be recognizing in fathers something like that pre-eminent and sovereign authority which has never been admitted by the jurisprudence of any civilized people, except that of ancient Rome, whose law held children to be

the property of the father, and placed them in relation to him, in the category of things, instead of that of persons. *Tiffany on Persons & Domestic Relations*, pp. 261, 262.

[4] The same authority, continuing, says:

"There is some authority to the effect that the right to a child's services and earnings does not vest in the mother, even where the father has deserted her and the child, or is dead: that the mother, even under such circumstances as these, is entitled only to reverence and respect, and has no authority over the child, or right to its services. This, however, is a mistake, due perhaps, to some extent, to following without reason or other authority the dictum of Blackstone and other old writers and judges to that effect, and to a failure to recognize the fact that there is no longer any such principle or doctrine as the old feudal doctrine, which, requiring, as it did the abject subjection and servitude of the wife, was unable to recognize the supremacy of the mother. By the overwhelming weight of modern authority, a widowed mother is entitled to the services and earnings of a minor child to the same extent as the father would be if living. The same rule applies where a wife is deserted by her husband, or he is imprisoned, and she is left to maintain her children, for the same reason for the rule applies in both cases." *Tiffany on Persons & Domestic Relations*, p. 256; 29 Cyc. 1624-25; *Barrett v. Riley*, 42 Ill. App. 258; *Soper v. Igo*, 121 Ky. 550, 89 S. W. 538, 1 L. R. A. (N. S.) 362, 123 Am. St. Rep. 212, 11 Ann. Cas. 1171; *Geraghty v. New*, 7 Misc. Rep. 30, 27 N. Y. Supp. 403; *McGarr v. National*, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122, 96 Am. St. Rep. 749; *Matthewson v. Perry*, 37 Conn. 435, 9 Am. Rep. 339; *Bradley v. Sattler*, 156 Ill. 603, 41 N. E. 171; *Hollingsworth v. Swedenborg*, 49 Ind. 378, 19 Am. Rep. 687; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Keller v. St. Louis*, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391; *Whitehead v. St. Louis*, 22 Mo. App. 60.

The record in this case with reference to maintenance is silent. The defendant pleaded and proved the minority of the plaintiff, and while we might infer from the fact that he was living with his mother, that she was maintaining him, still there is no proof directly with reference to his maintenance.

Believing that the above is sound doctrine, and from the authorities, we are constrained to hold that the assignment is well taken, and the case, therefore, will be reversed and rendered in favor of the appellant. It is so ordered.

BARGER et al. v. BRUBAKER et al.*
(No. 7176.)

(Court of Civil Appeals of Texas. Galveston.
May 9, 1916. On Motion for Rehear-
ing, June 29, 1916.)

1. BILLS AND NOTES \S 254, 408—LIABILITY OF INDORSER—HOW FIXED.

An indorser's liability on a note may be fixed by protest or by bringing suit at the first term of court to which the suit can be brought after the note becomes due or by suit at the second term of court after it becomes due, and showing why suit was not instituted at the first term.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 575-580, 1019-1021, 1113-1128; Dec. Dig. \S 254, 408.]

2. BILLS AND NOTES \S 254, 408—LIABILITY OF INDORSER—RELEASE.

If no such liability is so fixed, the indorser is released.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 575-580, 1019-1021, 1113-1128; Dec. Dig. \S 254, 408.]

3. VENDOR AND PURCHASER \S 278—VENDOR'S LIENS—STATUTE.

Vernon's Sayles' Ann. Civ. St. 1914, art. 5695, providing that when the time of payment of vendor's lien notes is extended, if the contract of extension is signed and acknowledged as provided for in the law relating to the execution of deeds of conveyance, by the party obligated to pay such notes, and filed for record, etc., the lien shall be in force until four years after the maturity provided in such extension, and the date of maturity set forth in the deed of conveyance or the recorded extension of the same shall be conclusive as to the date of maturity, is a statute of limitations for the protection of those who may deal with lands, against undisclosed liens against them.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 776, 777; Dec. Dig. \S 278.]

4. EVIDENCE \S 445(4) — LIABILITY OF INDORSERS—STATUTE.

Notwithstanding such statute, a verbal extension of a note by the indorser while it was in his hands may be shown by the indorsee in proving his promptness in bringing suit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2055-2057; Dec. Dig. \S 445(4).]

5. BILLS AND NOTES \S 254—LIABILITY OF INDORSER—WAIVER OF PROMPT SUIT TO FIX LIABILITY.

An indorser, requesting an indorsee to give the maker of notes further time, waived the bringing of any suit to fix his liability as indorser until after he notified indorsee that he denied liability as indorser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 575-580; Dec. Dig. \S 254.]

6. BILLS AND NOTES \S 404(1)—FIXING LIABILITY OF INDORSER—SUIT WITHIN REASONABLE TIME.

Instruments indorsed and transferred after maturity, being in legal effect payable on demand, must be presented within a reasonable time to charge an indorser, the holder not being strictly bound by Vernon's Sayles' Ann. Civ. St. 1914, art. 579, providing for suit at the first term of court, etc., after the maturity of the instrument, so as to fix the liability of the indorser, since the note may pass to the holder long

after its maturity date and after one term of court after maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1001-1004, 1099, 1101-1103; Dec. Dig. \S 404(1).]

7. BILLS AND NOTES \S 254, 422(1)—LIABILITY OF INDORSER—WAIVER OF BRINGING PROMPT SUIT.

Where the indorser by unequivocal words or acts misleads the holder, and induces him to dispense with notice, suit, etc., required by law to fix liability of an indorser, he may be regarded as having waived his right under the law to have the note protested, suit brought, etc.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 575-580, 1196-1199, 1203-1208; Dec. Dig. \S 254, 422(1).]

8. BILLS AND NOTES \S 452(1)—PAROL EVIDENCE—VARYING TERMS OF NOTE INDORSEMENT—EXTENT OF LIABILITY.

An indorser cannot escape liability by showing that he had an understanding that his indorsement was to be without recourse on him, that he was ignorant of the legal effect of signing his name on the back of the note, and that he was told that signing his name was only a formal matter necessary to transfer.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1352; Dec. Dig. \S 452(1).]

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Action by Edward H. Bailey against W. L. Brubaker and others. From the judgment plaintiff and defendant A. G. Barger appeal. Appeal of plaintiff dismissed on his motion, and judgment affirmed as to appellant Barger.

McDonald & Wayman and C. G. Dmbrell, all of Galveston, for appellants. Edw. H. Bailey, of Houston, for appellees.

LANE, J. For the purpose of this opinion the following statement is deemed sufficient:

On the 7th day of August, 1911, A. G. Barger conveyed to W. L. Brubaker 22 acres of land situated near League City, in Galveston county. In part consideration for said land Brubaker executed and delivered to Barger his two promissory notes for \$1,000 each, numbered 2 and 3, respectively, due and payable to Barger on the 7th day of August, 1913 and 1914, respectively, bearing 10 per cent. interest per annum until paid. The date of payment of note No. 2 was thereafter extended by Barger to August 7, 1914, thus making both of said notes due August 7, 1914. Three hundred forty-eight dollars was paid by Brubaker to Barger on the principal of note No. 2, and also all the interest due on both of said notes up to August 7, 1913, was paid.

On the 6th day of November, 1914, Barger transferred and delivered both of said notes to the Raywood Canal & Milling Company of Houston, and indorsed both of them in blank by writing his name on the back of each of them. On the 10th day of November, 1914, the Raywood Canal & Milling Company transferred and delivered said notes to Edward H. Bailey, without indorsement.

Edward H. Bailey brought this suit on the 16th day of March, 1915, against W. L. Brubaker, as maker, and A. G. Barger, original payee, and the Raywood Canal & Milling Company as indorsers, to recover the principal, interest, and attorney's fees due upon said notes, and for a foreclosure of his lien upon the said 22 acres of land, which was retained by Barger to secure the payment of said notes, when he conveyed said land to Brubaker.

Among other things, plaintiff Bailey alleged the insolvency of Brubaker, the maker of the notes, at all times since Barger transferred and indorsed the same, and that defendant Barger did, at the time he transferred said notes, and at various and sundry times since, up to January 12, 1916, beseech and importune the transferees of said notes not to sue on said notes, but to give defendant Brubaker more time.

The Raywood Canal & Milling Company answered specially, denying that it had indorsed either of said notes, or that it was in any way liable to Bailey for their payment.

A. G. Barger, the original payee of said notes, admitted that he had signed his name on the back of said notes at the time he transferred and delivered them to said Canal & Milling Company, but says that he was ignorant of the effect of said act in so signing his name on said notes; that it was understood and agreed at the time he so signed that his transfer was to be without recourse on him, etc. He also sets up as a defense that both of said notes became and were due and payable on the 7th day of August, 1914, and that if it be held that he is an indorser of said notes, then he says that said Bailey, the transferee and holder of said notes, did not protest the same, nor did he bring suit on them at the first term of the court having jurisdiction of such suit, after the maturity thereof, nor did he bring suit thereon at the second term of said court and show good cause for not bringing said suit at said first term of court, and therefore he, Barger, is released as such indorser.

W. L. Brubaker, maker of the notes, answered by general denial.

Plaintiff Bailey, by supplemental petition, in reply to the answer of defendant Barger, demurred to so much of said answer as alleged that it was understood and agreed between Barger, and those to whom said notes were first transferred and indorsed, that his indorsement was to be without recourse, and he further specially alleged that, on or about the 1st day of August, 1914, A. G. Barger, the original payee, while still the owner and holder of said notes, entered into a verbal agreement and contract with W. L. Brubaker, the maker of said notes, to extend the time of payment of the interest due thereon to January 1, 1915, with the further agreement that if said interest was then paid he would extend the time of payment of the principal

of said notes to August 7, 1915, and therefore said notes were not due until Brubaker had made default in the payment of said interest on the 1st day of January, 1915. He further says that if Barger did not in fact make such extension, he, Barger, told those to whom he transferred said notes, at the time said notes were so transferred and indorsed, that he had made such extension, and that he, Bailey, was in turn told by said transferee that such extension was made at the time he purchased said notes, and that he believed and relied on said statement and information, and that on the 5th day of January, 1915, he received a letter from said Barger, in which he told him Bailey, that such was in fact made, and that, so believing and relying he did not bring suit on said notes earlier than he did, and that such statement in said letter was a ratification by Barger of what he had been told by those from whom he purchased said notes, and that said Barger is now estopped to deny that such extension was in fact made.

The case was tried before a jury. After all parties had closed their evidence the court instructed the jury to return a verdict in favor of plaintiff E. H. Bailey against W. L. Brubaker and A. G. Barger for the sum of \$2,045.18, and against all the defendants for a foreclosure of the lien on said 22 acres of land, described in plaintiff's petition, and in favor of the Raywood Canal & Milling Company as to liability upon the notes sued upon. The verdict of the jury was in accordance with said instructions, and a judgment was rendered accordingly. From so much of the judgment as refused plaintiff Bailey a recovery against the Raywood Canal & Milling Company he has appealed, and from so much of said judgment as was against A. G. Barger he has appealed.

Since the record has reached this court on appeal E. H. Bailey has filed a motion, joined in by the Raywood Canal & Milling Company, praying that his appeal from that part of the judgment of the trial court in favor of the Raywood Canal & Milling Company be dismissed at his costs, which said motion is here now granted, and plaintiff's said appeal is here dismissed.

Appellant Barger insists by his first and second assignment of error that the court erred in overruling his demurrer to so much of appellee's petition as alleged that he, Barger, had orally extended the time of payment of said notes, because it affirmatively appears that said notes are secured by a vendor's lien on land, and that it is provided by article 5695, Vernon's Sayles' Civil Statutes, that when the time of payment of vendor's lien notes is extended, such extension must be by written contract, signed and acknowledged, as provided for in the law relating to the execution of deeds of conveyance, by the party obligated to pay such notes, and filed for record, etc., and unless such provisions are complied with, the dates

of maturity of such notes as set forth in the deed of conveyance shall, in all actions on such notes, be conclusive evidence of the dates of maturity of the same.

[1, 2] In this state the liability of an indorser on any promissory note may be fixed by protest, or by bringing suit on such note, at the first term of the court to which such suit can be brought, after the note becomes due, or by instituting suit thereon at the second term of said court after said note becomes due and showing why such suit was not instituted at said first term. If no such liability is so fixed the indorser is released. It would therefore ordinarily become an important inquiry to the parties as to whether the note sued on was in fact past due at the time of the institution of the suit. Appellee Bailey pleaded that appellant Barger had verbally extended the time of payment of said notes, in any event, to January 1, 1915, and therefore said notes were not due until that date, and that after that date, and before any court having jurisdiction of the subject-matter had convened, Barger had requested him to refrain from suit and to give Brubaker, the maker, more time, thus attempting to show good cause why he had not sued at the first term of said court after said notes became due. The court at which suit might have been brought upon said notes, if no extension was made, and before it was brought on March 16, 1915, convened on the first Monday of October and December, 1914, and the first Monday in February, 1915. Barger owned and held said notes until he transferred them on the 5th day of November, 1914.

[3, 4] Appellant's contention is that it was not admissible to show that any verbal extension of the time of payment of said notes had been made, even if true, because article 5695, Vernon's Sayles' Civil Statutes, in substance, provided that the date of payment of notes secured by Men upon land can only be shown by the date of maturity, as shown on the face of the note, or by a contract of extension in writing, properly signed, acknowledged, recorded, etc., and therefore appellant's said demurrers should have been sustained. We think it was the intention of the Legislature, in enacting said article 5695, to enable those who may deal with lands in this state to determine from the date, as shown on the face of the original instrument, then under consideration, the due date of a written obligation secured by a lien on land, or to so determine from some written contract entered into between the maker and holder of such obligation, by which said due date had been extended, properly signed, acknowledged, and recorded in the deed records of the county in which said land is situated, and to provide a reliable means by which one dealing with such land may legally presume that the due date shown by such written instrument last recorded is the true

date of such obligation. Such statute is a statute of limitation for the protection of those who may deal with lands in this state against undisclosed liens against the same. Such statute has no application to, nor in any manner affects, the fixing of liability of an indorser of a note or other written obligation, the latter being the question presented in the present case. We do not think the trial court erred in overruling appellant's demurrers; therefore assignments 1 and 2 are overruled.

By appellant's third and fourth assignments he insists that the trial court erred in instructing the jury to return a verdict against him in favor of appellee, because the evidence adduced upon the trial raised issues of fact which should have been submitted to the jury for its determination, as follows:

First. As to whether there was a contract of extension of the notes sued on as alleged by the plaintiff.

Second. As to whether appellant, by reason of his conduct and his statements made in the letters written by him to appellee, has estopped himself from showing that there was in fact no valid agreement made by him to extend the time of payment of said notes, as alleged by the plaintiff.

Third. As to whether or not appellee Bailey was induced by said letters or other acts and conduct of appellant to delay the bringing suit on said notes at the first term of the proper court after he, Bailey, became the owner and holder thereof, or to bring suit at the second term of said court after becoming such owner and holder.

Fourth. As to whether Bailey brought his suit on said notes at the first term after he had been informed by appellant that he repudiated his liability as indorser of said notes.

Fifth. As to whether or not the letters written by appellant to Bailey, together with other acts and conduct of appellant, induced plaintiff, Bailey, to delay the bringing of his suit until after the convening of the February term of court in 1915.

We shall not undertake to discuss and dispose of the several subdivisions of assignments 3 and 4, but will, in a general discussion, dispose of the main proposition therein presented, to wit: Did the court err in instructing a verdict in favor of appellee Bailey against appellant Barger?

The undisputed evidence shows that W. L. Brubaker executed and delivered the notes sued on to A. G. Barger; that one G. N. Tegnell owned a certain tract of land near Raywood, in Liberty county, which one J. W. Jump, a subagent of Elmen Land Company, was endeavoring to sell to A. G. Barger. Later this land was sold to Barger through the Elmen Land Company, Tegnell taking in part consideration for the purchase price of said land the two notes in question, which were transferred and delivered to Elmen Land

Company for Tegnell by Barger, and at the time they were so delivered, A. G. Barger indorsed them in blank by writing his name on the back of them; that said notes were thereafter transferred and delivered by Tegnell, or some one acting for him, to the Raywood Canal & Milling Company, for the purpose of having said company release some interest it had in the land sold to Barger, and Barger executed a written transfer of said notes to said company as if said notes were transferred directly by him to said company; that appellee Bailey had nothing whatever to do with said foregoing transactions; that in about 6 or 8 days, to wit, November 10, 1914, after said notes were transferred to said Raywood Canal & Milling Company, said company sold and delivered the same to appellee Bailey; that when said notes were sold to Bailey he was told by Mr. Tegnell, a member of the Elmen Land Company, who negotiated the sale, that the time of payment of the notes was extended. He was sent by Tegnell to J. W. Jump at League City, who was to show him the land sold by Barger to Brubaker, and for which said notes were given in part payment. Jump, as the agent of Tegnell, told Bailey before he bought the notes that Barger had told him, Jump, that he, Barger, had extended the date of payment of the interest due on the notes to January 1, 1915, and had extended the principal to August 7, 1915; that Tegnell, who sold the notes to Bailey, did not tell him that the Raywood Canal & Milling Company owned or had anything to do with the notes, nor did Bailey have any knowledge of such fact until the deal was closed. On the 2d day of January, 1915, after Bailey bought the notes and they had been transferred to him, he wrote appellant A. G. Barger the following letter:

"Houston, Texas, January 2, 1915.

"Mr. A. G. Barger, League City, Texas—Dear Sir: Some time ago I purchased from Raywood Canal & Milling Company the remaining notes, two and three, executed by Wm. L. Brubaker to you, the balance of the principal due thereon amounting to \$1,615.49, and at once wrote Mr. Brubaker that I had purchased these notes and that according to his agreement with you the interest would be due, amounting to \$186.10, on January 1, 1915. Mr. Brubaker has never replied to my letter, and to-day I wrote him that unless this interest is paid at once I will declare the notes due and sue and foreclose the vendor's lien against the property. As you are liable on these notes and will have to pay any balance which the property may not bring at forced sale, I thought you might wish to take the matter up with Brubaker and see if he intends to pay the interest. I was told when I purchased these notes that you had agreed with him to extend the time of the payment of interest to January 1, 1915, and the time of payment of the principal to August 7, 1915. I would be obliged if you would write me whether this is correct or not. Unless this interest is settled at once I will be compelled to file suit against Mr. Brubaker and yourself. Hoping to hear from you by return mail, I remain,

"Yours very truly, Edward H. Bailey."

To this letter Barger replied as follows:

"League City, Tex. 1—5—15.

"Mr. Edward H. Bailey, Houston, Texas—Dear Sir: I rec. your letter this A. M. The statements you make in regard to W. L. Brubaker notes are O. K. and I am writing him in regard to same. If I don't hear from him I am going to Galveston next Monday & will do all I can to get him to do what is right. He is unfortunate in being deaf & it is hard to get him to realize what he is up against, however I think I can make it clear to him. Thanking you for your kindness, I am,

A. G. Barger."

On the 12th day of January, 1915, Barger wrote Bailey the following letter:

"League City, Tex. 1—12—15.

"Mr. Edward H. Bailey—Dear Sir: I went to Galveston yesterday, & I seen Mr. Brubaker and explained the business to him as best I could. He tells me that he has an appointment with a man Wednesday that he thinks he will be able to close a deal right away, & he is willing to sacrifice all of his interest to satisfy those notes. I wish you could be easy a little longer & he will do all he can to meet it. I am personally acquainted with the man he is dealing with & he is well fixed financially. I am going down again tomorrow & will see them again & let you know.

"Very truly,

A. G. Barger."

On the 20th or 21st day of January, 1915, Bailey received a letter from Barger in which he denied any liability as indorser, saying that he had not given Brubaker any extension of the date of payment of either the principal or interest due on the notes, and insisted that as no suit had been brought on said notes he, Barger, was no longer liable as indorser. On the 27th day of January, 1915, Barger wrote Bailey as follows:

"League City, Texas 1—27—15.

"Mr. Edward Bailey, Houston, Texas—Dear Sir: Received your letter yesterday & wrote Mr. Brubaker in regard to it and asked him to let us know at once what progress he is making with his sale. We will likely hear from him in a day or so, could be very glad if he can make the deal.

Very truly, A. G. Barger."

The first term of the court, after the letters of January 12, 1915, and January 21, 1915, were written, convened on the first Monday in February, 1915, 11 days after Bailey was notified by Barger that he denied liability as indorser. Bailey lived at Houston, Barger at League City, and Brubaker at Galveston. Bailey filed his suit upon the notes on the 16th day of March, 1915.

Appellant Barger testified that he had agreed with Brubaker to extend the time of payment of the interest due on said notes to Christmas, 1914, and that if such interest was then paid he would extend the principal to August 7, 1915; provided he, Barger, continued to own the notes.

J. H. Ross, a witness for appellant Barger, a lawyer of League City, testified that he heard the agreement with reference to extension of notes and interest thereon, made between Barger and Brubaker, and that said agreement was that as stated by Barger.

C. A. Elmen, of the firm of Elmen Land Company, who was the active agent in the purchase of the notes from Barger, testified

that before and at the time Barger transferred the notes, he, Barger, said to him, Elmen—

"that he sure did not want us (meaning Elmen Land Company) to take advantage of Brubaker, but wanted us to grant him the extension he had already given."

J. W. Jump, who was active in an effort to have Barger transfer said notes, testified that Barger went to Houston to talk about his trade with Elmen Land Company three times; that he hesitated about making the transfer of the notes to Elmen Land Company for Tegnell, and said to him that they might transfer the notes to some one else and that he, Barger, did not want any advantage taken of the old man (Brubaker); that he had promised the old man to give him an extension, and that he wanted him to have it, and had Elmen to agree to give the old man more time before he would agree to make the transfer; that he told Bailey what Barger had said before Bailey purchased the notes.

The testimony of Elmen and Jump, as above stated, stands undisputed, except that appellant Barger says he qualified the alleged extension with the condition "that if he continued to own the notes to the time stated, he would grant the extension."

If it be conceded that, to support the judgment rendered, it was necessary that the evidence conclusively show that the extension of the time of payment of the notes and interest due thereon, as alleged by appellee Bailey, was in fact made, we would hold that the trial court committed reversible error in not submitting that question to the jury for its determination, as there was sufficient evidence to require the submission of such question, unless the same became immaterial and unimportant by reason of other facts shown by the undisputed evidence to exist. However, if it be conceded that no such extension as alleged by appellee Bailey was given, and that said notes were past due at the time appellant Barger transferred them, and at the time Bailey became the owner, and that Bailey did not fix the liability of the indorser (Barger) by protest or proper suit, nevertheless it is, we think, conclusively shown that appellant Barger, the indorser, was the owner of said notes from the 7th day of August, 1914, the date on which he insists they became due, that before he transferred and indorsed said past-due notes, the October term of the court at which suit might have been brought on the notes had convened, and no suit had been brought on said notes; that appellant transferred said notes to Elmen Land Company, for the benefit of Tegnell, on or about the 5th day of November, 1914, and that at the time of said transfer and indorsement, he, Barger, requested the transferee to give the maker of the notes further time in which to pay same; that when the notes were transferred to appellee Bailey, he was told by Elmen and Jump of such request;

that on January 2, 1915, appellee Bailey wrote to appellant that he had been so told, and on the 5th day of January, 1915, appellant, in reply to Bailey's letter, wrote him that the information given him was correct; that on the 12th day of January, 1915, appellant Barger wrote to appellee Bailey, asking him to give the maker of the notes further time; that not until January 21, 1915, did Barger ever insist that he could not be held as indorser because his liability had not been fixed as provided by law; that after Bailey was so informed he had only one day to prepare and file his suit so as to get service at the February term of court; and that it was impossible for him to bring his suit and get service on all the defendants so as to take judgment at said term of court, and that appellee did bring his suit at the next term thereafter.

From the facts stated we conclude:

First. That as appellant was the owner of the notes in question long after they became due, and although he had an opportunity to do so, he had brought no suit to collect the sum due on the notes, the transferee of the same was not required to exercise that degree of diligence in fixing the liability of the indorser which he would have been required to exercise if said notes had been transferred to him before maturity, but should be required to exercise such reasonable diligence only as was apparently necessary, under all the facts and circumstances of the case, to protect the indorser from loss by delay in bringing suit, and that appellee did exercise such diligence.

Second. That appellee Bailey did show good cause why he did not bring his suit at the December term, 1914, or at the February term, 1915, of said court.

[5] Third. That appellant, by his request to appellee Bailey and others to give the maker of said notes further time, waived the bringing of any suit to fix his liability as indorser until after he notified appellant that he denied his liability as such indorser, and therefore the court did not err in instructing a verdict against appellant as indorser. *Holliman v. Karger*, 30 Tex. Civ. App. 558, 71 S. W. 299; *Chadwick & Co. v. Jeffers*, 1 Rich. Law (S. C.) 397, 44 Am. Dec. 260; *Wickersham v. Altom*, 77 Ill. 620; *Brown v. Robbins*, 1 Ind. 82; *Lowther v. Share*, 44 Ind. 390; *Free v. Kierstead*, 16 Ind. 91.

We are so forcibly impressed with the reasoning of the court in the case of *Chadwick & Co. v. Jeffers*, supra, as applicable to the propositions under discussion, we have adopted the same in this case, as follows:

"The distinction between the case of a note indorsed after it is due, and of one indorsed before it is due, with respect to the diligence required in making demand and giving notice, is very obvious. When a note is indorsed after it is due, no time for payment is prescribed. The reasonable expectation of the holder that it will be paid when due has been already disappointed, and he has had the opportunity of

using such extraordinary diligence as might be necessary, if it could avail to protect himself against the failure of the maker to pay. The note has lost credit before the holder parts with it, and is unaccompanied by any engagement of the maker, respecting the time of payment, so that punctuality is out of the question. But a note indorsed before it is due, unless payable on demand, has a prescribed time for payment, at which it is the duty of the indorsee to demand, and of the maker to pay, the sum stipulated. The indorser may reasonably expect that it will be promptly paid when due, and may require the indorsee to demand payment at that time, and not subject him to the risk of loss that might follow on delay. If not paid when due, the indorser may also require the earliest reasonable notice of the failure of the maker. If the indorsee neglects to demand payment at the proper time, and to give notice to the indorser of nonpayment, he may justly resist liability for the loss when the indorsee has neglected to do what was important to his security.

"All the rules of diligence applicable to negotiable instruments are designed for the security of the parties secondarily liable, and when demand or notice is not necessary for their protection, it is dispensed with. * * * The same principle would dispense with notice of nonpayment to the indorser of a note past due. To visit on the indorsee in such case, a loss which may be presumed to arise from want of punctuality in making demand and giving notice of nonpayment of a note not payable at any specified time, and as to which the debtor had made default, while the note was in the hands of the indorser, on the presumption of an injury to the indorser, by depriving him of the advantage of taking prompt measures for recovery against the maker, which, while the note was in his possession, he had wholly neglected to pursue or had pursued ineffectually, would be, on a presumption against the fact, to substitute the indorsee to a loss justly chargeable to the indorser.

"The earlier decisions in our courts have not been very consistent, but the more recent cases have maintained that the rules of diligence respecting demand and refusal which are applicable to negotiable instruments transferred before they are due do not apply to transfers after they are due. Though demand and notice are not dispensed with, yet the duty of the holder, in these particulars, is limited to the use of such diligence, according to the circumstances of the case, that the indorser suffer no injury through his remissness or neglect."

[6] Instruments indorsed and transferred after maturity, being in legal effect payable on demand, must be presented within a reasonable time. Under such circumstances the holder cannot be strictly bound by the provisions of article 579, Vernon's Sayles' Statutes, which provide for suit at the first term of the court, etc., after the maturity of the instrument, so as to fix the liability of the indorser, for the reason that the note may pass, and in this case it did pass, to the holder long after its date of maturity and after one term of the court had passed, after such maturity.

[7] Where the indorser by unequivocal words or acts misleads the holder, and induces him to dispense with notice, suit, etc., required by law to fix liability of an indorser, he may be regarded as having waived his right under the law to have the note protested, suit brought, etc. Ruling Case Law, § 409, pp. 1187, 1188. In *Lowther v. Share*, supra, the court said:

"All the questions raised in the case resolve themselves into the question whether, under the circumstances, the appellant is liable to the appellee on the indorsement. We think, assuming that the delay to prosecute the maker was at the instance of the defendant, * * * the defendant is clearly liable to the plaintiff on the indorsement."

In *Brown v. Robbins*, supra, it is said:

"We think, on this evidence, the plaintiff had a right to recover. It appears by the evidence that, at the time of the assignment, the defendant did not think the maker of the note able to pay it, and did not wish that strict legal diligence should be used by the plaintiff to collect the note from the maker. The defendant told the plaintiff, at the time of the assignment, that the maker was an honest man; that he was under the weather, and to wait awhile and he would get his money."

We have reached the conclusion that from the simple, clear, and undisputed facts of this case no other judgment than the one rendered by the trial court could have been rendered, and it follows that we do not think that the court erred in instructing the jury to find for appellee against appellant, and therefore we overrule assignments three and four.

[8] By appellant's fifth assignment it is insisted that the court erred in sustaining plaintiff's special exception to so much of appellant's first amended answer as alleges that it was the understanding between him and those acting for his transferee that his indorsement was to be without recourse on him, and that he was ignorant of the legal effect of his signing his name on the back of the note transferred, and that he was told by those representing the transferee that his signing his name on the back of said notes was only a formal matter, and was necessary to make a proper transfer, and that, relying on such representations, he so signed his name, believing that he was transferring said notes without recourse on himself. In *Wizig v. Beisert*, 120 S. W. 954, it was held that the statement of an attorney for the indorsee of a note that the indorser of a note would not be bound thereby is only the expression of an opinion as to the legal effect of the indorsement, and not the misstatement of a fact entitling the indorser to avoid liability of his obligation, on the grounds of fraudulent representations; that a verbal agreement between the indorser and indorsee of a note that the former will not be bound by his indorsement is no defense to an action thereon, for the reason that evidence thereof cannot be offered to defeat the action. This proposition is also supported by the cases of *Cresap v. Manor*, 63 Tex. 485-488, and *Dwiggins v. Merchants' National Bank*, 27 S. W. 171. The fifth assignment is overruled.

As we find no error in the trial of this cause, the judgment rendered in the trial court is affirmed.

Affirmed.

On Motion for Rehearing.

In the original opinion filed in this court on the 9th day of May, 1916, we stated:

"That as appellant was the owner of the notes in question long after they became due, and although he had an opportunity to do so, he had brought no suit to collect the sum due on the notes, the transferee of the same was not required to exercise that degree of diligence in fixing the liability of the indorser which he would have been required to exercise if said notes had been transferred to him before maturity, but should be required to exercise such reasonable diligence only as was apparently necessary, under all the facts and circumstances of the case, to protect the indorser from loss by delay in bringing suit, and that appellee did exercise such diligence"

—and in support of such statement we quoted with approval a portion of the opinion in the case of *Chadwick v. Jeffers*, 1 Rich. Law (S. C.) 397, 44 Am. Dec. 260. Upon further consideration, on motion for rehearing, we have concluded that such statement, and the rule quoted from *Chadwick v. Jeffers*, supra, is not the law of this state as made by our statutes or by the decisions of our courts. We therefore recede from such holding.

But as we still think the judgment of the trial court was properly affirmed for the other reasons given in our opinion, the motion for rehearing is overruled.

BOUNDS et al. v. STEPHENSON et al.*
(No. 7441.)

(Court of Civil Appeals of Texas. Dallas.
June 10, 1916. Rehearing Denied
July 1, 1916.)

1. CORPORATIONS \S 320(11)—LIABILITY OF OFFICERS—UNDUE EXPENDITURES.

Evidence held insufficient to show that defendant corporation president hired attorneys without proper authority, or without necessity for their employment, so that he could not be held liable to stockholders for the fees paid them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1437; Dec. Dig. \S 320(11).]

2. CORPORATIONS \S 320(11) — LIABILITY OF OFFICERS—UNDUE EXPENDITURES—COLLUSION.

Evidence held insufficient to show that corporation officers were in collusion in fixing their salaries at an exorbitant figure, so that they could not be held liable to the stockholders for the amounts so expended.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1437; Dec. Dig. \S 320(11).]

3. CORPORATIONS \S 312(3)—LIABILITY OF OFFICERS—UNDUE EXPENDITURES.

The mere fact that, where by-laws required 10 days' notice of meeting to stockholders, the officers sent with the notice two proxy slips, one of which ran to the officers, and sent also a stamped envelope for return of the proxy, is insufficient to show mismanagement; the additional expense being slight.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1380, 1381; Dec. Dig. \S 312(3).]

4. CORPORATIONS \S 312(1), 317(3)—LIABILITY OF OFFICERS—UNDUE EXPENDITURES.

Where a corporation was authorized to act as surety, and its officers in its name signed an undertaking for the brother of the president, and on default suffered judgment against it, but took judgment over against the brother, and secured a lien on land to secure it, but did not

release the judgment, such facts were insufficient to show mismanagement or fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1376-1378, 1390, 1392, 1407; Dec. Dig. \S 312(1), 317(3).]

5. CORPORATIONS \S 294—LIABILITY OF OFFICERS—UNDUE EXPENDITURES.

Evidence held insufficient to show mismanagement of a surety corporation sufficient to warrant, on a stockholder's petition, removal of the president from office as trustee, with right to make loans for stock sales.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1263-1266; Dec. Dig. \S 294.]

6. CORPORATIONS \S 322—OFFICERS—EXCESSIVE SALARIES.

Salary of a corporation president cannot be held excessive, where there is nothing to show the duties exacted of him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1365; Dec. Dig. \S 322.]

7. CORPORATIONS \S 553(1)—RECEIVERS—APPOINTMENT—WHEN PROPER.

The power to appoint a receiver, especially of a corporation, will not be exercised, except upon a very grave necessity, and upon a clear showing that the applicants' rights imperatively demand the appointment, and that without it he had no adequate remedy, and is in danger of suffering irreparable loss.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2201, 2210, 2213-2216; Dec. Dig. \S 553(1).]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Suit for injunction and other relief by W. R. Bounds and others against J. B. Stephenson and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

C. M. Smithdeal, of Dallas, for appellants. Smith, Robertson & Robertson and Locke & Locke, all of Dallas, for appellees.

RAINEY, C. J. We take from appellants' brief the statement of the case, as follows:

Appellants for themselves, other stockholders similarly situated, and for the General Bonding & Casualty Insurance Company, sued John B. Stephenson, James A. Stephenson, George W. Riddle, A. Ragland, T. A. Smith, Frank Esell, J. H. Christler, and the General Bonding & Casualty Insurance Company, and alleged, in substance: That appellants are stockholders of the General Bonding & Casualty Insurance Company, which company was incorporated for the purpose of transacting all kinds of surety, casualty, and liability insurance. All defendants, except James A. Stephenson and J. H. Christler, were alleged to be directors, John B. Stephenson was alleged to be president, and T. A. Smith secretary, of said company. It was alleged that John B. Stephenson had dominated the company since its organization; that by virtue of agreements and conspiracies between John B. Stephenson, James A. Stephenson, J. H. Christler, George W. Riddle, A. Ragland, Harry L. Seay, and others, John B. Stephenson had retained himself in the offices of director and president of the company, and had voted to pay himself large sums of money in the way of salaries; that John B. Stephenson and his brother, James A. Stephenson, and their partner, J. H. Christler, acquired in their effort to control the company certain shares of the company's stock, and in order to sell said stock lent to the purchasers and prospective purchasers thereof the company's money, at 6 per cent. per annum, with which to pay therefor, when

the company could have lent its money at 8 and 10 per cent.; that said John B. Stephenson paid large sums of money to Locke & Locke, and other attorneys, unlawfully and improperly, the company at the time having a general attorney, who was employed and paid for the purpose of attending to its legal affairs; that in order to acquire and hold control of the company John B. Stephenson sent out letters, signed by the General Bonding & Casualty Insurance Company, asking stockholders for proxies, authorizing him, or some of his copartners, or dummy directors, to vote for such shareholders; that said campaigns for proxies were conducted at the expense of the company; that said John B. Stephenson, J. H. Christler, and other officers, as directors of the company, voted themselves salaries; that John B. Stephenson and his copartners made a contract with J. H. Christler to elect him a salaried officer of the company, and pay him a salary, in consideration for his purchase of stock from a copartnership composed of John B. Stephenson, J. A. Stephenson, and others, and that this contract was carried into effect, and a salary was paid to J. H. Christler, although said Christler was wholly incompetent and unfit to discharge the duties of the office; that said John B. Stephenson, as president of the company, obligated the company on a bond in the penal sum of \$30,000, conditioned that James A. Stephenson, T. H. Stephenson, and D. D. Crockett would pay a note executed to W. C. Tyrrell, and that said T. H. Stephenson and D. D. Crockett would sell a certain number of shares of the stock of the Republic Trust Company at a certain price per share; that James A. Stephenson, T. H. Stephenson, and John B. Stephenson are brothers; that a judgment was obtained by W. C. Tyrrell against the company on said bond in the sum of approximately \$24,000, and a judgment by the company over against James A. Stephenson; that the company was compelled to pay the judgment to Tyrrell and borrow the money for said purpose, but that John B. Stephenson had failed and refused to collect the judgment from his brother, James A. Stephenson, although the plaintiffs, as stockholders, demanded that such judgment be collected, and pointed out property that could be levied on, and out of which said judgment could be collected; that on account of the unlawful expenditures made by John B. Stephenson, plaintiffs, as minority stockholders, were entitled to a judgment in behalf of the company against John B. Stephenson, and were also entitled, in behalf of the company, to have the judgment against John B. Stephenson, James A. Stephenson, Harry L. Seay, Frank Ezell, George W. Riddle, T. A. Smith, and T. L. Camp, by voting their own stock and proxies, acquired in a campaign conducted at the expense of the company, had voted to liquidate the company and to make themselves, with exception of James A. Stephenson and Harry L. Seay, liquidating agents, but, after so voting to liquidate, said John B. Stephenson, George W. Riddle, T. A. Smith, Frank Ezell, and T. L. Camp delivered all of the property and assets of the company, amounting in value to over \$300,000, into the hands of John B. Stephenson, and by an instrument in writing, purporting to be a resolution of the directors, gave John B. Stephenson plenary power to sell the assets of the corporation at any price, to retain all of the officers and employees of the company at exorbitant salaries, and thereby dissipate the company's assets, and to do any and all other things which he (John B. Stephenson) might desire to do with regard to the properties and assets of said company; that it had become manifest that the object for which the corporation was organized could not be attained, and upon this becoming manifest the stockholders of the company owned the assets jointly, and were entitled to have a receiver appointed to take possession of them and wind up the affairs

of the company; that John B. Stephenson, to whom the so-called directors delivered the assets of the company, with full power to dispose of the same, was insolvent, and not only insolvent, but by his conduct in the handling of the business of the company, particularly with reference to his said refusal to collect the judgment from his brother, James A. Stephenson, and his conduct with reference to selling stock belonging to his brother and himself to persons to whom he had lent the company's money at 6 per cent. to pay for the stock, had shown himself to be an unfit person to act as trustee for the stockholders in winding up the company's affairs. The suit was dismissed as to J. H. Christler. Plaintiffs, in behalf of the General Bonding & Casualty Insurance Company, asked for judgment against John B. Stephenson for the moneys unlawfully expended by him for attorney's fees, salaries, conducting campaigns for proxies, etc., and also, in behalf of said company, prayed for a mandatory injunction requiring the collection of the judgment against James A. Stephenson, and for the appointment of a receiver to take possession of the assets and wind up the affairs of the General Bonding & Casualty Insurance Company. The case was tried before the court, and judgment was rendered that plaintiffs take nothing, and that the defendants recover of plaintiffs their costs, from which judgment this appeal is taken.

[1] The first error assigned is:

"Evidence showing, without contradiction, that under the by-laws of the General Bonding & Casualty Insurance Company the executive committee had the sole authority to appoint an attorney, and that the executive committee employed T. L. Camp as attorney for the company, who was paid a salary of \$250 a month to attend to the legal business of the company, and further showing that John B. Stephenson, the president of the company, without authority, employed other attorneys to perform the services which the said T. L. Camp was obligated to perform by the terms of his employment, and that said John B. Stephenson paid from the funds of the company large sums of money, to wit, approximately \$7,000, to Locke & Locke and other attorneys, who were not employed by the executive committee, and who were employed by said John B. Stephenson without authority, the court erred in holding that the plaintiffs, as minority stockholders of the General Bonding & Casualty Insurance Company, were not entitled to recover, in behalf of the corporation, and from John B. Stephenson, said sums so unlawfully expended by him."

The General Bonding & Casualty Insurance Company was incorporated on November 20, 1910, for the purpose of transacting all kinds of surety, casualty, and liability insurance business. J. B. Stephenson was its first secretary, and remained so until in January, 1912, when he was elected president and general manager. The by-laws of the company provide that the general attorney shall have charge of the legal department of the company, and shall advise concerning claims made upon it, and litigation in which it may be involved. Appellant says that:

"The evidence shows that a by-law was adopted conferring upon the executive committee of the company authority to employ counsel. It affirmatively appears that authority was not vested in the president of the company, John B. Stephenson, to employ attorneys."

But in support thereof he does not recite the record page where it can be found. This statement is controverted by appellee, who contends that Stephenson had the authority

usually incident to the combined office of president and general manager. Mr. T. L. Camp was employed as the general attorney for the company and testified:

"As general attorney of this company, it is true that I never refused to perform any services I was called upon to perform, except possibly in one suit. I have suggested the employment of counsel in many cases, and I suggested the employment of counsel in this case, tried in this court a few days ago, that I did not appear in. That was the only case in which I refused to appear, and that was not a refusal, but a suggestion that other counsel be employed. All these expenditures for attorney's fees paid out by this company have not been paid out under my direction. Mr. Stephenson has employed counsel in cases that were not employed under my direction; but he had usually talked to me about it, either before or after, and I have always acquiesced in it. I agreed to it. * * * I know that the by-laws provide that the executive committee shall appoint an attorney to look after the legal affairs of the company, but I do not recall the exact wording of it. I recall that there is such a power in the executive committee, and that it specifies the duties of the general attorney."

He further testified that the company had considerable litigation in different parts of the state, and he assumed that he himself had the right to employ other counsel, and that his understanding of the duties of the general attorneys were as above stated from the by-laws; that he did not understand that it was his duty to go all over the state, trying all the cases that arose; that, on the contrary, it was understood that he had authority to employ counsel to take charge of litigation in other parts of the state, and that as a matter of fact he had done so a great many times. It does appear that both Camp, general attorney, and Stephenson, as president and manager, did employ, at different times, counsel who rendered services for the company; but it does not appear definitely how much was paid by each. These services were accepted by the company, and Stephenson's acts were ratified by the directors. There is no fraud charged on the part of Stephenson in employing said counsel, nor is it shown that such employment was not necessary, or that the fees paid were unreasonable. We think, under the facts shown and the decision in *Ice Co. v. Crawford*, 18 Tex. Civ. App. 176, 44 S. W. 877, the court did not err in holding against the appellant.

[2] The appellant's second assignment of error is:

"The evidence showing without contradiction that George W. Riddle was a dummy director, subject to the influence and control of John B. Stephenson, and further that John B. Stephenson and T. L. Camp were jointly interested in 307 shares of the stock of the company, which they held under a voting trust, which obligated T. L. Camp to vote his interest in said stock for John B. Stephenson, and, further, that before each director's meeting, at which John B. Stephenson was elected to a salaried office, he consulted with George W. Riddle about the amount of salary he should have, and procured the promise of George W. Riddle to vote to fix his salary at the amount suggested by John B.

Stephenson, and that, at each directors' meeting at which John B. Stephenson's salary was fixed and voted, John B. Stephenson, J. H. Christler, and T. L. Camp, all of whom were drawing salaries from the company, voted to fix each other's salaries, and that George W. Riddle joined in their vote to fix their salaries, and voted, as he had agreed to, for whatever salary John B. Stephenson desired as president of the company, and further showing that there was community of interest and collusion between them with regard to fixing said salaries, and that the salaries of John B. Stephenson and J. H. Christler could not have been voted and paid to them without the votes of T. L. Camp and George W. Riddle, and that the votes of George W. Riddle, T. L. Camp, J. H. Christler, and John B. Stephenson were necessary to fixing and paying the salaries voted and paid to J. H. Christler and John B. Stephenson from and after the — day of January, A. D. 1912, the court erred in holding that the plaintiffs, as minority stockholders, were not entitled to recover in behalf of the corporation, against John B. Stephenson, the amount of salary so unlawfully voted and paid from the funds of the company to John B. Stephenson and J. H. Christler from and after the — day of January, A. D. 1912."

This assignment, in effect, attacks the acts of the directors, in that there was collusion between them in the fixing of salaries of Stephenson, president, and Christler, secretary, and that Riddle was the tool of Stephenson and under his control in acting for the concern, and charges that the evidence is uncontradicted to show this. On the proposition of Riddle being a dummy of Stephenson, it was shown: That he was the president of the First State Bank of Dallas, of which Stephenson was a patron, and from which he sometimes borrowed money, and in which the funds of this company were deposited, and with which it transacted its banking business. That Riddle owned one share of stock in this banking company, and had been a director of this company from its beginning. Riddle testified:

"* * * Since the organization of the company I have advised with John B. Stephenson frequently, and I usually had an understanding with him, and he frequently advised with me. I have had an understanding with him, and always supported him for president of the company, and always voted for him as director. As to the salary, that is a matter that has been discussed between us, and agreement reached between he and I, before the election. The records will show if I voted to raise his salary. My mind don't serve me just exactly that way. Before doing that he has always discussed the matter with me. He has always been that frank with me, and been that considerate of me."

Riddle was a man of substantial means and business standing. The company was organized in December, 1910. It had a board of 36 directors, among whom were both the appellants, who attended the first meeting. The company started out with too great an expense, there being eight salaried officers; the president receiving \$5,000, Stephenson as secretary, \$3,000. On March 14, 1911, Stephenson and Kneeland, secretary and vice president, respectively, addressed to the president a communication to the effect that expenses were too great and tendered

their resignations, to take effect immediately, and tendering their help in every way possible. The executive committee on April 11, 1911, considered this communication and refused to accept said resignations, and the salaries of the president, vice president, and secretary were reduced from \$5,000, \$3,000, and \$3,000, respectively, to \$2,400 each. The treasurer, medical director and agency director, whose salaries had been \$3,000, \$3,600, and \$2,400 each, were retired, and the salary of the medical director was fixed at \$100 per month. At the annual meeting of the stockholders January 9, 1912, 19 being present, including the appellants, salaries were fixed for president, \$3,600; secretary-treasurer, \$3,000; vice president, \$3,600; and general attorney, \$1,800. At this meeting J. B. Stephenson was unanimously elected president. In 1913 the board of directors was reduced from 36 to 7, and the president's salary was increased to \$4,800. No vote was ever cast against Stephenson as president, and no officer voted to fix his own salary. There was no agreement existing between Seay, Stephenson, Camp, and James A. Stephenson with regard to the 307 shares of stock owned by them jointly, although the stock was always voted by them in harmony, but never against the wishes of J. B. Stephenson. In 1914 the board of directors elected were J. B. Stephenson, Harry L. Seay, George W. Riddle, A. Stagland, C. M. Smithdeal, W. R. Bounds, and T. L. Camp. Of these Stephenson and Camp were the only salaried officials.

While the evidence shows that the board of directors were harmonious, there being no friction among them, yet we do not think there was any collusion between them to act against the interest of the company and only for their interest. The evidence fails to show that either of them voted to fix their own salary, or that any salary was fixed by improper acts on the part of either director. There is nothing showing what the services of John B. Stephenson were worth as president, or that his salary was exorbitant. This assignment is overruled.

[3] Appellant's third assignment of error is:

"The evidence showing, without contradiction, that before each annual meeting of stockholders John B. Stephenson sent proxies to each stockholder, with his name, or the names of his partners and dummy directors, inserted therein; that he had said proxies printed at the expense of the General Bonding & Casualty Insurance Company; that he bought stamps to mail same out from the funds of said company, and inclosed stamped envelopes, the stamps on which were bought from the funds of said company; that he signed the name of the company to the letters calling for said proxies, as though it were the company itself asking the stockholders to send in said proxies; that he used the money of the company and the time of the employees of the company in sending out said letters to the stockholders, in order that he might retain his control and management of the company; and that he did, by such methods, ob-

tain a sufficient number of proxies to enable him to elect such directors as he might choose, who would retain him in the control and management of said company, and that he did by these methods continue himself in control and management of the affairs of said company—the court erred in holding that the plaintiffs, as minority stockholders, were not entitled to recover, in behalf of said corporation and against John B. Stephenson, the amounts so unlawfully expended by him from the funds of the company."

The by-laws of the company require 10 days' notice to be given of each regular meeting of the stockholders, by mailing to each registered stockholder a written notice, addressed to him at his last address appearing upon the records of the company. The custom of the company was to send out a printed notice of the meeting, and to send with it two proxy forms, one printed on white paper and the other on blue paper. In the form printed on white paper the names of proxies were inserted, and in the form printed on blue paper no name was inserted, but a space was left to be filled in by the stockholder if he chose to be represented by some one other than those whose names were printed on the white blank. The notice, of course, was signed by the company through some officer, usually Mr. Stephenson. Several sets of notices and proxy forms appear in the statement of facts. They are similar in their terms. At the meeting of 1912 the white paper proxy form did not have the name of J. B. Stephenson on it, but for 1913 and 1914 his name did appear as one of the proxies. We see no objection to this way of procuring proxies for having sufficient shares of stock represented. No deception was practiced in securing proxies—every one was given an opportunity to vote for any one he chose to represent him in the meeting, and it seems to us that this manner of proceeding was fair, and insured practically a fuller meeting of stockholders than otherwise. The expense for printing the extra slips and sending them with the regular notices was but a trifle, and should not be considered.

[4] The fourth assignment, in effect, complains: That John B. Stephenson, as president of said company, signed the name of said company to a surety bond for \$30,000 upon which his two brothers and another were principals. That said bond was sued on, that J. B. Stephenson and the other directors failed to make any defense to same, and that judgment was rendered against the company for \$24,000, with judgment over against the principals. That Crockett and T. H. Stephenson, two of the principals, were insolvent. That James A. Stephenson, the other principal, had property out of which the judgment could have been collected. That said company borrowed money and paid judgment, and that at a meeting called to settle with James A. Stephenson his note was accepted, secured by lien on Western lands, which was done over the protest of appellants. That James A. Stephenson own-

ed certain shares of stock, which the directors refused to garnishee or to proceed to collect the judgment, all of which entitled appellant to a mandatory injunction.

Appellant was within its charter powers in becoming surety on said undertaking. It was also bound for the payment of the judgment rendered against it, and this much should be conceded; but the question is: Should the directors of appellant company have proceeded to the enforcement of the judgment against the Stephensons and Crockett, and not have made the agreement with James A. Stephenson for an extension of time for payment by him? John B. Stephenson, being a brother of James A. Stephenson, did not take part in the settlement made between James A. Stephenson and the other directors, and it does not follow that the other directors acted contrary to the best interest of the company in making the settlement. The judgment was not released in any way against James B. Stephenson, and he had given a lien on Western land to secure its payment. By enforcement of the judgment the land may have been sold under execution for much less than enough to pay the debt, while by pursuing a more lenient course in granting further time the debt might be paid. Taking this course rested with the directors, and the evidence shows that they acted in good faith, believing that the best interest of the stockholders would be subserved by pursuing that course. This latter view seems to have been adopted by the trial court, and we do not feel justified from the evidence in saying that he acted wrong.

[5] The fifth assignment of error complains of the court in rendering judgment for appellees and in not appointing a receiver, in that the uncontradicted evidence shows that John B. Stephenson, the president, dominated the directory, that the directory had failed to attain the object for which the company was incorporated, and that said Stephenson was insolvent and unfit for the office of trustee and the making of loans to facilitate stock sales.

We are of the opinion that the evidence is not uncontradicted or so conclusive one way that it required the trial court to appoint a receiver at the instance of appellants. It is true that the company had failed to succeed in its undertaking, and directory felt that its affairs should be placed in the hands of a trustee for liquidation, and John B. Stephenson was named as such trustee. This action

was approved by a majority of the stockholders at a regular meeting. The unfitness of said Stephenson for the office of trustee was not shown. The evidence does not show that he was insolvent, or that he was dishonest or incapable to carry out the trust. It shows, on the other hand, that he was an experienced business man and regarded as a man of integrity and capability, that the directors conferred with him and acted in harmony with each other in conducting the affairs of the company, and it is not conclusively shown that he dominated them to the detriment of the company's interest. They were all men of reputable standing, and Riddle, Camp, Christler, and Seay were men of large means and were independent, and the evidence shows they were not dominated by Stephenson. That they should have trusted each other and worked in harmony for the interest of the company was to be expected.

We think the evidence fails to show the directory censurable for the transactions in making loans to facilitate the sale of stock as charged. While some censure may lie for the settlement of the Tyrrell judgment, yet it is no uncommon thing for some errors to be made by the best-managed businesses, and though a mistake was made in this transaction, the evidence does not show that the amount will not be ultimately recovered and the company recoup its loss.

[6] The evidence fails to show what work was required of the president, John B. Stephenson, and that the salary paid him was excessive. Without such proof, we are unable to say that he has received any greater salary than he was entitled to, and which he should have refused.

[7] That the evidence fails to show that the property would be administered with less expense by the appointment of a receiver than by the trustee appointed is at least doubtful, and we are unable to say that the court erred in its judgment.

"The power to appoint a receiver, especially of a corporation, will not be exercised, except upon a very grave necessity, and upon a clear showing that the applicant's rights imperatively demand the appointment, and that without it he has no adequate remedy, and is in danger of suffering irreparable loss." *Investment Co. v. Crawford*, 45 S. W. 738; *Trust Co. v. Cowart*, 173 S. W. 588.

We have given all the assignments due consideration, and have concluded that the evidence is sufficient to support the action of the trial court; therefore the judgment is affirmed.

GLENS FALLS INS. CO. v. WALKER.*
(No. 8387.)

(Court of Civil Appeals of Texas. Ft. Worth.
June 3, 1916. Rehearing Denied
July 1, 1916.)

1. INSURANCE — §665(2) — ACTIONS — SUFFICIENCY OF EVIDENCE — DELIVERY OF POLICY.

Evidence held to sustain a verdict that a fire insurance policy was delivered to assured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1709; Dec. Dig. § 665(2).]

2. INSURANCE — §235 — ACTIONS — SUFFICIENCY OF EVIDENCE — CANCELLATION OF POLICY.

Evidence held to sustain a verdict that a fire insurance policy was not canceled by mutual consent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 507; Dec. Dig. § 235.]

3. ESTOPPEL — §56 — EQUITABLE ESTOPPEL — ESSENTIALS — PREJUDICE TO PARTY CLAIMING ESTOPPEL.

Assured's acquiescence in an insurance agent's mistaken statement that contemplated foreclosure proceedings voided the policy does not estop him from denying that the policy was canceled by mutual consent, where there is no proof that his silence misled the insurer.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 142; Dec. Dig. § 56.]

4. INSURANCE — §651(4) — ACTIONS — EVIDENCE — ADMISSIBILITY — CANCELLATION OF POLICY.

Where the defendant fire insurance company claimed that a policy had been canceled by mutual consent in a conversation between its agent and assured, the assured's explanation that he understood the policy was void only during certain foreclosure proceedings is admissible, where the conversation was somewhat ambiguous.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1673; Dec. Dig. § 651(4).]

Appeal from District Court, Tarrant County; R. B. Young, Judge.

Action by Herbert G. Walker against the Glens Falls Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 166 S. W. 122.

Crane & Crane, of Dallas, for appellant. Charles Kassel, of Ft. Worth, for appellee.

CONNER, C. J. Appellee recovered a judgment for \$1,150 upon a policy of fire insurance issued by the appellant company in terms payable to appellee "as his interest should appear" and covering a building destroyed by fire and upon which appellee had a lien. The defenses were that the policy had never been delivered as an operative instrument, or, if so, that it had later been mutually canceled before the loss. To this latter defense appellee replied that, if there had been a cancellation by agreement, but which was denied, the same had been induced by a mutual mistake of fact. The issues thus indicated were submitted to a jury, which returned a general verdict in favor of appellee for the amount specified in the judgment.

For various reasons, to be hereinafter more particularly noticed, appellant here insists that the court should have given a peremp-

tory instruction to find for defendant as requested, and an exception was taken to the action of the court in refusing to give this instruction; but the reason or reasons upon which the requested instruction was based were not set forth in the bill of exception, nor were reasons assigned in appellant's motion for a new trial, and appellee therefore objects to our consideration of the assignment on these grounds. This court, and most, if not all, of the other Courts of Civil Appeals, have held, in accordance with the provisions of the act approved March 29, 1913 (see General Laws 1913, p. 113), that to be available on appeal it must appear that specific exception was made to the action of the court in refusing a special instruction. See *Mutual Life Ins. Ass'n v. Rhoderick*, 164 S. W. 1067; *Heath v. Huffhines*, 168 S. W. 974; *St. L. & S. W. Ry. Co. v. Wadsack*, 166 S. W. 42; *T. & P. Ry. Co. v. Tomlinson*, 169 S. W. 217; *Cleburne Street Ry. Co. v. Barnes*, 168 S. W. 991; *Elser v. Putnam Land & Development Co.*, 171 S. W. 1052; *Bohn v. Burton Lingo Co.*, 175 S. W. 173; *King v. Gray*, 175 S. W. 763. Not only so, but this court has further held that the spirit of the enactment referred to and of our laws relating to bills of exception require that the excepting party should set forth in his bill of exception the specific reasons therefor to the end that the trial court may be properly informed and have presented an opportunity to correct the error, if one was thus made to appear. See *G. & S. F. Ry. Co. v. Loyd*, 175 S. W. 721. We yet entertain the views expressed in the decisions cited and under ordinary circumstances would feel no hesitation in sustaining appellee's exception to appellant's assignment to the action of the court in refusing to give the peremptory instruction; but since the decisions cited, as we are informed, our Supreme Court has granted a writ or writs of error indicating that the statute in force prior to the act of 1913 above referred to is controlling. This prior statute (Revised Statutes 1911, art. 1974) provides that when instructions are requested the judge shall note distinctly which of them he gives and which he refuses and shall subscribe his name thereto, and that such instructions "shall be filed with the clerk, and shall constitute a part of the record of the cause, subject to revision for error without the necessity of taking any bill of exception thereto." Of course, as appellant now contends, if this article of the statute controls, and if it be unnecessary to take an exception to the action of the court in refusing an instruction, it necessarily follows that appellee's objection to the assignment under consideration must fail. We have therefore concluded, in view of the uncertainty thus indicated, to consider appellant's first assignment of error.

[1] It is first insisted, in effect, that the evi-

dence is wholly insufficient to support the verdict of the jury on the issue of the delivery of the policy. On a former appeal (see 166 S. W. 122) we held that the evidence then presented sufficiently supported a verdict in appellee's favor upon the issue, and as we think the evidence on the last trial was equally, if not more, forceful. While it is true that no witness testified specifically to the delivery of the policy, yet the evidence in substance was to the effect that appellee had occasion to secure many policies of insurance, and that one Glenn Walker, a brother, was engaged in the insurance business and procured for appellee all original policies that his business necessitated and caused the issuance of all renewal policies that were required; that as to the piece of property in question appellee had procured a policy of insurance in a company going out of business and which for this reason canceled the policy on the property involved in this controversy a year before its expiration by the terms used; that thereupon the policy sued upon in this case was secured as a substitute for the canceled policy referred to; that by the practice of the insurance office conducted by Glenn Walker, which was just across the hall from the office of appellee, insurance policies when issued or when renewed by the insurance agency were brought into appellee's office and placed upon the desk or delivered to whomsoever was in the office; that the policy in question was found among others of the appellee's policies. One or more of appellee's witnesses distinctly testified to the fact that the policy in question had been in appellee's office and among his other insurance papers some time, perhaps a week or two weeks, before the loss under consideration. True, there was testimony in behalf of the appellant to the effect that after the fire the policy was discovered among other papers of the appellant insurance company indorsed "canceled," and Glenn Walker, the agent, testified to the effect that he took the policy into the office of appellee for the purpose of delivering it, but that appellee then mentioned the fact that he had commenced foreclosure proceedings upon the premises in controversy, whereupon he (Glenn Walker) informed him that that fact voided his policy, and thereupon, as he (the witness) remembered, he returned the policy to the company directing its cancellation. This witness, however, was not positive in his testimony to the effect that the policy was in fact not delivered, and there was further testimony in behalf of appellee to the effect that the day of the conversation as related by the witness Glenn Walker and upon which, as Glenn Walker testified, he was informed of the foreclosure proceedings, was several days, perhaps a week or more, after the policy in question was known to be among appellee's other policies and handled by his office force. There was also testimony to the effect that one William

Riggs, another representative of the appellant company, came into appellee's office and called for the policy in question, and that it was delivered to him by one of appellee's employés; Riggs at the time not stating what he wanted with the policy. While Riggs denied that he thus secured the policy from the possession of appellee and that both Riggs and Glenn Walker gave a different account of its return to the appellant company, yet on the whole we cannot say, as appellant insists, that the evidence is only susceptible of the construction that the policy was never delivered. It is to be remembered that in determining this question effect must be given to the testimony most favorable to appellee, and, thus viewing the evidence, we feel that it cannot be said that the court committed error in refusing the peremptory instruction and in submitting the issue of delivery to the jury. No complaint has been made of the terms in which the issue was submitted, and we think the verdict of the jury on the issue must be sustained.

[2] Appellant further insists that the peremptory instruction should have been given for the reason that the undisputed evidence shows "that the contract had been canceled by mutual agreement several weeks prior to the date of the fire"; but the evidence, as we think, by no means requires this conclusion. Glenn Walker, himself, testified that:

"I wrote the company at the time this matter came up to the effect that the policy was never delivered; but that before the policy was delivered I ascertained from conversation with my brother that foreclosure proceedings were pending against the property, and I refused to deliver the policy and took it back and had it canceled. I never did claim to them that this policy after it was in effect, and after it was delivered, was canceled by mutual consent between me and Herbert Walker. I never wrote or claimed any such thing as that to them, and I never claimed to them that, the policy being in effect, I had given regular notice of cancellation to Herbert Walker and had taken up the policy at the end of ten days. It was my understanding that I had not delivered that policy, and that was my belief, and I definitely and certainly recollect that I never did undertake to cancel this policy regularly under its provisions as being an existing policy; and it is furthermore true, under no circumstances, and never did I undertake to claim to my company or anybody that Herbert (appellee) and I had canceled this policy by mutual consent after it was in effect. The only thing I claim, and the only thing I ever claimed, is that I did not deliver the policy to him at all."

This testimony is wholly inconsistent with the theory of a mutual cancellation of the policy. This defense rests, so far as we have been able to ascertain, upon the testimony of appellee, to the effect that, when Glenn Walker came into his office and he told him that he had been required to institute foreclosure proceedings upon the property in question, Glenn Walker replied:

"That renders your policy void." * * * I did not tell him anything. I took it for granted the statement that the policy was void was correct. * * * I did not feel there was anything for me to agree to. It was not my understanding from that conversation with my brother

er that, during the time these foreclosure proceedings were pending, I had no insurance under this policy, in that I was performing an act that the insurance company said voided my choice to exercise that option; if they chose to exercise the option they had, it would void my policy. I did not know a thing about their right. I just took that statement for granted, that Glenn was right on it. Glenn did not say anything to me as to whether the company would then or in the future, if I did not get the title back, exercise the option to declare it void; he said the policy was void, and I just took that statement for granted and did not consider whether it was right or wrong, or whether he was asking me to agree to the evidence of it. He never used the word 'canceled' in any way and never wrote me; never used that word at all. * * * He did not tell me anything at that time as to what would be done or should be done with the policy itself. He made no statement or requests to me with reference to the physical policy, at that time. He made no other remark about that than what I have stated. In other words, he did not say, 'Well, I am going to take this policy back and cancel it,' or anything like that. There was no statement like that, just merely the words, 'Foreclosure proceedings voids your policy.'"

On redirect examination he further testified:

"I told Glenn, at the time I had this conversation with him, that this suit (the foreclosure suit) might be ended in a few weeks, and he said that would be all right, and I understood that while foreclosure proceedings were pending, if a fire occurred, I could not get my money, and I understood, also, if the suit was settled right, that that policy would be a good policy. In other words, I will explain it by a circumstance that frequently happens: If you get a policy and you put gasoline in your house, that policy is void; if you move the gasoline away, your policy is all right, you have a policy still, although, really at one time, your policy was void."

[3] While Glenn Walker, the agent, testified that it was the general business policy of his company not to insure premises covered by liens and to cancel policies upon foreclosure proceedings, the policy under consideration in fact contained, among other special provisions, one to the effect that the policy in question "should not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by foreclosure or other proceedings or notice of sale relating to the property." So that, on the whole, we do not think that appellee's mere silence or acquiescence in the erroneous statement of Glenn Walker that the foreclosure proceedings rendered the policy void requires the conclusion of a mutual cancellation of the policy, as alleged and urged by the appellant in this case, and it is quite clear under the evidence that there was no cancellation of the policy under its terms providing that this might be done upon giving ten days notice, etc. Nor, even if it had been made an issue in the pleadings, would appellee's mere silence or acquiescence in the mistaken statement of Glenn Walker estop him in the absence of some proof that such silence or acquiescence had the effect to mis-

lead the appellant company to its injury. See *East Texas Fire Ins. Co. v. Perkey*, 89 Tex. 604, 35 S. W. 1050.

The foregoing conclusions, of course, render wholly immaterial the further contentions relating to the question of whether the mutual agreement to cancel was avoided because of a mutual mistake of fact on the part of both appellee and Glenn Walker. Nor do we think there is any force in appellant's further contention that Glenn Walker was such agent of the appellee in the procurement and renewal of the policies as to make his act in indorsing the policy canceled the act of appellee. Appellant's first assignment of error and all propositions thereunder are, accordingly, overruled.

[4] Appellant further assigns error to the action of the court in permitting the appellee to testify, over its objection that the testimony was irrelevant and incompetent, to the effect that he did not understand from the conversations of Glenn Walker that he (Glenn Walker) was proposing a mutual cancellation of the policy, but that he merely understood that if a fire occurred, during the foreclosure proceedings, he could not get his money, and that if the foreclosure suit was settled that the policy would be valid, etc. The conversations, however, already above noted do not necessarily import a contract, and we are of the opinion that the court properly ruled in this matter, for the essence of a contract is that the minds of the parties thereto must meet on the same thing, and the intent or understanding of the parties is necessarily an essential element, and where the agreement relied upon is to be deduced, if at all, from conversations of a more or less indefinite character and that may or may not support the contention of a contract, the understanding of the parties—the sense in which the terms were received, the construction given the terms—is relevant when the conversations or declarations at the time, under all of the circumstances, are reasonably susceptible of the construction given them and acted upon by one of the parties to the asserted agreement. Even in cases where the foundation of the alleged contract is in writing and the words, therefore, ascertainable with certainty, yet, if the terms used are ambiguous or indefinite or susceptible of different conclusions, the practical interpretation given the instrument by the parties may be proved and, as said in the authorities, is often entitled to great weight. 3 *Jones on Evidence*, § 453.

We are of the opinion further that the evidence supports the verdict of the jury in appellee's favor, and, no other question being presented by the assignments, the judgment will be affirmed.

HILL v. STAATS. (No. 8416.)

(Court of Civil Appeals of Texas. Ft. Worth.
June 24, 1916.)

1. APPEAL AND ERROR — 263(1)—REVIEW—SCOPE—QUESTIONS CONSIDERED.

Although the Court of Appeals considers exceptions to rulings on requested instructions necessary, yet an assignment of error without such exception will be considered where the Supreme Court's action in granting writs of error renders the necessity of an exception doubtful.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1516; Dec. Dig. —263(1).]

2. MASTER AND SERVANT — 302(2)—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT.

Where defendant's chauffeur, after leaving defendant's wife and children at a circus, drove away in disobedience of specific instructions, and ran down plaintiff, held, that defendant was not liable, since the chauffeur was acting outside the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1218, 1219; Dec. Dig. —302(2).]

3. EVIDENCE — 589 — WEIGHT — INTERESTED PARTIES.

Although the entire testimony as to the instructions given the chauffeur came from defendant and his wife, yet their uncontradicted testimony cannot be disregarded where no discrediting circumstances appear.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2438; Dec. Dig. —589.]

Appeal from District Court, Tarrant County; Marvin H. Brown, Judge.

Action by S. D. Hill against C. G. Staats. Judgment for defendant, and plaintiff appeals. Affirmed.

J. W. Stitt, of Ft. Worth, for appellant. Capps, Cantey, Hanger & Short, of Ft. Worth, for appellee.

BUCK, J. Appellant sued appellee to recover damages for personal injuries alleged to have been caused by defendant's automobile, driven by the latter's servant, running into a wagon in which plaintiff was riding on East Front street in the city of Ft. Worth. He alleged that the automobile of defendant was being driven recklessly and at an unlawful rate of speed, to wit, 30 miles an hour, and that the same was being driven under defendant's authority and direction. He alleged damages for injury to wagon and horse, as well as for personal injuries.

Defendant, among other defensive pleadings, denied that at the time of the accident the driver of the automobile was acting under his authority, but alleged that on said day the defendant, before he left home, had instructed the driver, or chauffeur, to drive defendant's wife and children to the circus grounds, located in the eastern part of the city, near East Front street; that he instructed the chauffeur not to leave the place where Mrs. Staats and children would alight from the automobile to enter the circus until Mrs. Staats was ready to return home, and not to move the car from said position during the interval, and that said driver was specif-

ically and emphatically told not to use said automobile for his own pleasure or purposes in any way or manner whatsoever; that, in addition to what the defendant, himself, had said to the driver, when Mrs. Staats left the car on East Front street near the circus grounds, she instructed the chauffeur not to move the automobile while she was gone, but to leave it in the exact place where they alighted; that when she returned to the car she found it in practically the same place where she left it. Defendant pleaded therefore that, if the injuries to plaintiff were caused through the acts of negligence of the defendant's driver, such driver was not engaged in any work or labor for the defendant, and was not performing any manner of employment for him, but, on the contrary, was acting contrary to the express instructions and directions of the defendant, and hence defendant would not be liable for any injuries inflicted by the driver while so acting or engaged.

Upon a trial before a jury plaintiff introduced evidence amply sustaining the theory of negligent and reckless driving on the part of defendant's chauffeur while driving defendant's car, and also upon the question of substantial injuries having been inflicted upon plaintiff by reason of the accident. Defendant and his wife testified to the instructions given to the chauffeur not to leave the vicinity of the circus grounds during the time that Mrs. Staats and the children were in attendance upon the circus, in effect and substance sustaining the defensive allegations pleaded upon this issue. Upon this issue the evidence was uncontradicted. In fact, the testimony introduced by the plaintiff as to the driver's recklessness and negligence was likewise uncontroverted. The evidence showed that, at the time of the accident, the automobile was coming from the direction of the business section of the city and going in the general direction of the circus grounds; the collision occurring between 3 and 4 o'clock in the afternoon, and at a place several blocks from the show grounds. The circus opened about 2 o'clock p. m., and closed about 5 o'clock p. m. Hence it is evident that the accident occurred while defendant's family were attending the circus. The driver did not testify, and no positive evidence was introduced to show where he had been during his absence from the place where he was told to wait, nor the reason for his leaving said place. One witness stated that at the time of the accident the chauffeur was racing with another negro driver.

Both plaintiff and defendant moved for a peremptory instruction, the former requesting that only the question of the amount of damages be submitted as issuable. The court instructed a verdict for defendant and overruled plaintiff's motion for a peremptory instruction.

In the statement of facts it is shown that the following proceedings occurred:

"The Court: Defendant's motion for peremptory instruction is granted. I will give the plaintiff an exception.

"Mr. Stitt (counsel for plaintiff): We will file a motion for new trial. I do not care for a notation of an exception at this time. Just enter the verdict and we will file a motion."

Plaintiff did file a motion for new trial, which was by the court overruled, and plaintiff appealed to this court; the case being given the docket number 8325.

Subsequent to the lodgment of the transcript in this court, appellee filed a motion in the trial court to strike out bill of exception No. 3, shown in the transcript of cause No. 8325, and which recited that an exception to the action of the court in overruling plaintiff's motion for peremptory instruction and in granting defendant's motion for instruction was reserved. Defendant alleged as grounds for his motion that in fact plaintiff at the time the ruling was made, reserved no exception to the action of the court in this regard, and that the recitation in the bill of exception that an exception was taken was incorrect. Plaintiff replied that bill of exception No. 3, as shown in the transcript in cause No. 8325, correctly recited the facts, and that same had been properly allowed by the court with defendant's approval, and had been duly approved by the court. Defendant, in answer, stated that, if in fact said bill of exception had been agreed to by counsel for defendant, the same was done under a mutual misapprehension of fact as to the reservation of an exception by plaintiff. The court, having heard the evidence upon this issue, granted defendant's motion to strike, from which order and ruling the plaintiff appealed, and, upon the transcript having been filed in this court, the case was given the docket number of 8416. Upon motion by plaintiff the two cases were consolidated by this court and given the docket number of 8416.

[1] We have concluded that we are not called upon to determine the correctness vel non of the court's action in sustaining defendant's motion to strike out the bill of exception mentioned. In the late case, not yet published, No. 8387, entitled Glens Falls Insurance Co. v. Herbert G. Walker, 187 S. W. 1036, this court, speaking through Chief Justice Conner, said:

"For various reasons, to be hereinafter more particularly noticed, appellant here insists that the court should have given a peremptory instruction to find for defendant as requested, and an exception was taken to the action of the court in refusing to give this instruction; but the reason or reasons upon which the requested instruction was based were not set forth in the bill of exception, nor were reasons assigned in appellant's motion for a new trial, and appellee therefore objects to our consideration of the assignment on these grounds. This court, and most, if not all, of the other Courts of Civil Appeals, have held, in accordance with the provisions of the act approved March 29, 1913 (see General Laws 1913, p. 113), that to be available on appeal it must appear that spe-

cific exception was made to the action of the court in refusing a special instruction. See Mutual Life Ins. Ass'n v. Rhoderick, 164 S. W. 1067; Heath v. Huffhines, 168 S. W. 974; St. L. & S. W. Ry. Co. v. Wadsack, 166 S. W. 42; T. & P. Ry. Co. v. Tomlinson, 169 S. W. 217; Cleburne Street Ry. Co. v. Barnes, 168 S. W. 991; Elser v. Putnam Land & Development Co., 171 S. W. 1052; Bohn v. Burton-Lingo Co., 175 S. W. 173; King v. Gray, 175 S. W. 763. Not only so, but this court has further held that the spirit of the enactment referred to, and of our laws relating to bills of exception, require that the excepting party should set forth in his bill of exception the specific reasons therefor, to the end that the trial court may be properly informed and have presented an opportunity to correct the error, if one was thus made to appear. See G., C. & S. F. Ry. Co. v. Loyd, 175 S. W. 721. We yet entertain the views expressed in the decisions cited, and under ordinary circumstances would feel no hesitation in sustaining appellee's exception to appellant's assignment to the action of the court in refusing to give the peremptory instruction; but since the decisions cited, as we are informed, our Supreme Court has granted a writ or writs of error indicating that the statute in force prior to the act of 1913 above referred to is controlling. This prior statute (Revised Statutes 1911, art. 1974) provides that, when instructions are requested, the judge shall note distinctly which of them he gives and which he refuses and shall subscribe his name thereto, and that such instructions 'shall be filed with the clerk and shall constitute a part of the record of the cause, subject to revision for error, without the necessity of taking any bill of exception thereto.' Of course, as appellant now contends, if this article of the statute controls and if it be unnecessary to take an exception to the action of the court in refusing an instruction, it necessarily follows that appellee's objection to the assignment under consideration must fall. We have therefore concluded, in view of the uncertainty thus indicated, to consider appellant's first assignment of error."

In line with the policy thus enunciated, we have concluded that defendant's assignment attacking the action of the court in refusing plaintiff's motion for a peremptory instruction and granting defendant's motion to the same effect should be considered, with or without exception being reserved to such action.

[2] Hence, there is presented to us only one question for consideration, to wit, did the uncontroverted testimony establish defendant's contention that at the time of the accident defendant's driver did not bear to defendant such a relation as would make defendant liable for injuries to third persons negligently inflicted by said driver?

In 2 Mechem on Agency (1914 Ed.) § 1858, in discussing the liability of the principal for the agent's torts and crimes, it is said:

"In all of the discussions of this question, it is constantly assumed, and it is always a condition precedent, that the relation of principal and agent, or master and servant, shall actually exist. That this is so seems often to be easily overlooked, and it cannot very well be unduly emphasized. Two quotations from a single court, out of many similar ones, may therefore be justified."

"A person, either natural or artificial, is not liable for the acts of negligence of another, unless the relation of master and servant or principal and agent exists between them."

"There can be no recovery against one

charged with negligence upon the principle of respondeat superior unless it be made to appear that the relation of master and servant in fact existed, whereby the negligent act of the servant was legally imputable to the master.

"The relation must also exist at the time in question. If it had not yet begun, or if it had already terminated, no liability can ordinarily arise."

In the case of *Goodrich v. Musgrave Fence & Auto Co.*, 154 Iowa, 637, 135 N. W. 58, it was held that where a man was allowed to take an automobile with a view to showing it to a possible purchaser, and, after having done so, without selling it, to keep it several days without further authority, during which time, while using it for his own purposes, he negligently injured the plaintiff, there was neither such a relation of agency or of master and servant as would make the owner liable.

In *Robards v. Bannon Sewer Pipe Co.*, 130 Ky. 380, 118 S. W. 429, 18 L. R. A. (N. S.) 923, 132 Am. St. Rep. 394, the Kentucky Court of Appeals said:

"The master is liable only for the authorized acts of the servant, and the root of his liability for the servant's acts is his consent, express or implied, thereto. When the master is to be considered as having authorized the wrongful act of the servant, so as to make him liable for his misconduct, is the point of difficulty. Where authority is conferred to act for another without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use of force towards or against another, the use of such discretion or force is a part of the thing authorized, and, when exercised, becomes, as to third persons, the discretion and act of the master, and this although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business, and was acting within the general scope of his employment. It is not the test of the master's liability for the wrongful act of the servant from which injury to a third person has resulted that he expressly authorized the particular act and conduct which occasioned it. In most cases where the master has been held liable for the negligent or tortious act of the servant, the servant acted, not only without express authority to do the wrong, but in violation of his duty to the master. It is in general sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders."

See, also, *Acme Laundry v. Weinstein*, 182 S. W. 408; *Weber v. Lockman*, 68 Neb. 469, 92 N. W. 591, 60 L. R. A. 313.

The question of extreme difficulty in the consideration of the phase of the subject now under discussion is to determine what constitutes the "course of employment" in cases relating to master and servant, or the "scope of the authority," in cases of agency. As is said in 2 *Mechem on Agency*, § 1879:

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"The utmost that can ordinarily be said is that a servant is acting within the course of his employment when he is engaged in doing, for his master, either the act consciously and specifically directed or any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act or a natural, direct, and logical result of it. If in doing such an act the servant acts negligently, that is negligence within the course of the employment."

In the cases of *G. H. & S. A. Ry. Co. v. Currie*, 100 Tex. 136, 96 S. W. 1073, an engine dispatcher having charge of the engines and machinery in a railway roundhouse, and handling a hose conveying a blast of compressed air, provided to work certain machinery, but which, as an experiment, he was using instead of a water hose to extinguish fire in an engine, turned the air blast, in sport, and without intending injury, upon the person of an engine wiper, his subordinate in the roundhouse, inflicting injuries which caused his death. It was held that in such an act he was not engaged in the employer's service and that the railway company was not liable. In an exhaustive opinion in this case, Associate Justice Williams of our Supreme Court said:

"The fact that Nicholls, while holding the hose, conceived the purpose of using it, and did use it upon the employee, in sport, is undisputed and is wholly inconsistent with any assumption that he was then in any way attempting to serve the defendant. His act was a clear departure, for the time, from that service, and the quickness with which it was done cannot be made the test. If the turning aside from the master's business be only for an instant, so that it be complete, the authorities agree that there is no liability on his part for the servant's act. 1 *Thomp. on Neg.* 526, and cases there cited. If a miner, or butcher stand with pick or knife raised, to dig or to stab an animal, for the master, and, seeing his enemy before him, turn the tool upon him as a weapon to kill him, would any one argue that the master should be held accountable for the death? Where is the difference if the instrument be used merely to frighten for the amusement of the servant? The only difference between such cases and other personal wrongs committed by persons who happen to be employees of other persons is the fact that in the cases supposed the servants misuse implements intrusted to them by their masters. But that, certainly, is no reason for charging the master, as cases almost numberless will show. *I. & G. N. Ry. Co. v. Cooper*, 88 Tex. 610 [32 S. W. 517]; *Little Miami Ry. v. Wetmore*, 19 Ohio St. 110 [2 Am. Rep. 878]; *Golden v. Newbrand*, 52 Iowa, 59 [2 N. W. 537, 35 Am. Rep. 257]; *Howe v. Newmarch*, 12 Allen [Mass.] 49."

In the *Cooper Case*, cited in the opinion just quoted, an engineer and fireman in charge of a freight train permitted *Cooper* to ride in the cab. They had no authority to do so. In playing a practical joke upon *Cooper*, they scalded him, inflicting a serious bodily injury, and it was held that the act of the engineer and fireman causing the injury was not in furtherance of the business of the railway company nor in the accomplishment of the object for which they were employed, and that the railway company was not liable.

In *I. & G. N. Ry. Co. v. Anderson*, 82 Tex.

516, 17 S. W. 1039, 27 Am. St. Rep. 902, the same principle is enunciated by Judge Gaines in the following words:

"To hold the master liable for the acts of his servant, it is not necessary that the servant should have authority to do the particular act. The act of the servant may be contrary to his express orders, and yet the master may be liable. But the act must be done within the scope of the general authority of the servant. It must be done in furtherance of the master's business, and for the accomplishment of the object for which the servant is employed. For the mode in which the servant performs the duty he is engaged to perform, if wrongful and to the injury of another, the master is liable, although he may have expressly forbidden the particular act. But whether the act in question can be implied from the general authority conferred upon the servant must in general depend upon the nature of the service he is engaged to perform and the circumstances of the particular case."

In *Branch v. I. & G. N. Ry. Co.*, 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844, where a railway company had intrusted the care of a hand car to a section foreman, and the plaintiff was injured at a public crossing by a collision with such hand car, through the negligence of the foreman while operating it upon a private errand, and not in the performance of a duty to the company and against its orders, it was held that the railway company was not liable. Also, in the case of *I. & G. N. Ry. Co. v. Yarbrough*, 39 S. W. 1096, where railroad employes in charge of the locomotive sounded a whistle without any proper occasion therefor, but for the purpose of frightening a horse near the track, and not in the discharge of any duty, it was held that the railway company was not liable for damages caused thereby; such acts not being within the scope of their employment.

In the case of *Tyler v. Stephan's Adm'x*, 163 Ky. 770, 174 S. W. 790, under a state of facts very similar to that disclosed in the instant case, the Kentucky court of last resort, in holding that the master was not liable for an accident occurring while the driver of the automobile was returning from a trip or journey taken, not in the furtherance of his employer's business, but for his own pleasure, said:

"It was still his own journey, undertaken exclusively for his own purposes, and for the accommodation of Gudgel. He was not, therefore, engaged in the master's work at the time the accident occurred. It follows that the trial

court should have directed a verdict in favor of the defendant."

See, also, *Danforth v. Fisher*, 75 N. H. 111. 71 Atl. 535, 21 L. R. A. (N. S.) 93; *Cordner v. B. & M. R. Co.*, 72 N. H. 413, 57 Atl. 534; *Colwell v. Aetna Bottle & Stopper Co.*, 33 R. I. 531, 82 Atl. 388; *Patterson v. Kates* (C. C.) 152 Fed. 481; *Fleischner v. Durgin*, 207 Mass. 435, 93 N. E. 801, 33 L. R. A. 79, 20 Ann. Cas. 1291; *Symington v. Sipes*, 121 Md. 313, 88 Atl. 134, 47 L. R. A. (N. S.) 662; *Morier v. Railway Co.*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793; *Foster-Herbert Co. v. Pugh*, 115 Tenn. 688, 91 S. W. 199, 4 L. R. A. (N. S.) 804, 112 Am. St. Rep. 881.

In *Colwell v. Aetna Bottle & Stopper Co.*, supra, a case very similar to the case at bar, the court said:

"When he (the chauffeur) first arrived at the garage on Bradford street, it was his duty, then, to take the automobile into the garage, and wash it, and put it up for the night. That was all that he was instructed or expected to do. He had no authority, either express or implied, to use the machine for the benefit of another employe, or for his own convenience in going to get his supper. His use of the automobile from the time he left the Bradford Street garage, and during the whole circuit that he made from that point to Potter's avenue, and from there to the restaurant on Westminster street, and from there back to the Bradford Street garage, was unauthorized and beyond the scope of his employment."

[3] Without citing further authorities, it is sufficient to say that we find that the trial court did not err in directing a verdict for defendant upon the facts shown. This conclusion is reached with the knowledge that the entire testimony upon the question of the instructions given to the chauffeur came from the lips of defendant and his wife, who both may be said to be interested parties. The testimony of appellee and his wife was positive and unequivocal, nor is there any circumstance disclosed in the record tending to discredit or impeach such testimony. See *Felts v. Bell County*, 103 Tex. 616, 132 S. W. 123; *Malone v. Bank*, 162 S. W. 369; *Christensen v. Christiansen*, 155 S. W. 995; *Brooks v. Davis*, 148 S. W. 1107; *Grand Fraternity v. Melton*, 102 Tex. 399, 117 S. W. 788; *Starkey v. Wooten Gro. Co.*, 143 S. W. 692; *Friedman v. Peters*, 18 Tex. Civ. App. 11, 44 S. W. 572.

Finding no reversible error, all assignments of error are overruled, and the judgment of the trial court is affirmed.

BARTON v. WICHITA RIVER OIL CO. et al. (No. 8364).*

(Court of Civil Appeals of Texas. Ft. Worth. April 22, 1916. On Motion for Rehearing June 3, 1916. Rehearing Denied June 24, 1916.)

1. CHATTEL MORTGAGES \S 138(1)—**EXISTING LIEN LAW—LABORERS' LIEN—PRIORITY.**

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5644, giving to mechanics, laborers, etc., a first lien against the products of their work and labor, in force at the time of a chattel mortgage executed by an oil well company to secure the purchase price of its machinery and tools, the claim of laborers engaged in drilling an oil well with such machinery and tools, if within the statute, was prior to the lien of the chattel mortgage, since the statute was to be read into the mortgage contract as a part thereof and as if expressly assented to by the parties at the time of the contract, article 5671, providing that nothing in the title should impair the rights of parties who claim liens by special contract or any other lien not covered by the statute, not applying.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. \S 228, 229, 231-236; Dec. Dig. \S 138(1).]

2. CHATTEL MORTGAGES \S 157(2)—**PRIORITIES—LABORERS' LIEN—BURDEN OF PROOF.**

The assignee of claims of laborers engaged in drilling an oil well, who, after foreclosure, asserted a lien under Vernon's Sayles' Ann. Civ. St. 1914, art. 5644, superior to that of an existing chattel mortgage, had the burden of showing that such lien was given by the statute.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. \S 157(2).]

On Motion for Rehearing.

3. MINES AND MINERALS \S 112(3)—**LIENS—DRILLING OIL WELL—"MINE"—"MINERAL"—"MINER"—STATUTE.**

Vernon's Sayles' Ann. Civ. St. 1914, art. 5644, enacted in 1895 when oil wells in the state were not generally known and considered, gives to any one laboring in any mine, quarry, factory, or mill of any character a first lien upon the products, machinery, etc., created by such labor or necessarily connected with its performance that may be owned by or in the possession of the employer. Rev. St. 1911, art. 5502, subds. 1, 6, declare that the ordinary signification shall be applied to words, and that in all interpretations, the court shall look for the intention of the Legislature, keeping in view the old law, the evil, and the remedy, and the rule prescribed by law is that statutes shall be liberally construed with a view to effect their objects and to promote justice. Const. art. 1, \S 3, declares that no man, or set of men, is entitled to exclusive privileges but in consideration of public services. *Held*, that a "mine" is an excavation, properly underground, for digging out some useful product, as ore, metal, or coal, any deposit of such material suitable for excavation and working; that "to mine" is to obtain by digging out of the earth, to dig into the earth for ore; that a "miner" is one who mines in any sense, especially one whose occupation is to excavate ore, coal, etc., in a mine; that while oil is classed as a "mineral," that term refers ordinarily to minerals in place, and not to substances in solution and migratory, such as oil; and that an oil well was not a mine or the driller a miner, and hence that a

driller had no lien on the oil company's machinery and tools used in drilling the well.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. \S 235; Dec. Dig. \S 112(3).]

For other definitions, see Words and Phrases, First and Second Series, Mine; Miner; Minerals.]

Appeal from District Court, Wichita County; J. W. Akin, Judge.

Suit by S. I. Barton against the Wichita River Oil Company and Claude Minor. Judgment for plaintiff, making the lien of his chattel mortgage inferior to the laborers' liens foreclosed by defendant Minor, and discharging defendant Minor, and plaintiff appeals. Reversed and rendered for plaintiff, with a foreclosure of his chattel mortgage against all the defendants.

John C. Kay, of Wichita Falls, for appellant. C. M. McFarland, of Wichita Falls, for appellees.

CONNER, C. J. This suit was instituted by S. I. Barton against the Wichita River Oil Company upon promissory notes aggregating some \$2,048.84, which had been given by the oil company to the Keystone Driller Company for the purchase money of certain oil well machinery, supplies, and tools. The plaintiff alleged that by assignment he had become the owner of the notes, and that to secure their payment the Wichita River Oil Company had executed and delivered to the Keystone Driller Company a chattel mortgage upon all of the oil well machinery, supplies, and tools sold at the time, and for which the notes were given; that the materials so sold were not delivered to the oil company until after the execution of the notes, and until after the said chattel mortgage had been duly filed for record in Wichita county. As against the Wichita River Oil Company the prayer of the petition was for a recovery of the amount of indebtedness shown by the note, with a foreclosure of the chattel mortgage lien. It was further alleged, however, that one Claude Minor was claiming some interest in the machinery and supplies covered by the mortgage, and further prayer was made to the effect that he be made a party defendant, and that the plaintiff have judgment against him also for a foreclosure of the chattel mortgage lien.

Claude Minor appeared and alleged, in substance, that he and others, whose claims he owned by assignments duly made, had worked for the Wichita River Oil Company, and used the machinery and tools described in the plaintiff's petition in drilling an oil well, for which labor the Wichita River Oil Company became indebted in the sum of \$1,160.75; that later, to wit, on November 16, 1914, laborers' liens against said machinery, etc., had been filed with the county clerk in the manner provided by law, after which time Claude Minor had instituted suit in

the district court of Wichita county against said Wichita River Oil Company for his debt, with foreclosure of said laborers' liens; that said liens had been duly foreclosed and the property sold thereunder, at which sale said Claude Minor became the purchaser, and by reason of which it was alleged he was then the owner of the property upon which the plaintiff sought to foreclose the chattel mortgage lien.

A trial was had upon the 30th day of June, 1915, and resulted in a judgment for the plaintiff, S. I. Barton, against the defendants, composing the Wichita River Oil Company for the debt, interest, and attorney's fees, as evidenced by the notes declared upon in the petition. It was further adjudged, however, that the plaintiff's lien, as evidenced by the chattel mortgage declared upon, was "inferior and not prior" to the laborers' liens which had been foreclosed by the defendant Claude Minor, and the plaintiff's prayer to foreclose his chattel mortgage lien was therefore denied, and the defendant Claude Minor entirely discharged. From this judgment the plaintiff, S. I. Barton, has appealed.

[1] The facts are undisputed, and are as stated in the pleadings of the parties, as above substantially given, and the sole question presented for our determination is whether, under the circumstances, the laborers' lien as claimed by the appellee Claude Minor was superior to the lien of the chattel mortgage owned by the plaintiff. If so, the judgment should be affirmed. If not, the judgment should be reversed and here rendered for the appellant.

Title 86, Vernon's Sayles' Texas Civil Statutes, vol. 4, treats of judgment liens, of mechanics, contractors, builders, and materialmen liens, of liens of railroad laborers, of liens on domestic vessels, of keepers of live stock of chattel mortgages, and other liens. The article of the statute upon which appellee relies for the superiority of his laborer's lien over the chattel mortgage lien is article 5644, found in chapter 4 of the title referred to, and which reads:

"That whenever any clerk, accountant book-keeper, artisan, craftsman, factory operator, mill operator, servant, mechanic, quarryman, or common laborer, farm hand, male or female, may labor or perform any service in any office, store, saloon, hotel, shop, mine, quarry, factory or mill of any character, or who may perform any service in the cutting, preparation, hauling, handling, or transporting to any mill, or other point for sale, manufacture or other disposition, logs or timber, or who shall perform any service upon any wagon, cart, tram, or railroad or other means or methods of transporting such logs or timber, and in the construction or maintenance of such tram or railroad, constructed or used for the transportation of logs or timber to or for such mills or to its owner or operator, or to points for sale, shipment or other disposition, or any farm hands, under one or by virtue of any contract or agreement, written or verbal, with any person, employer, firm, corporation, or his, her, or their agent or agents, receiver or receivers, trustee or trustees, in order to secure the payment of the amount due or owing under such contract or agreement,

written or verbal, the hereinbefore mentioned employes shall have a first lien upon all products, machinery, tools, fixtures, appurtenances, goods, wares, merchandise, chattels, wagons, carts, tramroads, railroads, rolling stock, and appurtenances, or thing or things of value, of whatsoever character that may be created in whole or in part by the labor of or that may be used by such person or persons, or necessarily connected with the performance of such labor or service, which may be owned by or in the possession or under the control of the aforesaid employer, person, firm, corporation, or his, or their agent or agents, receiver or receivers, trustee or trustees; provided, that the lien herein given to a farm hand shall be subordinate to the landlord's lien now provided by law."

It is to be noted that the statute quoted gives to those persons to whom it applies a "first" lien upon the property specified to secure the character of labor to which the article relates, and appellant attacks the judgment below for the reason that it has been specially provided in article 5671 of chapter 8, title 86, relating to "other liens" than those theretofore specified in the title, that:

"Nothing in this title shall be construed or considered in any manner impairing or affecting the rights of parties to claim liens by special contract or agreement, nor shall it in any manner affect or impair other liens arising at common law or in equity, or by any statute of this state, or any other lien not treated of under this title."

Appellant's insistence is that articles 5644 and 5671, both of which have been quoted and both of which are parts of the same title, are to be construed together, and that, when so construed, article 5644, under which appellee claims, should not be given superior effect over a chattel mortgage lien that was duly executed and recorded upon the property involved prior to the time when appellee's labor therewith was performed, but we have been unable to adopt this contention, and thus disturb the judgment below. To give to article 5671 the effect contended for would be to wholly nullify the express declaration that the laborers' lien shall be a "first" lien. If appellee and his assignors are within the class of persons named in article 5644, and entitled thereunder to the laborer's lien upon the oil well machinery with which they worked, article 5671, as we think, can have no application, for the reason that it is undisputed that the laborer's lien law (article 5644) was in force at the time the chattel mortgage upon which appellant relies was executed and recorded, and therefore is to be read into the mortgage contract as if a part thereof, and as if expressly assented to by the parties to the contract at the time. Thus, it is said in 6 Ruling Case Law, §§ 814, 315, p. 325:

"Conformably to the well-established rule that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms, the obligation of a contract is measured by the standard of the laws in force at the time it was entered into, and its performance is to be regulated by the terms and rules which they prescribed. * * * The provision of the Constitution

which declares that no state shall pass any law impairing the obligation of contracts does not apply to a law enacted prior to the making of the contract, the obligation of which is claimed to be impaired, but only to a statute of a state enacted after the making of the contract. The obligation of a contract cannot properly be said to be impaired by a statute in force when the contract was made, for in such cases it is presumed that it was made in contemplation of the existing law."

And in 1 Jones on Mortgages (7th Ed.) § 609, in speaking of priorities between mortgages and mechanics' liens, it is said, among other things, that:

"Lien laws in force at the time of the execution of a mortgage enter into and become a part of the contract; and if these laws provide that certain liens shall be paramount over all other incumbrances, whether prior or subsequent, a mortgagee takes his mortgage subject to such liens as may afterward be acquired under the statute. But laws enacted after the execution of a mortgage cannot have the effect of creating a lien superior to such existing mortgage, for such laws are repugnant to the provisions of the federal Constitution, forbidding the impairment by any state of the obligations of a contract."

So in the familiar statutes embodied in title 86, relating to farm hands and landlords, the preference liens therein conferred have been expressly held to be prior in right to pre-existing contract liens. See *Neblett v. Barron*, 104 Tex. 111, 134 S. W. 208; *Id.*, 160 S. W. 1167; *Cash v. First Nat. Bank*, 26 Tex. Civ. App. 109, 61 S. W. 723; *Ivy v. Pugh*, 161 S. W. 939. See, also, *Sparks v. Lumber Co.*, 40 Tex. Civ. App. 222, 89 S. W. 423, where, as we infer from the opinion, the preference given by the very article under which appellee claims in this case was upheld as against a prior contract lien.

[2] We, therefore, as stated, feel unable to disturb the judgment below upon the only theory on appeal that appellant has presented. We nevertheless have concluded that the judgment was erroneous for the reason that appellee did not bring himself within the statute upon which he relies. The beneficial operation of the statute must be confined to the particular classes of laborers specified in the statute. To such persons alone is a first lien given, and it seems manifest that before a laborer of the kind here involved is entitled to supersede, or to be given priority of lien over a previously executed contract lien, of which he, by registration or otherwise, has notice, he should show himself to be strictly within the statute, for such preference or priority is not given by any other law. Such preference or priority is indeed, save for the statute, contrary to well-established principles. Thus it is said in 1 Jones on Mortgages, § 609, from which we have heretofore quoted, that:

"A mortgage executed before the commencement of a building erected on the land is paramount to a mechanic's lien for work and materials furnished for the building by one having actual or constructive notice of such mortgage."

The author here is evidently speaking of the general rule, inasmuch as later in the

same section, as we have heretofore quoted, it is stated that if a priority is given by a statute in existence at the time of a contract lien, the statutory priority will be given effect. In the case of *Blackford v. Ryan*, 61 S. W. 161, by one of our Courts of Civil Appeals, it was held that the lien given to livery stable keepers by article 5664, ch. 8, tit. 86, was not entitled to priority over a previously executed contract lien of which he had notice, the statute there considered, as will be seen by a reference thereto, not giving a first or preference lien. To the same effect is the case of *Masterson v. Pelz*, 86 S. W. 56, by the Court of Civil Appeals for the Fourth District. And in stating the general rule it is said in 27 Cyc. page 234:

"Where property is subject to a mortgage or other incumbrance at the time when the building or work, or furnishing of materials, is commenced, such lien is entitled to priority over any mechanic's lien arising out of the improvement of the property."

So that we think we must emphasize the proposition that before appellee was entitled to the "first lien," as asserted by him, it was necessary that he clearly show that he was one of the classes of persons specified in the statute, and that the labor performed by him and his assignors was of the character of labor contemplated thereby. The burden of proof was upon appellee to do this, and, as indicated, we think he has not discharged this burden. By a close scrutiny of the article of the statute under consideration (5644), it will be seen that it applies in terms: First, to any clerk, or other person who may labor, or perform, any service "in any office, store, saloon, hotel, shop, mine, quarry, factory or mill, of any character"; second, to any person who may perform any service "in cutting, preparation, hauling, handling, or transporting to any mill or other point for sale, manufacture, or other disposition, logs or timber," or upon wagons or other means, of transporting such "logs or timber"; and, third, to "farm hands" working under contract for wages, etc. All of these persons are given a first lien upon the products, machinery, tools, fixtures, etc., "that may be created (in whole or in part)" by such labor, or that may be necessarily connected with the performance of the labor required that may be "owned" by or in "possession" of the employers.

It seems quite plain to us that the labor performed by appellee, and others under whom he claims, was not in any office, store, or other place named in the article of the statute, nor was it in the cutting, preparation, or hauling of logs or timber to a mill, nor was it as a farm hand, nor was the labor performed for the protection or creation of the property upon which the lien was foreclosed, nor for its betterment nor preservation, and hence entitled to priority of payment on equitable principles as developed in the decisions. See *Provident Institution v.*

Mayor et al. of Jersey City, 113 U. S. 506, 5 Sup. Ct. 612, 28 L. Ed. 1102; McIlhenny Adm'r. & U. T. Co. v. Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705. On the contrary, the labor here was in sinking a well with machinery and tools used as mere instrumentalities for the prosecution of a work not comprehended by article 5644. However true it may be that the "laborer is worthy of his hire," and however desirable it may be that our Legislature should provide lien laws for the security of every class of labor, it has not thus far done so. No preference lien has been given by the law to a mere teamster not laboring upon a railroad, nor engaged in hauling logs to a saw-mill, nor to a cowboy upon the horse he rides in rounding up his employer's herds, nor in numerous other cases that might be mentioned. Appellee cites a number of cases as supporting the judgment, but, in our opinion, they fall within the statute, and hence are not in point, unless it is the case of Red Deer Oil Development Co. v. Huggins, 155 S. W. 949, in which a writ of error was refused by our Supreme Court (161 S. W. xvi). That seems to have been a case where laborers were awarded liens against certain property of the defendant engaged in drilling a well for the development company, but the character of the property upon which the lien was foreclosed does not appear. From a reading of the opinion we cannot say that it was, as here, upon the drill machinery and tools with which the well was sunk. Moreover, no question in that case seems to have been made of whether the laborers brought themselves within the statute now under consideration. So that we feel at liberty to follow our own judgment in the matter.

It is accordingly ordered that the judgment below be reversed in the particular under consideration, and here rendered for appellant, as was done below, with a foreclosure of his mortgage lien against all parties defendant upon the property described in his petition, together with all costs in both courts.

On Motion for Rehearing.

[3] Appellee presents a very forceful and persuasive motion for rehearing. No fault, of course, is found with our conclusion that the laborer's lien is, by reason of the statute, superior to the contract lien previously executed and recorded, but it is plausibly insisted that the labor performed by appellee Claude Minor, and those whose claims he holds, was performed in a "mine," and hence that such laborers are within the purview of Revised Statutes, art. 5644, quoted in our original opinion. The contention is that oil is a mineral, and that hence one engaged in the labor of extracting it from under the surface of the earth, whatever be the method of doing so, is a miner engaged in mining.

Appellee so paraphrases the statute as to make it read:

"That whenever any * * * common laborer * * * may labor or perform any service in any * * * mine * * * of any character."

—he is entitled to a lien, and emphasis is given the terms "of any character," as qualifying the term "mine," as well as the other terms of the statute, so that, as appellee contends, if drilling an oil well is mining "of any character," then appellee is within the statute. It is to be implied from this argument that, while ordinarily a driller engaged in drilling or boring an oil well may not be classified as a "miner," or as engaged in mining, in view of the qualifying terms it may and should be so held.

It will be found, however, that the article of the statute under consideration was accurately quoted in our original opinion, and that as so quoted the terms "of any character" qualify the terms "factory" and "mill," and not the term "mine." It should also be noted that in immediate connection with the word "mine," the statute (article 5644) specifies a "quarry" as one of the protected places, and in other parts of the article names a "quarryman" as one of the classes of laborers intended to be benefited. Rock or stone in place may be a quarry, and one employed in its displacement for commercial purposes is a quarryman. Yet stone or rock in its most general sense is, like oil and gas, classed as mineral. If, therefore, the legislative body in the enactment of article 5644 entertained the view now urged in behalf of appellee that any person employed in taking from or under the earth's surface any substance whatever that is within the general classification of mineral is a miner, or performing service in or about a "mine," then no reason is perceived why the words "quarry" and "quarryman" should have been inserted in the statute. In that event the simple word "mine," when applied to other words of the statute, would have been all-sufficient. Indeed the use of the words "mine" and "quarry" in immediate connection indicates that the word "mine" was not used in any other sense than as ordinarily understood. This conclusion receives added force when it is remembered that in 1893, when the laborer's lien law now considered was enacted, such a thing as an oil well in Texas was hardly thought of, or at least was not generally known and considered. The term "mine," therefore, as used in the statute, must be construed as it stands without expansion or enlargement because of qualifying terms relating thereto. Our statute so far as now pertinent, declares that:

"1. The ordinary signification shall be applied to words, except words of art or words connected with a particular trade or subject-matter, when they shall have the significance attached to them by experts in such art or trade, or with reference to such subject-matter. * * *

"6. In all interpretations, the court shall look diligently for the intention of the Legislature, keeping in view at all times the old law, the evil and the remedy." Revised Statutes 1911, art. 5502.

What then is the ordinary signification of the word "mine"? We have examined numerous definitions of the terms "mine" and "mining," and those given by Webster have perhaps received as general judicial approval as any. His primary definition of "mine," when used as a noun, is:

"An excavation, properly underground, for digging out some useful product, as ore, metal, or coal. (2) Any deposit of such material suitable for excavation and working; as a placer mine."

When used as a verb the same lexicographer says "to mine" is:

"To obtain by digging out of the earth; also to make diggings into for ore or the like, as coal is mined. 'They mined rich veins of silver.'"

Webster defines a miner as:

"One who mines in any sense; especially one whose occupation is to excavate ore, coal, etc., in a mine."

In 27 Cyc. p. 531, it is said:

"The primary meaning of the word, 'mine,' standing alone, is an underground excavation made for the purpose of getting minerals; a pit or excavation in the earth from which metallic ores, or other mineral substances are taken by digging."

While it is true that in classifying the earth's substances oil is classed as a mineral (see 27 Cyc. 532); and that the method of its extraction, whether by digging, trenching, or otherwise, is immaterial in a consideration of the question, yet as it seems to us the definitions given are ordinarily referable to minerals in place, such as iron, gold, silver, salt, sulphur, etc., and not to substances, though classed as mineral, that are in solution and migratory such as gas and oil. It had not occurred to us on original hearing that the well, upon and about which Claude Minor and his assignors worked, was a "mine," or that they were "miners," and we feel safe in saying that ordinarily they would not be so designated, and by the statutory rule of construction quoted it is the ordinary, and not a strained or exceptional, significance that must be given the term "mine" as used in the statute, by virtue of which appellee claims. It is, we think, common knowledge that an oil well is simply so designated, and that the one engaged in its boring or drilling is designated as a driller. If this be true—and we do not think it can be gainsaid—we cannot designate an oil well as a mine, or the driller as a miner, without violating the rule of construction we are directed to follow, for it, by necessary implication, declares that words used in our civil enactments, when connected with a particular trade or subject-matter, must be given the signification attached to them by experts in such art or trade, or with reference to such subject-matter.

Appellee cites several cases, including *Swayne v. Lone Acre Oil Co.*, 98 Tex. 597, 86

S. W. 740, 69 L. R. A. 986, 8 Ann. Cas. 1117; *Ohio Oil Co. v. Daughetee*, 240 Ill. 861, 88 N. E. 818, 36 L. R. A. (N. S.) 1108; *People v. Bell*, 237 Ill. 332, 86 N. E. 593, 19 L. R. A. (N. S.) 746, 15 Ann. Cas. 511; *Isom v. Rex Crude Oil Co.*, 147 Cal. 659, 82 Pac. 317; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *McIntosh v. Ropp*, 233 Pa. 497, 82 Atl. 949; *Weaver v. Richards*, 156 Mich. 320, 120 N. W. 818; *Consumers' Gas T. Co. v. Quinby*, 137 Fed. 882, 70 C. C. A. 220; *Berentz v. Belmont Oil Co.*, 148 Cal. 577, 84 Pac. 47, 113 Am. St. Rep. 308; *Etchison Drilling Co. v. Flournoy*, 131 La. 442, 59 South. 867; *Red Deer Dev. Co. v. Huggins*, 155 S. W. 949—that in an indirect and inferential way seem to support his present contention that an oil well is a mine, but the cases that we have been able to find most nearly in point are the cases of *Guffey Petroleum Co. v. Murrel*, by the Supreme Court of Louisiana, reported in 127 La. 466, 53 South. 705, and *Kreps v. Brady*, by the Supreme Court of Oklahoma, reported in 37 Okl. 754, 133 Pac. 217, 47 L. R. A. (N. S.) 106. In the case first mentioned, the court had under consideration the Constitution and laws of Louisiana, which, in substance, exempted from taxation property used in mining operations, and the exemption was claimed in that case by the oil company, the property involved being such as is usual in developing, storing, and marketing oil secured by drilling. In the course of the opinion the court defines the terms "mine" and a "mining operation" as understood in their most usual signification, and, among other things, said:

"A productive oil well or aggregation of them is always universally and invariably known as an 'oil field.' Who ever heard of such being called a 'mine'? If an oil well was a 'mine' in the usual signification of the word, surely sometime, somewhere, some intelligent person would be heard to designate it by that term; but it is never done. Now a 'mining operation' must certainly be something having to do with a mine, and, if an oil well is never known in the ordinary and customary use of language as a 'mine,' then neither the making nor operating of one would possibly be considered a mining operation in the ordinary signification of the word. He who works in a mine is termed a 'miner,' but no one ever heard of a laborer at an oil well being called a 'miner.' It is shown by the testimony that an oil well is too small for a man to get into, even if such was necessary or desirable, which it is not. We think it absolutely clear that the words 'mine' or 'mining operation' never refer to oil wells or oil production in ordinary parlance."

The Oklahoma case was one where the plaintiff sued for personal injuries caused by a fellow servant while working with or about a derrick and machinery of an oil well. It seems that by the laws of Oklahoma they have abrogated the common-law doctrine relieving the master from liability for injuries proximately caused by a fellow servant when the injuries are received while engaged in a mining operation. The court, therefore, found it necessary to determine in that case whether the drilling of oil wells

was mining, and the court, after quoting numerous definitions of the words "mine," "mines," "to mine," etc., concluded that drilling a well in search of oil or gas was not "mining" within the meaning of the law under consideration.

It would thus seem that unless we are to give a strained construction out of the ordinary to the term "mine," as used in the laborers' lien law (article 5644) we must adhere to the conclusion stated in our original opinion that appellee has not brought himself within that statute. In now concluding to do this we have not overlooked the rule of liberal construction appellee invokes. This rule, as prescribed by law, is that our statutes "shall be liberally construed with a view to effect their objects and to promote justice." It cannot be said that the object of the Legislature in enacting article 5644 of the Revised Statutes was to give a lien to every laborer. As originally pointed out, the lien is only given laborers of designated classes, and the vital question for our determination is simply whether laborers of appellee's class are included in the legislative grant, and not whether his class ought to have been included. The latter question is for the Legislature, and not for the courts. Nor, so far as we can apprehend, are we required to give an unusual construction to the term "mine" in order to "promote justice." The case before us is one where the owner of certain well-digging machinery sells it, and, to secure a part or all of the unpaid purchase money, reserves or takes a written lien upon all such machinery from the vendee and duly records the lien. The vendee thereafter employs the appellee and others who use and labor with such machinery in drilling an oil well. They do not labor upon or with such machinery in its creation or in or for its improvement, and thus benefit the owner or maker and raise a natural equity in themselves for payment. On the contrary, they use the machinery as mere instruments in the prosecution of their occupation; constantly deteriorating the same, and without which their occupation as drill-

ers would be gone. Of the mortgage and of the fact that the machinery had not been paid for appellee and his assignors had full notice constructively by force of our registration statutes. Under such circumstances, what principle of justice is to be "promoted" by a determination of the question under consideration in appellee's favor? Is it not at least a simple question of whether appellee has shown himself to be one of that class of laborers to whom the statute gives a first lien? We think it is, and in our thinking on the subject no reason has occurred to us why, if appellee is within the particular statute under consideration, the borer or driller for ordinary artesian or other water is not also, and no one thus far has so contended, for water, as oil and gas is likewise classed as a mineral in the kingdoms of matter. See *Ridgway Light & Heat Co. v. Elk County*, 191 Pa. 465, 43 Atl. 323. In *5 Words and Phrases*, p. 4515, citing *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731, the writer says:

"Water, like gas and oil, is a mineral, but a mineral with peculiar attributes. The decisions in ordinary cases of mineral rights, etc., have never been held as unqualified precedents in regard to flowing, or even to percolating waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy is not too fanciful, as minerals *ferre naturæ*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner."

See, also, *Texas Co. v. Daugherty*, 176 S. W. 717; *Swayne v. Lone Acre Oil Co.*, 93 Tex. 597, 86 S. W. 740, 69 L. R. A. (N. S.) 986, 8 Ann. Cas. 1117. To extend the benefit of the statute to the driller for oil and not to the driller for water, while the conditions are so similar, would at least seem to violate the spirit of section 3, art. 1, of our Constitution, which declares that:

"All freemen, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

We conclude that appellee's motion for rehearing must be overruled.

HUNTER v. HUNTER. (No. 89.)

(Court of Civil Appeals of Texas. Beaumont.
April 13, 1916. Rehearing Denied
July 3, 1916.)

1. TRIAL \S 814(1)—REMARKS OF COURT—COMMISSION OF JURY.

When the jury had been out two days and asked to be discharged, it was highly improper for the judge to reply that the trial had been costly and that he would give them eight more days to reach a verdict, where, in view of terrific storm conditions and lack of communication with their homes, the jury might have been and apparently were coerced into rendering a compromise verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 472, 473, 747; Dec. Dig. \S 814(1).]

2. NEW TRIAL \S 26—PRESERVATION OF EXCEPTIONS—REMARKS OF COURT—TIME TO OBJECT.

Where appellant's counsel was present and made no objection to erroneous remarks of the court in retiring the jury after its request to be discharged, his objection to the error came too late in motion for new trial made a week later.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 37-39; Dec. Dig. \S 26.]

3. DIVORCE \S 149—CONFLICT IN VERDICT—CUSTODY OF CHILDREN.

Error cannot be predicated on the alleged conflict in the verdict which found the mother entitled to a divorce and custody of two girls, but not a fit and proper person to have custody of a boy; no actual conflict necessarily following from such findings.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 496-498; Dec. Dig. \S 149.]

4. APPEAL AND ERROR \S 690(4)—RECORD—ADMISSION OF TESTIMONY—SCOPE OF REVIEW—SUFFICIENCY.

In the absence from the record of any statement of facts, error alleged in admission of testimony will not be reviewed, there being no way to determine whether the admission was error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2899; Dec. Dig. \S 690(4).]

5. DIVORCE \S 302—DECREE—FUNDAMENTAL ERROR—INCONSISTENT FINDINGS.

It was not fundamental error for the judgment to award divorce to the wife with custody of two girls and deny custody of a boy to her, on the ground that it was not in accordance with the verdict, which, while not in conflict in itself, required such disposition.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 791, 792; Dec. Dig. \S 302.]

**Appeal from District Court, Tyler County;
A. E. Davis, Judge.**

Suit by P. I. Hunter against D. L. Hunter, wherein defendant filed a cross-action and sued out injunction. Judgment awarding divorce and custody of two children to defendant, and custody of one child to plaintiff, and defendant appeals. Affirmed.

Smith & Lanier, of Jasper, and Thomas & Wheat, of Woodville, for appellant. Mooney & Shivers, of Woodville, for appellee.

MIDDLEBROOK, J. This is a suit filed in the district court of Tyler county, Tex., July 10, 1915, for divorce, on the ground of three years' permanent abandonment. Defendant,

D. L. Hunter, filed her answer and cross-action on July 29, 1915, denying plaintiff's right to recover a divorce of her, and in cross-petition pleaded for divorce in her own behalf, basing such plea upon the ground of cruel treatment. The trial of the case began on the 16th day of August, and was finally finished on the 21st day of August, the jury rendering verdict in favor of the defendant on her cross-action.

Upon filing of petition by the plaintiff, defendant sued out an injunction, asking that the plaintiff be restrained from interfering with her three children, two of whom were girls and one a boy. The defendant alleged in her petition for injunction that after filing of suit by the plaintiff, but before citation was served on her, the plaintiff wrongfully took charge of John R. Hunter, the boy, who was only five years old, and that she feared he would remove him beyond her reach, and out of the state, into the state of Louisiana. The injunction was granted on this petition, and an order entered commanding the delivery of the boy, John R. Hunter, back to the mother, D. L. Hunter. Later this order was modified by the district judge, on petition of P. I. Hunter and upon a representation to the court by him that he would not take the child out of the state, and that he would have the child present at the trial of the case. The case was tried before a jury and was submitted to the jury upon special issues, after a general instruction to the jury, as to grounds of divorce.

The five special issues submitted to the jury by the court, as presented by the record, are as follows:

(1) Is the plaintiff, under the facts and pleadings, entitled to a divorce?

(2) Is the defendant, Mrs. D. L. Hunter, under the facts and circumstances, entitled to a divorce?

(3) Is the plaintiff a fit and proper person to have the care and custody of the boy, John R. Hunter?

(4) Is Mrs. D. L. Hunter a fit and proper person to have the care and custody of the three children?

(5) Would the interests of the children be best subserved by placing their care and custody in the hands of Mrs. D. L. Hunter, or by placing the care and custody of the two girls in the hands of Mrs. D. L. Hunter, and the care and custody of the boy, John R. Hunter, in the hands of P. I. Hunter?

The jury answered the first question, "No." It answered the second question, "Yes." It answered the third question, "Yes." The instruction given to the jury, as to their answer to the fifth question, was as follows:

"If you find the fact to be that the best interests of the three children will be best subserved by placing their care and custody in the hands of Mrs. D. L. Hunter, then you will answer this question with the words: 'Mrs. D. L. Hunter'; but if you find the fact to be that

the best interests of the children will be subserved by placing the care and custody of the two girls in the hands of Mrs. D. L. Hunter, and the care and custody of the boy, John R. Hunter, in the hands of Mr. P. I. Hunter, then you will answer this question as follows: 'Give the girls to Mrs. D. L. Hunter, and give the boy to Mr. P. I. Hunter.'

The jury answered that question: "Give the girls to Mrs. D. L. Hunter, and give the boy to Mr. P. I. Hunter." Judgment was entered by the trial court, giving the custody of the two girls in the care of Mrs. D. L. Hunter, and the custody of the boy in the care of P. I. Hunter, and also a decree of divorce, in the following language:

"It is therefore ordered, adjudged, and decreed by the court that the bonds of matrimony heretofore existing between the plaintiff, P. I. Hunter, and D. L. Hunter be, and are hereby, in all things dissolved, and they are now divorced."

P. I. Hunter, the plaintiff, in supplemental petition asked for the care and custody of the boy, and represented in his petition, which was sworn to, that he was better able to care for, support, and educate the boy than was Mrs. D. L. Hunter and that he desired to give the boy a collegiate education, as he had one of his sons by another marriage.

There is no statement of facts in the record in this case, hence the only thing before us for consideration is whether or not the record presents fundamental error. The record, as presented, shows that the trial of this case was in progress during the notorious storm, which struck southeast and east Texas on or about the 16th of August. After the jury had deliberated upon a verdict for 18 hours, it returned into open court in body, and the foreman of the jury delivered to the trial judge the following written request:

"Judge A. E. Davis: We are hopelessly divided in this cause, and there are no hopes of reaching a verdict, and we would like to be excused. [Signed] L. G. Miller, Foreman."

Upon receiving this message from the jury, the trial judge addressed the jury as follows: "Mr. Miller, did you write this note?" Mr. Miller answered, "Yes." The trial court then asked the jurors if they had asked the foreman to write the note, to which they answered they had, and the trial judge then addressed the jury, substantially, as follows:

"Gentlemen, it has taken about three days to try this case, and at considerable cost, and I will just give you until midnight of next Saturday night to reach a verdict in this case."

He retired the jury to their room, with this instruction, and in about six hours they again returned into open court, with the verdict heretofore set out.

Appellant's first assignment of error is lengthy, but it complains of the action of the trial court in the remarks he made to the jury, when the jury came before him, after they had been deliberating about 18 hours, and announced that they were hopelessly divided and asked to be discharged. The assignment of error, the motion for new trial, and the bill of exceptions show that

the case was on trial during the notorious August, 1915, storm, and the contention of the appellant in her motion for new trial and assignment of error, is that the trial court, in instructing the jury that he would keep them in consideration of the case until Saturday night August 28th, was a coercion by the court upon the jury to extort a verdict from them, and that it did have the effect of extorting a verdict from them, and that such extortion is reflected in that part of the jury's verdict, wherein they say that Mrs. D. L. Hunter is not a proper person to have the care and custody of the boy, and yet give her the care and custody of the two girls.

[1] We think, unquestionably, that the language of the trial court to the jury, in which he threatened to keep them together for eight more days, after they had deliberated upon a verdict for a part of two days, was very improper. We all know that courts are very expensive, and judges of courts are to be commended for their zeal and industry directed to the end that the most may be done at the least cost; but under no circumstances should a trial judge let his zeal for an economical administration of justice swerve him from that high authority with which the law clothes him to see that justice is administered, at whatever the cost may be. It is very likely, practically certain, that the instruction delivered to the jury by the trial judge, at the time and under the surroundings under which the jury was then deliberating, had the effect to cause them to return a compromise verdict. The motion for new trial, and the bill of exceptions duly approved by the trial court, show that this occurred during the great hurricane before mentioned. They show also that telephone communication and telegraph communication were out of commission, and that the jurors were away from home; and it is not necessary to speculate upon the condition of the minds of those jurors at that time, and especially when the court told them he would give them until the next Saturday night at midnight, eight days later, to find a verdict; and if timely objection had been made to this language, and proper bill of exception taken, this assignment of error would present a very serious issue in this case, and would, perhaps, cause a reversal of the case. *Wootan v. Partridge*, 39 Tex. Civ. App. 346, 87 S. W. 356; *G. C. & S. F. Ry. Co. v. Johnson*, 99 Tex. 841, 90 S. W. 164; *Pecos & N. T. Ry. Co. v. Finklea*, 155 S. W. 617; *Texas Midland Ry. Co. v. Byrd*, 41 Tex. Civ. App. 164, 90 S. W. 185, and authorities therein cited.

[2] There is, however, another feature in the proceedings of this case that cannot be overlooked by the appellate court. The motion for new trial is sworn to by one of the attorneys. The motion for new trial has the objectionable remarks of the court to the jury copied in full, together with the jury's request to the court. Appellant's counsel, at

cording to his affidavit, must have been present at the time the instruction was given by the trial court to the jury. His affidavit winds up: "Who being by me duly sworn, upon oath, deposes and says the statements made in said motion are true." He could not have made the affidavit in these words, unless he had been present and heard the instructions given by the court to the jury. It is asserted also, in appellee's brief, that counsel for appellant was present at the time and heard the instructions given, and that no complaint was raised until the presentation in court of motion for new trial on August 27th, nearly a week later. The question is: Can appellant be heard to complain at so late a day, after the instruction was given by the court to the jury? It would seem that at the time the instruction was given by the court to the jury, it was satisfactory to appellant's counsel. It must have been satisfactory, because no objection was raised to it, and no doubt, had the jury seen fit to give the boy to his mother, the appellant, no complaint would have ever been heard from appellant on the instruction given by the court to the jury. We think it is too late, in a proceeding of this case, to raise the issue on motion for new trial, and, in order to get the benefit of such error, it is necessary for objection to be raised and exception reserved there-to at the time. Had such been done, it is more than probable that the trial court would have seen his error, retraced his steps, and instructed the jury not to consider what he had said to them, but to go and consider further of their verdict, and reach a conclusion, if they could do so. True, this is speculation, but ordinarily trial judges are quick and willing to correct any error made by them during the proceedings of a trial, when their attention is called to it.

In *Renn et al. v. Samos et al.*, 42 Tex. 110, we think the Supreme Court announced the correct doctrine as to the error complained of here. Associate Justice Moore in writing the opinion in that case, says:

"In reference to the alleged error of the court in telling the jury 'to find some character of verdict,' as both parties preferred any verdict rather than a mistrial, as the case would be taken to the Supreme Court, let their verdict be what it might, it will suffice to say that this statement, as the judge certifies, was made to the jury at the instance of appellant's counsel. If so, surely he should not complain of it. Nor does it appear from the supposed bill of exception found in the record that appellant's counsel excepted to the action of the court at the time it was had. The inference is that he did not do this until after the jury returned their verdict."

The Supreme Court affirmed that case, and perhaps there is no less vice, as measured by the law, in the statements by the trial court in that case than in the instant case. We think appellant's complaint came too late, and his assignment of error is overruled.

[3] Appellant's second assignment of error is:

"The verdict of the jury should be set aside, because the same is inconsistent with the facts in the case and with itself, in that it finds that she is entitled to a divorce under the allegations of her petition but that he is not."

Appellant's proposition under this assignment is to the effect that the verdict of the jury is in conflict with itself, which shows it to have been reached because of some improper influence, and is so inconsistent as to be insufficient upon which to base a written judgment. The reasoning, as set forth in appellant's brief, is to the effect that the jury having found appellant entitled under the pleadings and facts to a divorce and found the appellee (plaintiff below) not entitled to a divorce, under the pleadings and facts of the case, and having also found that the appellant (defendant below) was not a proper and fit person to have the care and custody of the boy, are directly in conflict with each other, the argument being that there is no rule by which the conflicting (as contended by appellant) findings of the jury, that Mrs. Hunter was entitled to a divorce on her plea of cruel treatment and Mr. Hunter denied a divorce on his plea of three years' abandonment, and Mrs. Hunter pronounced by the jury not a fit and proper person to have the care and custody of the boy and Mr. Hunter to be a proper person to have the care and custody of the boy, can be harmonized.

Appellant stresses the finding of the jury that Mrs. Hunter is not a fit and proper person to have the care and custody of the boy from the standpoint that it casts a reflection upon her, on the one hand, and then stresses the absurdity of giving her the care and custody of the girls while she is an unfit person to have the care and custody of the boy. We have no way of weighing the facts in this case, there being no statement of facts in the record, but certainly, a jury's finding that a mother is not the proper and fit person to have the care and custody, maintenance, education, etc., of a boy does not cast any reflection upon the good name of the mother of that boy. It is altogether owing to what meaning you apply to the term "fit and proper," and, as the record is presented before us, there is but one conclusion for us to come to, and that is that the trial court and the jury found that the father was better able to take care of and educate the boy. In other words, that the boy's opportunities for life would be enhanced by being provided for by the father, beyond what they would be by having to be provided for by the mother. Certainly it cannot be considered fundamental error, as the case is presented. *Lohmuller v. Lohmuller*, 135 S. W. 751; *Moore v. Moore*, 22 Tex. 237.

[4] Appellant's third assignment of error complains of the action of the trial court in admitting the testimony of a number of witnesses for plaintiff, because the same calls for the conclusions of the witnesses. As be-

fore stated, there is no statement of facts in this record, and, such being the case, there is no way for this court to determine whether the testimony was improperly admitted or not.

[5] "As fundamental error and independent proposition," appellant submits "The judgment must be rendered in accordance with the verdict, or the same will be set aside." In our consideration of appellant's assignment No. 2, we have discussed the issues which might be presented under this assignment, and we do not think, as before stated in this opinion, that, because a jury finds that the mother of the boy is not the fit and proper person to have the care and custody, education, and maintenance of him, and in the same verdict finds that she is the proper person to have the care, custody, education, and maintenance of her girls, they are necessarily inconsistent findings. Indeed, as the issues were presented to the jury by the trial court, they might be consistent findings, and that, too, without any reflections upon the mother of the boy. Certainly, there is not fundamental error presented in this issue.

There being no statement of facts in the record, and no fundamental error appearing, there is but one course for this court to pursue; that is, to affirm the case, and it is so ordered.

Affirmed.

PEIL et al. v. WARREN, Jr., et al.*
(No. 7157.)

(Court of Civil Appeals of Texas, Galveston.
May 31, 1916. Rehearing Denied
June 29, 1916.)

1. WITNESSES \S 150(3) — "SUIT BETWEEN HEIRS" — TRANSACTIONS WITH DECEDENT — STATUTE.

A suit for partition, brought by plaintiff as heir of her deceased father against her brother and her sister, the only other surviving heirs jointly and equally interested therein, where it appeared that the sister and her husband had conveyed to the brother all their interest in the land except in certain tracts, and where the only issue was whether the brother owned in his own right, as a partner of his father, a one-half undivided interest in certain tracts, was a suit by or between heirs of a decedent as such, within Vernon's Sayles' Ann. Civ. St. 1914, art. 3690, so that testimony of the sister and her husband and of the brother as to statements made by and transactions had with the deceased father, tending to show that the brother was a partner in a land business and owned a one-half interest in several tracts involved in the suit, was inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 655; Dec. Dig. \S 150(3).]

2. WITNESSES \S 155 — TRANSACTIONS WITH DECEDENT — "OPPOSITE PARTIES."

In such suit, where it was contended that the defendant brother was sued in his individual capacity and not as heir of his deceased father, and that the defendant sister and her husband were not adversely interested to plaintiffs, but where the sister's answer began with a demurrer to the petition and included a general denial of its allegations and opposed the parti-

tion of the land involved, their testimony as to transactions with and statements by their deceased father relative to matters involved in the suit was inadmissible within Vernon's Sayles' Ann. Civ. St. 1914, art. 3690, rendering evidence as to such transactions and statements inadmissible unless the party is called to testify thereto by the opposite party, since the defendants were "opposite parties" to plaintiff, regardless of whether they were interested in the subject-matter of the suit or not.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. \S 155.

For other definitions, see Words and Phrases, First and Second Series, Opposite Party.]

3. WITNESSES \S 37(1) — COMPETENCY — IN GENERAL.

Under the general rules of evidence, all persons are competent witnesses to testify to any fact which is relative and material to the matter under investigation, and which is within their knowledge, and are disqualified to so testify only because excepted by some special statute.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 80, 83, 87; Dec. Dig. \S 37(1).]

4. APPEAL AND ERROR \S 1052(8) — HARMLESS ERROR — ADMISSION OF EVIDENCE.

In a suit for partition, error in the admission of evidence of transactions with and statements by the deceased father of the parties was harmless, where the other independent evidence in the case was not such as to require the court to render a different judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4177; Dec. Dig. \S 1052(8).]

5. PARTITION \S 63(3) — SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to support a verdict for plaintiff with an award of a one-half interest in certain tracts to the brother as partnership land of himself and the deceased.

[Ed. Note.—For other cases, see Partition, Cent. Dig. \S 185; Dec. Dig. \S 63(3).]

Error from District Court, Harris County; Chas. E. Ashe, Judge.

Suit for partition by Mary G. Peil and husband against John Warren, Jr., and others. Judgment for plaintiffs, allowing a one-half interest in certain tracts to defendant John Warren, Jr., and plaintiffs bring error. Affirmed.

W. S. Hunt and Roberts & Sears, all of Houston, for plaintiffs in error. Campbell, Sewall & Myer and Hutcheson & Hutcheson, all of Houston, for defendants in error.

LANE, J. This suit was instituted by Mary G. Peil and husband, W. J. Peil, against John Warren, Jr., and Mrs. Eliza J. Ellis and husband, George Ellis, for partition of certain tracts of land described as follows: T. Coghill survey of 1,476 acres more or less; A. Culliver survey of 1,476 acres more or less; Samuel Everetts survey of 220 acres more or less; Samuel McCurtain survey of 245 acres more or less; lots 5, 11, 12, 15, section 22, of Harris county school lands, containing 163 acres more or less; J. Hudson survey of 640 acres more or less; C. N. Kinman survey of 373 acres more or less; Geo. Pemberton survey of 640 acres more or less.

less; Walter Wade survey of 580 acres more or less; H. T. & B. Ry. Co. survey of 640 acres more or less; A. B. Langerman survey of 98.52 acres more or less.

It is alleged in plaintiffs' petition that all of said land was the property of John Warren, Sr., at the time of his death; that he died intestate, and that plaintiff Mary Peil and defendants John Warren, Jr., and Mrs. Eliza Ellis were the children and only surviving heirs of said John Warren, Sr., and that they were jointly and equally interested therein.

Eliza J. Ellis and husband, George Ellis, answered, alleging that they had sold and conveyed to John Warren, Jr., all interest owned by them in all of said tracts of land except the T. Coghill tract of 1,476 acres, the A. Culliver tract of 1,476 acres and lots 5, 11, and 15, section 22, of Harris county school lands of 163 acres.

John Warren, Jr., the other defendant, admitted that the deeds of conveyance, of record in Harris county, showed that all said land was conveyed to John Warren, Sr., deceased, and that the legal title, apparent of record, was in John Warren, Sr., but he alleged that at and prior to the time the said J. Hudson tract of 640 acres; the G. N. Kinman tract of 363 acres; the Geo. Pembleton tract of 640 acres; the Walter Wade tract of 580 acres; the H. T. & B. Ry. Co. tract of 640 acres; and the A. B. Langerman tract of 98.52 acres; or any of them—were deeded to said John Warren, Sr., he, the said John Warren, Jr., and John Warren, Sr., were engaged as copartners in the business of buying and holding land and raising cattle under the name of John Warren, and that said last-named six tracts of land were so purchased by them; that while the land in fact was conveyed to John Warren, Sr., it was purchased for said partnership and paid for out of the funds of said copartnership, or that one-half of the purchase money was paid by each of said partners, and that the legal title thereto was held by John Warren, Sr., in trust for said copartnership; that the said John Warren, Sr., and he, the said John Warren, Jr., each owned a one-half interest in all of said copartnership property.

It was admitted by all parties that whatever lands belonged to John Warren, Sr., at the time of his death was jointly and equally owned by plaintiff Mrs. Peil, Mrs. Ellis, and John Warren, Jr.; that thereafter Mrs. Ellis, joined by her husband, George Ellis, conveyed all their undivided interest in all of said land to John Warren, Jr., except their one-third undivided interest in the Coghill, Culliver and Harris county school land tracts, and that they now hold vendor's lien notes executed by John Warren, Jr., for part of said purchase money, which they are setting up in this suit as liens on said land so sold by them.

The only controversy is as to whether or

not John Warren, Jr., owned in his own right as a partner of his father, John Warren, Sr., one-half undivided interest in the Hudson, Kinman, Pembleton, Wade, Langerman, and H. T. & B. Ry. Co. tracts.

The case was tried before a jury upon special issues in substance as follows:

First. Were the George Pembleton, Walter Wade, J. Hudson, G. N. Kinman, A. B. Langerman, and H. T. & B. Ry. Co. tracts paid for out of the proceeds of the sale of cattle or other livestock belonging to the firm composed of John Warren, Sr., and John Warren, Jr.?

Second. At the time of the purchase of the above-named tracts, was there an agreement between John Warren, Sr., and John Warren, Jr., that John Warren, Jr., was to have a one-half interest in said tracts?

The jury answered both of said questions in the affirmative. Upon the answers of the jury the court rendered judgment as prayed for by plaintiffs, except that one-half undivided interest in the J. Hudson, G. N. Kinman, George Pembleton, Walter Wade, A. B. Langerman, and H. T. & B. Ry. Co. tracts were awarded by the same to John Warren, Jr., as his one-half interest in the partnership land of himself and John Warren, Sr., deceased, and except that the vendor's lien asserted by Mrs. Eliza Ellis against a certain interest in said lands sold by her to John Warren, Jr., was foreclosed as against such interest so sold. From this judgment the plaintiffs Mary J. Peil and husband, W. J. Peil, have appealed.

[1] By appellants' first, second, and third assignments it is insisted that the court erred in permitting George Ellis, Eliza Ellis, and John Warren, Jr., to testify to certain statements made by, and transactions had with, John Warren, Sr., deceased, tending to show that John Warren, Sr., and John Warren, Jr., were partners in a cattle and land business as alleged by John Warren, Jr., and that he, John Warren, Jr., owned a one-half interest in several tracts of the land involved in this suit, because this was a suit by plaintiffs as heirs of John Warren, Sr., against defendants, other heirs of said John Warren, Sr.; and that the admission of such testimony was in violation of the provisions of article 3690, Vernon's Sayles' Statutes, where in it is provided that:

"In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent."

Appellees contend that article 3690, supra, has no application to a suit of this character: (1) Because this is not a suit by or against heirs of a decedent as such, and not one in which judgment may be rendered for

or against heirs as such, but is a suit between heirs of a decedent in their individual capacity; and (2) that the testimony of defendants Eliza Ellis and George Ellis was admissible because neither of them were adversely interested to the plaintiffs. We do not think that either of such contentions is tenable. Plaintiffs Mary Pell and husband sue for an interest in the land described in their petition, and pray for a partition thereof for Mary Pell as an heir of John Warren, Sr. No claim whatever is made to any portion of said land by plaintiffs, except that Mary Pell inherited the same as such heir. They sue all the defendants as heirs of John Warren, Sr., and specially alleged that the defendants have an interest in said land as such heirs. Mrs. Eliza Ellis and husband, George Ellis, assert no claim to any interest in said land except as such heirs. Defendant John Warren, Jr., also claims a certain interest in said land as an heir of John Warren, Sr. We think the suit was clearly a suit by heirs as such, and that it was also a suit against heirs as such, and that the provisions of article 3690, Vernon's Sayles' Statutes, does apply as contended by the plaintiffs.

[2, 3] All the witnesses whose testimony was objected to were parties to the suit and interested in the subject-matter thereof, and all of them were "opposite parties" from the plaintiffs, as that term is used in said article 3690. There is no contention that John Warren, Jr., is not such "opposite party," but it is contended that he is sued in his individual capacity, and not as an heir of John Warren, Sr. It is also contended that Eliza Ellis and husband, George Ellis, are not adversely interested to plaintiffs and that therefore the provisions of article 3690, supra, do not, as to either of them, apply. If we look to the answer of Ellis and wife, we find that they begin their answer by a demurrer to plaintiffs' petition; that they make a general denial of all and singular the allegations of said petition, and that they specially oppose the partition of the land involved, as prayed for by plaintiffs. We think they are clearly "opposite parties" to plaintiffs, as that term is used in the statute mentioned. We also think the testimony objected to was with reference to transactions with, and statements made by, John Warren, Sr., relative to matters involved in this suit, and therefore was inadmissible, and that the trial court erred in admitting the same over the objection urged thereto. Under the general rules of evidence in this state, all persons are competent witnesses to testify to any fact which is relative and material to the matter under investigation, and which is within the knowledge of such person, and if they are disqualified to so testify, it is only by reason that they have been excepted out of the general rule by some special statute. Article 3690, supra, is a statute which specifically provides an exception to the gen-

eral rule above referred to, and specially provides that, in actions by or against heirs, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, etc., the persons excluded from testifying in the case mentioned are excluded only because they are specially excepted out of the general rule of evidence. This statute excludes parties to the suit specifically, and it therefore makes no difference whether they are interested in the subject-matter of the suit or not. If they are the "other party," opposite party, to those in the suit who object to their testimony, and who did not call them to testify, they were incompetent witnesses to testify to transactions with, and statements made by, the intestate, relative to the matters in dispute, because, and only because, they are made incompetent by the statute. *Colonial & U. S. Mort. Co. v. Thedford*, 21 Tex. Civ. App. 254, 51 S. W. 283; *Roberts v. Yarboro*, 41 Tex. 449; *Gilder v. Brenham*, 67 Tex. 345, 3 S. W. 309; *Grange Warehouse Ass'n v. Owen*, 86 Tenn. 355, 7 S. W. 457; *Newton v. Newton*, 77 Tex. 510, 14 S. W. 157; *Howard v. Galbraith*, 30 S. W. 839; *Wallace v. Stevens*, 74 Tex. 560, 12 S. W. 283. In the case of *Roberts v. Yarboro*, supra, our Supreme Court said:

"1. In the courts of this state there shall be no exclusion of any witness on account of color, nor in civil actions, because he is a party to or interested in the issues tried.

"2. In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, or any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court.

"The executor or administrator of Yarboro was not a party to this suit, and the prohibition, taken literally, does not support the ruling of the court. There is no ambiguity in the wording of the statute, nor can there be said to be any doubt arising out of the language of the law as to the intention of the Legislature in its enactment. 'It is not for the court to say, where the language of a statute is clear, that it shall be so construed as to embrace cases because no good reason can be assigned why they were excluded from its provisions.' *Denn v. Reid*, 10 Pet. 526 [9 L. Ed. 519] and see *Potter's Dwarrior on Statutes*, 143-146. If, however, we look to the reason of the law, it will be difficult to pronounce that it applies as fully to a surviving partner as it does to executors, administrators, or guardians. It is well suggested in the brief of appellant that the surviving partner is himself interested in the suit, and has a stimulus to activity and vigilance which is ordinarily wanting in administrators and guardians. For naught that appears, the object of the exception is to protect estates and lands, because of the fact that they are represented imperfectly by agents ordinarily appointed by the law.

"Even if it were admitted that the reason of the law applies with full force to this case, and the attempt be made to extend the statute by construction, so as to embrace surviving partners, it cannot be accomplished without unsettling

settled rules of construction. In *Tyson v. Britton*, 6 Tex. 224, Chief Justice Hemphill says: 'The Legislature has prescribed a general rule, with special disabilities or privileges, and these cannot be enlarged or extended to objects not embraced in the exception by mere implication or from parity of reason.' To the same effect is the language of Judge Story, in *United States v. Dickson*, 15 Pet. 165 [10 L. Ed. 689]: 'When the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fully within its terms.' The general rule is prescribed by the statute that no witness shall be excluded because he is a party to or interested in the suit. The second section is, in substance, a proviso excepting parties in certain actions from the operation of the rule. The rule as established extends a privilege to parties, while the exception operates to curtail that privilege or right, and should not therefore be extended by construction."

In *Wallace v. Stevens*, supra, it is said:

"Following well-known rules of construction of statutes, the Supreme Court of this state, in discussing the foregoing statutes, has declared that where a general rule has been established by statute with exceptions, the courts will not curtail the rule or add to the exceptions by implication. *Roberts v. Yarboro*, 41 Tex. 452."

In *Grange Warehouse Co. v. Owen*, supra, the Supreme Court of Tennessee, in construing a statute identical with our article 3690, said:

"Under our statute, interest does not disqualify in suits by or against executors, administrators, etc. Exclusion goes only to parties to the suit. It is an exception to the statute removing the disability of interest, and, as such, is to be construed strictly. 'In actions or proceedings by or against executors,' etc., 'neither party shall be allowed to testify against the other.'"

[4] We conclude that the testimony objected to was inadmissible, and should have been excluded, and that if the other evidence in the case, independent of such testimony erroneously admitted, was not such as to require the court to render judgment for the defendants, or, in other words, if such other evidence was not such as would support no other verdict than that found by the jury, the judgment rendered should be reversed, and his case remanded for another trial.

[5] In view of what has been already said, the next inquiry is, Is the evidence in the case, independent of that which we have held was erroneously admitted, such as would admit of only such verdict as was rendered by the jury? Such question can only be answered by a review of the testimony of the witnesses other than the parties to the suit.

J. W. Anderson testified, that he had worked for John Warren, Sr., and John Warren, Jr., for 18 years; that he had known all the Warren family all his life; that John Warren, Sr., and John Warren, Jr., were partners in the stock business; that they told him that they had bought the J. Hudson, George Pembleton, and Walter Wade surveys of land containing 640, 640, and 580 acres, respectively, known as the Turner land, and that they wanted him to sell certain of their horses and mules to pay for

said land; that these lands were inclosed in a pasture, and that the firm of Warren used said pasture for the purpose of grazing their stock, cattle, horses, and mules; that he sold some of their stock, and that the Warrens told him that they wanted the money (proceeds of such sale) to pay for the Turner land; that in 1900 he sold about \$3,000 worth of cattle for said firm, and turned the money over to John Warren, Sr.; that while he worked for the firm he took fat cattle to the New Orleans market four or five times each year and sold them; that he had conversations with John Warren, Sr., when he worked for them, in which said John Warren, Sr., told him that his son John Warren, Jr., and himself owned all lands at the ranch together, and that he always referred to the whole thing as their place.

T. H. White, for defendant, testified that in 1902 or 1903 he talked to John Warren Sr., and that in such conversation he told him (White) that he and his son had bought a tract of land together; that he and his son John owned several hundred acres across the railroad track.

W. E. Ellis, for defendant, testified that John Warren, Sr., told him that John Warren, Jr., owned a half interest in the land and stock business; that witness is a grandson of John Warren, deceased; that his said grandfather told him that John Warren, Jr., and himself had jointly purchased the land known as the "Turner land"; that he also told him that he and John Warren, Jr., were each one-half owners of the land bought since the wife of John Warren, Sr., died, and in all the stock, but did not mention any particular tracts.

It is shown by the undisputed evidence that the plaintiffs and defendants in this cause instituted, or caused to be instituted, a suit against one Mrs. Goodrich to recover all the real and personal property belonging to the estate of John Warren, Sr., deceased, and that a list of the property belonging to said estate was furnished by them to their attorneys to enable them to file their petition; that the said list so furnished showed that said John Warren, Sr., only owned a one-half undivided interest in the tracts of land in controversy between the plaintiffs in this cause, Mrs. Peil and husband, W. J. Peil, and defendant John Warren, Jr.; that said petition was prepared from the information so furnished and that on the 27th day of November, 1911, a decree was rendered in favor of said parties plaintiff in said Goodrich suit, and that in said decree only a one-half undivided interest in said tracts in controversy was adjudged to belong to the estate of John Warren, Sr., deceased. It was, or seemed to be, conceded at that time that John Warren, Sr., only owned a one-half interest in said lands in controversy, and that John Warren, Jr., owned the other one-half interest therein.

Ben Campbell, now mayor of Houston, for defendant, testified that he knew of the partnership which existed between John Warren, Sr., and John Warren, Jr.; that both of these parties told him several years prior to the institution of this suit, while both were present, that they had, after the death of the wife of John Warren, Sr., bought and jointly owned the following tracts of land: J. Hudson tract of 640 acres; G. N. Kinman tract of 373 acres; George Pembleton tract of 640 acres; Walter Wade tract of 580 acres; and the H. T. & B. R. R. tract of 640 acres; that they owned said tracts jointly, and that at that time he made a memoranda in his own handwriting of the tracts so designated, and that the memoranda shown him at the trial of this case was the list of the property so made by him, and that said memoranda or list of said lands is in his own handwriting; that in that conversation in which said tracts of land were given to him as the joint property of John Warren, Sr., and John Warren, Jr., John Warren Sr., was the principal spokesman, and furnished the list so reduced to writing by said witness; that he never heard any one dispute the fact that John Warren, Jr., owned a one-half undivided interest in said lands with his father, until about the time this suit was brought, although all the parties had discussed the property rights of John Warren, Sr., with him as their attorney. He also testified that some time after the above memoranda was made by him, John Warren, Sr., and John Warren, Jr., jointly purchased the Langerman tract of about 98 acres. This purchase

was made in or about the year 1905. This witness testified that he was the attorney for said parties, and that at the time said list of property was given to him by John Warren, Sr., as the joint property of himself and John Warren, Jr., they were informing him as to what properties belonged to the community estate of John Warren, Sr., and his deceased wife, with a view of making a settlement of said estate.

Witnesses Patillo Higgins and J. R. Jester testified that in negotiating an oil lease of certain lands with John Warren, Sr., he, Warren, refused to make the lease until he could confer with John Warren, Jr., saying that they, John Warren, Sr., and John Warren, Jr., owned the lands together, and that John Warren, Sr., told them that he wanted them to pay one-half of the lease money to him and the other one-half to his son, John, Jr.

The foregoing testimony and evidence stands practically undisputed, and we think demands the rendition of the judgment rendered by the trial court.

We have reached the conclusion that no verdict or judgment other than that reached by the jury and rendered by the trial court could be sustained by the evidence adduced upon trial, independent of the testimony of Eliza Ellis, George Ellis, and John Warren, Jr., parties to the suit, which was admitted over the objection of appellants. Having so concluded, we further conclude that the admission of evidence objected to was harmless, and that the judgment of the trial court should be affirmed; and it is so ordered.

Affirmed.

STRASNER v. CARROLL. (No. 132.)

(Supreme Court of Arkansas. July 10, 1916.)

1. TRUSTS \S 110—CONSTRUCTIVE TRUSTS—EVIDENCE—SUFFICIENCY.

In ejectment to recover land, evidence held to show that plaintiff bought in the land at foreclosure of a mortgage under an agreement that he should convey to defendant, the owner, on receipt of the amount advanced.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. \S 160; Dec. Dig. \S 110.]

2. TRUSTS \S 100—CONSTRUCTIVE TRUSTS—ENFORCEMENT.

Where plaintiff agreed on foreclosure of a mortgage on defendant's land to buy in the land for the benefit of defendant and allow him to redeem on payment of amount advanced, and in that manner was enabled to secure the lands for the amount of the mortgage which was for a sum much less than the value of the lands, it appearing that other bidders were discouraged and that defendant relaxed his efforts to secure the money to buy in the property, plaintiff cannot, on the ground that the agreement was oral, repudiate the trust and take the lands free from any claim of defendant, for that would give him an unconscionable advantage.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. \S 151; Dec. Dig. \S 100.]

Appeal from Pike Chancery Court; Jas. D. Shaver, Chancellor.

Ejectment by M. L. Carroll against T. J. Strasner, who cross-complained. From a decree for plaintiff, defendant appeals. Reversed and remanded, with directions.

W. C. Rodgers, of Nashville, for appellant. Langley & Steel, of Murfreesboro, for appellee.

HART, J. M. L. Carroll instituted an action of ejectment in the circuit court against T. J. Strasner to recover 220 acres of land in Pike county, Ark. Strasner filed an answer and cross-complaint, and set up substantially the following state of facts: He owned 300 acres of land in Pike county upon which he resided and mortgaged the same to a bank in Pike county to secure the sum of \$600, which he owed the bank. The debt of the bank fell due in 1914, and, Strasner failing to make payment, the bank proceeded to foreclose the mortgage. The land was worth much more than the mortgage debt, and in order to prevent a sacrifice of the land, it was agreed that Carroll should purchase the land at the foreclosure sale for the amount of the indebtedness due the bank by Strasner, and hold the title to the land in trust for the latter until he could repay Carroll the amount bid for the land. Two friends of Strasner were to sign the note for the purchase money given by Carroll as surety, and did so. Carroll became the purchaser at the sale and sale was confirmed and a deed executed to him by the commissioner who made the sale. Strasner tendered to Carroll the amount of the debt, principal, and interest, and requested Carroll to make a deed, conveying back to him the land purchased by

Carroll at the foreclosure sale. Carroll refused to do this. The prayer of the answer and cross-complaint of Strasner are that he be permitted to redeem the land, and that the claim of Carroll be canceled as a cloud upon his title. Carroll filed an answer to the cross-complaint, in which he denied he purchased the land at the foreclosure sale for Strasner and agreed to hold the same in trust for him. He stated that he purchased the land for himself at the foreclosure sale, but agreed to resell it to Strasner within 90 days if the latter should pay him the amount which he had bid for the land, that Strasner failed to make the payment, and that the sale was confirmed in himself by the chancery court. On motion the case was transferred to the chancery court. The chancellor found the issues of fact in favor of Carroll, and held that he was the owner of the land and entitled to the possession thereof. A decree was entered accordingly, and Strasner has appealed to this court. The material facts are as follows:

Strasner owned 300 acres of land in Pike county upon which he resided. He executed a mortgage to the bank to secure an indebtedness due it of \$600. The bank instituted foreclosure proceedings, and obtained a foreclosure decree in the chancery court.

According to the testimony of Strasner, M. L. Carroll, J. C. Couch, and Isaac Webb, who were his friends and neighbors, agreed to purchase the land at the foreclosure sale for the amount of the debt due the bank, and to hold same in trust for him until he could pay the amount of the indebtedness, principal and interest. Pursuant to this agreement Carroll became the purchaser of 220 acres of the land at the foreclosure sale for the sum of \$635, being the amount due on the mortgage debt. Carroll gave his note to the commissioner making the sale for the purchase money, and Couch and Webb signed it as his sureties. Strasner resided on the lands, and was getting out stave bolts and paying a part of the proceeds arising from the sale of them to Carroll to be credited on the mortgage indebtedness. This was pursuant to the agreement he had made with Carroll in the beginning; that 90 days after the land was bid in by Carroll he had paid to him \$140 from the proceeds of the sale of stave bolts. The value of the land bid in by Carroll was variously estimated by the witnesses from \$7 to \$10 per acre. Most of the witnesses placed its value at \$10 per acre. Couch and Webb corroborated the testimony of Strasner as above abstracted. In addition Strasner testified that if the agreement had not been made with Carroll, who purchased the land, he had another friend who had the money to buy the land, and who would have loaned him the money for that purpose. He also testified that after he made the agreement with Carroll he did not

try to secure any further bidders, and that it was generally known that the lands were being bid to be held in trust for him.

J. C. Cornish stated that he came to Murfreesboro with the intention of bidding at the sale, but came a day too soon by mistake; that he had a talk with Mr. Carroll about the sale, and asked him if it was going to be sold in bulk or by 40's; that Carroll told him that he thought that he and Strasner had the matter fixed up. Cornish then left, and did not stay to the sale.

Two other witnesses testified that Carroll gave Cornish to understand that the matter had been arranged.

M. L. Carroll testified in his own behalf. He denied that he entered into an agreement whereby he was to become the purchaser of the land at the foreclosure sale and hold the same in trust for Strasner. He said that the court would convene about 90 days after the day of sale, and that the sale would then come up for confirmation; that he agreed with Strasner that he would resell the land to him if he would pay him the amount he had bid for the land within 90 days; that if Strasner repurchased the land, the amount derived from the sale of stave bolts was to be credited on the purchase price, but that if Strasner failed to repurchase the land within 90 days, the amount derived from the sale of stave bolts should be retained by him because he owned the land.

[1, 2] We think the clear preponderance of the evidence shows that Carroll agreed with Strasner to purchase the land at the foreclosure sale and take the title in his own name upon a verbal agreement to hold it for the benefit of Strasner. Of course the testimony of Carroll shows that the agreement was for resale by him to Strasner upon certain conditions which were not complied with by Strasner. His testimony, however, is contradicted by Strasner, and Strasner is corroborated by Couch and Webb. So we think a clear preponderance of the evidence shows a parol agreement on the part of Carroll to purchase the land at the foreclosure sale, hold it in trust for Strasner, and to convey it back to Strasner on repayment of the purchase money, and that he afterwards refused to do so. Even under this state of facts it is contended by counsel for Carroll that the agreement, being a verbal one, was within the statute of frauds, and not enforceable as a trust in equity. It is true the general rule is that a mere verbal agreement by which one of the parties thereto promises to buy in at a judicial sale lands of the other and hold the same for his benefit does not create a resulting or implied trust; the agreement itself being within the statute of frauds. There are, however, several well-recognized exceptions to the general rule, and one of them is that where the purchaser of lands in which the other is interested becomes such under such a state of facts as would make it a fraud to permit him to hold on to his bar-

gain. *Trapnall v. Brown*, 19 Ark. 39; *McNeill v. Gates*, 41 Ark. 264; *La Cotts v. La Cotts*, 109 Ark. 335, 159 S. W. 1111. In the first two mentioned cases the principle is announced that it would be a fraud in a purchaser, who obtained property at a price greatly below its value by means of a verbal agreement, to keep the property in violation of the agreement.

In the instant case the evidence shows that the land was bid in for \$635, and the proceeds arising from the sale of the stave bolts, amounting to \$140, was credited thereon. The evidence shows that the lands were worth much more than the amount bid for them by Carroll. It also shows that Strasner relied upon the promise of Carroll to bid in the property for his benefit, and relaxed his efforts to borrow the money from some one else, and thus prevent a sacrifice of his land. Strasner stated that he had another friend from whom he could have borrowed the money. He also stated that he relaxed his efforts to secure other bidders because of the agreement made with Carroll. It is also shown by the evidence that another bidder who was able to purchase the land came to Murfreesboro for the purpose of attending the sale and bidding thereat. He refrained from bidding because Carroll told him that an understanding or agreement had been reached between him and Strasner about the land. In the case of *Slowe v. McMurray*, 27 Mo. at page 118 (72 Am. Dec. 251), the court, in discussing this question said:

"There is another class of cases growing out of the conduct of debtors and purchasers at public sales. This is where the purchaser becomes such under a state of facts as would make it a fraud to permit him to hold onto his bargain. As if a purchaser, by means of a promise to reconvey to his debtor, should induce a relaxation of the efforts on his part to prevent a sacrifice of his property and thereby obtain it at an under price, or, if the purchaser, taking advantage of that reluctance invariably manifested by those attending public sales to interfere with any arrangement a debtor makes to save his property, should create an impression that he was buying for the debtor, thereby preventing competition, or by any other improper means obtain the property of a debtor, at a sacrifice, such conduct would convert the purchaser into a trustee for the benefit of those who were defrauded by his conduct. Such cases go upon the ground of fraud, and courts will give relief without regard to the circumstances whether the agreement was a written or a verbal one, or whether it was supported by a consideration or not. Such are the cases of *Rose v. Bates*, 12 Mo. 30; *Estill v. Miller & Estill*, 3 Bibb. [Ky.] 177."

See, also, *Leahy v. Witte*, 123 Mo. 207, 27 S. W. 402. The same rule applies where the promisee relaxed his efforts to save the property from being sold at the judicial sale. *Arnold v. Cord*, 16 Ind. 177; *Lillard v. Casey*, 2 Bibb. (Ky.) 459. As bearing on the subject as sustaining the rule where the facts warrant it, see *Patrick v. Kirkland*, 53 Fla. 768, 43 South. 969, 125 Am. St. Rep. 1096, 12 Ann. Cas. 540, and note; *Carr v. Craig*, 138 Iowa, 526, 116 N. W. 720, and case note to 5 Ann. Cas. at page 173; *Perry on Trusts*

(4th Ed.) vol. 1, § 215; and *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696.

From the views we have expressed, it follows that the decree should be reversed and the cause remanded, with directions to permit Strasner to redeem the land and have further proceedings in accordance with the views expressed in this opinion.

HOOD et al. v. ROLESON et al. (No. 129.) (Supreme Court of Arkansas. July 10, 1916.)

1. HUSBAND AND WIFE § 278(1)—AGREEMENTS ADJUSTING PROPERTY RIGHTS—VALIDITY.

Agreements made between husband and wife, looking to the adjustment of their property rights, standing alone, are not invalid.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1046-1049, 1051, 1053; Dec. Dig. § 278(1).]

2. BILLS AND NOTES § 106—CONSIDERATION—ILLEGALITY—FACILITATING DIVORCE.

A contract between husband and wife, whereby part of the consideration for his execution of a note was that the wife should not file an answer to his cross-complaint for divorce and should make no defense to the action, was void as against public policy, notwithstanding the existence of legal grounds for divorce, since an agreement intended to facilitate procuring a divorce is against public policy, any promise founded thereon being void.

[Ed. Note.—For other cases, see *Bills or Notes*, Cent. Dig. §§ 219, 225-232; Dec. Dig. § 106.]

Appeal from Circuit Court, Lee County; S. H. Mann, Special Judge.

Suit by H. F. Roleson and others against J. B. Hood and others. From a judgment for plaintiffs, defendants appeal. Judgment reversed, and cause remanded for new trial.

D. S. Plummer, of Marianna, for appellants. Fink & Dinning, of Helena, for appellees.

HART, J. Appellees sued appellants to recover \$1,400 balance alleged to be due on a promissory note. The material facts are as follows: J. B. Hood and Nannie L. Hood were married in the year 1912, and lived together as husband and wife until the year 1913, when they separated. Mrs. Hood first went to Michigan on an extended trip and subsequently went to Memphis. While in Memphis she became very ill and was carried to a hospital. During her stay in Memphis she incurred numerous debts and charged them to Mr. Hood's account. Finally Hood published a notice in a Memphis paper to the effect that he would no longer be responsible for anything purchased by his wife. Since their separation he has remained in Arkansas.

After Mrs. Hood got well she returned to Arkansas and instituted a suit against her husband for alimony. Mr. Hood filed an answer to her bill for alimony and also a cross-complaint, in which he sought a divorce from her. Finally a contract was entered in-

to between the parties which resulted in the execution of the note sued on. The note was executed July 20, 1914, by J. B. Hood as principal and J. B. Daggett, C. E. Daggett, and Morris Lesser as sureties, and was payable to the order of Roleson McCulloch. It was for \$2,250. The agreement was that Mrs. Hood dismiss her action for alimony and make no defense to her husband's suit for divorce; and, in consideration therefor, Mr. Hood was to pay to her \$2,000, and \$250 for attorney's fee. Mrs. Hood made no defense to the action for divorce and Mr. Hood was granted divorce on his cross-complaint. He made payments on the note which reduced it to \$1,400. The above facts were testified to by Mr. Hood, by one of his sureties, and by his attorney in the suit for alimony and divorce.

According to the testimony of H. F. Roleson, one of the attorneys for Mrs. Hood in the alimony suit, the note in question was executed in settlement of her suit for alimony and the fees of her attorneys, and that the contract was independent of the divorce proceedings. The court directed a verdict in favor of appellees, and the case is brought before us on appeal.

[1] Counsel for appellees seek to uphold the judgment on the ground that the consideration sued on was the adjustment of the property rights merely between the parties. Such agreements standing alone are not invalid. *Pryor v. Pryor*, 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102; *McConnell v. McConnell*, 98 Ark. 193, 136 S. W. 931, 33 L. R. A. (N. S.) 1074. Other cases from this court might be cited to sustain this proposition, but it is so well settled as to render further citation of authorities useless. The testimony of appellees was sufficient to uphold a verdict in their favor, but we are dealing with a directed verdict in favor of appellees.

[2] According to the testimony of appellants, the general purpose of the agreement was to facilitate the procuring of a divorce. A lump sum was agreed to be paid in settlement of the alimony suit and also to facilitate the procurement of a divorce. A part of the consideration for the execution of the note was that Mrs. Hood should not file an answer to the cross-complaint of Mr. Hood and should make no defense to his action for divorce. Such contracts are against public policy and void, notwithstanding the existence of legal grounds for divorce. The reason given in many of the cases is that the marital relation, unlike ordinary contractual relations, is regarded by the law as the basis of the social organization. The preservation of that relation is deemed essential to the public welfare. *Rowe v. Young*, 185 S. W. 438; *Viser v. Bertrand*, 14 Ark. 267. In the latter case the plaintiff, an attorney, had bound himself at the request of the defendant

to pay \$300 to the defendant's husband as a consideration for the relinquishment of the latter's claim to certain negroes, and his promise to make no further opposition to her suit for divorce. It was held that the agreement was against public policy and the plaintiff could not recover the \$300.

The rule is well established that an agreement intended to facilitate the procuring of a divorce is against public policy, and any promise founded on such an agreement is void. See case note to 11 Ann. Cas. at page 377. It follows that the court erred in directing a verdict in favor of appellees.

The record shows that the suit was brought by Roleson and McCulloch for themselves and for the benefit of C. L. Lippincott as administrator of Allie L. Hood, deceased. It is claimed that H. F. Roleson deposited the note as collateral security with the McCintock Banking Company for an indebtedness of \$250 due by him to the bank, and that the bank is an innocent purchaser for value before maturity of the note to the extent of Roleson's indebtedness to it. The record, however, shows that the bank is not a party to this suit, and its rights are in no wise affected thereby.

For the error in directing a verdict for appellees, the judgment must be reversed, and the cause will be remanded for a new trial.

McCULLOCH, C. J., being disqualified, did not participate.

McNEIL v. STATE. (No. 136.)

(Supreme Court of Arkansas. July 10, 1916.)

1. INTOXICATING LIQUORS \Leftrightarrow 219—INDICTMENT—SUFFICIENCY.

An indictment, charging the unlawful sale of intoxicants substantially in the language of the statute, and so as to enable a person of common understanding to know what was intended, the accused what he was called upon to answer, and with sufficient certainty to enable the court to pronounce judgment, on conviction, according to the right of the case, was sufficient, though not alleging the name of the person to whom the liquor was sold.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 237-239; Dec. Dig. \Leftrightarrow 219.]

2. INTOXICATING LIQUORS \Leftrightarrow 236(2)—TIME OF SALE—SUFFICIENCY OF EVIDENCE.

In a prosecution for the unlawful sale of intoxicants, testimony held sufficient to support finding that defendant made the sale of whisky charged after the 1st day of January, 1916.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 303; Dec. Dig. \Leftrightarrow 236(2).]

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

L. J. McNeil was convicted of unlawfully selling intoxicating liquors, and he appeals. Judgment affirmed.

Appellant prosecuted this appeal from a judgment of conviction for the unlawful sale of intoxicating liquors. The indictment charges that he "unlawfully and feloniously

did sell vinous, malt, fermented, alcoholic and intoxicating liquors," etc., without naming any person to whom they were sold. A demurrer was interposed to the indictment and overruled and exception saved. It appears from the testimony that appellant sold whisky three or four different times to one Harrison Davis, in the back end of his place—a sort of restaurant or eating house in the city of Ft. Smith. Davis stated that he bought whisky the first time from L. J. McNeil, some time after Christmas, last year; that he bought three or four times, the last half pint on Thursday, about 2 o'clock in the afternoon, before he was arrested that night for being drunk. He got the whisky from appellant, who poured it out of a quart bottle, and paid him the money for it in his kitchen. Three officers testified they had searched appellant's place and found a quart and two pints of whisky in sealed bottles, upstairs in a trunk, which was claimed to have been put there for his wife, and a barrel of empty quart bottles in the back end of the house, on the first floor. Appellant denied having sold any whisky to Harrison Davis at any time, and that he had or kept any whisky on the premises, and stated, also, that he was not about his place of business the afternoon of this particular Thursday on which Davis claims to have purchased whisky the last time. Several other witnesses also testified that he was not at the house at the time of the alleged sale, and was at other different places in town during the afternoon.

Edwin Hiner and John B. Hiner, both of Ft. Smith, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

KIRBY, J. (after stating the facts as above). It is contended that the court erred in overruling the demurrer, and that the proof is not sufficient to show the sale was made after the law became operative on January 1, 1916, making the sale of intoxicating liquors a felony. This court has held an indictment, charging the sale of liquors without license, which did not allege the name of the person to whom the liquor was sold, sufficient. *Johnson v. State*, 40 Ark. 453; *McCuen v. State*, 19 Ark. 630; *State v. Bailey*, 43 Ark. 150.

[1] It is true the offense has been raised to the grade of a felony by the new law, fixing the punishment, but it is still not an offense against the property or person of an individual and the gravamen of the offense consists in the selling of the liquor, the sale of it, and it was not necessary, as held heretofore, to allege the name of the person to whom the liquor was sold. The offense is charged substantially in the language of the statute, and in such a manner as to enable a person of common understanding to know

what is intended, the accused what he is called upon to answer, and with a sufficient degree of certainty to enable the court to pronounce judgment on conviction, according to the right of the case. *Howard v. State*, 72 Ark. 538, 82 S. W. 196; *Parker v. State*, 98 Ark. 578, 137 S. W. 253; *Quartermours v. State*, 95 Ark. 61, 127 S. W. 951.

[2] The testimony does not show definitely the date of the sale to the witness Davis, but he testified he had bought whisky from appellant upon four different occasions, the first time, some time after Christmas of last year, and the last on a particular Thursday in the afternoon, before he was arrested for getting drunk that night. All the witnesses knew the date of said day and whether or not it was during the year of 1916. Appellant testified not that said day was of last year, but only that he did not make the sale, and that he was not at his place of business at the time witness claimed to have bought whisky, and many other witnesses stated that he was at different places in the city during the afternoon of that day. The court instructed the jury that if they found appellant sold the whisky after the 1st day of January, 1916, they should return a verdict of guilty, and the testimony is sufficient to support the finding.

The judgment is affirmed.

WORLEY et al. v. McMULLEN. (No. 137.)
(Supreme Court of Arkansas. July 10, 1916.)

1. EJECTMENT §§ 45, 50—PARTIES—STATUTES.

Under Kirby's Dig. §§ 2734-2737, providing by whom and when the action of ejectment may be brought, such action may be brought for the recovery of realty against the person in possession, or his lessor, or both, and may be maintained in all cases where plaintiff is legally entitled to possession, while the person from whom defendant claims may, on his motion, be made a codefendant.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 132, 138, 139, 145; Dec. Dig. §§ 45, 50.]

2. EJECTMENT § 9(3)—RECOVERY—STRENGTH OF PLAINTIFF'S TITLE.

Plaintiff in ejectment must recover on the strength of his own title, and not upon the weakness of defendant's.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 18, 20-24, 27; Dec. Dig. § 9(3).]

3. ESTOPPEL § 23—ESTOPPEL BY WARRANTY DEED.

Defendants in ejectment cannot be heard to say they had no title to the land in derogation of their deed conveying the same in fee, with general covenants of warranty, to plaintiff's grantor.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 52-60; Dec. Dig. § 23.]

4. EJECTMENT § 50—MAKING PARTIES DEFENDANT—DISCRETION OF COURT.

In ejectment, the refusal of the court to permit to be made parties the heirs of a decedent, under whom defendants held as tenants,

was proper; the matter being in the discretion of the court.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 139, 145; Dec. Dig. § 50.]

Appeal from Circuit Court, Yell County; Marcellus L. Davis, Judge.

Suit by R. D. McMullen against Z. J. and E. R. Worley. From a judgment for plaintiff, defendants appeal. Judgment affirmed.

R. D. McMullen brought suit against appellants, alleging he was the owner and entitled to the immediate possession of certain lands held by them. He deraigned title thereto through a warranty deed executed by appellants to Van D. Foley and by Foley to him.

The complaint also contained allegations attempting to show a forcible entry and unlawful detainer of the lands by appellants, but no writ of possession was issued and a demurrer was sustained to so much of the complaint as attempted to allege the right to recover for a forcible entry, and the cause was ordered to proceed as an action of ejectment. The names of all parties to the answer, except those of appellants were stricken therefrom, upon motion of appellee.

Defendant E. R. Worley answered separately, denying the allegations of the complaint, that he entered into possession of the lands without right and alleged he was in lawful possession thereof as the tenant of the owners, the heirs of said Jno. Q. Brinson, naming them, and alleging that he was the owner in fee at the time of his death and that they inherited same from him.

A separate answer of Mrs. Z. J. Worley was filed, denying the allegations of the complaint and asking that the heirs of said Brinson be made parties defendant, naming them, and purporting to answer as such heirs. She denied executing the deed in appellant's chain of title, alleged to have been made by herself and husband to Van D. Foley, and averred that if any conveyance was made by her to said Foley, they only undertook to convey such rights as she had acquired by leave and sufferance of Aggie Brinson, widow of Jno. Q. Brinson, deceased, while she held the same as a homestead. In paragraph 3 it was alleged that the defendants, naming the children of Jno. Q. Brinson, were his only heirs at law and inherited the lands in controversy from him, that he died seised and possessed thereof, and that same were held by their mother as a homestead, to the date of her death, the 20th day of October, 1913, at which time they became seised and entitled to the possession thereof; that later when the land in controversy was vacant and unoccupied and in the constructive possession of the said owners, the defendants took possession thereof through their tenant, said E. R. Worley.

The court denied defendant's motion to make the said heirs of Brinson parties to the

suit, and upon motion of plaintiff struck all their names and all other names from the answer, except those of appellants.

It appears from the evidence that appellants conveyed the lands by a warranty deed on the 29th day of August, 1905, to Van D. Foley, who with his wife conveyed same by a general warranty deed to R. D. McMullen on the 31st day of August, 1910, both of which deeds were duly recorded.

McMullen stated that appellants were the owners of the lands and in possession thereof at the time they conveyed them to Foley, who continued in possession until the lands were conveyed to him; that he went into possession immediately and remained in the possession up to a short time prior to the bringing of this suit when appellees took possession of the vacant house thereon without right. He stated, further, that after he bought the lands, appellants occupied the same as his tenants and worked for him and exhibited checks that he had given E. R. Worley in payment for work with his indorsement thereon. These signatures were used for the purpose of comparison with the signatures to the deed.

Foley stated that he bought the land from Z. J. and E. R. Worley on the date of their conveyance; that they immediately gave him possession which he held to the time of conveying the lands to appellee. He also stated that he saw appellants sign the deed executed to him and they personally delivered it to him; that he paid part of the purchase price in cash and assumed the payment of a mortgage to Goldman & Co., which was satisfied by his making a new mortgage of the lands to said company.

Appellant E. R. Worley denied having executed any deed conveying the lands to Van D. Foley, and disclaimed ever having any interest in or title to the land, and stated his wife was one of the heirs of Jno. Q. Brinson, deceased, and inherited a one-fourth interest. She testified that her husband rented the premises from the heirs of J. Q. Brinson, deceased, and they went quietly into possession of the house, which was vacant and unoccupied, with the doors unfastened. She denied ever having executed a deed to any other person.

Defendants then offered to prove that E. R. Worley held possession of the lands as the tenant of the heirs of Jno. Q. Brinson, deceased, naming him, who died seised and in possession of same as his homestead; that his widow held the same as a homestead till her death in October, 1913, but the court refused to permit the introduction of the testimony, and, as the record states, refused to permit any testimony whatever to go to the jury, except the naked fact as to whether or not the defendants Z. J. and E. R. Worley had executed the deed relied upon by plaintiff.

The court refused all of defendants' re-

quested instructions and instructed the jury over their objection that if they found from the evidence that defendants executed the deed, which was made Exhibit A to the complaint, conveying the lands to Foley, appellee's grantor, they would find for the plaintiff, and if not for the defendants, and they should not take into consideration any fact in the whole case, except the naked fact as to whether or not the defendants had signed the deed. From the judgment on the verdict against them, appellants prosecute this appeal.

Jno. B. Crownover, of Dardanelle, for appellants. Sellers & Sellers, of Morrilton, for appellee.

KIRBY, J. (after stating the facts as above). It is insisted that the court erred in refusing to permit the heirs of Brinson made parties defendant, and in allowing the action to proceed as an action of ejectment.

[1] Ejectment may be brought for the recovery of real property against the person in possession of the premises claimed or his lessor, or both, and may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises. The person from or through whom the defendant claims title to the premises may on his motion be made a codefendant. Sections 2734-2737, Kirby's Digest; Hill v. Plunkett, 41 Ark. 467; Ritchie v. Johnson, 50 Ark. 551, 8 S. W. 942, 7 Am. St. Rep. 118.

[2, 3] The plaintiff in ejectment must recover on the strength of his own title, and not upon the weakness of the title of defendant and as against the defendants, plaintiff's title through their warranty deed was superior and could not be disputed by them. They denied having conveyed the land to plaintiff's grantor by a warranty deed, and the execution of the deed exhibited in evidence, but the jury found against them on this point, and they cannot be heard to say they had no title to the lands in derogation of their deed conveying same in fee with general covenants of warranty. 16 Cyc. 686; Simmons v. Simmons, 150 Ky. 85, 150 S. W. 61; Steele v. Culver, 158 Mo. 137, 59 S. W. 67; Tew v. Henderson, 116 Ala. 545, 23 South. 129; Dodge v. Walley, 22 Cal. 224, 83 Am. Dec. 63.

[4] No error was committed in not allowing appellants to show in contradiction of the terms of their deed that they had no title in fact at the time of its execution and only intended to convey a possessory interest. They set up no cause for relief on account of fraud or mistake, but denied the execution of the deed. The court could have permitted the heirs of Brinson to be made parties, but it was in its discretion to do so, and we find no abuse of discretion in its refusal to bring them in and adjudicate their rights or appellees' as against them. Of course not being parties to the suit the other

heirs of Brinson are in no wise bound by the judgment nor their claim of title in any wise affected, since the court refused to allow them made parties and the defendants the right to show that they were only tenants of said heirs, who were the true owners.

The judgment is affirmed.

PERSON v. WILLIAMS. (No. 134.)

(Supreme Court of Arkansas. July 10, 1916.)

1. LANDLORD AND TENANT §129(4)—BREACH OF CONTRACT—DAMAGES—MEASURE.

Where the landlord breaks his lease contract by refusing to deliver possession of the premises, the measure of the tenant's damages is the difference between the reasonable rental value and the stipulated rent for the premises, and does not include reasonable profits from cultivation.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 453, 455, 456; Dec. Dig. §129(4).]

2. LANDLORD AND TENANT §129(3)—BREACH OF CONTRACT—DAMAGES—EVIDENCE.

In such case, the tenant cannot recover any damages in the absence of evidence of the agreed rent; there being then no evidence to show what the damages were.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 452, 455, 456; Dec. Dig. §129(3).]

Appeal from Circuit Court, Miller County; Geo. R. Haynie, Judge.

Action by J. B. Williams against Mrs. C. W. Person. Judgment for plaintiff, and defendant appeals. Affirmed, on condition that remittitur be filed, otherwise reversed and remanded.

Appellee brought this suit for damages for the rental value of certain farm lands which he was denied the right to cultivate during the year 1915. He rented different tracts of land for cultivation during 1914, on the Candler farm, in Miller county, at a stipulated price and certain new ground to be cleared by him, which he was to have rent free for two years.

The farm was sold early in 1914 to appellant, and the testimony is sufficient to show that she had notice of the written lease for the new ground, or of such facts as should have put her on inquiry that would have disclosed the lease, which was not recorded. She was to permit the tenants on the place for the year 1914 to continue the cultivation of the lands rented from her grantor, and did so, and did not, in fact, know that appellee had a lease of any lands for another year. On account of the overflow that year, appellee was not able to pay the rent agreed on for the old land and the contract was changed from "money rent" to "one-quarter of the crop produced."

There was testimony tending to show that appellee made a new contract with appellant's agent in 1914 for the old land, for 1915, but no testimony showing the price

agreed to be paid for the rent thereof. No crop was raised on the new ground in the year 1914 on account of the overflow, and only some of it was plowed once. The rental value of such land was shown to be about one-half that of the old land, or \$3 per acre.

The court instructed the jury, over appellant's objection, that if it found appellee was entitled to the possession of any of said lands for the year 1915, it would find for him a reasonable rental value for such year and refused appellant's requested instruction that the damages recoverable "are the reasonable rental value of the new ground in the condition it was in January, 1915, and the difference, if any has been proven, between the rental price and the reasonable market rental value of the houses and 50 acres of old land, for the year 1915"; also instruction No. 7, telling the jury that they could only find nominal damages for the refusal to allow appellee to cultivate the old land, if the testimony showed he made a contract therefor.

From the judgment on the verdict against her, appellant prosecutes this appeal.

Henry Moore, Jr., of Texarkana, for appellant. Webber & Webber, of Texarkana, for appellee.

KIRBY, J. (after stating the facts as above). [1] It is contended that the court erred in the giving of and refusing to give said instructions, and the contention must be sustained. In *Rose v. Wynne*, the court said:

"The books agree that in an action by a lessee against a lessor for damages for refusal or failure to deliver possession of the demised premises the general rule for the measure of damages is the difference between the rent reserved and the value of the premises for the term. If the value of the premises for the term is no greater than the rent which the tenant has agreed to pay, then the latter is not substantially injured, and can in general recover only nominal damages, though the landlord without just cause refused to give possession." *Rose v. Wynne*, 42 Ark. 261.

"The damage plaintiff was entitled to recover was the difference between the price he agreed to pay and the rental value." *Andrews v. Minster*, 75 Ark. 590, 88 S. W. 822.

This would not include probable profits of the lessee from the cultivation of the demised land. *Thomas v. Croom*, 102 Ark. 113, 143 S. W. 88. There was no testimony tending to show the price agreed to be paid as rent for the old lands for the year 1915, even if appellee had a contract for them for that year and said instruction given relative to the measure of damages was erroneous, since the suit was for damages for refusal to give possession of both the old and the new land.

A specific objection was made to said instruction, because it did not state correctly the rule as to damages for the old land, and the court refused appellant's said instructions, stating the rule correctly.

[2] There could be no recovery of damages for failure to give possession of the old lands

for the year 1915, because there was no testimony showing any damages resulted. It is undisputed that the new ground was not worth as much as the old land for cultivation; the testimony showing the value thereof to be about one-half, or \$3, per acre. No damages being shown to have resulted from the failure to deliver possession of the old lands, the verdict of the jury should not have been for more than the rental value of the new ground, 67 acres, for the year 1915, and if a remittitur is entered within 15 days, reducing the judgment to that amount, or \$201, the judgment will be affirmed; otherwise, for the errors indicated, the judgment is reversed, and the case remanded for a new trial.

ST. LOUIS, I. M. & S. RY. CO. v. STATE.
(No. 133.)

(Supreme Court of Arkansas. July 10, 1916.)

1. PENALTIES \S 16—**CRIMINAL PROSECUTION**
—“PUBLIC OFFENSE.”

Under Kirby's Dig. § 1546, providing that a public offense is any act or omission for which the law prescribes a punishment, and section 2082, providing that a public offense, for which the only punishment is a fine, may be prosecuted by penal action in the name of the state or in the name of an individual, where the whole fine is given to the individual, and that proceedings in penal actions are regulated by the practice in civil actions, statutory penalties may be recovered by civil or criminal actions, but the offense is no less a public offense.

[Ed. Note.—For other cases, see Penalties, Cent. Dig. §§ 13, 15, 16; Dec. Dig. \S 16.]

For other definitions, see Words and Phrases, First and Second Series, Public Offense.]

2. RAILROADS \S 254(6) — **REGULATION** —
BLOCKING FROGS—PENALTIES.

Acts 1911, p. 257, providing for recovery of a penalty of a fine on conviction of failing to block frogs, is a penal statute; and the penalty is properly recoverable in criminal proceedings by prosecutions under informations filed by the prosecuting attorney before a justice of the peace.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 772; Dec. Dig. \S 254(6).]

3. STATUTES \S 241(1)—**CONSTRUCTION** — **PENAL ACTIONS.**

A penal statute is construed strictly, since courts are opposed to enforcement of penalties except to the extent necessary to secure the manifest object of their infliction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 322; Dec. Dig. \S 241(1).]

4. RAILROADS \S 254(4) — **REGULATION** —
BLOCKING FROGS—SEPARATE OFFENSES.

Under Acts 1911, p. 257, requiring railroads to block frogs, the penalty accrues on failure to block all frogs, and but one penalty can be collected in one county to the date of beginning the prosecution, regardless of the number of frogs left unblocked.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 769; Dec. Dig. \S 254(4).]

5. RAILROADS \S 254(4) — **REGULATION** —
BLOCKING FROGS—SEPARATE OFFENSES.

Under Acts 1911, p. 257, requiring all railroads to block frogs, the penalty imposed is a continuing one, for violation of which prosecu-

tion may be instituted in one county on each day that the offense continues.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 769; Dec. Dig. \S 254(4).]

Appeal from Circuit Court, Pope County; A. B. Priddy, Judge.

Two prosecutions by the State against the St. Louis, Iron Mountain & Southern Railway Company for failure to place adequate blocks in switch frogs. From judgments of conviction in the circuit court on defendant's appeal from the justice court, the defendant appeals. The cases were consolidated for hearing. Judgment in the first cause affirmed, and in the second reversed and the charge dismissed.

Thos. B. Pryor, of Ft. Smith, and W. P. Strait, of Morrilton, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State. Hill, Brizzolara & Fitzhugh, of Ft. Smith, amici curiæ.

HART, J. On the 10th day of August, 1915, the prosecuting attorney filed an information before a justice of the peace in Pope county, Ark., charging that the St. Louis, Iron Mountain & Southern Railway Company on the 2d day of August, 1915, did unlawfully fail, neglect, and refuse to place and maintain blocks of sufficient size to prevent employes from getting their feet caught in the fifth frog east of the icing station in the yards at Russellville, Ark., as required by section 1, Act 261, of the General Acts of 1911.

On the 11th day of August, 1915, the prosecuting attorney filed another information before a justice of the peace in Pope county, charging that the same railroad company on the 3d day of August, 1915, failed, neglected, and refused to place and maintain blocks of sufficient size to prevent employes from getting their feet caught in a certain frog, being the second frog east of the icing station in Russellville, Ark., as required by section 1, Act 261, of the Acts of 1911. The defendant was convicted in each case before the justice of the peace and took an appeal to the circuit court. The trial in the circuit court again resulted in the conviction of the defendant in each case, and from the judgments rendered the defendant has appealed to this court.

The cases were consolidated here for the purpose of hearing. The informations were filed by the prosecuting attorney under Act 261 of the Acts of 1911. The act reads as follows:

“Section 1. That any company owning or operating any railroad in this state shall be required to place and maintain blocks of sufficient size in all its frogs and guard rails to prevent employes from getting their feet caught therein.

“Section 2. Any company, owning and operating any railroad in this state, violating the provisions of this act shall be liable on conviction to a penalty of a fine of not less than \$25 for

each separate offense." General Acts of 1911, pages 257, 258.

[1, 2] In construing the switch light statute which was passed at the same session of the Legislature, we said:

"The act creates no public offense and according to its terms subjects the railroad to a penalty to be recovered by civil action in the name of the state." St. L., I. M. & S. Ry. Co. v. State, 107 Ark. 454, 155 S. W. 517.

So, too, in *Kansas City, etc., Ry. Co. v. State*, 63 Ark. 136, 37 S. W. 1047, in construing the statute requiring railroad companies to give a signal for public road crossings, the court said that the act created no public offense and that the proceedings to collect the penalty of the statute were in the nature of a civil action. Counsel for the defendant claimed that these decisions are decisive of the present cases and in effect hold that the recovery of the statutory penalty must be in an action of a civil instead of a criminal nature. We do not agree with counsel in this contention. In those cases, the words, "creates no public offense," were used in their ordinary acceptance and meant that the act did not create a criminal offense within the meaning of article 2, section 8, of our Constitution, which provides that no person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except in certain enumerated cases. This is shown by the reasoning of the court in the case of *Railway Company v. State*, 56 Ark. 166, 19 S. W. 572, where the court had under consideration the section of the statute which provides a penalty for failure of a railway company to signal at a highway crossing. Section 1546 of Kirby's Digest, which is a part of our Criminal Code, provides that a public offense is any act or omission for which the law prescribes a punishment. Section 2082 of Kirby's Digest, which is also a part of our Criminal Code, reads as follows:

"A public offense, of which the only punishment is a fine, may be prosecuted by a penal action in the name of the state of Arkansas, or in the name of an individual or corporation, where the whole fine is given to such individual or corporation. The proceedings in penal actions are regulated by the practice in civil actions."

So it will be seen that under our Code the recovery of statutory penalties may be by actions of a civil or criminal nature, as the Legislature may direct. The act providing the penalty for the failure of a railroad company to light switches contains a clause which provides in express terms that the penalty shall be recovered in civil actions in the name of the state. St. L., I. M. & S. Ry. Co. v. State, 107 Ark. 450, 155 S. W. 517. This act was passed at the same session of the Legislature as the act now under consideration. The act now under consideration does not provide that the penalty shall be recovered in a civil action in the name of the state. The omission is significant in indicating that it was the intention of the Leg-

islature that the penalty under the frog statute should be recovered by criminal proceedings.

As said by Mr. Justice Field in *United States v. Chouteau*, 102 U. S. 611, 26 L. Ed. 246:

"Admitting that the penalty may be recovered in a civil action as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. * * * To hold otherwise would be to sacrifice a great principle to the mere form of procedure."

The penalty provided by the statute is a punishment that the state inflicts upon the carrier which has violated the protective measures provided by the statute. The statute in express terms provides that the company violating the provisions of the act shall be liable on conviction to a penalty of a fine. The words "fine, penalty, and conviction" convey the idea of punishment imposed and enforced by the state for a crime or offense against its laws. The penalty denounced by the statute was in the nature of a punishment for the nonperformance of the acts imposed by the statute. There is nothing in the language used which indicates that the Legislature intended that the proceedings should be regulated by the practice in civil actions. This the Legislature had the power to do, but it is sufficient to say that it has not done so. It is manifest that the Legislature intended criminal process for the enforcement of the penalty prescribed by the act. The prosecutions were begun by informations filed by the prosecuting attorney before justices of the peace, and, as the proceedings contemplated by the statute are criminal, the justice of the peace had jurisdiction of them and the circuit court properly so held.

[3-5] It is next contended by counsel for the defendant that but one penalty can be recovered for a violation of the provisions of the statute in each county. On the other hand, it is contended by counsel for the state that the statute contemplates that the corporation shall be liable for a penalty if it fails to comply with the act at each and every station and every frog at said station. We do not agree with the contention of counsel on either side in its entirety. Courts have always been opposed to the enforcement of penalties except to the extent necessary to secure the manifest object of their infliction. For this reason penal statutes are construed strictly. The declared purpose of the present statute is to require railroad companies to place and maintain blocks of a sufficient size in all its frogs and guard rails to protect employes from getting their feet caught therein. If the Legislature had meant to provide that the penalty should be imposed for a violation of each and every frog at each and every station, we think it would have

so declared in express terms. Under our Constitution, general jurisdiction for the trial of crimes is vested in the circuit courts, and it is through the medium of county organizations that this jurisdiction is exercised. The duty of the railroad is to place and maintain blocks of a sufficient size in all its frogs and guard rails, and the penalty accrues on its neglect to do so. It is not increased by the increased number of places in which it neglects to provide them in each county. The failure to block and maintain blocks at any and all of its frogs constitutes but one offense. A separate penalty does not accrue for the failure to place and maintain blocks at each of its frogs. *Clark v. Lisbon*, 19 N. H. 286. To illustrate, if the railroad company has 12 frogs in any one county and fails to block all of them, this constitutes but one offense. If it fails to block one of them, this still constitutes an offense. The railroad does not comply with the statute by blocking a part of its frogs, but it must block all of them and a failure to block any or all of them constitutes but one offense. It would not do to say, however, that but one penalty could be recovered; for this would defeat the manifest purpose of the statute. The railroad could defeat the purposes of the statute by failing to comply with it and paying one penalty therefor in each county. We think the penalty is a continuing one in the sense that but one penalty can be recovered in each county under the statute for all acts committed prior to the commencement of the prosecution. If the railroad company failed to construct and maintain blocks in its frogs as required by the statute, such penalties may be recovered as often as there are failures to comply with the statute. If, after the commencement of the prosecution, the statute is again violated, another penalty may be recovered in another prosecution commenced thereafter, and so on as long as violations continue. To illustrate, if a prosecution should be instituted on the 10th day of a month, this would be warning to the railroad company of an intention on the part of the state to enforce the statute, and the prosecuting attorney might institute a prosecution each day thereafter until the railroad company would comply with the statute.

This construction of the statute is just and reasonable and carries out the intent of the Legislature. Such construction will compel railroad companies to comply with the statute, and will also protect them from cumulative penalties by not allowing prosecuting attorneys to institute prosecutions for a ruinous amount of penalties at one time. This construction is in accordance with the rule laid down with regard to the failure to light switches in the case of the *St. L., I. M. & S. Ry. Co. v. State*, 107 Ark. 450, 155 S. W. 517. See, also, *K. C., M. & B.*

R. Co. v. J. J. Spencer et al., 72 Miss. 491, 17 South. 168.

In case No. 2080, the prosecution was commenced on August 10, 1915, and the judgment in that case will be affirmed.

The information in No. 2081 was not filed until the 11th day of August, 1915, but it charged a violation of the statute on the 3d day of August, 1915. This was prior to the commencement of the first prosecution and could not be done under the rule we have laid down above.

It follows that the judgment in No. 2081 will be reversed, and the charge contained in it against the defendant dismissed.

ARD et al. v. BOWIE (PHILLIPS & FERGUSON AGENCY, Garnishee). (No. 128.) (Supreme Court of Arkansas. July 10, 1916.)

1. GARNISHMENT \S 52—PROPERTY SUBJECT TO GARNISHMENT.

Where insurance company sent draft in payment of defendant's loss to its agent for delivery to defendant, such draft remained the property of the insurance company subject to recall until delivery to the insured, and could not be reached by garnishee proceedings in which the agent was made garnishee.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. \S 25, 102, 104; Dec. Dig. \S 52.]

2. BILLS AND NOTES \S 63—NECESSITY OF DELIVERY TO COMPLETE NEGOTIABLE INSTRUMENT.

Under Uniform Negotiable Instruments Law (Acts 1913, p. 275) \S 16, and under the law merchant, negotiable instruments are incomplete and revocable until delivery is made.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 95-103; Dec. Dig. \S 63.]

3. GARNISHMENT \S 162—OWNERSHIP OF PROPERTY IN HANDS OF GARNISHEE—EVIDENCE.

In garnishment proceedings to reach a draft payable to defendant for insurance loss, the fact that the insurance policy was in the name of the defendant's wife is prima facie evidence that she and not the defendant is entitled to the proceeds of such draft.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. \S 300; Dec. Dig. \S 162.]

Appeal from Circuit Court, Jackson County; Dene H. Coleman, Judge.

Garnishment proceedings by A. Bowie against J. U. Ard and others, defendants, and Phillips & Ferguson Agency as garnishee. From a judgment for plaintiff, garnishee appeals. Judgment affirmed as to defendants, and reversed and rendered as to garnishee.

Phillips & Ferguson Agency, hereinafter for convenience called Agency, was a corporation, located at Newport, and was agent for the Connecticut Fire Insurance Company. As such agent, on the application of one J. U. Ard, they insured in the name of Alice S. Ard, his wife, some household goods. There was a loss, and Ard, acting as agent of his wife, adjusted the mat-

ter, and the insurance company sent to its agency a draft payable to J. U. Ard.

The appellee, Bowie, filed his complaint against J. U. Ard in the Jackson circuit court, asking judgment in the sum of \$502.-84, and also caused a writ of garnishment to be issued directed to the Agency, while it held in its hands the draft. In its answer to the interrogatories the Agency stated that it was not indebted to the defendant and had no goods or moneys in its hands belonging to him.

On the trial it was shown that the Agency insured the property as that of J. U. Ard. The Agency books showed J. U. Ard to be the insured and the owner, and reports that the Agency sent the company showed the same. When the loss occurred it was reported to the company as the loss of J. U. Ard. The policy was written in the name of Alice S. Ard, but the Agency did not know that such was the case until the institution of this suit. The name of Mrs. Ard appearing in the body of the policy instead of J. U. Ard was a mistake. At the time the Agency wrote the policy in question it wrote also another policy for J. U. Ard on the same property for cyclone insurance. The accounts of J. U. Ard and Alice S. Ard, were kept separately.

A witness testified that she was the clerk in the office of the Agency at the time the policy was issued. She wrote a policy on the house in the name of Alice S. Ard, and also, through mistake, put the name of Alice S. Ard in the policy insuring the household goods. That should have been in the name of J. U. Ard instead of Alice S. Ard. It was the purpose of the Agency at the time to insure the household goods as the property of J. U. Ard, and Mrs. Ard's name was written in the policy through mistake.

Ard testified that he had made proof of loss, stating that the property was his, and that he had assessed the property on the tax books as his property. He further testified that he did not make any contention as to the correctness of the account sued on; that his wife was the owner of the household goods. As her agent he instructed the Agency to insure the house and the household goods. The policy was made payable to his wife, Alice S. Ard, which was correct and according to his understanding with the Agency. The policy was indorsed on the back as being the policy of J. U. Ard. He sometimes assessed the personal property in his name and sometimes in his wife's name. After the loss he adjusted the same with the Agency. Mrs. Ard testified that the property insured and on which the loss occurred and for which the draft was issued was her property.

The writ of garnishment was directed to Phillips & Ferguson Agency, a corporation. The draft was sent by the insurance company to the Agency after the service of the writ of garnishment, to be delivered, but be-

fore the same was delivered the insurance company ordered the draft returned, which was done. Neither Ard nor Mrs. Ard were notified that the Agency had the draft, and no attempt was made to deliver it before the same was recalled by the insurance company. Afterwards the insurance company made another draft payable to the joint orders of J. U. Ard, Alice S. Ard, and the Farmers' Bank. This draft was sent to Stayton & Stayton, attorneys, and upon the execution of a bond indemnifying the parties in interest the draft was delivered to the payees.

The appellants Ard and the Agency asked a peremptory instruction in favor of the Agency, which the court refused. The court directed the jury to return a verdict in favor of the appellant against Ard, and the Agency, as garnishee, and this appeal has been duly prosecuted.

L. L. Campbell, of Newport, for appellant.
Appellee, pro se.

WOOD, J. (after stating the facts as above). The appellants do not challenge the correctness of the judgment against Ard. The only question presented by this appeal is as to whether or not a judgment, under the facts above disclosed, should have been rendered against the Agency as garnishee. The insurance company is not a party to this record. Neither was the Agency garnished as the agent of the insurance company. The Agency was garnished simply as a corporation. The judgment against the Agency, as garnishee, was erroneous for several reasons:

[1] 1. In the first place, the draft was sent to the Agency to be delivered and was held by it as the property of the insurance company until it was delivered. It was never delivered to Ard, and until delivery took place it remained the property of the insurance company and was held by the Agency as the property of the company, and not as the property of Ard. So long as the Agency held the draft it was subject to recall by the insurance company, and was recalled before it was delivered to Ard. The Agency represented the company and not Ard. It owed no duty to Ard, and was under no liability to him for the amount of the draft. The draft could not become Ard's property until it was delivered to him.

[2] Our statute to make uniform the law of negotiable instruments provides:

"Every contract or a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto." Act 81, § 16, Acts of 1913.

It is the general rule of the law merchant that delivery is necessary for the completion of commercial paper. 7 Cyc. 683 et seq.; Jones v. Jones, 23 Ark. 212; German Bank v. De Shon, 41 Ark. 331.

The Agency had not notified Ard that it held the draft for him, and the insurance company, by sending the draft to its agent,

rather than mailing it direct to Ard, indicated an intention to retain control over the same until it was transferred by manual delivery to Ard.

2. As the Agency was not indebted to the appellee Ard, the defendant in the original suit, and did not have in its hands any money or property belonging to the debtor Ard, garnishment proceedings could not be maintained against the Agency.

In *Graf v. Wilson*, 62 Or. 476, 125 Pac. 1005, Ann. Cas. 1914C. 462, it is said:

"The general rule is that the creditor has no greater rights against the garnishee than the defendant had before the writ was served; that he steps into the shoes of the defendant and prosecutes for him in order that the credit or property of the latter may be subjected to the payment of such judgment as may be obtained against him."

And it is further said in that case:

"It is not a decisive test, though a usual one, that the principal defendant be able to maintain an action or suit against the garnishee, in order for garnishment to lie."

Here the draft evidenced an indebtedness of the insurance company to Ard, and not an indebtedness of its agent, the Phillips & Ferguson Agency. The Phillips & Ferguson Agency was a separate corporation, and, as we have seen, was not even garnished as the agent of the insurance company. See *St. L. S. W. Ry. Co. v. Gate City Grain Co.*, 70 Ark. 10, 65 S. W. 706. See, also; case note 2 to *Mayo et al. v. Milwaukee Amusement Co.*, 36 L. R. A. 561.

[3] 3. The policy covering the loss for which the draft was made was in the name of Mrs. Ard, and this was at least prima facie sufficient to show that Mrs. Ard was entitled to the proceeds of the draft. Such being the facts disclosed by the record, the court was certainly justified in holding that the draft was not subject to garnishment in the hands of the appellant Phillips & Ferguson Agency.

The court therefore erred in not granting appellant Phillips & Ferguson Agency's prayer for judgment in its favor. The judgment therefore will be reversed as to the appellant Phillips & Ferguson Agency, and judgment entered in its favor.

The judgment against appellant Ard is affirmed.

G. W. JONES LUMBER CO. et al. v. WISARKANA LUMBER CO. et al. (No. 103.)

(Supreme Court of Arkansas. July 3, 1916.)

1. CORPORATIONS ¶318—SUIT BETWEEN CORPORATIONS WITH INTERLOCKING DIRECTORATES.

That two corporations have directors or other officers in common does not of itself prevent one from maintaining an action at law against the other.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1363, 1364; Dec. Dig. ¶318.]

2. CORPORATIONS ¶522—JUDGMENT—VALIDITY—FRAUD.

Judgment rendered in an action by one corporation against another, the directorates being interlocking, is valid if free from fraudulent conduct on the part of the officers who procured the judgment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2035, 2099, 2113; Dec. Dig. ¶522.]

3. CORPORATIONS ¶1—NATURE.

A corporation is an entity separate and distinct from its stockholders and from other corporations with which it may be connected.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1, 3-6; Dec. Dig. ¶1.]

For other definitions, see Words and Phrases, First and Second Series, Corporation.]

4. CORPORATIONS ¶615—JUDGMENT—COLLATERAL ATTACK—FRAUD IN PROCURING JUDGMENT.

In suit to wind up a corporation and obtain satisfaction of a judgment due complainant corporation, which owned 657 out of 1,000 shares of defendant corporation, where ample notice of suit for the prior judgment was given to holder of 170 shares, who was more or less associated with the holder of 30 shares, and the latter heard of the judgment shortly after rendition but took no steps to set it aside, he could not attack it for fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2436-2444; Dec. Dig. ¶615.]

5. CORPORATIONS ¶174—RIGHTS OF MINORITY STOCKHOLDERS.

The relative rights of majority and minority stockholders must be measured by the charter and by-laws.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 649-652; Dec. Dig. ¶174.]

6. CORPORATIONS ¶55—RIGHTS OF MINORITY STOCKHOLDERS.

Majority stockholders may impose upon the minority additional by-laws not inconsistent with the charter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 152; Dec. Dig. ¶55.]

7. CORPORATIONS ¶186—RIGHTS OF MINORITY STOCKHOLDERS.

Majority stockholders may not cause the corporation to pay gratuities, unauthorized by by-laws or charter, to one of their number, whether or not such payment is for valuable services rendered.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 695-701; Dec. Dig. ¶186.]

8. JUDGMENT ¶701—CONCLUSIVENESS—PARTIES CONCLUDED.

A judgment against a corporation for a third party for money advanced for salary of the corporation's president is not, as between the president and the corporation, res judicata of the right of the president to retain the salary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1226; Dec. Dig. ¶701.]

9. CORPORATIONS ¶312(1)—OFFICERS—LIABILITY FOR CORPORATE FUNDS.

A corporation officer is a trustee for the corporation as to its funds received by him without right.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1376-1378, 1390, 1392; Dec. Dig. ¶312(1).]

10. COSTS ¶98—AUDITING BOOKS OF CORPORATION.

Where the items in a suit against a corporation were res judicata so that there was no necessity for examination of its books, and an examination showed no impropriety in manner

of keeping the books, expenses of examination were taxable against intervenor causing it to be made.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 383; Dec. Dig. ¶98.]

11. CORPORATIONS ¶181(1)—RIGHT OF STOCKHOLDER TO EXAMINE BOOKS.

A stockholder may have an examination of the corporation books made only at the corporation's office, and cannot require removal of the books from the office to some other place.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 674, 676, 677; Dec. Dig. ¶181(1).]

12. COSTS ¶13—EQUITY—DISCRETION OF CHANCELLOR.

The matter of costs is within the sound discretion of the chancellor.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 21, 25; Dec. Dig. ¶13.]

13. COSTS ¶13—EQUITY—DISCRETION OF CHANCELLOR.

It was an abuse of discretion for chancellor to tax a large unnecessary expense of auditing corporation books against parties who gave no cause for it.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 21, 25; Dec. Dig. ¶13.]

Wood, J., dissenting in part.

Appeal from Craighead Chancery Court; Chas. D. Frierson, Chancellor.

Suit by the G. W. Jones Lumber Company and another against the Wisarkana Lumber Company, in which L. J. Nash intervened. From the decree, plaintiffs appeal, and intervenor takes cross-appeal. Reversed and remanded, with directions.

Mann, Bussey & Mann, of Forrest City, for appellants. Lamb, Turney & Sloan, of Jonesboro, for appellee.

MCCULLOCH, C. J. The Wisarkana Lumber Company is a corporation organized under the laws of the state of Wisconsin, but its assets have always been situated in Craighead county, Ark., where it constructed and operated a large lumber manufacturing plant and where a large body of timber lands owned by it is situated. It was organized with a capital stock of \$100,000, divided into 1,000 shares of the par value of \$100 per share, of which the G. W. Jones Lumber Company, another Wisconsin corporation, owned 657 shares, G. V. Nash 200 shares, C. L. Storrs 100 shares, and B. C. Wettlaufer 40 shares, and the other shares were held by three individuals merely for the purpose of qualifying them as officers of the corporation, one of whom was G. W. Jones, who was made president of this corporation, and who was also the president and principal stockholder of the G. W. Jones Lumber Company.

The promoters of the corporation were G. W. Jones and G. V. Nash, who conceived the idea of purchasing a large body of timber lands somewhere in the South and establishing a mill and lumber business. Nash came South in search of timber land, and finally located a large tract in Craighead county, and upon his recommendation the lands were

purchased by the G. W. Jones Lumber Company, and upon the organization of the Wisarkana Lumber Company the lands were conveyed to the latter. That occurred early in the year 1905, and a mill was built at Nettleton, Craighead county, Ark., and the manufacturing business was begun. G. V. Nash was elected treasurer and general manager of the corporation and was put actively in charge of its business at Nettleton. He continued to act in that capacity until the year 1909, when some difference arose between him and G. W. Jones, when he resigned as manager and another was put in his place. He continued to be treasurer of the company for about a year thereafter, but ceased to have any actual control over the affairs of the corporation. He sold 170 shares of his stock to the F. Kiech Manufacturing Company, a corporation controlled by his brother-in-law and doing business in Craighead county, and he sold the remaining 30 shares to his brother, L. J. Nash, who is one of the appellees.

On October 10, 1911, a suit was instituted in the chancery court of Craighead county by the Bank of Nettleton (a banking corporation controlled by the stockholders of the F. Kiech Manufacturing Company), the F. Kiech Manufacturing Company, and the administrator of F. Kiech, deceased, and G. V. and L. J. Nash against the Wisarkana Lumber Company and the stockholders and directors, alleging that the Wisarkana Lumber Company was insolvent, and asking that its affairs be wound up and that a debt to the Bank of Nettleton be paid out of the assets. Pursuant to the prayer of the complaint, a receiver was appointed and placed in charge of the assets of the Wisarkana Lumber Company, but subsequently an agreement was reached between all of the interested parties whereby the suit was withdrawn and the receiver discharged.

It appears from the testimony in the present case that from the time G. V. Nash severed his connection with the Wisarkana Lumber Company, the parties in interest, that is to say, the Kiech's and the Nash's on one side and Jones on the other, dealt with each other at arms' length and to some extent in antagonism to each other's interest, though their relations were not altogether unfriendly. The business of the G. W. Jones Lumber Company had been continued at the place of its domicile, Appleton, Wis., and it acted as sales agent for the Wisarkana Lumber Company and made sales of the lumber produced at the Nettleton mill. It also advanced money from time to time for the Wisarkana Lumber Company and guaranteed its credit; and in August, 1912, an action at law was commenced by the G. W. Jones Lumber Company against the Wisarkana Lumber Company in the circuit court of Craighead county for the recovery of an amount of an

account alleged to be due in the sum of \$48,560.79. The suit was instituted at the instance of G. W. Jones, as president of the G. W. Jones Lumber Company. Said account, which was the subject-matter of that suit, covered all the transactions between the two corporations and showed a balance in the sum above named to the G. W. Jones Lumber Company. Judgment by default was rendered in the circuit court in favor of the G. W. Jones Lumber Company for the full amount of the account on September 11, 1912, and on January 8, 1913, the G. W. Jones Lumber Company and G. W. Jones commenced the present suit in the chancery court of Craighead county against the Wisarkana Lumber Company for the purpose of winding up the affairs of the corporation and obtaining satisfaction of the judgment debt due to the G. W. Jones Lumber Company.

The stock of the F. Klech Manufacturing Company was then assigned to L. J. Nash and he intervened in the case to protect his rights as holder of that stock, as well as the 30 shares which he had purchased from his brother, G. V. Nash. In the intervention plea of L. J. Nash, he attacked the validity of the judgment rendered in favor of the G. W. Jones Lumber Company, and also of a number of the items embraced in the account of that company against the Wisarkana Lumber Company. At the instance of the intervener, L. J. Nash, the court appointed an expert accountant as special master to examine the books and check up the accounts of the Wisarkana Lumber Company and make report. The master made an elaborate report, with findings favorable to the G. W. Jones Lumber Company, and exceptions thereto were filed by the intervener, some of which were sustained and others overruled. The exceptions covered items aggregating the sum of \$11,627.02, and the court sustained the exceptions concerning four of the items aggregating \$9,764.75 and struck those items from the account. The court also decreed payment of the costs of the litigation as follows:

"That the plaintiff, G. W. Jones Lumber Company, pay one-half of the costs, and that the Wisarkana Lumber Company pay one-quarter of the costs and that the intervener, L. J. Nash, pay one-quarter of the costs, * * * and that the said costs include the charge of the special master, Homer K. Jones, \$3,137.45."

Plaintiffs G. W. Jones and G. W. Jones Lumber Company appealed from so much of the decree as was against them, and the intervener, L. J. Nash, cross-appealed.

The first question presented concerns the validity of the judgment rendered in favor of G. W. Jones Lumber Company against the Wisarkana Lumber Company, for if that judgment was valid it constituted an adjudication of all the matters in controversy therein between the two parties to that suit, and this embraced all of the items covered by the exceptions, except one involving the sum of \$3,000 which will be discussed later.

All of the other items were charges of the G. W. Jones Lumber Company against the Wisarkana Lumber Company, and, of course, if the judgment had any validity at all it constituted a final adjudication between the parties.

[1, 2] It is not contended that the proceedings were not conducted in accordance with the statutes with respect to the issuance and service of process and the rendition of the judgment; but it is argued that the fact that G. W. Jones was president of both corporations, and instigated the litigation, makes the judgment voidable at the instance of the minority stockholders of the Wisarkana Lumber Company. This contention presents the question whether or not one of two corporations having what is termed interlocking directors or officers can maintain an action at law against the other. The authorities on that point hold squarely that the fact that the two corporations have directors or other officers in common does not of itself prevent one from maintaining an action at law against the other, and that a judgment rendered in such an action is valid if free from fraudulent conduct on the part of the officers who procured the judgment.

[3] In *Joyce on Actions By and Against Corporations* (section 226), the rule is stated as follows:

"Although there is a commingling of officers of two corporations, as when some of the directors of one corporation are directors of another, still it does not prevent them from being distinct corporations, with a right to contract with each other in their corporate capacities, and to sue and be sued by each other in regard to such contracts, where the relations of the parties have not been abused. The fact that the stockholders of two separately chartered corporations are identical, that one owns shares in another, and that they have mutual dealings, will not, as a general rule, merge them into one corporation or prevent the enforcement against the insolvent estate of the one of an otherwise valid claim of the other. It is an elementary and fundamental principle that a corporation is an entity separate and distinct from its stockholders and from other corporations with which it may be connected."

Substantially the same rule is stated in another text-book on the subject. *Spelling's Corporate Management*, § 300. The text finds support in the decision of the Supreme Court of the United States in the case of *Leavenworth v. C., R. I. & P. Ry. Co.*, 134 U. S. 688, 10 Sup. Ct. 708, 33 L. Ed. 1064, where it is held that the trust relation between two corporations did not prevent one from suing the other when there was no collusion or fraud in fact.

[4] This brings us to the question whether or not there was any actual fraud in the procurement of the judgment. When the action at law was instituted, F. Klech Manufacturing Company and L. J. Nash were the only two holders of stock which were antagonistic to the Jones interest. F. Klech Manufacturing Company was located in Craighead county and was represented by attor-

neys who were members of the bar at the city of Jonesboro, where the action was pending. They were apprised of the pendency of the litigation and applied to the attorneys for the plaintiff for a statement of the account, which was furnished them; and every opportunity was given to them to consider whether or not a defense should be offered for the F. Kiech Manufacturing Company. After consideration, those attorneys reached the conclusion that no defense should be made by their client, and so notified the attorneys for the plaintiff, who then asked the court for a judgment by default, which was rendered. L. J. Nash is a lawyer and resided in Wisconsin. He had been practicing law there for a great many years, and had been on terms of intimacy with G. W. Jones, and for many years had been the attorney for Jones and the G. W. Jones Lumber Company.

Nash and Jones had had considerable correspondence about disposing of the assets of the Wisarkana Lumber Company, but there was no evidence that Nash received any information concerning the pendency of the suit at Jonesboro until September 7, 1912, when he addressed a letter to G. W. Jones at the office of the G. W. Jones Lumber Company in Appleton, making inquiry about the suit pending at Jonesboro, and also about the affairs of the corporation, whether it was insolvent or not, etc. Jones was absent at the time, but some one in his office answered the letter, stating that Mr. Jones was absent, and that his attention would be called to the matter on his return. It appears that Jones was then in Arkansas, and the judgment was rendered before his return, and, when Nash heard a day or two later that judgment had been rendered, he protested against it but took no steps then towards having the judgment set aside. The antagonism between the parties grew more and more acute until it probably culminated in the present litigation.

We do not think that the testimony supports a charge of fraud in the procurement of the judgment. All of the items of the account sued on were disclosed by statements that were furnished by the G. W. Jones Lumber Company to the Wisarkana Lumber Company from time to time, and any stockholder had the opportunity to know what was embraced therein. Those accounts became accounts stated, within the meaning of the law, and it is doubtful whether a defense against any of the items could have been successfully made. There is no evidence whatever that G. W. Jones intended to conceal the institution and pendency of the suit in the circuit court of Craighead county. On the contrary, the indications are that he instituted the suit openly, and that the pendency of the suit came to the knowledge of the stockholders most interested on the other side, namely, the F. Kiech Manufacturing

Company. That concern was operated by men there in the same county, and with attorneys practicing at the bar who would likely take notice of any litigation which affected the rights of their clients. The correspondence between the attorneys, which is set out, showed that the attorneys for the respective parties dealt with each other in the most courteous way, without any effort to cut off any right to present a defense, and that not until the attorneys for the F. Kiech Manufacturing Company had declined to make defense for their client was there any effort to secure a judgment by default. The attorneys for the plaintiff in that action doubtless assumed, as they had the right to do, that, if one of the antagonistic stockholders was informed as to the pendency of the suit, the information would be conveyed also to the other one. It is significant that both of those stockholders were purchasers from G. V. Nash, a brother of the intervener, and that when the intervener was preparing to appear in this action he secured a transfer of the stock of the F. Kiech Manufacturing Company to him, solely for the purpose of giving him additional status in this litigation as a large stockholder. The proof shows that it was transferred to him merely for the purpose of bringing it into this litigation and for no other purpose. Under those circumstances we are unwilling to say that there was any fraudulent conduct on the part of G. W. Jones which rendered the judgment voidable.

Now, this settles the controversy concerning all the items except the item of \$3,000 referred to above, which was the salary of G. W. Jones as president of the Wisarkana Lumber Company. In the year 1911, after G. V. Nash severed his connection with the corporation, the board of directors met and allowed G. W. Jones a salary of \$3,000 for the period of six years prior to that time. So far as is disclosed by the evidence in this case, there was no by-law authorizing the payment of salary to the president, nor had there been any contract with respect to such a charge. The evidence shows that Jones acted as president during all the time, and that he made frequent trips to Arkansas, and in other ways gave attention to the business of the corporation. The evidence is sufficient, in other words, to warrant a finding that G. W. Jones earned that sum of money by services rendered to the corporation, but that is not the true test, we think, of the right to collect the salary under the circumstances shown in this case.

[5-7] The relative rights of majority and minority stockholders must be measured by the charter and by-laws of a corporation, and minority stockholders had a right to look to the courts for protection from a violation of their rights. The majority have the right to impose upon the minority additional by-laws not inconsistent with the charter, but

they have no right to pay gratuities to one of their number. If the by-laws had been amended so as to authorize the payment of a salary to the president, then it would have been competent to pay Mr. Jones the salary thereafter earned under the by-laws; but it does not appear that this payment was made pursuant to any by-law. It was merely voted to him as a back salary for services already rendered. The minority stockholders had the right to assume, in the absence of a by-law or contract, that no salary would be paid, and the attempt of the majority to vote a salary to the president for past services was a distinct violation of the rights of the minority.

[8, 9] This item was credited to G. W. Jones on the books of the G. W. Jones Lumber Company, and a corresponding charge was made against the Wisarkana Lumber Company. In this way the G. W. Jones Lumber Company advanced the money for the Wisarkana Lumber Company and paid it over to Jones. So far as concerns the account of the G. W. Jones Lumber Company, it will be conceded that the judgment at law was a bar to any further inquiry as to the item, but it does not follow that in this proceeding Jones, as president of the Wisarkana Lumber Company, cannot be called to account for a sum of money which he had wrongfully accepted from the funds of the corporation. The matter stands the same as if he had caused a check to be drawn by the Wisarkana Lumber Company on its bank to pay this sum. Having received the funds without being entitled to it, he is a trustee to that extent, and the minority stockholders have a right to call him to account for it, and that right is not barred by judgment recovered by the G. W. Jones Lumber Company against the Wisarkana Lumber Company. We are of the opinion, therefore, that the court was correct in rendering a judgment against G. W. Jones for that amount.

[10, 11] The only other point which we deem it necessary to discuss is that which relates to the award of costs, it being the contention of counsel for plaintiffs that the court erred

in assessing the fee of the accountant as a part of the costs to be paid by them. There seems to be much force in the contention that the intervener, Nash, caused a fruitless audit of the books of the company, and that he alone should bear the expense. It is true that nothing was accomplished by the audit of the books. The items in dispute were known to the parties, or were easily ascertainable, and it does not appear that there was any real necessity for having the books audited. There were negotiations between the parties about the examination of the books, and Jones offered to permit Mr. Nash to have the books audited, and the latter selected an accountant but failed to do the work, because Jones objected to the books being taken away from the office of the company. It was not unreasonable to insist that the books be not removed from the office, and if an examination of the books was desired it ought to have been made at the place where the books were ordinarily kept. The report of the master was favorable to the plaintiffs, and the only errors that were found in the books were very slight ones and were against the interests of the G. W. Jones Lumber Company. The audit resulted in nothing favorable to the intervener, and it shows that the charges of improper book-keeping were unfounded.

[12, 13] There is no reason, therefore, why either the Wisarkana Lumber Company or G. W. Jones Lumber Company, or G. W. Jones himself, should be required to pay any of that unnecessary expense, and we are of the opinion that the court ought not to have included it in the general costs, but should have adjudged that item against the intervener. The matter of costs was within the sound discretion of the chancellor, but we think it amounted to an abuse of that discretion to tax this large unnecessary expense against those who gave no cause for it.

The decree is therefore reversed and the cause remanded, with directions to enter a decree in accordance with this opinion.

WOOD, J., dissents as to decree for costs.

MISSOURI, K. & T. RY. CO. OF TEXAS v.
CARDWELL. (No. 8411.)(Court of Civil Appeals of Texas. Ft. Worth.
June 17, 1916.)1. NEGLIGENCE \S 136(9)—JURY QUESTION.

Negligence, whether of plaintiff or defendant, is generally a question of fact, and becomes a question of law only when the act done is in violation of law, or when the facts are undisputed and admit of but one inference.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 293-297; Dec. Dig. \S 136(9).]

2. NEGLIGENCE \S 136(9) — EVIDENCE — DIRECTED VERDICT.

To authorize a directed verdict on the issue of negligence, the evidence must be of such character that there is no room for ordinary minds to differ as to the conclusion to be drawn.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 293-297; Dec. Dig. \S 136(9).]

3. RAILROADS \S 350(15)—NEGLECT—CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.

Plaintiff, who was injured by his head striking the end of a projecting bolt while riding a mule through a passage underneath defendant's railway, when his mule ran away, was not negligent as a matter of law, although he knew the bridge to be so low that a man on horseback must lean over to guard against injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1168; Dec. Dig. \S 350(15).]

4. RAILROADS \S 350(15)—NEGLECT—CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.

Where plaintiff, knowing the dangerous character of a passageway under a railroad crossing his inclosure, was injured while using it when his mule ran away, the fact that there was a grade crossing 1,800 feet east of such passageway did not make plaintiff guilty of contributory negligence as a matter of law in not using such grade crossing, where no showing was made that plaintiff had a right of way through the land on the other side.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1168; Dec. Dig. \S 350(15).]

5. RAILROADS \S 303(6)—NEGLECT—INJURIES TO INVITEE OR LICENSEE.

Where defendant railroad closed a grade crossing that had been in use for 20 years and improved a passageway under its track connecting portions of plaintiff's inclosure, which passageway was used by plaintiff and his landlord for six years, whether plaintiff's right to use such passageway was by implied contract or whether he was a mere invitee was immaterial in determining the defendant's negligence in maintaining a defective passageway.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 966; Dec. Dig. \S 303(6).]

6. NEGLIGENCE \S 32(1) — INJURIES TO INVITEE OR LICENSEE.

The owner of premises who invites others thereon or knowingly permits them to use or remain thereon must exercise reasonable care so to use and maintain such premises as to prevent injuries to such licensee or invitee.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 42; Dec. Dig. \S 32(1).]

7. NEGLIGENCE \S 61(1)—"PROXIMATE CAUSE."

The "proximate cause" of an injury in a legal sense is not necessarily the immediate or sole cause.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 74; Dec. Dig. \S 61(1).]

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

8. NEGLIGENCE \S 62(1)—PROXIMATE CAUSE—INTERVENING CAUSES.

If defendant's negligence be a concurring cause operating at the same time in producing the injury as an intervening cause, it may be the proximate cause if the injury or some like injury could have reasonably been foreseen as a consequence of such negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 76, 78; Dec. Dig. \S 62(1).]

9. NEGLIGENCE \S 62(1)—PROXIMATE CAUSE—INTERVENING CAUSE.

An injury will not be said to be proximately caused by an intervening agency other than defendant's negligence, unless such agency entirely supersedes the act of negligence and was in itself responsible for the injury, and was of such character that it could not reasonably have been foreseen or anticipated, but, if both agencies are required to produce the injury or if both concurrently contributed thereto, one will not exculpate the other, since each would still be an efficient cause.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 76, 78; Dec. Dig. \S 62(1).]

10. NEGLIGENCE \S 4 — REASONABLE CARE — PROBABILITY OF SAME INJURY.

To incur liability for negligence, it is not necessary that the tort-feasor must or could have foreseen that the particular injury occurred, but it is sufficient if it reasonably appears that an ordinarily prudent person could have foreseen that a similar injury might arise as a probable result.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 6; Dec. Dig. \S 4.]

11. RAILROADS \S 350(32) — NEGLIGENCE — PROXIMATE CAUSE—JURY QUESTION.

The fact that plaintiff's mule was frightened and ran away did not relieve defendant of liability for its negligence; the proximate cause of the injury being for the determination of the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1190; Dec. Dig. \S 350(32).]

12. NEGLIGENCE \S 136(25)—PROXIMATE CAUSE—JURY QUESTION.

The proximate cause of an injury is ordinarily a jury question.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 326-332; Dec. Dig. \S 136(25).]

13. TRIAL \S 260(8)—INSTRUCTIONS COVERED BY GENERAL CHARGE.

The refusal of a charge requested by defendant on contributory negligence is not error, where no exception or complaint is made to the court's general charge on that issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 657; Dec. Dig. \S 260(8).]

14. TRIAL \S 191(8)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

An instruction that plaintiff was guilty of contributory negligence in the use of an underground passageway if he knew such use to be dangerous was properly refused as submitting certain facts in evidence as constituting negligence which invades the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 429, 430; Dec. Dig. \S 191(8); Negligence, Cent. Dig. \S 356-360; Railroads, Cent. Dig. \S 1383.]

15. TRIAL \S 253(4)—INSTRUCTIONS—IGNORING ISSUES—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

An instruction that charged defendant for liability for negligently maintaining an instrumentality which resulted in plaintiff's injury, and which ignored the issues of plaintiff's con-

tributory negligence and the proximate cause of the injury, was improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613, 616; Dec. Dig. ¶253(4).]

16. TRIAL ¶296(3)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

Error in giving such instruction held prejudicial, and not cured by other instructions properly presenting the issues of contributory negligence and proximate cause.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. ¶296(3).]

17. RAILROADS ¶348(1)—NEGLIGENCE—INJURY FROM DEFECTIVE VIADUCT—SIMILAR VIADUCTS.

The fact that a railroad bridge is constructed in the same manner as all other bridges of its kind is not conclusive that its maintenance for use as the roof of an underground passageway between portions of an inclosure was not negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138, 1140, 1141; Dec. Dig. ¶348(1).]

Appeal from District Court, Montague County; C. F. Spencer, Judge.

Action by Albert Cardwell against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

John Speer, of Bowie, and J. M. Chambers, of Dallas, for appellant. W. S. Jameson and Paul Donald, both of Montague, and J. A. Templeton, of Ft. Worth, for appellee.

CONNER, C. J. The plaintiff was a tenant upon the farm of the estate of D. C. Jordan, through which defendant's line of railroad passes, the tenant houses being on the north side and the balance of the farm land on the south side of the right of way, which runs in a general direction from east to west. Panther creek crosses the farm running in a northerly direction, and over this creek defendant has a bridge about seven feet high beneath which a passway has existed since the road was built in 1885 or 1886. About 1895 the right of way was for the first time fenced. At this bridge the fences at either end were turned in and attached to the end of the bridge, leaving an opening way under the bridge and across the right of way. At the time the right of way was fenced there was a crossing on the right of way about 300 yards east of the bridge, which had been constructed and maintained by the railway company for the use of the owner of the farm, D. C. Jordan, from the time of the construction of the road until the right of way was fenced. Gates were placed in the right of way fence, and the crossing was thereafter continuously maintained and used until about the year 1904 or 1905, when the defendant closed the gates leaving open the passway already mentioned under the bridge. At the time of closing the gates appellant's section men leveled down the bed of the creek under the bridge so as to make it more passable. This bridge was constructed in

the usual way with bolts extending from the timbers above down through the stringers and the ends of the bolts extended two or three inches below the underside of the stringers, and the bridge was at all times so low that a man could not ride on horseback under it without leaning over to prevent his head from striking the under parts of the bridge.

The plaintiff rented and moved upon the Jordan farm and cultivated it for the years 1910 and 1911, and in passing from the residence on the north to the farm on the south continuously used the passway under the bridge, until the time of his injury, as hereinafter detailed, which was in April, 1911. At the time of his injury plaintiff was attempting to cross the right of way riding one mule and leading another. About the right of way fence on the north side the mule he was riding became frightened at a piece of tie lying on the ground and ran under the bridge, where plaintiff's head came in contact with the end of one of the bolts projecting below the stringers, thus causing the injuries for which damages were sought. The evidence shows that the plaintiff knew the conditions of the crossing under the bridge, knew of its approximate height, and of the extending bolts, and knew that it was dangerous, and requests had been made several times of the section foreman to have the company open the gates that had been closed; the foreman, however, declining to so act, stated that he was without authority to do so, though the requests were forwarded to those "higher up."

The plaintiff alleged that the crossing east of the bridge had been put in under a contract with D. C. Jordan, and that the closing of the gates in 1904 was illegal. It was further alleged that the crossing under the bridge was dangerous and negligently constructed and maintained.

The defendant answered by a general denial, plea of contributory negligence, and specially denied that it had designated the bridge as a crossing or authorized any agent or employé to so designate it.

The trial was before a jury, and resulted in a verdict and judgment in the plaintiff's favor for the sum of \$6,000, and the defendant railway company has appealed.

[1, 2] Appellant first insists that the court erred in refusing to give its requested charge peremptorily instructing the jury to find a verdict for the defendant. One ground of the contention is that the evidence conclusively showed that plaintiff was guilty of contributory negligence. It is true that the evidence without conflict shows that for more than a year prior to the plaintiff's injury he knew that the bridge in question was not high enough to ride under it without stooping, and knew of the presence of the bolts extending below the timbers, and knew in a general

way that the crossing was a dangerous one; yet we do not believe that the court would have been justified in taking the issue away from the jury. The rule by which we should be guided has been often announced, but, perhaps nowhere more clearly than by Justice Brown of our Supreme Court in the case of *Lee v. I. & G. N. Ry. Co.*, 89 Tex. 583, 36 S. W. 63. He there said:

"Negligence, whether of the plaintiff or defendant is generally a question of fact, and becomes a question of law to be decided by the court only when the act done is in violation of some law, or when the facts are undisputed and admit of but one inference regarding the care of the party in doing the act in question; in other words, to authorize the court to take the question from the jury, the evidence must be of such character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it."

[3] The rule was reiterated and applied in the case of *Choate v. S. A. & A. P. Ry.*, 90 Tex. 82, 36 S. W. 247, 37 S. W. 819, and has been followed by many other cases that might be cited. In the case before us it is clear that the plaintiff at least violated no statute in attempting to use the underground passage as he did. The testimony to our minds makes it evident that after closing the gates east of the bridge, as was done, the servants and employes of the appellant company in a measure prepared the passway under the bridge to supply a needed passage across appellant's tracks that had been destroyed by the acts of appellant in closing the long-standing gates theretofore provided. Plaintiff, as the testimony showed, had used this underground passway for more than a year, and perhaps others, and the record discloses no previous resulting injury. The jury in answer to the submission of the issue evidently found, under the court's charge, that the plaintiff was not guilty of contributory negligence at the time and under the particular circumstances he attempted to go under the bridge on the occasion in question, and the mere fact that in a general way the plaintiff knew of the dangerous condition of the bridge is not conclusive against the plaintiff on the issue of his contributory negligence. In the case of *G., C. & S. F. Ry. Co. v. Gasscamp*, reported in 69 Tex. 545, 7 S. W. 227, the plaintiff, Gasscamp, was injured in attempting to pass over a bridge upon a public road where the highway crossed the tracks of the railway company. The plaintiff himself testified to the defective condition of the bridge and to his knowledge of the fact, and it was there contended, as here, that he was guilty of contributory negligence in that he attempted to ride across the bridge when he knew it was defective and dangerous. In disposing of the question the court said:

"The issue of contributory negligence was submitted to the jury, and has by the verdict been determined in plaintiff's favor. This is conclusive of the question, unless we can say that the act of plaintiff was negligent in law, or at least that it tended so strongly to establish negligence

on his part that the verdict should not be permitted to stand. According to the rule in this court, in order that an act shall be deemed negligent per se, it must have been done contrary to a statutory duty, or it must appear so opposed to the dictates of common prudence that we can say, without hesitation or doubt, that no careful person would have committed it. It is apparent that this cannot be said of the plaintiff's conduct in this case."

In this connection reference was made to the line of authorities, which in such cases imposes upon the traveler the duty of selecting another safe passageway, if there be one, and further says:

"It is accordingly held, on the other hand, that if the passenger or traveler have no other convenient way, the mere fact that he takes the chances of a known danger and attempts a passage is not controlling proof of his negligence. Whether the act be negligent or not depends upon the circumstances attending it; and the question is for the determination of the jury"—citing numerous cases with approval, in one of which (*County Commissioners v. Burgess* [81 Md. 29, 48 Am. Rep. 88]), the following language was used: In this case the knowledge of the plaintiff was some evidence of negligence, proper to go to the jury to be considered by them in conjunction with the condition of the bridge of which he had knowledge, and to be found a bar only in case they found the bridge from the proof to be wholly unfit for use, and that he knew its true condition."

And our Supreme Court concluded by stating:

"This language recognizes the correct rule and is strictly applicable to the case now before us. The defendant by showing that many persons habitually used the bridge with safety proved that a mere attempt to cross it was not conclusive evidence of negligence."

The case from which we have quoted so liberally has not only been followed and applied by this court, but by many others. See *Cowans v. F. W. & D. C. Ry.*, 40 Tex. Civ. App. 539, 89 S. W. 1116; 3 Notes to Texas Reports, p. 911.

[4] In the case before us there was an attempt made to show that the plaintiff had another and a safe way to cross appellant's right of way, in that there existed a grade crossing over appellant's right of way with gates in the right of way fences some 900 feet east of the grade crossing that had theretofore been closed as hereinbefore stated, but we have attached but little, if any, importance to this testimony from the fact that it evidently was not a convenient crossing in the sense that we can say as a matter of law that the plaintiff's failure to use it amounted to contributory negligence. In the same connection it was shown that the plaintiff's landlord did not own the land on the north side of the right of way of the free grade crossing last mentioned, and no evidence, as we recall, has been pointed out indicating that the plaintiff would have had any legal right to cross the right of way from the farm on the south, which he was cultivating, to and over the land owned by such other person on the north so as to get to the tenant houses where plaintiff lived, situated almost immediately north of the crossing under the

bridge. We think the issue of plaintiff's contributory negligence was one for the jury's determination.

[5, 6] It is further insisted that there was no proof of a contract on appellant's part to maintain a crossing over its right of way, as plaintiff alleged, and that plaintiff's right to use the underground passage, at most, was that of an invitee only; but in these contentions we find no foundation for a peremptory instruction. It is true no witness testified to an express contract by appellant to maintain a crossing over its right of way, but it was shown without dispute that a crossing was provided and maintained by appellant as early as 1885 or 1886, and continuously used by D. C. Jordan, the owner of the farm through which appellant's line of railway extended, until the right of way was fenced in 1895, that at this time the crossing was continued, appellant placing in its right of way fence gates through which the owner might pass from his residence to the cultivated portion of his farm, and that the crossing and right of way gates were maintained until the gates were closed in 1904 or 1905, covering a period in all of some 20 years, and this evidence, in our judgment, authorized an inference that at the time appellant constructed its road in 1885 the owner, D. C. Jordan, then reserved, or to him was then granted by the appellant company, the right to pass over appellant's right of way and track, as, it is evident, was an imperative need of the situation caused by the construction of the road, and the situation of the owner's houses and cultivated lands. And, as it seems to us, the action of appellant's employes in preparing the underground passageway, as they did, is susceptible of no other reasonable construction than that it was intended that such underground passageway should be substituted for that which had been closed, presumably for appellant's convenience. It is certainly true that within the knowledge of appellant's employes, not only of the section men, but of those higher up, the owners and tenants of the D. C. Jordan farm continued to use, as they were compelled under the circumstances to do, the underground passageway from about 1904 or 1905, when the crossing gates were closed, until the plaintiff's injury in April, 1911, and there is no evidence indicating that appellant, or any one for it, protested against such use of the underground passageway. On the contrary, the evidence as a whole relating to the subject, as we view it, amounts to a recognition on appellant's part of a right to so use such underground passageway, or certainly to an invitation and permissive use of the same, and whether one or the other, as we think, can make but little difference in the degree of care required of appellant in maintaining the underground crossing.

No principle seems better established in the authorities than that the owner of prem-

ises who invites others thereon, or knowingly permits them to use or remain thereon, must exercise at least ordinary care to so maintain and use his premises as to prevent injuries to such invitees or licensees. *Johnson v. Atlas Supply Company*, 183 S. W. 31, by this court, not yet officially published.

It is further insisted with apparent force that appellant's negligence in maintaining the underground crossing in the manner in which it was maintained, even if negligent, was not the proximate cause of the plaintiff's injury, the contention being that the fright and running of the mule, and not the condition of the bridge, was the proximate cause, and the following cases are cited in support of this contention: *T. & P. Ry. Co. v. Doherty*, 15 S. W. 44; *T. & P. Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162; *Neely v. F. W. & R. G. Ry. Co.*, 96 Tex. 274, 72 S. W. 159; *St. L. S. W. Ry. Co. v. Wilkes*, 159 S. W. 126; *Hartnett v. Boston Store*, 265 Ill. 331, 106 N. E. 837, L. R. A. 1915C, 460. We shall not undertake to make a close analysis of these cases and attempt to show the particular respects in which they are distinguishable from the one we now have before us, but even in the *Bigham Case*, cited by appellant, it was said, among other things:

"We are not prepared to hold that in no case can the original cause of the injury be deemed the proximate cause, where an independent and disconnected agency has supervened and brought about the result. The fact of the intervention of an independent agency, it occurs to us, bears more directly upon the question whether the injury ought, under all the circumstances, to have been foreseen; and, where this latter fact appears, we think that the original negligent act ought to be deemed actionable."

And in *Seale v. Railway Co.*, 65 Tex. 274, 57 Am. Rep. 602, it was said:

"If the intervening cause and its probable or reasonable consequences be such as could reasonably have been anticipated by the original wrongdoer, the current of authority seems to be that the connection is not broken."

[7-9] The "proximate cause" in a legal sense is not necessarily the immediate or sole cause. If the negligence of the defendant be a concurring cause, operating at the same time in producing the injury as the intervening agency, it may be a proximate cause, if the injury, or some like injury, could have been reasonably foreseen to follow as a consequence of the negligence shown. See *Gonzales v. City of Galveston*, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17; *Shippers' Compress & Warehouse Co. v. Davidson*, 35 Tex. Civ. App. 558, 80 S. W. 1032; *Obermeyer v. Logeman Chair Co.*, 120 Mo. App. 59, 96 S. W. 677; *Sickles v. M., K. & T. Ry. Co. of Texas*, 13 Tex. Civ. App. 434, 35 S. W. 493, and authorities therein cited. As said in one of the cases cited (*Shippers' Compress & Warehouse Co. v. Davidson*, supra):

"Intervening agencies sometimes interrupt the current of responsible connection between negligent acts and injuries, but, as a rule, these agencies, in order to accomplish such a result, must entirely supersede the original culpable act, and

be in themselves responsible for the injury, and must be of such a character that they could not have been foreseen or anticipated by the wrongdoer. If it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of one will not exculpate the other, because it would still be the efficient cause of the injury."

[10-12] As it seems to us, the language just quoted applies here. The bridge in question was known by appellant and its employees, whose duty it was to see to the maintenance of its tracks and ditches, to be too low. The existence and situation of the projecting bolts were known; for appellant invokes proof of the fact that its construction was as all other bridges of like kind, and that in all such cases the superstructures were fastened to the stringers by protruding bolts, and as it seems to us, it could have been easily foreseen that an injury similar to the one in question might arise. It is not necessary that the tortfeasor must or could have foreseen that the particular injury complained of would probably occur. It is sufficient if it reasonably appears that a person of ordinary prudence in the light of all the surrounding circumstances should have foreseen that some injury of a similar character might arise as a probable result. *M., K. & T. Ry. Co. of Texas v. Morgan*, 49 Tex. Civ. App. 212, 108 S. W. 725; *M., K. & T. Ry. Co. v. Harrison*, 56 Tex. Civ. App. 17, 120 S. W. 254; *Greer v. Railway Co.*, 158 S. W. 740. In the case before us it seems clear that the low structure of the bridge and protruding bolts was a concurrent operating cause of appellee's injury, and, if the maintenance of the bridge in the condition it was shown to be constituted negligence, as was for the jury's determination, then, as it seems to us, the mere fact that the mule was frightened at something by the roadside does not prevent the negligence of the appellant, if any, from being the proximate cause in a legal sense of appellee's injury. It must have been within the contemplation of appellant from the necessarily constant use of the passageway by a farmer and his tenants that it would be used by men and horses, and by the passage of wagons, and that occasion might arise when some unexpected happening would bring the user in contact with the low-hanging bridge. At least, as we think, it was for the jury's determination; for, as said in *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury * * * it is to be determined as a fact in view of the circumstances attending it."

The above rule is approved in *Sickles v. Railway Co.*, 13 Tex. Civ. App. 434, 35 S. W. 495. The question of proximate cause was submitted to the jury in this case, and we think properly so. So that on the whole we conclude that for no reason assigned did the court err in refusing to give the

peremptory instruction. Appellant's first assignment will accordingly be overruled.

In appellant's second assignment complaint is made of the refusal of the court to give the following special instruction requested by appellant:

"Gentlemen, at the request of the defendant, I charge you as follows: That if you find and believe from the testimony in this case that the use of the underground passageway used by plaintiff was a dangerous one, and that all the dangers were apparent to plaintiff before and at the time he was injured, then he was guilty of contributory negligence in using the same, and your verdict will be for the defendant."

[13, 14] We think this assignment may be briefly disposed of by the statement that the court submitted the issue of plaintiff's contributory negligence in a charge not complained of on this appeal by any assignment of error, and by the further statement that, as we understand the rule, it is improper for the court to submit certain facts in evidence as constituting negligence if found by the jury. It is held that such a charge takes from the jury the question of negligence as a fact. See *I. & G. N. Ry. Co. v. Dyer*, 76 Tex. 156, 13 S. W. 377. The charge quoted plainly contravenes the rule stated, and appellant's second assignment will therefore be overruled without further discussion.

Appellant's third assignment, however, we find presents reversible error. Therein complaint is made of the action of the court in giving the following special instruction at the plaintiff's request, viz.:

"If at any time after closing of the gates crossing the agents of the defendant in charge of the right of way did any acts or said anything to encourage or invite the plaintiff to use said bridge crossing as alleged by him, and he thereafter did use said bridge crossing under the said bridge, defendant would be liable for any damage sustained by plaintiff if caused by the negligent manner in which said crossing was made or maintained under the bridge as heretofore indicated in the main charge, if defendant was negligent as alleged."

[15] A mere reading of the charge, as we think, renders it apparent that thereby the issue of plaintiff's contributory negligence was excluded. Under the evidence it seems plain that the issue of contributory negligence was in the case. It was so regarded by the court, and apparently by the parties; for, as stated, it was submitted to the jury without objection on the part of either plaintiff or defendant, and the special charge requested instructed the jury, regardless of the issue of contributory negligence, to find for plaintiff upon a determination in his favor of the facts stated in the special charge. It may be noted, too, that the special charge likewise excludes the issue of proximate cause, which seems also to have been in the case, and was certainly submitted by the court to the jury as one of the issues by it to be determined.

[16] Appellee, however, insists that the reference in the special charge to the main charge renders the above strictures unfound-

ed, but we cannot so conclude. The words "as heretofore indicated in the main charge" plainly, as we think, relate to the issue of appellant's negligence in the matter of maintaining the bridge in the condition it was. At least such reference seems altogether insufficient to convey to the jury the idea that the special charge was to be qualified by the court's instructions on the issues of contributory negligence and proximate cause. Nor can we say, as appellee further insists, that the special charge was harmless under the operation of Rule 62a (149 S. W. 2). So that, as already stated, we have been unable to avoid the conviction that the special charge was upon the weight of the evidence, in that it ignored and excluded vital issues in the case to appellant's probable prejudice, from which it must follow that appellant's third assignment should be sustained and the judgment reversed. See *I. & G. N. Ry. Co. v. Underwood*, 64 Tex. 463.

[17] A number of other assignments of error are presented, but we cannot notice each particularly without unduly extending this opinion. We think it sufficient to say that they have been examined, and we find no reversible error in them. Possibly we should add that the fact that the bridge as originally constructed was constructed as all other bridges of the kind is by no means conclusive on the issue of appellant's negligence in maintaining the bridge as an underground passageway. As originally constructed, it may have been and was intended for an altogether different purpose, and for the purpose intended in all things sufficient, but when later applied to the additional use as a covering for the passageway, as indicated by the testimony in this case, the question further appropriately arises as to whether appellant's maintenance of the bridge in its original form for the new uses to which it was put constituted negligence.

We conclude that all assignments of error should be overruled except the third, which we sustain, and because of the error therein complained of it is ordered that the judgment be reversed, and the cause remanded.

HOUSTON OIL CO. OF TEXAS v. STEPNEY et al. (No. 45.)*

(Court of Civil Appeals of Texas. Beaumont. May 11, 1916. Rehearing Denied July 3, 1916.)

1. ADVERSE POSSESSION § 85(2) — HOSTILE POSSESSION.

On the issue of title by adverse possession the material point of inquiry is whether claimant has actually claimed adversely to the owner, and it is not material whether his claim would have been different if his knowledge of the title had been more correct.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 501-503; Dec. Dig. § 56(2).]

2. APPEAL AND ERROR § 1058(2)—HARMLESS ERROR—CONVERSATION WITH DECEASED.

In trespass to try title defendants claiming by adverse possession, excluding evidence of instructions by plaintiff's deceased grantor to his agent to allow defendants to occupy the land permissively, was not error, where witness was permitted to testify that under such instructions he had permitted defendants to remain on the premises without paying rent, and that one defendant had told witness he was holding possession under such an arrangement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201; Dec. Dig. § 1058(2).]

3. ADVERSE POSSESSION § 115(1)—QUESTION FOR JURY—DURATION AND CONTINUITY OF POSSESSION.

In such action evidence of occupation by defendants and their predecessors, and conflicting evidence as to interruption thereof held not to warrant peremptory instruction for plaintiff.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 691, 701; Dec. Dig. § 115(1).]

4. ADVERSE POSSESSION § 100(1)—CONSTRUCTIVE POSSESSION.

The rule that possession by the true owner of a part of a tract gives constructive possession of all not actually adversely held does not apply where the true owner cuts logs from land which are sold him by the adverse occupant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 547; Dec. Dig. § 100(1).]

5. ADVERSE POSSESSION § 116(5)—INSTRUCTIONS.

In trespass to try title, defendant claiming by adverse possession, a charge that "adverse possession is a claim inconsistent with and hostile to the claim of another," was not misleading as suggesting that defendants' possession could be adverse, although against "another" than the owner, where the court also submitted the direct question whether defendants did in fact claim adversely to the true owner, naming him, and the jury answered in the affirmative.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. § 116(5).]

6. ADVERSE POSSESSION § 70—"CLAIM OF RIGHT."

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5681, defining adverse possession as actual and visible appropriation of the land, commenced and continued under a "claim of right" inconsistent with and hostile to the claim of another, entry under "claim of right" simply means an entry not subordinate to another's title, but with claim of right to the land, hostile and adverse to the true owner, although the person so entering knows he has no title except such as possession may confer.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 304-414; Dec. Dig. § 70.

For other definitions, see Words and Phrases, First and Second Series, Claim of Right.]

7. ADVERSE POSSESSION § 68 — "COLOR OF TITLE."

Color of title, by which is meant that which has the semblance or appearance of title, legal or equitable, but which is in fact no title, is not necessary to perfect title by adverse possession, in the absence of statutory provisions expressly or by clear implication requiring it.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 387-393; Dec. Dig. § 68.

For other definitions, see Words and Phrases, First and Second Series, Color of Title.]

8. ADVERSE POSSESSION ¶12 — CLAIM OF RIGHT.

Claim of title or claim of right by the occupant is necessary in all cases where title is established by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 387-393; Dec. Dig. ¶12.]

9. ADVERSE POSSESSION ¶11—HOSTILE POSSESSION.

No matter how exclusive and hostile to the true owner the possession may be in appearance, it cannot be adverse unless accompanied by the intent of the occupant to make it so.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 67-76; Dec. Dig. ¶11.]

10. ADVERSE POSSESSION ¶68 — CLAIM OF RIGHT—LENGTH OF CLAIM.

Entry and possession without a claim of right is nothing more than a trespass, and can never ripen into good title, no matter how long continued.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 887-898; Dec. Dig. ¶68.]

11. ADVERSE POSSESSION ¶31—ELEMENTS—KNOWLEDGE OF OWNER.

In order to make a good claim by adverse holding, the true owner must have actual knowledge of the hostile claim, or the possession must be so open, visible, and notorious as to raise the presumption of notice that the rights of the true owner are invaded intentionally and with the purpose of asserting a claim of title adverse to his, so patent that the owner could not be deceived, and such that, if he remains in ignorance thereof, it is his own fault.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 128-133; Dec. Dig. ¶31.]

12. DESCENT AND DISTRIBUTION ¶11—REAL PROPERTY.

Where title to land has been established by limitation upon death of the occupants it descends to their heirs and becomes their separate property.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 40-44, 47, 180, 184; Dec. Dig. ¶11.]

13. JUDGMENT ¶707 — CONCLUSIVENESS — PARTIES.

A judgment is not binding upon persons not parties nor privies thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ¶707.]

14. JUDGMENT ¶743(2)—CONCLUSIVENESS—AFTER-ACQUIRED TITLE.

One is not estopped by a judgment that he has no title to land from setting up an after-acquired title, or a title based on the ten-year statute of limitations.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1276, 1284; Dec. Dig. ¶743(2).]

15. APPEAL AND ERROR ¶1062(1)—HARMLESS ERROR — SUBMISSION OF INTERROGATORY.

The submission of an interrogatory the answer to which becomes immaterial by the submission and answer of other interrogatories is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4212; Dec. Dig. ¶1062(1).]

Appeal from District Court, Newton County; A. E. Davis, Judge.

Action by the Houston Oil Company of Texas against Demps Stepney and others.

From a judgment for defendants, plaintiff appeals. Affirmed.

Parker & Kennerly, of Houston, for appellant. Powell & Huffman, of Jasper, for appellees.

CONLEY, C. J. This suit was brought by the appellant, Houston Oil Company of Texas, as plaintiff below, against Demps Stepney and his wife, Lucy Stepney, and others, as an action of trespass to try title for recovery of a specific 160 acres of land, a part of the D. S. D. Moore league in Newton county, Tex., and for damages for cutting timber therefrom. All of the defendants filed disclaimers, except Demps Stepney and his wife, Lucy, who pleaded general denial, not guilty, and the ten-year statute of limitations.

By supplemental petition appellant alleged that during the receivership of the Houston Oil Company of Texas, to wit, on the 5th day of December, 1905, receivers in that cause filed suit against Demps Stepney in the United States Circuit Court for the Southern District of Texas, praying for the recovery of title to and the possession of the same land sued for herein, and, further, that the defendant, Demps Stepney, be enjoined from interfering with the title and possession of said receivers to said property; that said Demps Stepney filed an answer in said cause, and appeared by attorney, in which he undertook to establish title under the ten-year statute of limitations, that said receivers recovered judgment in said cause on the 28th of September, 1908, in which they were awarded title and possession of said 160 acres of land under the decree of the court duly entered, and which judgment they contend is a bar to said Demps Stepney and others claiming under him from disputing the title of the appellant in this cause.

By supplemental answer the appellees specially excepted to that part of the supplemental petition which sets up the federal court judgment as a bar: First, because said petition shows on its face that, if any judgment was obtained against Demps Stepney, the same was recovered in the United States Circuit Court for the Southern District of Texas, in the city of Houston, Harris county, Tex., in the exercise of its equity powers in the receivership against the Houston Oil Company of Texas by intervention in said original suit in equity, No. 54, brought by the Maryland Trust Company of Baltimore against the Kirby Lumber Company and the Houston Oil Company of Texas, two Texas corporations, and that said court had no jurisdiction over the person of Demps Stepney or over the land in controversy, because the receivers of the Houston Oil Company of Texas, in their intervention No. —, against Demps Stepney, were asserting a legal title to real estate against Demps Stepney, who was in actual, adverse possession

of the land in controversy; and, second, because said receivers of the Houston Oil Company of Texas nor the Houston Oil Company of Texas were in possession of the land sued for and described in said judgment, and therefore could not entertain or maintain a suit in equity therefor; their right being one of ejectment, they had a complete and adequate remedy at law, which could be brought only in Newton County, Texas, where the land was situated, and the defendant, Demps Stepney, resided, and the said judgment is therefore void; third, because said pleadings show upon their face that Demps Stepney, one of the defendants only in this cause, was a party to said suit in the Circuit Court of the United States, and that Lucy Stepney, who was one of the defendants in this suit, was not a party to the suit in which the alleged judgment was obtained.

The defendants also further answered, denying that any citation had ever been served upon Demps Stepney or his wife in the federal court suit, nor that they or either of them ever knew that a suit was filed against them in which the alleged judgment was obtained against Demps Stepney, and that the judgment entered therein is against Demps Stepney only for land, which at the time of the filing of said suit and obtaining said judgment was, and is now, the homestead of Demps Stepney and Lucy Stepney, and that said Lucy Stepney is and was not a party to said suit and judgment, and same is therefore void. All the demurrers and exceptions were overruled.

During the trial of this cause the appellees, to avoid the effect of this judgment, and in addition to attacking it as being void for want of jurisdiction, offered testimony to prove that Levi Levias and his wife, Mary Levias, who were the father and mother of Demps Stepney's wife, Lucy Stepney, lived on the land in controversy and matured a complete limitation title to it before their death, and that consequently when they died Lucy Stepney and the other heirs (whose interest Demps Stepney and wife have acquired since the judgment in the federal court suit in 1908) inherited said land as their separate property, and that consequently the judgment against Demps Stepney alone was not binding on Lucy Stepney nor the other heirs who were not parties to that suit.

The court submitted the case upon special issues to the jury, as follows, to wit:

"Question No. 1: Have Demps Stepney and his wife, Lucy Stepney, had and held peaceable and adverse possession of the land described in their answer, cultivating, using, or enjoying the same, for ten consecutive years prior to January 16, 1914? You will answer this question 'Yes' or 'No,' as you may determine the fact to be.

"Question No. 3: Did Levi Levias and wife have and hold peaceable and adverse possession of the land described in plaintiff's petition and defendants' answer, cultivating, using, or enjoying the same, for ten consecutive years prior to January 16, 1914. You will answer this

question 'Yes' or 'No,' as you may determine the fact to be.

"Question No. 4: Did Demps Stepney and his wife, Lucy Stepney, live upon the land described in plaintiff's petition and in defendants' answer in peaceable and adverse possession, claiming, using, cultivating, or enjoying the same, for more than ten years consecutively before the 1st day of January, 1914? You will answer this question 'Yes' or 'No,' as you may determine the fact to be. * * *

"Question No. 6: Did Levi Levias claim the land on which they were living adversely against Judge D. R. Wingate? Answer 'Yes' or 'No.'

"Question No. 7: Did Levi Levias' wife claim the land on which she was living adversely against Judge D. R. Wingate? Answer this question 'Yes' or 'No.'"

The jury answered the questions as follows, to wit:

"Question No. 2 we answer 'Yes.'

"Question No. 3 we answer 'Yes.'

"Question No. 4 we answer 'Yes.'

"Question No. 6 we answer 'Yes.'

"Question No. 7 we answer 'Yes.'"

Upon motion of the appellees, judgment was entered in their favor on the answers of the jury to the several questions propounded to it, and from this judgment the Houston Oil Company of Texas has duly perfected an appeal.

[1] Under the first assignment of error it is contended that the court erred in refusing to let the appellant, Houston Oil Company of Texas, ask the witness Demps Stepney whether, if he had known that the land they were living on was at the time and during the early part of their claim the land of D. R. Wingate, he would have claimed it adversely against him; it having been developed by the evidence that D. R. Wingate owned the land during a part of the time limitation was running, and that Levi Levias, the father-in-law of Demps Stepney, was an old slave of Judge Wingate. The evidence shows that Levi Levias and Mary Levias moved on the land in controversy somewhere between the years 1871 and 1873, the exact date being in controversy; that Levi Levias lived on this place until his death, which is fixed by the witnesses from the year 1879 to 1889; that Mary Levias continued to live on this land until her death, which occurred some time subsequent to that of her husband, and the date of which is also in controversy, it ranging from 1886 until later years; that the land in controversy is situated principally on a 400-acre tract, and only partially on a 800-acre tract, both of which tracts belonged to Judge D. R. Wingate. The jury found from the evidence submitted to them that Levi Levias and Mary Levias, his wife, had matured limitation title to the 160 acres of land in controversy. The evidence also shows that neither Levi Levias nor Mary Levias, his wife, nor Demps Stepney, knew that Judge Wingate ever owned or claimed any of the land in controversy.

If limitation title was perfected in the heirs of Levi Levias and his wife, Mary Levias, at the date of the death of the latter, as the jury found by their verdict, it

is immaterial what Demps Stepney might have done if he had known who the true owner was. If, as a matter of fact, Demps Stepney had claimed the land in controversy for a sufficient length of time to mature limitation title, it is quite immaterial what he would otherwise have done had his information as to the ownership of the land been different. The material point of inquiry was whether he had actually claimed the land adversely to the owner, and not whether his claim would have been different if his knowledge of the title had been more correct. The court did not err in excluding this evidence, nor in refusing to give the special requested instruction based thereon defining the meaning of "adverse possession." This assignment is therefore overruled.

[2] Under the second assignment of error the appellant complains of the action of the court in refusing to allow it to ask the witness R. P. Wingate about the instructions he had received from his father, D. R. Wingate, with reference to permitting Levi Levias and his wife, and Demps Stepney and his wife, to live on the land which they claimed, and which was part of the land owned by D. R. Wingate, deceased, and a part of the land in controversy, without requiring them to pay rent either to him or to D. R. Wingate. The record shows that this witness had testified that his father made him agent for the purpose of looking after the lands. He said that "his father charged him what to do and told him to exempt old man Levi, and not to charge him any rent or anything that way." The appellees objected to the introduction of this evidence, and the record shows that the court ruled:

"He can testify that his father put him in charge of that land to look after the land, and he can testify that he didn't collect any rents from Levi Levias, because of the instructions received, but, as to telling what was told him by his father, detailing the conversation between him and his father, I don't think it admissible, but he can tell what he did under the instructions."

There was no error in this ruling of the court, and, besides, at another place in his testimony, this witness was permitted to tell the jury, without objection, speaking of the conversation which he had with Levi Levias before his death, that:

"He (Levias) told me that Father told him he could go out on any of the land he wanted to and stay there as long as he wanted to, and he wouldn't charge him any rent for it."

This is practically the same evidence as the court excluded. There is no merit in this assignment of error, and it is overruled.

[3] Under the third assignment of error the appellant urges that the court should have given the special requested instruction to peremptorily return a verdict for the appellant—

"because the evidence failed to show ten years' adverse possession beyond the amount of land in the actual possession of the appellees, as the testimony was undisputed that the owner of the real title was logging a part of the land in

controversy, which was covered by deeds to him, and consequently, by reason of such actual possession incident to the logging operations, he had constructive possession of all of the land covered by said deeds not in the actual adverse possession of the claimants."

[4] An investigation of the evidence discloses that Levi Levias and his wife went on to the 160 acres in controversy and settled a home thereon between the years 1871 and 1873; that they cleared two fields and had in cultivation about 10 acres; that they built houses, roads, and fences on said land; that they lived there until they both died, some time in the 80's, the dates of their respective deaths being heretofore referred to. Demps Stepney went to live with his father-in-law, Levi Levias, in 1878 or 1879, and after his death continued to farm a portion of the improvements for his mother-in-law, Mary Levias, until her death. After the death of his mother-in-law Demps Stepney and his wife continued to live on the land, and have claimed same until the filing of this suit in 1914. The evidence is conflicting as to the exact date Levi Levias went on the land. It varies from 1871 to 1877, and the death of old man Levi Levias is also uncertain; the dates ranging from 1879 to 1889. These were all conflicting issues, which were settled by the special verdict in favor of appellees, in answering questions 3, 6, and 7. The evidence as to the logging operations was conflicting. While the evidence shows that Walter Wingate, acting for his father, did some small amount of logging on the 160-acre tract in controversy, yet Demps Stepney testified that he sold him the logs. While it is the rule of law that the true owner possessing a part of a tract of land shall give constructive possession of all of the land which is not in actual possession of the adverse claimant, yet, if Walter Wingate purchased the timber from Demps Stepney, and went on the land and cut the timber under such circumstances, there would not be any break in the continuity of the adverse claimant's possession, and the rule as urged by the appellant in this assignment would not apply. The evidence upon this issue was also conflicting, and was settled by the above answers of the jury to the special issues propounded to them. This assignment of error is therefore overruled.

Under the fourth assignment of error appellant contends that the court's charge on adverse possession, although abstractly correct, is misleading, in view of the fact that the court had, in the hearing of the jury, refused to permit the plaintiff to ask the defendant Demps Stepney if he would have claimed the land in controversy adversely to Judge Wingate if he had known that Judge Wingate had owned it, because it states "that adverse possession is a claim inconsistent with and hostile to the claim of another," whereas the charge should have stated that the possession is not adverse if the claimant does not claim the land against the person

who is at the time the real owner; that this charge as given might reasonably have impressed the jury with the idea that, though the claimant did not claim against anybody who in fact owned it, the possession was still adverse if they claimed against others.

[5] The charge as given by the court on adverse possession is a correct statement of the law, and in connection with that charge the court also submitted to the jury the direct question as to whether or not Levi Levias and Mary Levias did in fact claim the land adversely to Judge Wingate, and the jury answered in the affirmative. There is no reason, therefore, for the inference that the jury could have formed any impression that the possession of the land was adverse, within the meaning of the charge of the court, although the claimants were not holding against Judge Wingate. There is no merit in this assignment, and it is also overruled.

[6] Under the fifth assignment of error the appellant urges upon the court that the verdict of the jury and the judgment of the court thereon are unsupported by the law and the evidence, because the uncontradicted evidence shows that there "never was any entry or possession held under a claim of right" by Levi Levias or his wife, or by Demps Stepney and his wife, or by any person under whom the appellees claimed; that the only claim of right which the appellees' evidence shows ever to have been held by Levi Levias and wife was such only as might arise by reason of the bare fact of occupancy, conflicted with adverse claim, and that there was absolutely no evidence tending to show that the entry by Levi Levias and wife was made on land which he claimed to own, or that there was ever any claim of right under which the possession was held."

Since the decision by the Supreme Court in the case of *Stevens v. Pedregon*, 173 S. W. 210, there seems to have been created some confusion in the minds of the profession as to the correct meaning to be given the terms "under a claim of right," as contained in *Vernon's Sayles' Ann. Civ. St.* 1914, art. 5681, which, in defining adverse possession, contains the following language:

"Adverse possession is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another."

The ten-year statute of limitations of 1841, which remained unchanged until 1879, when the present statute was enacted, did not specially provide that the possession should be adverse, nor was the term "adverse possession" used or defined in the statute. However, the courts, in construing that act, held that the peaceable possession provided for upon the part of the claimant of necessity must be adverse to the claim of the true owner, and not held in subordination of his title. *Redding v. Redding*, 15 Tex. 251; *Hudson v. Wheeler*, 34 Tex. 366. In the early *Portis v. Hill, Administrator*, 3 Tex.

278, Mr. Justice Wheeler defined adverse possession as "an actual visible and exclusive appropriation of the land commenced and continued under a claim of right, either under an openly avowed claim or under a constructive claim, arising from the acts and circumstances attending the appropriation, to hold the land against him who is seized."

When the ten-year statute of limitations was amended in 1879, and "peaceable possession" and "adverse possession" expressly defined, the language of Mr. Justice Wheeler defining "adverse possession" was almost adopted verbatim et literatim. Since the enactment of the limitation statute in 1841, and since the amendment of 1879, there has been an unbroken line of decisions declaring that it did not matter how tortious or wrongful may have been the seizure of the adverse claimant, if possession be continued for the time required by statute, it would give title, preclusive of all claims.

In the case of *Charlie v. Saffold*, 13 Tex. 112, Mr. Justice Hemphill said:

"It thus appears that naked possession will secure title for 640 acres, without inclosure, * * * and the circumstances under which the possession is taken are altogether immaterial to the right, provided the occupant claimed for himself and adversely to all others. No matter how tortious or wrongful may be the seizure, if possession be continued for the time limited by the statute, it will give title, preclusive of all claims. * * * The object of the statute in its longer terms is not to settle questions in relation to good or bad faith, the right or wrong of the possession; it proceeds on other principles. As said in *Cholmondley v. Clinton*, 2 Jac. & Walker, 155: 'A tortious act can never be the foundation of a legal any more than an equitable title. It is no more favored by a court of law than a court of equity, considered nakedly by itself, but the statute bar arises from other principles. Admitting the title, if it could be inquired into, to be clearly in favor of the plaintiff and against the defendant, still the question is whether he has prosecuted that title in time. The quiet and repose of the kingdom, the mischief arising from stale demands, the laches and neglect of the rightful holder, and all the other principles of public policy take away the remedy notwithstanding the title *veri domini* and the tortious holding of the possession. To advert to the merits is to shift the question from the real subject of inquiry. The case never arrived at that point; it is stopped in limine in courts of equity as of law. The title is changed in both by operation of a public law upon public principles, without regard to original private right. If the negligent owner has forever forfeited by his laches, his right to any remedy to recover, he has in effect lost his right to recover.'"

In the case of *Kinney v. Vinson*, 32 Tex. 126, the court said:

"The statute of limitations of ten years does not involve the question of good faith in the naked possessor. The language of the act is broad and unqualified, and the legislation was based, no doubt, upon the policy of compelling those who had a right of entry under title to take actual possession of their lands, and have the country settled at the peril of being ousted by those who would settle the land and improve the country. It is, then, a mere question of fact as to the adverse possession for that period of time."

The result of the holding of the court in the case of *Craig v. Cartwright*, 65 Tex. 413, was that, if one entered upon the land of another without right and erected houses and opened fields thereon, continuously occupying the house and using the fields for such purposes as the land is adapted thereto, although a trespasser, still, if this continues or be permitted by the true owner to continue for the period prescribed by the statute, without interruption, this "naked trespasser" will, under the law, lose that character, and become the owner of the land.

The case of *Link v. Bland*, 43 Tex. Civ. App. 519, 95 S. W. 1110, is directly in point on the issue involved under this assignment. That case was a suit by J. W. Link against Richard Bland, in trespass to try title for 640 acres of land in Orange county. The defendant, among other defenses, pleaded the statute of limitation of ten years as to 160 acres of land sued for, including his residence and improvements, the 160 acres being specifically described in his answer, and disclaimed as to the remainder of the survey. There was a verdict for the defendant as to the 160 acres. Under the first assignment of error the appellant assailed the verdict of the jury and the judgment of the court in that case on the ground "that the undisputed evidence showed that defendant's possession was not commenced or continued under a claim of right, as required by the statute." The court, in considering the question, said:

"From the evidence in the record as to the appellee's possession we deduce the following facts: The suit was begun September 8, 1904. In February, 1894, appellee, who was a married man, moved upon the section of land in controversy with his wife. He built a dwelling house with other usual improvements of a home, on the southeast quarter of the section, before moving on it, cleared land, put about 4 acres in cultivation the first year, which was afterwards increased to 10 acres in cultivation and 15 acres in pasture. He has continuously lived with his family on the land since first moving there in February, 1894, and has always claimed the land adversely to the owner and all other persons. When he first began to clear the land for his home, he thought the land was on section 22, a school section, but found out before his house was built, and before he took up his residence, that it was on section 19, and that the section belonged to the Texas & New Orleans Railway Company. Appellee's intention was to hold the land in hostility to the owner and every one else, but he testified that he had no title to the land, that he had never bought it, nor inherited it, nor had anybody ever given it to him. Knowing he had no title, he took possession claiming, and intending to claim, the land by virtue of his possession, and continued to occupy it as his home under such claim based upon his possession alone, from and after February, 1894. His possession was during all this time open and notorious, and was exclusive and hostile to the owner and all others. Appellee testified that he knew that the land was not his, and that he did not claim to own it when he first went on it; that he never asserted a better title than the Texas & New Orleans Railway Company, but his testimony shows clearly that what he meant by these expressions was that he had no title to the land, and never claimed to have any except what his naked possession gave him, and never asserted

any hostile claim except such as could be predicated upon his possession. The undisputed evidence shows clearly that appellee's possession was an actual and visible appropriation of the land, adverse to all the world, and that he at all times claimed whatever right such possession gave him, without at any time claiming to be the owner of the land in the sense of having title or right except such as inherited in, and was attached to, such possession.

"Appellant's contention as to the law upon this state of facts can best be stated by the following quotations from his brief: 'The language of the statute applying to the contention of appellant in this case is plain: "Adverse possession is an actual and visible appropriation of the land commenced and continued under a claim of right inconsistent with, and hostile to the claim of another." Under this statute a man, to start the statute of limitations running, must be an honest claimant of the land he is in possession of. The statute was made to protect persons honestly claiming their property and in the possession thereof. The statute was not made nor intended to deprive the owner of land of his title thereto, at the claim of a possessor thereof in bad faith, who was occupying the land without a claim of right; in other words, knowingly, without title, and without the right of possession. There is no law in Texas that protects a naked squatter on the lands of another. His term of occupancy as a naked squatter, and knowing that he had no right to enter or hold the land, and not claiming to have any such right, would never ripen into title, and possession of this kind was never intended to ripen into title or deprive the owner of any rights of property.' Appellant lays much stress upon the provisions of article 3349, Rev. St. 1895, defining adverse possession to be 'actual and visible appropriation of the land commenced and continued under a claim of right, inconsistent with, and hostile to the claim of another,' and it is strenuously insisted that the undisputed evidence shows that appellee did not enter into possession under such 'claim of right' as is here intended.

"It cannot be denied that he claimed whatever right his possession entitled him to, but it is insisted that the entry and possession must be upon at least a claim of ownership and right of possession, independently of the possession itself. We think this is a fair statement of appellant's contention. The law has clearly been settled otherwise by an unbroken line of decisions in this state. It was held by the Supreme Court in *Charles v. Saffold*, 13 Tex. 112: 'It thus appears that naked possession will secure title for 640 acres without inclosure, or 1,000 or 2,000 with inclosure; and the circumstances under which the possession is taken are altogether immaterial to the right, provided the occupant claims for himself and adversely to others. No matter how tortious or wrongful may be the seizure, if possession be continued for the time limited by statute, it will give title preclusive of all claims; * * * no question is made or is open relative to the bona fides or mala fides of the possession.' This doctrine has been followed in numerous cases, of which we need only cite the following: *Craig v. Cartwright*, 65 Tex. 421; *Word v. Drouthett*, 44 Tex. 369; *Bruce v. Washington*, 80 Tex. 372, 15 S. W. 1104; *Cox v. Sherman Hotel Co.*, 47 S. W. 809. It is true that the statute defining adverse possession was not passed until the adoption of the Revised Code of 1879 (article 3198, Rev. St. 1879), and that of the cases cited *Charles v. Saffold* and *Word v. Drouthett* were decided prior to that date; but the statute referred to only incorporates as a part of the law the very construction placed upon the former law as to what was necessary to constitute adverse possession, as laid down in *Portis v. Hill*, 3 Tex. 279; *Craig v. Cartwright*, *supra*. There is no intimation in the evidence that

appellee held in subordination to the title of appellant or any one else. He says that he intended to hold the land until he was put off, by which is evidently meant until he was divested of possession by some one whose title was superior to whatever rights his possession gave him. Appellee was a naked possessor, but such persons are clearly within the protection of the statute, even where they take and hold possession with the intention of acquiring title by limitation to something to which they have no claim otherwise. None of the cases cited by appellant in his brief support his contention. It will be found that all of them turn upon the point that the possession has been in subordination to the title of the owner, or under circumstances which show that it was not intended to be adverse to the owner, or did not show a visible appropriation of the land. Appellee's possession gave him title to 160 acres of the land."

The language of the Supreme Court in the case of *Stevens v. Pedregon* must be read in the light of the facts which the court was discussing in that case. It is to be noted that the court was considering the statutory definition of adverse possession. Quoting *Vernon's Sayles' Statutes*, it said:

"Adverse possession is an actual and visible appropriation of the land commenced and continued under a claim of right inconsistent with and hostile to the claim of another. Article 5681."

[7-10] No matter in what jurisdiction the determination of what constitutes adverse possession may arise, the decisions and textbooks are unanimous in declaring that such possession, among other things, must be hostile. Color of title (and by which we mean that which has the semblance or appearance of title, legal or equitable, but which is in fact no title) is not necessary under any of the authorities to perfect title by adverse possession, in the absence of statutory provision which expressly or by clear implication required it. 1 Cyc. 1084. However, claim of title or claim of right by the occupant is in all cases necessary. 1 Cyc. 1028. No matter how exclusive and hostile to the true owner the possession may be in appearance, it cannot be adverse unless accompanied by the intent on the part of the occupant to make it so. The naked possession unaccompanied with any claim of right will never constitute a bar. Where a party enters upon land and takes possession without a claim of right, his occupation is subservient to the paramount title, not adverse to it. It is nothing more than a trespass, and, no matter how long continued, can never ripen into a good title. *Sellman v. Hardin*, 58 Tex. 86; *Murphy v. Welder*, 58 Tex. 235; *Schleicher v. Gatling*, 85 Tex. 270; 1 Cyc. 1028, 1029.

[11] In order to make a good claim by adverse holding the true owner must have actual knowledge of the hostile claim, or the possession must be so open, visible, and notorious as to raise the presumption of notice that the rights of the true owner are invaded intentionally, and with the purpose of asserting a claim of title adverse to his, so patent that the owner could not be deceived,

and such that, if he remains in ignorance of, it is his own fault. 1 Cyc. 996 and 1000. This was the sense in which Mr. Justice Brown was considering the phrase "claim of right," and entry under "claim of right," as therein used, simply means an entry not in subordination of another's title, but, on the contrary, that the claimant's entry on the land and his acts and possession incident thereto are of such a character as to manifest an immediate intention and purpose to claim a right or title to the land in himself hostile and adverse to the true owner. The cases Mr. Justice Brown cites are all upon the subject of possession by claimants to land, which possession was not held sufficient to charge notice on the true owner that his land was being adversely claimed, or not sufficient to set in motion the statutory bar to the true owner's right. This conception of the meaning of the term, as used in that case, is further emphasized by subsequent language found in the same opinion, for the court specifically says:

"At no time from the first entry upon the land to the institution of this suit does defendant in error claim to have actually resided upon the land, nor to have the land or any part so inclosed, nor does he claim that at any time he had a tenant upon it for a length of time sufficient to constitute limitation under any provision of the law, or any decision of this court. Such possession as he claims to have had consisted of cultivating a small portion of the land one year at one place, and the next year at another, and some years there was no cultivation of any part of the land for the want of water. There was nothing in his acts that would indicate a claim of ownership [or, as we may say, and in the sense in which the term was used by Mr. Justice Brown, of a claim of right] to the land. All that defendant in error did in the use of the land might have been regarded as harmless trespass."

We do not think it was the intention of this case to overrule the long-established principle in this state that the good or bad faith inception of the entrance of the adverse claimant was not a subject of inquiry in the perfection of title by limitation, under the ten-year statute.

[12-14] The jury having found that title by limitation had been perfected in *Levias* and his wife, upon their death the land in question descended to their heirs, and became the separate property of the four daughters. The judgment in the federal court rendered against *Demps Stepney*, waiving the question of the jurisdiction of the federal court to render any such judgment, was not binding upon such heirs; they not being parties to that suit. The title acquired by *Demps Stepney* from these heirs came to him subsequent to the rendition of the judgment in that suit, and therefore he is not estopped by such judgment from pleading the after-acquired title, nor from setting up the ten-year statute of limitation as a basis of recovery affecting the 160 acres of land involved in this suit. The fifth assignment of error is therefore overruled.

The sixth assignment of error charges that

the court erred in not submitting appellant's special charge No. 1, on the subject of adverse possession, and in submitting the one the court gave. What we have said heretofore in considering the first and fourth assignments of error disposes of the questions raised hereunder, and this assignment is therefore overruled.

[16] Under the seventh assignment of error appellant urges upon us that the court erred in submitting to the jury question No. 2; they contending that any limitation title which might have matured in whole or in part during the marriage of Demps and Lucy Stepney by reason of their occupancy of said land would be community property, and that therefore the judgment against Demps Stepney alone would be sufficient, he being the head of the family, to divest both him and his wife of all title to the land in controversy. The jury having found on another issue that limitation title to the land in controversy had been perfected in Levi and Mary Levias, the father and mother of Demps Stepney's wife, and the other three heirs, the land in controversy descended to them as their separate property, and, even if there was error in the submission of question No. 2, it was harmless under the finding by the jury that limitation title had been perfected to this land by Levi Levias and his wife. This assignment of error is therefore overruled.

Having heretofore determined that the heirs of Levi and Mary Levias owned the land in dispute in their separate right at the time of the institution of the suit in the federal court against Demps Stepney, and they, not being parties to that suit, were not bound thereby, it is not necessary at this time to examine into the question affecting the jurisdiction of the federal court in said cause to render the judgment it did against Demps Stepney, even if the federal court had jurisdiction of the subject-matter of that suit, since its jurisdiction was wholly lacking over the real owners of the land.

The judgment of the trial court is therefore in all things affirmed; and it is so ordered.

MAGNOLIA PETROLEUM CO. et al. v. RAY.
(No. 8383.)

(Court of Civil Appeals of Texas. Ft. Worth.
May 27, 1916. On Rehearing,
June 24, 1916.)

1. MASTER AND SERVANT — 107(3) — MASTER'S DUTY — SAFE PLACE TO WORK — DANGEROUS CHARACTER OF WORK.

The general rule requiring the master to exercise ordinary care to furnish a reasonably safe place to work has no application to a car inspector, employed to see whether cars were in a safe condition for use by the road and to remedy any defects in them which he might discover since the character of his employment necessarily required him to go upon cars that were in an unsafe and dangerous condition; the reason be-

ing that no negligence can be charged to the master when the servant voluntarily contracts to assume the very risk of which he complains.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 201, 255; Dec. Dig. — 107(3).]

2. MASTER AND SERVANT — 203(1) — ASSUMPTION OF RISK — MASTER'S NEGLIGENCE.

The defense of assumption of risk implies negligence on the part of the master creating liability for the damages sustained, unless such a right of action is destroyed by the defense; and, where the common-law rule of allowing the defense of assumed risk where the master has been guilty of negligence is charged by the statute, such defense has no place in a case where there has been no negligence on the part of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-540, 542, 543; Dec. Dig. — 203(1).]

3. EXPLOSIVES — 8 — MASTER AND SERVANT — 111(1) — INJURY — CARE REQUIRED — EXPLOSION OF TANK CAR.

A railroad owed the duty to its employes, other than its car inspector, and to strangers whose presence might reasonably be expected sufficiently near an oil tank car to receive injury from an explosion thereof, to exercise ordinary care to see that the car was in a proper condition to avoid such explosion.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. — 8; Master and Servant, Cent. Dig. §§ 215, 255; Dec. Dig. — 111(1).]

4. MASTER AND SERVANT — 107(3) — SAFE PLACE TO WORK — CAR INSPECTOR — LIABILITY.

There may be unusual circumstances rendering the situation of a car inspector extraordinarily hazardous, and, when he is excusably ignorant thereof, the master may be liable for an injury resulting therefrom through a negligent failure to remedy such conditions or to inform him thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 201, 255; Dec. Dig. — 107(3).]

5. MASTER AND SERVANT — 258(13) — ACTION FOR INJURIES — PETITION — SAFE PLACE TO WORK — INJURY TO CAR INSPECTOR.

A petition in a car inspector's suit for injury from the explosion of a tank car loaded with gasoline and naphtha, not alleging that he was inexperienced in such work or was ignorant of the dangers incident thereto, or that defendant was negligent in not warning him of the dangers before directing him to inspect the car, did not show any such unusual facts or circumstances as to exempt him from the general rule applicable to servants employed to repair defective machinery or other equipment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 828; Dec. Dig. — 258(13).]

6. NEGLIGENCE — 62(1) — INTERVENING NEGLIGENCE — "PROXIMATE CAUSE."

Intervening agencies between an act or omission constituting negligence and an injury do not preclude a finding that the negligence was the "proximate cause" of the injury, if it can reasonably be said that the injury was the natural and proximate result of such negligence and that, in the light of the attending circumstances, some such injury ought reasonably to have been anticipated as the probable result.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76, 78; Dec. Dig. — 62(1).]

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

7. MASTER AND SERVANT \Leftrightarrow 286(18)—INJURY TO SERVANT—QUESTION FOR JURY—ANTICIPATION OF INJURY.

Whether or not an injury to a car inspector, from the explosion of a tank car in which he was trying to remedy a defect, ought reasonably to have been anticipated as a probable result of the road's negligence, in allowing a defective tank car to remain in its yard, was for the jury, unless, by reason of an absence of proof, or conclusiveness of proof to sustain the affirmative of that issue, a peremptory instruction thereon would be warranted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1020; Dec. Dig. \Leftrightarrow 286(13).]

8. TRIAL \Leftrightarrow 203(3) — INSTRUCTION — DEFENDANT'S THEORY OF THE CASE.

In an action for injury to a car inspector, from the explosion of a tank car loaded with gasoline and naphtha, which it was alleged defendant railroad negligently permitted to remain in its yard in a defective condition, defendant was entitled to an instruction affirmatively presenting the group of facts upon which it relied to refute the charge of negligence, such as an instruction that, if the injury resulted from a pure accident not proximately caused by the negligence of any one, plaintiff could not recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 478, 479; Dec. Dig. \Leftrightarrow 203(3).]

Appeal from District Court, Tarrant County; R. B. Young, Judge.

Action by R. S. Ray against the Magnolia Petroleum Company, the Corsicana Petroleum Company, the Ft. Worth & Denver City Railway Company, and the Houston & Texas Central Railway Company. Judgment for plaintiff against defendant Houston & Texas Central Railway Company, and it appeals. Reversed and remanded for another trial as between plaintiff and such defendant, leaving the other part of the judgment undisturbed.

Thompson & Barwise and G. W. Wharton, all of Ft. Worth, Baker, Botts, Parker & Garwood, of Houston, and R. M. Rowland, of Ft. Worth, for appellant. McLean, Scott & McLean, of Ft. Worth, for appellees.

DUNKLIN, J. A tank car was loaded with a mixture of gasoline and naphtha at Electra, Tex., and consigned for shipment to Corsicana, Tex., over the Ft. Worth & Denver City Railway to Ft. Worth, and from Ft. Worth to Corsicana over the Houston & Texas Central Railway. After reaching Ft. Worth it was delivered to the Houston & Texas Central Railway Company at 3:30 o'clock p. m. on the 14th day of March, 1915. A few minutes after 6:30 o'clock p. m. of the same day, R. S. Ray, a car inspector of the Houston & Texas Central Railway Company, was directed by Fife, the general yardmaster of the Houston & Texas Central Railway Company, to inspect the car, the yardmaster telling him at the time that the car was leaking. Ray had just gone on duty when he received those instructions and proceeded at once to the car. When he reached it he found that gas was escaping from the edges of the dome cap in quantities sufficient to

make a hissing noise. He and his helper, Pettigrew, then proceeded to examine the car. They both carried lanterns, but Pettigrew, upon instruction from Ray, extinguished his before he reached the car for fear of an explosion from the ignition of the escaping gas. Ray did not extinguish his lantern, but on account of the same danger he left it at a distance estimated at between 75 and 100 feet from the car. The dome cap of the car was screwed into the opening known as the manhole, approximately three feet in diameter. On top of the car were two valves called "pop-off" valves. The purpose of these valves was to allow the escape of gas that might accumulate in the car and thereby avoid an explosion. When the gas reached a certain tension inside of the car, the valves would be opened by such pressure, and after the relief of the pressure the valves would close. Fearing that the car might explode, Ray and Pettigrew ascended to the top of the car and tried to open these valves by hammering down on them with a bar of iron. They were unable thus to open the valves, and thereupon conceived the idea of unscrewing the dome cap from the manhole. After giving the dome cap a partial turn, which resulted in an increase in the escape of gas, they ceased further efforts and alighted from the car; Ray being of the opinion then that the pressure of gas would be relieved by the loosening of the dome cap, which had then been accomplished by himself and Pettigrew. Just as they had reached that conclusion, Clopton, another employé of the Houston & Texas Central Railway Company, who was engaged as an engine foreman, came on the scene and suggested that the dome cap be unscrewed farther. Ray himself declined to make any further efforts to do so, but his helper, Pettigrew, and Clopton ascended the car and gave the dome cap another turn, which resulted in an explosion, the force of which blew the dome cap off and shot a stream of liquid and gas to an estimated height of 100 to 150 feet in the air. In some manner this gas and liquid caught fire and severely burned Ray, who was on the ground near the car at the time.

Ray instituted this suit to recover for the injuries so sustained. The defendants in the suit were the Magnolia Petroleum Company, alleged to be the owner of the car, the Corsicana Petroleum Company, who loaded the car at Electra, the Ft. Worth & Denver City Railway Company, who transported it from Electra to Ft. Worth, and the Houston & Texas Central Railway Company. It was alleged that the Magnolia Petroleum Company, who owned and operated the car, owed the duty to see that the pop-off valves were constructed and maintained in a reasonably safe condition, but that said company negligently permitted said valves to become rusted.

ty, corroded, and otherwise defective, and used the car in that condition for transporting high explosives; that if the pop-off valves were properly constructed and in proper condition for the car to be used in the transportation of gasoline, or any other explosive substance, such valves would automatically open whenever the pressure inside the car reached a stage of 12 pounds to the square inch, but that, by reason of the defective and corroded condition of those valves in that car, that result could not be attained. It was alleged that the Corsicana Petroleum Company negligently caused the car to be loaded at Electra with the highly explosive liquid without inspecting it to ascertain whether or not said pop-off valves were in proper condition, and negligently procured the same to be transported and delivered into the yards of the Houston & Texas Central Railway Company in that condition. It was alleged that the Ft. Worth & Denver City Railway Company negligently and carelessly delivered the car to the Houston & Texas Central Railway Company without making any inspection to ascertain the condition of the car and its contents, and that if a proper inspection had been made the defective condition of the pop-off valves would have been discovered and that the said railway company was guilty of negligence in failing to warn the Houston & Texas Central Railway Company, to whom it delivered the car, and the plaintiff, R. S. Ray, its car inspector, of the contents of the car and its defective and dangerous condition.

Plaintiff further alleged that at the time of the accident he was in the employment of the defendant Houston & Texas Central Railway Company in the capacity of car inspector in its yards in the city of Ft. Worth, and that the duties of his employment consisted of inspecting the cars in the yards of said company and ascertaining whether or not the same were in need of repairs and were in fit and proper condition. The allegations of negligence on the part of the Houston & Texas Central Railway Company are as follows:

"That it was then and there the duty of the defendant Houston & Texas Central Railway Company, to exercise ordinary care to furnish plaintiff with a reasonably safe place in which to perform his work and to exercise a like degree of care to maintain the same in a reasonably safe condition. But the said defendant Houston & Texas Central Railway Company, its agents, and employes negligently and carelessly caused and permitted said car to come into its yards in the condition aforesaid, well knowing that plaintiff and others of similar employment would be working around and near said car. Defendant Houston & Texas Central Railway Company, its agents, and employes negligently and carelessly permitted said car, in its dangerous and defective condition with its contents aforesaid, to be and remain in said yards. That said car in its then condition with its contents aforesaid, being and remaining in said yards, rendered the place where plaintiff was required to perform his work dangerous and unsafe. And plaintiff alleges that the said de-

fendant Houston & Texas Central Railway Company, its agents, and employes knew, or by the exercise of ordinary care could and should have known, of the defective and dangerous condition of said car, with its contents aforesaid, and in the light of the attending circumstances could and should have foreseen such injury and damage as plaintiff suffered as the natural and probable consequence thereof. That in all of said acts, the defendant Houston & Texas Central Railway Company was guilty of negligence which proximately caused all of plaintiff's injury and damage."

It was alleged that the negligence of each and all of the defendants was the proximate cause of the plaintiff's injury, and judgment was asked against each for the damages resulting to the plaintiff by reason of his injuries.

The trial was before a jury, who returned a verdict in favor of the two oil companies and the Ft. Worth & Denver City Railway Company in obedience to a peremptory instruction from the court; but a judgment was rendered in favor of the plaintiff against the Houston & Texas Central Railway Company for the sum of \$13,750 upon evidence heard and a charge submitting the issue of liability of that railway company as a controverted issue, from which judgment that defendant has prosecuted this appeal.

The record does not show upon what theory the peremptory instruction was given in favor of the other three defendants, nor does it appear in the record that the plaintiff took any bill of exception to that instruction.

The car was loaded with 8,760 gallons of gasoline and 1,260 gallons of naphtha, the naphtha being mixed with the gasoline in order to reduce the vapor tension of the latter. According to the testimony of O. C. Baker, an employe of the Corsicana Petroleum Company, who had charge of the loading of the cars of that company, the car was a steel frame car, the body of which was tested to stand a pressure of 60 pounds to the square inch, and the pop-off valves were tested to stand a pressure of 12 pounds to the square inch. The car belonged to the Magnolia Petroleum Company, who sold its contents to the Corsicana Petroleum Company, and furnished the car to the latter company for the shipment of said contents. According to other testimony, which seems uncontroverted, the plugs in the pop-off valves could be raised by prizing them up with an iron bar and the valves were equipped with springs and screws by means of which the pressure inside of the car could be regulated; in other words, the valves could be so regulated that the pressure inside the car would exhaust through the valve whenever it reached a certain tension.

According to the testimony of the witness A. G. Craft, introduced by the defendant, who was joint car inspector for the different railroads in Ft. Worth, including the two defendant railway companies, the morning after the accident the dome cap of the car in question was again screwed into the manhole

and steam was inserted for the purpose of determining whether or not the pop-off valves were in proper condition. He testified that as the result of this test the plugs in the pop-off valves lifted and permitted the steam to escape when the pressure reached the stage of 20 or 22 pounds to the square inch, but not until it reached that pressure. This witness further testified, however, that with that pressure no steam escaped around the edges of the dome cap, his testimony as to the fact last stated being introduced by the plaintiff as tending to show that the pressure in the car at the time of the accident was greater than 22 pounds to the square inch. The car reached Ft. Worth and was delivered to the Houston & Texas Central Railway Company by the Ft. Worth & Denver City Railway Company at 3:30 o'clock p. m. on March 14, 1915, and A. G. Craft, the joint car inspector, testified that he inspected the car at the time of the delivery and heard no escape of gas therefrom, and discovered no defect in its condition, nor any evidence indicating any danger of explosion. As stated above, the accident happened shortly after 6:30 o'clock during the same afternoon.

After giving the usual definitions of ordinary care and negligence, the sixth and seventh paragraphs of the court's charge to the jury, in presenting the plaintiff's case against the Houston & Texas Central Railway Company read as follows:

"(6) You are instructed that it is the duty of the master to exercise ordinary care to furnish his servant with a reasonably safe place in which to perform his work and to exercise a like degree of care to maintain the same in a reasonably safe condition. A failure so to do is negligence.

"(7) Bearing in mind the foregoing definitions and instructions, if you find and believe from the evidence that on or about the 14th day of March, 1915, the defendant Houston & Texas Central Railway Company caused or permitted a certain tank car containing highly explosive and dangerous substance to be brought into its yards in the city of Ft. Worth, and that said car was in such condition as that said substance or substances escaped therefrom, and that in such condition it was dangerous and unsafe, and that the presence of same in said yards rendered the place where the plaintiff was working and required to be at work dangerous and unsafe, and the said Houston & Texas Central Railway Company, or its agents and employes, permitted said car to so remain in said yards in such condition; and if you believe and find from the evidence that said car, in its then condition, being and remaining in said yards rendered the place where plaintiff was working and required to work dangerous and unsafe, and you further find that said Houston & Texas Central Railway Company, its agents, and employes, knew or by the exercise of ordinary care should or could have known, of the dangerous condition of said car, if such was its condition, and you further find that said Houston & Texas Central Railway Company, its agents, and employes, knew or by the exercise of ordinary care should have known that the presence of said car in said yards in the condition you may find it was in rendered the place where plaintiff was required to work dangerous and unsafe, if you find that it did render such place dangerous and unsafe, and you further believe and find that said acts and omissions of said defendant company, its servants,

and employes, if any, were negligence, as that term has been heretofore defined, and you further find that such negligence, if any, was the proximate cause of plaintiff's injuries, if any, and you do not find for the defendant under other instructions herein given you, your verdict will be for the plaintiff, R. S. Ray, and against the defendant Houston & Texas Central Railway Company."

[1,2] Error has been assigned to both of those instructions substantially upon the ground that the evidence did not warrant a recovery upon the theory of negligence in failing to provide the plaintiff with a reasonably safe place to work, or that it was guilty of negligence in failing to maintain the same in a reasonably safe condition, and we are of the opinion that those assignments must be sustained. According to the allegations in plaintiff's petition and the undisputed evidence, plaintiff was employed for the express purpose of inspecting cars in order to determine whether or not they were in a safe condition for use by the company. The evidence further shows that it was within the scope of the duties of plaintiff's employment to remedy any defects in the cars which he might discover upon inspection and which could be repaired by him. Plaintiff's employment necessarily required him to go upon cars that were in an unsafe and dangerous condition, for the purpose of determining and repairing that condition, and it is well established that the general rule given in the court's charge which requires the master to exercise ordinary care to furnish the servant with a reasonably safe place to work has no application to that character of employment under such circumstances. See *S. A. & A. P. Ry. Co. v. Weigers*, 22 Tex. Civ. App. 344, 54 S. W. 910; *Wells Fargo Express Co. v. Page*, 29 Tex. Civ. App. 489, 68 S. W. 528; 3 *Labatt's Master and Servant* (2d Ed.) §§ 924, 1176, and authorities there cited.

In *Allen v. G., H. & S. A. Ry. Co.*, 14 Tex. Civ. App. 346, 37 S. W. 171, in which a right of error was denied by our Supreme Court, the following was said:

"Ordinarily, the master owes his servant the duty of inspection or reasonable care in furnishing him safe and suitable means for performing his work. This rule has no reference to the safety and condition of the thing the servant is employed to repair or complete. As stated in *Carlson v. Railway Co.*, 21 Or. 450, 28 Pac. 497: 'Where a servant is employed to put a thing in a safe and suitable condition for use, it would be unreasonable and inconsistent to require the master to have it in a safe condition and good repair for the purpose of such employment.'"

To the same effect are numerous decisions collated in notes to *Forbes v. Gorman*, 25 L. R. A. (N. S.) 321.

In many of the authorities announcing that the general rule requiring a master to furnish a safe place for the servant to work does not apply in such cases, it is stated that the servant assumes all such risks. The underlying principle of the exception, as we understand it, is that no negligence can be charged to the master when the servant vol-

untarily contracts to assume the very risk of which he complains; and, in the absence of negligence on the part of the master, the servant has no cause of action as a matter of course. The use of the expression in the authorities referred to, that the servant assumes the risk, is misleading, in that the defense of assumption of risk implies negligence on the part of the master creating liability for the damages sustained, unless such a right of action is destroyed by that defense. It is important to keep this distinction in mind, if the common-law rule of allowing the defense of assumed risk where the master has been guilty of negligence is changed by statute, as has been done in this state, and if that statute applies in the present suit. If there has been no negligence on the part of the master, then the defense of assumed risk has no place in the case.

[3] The appellant Railway Company owed the duty to its other employes and to strangers, whose presence might reasonably be expected sufficiently near the place of the accident to suffer injury from such an explosion, to exercise ordinary care to see that the car was in a proper condition to avoid such explosion. Appellant is a corporation and could discharge that duty only by employing some one to perform it, and it would be unreasonable to say that it owed the duty to see to it that the car which needed repairs was already in a safe condition before the servant employed to repair it was called on to perform that service.

[4] Of course, the master is not exonerated from all duties for the protection of the servant employed to remedy such defects. There may be unusual circumstances rendering the situation of the servant extraordinarily hazardous and of which circumstances the servant is excusably ignorant, and the master may be liable for an injury resulting therefrom through a negligent failure to remedy them, or to inform the servant thereof. For illustration: In *Clark v. Johnson County Tel. Co.*, 146 Iowa, 428, by the Supreme Court of Iowa, reported in 123 N. W. 327, it was said:

"While it is true that a servant employed to make a dangerous place safe assumes the risk of the very danger which he undertakes to remove, he does not assume the risk of the method employed in doing such dangerous work if that method is unnecessarily hazardous in respects as to which the employe has no knowledge, provided that in these respects the employment could have been rendered less hazardous by the exercise of reasonable care on the part of the employer."

Other illustrations might be given, such as the negligent failure to inform an inexperienced servant of the dangers incident to repair work when his ignorance of such danger was known to the employer.

[5] Plaintiff alleged no such unusual facts or circumstances as would exempt him from the operation of the general rule applicable to servants employed to repair defective machinery or other equipments. His petition

contained no allegation that he was inexperienced in such work, ignorant of the dangers incident thereto, that such ignorance on his part was known to appellant and that appellant was guilty of negligence in failing to warn him of such dangers before he was directed to perform the service. So far as appears from the pleadings and the evidence, the only employes whose duties required such work as plaintiff was doing at the time of the accident were car inspectors. The plaintiff and Craft, the joint car inspector, were charged with the same duties. The theory advanced in plaintiff's brief, and also in his pleadings, was that the defects and dangerous condition of the car were present at the time the car was delivered to appellant by the Ft. Worth & Denver City Railway Company and at the time Craft inspected it; and the evidence of Utley, the switchman who handled the car from the time it was received, to the effect that the car was emitting a hissing sound at that time and continuously up to the time of the accident, and the testimony of Malone, the yard clerk who checked the car, to the effect he heard the same noise emanating from the car about 5 o'clock in the afternoon of the date of the accident, is cited by appellee to establish that fact. If plaintiff had been called upon to perform the same service as soon as the car was received by appellant, and the same accident had then happened, clearly he would be in no position to claim liability on the part of the defendant for such injuries. If, instead of him, Craft had then attempted to perform the same service, exercising proper care, as the jury found the plaintiff did, and he had been injured, as plaintiff was injured, as a result of such defects, it is equally clear that he would have had no cause of action. If, in the performance of the service which plaintiff was performing on the occasion of the accident, he acted as a person of ordinary prudence would have acted under the same or similar circumstances, as found by the jury, then it must be presumed that Craft would have pursued the same course and would have suffered a like injury if he had discovered the alleged defects and had attempted to remedy them, when the car was first delivered to appellant by its connecting carrier. Upon what principle can plaintiff in the present suit insist that Craft should have suffered an injury rather than himself, and that appellant should respond in damages to him for Craft's failure to take that risk? It is difficult to perceive upon what theory the defendant would be liable to the plaintiff for the accident that did happen to him and would not have been liable to plaintiff, if, from the same causes, the same accident had happened immediately upon receipt of the car by appellant some three hours earlier than the time the accident did happen. If car inspectors were the only employes hired to inspect and repair such cars, and if the

duties of their employment which they voluntarily assumed and contracted to perform, knowing the dangers and risks incident thereto, required them to inspect and repair cars in the condition the car in controversy was, then, in the absence of some extraordinary circumstance of the character suggested above, we fail to perceive any basis for a charge of negligence on the part of the employer predicated solely upon the fact that the car was a dangerous place to work.

By different assignments appellant contends that the alleged negligence on its part, upon which plaintiff based his suit, was not, as a question of law, the proximate cause of the injury, and that therefore the court erred in submitting to the jury any issue as a basis for a verdict in plaintiff's favor. By one of those assignments it is insisted that the evidence shows without controversy that the escaping gas was ignited by coming in contact with plaintiff's lantern, which he had left upon the ground near the car, and that his act in so leaving it was the proximate cause of his injury. By two other assignments it is contended that the act of Pettigrew and Clopton in unscrewing the dome cap was the proximate cause of the accident and injury, and that plaintiff in his pleadings had not alleged that Clopton and Pettigrew were guilty of negligence in so doing or that appellant was in any manner liable therefor.

The principal argument advanced in support of those assignments is, substantially, that each of those acts was an intervening agency causing the injury, wholly independent of the alleged negligence of appellant and wholly disconnected from it. Many authorities are cited in support of those assignments, such as *T. & P. Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162; *Commercial Assurance Co. v. Gulf Refining Co.*, 174 S. W. 874; *G. C. & S. F. Ry. Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652; *Newnom v. S. W. Tel. Co.*, 47 S. W. 669; *S. W. Tel. & Tel. Co. v. Keys & Casey*, 50 Tex. Civ. App. 648, 110 S. W. 767; *Stone v. B. & A. Ry. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

[6] The foregoing conclusions upon assignments first discussed render it unnecessary to discuss these, but, in view of another trial, we deem it proper to suggest that intervening agencies between an act or omission constituting negligence and an injury does not preclude a finding that the negligence was the proximate cause of the injury, if it reasonably can be said that the injury was the natural and probable consequence of such negligence, and that in the light of the attendant circumstances some such injury ought reasonably to have been anticipated as a probable result of such negligence. *Mexican Nat. Ry. v. Mussette*, 86 Tex. 708, 26 S. W. 1075, 24 L. R. A. 642; *Gonzales v. Galveston*, 84 Tex. 3, 19 S. W. 284, 31 Am. St.

Rep. 17; *Texas & Pac. Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162; *Reynolds v. G., H. & S. A. Ry.*, 101 Tex. 2, 102 S. W. 724, 130 Am. St. Rep. 799; *Stone v. Boston & A. Ry.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

[7] It is proper to note further that the question whether or not an injury of the character of the one in controversy ought reasonably to have been anticipated as a probable result of the negligence alleged should be specifically submitted to the jury for their determination, if the court is requested so to do, unless by reason of an absence of proof or conclusiveness of proof to sustain the affirmative of that issue a peremptory instruction thereon would be warranted. *T. & P. Ry. v. Reed*, 88 Tex. 439, 31 S. W. 1058; *Washington v. M., K. & T. Ry.*, 90 Tex. 314, 38 S. W. 764; *Mex. Nat. Ry. Co. v. Mussette*, 86 Tex. 708, 26 S. W. 1075, 24 L. R. A. 642.

Appellant presents the further contention that the proof showed that at the time of the accident plaintiff was performing a service pertaining to interstate commerce; that the alleged negligence upon which a recovery was sought did not consist of any violation of the federal Safety Appliance Act, passed April 22, 1906; that, under the established rule obtaining under such circumstances, plaintiff assumed the risk of his injury since, from his own testimony, it conclusively appears that before and at the time he undertook to relieve the pressure of gas in the car he knew of the alleged defect and of the dangers incident to his attempt to remedy it, citing, among other authorities, *N. Y. Central Ry. & Hudson River Ry. v. Carr*, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298; *S. A. L. Ry. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *St. L. S. W. Ry. v. Hynson*, 101 Tex. 543, 109 S. W. 929; *St. L. S. W. Ry. v. Mathis*, 101 Tex. 842, 107 S. W. 530; *Snipes v. Bomar Cotton Oil Co.*, 161 S. W. 1, by our Supreme Court.

The trial court in express terms charged the jury that plaintiff was engaged in handling interstate commerce at the time of his injury. The evidence cited by appellant to show that plaintiff was so engaged consisted of proof that at the time of the accident the car in controversy was one of a train of cars already made up and standing on a side track ready to leave on a trip south, although no engine had yet been attached for the trip; that several other cars in the train were loaded with interstate traffic, some originating in Kansas, some in Missouri, and some in Colorado, most of which were destined for Galveston, Tex. Neither by an exception to that instruction nor by briefs here has the plaintiff questioned the correctness of that instruction. However, in view of another trial, we suggest that, even if plaintiff was so engaged, yet, as shown already, the immediate occasion of the explosion was

the further loosening of the dome cap by Pettigrew and Clopton; and by reason of that fact we doubt the application of the rule of assumed risk upon the theory advanced by appellant, unless it can be said that in so doing Pettigrew and Clopton were acting under the direction of plaintiff, or with his consent and approval, or that after he discovered that they would proceed to further unscrew the cap, and before they did so, plaintiff voluntarily remained in a place of known danger, and that if he had desired to do so, he had sufficient time and opportunity to leave the car and place himself in a place of safety before the explosion occurred; with respect to which issues there was some controversy in the evidence.

[8] We believe that the evidence was sufficient to warrant the submission of the issue of future impairment of plaintiff's ability to earn money, contrary to appellant's contention presented in another assignment. But we are of the opinion that appellant was entitled to an instruction to the jury presenting in an affirmative manner the group of facts upon which it relied to refute the charge of negligence upon which plaintiff's suit was predicated. *E. P. & S. W. Ry. Co. v. Foth*, 101 Tex. 133, 100 S. W. 171, 105 S. W. 322; *Yellow Pine Lumber Co. v. Noble*, 101 Tex. 125, 105 S. W. 318; *St. L. S. W. Ry. Co. v. Johnson*, 100 Tex. 237, 97 S. W. 1039; *St. L. S. W. Ry. Co. v. Hall*, 98 Tex. 480, 85 S. W. 786; *Wells Fargo Co. v. Benjamin*, 179 S. W. 513. The court not only failed to give any such instruction in his main charge but refused two requested by appellant. One of those so requested reads as follows:

"If you believe from the evidence plaintiff's injury resulted from a pure accident and was not proximately caused by the negligence on the part of any one, then you are instructed to find for defendant Houston & Texas Central Railway Company."

That instruction, or some other of like import, should have been given. *G., H. & S. A. Ry. Co. v. Washington*, 94 Tex. 510, loc. cit. 517, 63 S. W. 584.

For the reasons indicated the judgment is reversed, and the cause remanded.

On Rehearing.

As noted in our opinion on original hearing, plaintiff has never questioned the correctness of the peremptory instruction to the jury by the trial judge to return a verdict in favor of defendants, the Magnolia Petroleum Company, the Corsicana Petroleum Company, and Ft. Worth & Denver City Railway Company, and no complaint has been made by him, either in the trial court nor in this court, of the judgment in favor of those defendants based on a verdict in their favor in obedience to the instruction.

In our original opinion it was our intention to leave that part of the judgment undisturbed and to reverse only that part of the

judgment rendered in favor of plaintiff against appellant, the Houston & Texas Central Railway Company, and to remand the case for another trial as between plaintiff and that defendant only; and the judgment so rendered by us and the opinion filed will therefore be amended and reformed so as to give effect to that intention.

JENKINS et al. v. MORGAN. (No. 8385.)

(Court of Civil Appeals of Texas. Ft. Worth. June 3, 1916. On Motion for Rehearing, July 1, 1916.)

1. PAYMENT \S 38(1) — APPROPRIATION BY DEBTOR—VOLUNTARY PAYMENT.

Where a creditor has several claims against a debtor, a voluntary payment must be applied to the debt designated by the debtor.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. \S 90, 128; Dec. Dig. \S 38(1).]

2. APPEAL AND ERROR \S 786 — ASSIGNMENT OF ERROR—INCLUDING ERRORS IN ONE ASSIGNMENT.

An assignment of error, which is a combination of several assignments contained in the motion for a new trial, is insufficient.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3028, 3029; Dec. Dig. \S 736.]

3. APPEAL AND ERROR \S 728(1)—ASSIGNMENT OF ERROR—SPECIFICATION—EVIDENCE.

An assignment of error, which complains of evidence rulings as to several witnesses, and fails to set out the objections made to such rulings, is insufficient.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3010; Dec. Dig. \S 728(1).]

4. APPEAL AND ERROR \S 490(3) — ASSIGNMENTS OF ERROR—SPECIFICATION—GROUND FOR OBJECTION.

An assignment of error is insufficient, where neither it, nor the bill of exceptions to which it refers, states what objections were made to the evidence in question.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 2297; Dec. Dig. \S 490(3).]

5. APPEAL AND ERROR \S 213 — RESERVING GROUND FOR REVIEW—SPECIAL ISSUES—SEPARATE REQUESTS.

Where a request to submit a special issue contained two propositions, one of which was submitted to the jury, the failure to submit the other is not reversible error, in the absence of a separate request to do so.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 1149, 1165, 1304-1308; Dec. Dig. \S 213.]

6. APPEAL AND ERROR \S 1062(2)—HARMLESS ERROR—FAILURE TO SUBMIT ISSUE—CURE BY VERDICT.

Under an issue of breach of warranty, failure to submit an issue whether plaintiff agreed to send defendant an expert to rig and operate the stump puller in question is not reversible error, where the jury found that the only warranty made related to what stumps the machine could pull.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4213; Dec. Dig. \S 1062(2).]

7. NEW TRIAL \S 108(3)—GROUNDS—NEWLY DISCOVERED EVIDENCE—SUFFICIENCY.

The trial court correctly denied a motion for new trial because of newly discovered evidence, which was based upon an affidavit that the lever to a stump puller, for whose purchase

price the note sued upon was given, was about 20 feet long, instead of 18 feet, as stated at the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 223, 227; Dec. Dig. § 108(3).]

On Motion for Rehearing.

8. CHATTEL MORTGAGES § 110—CONSTRUCTION—FUTURE ADVANCES.

A chattel mortgage, with a printed clause covering future indebtedness up to \$150, does not cover an indebtedness of \$155 for a stump puller, where the parties intended the clause to cover future indebtedness for store supplies.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 192; Dec. Dig. § 110.]

9. CHATTEL MORTGAGES § 240—PAYMENT—DELIVERY OF MORTGAGED PROPERTY.

Where a creditor held chattel mortgages on a debtor's cotton and stump puller, a credit obtained by delivering some of the mortgaged cotton to the mortgagee should be applied on the cotton mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 505, 506; Dec. Dig. § 240.]

Appeal from Johnson County Court; B. Jay Jackson, Judge.

Action by R. Morgan against W. N. Jenkins and others. Judgment for plaintiff, and defendants appeal. Affirmed as modified.

The first two assignments of error, and appellee's counter assignments thereto, are as follows:

First Assignment of Error.

The court erred in sustaining the appellee's objection to the testimony of Lon Hopkins, Kelley Stevenson, and John Jenkins, and in refusing to allow their evidence to go to the jury, which testimony would have been to the effect that they had seen other stump pullers in operation, and knew the amount of power or force used by other stump pullers, and had seen the appliances and equipment used, and that they had seen the stump puller in question, and that it would not do what they had seen other stump pullers do; it was not a satisfactory stump puller, was not first-class in every particular; with the same equipment and appliances it would not do the work they had seen other stump pullers do; that it would not pull stumps of the same or similar size, under the same or similar conditions, they had seen other stump pullers pull; that it would not pull stumps in size up to two feet in diameter; that it was not a success; that it would not do satisfactory work, and that it had no value as a stump puller.

First Counter Proposition to First Assignment.

The purported bill of exception, to the exclusion of the testimony of Lon Hopkins and the other witnesses referred to in the assignment, is fatally defective, and should not be considered, because it does not set out the objections made to the testimony in the lower court.

Second Counter Proposition to First Assignment.

The assignment is multifarious, and attempts to present two or more distinct questions, and therefore should not be considered.

Third Counter Proposition to First Assignment.

The jury having found that the only warranty made by the appellee of the stump puller was that it would pull any stump that any other puller of the same size would pull, evidence concerning other stump pullers was inadmissible,

in the absence of evidence showing that they were the same size of the puller in controversy. As the appellants failed to show that the pullers referred to by the witnesses were the same size as the puller in controversy, the testimony was not relevant.

Fourth Counter Proposition to First Assignment.

The testimony was not admissible, on account of being mere opinions of the witnesses, and it was not shown that they were qualified to express such opinions. The question of their qualification was for the determination of the trial court, and is not reviewable, except on a showing of abuse of the discretion.

Fifth Counter Proposition to First Assignment.

No error was committed, because the court finally admitted all of the material facts which appellants state in the assignment were excluded.

Second Assignment of Error.

The court erred in permitting witnesses Kirby, Martin, Pierson, and Hill to testify as to the demonstration or experiment made on the farm of Henry Martin, and to the effect that the stump puller evidenced no difficulty, and seemed to do all that a stump puller could do, all of which was inadmissible, because the conditions of the experiment and appliances used were not similar to the stump puller used by Jenkins.

First Counter Proposition to Second Assignment.

No error is presented because other witnesses were permitted to testify without objection to the same facts testified to by Kirby, Martin, Pierson, and Hill complained of in the assignment.

Second Counter Proposition to Second Assignment.

It was not necessary that the conditions surrounding the demonstration or use of the puller on the Martin farm should be the same as when it was in use by Jenkins. The appellee merely took the puller out and pulled stumps, and the testimony of the action of the puller while in use was admissible on the plea of breach of warranty and the contention that the puller was worthless and would not pull stumps.

Third Counter Proposition to Second Assignment.

No error is presented, because the conditions under which the puller was used or demonstrated at the Martin farm were substantially similar to the conditions under which Jenkins used it.

Fourth Counter Proposition to Second Assignment.

Appellants contend the testimony was not admissible because a different lever was used. The lever was not a part of the puller, and when Jenkins bought the puller he made his own lever. When he brought the puller back at the time the demonstration was made on Martin's farm, he did not bring his lever; hence it became necessary for the appellee to furnish one. This circumstance did not affect the admissibility of the testimony.

Johnson & Harrell, of Cleburne, for appellants. Walker & Baker, of Cleburne, for appellee.

BUCK, J. Appellee brought this suit upon two promissory notes; the first note being in

the principal sum of \$418, signed by appellants, W. N. Jenkins and J. A. and W. L. Donoho, and secured by a chattel mortgage signed by Jenkins on 2 mules, 45 acres of cotton, 50 acres of corn, a cultivator, and a wagon. The second note was in the principal sum of \$155, secured by a chattel mortgage on one stump puller; note and mortgage signed by Jenkins alone. Plaintiff sued for his debt, evidenced by the two notes, principal, interest, and attorney's fees, and for foreclosure of his mortgages.

Appellants pleaded that there had been a payment by Jenkins of \$105.10, by cotton delivered by him to Morgan, and that Jenkins had requested at the time of said delivery that it be applied on the \$418 note; the payment having been by defendant applied on the \$155 note. This payment was in addition to the settlement of an open account owing to Morgan by Jenkins, the payment of which is not objected to by appellants in their brief. Appellants further pleaded that it was the agreement and understanding of all parties that the mortgage taken to secure the \$418 note should be made payable to the Donohos, who signed the note as accommodation paper, instead of being made payable to Morgan. Jenkins pleaded further that the stump puller, for which he had given the \$155 note and the second mortgage, did not comply with the warranties made and did not do the work promised, and that after a thorough test of said stump puller, and after its inability and unfitness to do the work promised had been thoroughly established, he had returned it to Morgan, and that the second note and mortgage should be canceled for failure of consideration. Other pleas were contained in the original and supplemental pleadings of the parties, but sufficient, we think, has been given for the purpose of this opinion.

The cause was submitted to the jury on special issues, and in answer thereto the jury found:

(1) That plaintiff did not agree to accept the note for \$418, signed by Jenkins and the two Donohos, unsecured by a mortgage in his (Morgan's) favor, and did not agree that the mortgage given by Jenkins should be in favor of the Donohos.

(2) That the defendants agreed that the open account of Jenkins to Morgan should be paid out of the proceeds of the crop of Jenkins before the payment of the note for \$418.

(3) That the defendant knew at the time it was made the kind of mortgage executed by Jenkins to Morgan.

(4) That the only warranty made by Morgan as to the stump puller was that "it would pull any stump that any puller of same size would pull."

(5) That the stump puller had not failed to comply with the warranty made, and that Jenkins had made no complaint to Morgan

during the year 1914 as to any alleged failure.

(6) That Jenkins instructed plaintiff to apply the proceeds of the eight bales of cotton sold, first, to the open account; and, second, to the \$418 note.

Other issues were presented and answered, but, except as noted hereafter in this opinion, the above we consider sufficient for this statement.

Upon this verdict the court entered judgment as follows: Prorating the \$105.10, crediting \$76.64 on the \$418 note, and \$28.41 on the \$155 note, and giving a judgment for plaintiff against all parties defendant for balance of \$418 note, to wit, \$399.23, and giving judgment for plaintiff against Jenkins for balance of \$155 note, or \$147.87, with a foreclosure of both mortgages. Defendants appeal.

[1] We conclude that the trial court erred in prorating the \$105.10 payment between the two obligations. The jury found, as they were justified by the evidence, that Jenkins instructed plaintiff to apply this payment on the \$418 note. This he had a right to do. If a creditor, having several debts against a debtor, receive a voluntary payment from the debtor with instructions to appropriate it to one of them, it must be so appropriated. *Eylar v. Read et al.*, 60 Tex. 387, 389; *Larkin v. Watt*, 32 S. W. 552; *Crawford v. Pancoast*, 62 S. W. 559; 4 *Green's Digest*, 8845-8846, and authorities there cited; 30 Cyc. 1227 et seq. Therefore we sustain appellants' fourth assignment, which urges as error this action of the court.

[2-4] We feel that appellee's objection to the consideration of appellants' first and second assignments must be sustained, because (1) they are not even substantial copies of any assignment contained in the motion for new trial, being, at best, only a combination and a reconstruction of several assignments therein contained; (2) they are multifarious, and complain of the exclusion in the one instance, and the admission in the other, of the testimony of several witnesses, and they do not set out the objections urged thereto in the trial court; (3) the bill of exceptions to which reference is made to sustain assignment No. 1 does not state what objections were urged to the admission of the testimony. *Buckler v. Kneezell*, 91 S. W. 367; *Dixson v. Cooper*, 178 S. W. 695; *Watson v. Patrick*, 174 S. W. 633; *National Live Stock Ins. Co. v. Gomillion*, 174 S. W. 830; *Ruth v. Cobe*, 165 S. W. 530. Moreover, we are of the opinion that, were the assignments given consideration, no reversible error would be found, for the reasons, in the main, set forth in appellee's counter assignments.

[5, 6] The third assignment urges error in the failure of the court to submit the following special issue:

"Did the plaintiff, R. Morgan, in the sale to the defendant, W. N. Jenkins, of the stump pull-

er in question, guarantee the same to give satisfactory service as a stump puller with the team of mules then owned by the defendant, Jenkins, and that he (Morgan) would send a competent person, or expert, to show the defendant, Jenkins, how to rig and operate said stump puller?"

If this assignment be not subject to the vice of multifariousness, as urged by appellee, and therefore not required to be considered by us, we are of the opinion that the first question was submitted and answered in special issue No. 7 given, to wit:

"Did the plaintiff, R. Morgan, in the sale to the defendant, Jenkins, of the stump puller in question in this suit, guarantee the same to give satisfactory service as a stump puller with the team of mules then owned by the defendant, Jenkins?" To which the jury answered: "No."

If the defendants desired the submission of the other question contained in the special charge tendered, it was their duty to submit it separately, and their failure so to do would preclude their successfully urging error to the court's action in failing to submit two issues in the same special charge, one of which had been already submitted in the main charge. *Griffin v. Heard*, 78 Tex. 607, 14 S. W. 892; *McWhirter v. Allen*, 1 Tex. Civ. App. 649, 20 S. W. 1007; *G., etc. Ry. Co. v. Clark*, 2 Willson Civ. Cas. Ct. App. § 512. Moreover, if there had been a promise on the part of plaintiff to send an expert to show Jenkins how to "rig and operate the puller," it was no part of the warranty; the jury having found that the only warranty made by plaintiff was that the stump puller "would pull any stump that any puller of same size would pull." The evidence, further, was contradicted that the appellee did send a representative out to Jenkins' place twice for the purpose of showing Jenkins how to rig and operate the puller. It is true that defendants claim that such representative was not an expert; but, in view of what we have heretofore said, we do not think any reversible error is presented in this assignment.

[7] The fifth assignment is as follows:

"The court erred in refusing to set aside the judgment and grant the appellants a new trial, because of the newly discovered evidence as to the experiments or tests made by the appellee, Morgan, with the stump puller on the farm of Henry Martin, which newly discovered evidence shows said experiments to have been made by a different stump puller, or a stump puller with different appliances and equipment than the Jenkins' stump puller."

We do not think there is any merit in this contention. It is uncontradicted that the same stump puller was used in both tests. So far as the record discloses, the only difference in the equipment of the stump puller as used by Jenkins on his farm, and as used by Morgan on the Martin farm, was as to the lever. The plaintiff testified, and his testimony is uncontradicted, that it is not customary to furnish a lever with a stump puller. Martin made his lever out of a green sapling, and it was claimed by plaintiff and some of the witnesses that the lever, being green, would under strain bend or "cup up."

Morgan constructed a lever by nailing two timbers 2x8 and 18 feet long together. The only difference between the testimony of plaintiff's witnesses and the witnesses whose affidavits were offered on the motion for new trial, as to this lever, was that plaintiff's witnesses testified that the lever was 18 feet long, and one of defendants' affiants stated that the beam was "about 20 feet long." After an examination of the affidavits attached to defendants' motion for a new trial, we have concluded that the trial court did not err in overruling the motion, and the fifth and last assignment is overruled.

For the reasons given, the judgment of the court below will be reformed, so as to appropriate the entire payment of \$105.10 to the \$418 note, and, as so reformed, the judgment will be affirmed, with the costs of appeal taxed against appellee.

On Motion for Rehearing.

[8] Appellee presents an insistent motion for rehearing, contending that the \$105.10 prorated by the court below, and by this court wholly allowed as a credit on the \$418 note first declared upon in appellee's petition, was not a voluntary payment by the defendant Jenkins, in the sense that he was thereby, as we held, entitled to direct its application, and that therefore appellee had the right, under the authorities hereinafter cited, to apply the payment in whole or in part to the note for \$155, also declared upon. The basis for the contention is a provision in the mortgage given to secure the first note that in general terms is made to apply to any future indebtedness, and the following cases are cited in support of the contention: *Case Threshing Machine Co. v. Matthews*, 188 Mo. App. 429, 174 S. W. 198; *Rush v. First National Bank*, 160 S. W. 325; *Taylor & Co. v. Cockrell*, 80 Ala. 236.

In the case first cited, which was by a Missouri Court of Appeals, it was said, among other things, that:

"Where a creditor holds several securities for the same debt, he is entitled to enjoy the full benefit of all without restriction, unless some contractual stipulation provides otherwise. For instance, if the creditor holds several notes, as here, against the same debtor, all of which are secured by a mortgage, and on one or more of the notes a personal security is bound as well, he is entitled to the benefit of all of the securities he has taken. Therefore, if the property be sold under the mortgage, the creditor may apply the proceeds of the sale to the payment of the notes not otherwise secured, and pursue the personal security for the payment of those to which he has affixed his name in assurance of their payment; otherwise, the creditor will be denied the right to the benefit of all of the security he has taken for the debt. The point has been expressly decided, as will appear by reference to the following cases: *Mathews v. Switzer*, 46 Mo. 301; *Sturgeon Bank v. Riggs*, 72 Mo. App. 239."

It is insisted that the facts of this case bring it within the principle so declared. We find that the mortgage given to secure the \$418 note signed by Jenkins and his sure-

ties, J. A. Donoho and W. L. Donoho, contains the following recitals:

"This conveyance, however, is intended as a trust for the better securing R. Morgan, of Grandview, Texas, in the payment of my indebtedness to them, the same being evidenced by a certain promissory note, of which the following is a substantial copy:

"\$418.00 Grandview, Texas, 5/23/1914.

"Oct. 1, 1914, after date, without grace, I, we, or either of us, promise to pay to the order of R. Morgan, of Grandview, Texas, four hundred and eighteen dollars, for value received, at the Farmers' & Merchants' National Bank, with interest from maturity at the rate of ten per cent. per annum and ten per cent. of principal and interest for attorney's fee, if placed in the hands of an attorney for collection.

"Due
"No. P. O. W. N. Jenkins."

"And, whereas, it is contemplated that the first party may hereafter become indebted unto R. Morgan, of Grandview, Texas, in the further sum or sums of money to the amount of \$150.00, either by note or open account, which said indebtedness now accrued, or to accrue in the future, it is agreed, shall all be payable at Grandview, Texas, and bear interest at the rate of ten per cent. per annum from date of actual accrual until paid, by whatever means the same shall accrue; and this conveyance is made for the security and enforcement of the payment of the said present and future indebtedness."

There is, therefore, at least apparent force in the contention appellee now makes that the error of the trial court, if any, was in not applying the entire \$105.10 payment to the \$155 note only secured by a chattel mortgage. But after a careful consideration of the entire record we find ourselves indisposed to disturb our original conclusions. In the first place, we are not all entirely agreed that the payment of the \$105.10 by Jenkins was not a voluntary payment, the writer particularly being inclined to think it was, in which event, under all of the authorities, Jenkins had the right to direct the application of the payment, as he undoubtedly did; and, second, that regardless of whether the payment was voluntary, we all are of opinion that its proper application is as announced in our original opinion. As we construe the evidence, we are not inclined to the view that the appellee's first mortgage covered the debt evidenced by the \$155 note. The provision quoted is evidently part of a printed form in common use by merchants who take crop mortgages, for the identical provision appears in the chattel mortgage given to secure the \$155 note, and to this debt nothing appears indicating that the provision has any relevancy. The evidence shows that the first mortgage matured by its terms on October 1, 1914. The second matured on November 15, 1914, and contains the following express provision:

"It is agreed that R. Morgan will extend the payment of this note [the \$155 note], or any part thereof, provided I am unable to pay it all this fall."

The second mortgage covered an indebtedness in excess of the indebtedness to which the future or contingent indebtedness was limited in the first, and, as shown by the

evidence, the future indebtedness in contemplation at the time of the execution of the first mortgage bears no relation to a stump puller, for which the second note was given, but had reference to the usual account for farm supplies. To illustrate: Appellee in testifying said:

"Mr. Jenkins read the mortgage that secured the \$418 note. He made no complaint about it. He had it in his hand and signed it. He heard the part of it read there that provides for \$150 additional indebtedness, and we discussed about Jenkins buying more goods from me. The account amounted to \$58.93. The books there will show the amount of this account."

At another point he testified:

"Jenkins had the mortgage [the \$418 mortgage] in his hands and signed it. We discussed about Jenkins running an account and buying goods from me."

The stump puller, for which the \$155 note was given, and upon which the second mortgage rested, seems to have been later secured by Jenkins in furtherance of an object altogether disconnected with farm supplies for that crop year. He testified:

"Some time later I wanted to buy a stump puller. There was about 65 acres of stumps on the place I was working, which belonged to Mr. George Hurley, and he told me that if I would clear it of stumps he would give me all I could make off of about 180 acres of land for two years. This 180 acres of land included the 65 acres that was in stumps. I had previously cleared a part of this land, and a part of it was in pasture; but I was to get all I could make off of the 180 acres for two years, if I would clear the 65 acres of stumps. I was trying to buy a stump puller, and was at Mr. Morgan's store in Grandview, Tex., and he told me that he had a stump puller there that he would sell me for \$155."

[9] If, as we think the evidence tends to show, the \$418 mortgage only covered the note therein specified and the account of \$58.93 for merchandise, in payment of which it is undisputed part of the mortgaged crop was applied, then it was proper to apply the \$105.10 payment on the \$418 note, regardless of Jenkins' direction to have it so done. As said in one of the cases appellee cites (Taylor v. Cockrell, 80 Ala. 236):

"The general rule is that, while a creditor has the right to apply a general payment, the debtor having made no specific application, the law, in the absence of an agreement to the contrary, applies a payment realized from a particular fund in relief of such fund. On this principle a mortgagee, in the absence of an agreement with the mortgagor, is bound to apply moneys realized from the sales of property covered by the mortgage to the mortgage debt; but, as between mortgagor and mortgagee, such money may, by the consent of the mortgagor, be applied to the payment of an unsecured debt."

In addition to what we have said, it may not be inappropriate to further observe that the record shows that appellee's mortgage was foreclosed on the stump puller yet in his possession, and there is no evidence pointed out tending to show that it is of less value than the amount of the \$155 indebtedness to secure which the mortgage was given, and it is therefore not apparent that appellee can be materially prejudiced by the

application made by this court of the \$105.10 payment.

We conclude, on the whole, that the motion for rehearing should be overruled; and it is so ordered.

McCAMANT v. McCAMANT et al. (No. 8379.)

(Court of Civil Appeals of Texas. Ft. Worth. May 27, 1916. On Motion for Rehearing, July 1, 1916.)

1. BILLS AND NOTES §299 — ACTION AGAINST INDORSER—TIME—STATUTE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 579, relating to the liability of an indorser, and providing how it may be fixed by suit against the maker, etc., in the district or county court, applicable to negotiable instruments indorsed after as well as before maturity, there was no cause of action against the payee and indorser of a note, where suit thereon was not filed before the first term to which suit could be brought after the right of action accrued, or before the second term of such court, and where the suit was not filed until more than a year after the maturity of the note, and where there was no showing of the indorser's waiver of the formalities requisite to fix his liability.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 680-705; Dec. Dig. § 299.]

2. JUDGMENT §558—SUIT FOR VACATION—GROUNDS—INSUFFICIENCY OF PETITION.

A judgment will not be set aside for defects or insufficiency in the pleadings, especially where the alleged defect was amendable or had been waived by joining issue and by going to trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 696, 701; Dec. Dig. § 558.]

3. JUDGMENT §18(2) — VOID JUDGMENT — WANT OF PLEADING.

Where a petition is defective in substance to the extent of failing to show a cause of action, a judgment for the plaintiff is null and void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 36; Dec. Dig. § 18(2).]

4. BILLS AND NOTES §299—LIABILITY OF INDORSER—PRIMARY OR SECONDARY LIABILITY.

An indorser is ordinarily only secondarily liable, and only in a case where the indorsement was made at the execution and delivery of the instrument is he primarily liable so as to dispense with the necessity of fixing his liability by compliance with statutes regulating the bringing of such suits at a given term.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 680-705; Dec. Dig. § 299.]

5. BILLS AND NOTES §299—LIABILITY OF INDORSER—PLEADING—EXCUSE OF DELAYING ACTION.

To bind an indorser where suit has not been brought within the time required by law, matters of excuse must be alleged and proven.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 680-705; Dec. Dig. § 299.]

6. JUDGMENT §485 — VACATION — INVALIDITY.

A judgment, the invalidity of which is apparent upon the record, may be successfully attacked at any time and under any circumstances.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 919; Dec. Dig. § 485.]

7. COURTS §35 — JURISDICTIONAL FACTS — PRESUMPTION.

Every presumption will be indulged in favor of the records of superior courts; and, if the record is silent as to jurisdictional facts, it will be aided by presumptions; but there can be no presumption against the record, so that where it recites jurisdictional facts not sufficient to confer jurisdiction, there can be no presumption that the recital is incorrect or incomplete.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 140, 141, 145, 146; Dec. Dig. § 35.]

8. JUDGMENT §386(2)—SUIT FOR VACATION — LACHES.

Neither lapse of time nor laches affect the right to vacate a judgment void on its face.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 736; Dec. Dig. § 386(2).]

On Motion for Rehearing.

9. BILLS AND NOTES §467(3) — ACTION AGAINST INDORSER — PLEADING — TIME OF TRANSFER.

A petition in an action against the maker, the payee and indorser of a note, alleging that the note was due and wholly unpaid; that plaintiff was an innocent holder for value; that the defendant payee in the note indorsed it in blank and in due course of business to the plaintiff, who became the owner and holder thereof for value, not expressly alleging the date of the indorsement—in effect averred that plaintiff acquired the note before maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1488; Dec. Dig. § 467(3).]

10. COMMON LAW §6—LAW MERCHANT—ADOPTION BY STATE.

The law merchant is part of the common law adopted by the state of Texas.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 6; Dec. Dig. § 6.]

11. BILLS AND NOTES §327—TRANSFER—"HOLDER IN DUE COURSE."

A "holder in due course" is one who has taken an instrument complete and regular on its face, and has become the owner of it before it was overdue (citing Words and Phrases, 2d Series).

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 792; Dec. Dig. § 327.]

12. BILLS AND NOTES §327—TRANSFERS—"BONA FIDE HOLDER FOR VALUE."

An innocent or "bona fide holder for value" of negotiable paper is one who has taken it in good faith for a valuable consideration in the ordinary course of business and when it was not overdue.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 792; Dec. Dig. § 327.]

For other definitions, see Words and Phrases, First and Second Series, Bona Fide Holder.]

13. JUDGMENT §248—VALIDITY—NECESSITY OF PLEADINGS.

Until their action is called in exercise by pleadings, courts have no more power to render judgment in favor of a person than they have to render judgment against a person until he has been brought within their jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 434; Dec. Dig. § 248.]

Appeal from Tarrant County Court; Charles T. Prewitt, Judge.

Suit by Mrs. Minnie May McCamant, on behalf of herself and as community administratrix of the estate of herself and of her de-

ceased husband, W. A. McCamant, against R. L. McCamant and others, to vacate a judgment obtained by defendant McCamant. Judgment against plaintiff individually and as community administratrix, denying the relief sought, and for costs of suit, and she appeals. Reversed, and cause remanded.

N. J. Wade, of Ft. Worth, for appellant. McCart, Curtis & McCart, of Ft. Worth, for appellees.

BUCK, J. On January 14, 1910, J. W. and J. H. Woodard, of Tarrant county, executed and delivered to Mrs. Minnie May McCamant, community administratrix of the estate of herself and her husband, W. A. McCamant, deceased, a certain note in the sum of \$700, due August 1, 1910. On January 1, 1911, Mrs. McCamant for the purpose of securing her brother-in-law, R. L. McCamant in the payment of certain indebtedness due him by the community estate of which Mrs. McCamant was administratrix, and to secure him against loss by reason of the payment of a certain \$400 note, which W. A. McCamant had, prior to his death, executed in favor of an El Paso bank, transferred and delivered the Woodard note to said R. L. McCamant, and indorsed on the back thereof as follows: "Minnie May McCamant, Community Administratrix." On October 30, 1911, suit was filed in the county court of Tarrant county for civil cases by R. L. McCamant on his note and against J. W. and J. H. Woodard and Minnie May McCamant, as community administratrix, the petition alleging, in part, as follows:

"That on, to wit, January 14, 1910, the defendants J. W. Woodard and J. H. Woodard, made, executed and delivered, for a valuable consideration, their certain promissory note of that date in the sum of \$700, payable to the order of Minnie May McCamant, community administratrix, payable on or before August 1, 1910, with interest after date at the rate of 8 per cent. per annum. Said note further stipulated that, should it not be paid at maturity and collected by an attorney or legal proceedings an additional sum of 10 per cent. on the amount of the note should be added as attorney's fees. And said note is long since due and wholly unpaid. That plaintiff is an innocent holder for value of said note, for that the defendant, payee in said note, indorsed the same in blank, and in due course of business plaintiff became the owner and holder of same for value, and brings this suit by his attorney to enforce collection of the same."

J. H. Woodard and Mrs. McCamant having been served, and Mrs. McCamant having filed her formal answer, consisting of general demurrer and general denial, on March 12, 1912, judgment was entered in favor of R. L. McCamant, plaintiff, against J. H. Woodard and Mrs. Minnie May McCamant, as administratrix, in the sum of \$903, principal, interest and attorney's fees. The judgment further recited that:

"Plaintiff asked that the defendant J. W. Woodard be dismissed from said cause; sheriff's return showing that said defendant was de-

ceased. It is therefore ordered that said cause be, and it is hereby, dismissed as to said defendant, at the cost of the plaintiff."

On October 8, 1914, this suit was filed by Mrs. Minnie May McCamant in the same court, in which R. L. McCamant recovered the judgment hereinabove set out. Mrs. McCamant, on behalf of herself and as community administratrix of the estate of herself and deceased husband, sought to have vacated the judgment of March 12, 1912, aforesaid, and prayed for other relief not necessary here to consider, making parties defendant R. L. McCamant and his attorney and one W. H. James, who was alleged to reside in Hunt county, Tex., and who, it was alleged, was setting up some claim to the judgment aforesaid. As equitable grounds for the setting aside and vacating of the judgment obtained by R. L. McCamant against her, plaintiff pleaded, in part, as follows:

(1) That the note transferred by her to R. L. McCamant was indorsed without recourse. (This allegation was not sustained by proof.)

(2) That suit thereon was not filed before the first term to which suit could be brought after the right of action had accrued, or before the second term of said court, as provided in article 579, Vernon's Sayles' Texas Civil Statutes, but in fact suit was not filed until more than a year after the maturity of the note, and that therefore the plaintiff in the former suit had not complied with the law necessary to fix the liability of an indorser.

(3) That the trial court erred in dismissing, upon the request of plaintiff, the suit as to J. W. Woodard, alleged to be deceased, said Woodard being one of the makers of said note sued on, and plaintiff herein being only secondarily liable, if at all, as indorser on said note.

(4) In the suit whose judgment was sought to be set aside, plaintiff made no allegations or contentions, nor was any proof offered to show the insolvency of the makers of said note, or of the estate of J. W. Woodard, deceased, of which the said J. H. Woodard was administrator, and that, therefore the plaintiff herein was not bound on said note, inasmuch as R. L. McCamant made no claim against her except as an indorser.

(5) That the petition of plaintiff in the suit whose judgment was attacked contained no allegation that plaintiff herein bound herself, or intended to bind herself, thereby to pay said note, and that therefore the petition alleged no cause of action against her.

She further alleged that:

"She had no actual knowledge that this judgment had been entered, or even that the case had been set down for trial; that while it is true a formal answer of general demurrer and general denial had been filed by her attorneys, neither she nor her said attorneys took any further note of the case, nor was it necessary, under the state of the pleading, without same had been amended, that she should do so."

The case was submitted to the jury on special issues, which, with the answers thereto, are hereinafter set out:

Q. (1) Were J. W. and J. H. Woodard insolvent from the 1st day of January, 1911, until the 30th day of October, 1911. A. Yes.

"Q. (2) If you answer 'yes' to the first question, then did such insolvency continue during the whole period between the 1st day of January, 1911, and the 30th day of October, 1911? A. Yes.

"Q. (3) Were J. W. and J. H. Woodard insolvent on the first Monday in January, 1911? A. Yes."

Upon the motion of defendants R. L. McCamant, W. H. James, and J. H. Woodward, the latter individually and as the administrator of the estate of J. W. Woodard, deceased, judgment was rendered against plaintiff, both personally and as community administratrix, for all costs of suit, and denying the relief sought, from which judgment the plaintiff appeals.

[1] We are of the opinion that the petition of the plaintiff in the suit of R. L. McCamant against plaintiff herein and others, which resulted in the judgment of March 12, 1912, did not show a cause of action against Mrs. McCamant as an indorser, and was bad as against a general demurrer. In the case of *Beauchamp v. Chester et al.*, 39 Tex. Civ. App. 234, 86 S. W. 1055, it is held that a petition, disclosing that defendant is sued as an indorser, and that the time has passed when his liability as such can be fixed, either by suit or protest, and failing to allege any waiver by defendant of formalities requisite to fixing his liability, is bad on general demurrer. In the case of *Smith v. Richardson Lbr. Co.*, 92 Tex. 448, 49 S. W. 574, Judge Brown, speaking for the court, says:

"If the plaintiff's petition had not contained the allegation that J. C. Tyree was notoriously insolvent at the time the suit should have been brought to fix the liability of the indorser, no cause of action would have been shown against W. B. B. Smith, because it appeared from the allegations in the petition that suit was not brought either to the first or the second term of the court after the debt matured. It devolved upon the plaintiff to allege and prove in this case one of the exceptions expressed in article 1204 (now article 1543), in order to maintain this action against the indorser, who was discharged by the failure to sue at the first or second term of the court unless one of the exceptions which relieved the holder of the note from bringing such suit existed. *Fisher v. Phelps*, 21 Tex. 553; *Elliott v. Wiggins*, 16 Tex. 596."

[2] Article 579, supra, applies to negotiable instruments indorsed after maturity, as well as those indorsed before maturity. *Caldwell v. Byrne*, 30 S. W. 836; *Burke v. Ward*, 32 S. W. 1047. Therefore it would appear that this case comes within the rule laid down by the Supreme Court in *Smith v. Lumber Co.*, supra. It is said in 23 Cyc. 929:

"A judgment will not be set aside on account of defects or insufficiency on the pleadings, especially where the alleged fault was amendable, or has been waived by joining issue and going to trial; although it seems a judgment may be

vacated if the declaration or complaint states no cause of action, or contains no averments showing liability on the part of the defendant."

[3] 1 Black on Judgments (1891) § 170, defines and distinguishes void and voidable judgments, and in section 183, it is said:

"A judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered. * * * So where the declaration is defective in substance to the extent of failing to show a cause of action, no judgment can be entered upon it."

While it is asserted that a judgment cannot be regarded as entirely void when jurisdiction over both the parties and the subject-matter is once obtained, and that no error committed in the exercise of that jurisdiction can make the proceedings or judgment of the court void (*Freeman on Judgments*, § 135a), yet, as said by Black in his work aforementioned (section 184):

"In no proper sense can a court of law be said to have jurisdiction if there is no specific question or controversy submitted for its determination. It is not enough that the parties are properly in court. That does not give the tribunal power to adjudicate any and all matters of difference between them. When we speak of 'jurisdiction of the subject-matter,' we do not mean merely cognizance of the general class of actions to which the action in question belongs, but we also mean legal power to pass upon and decide the particular contention which the judgment assumes to settle. And how can a court acquire jurisdiction of the particular contention, except it be clearly marked out and precisely defined by the pleadings of the parties? And how can that be done, in any mode known to the law, save by the formation of a regular issue?"

For illustration, the district court has jurisdiction over and power to grant divorces, and also to determine questions involving the title to land. Suppose a son should sue his father and mother for an interest in land, and upon a hearing, with all parties before the court, the court should proceed to grant a divorce to one of the parents, could it be reasonably contended that such a judgment was not absolutely void, a mere nullity? We feel sure no one would so contend.

[4, 5] An indorser is ordinarily only secondarily liable, and only in the case where the indorsement was made at the time of the execution and delivery of the instrument to the payee can he be said to be primarily liable, so as to dispense with the necessity, on the part of him who seeks to hold such indorser primarily liable, of fixing such liability by a compliance with statutes regulating the bringing of such suits to a given term. *Carr's Ex. v. Rowland*, 14 Tex. 275; *Kennon v. Bailey*, 15 Tex. Civ. App. 28, 38 S. W. 377; *Derrick v. Smith*, 148 S. W. 1173; *Kampmann v. Williams*, 70 Tex. 568, 8 S. W. 310. In order to bind an indorser where suit has not been brought within the time required by law, matters of excuse must be alleged and proven. *Mullaly v. Ivory*, 30 S. W. 239; *Seguin Milling & Power Co. v. Guinn*, 137 S. W. 456; *Buster v. Woody*, 148 S. W. 689; *Dunn v. Townsend*, 163 S. W. 312; *Bank v. Powell*, 149 S. W. 1096; *Dillard v. Lbr. Co.*,

141 S. W. 1023; Lbr. Co. v. Lee, 7 Tex. Civ. App. 522, 27 S. W. 161.

[6-8] Appellees urge that appellant's petition being in the nature of a bill of review, in order to entitle her to the relief sought, it should show: (1) Diligence on her part to prevent the original judgment; (2) a good defense to the original suit; (3) that a different result would follow on a new trial—none of which does her petition show. It may be conceded that appellant's petition is barren of such a showing, but by reference to the cases cited by appellees in support of this proposition (Burnley v. Rice, 21 Tex. 183; Clegg v. Darragh, 68 Tex. 361; Holliday v. Holliday, 72 Tex. 581, 10 S. W. 690; Brownson v. Reynolds, 77 Tex. 254, 13 S. W. 936; Johnson v. Templeton, 60 Tex. 238; Harn v. Phelps, 65 Tex. 592, etc.), the basis for the claimed invalidity of the judgment sought to be set aside in the cited cases was not apparent of record, or manifest upon the face of the pleadings, as here. A judgment whose invalidity is apparent upon the record may be successfully attacked at any time and under any circumstances. Milam County v. Robertson, 47 Tex. 222; Van Fleet on Collateral Attack, § 4; Bender v. Damon, 72 Tex. 92, 9 S. W. 747; Dunn v. Taylor, 42 Tex. Civ. App. 241, 94 S. W. 347-349. Freeman on Judgments, § 116, says:

"If the want of jurisdiction over either the subject or the person appears by the record, there is no doubt the judgment is void." "The general rule, as stated, is that every presumption will be indulged in favor of the records of superior courts. An important corollary to this rule is that there can be no presumption against the record. For if the record imports absolute verity, its recitals must be equally conclusive when they make against the jurisdiction as when for it. If the record is silent as to jurisdictional facts, it will be aided by presumptions. But if it recites such facts, and the facts recited are not sufficient to confer jurisdiction, there can be no presumption that the recital is incorrect or incomplete." 2 Black on Judgments, §§ 276-278.

Nor will lapse of time nor laches affect the right to vacate a judgment void on its face. Black on Judgments, § 313; Cunningham v. Taylor, 20 Tex. 126-130.

For the reasons indicated, we are of the opinion that the court below erred in holding that the petition of R. L. McCamant was a sufficient basis for the judgment of March 12, 1912, and in not holding said judgment void, and therefore it is our conclusion that the judgment herein should be reversed, and the cause remanded for further proceedings in accord with this opinion; and it is so ordered.

On Motion for Rehearing.

In appellee's motion for rehearing, his counsel urgently insists that we erred in our original opinion, and cites Belcher v. Ross, 33 Tex. 13, Canales v. Perez, 65 Tex. 293, and George v. Vaughan, 55 Tex. 131, as sustaining the contention that the petition in the original suit, filed October 30, 1911, was good

as against a general demurrer, and that therefore the judgment rendered thereon was not void. He admits that of the three cases cited, the first is the strongest in support of his contention, and that, so far as he has found from diligent investigation, it has never been cited, either by the Supreme Court, or by any of the Courts of Civil Appeals. In this case, it was held that in support of a judgment by default, on a note, the presumption will be indulged that the indorsement was made subsequent to the date of the note, and that suit was brought in due time to fix the indorser's liability. While it appears that some statements and arguments are used in the course of the cited opinion as to the expression, "were indebted to him," being an allegation of the fact that suit was filed in due time, which expression we consider, not as an allegation of fact but as a conclusion of law of the pleader, yet, so far as the conclusions therein reached may apply to the issue presented in the instant case, they are not at variance with the views expressed in our original opinion.

[9-12] While it is true that appellee, plaintiff in the original suit, did not in so many words allege the date of the indorsement by Mrs. McCamant, yet by the use of certain expressions contained in the petition he did in effect aver that he acquired the note before maturity. He alleged that he was an "innocent holder for value," and that defendant indorsed the note in blank, and "in due course of business plaintiff became the owner and holder for value." In the law merchant, part of the common law adopted by this state, these terms have a meaning more or less fixed. In the "negotiable instruments law," adopted by many of the states, and embodying, in the main, the principles of the law merchant, it is provided:

"A holder in due course' is one who has taken the instrument under the following conditions: First, that the instrument is complete and regular on its face; second, that he became owner of it before it was overdue," etc. 2 Words and Phrases (Second Series) 895, and cases there cited; 7 Cyc. 925 (B); 3 R. C. L. § 238, p. 1031, and section 250, p. 1045; 1 Daniel on Negotiable Instruments, § 769a, p. 885; Kneeland v. Miles, 24 S. W. 1113-1115.

An innocent or bona fide holder for value of negotiable paper is one who has taken it in good faith for a valuable consideration in the ordinary course of business, when it was not overdue, etc. 2 Enc. Digest (Texas) p. 904, § B, and cases there cited.

[13] Hence we are forced to the conclusion that plaintiff in the original suit did, in effect and in fact, allege the transfer to him before the maturity of the note, which was some 15 months before suit was filed. As was said in the original opinion, no presumption can be indulged against the record to support the judgment. Courts have no more power, until their action is called into exercise by pleadings, to render judgment in favor of a person than they have to render judg-

ment against a person until he has been brought within their jurisdiction. *Dunlap v. Southerlin*, 63 Tex. 88, 43; *Sandoval v. Rosser*, 26 S. W. 930; *Railway Co. v. Vieno*, 26 S. W. 230; *Flores v. Smith*, 66 Tex. 115, 18 S. W. 224; *Anding v. Perkins*, 29 Tex. 348; *Neill v. Newton*, 24 Tex. 202.

The motion for rehearing is overruled.

MCCONKEY v. MCCONKEY. (No. 8360.) *

(Court of Civil Appeals of Texas. Ft. Worth. May 27, 1916. Rehearing Denied June 24, 1916.)

1. DIVORCE \S 165(3) — VACATING DECREE — GROUNDS — IRREGULARITY.

Where a husband's action for divorce on the ground of the wife's abandonment, which the district court was expressly empowered to try by Rev. St. 1911, arts. 4630, 4631, was tried by a judge specially appointed during the illness of the regular judge, out of its regular order, in a room other than that designated for the trial of causes, and without notice to defendant or her counsel, a decree rendered for the husband, while not a nullity, was affected by such irregularities as to authorize its vacation.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 535-538; Dec. Dig. \S 165(3).]

2. DIVORCE \S 167 — DECREE — SUIT TO SET ASIDE — QUESTION FOR JURY.

In a wife's suit to set aside a decree of divorce for fraud in the trial of such action, which, through no want of diligence, was not discovered during the term of the court at which the decree was rendered, and alleging that she had a meritorious defense to the action, where such matters were made issuable both by the defendant's pleadings and the evidence, the court was not authorized to take the case from the jury, direct a verdict, or enter up a judgment for plaintiff.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 533-548; Dec. Dig. \S 167.]

3. APPEAL AND ERROR \S 1170(3) — REVERSAL — IMPROPER JUDGMENT — RULE OF COURT.

Plaintiff's allegations being in the main relevant to the necessary elements of her suit, any unnecessary averments or averments in the nature of mere evidentiary facts did not require a reversal of the judgment for her, in view of rule 62a for Courts of Civil Appeals (149 S. W. x), providing that no judgment shall be reversed on the ground of error of law in the trial unless the appellate court is of opinion that the error amounted to a denial of the rights of the appellant calculated to cause the rendition of an improper judgment or to prevent a proper presentation of the case to the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4066, 4075, 4093, 4101, 4542; Dec. Dig. \S 1170(3).]

4. DIVORCE \S 167 — VACATION OF DECREE — AGREEMENTS OF COUNSEL — KNOWLEDGE OF CLIENT.

In a suit, to set aside a decree of divorce alleged to have been entered in violation of an agreement, the fact that defendant himself was not made to appear cognizant of the agreements of his counsel and of the want of notice to plaintiff's counsel was not a defense.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 533-548; Dec. Dig. \S 167.]

5. DIVORCE \S 167 — VACATION OF DECREE — ORAL AGREEMENTS OF COUNSEL — VIOLATION.

Though an oral agreement of counsel in a divorce action that the jury fee might be paid at any time before trial was not enforceable, its violation might be considered as a circumstance of fraud in an action to vacate the decree.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 533-548; Dec. Dig. \S 167.]

6. DIVORCE \S 167 — ACTION TO SET ASIDE DECREE — SPECIAL ALLEGATIONS — PREJUDICE.

In a wife's suit to set aside a decree of divorce obtained by the husband on the ground of her abandonment, specific allegations in the petition in reply to the husband's averments in his petition for divorce that she had left with intent to abandon him, notwithstanding his kind treatment and provision for her, that at the beginning of such alleged abandonment she had at his request gone to visit her father in another county, and that thereafter their home burned, and the husband collected the insurance money, refused to furnish a new home, and spent the money on other women, were not prejudicial to the defendant.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 533-548; Dec. Dig. \S 167.]

7. DIVORCE \S 165(3) — VACATION OF DECREE — PARTY'S SUBSEQUENT REMARRIAGE — EFFECT.

Where a husband, suing for a divorce on the ground of the wife's abandonment, obtained a decree through fraudulent representations that there would be no contest, etc., the wife was entitled to its vacation and to a restoration to her status as a lawful wife, with the legal right to defendant's protection and support for herself and children, notwithstanding the fact that he had entered into a marriage relation with another innocent woman; as he was in no position to profit by the innocence of such other woman.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 535-538; Dec. Dig. \S 165(3).]

8. DIVORCE \S 167 — ABANDONMENT — EVIDENCE — PREVIOUS SEPARATION.

Evidence of a quarrel between plaintiff and defendant some eleven years before as a result of which she then left him, in view of a subsequent reconciliation and living together, was too remote and of no probative force on the issue of the three years' abandonment on which his action was based.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 533-548; Dec. Dig. \S 167.]

9. DIVORCE \S 111 — ABANDONMENT — ISSUES — EVIDENCE — CRUELTY.

In a husband's action for a divorce on the ground of the wife's abandonment, evidence as to his other reasons for filing the suit, such as her humiliation or cruelty to him, was immaterial.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 365, 366; Dec. Dig. \S 111.]

10. APPEAL AND ERROR \S 213 — SUBMISSION OF ISSUES — REQUESTS.

In a wife's suit to set aside a decree of divorce alleged to have been fraudulently obtained by the husband, the husband presented numerous exceptions to the special issues submitted to the jury on the ground of omissions clearly calling for requested issues embodying the additional finding desired, in the absence of his request for such special issues, would be overruled.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 1149, 1165, 1304-1308; Dec. Dig. \S 213.]

11. DIVORCE §37(5)—ABANDONMENT—PERMANENCY.

While the statute does not use the term "permanent" in prescribing abandonment as a ground for divorce, its permanency is necessarily implied, and an abandonment which is only temporary is not cause for divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 111; Dec. Dig. §37(5).]

12. TRIAL §350(3)—VACATION OF DIVORCE DECREE—SUBMISSION OF ISSUES—SPECULATIVE ISSUE.

In a wife's action to vacate a decree of divorce alleged to have been fraudulently obtained by the husband by reason of the representation of his counsel that there would be no contest, and a trial without notice to the wife, a requested issue as to whether, if the jury fee had been paid, the case would have been tried and the decree rendered, was merely speculative and immaterial, and properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 829, 831; Dec. Dig. §350(3).]

13. ATTORNEY AND CLIENT §86—AGREEMENTS OF ATTORNEY—KNOWLEDGE.

If agreements of defendant's counsel relating to the payment of the jury fee in a husband's action for divorce and to the passing of the case were in fact made, it was immaterial that defendant was without knowledge thereof.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 155-160; Dec. Dig. §86.]

14. TRIAL §351(5)—SUBMISSION OF ISSUES—REQUESTS—MATTERS ALREADY COVERED.

Requested issues were properly refused, where, so far as proper, they were sufficiently comprehended in the special issues submitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 834; Dec. Dig. §351(5).]

15. TRIAL §351(1)—TIME TO PREPARE AND FILE OBJECTIONS—DISCRETION.

In a wife's suit to vacate a decree of divorce fraudulently obtained by the husband, the allowance to defendant's counsel of an hour or an hour and a half to file objections to the issues submitted and to prepare and present special issues, and where it appeared that numerous special issues were prepared and presented, and it did not appear what other special issues would have been prepared and presented, was not an abuse of its discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 829, 836; Dec. Dig. §351(1).]

16. TRIAL §351(5)—VACATION OF DIVORCE DECREE—FRAUD—FINDING.

In a wife's suit to vacate a decree of divorce alleged to have been fraudulently obtained by the husband, it was immaterial that fraud eo nomine was not submitted or found by the verdict, where it was a necessary conclusion from the facts submitted and found.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 834; Dec. Dig. §351(5).]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Suit by Clara L. McConkey against C. E. McConkey to set aside a decree of divorce obtained by defendant. Judgment setting aside the decree and denying defendant's petition for divorce, and he appeals. Affirmed.

S. C. Padelford and J. O. Lockett, both of Cleburne, for appellant. Walker & Baker, Johnson & Harrell, and Ramsey & Odell, all of Cleburne, for appellee.

CONNER, C. J. This suit was instituted by the appellee, Mrs. Clara L. McConkey, in the district court of Johnson county, to set aside a decree of divorce entered in the same court at a previous time in favor of appellant, C. E. McConkey. In outline the case seems simple enough, but it has taken a transcript of some 479 pages to present a copy of the proceedings on the trial below, and the transcript, with its accompanying statement of facts, consisting of some 118 pages furnishes the foundation of a brief in behalf of appellant of 172 pages of closely printed matter urging 114 assignments of error, to which appellee replies in a brief of 122 pages. It is therefore evident that the record before us is voluminous, and that the assignments of error can only be disposed of in a general way, if we confine ourselves, as we think should be done, to an opinion of reasonable length. In the attempt to do this, we think the following statement of the case from appellee's brief, which we adopt, will be of service:

"In 1897 appellant and appellee were married, and continuously after said date lived together until some time in the year 1910; the exact date and cause of their separation being one of the contested issues in the case. As a result of this marriage there were born to them five children, four of whom were living at the date of the trial, three being girls and the youngest a boy, and all minors.

"On June 28, 1913, the appellant filed in the district court of Johnson county, Tex., a suit for divorce against appellee, who was then residing in Bell county, the petition alleging that in May, 1910, the appellee without provocation, justification, or excuse had abandoned appellant, and refused to live with him. This petition was filed by W. Featherstone, a member of the Cleburne bar. Shortly afterwards service was obtained upon the appellee in said cause, and in July, 1913, a few days later, appellee employed Ramsey & Odell, a firm composed of W. F. Ramsey, Jr., and W. M. Odell, members of the bar of Johnson county, Tex., to defend her in said cause. On July 24th said attorneys, as counsel for appellee, filed an answer in said cause, denying the allegations in appellant's petition, and presenting a plea for alimony pending trial, attorney's fees, etc. The case was returnable to the October term, 1913, of said court, and on October 17th of that year an amended answer was filed in said cause by the appellee denying in detail the allegations in plaintiff's petition, and alleging at length the facts constituting appellee's defense and renewing the prayer for alimony, attorney's fees and costs. On October 10th appellee filed an application for security for cost, which was granted on said date by an order duly entered in the minutes of said court. During the October term, 1913, interrogatories were propounded in the case by counsel for appellee, and service waived by counsel for appellant. The case was set for trial on several dates during the October term, but was not tried during that term, the reason for its postponement and continuance being a contested issue in the case, but the jury found that it was passed from time to time by agreement between W. M. Odell and W. B. Featherstone. On the call of the docket at the January term, 1914, on the first day of that court, counsel for appellee requested a jury in the case, and, as shown by appellee's testimony, and found by the jury, it was agreed by W. M. Odell, one of the attorneys for ap-

pellee, and W. B. Featherstone, attorney for appellant, that the jury fee might be paid at any time before the case was tried.

"Thereafter, by agreement between Odell and Featherstone, according to the testimony of the former, the case was set for trial for the week beginning February 9th, one of the weeks for which civil jury cases were assigned for trial at said term of said court, and on January 27th appellee's counsel wrote to her at Temple advising her of the setting of the case for that date, and requesting her to remit the jury fee. A few days later, according to testimony offered by appellee, Odell and Featherstone had a conversation in which it was agreed that on account of the fact that there were a number of other cases on the docket ahead of this case, and in order that appellant might not have to lay off his run as railway fireman, and that appellee would not have to come to Cleburne unnecessarily, this case should not be called for trial before Wednesday of the week beginning February 9th, or February 11th, and on February 6th appellee's counsel advised her to that effect. On Monday, February 9th, the first day of the week for which the case had been set by this agreement, when the time came for court to be called, it was announced to the members of the bar that Judge Lockett, the regular judge of said court, was seriously ill and would not be able to hold court that day, and probably not during the week. After the members of the bar conferred with each other and the clerk of the court, the jury for that week was discharged, and no cases of any character were taken up for trial that week. On Monday, February 16th, which was the last civil jury week of the term, Judge Lockett's illness continued, he being seriously ill at that time, his illness in fact continuing for several months, and he was not present at any other time during the January term of said court. By reason of this fact the jury for the week beginning February 16th was discharged, and no cases were taken up for trial during that week at all. Under the custom of said court, as shown by appellee's testimony without contradiction, the first week of court was set aside for the trial of nonjury cases, and the next week and certain weeks following that were assigned to the trial of civil jury cases, and the balance of the term was assigned to the trial of the criminal docket. At the term in question the week beginning February 16th was the last civil jury week, and the week beginning February 23d was the beginning of the weeks set apart for the criminal docket. It was also shown that for many years it had been the custom of that court that no civil cases would be called for trial or tried during the weeks set apart for the trial of criminal cases except by agreement of counsel with the approval of the court, or by a special order of the court after notice to the parties to the suit or their attorneys. On Friday, February 20th, before the criminal docket was to be called on Monday, February 23d, the bar of Johnson county was called together in the courtroom, and Col. J. F. Henry was elected as special district judge to preside in the absence of Judge Lockett. After the election of Col. Henry as special judge, and during the week beginning February 23d, Mr. Featherstone requested him to take up and try a divorce case for him; the conversation between them, as testified to by Col. Henry, being quoted so far as material to this statement. According to this testimony, Mr. Featherstone stated to him that he had a little divorce case that he wanted him to try. 'He said his client was a railroad man, and it was not convenient for him to be here except late in the afternoon somewhere about 5 or 6 o'clock; I think he mentioned the time. I think I told him I would hear the case the next day and to get his client here, perhaps that evening. I don't recollect; but anyhow I agreed to hear the case at 5 or 6 o'clock in the evening, in order to suit the convenience of his client. Now, the next day, or whatever day I told him I would hear the case,

I am not sure now, I met him about the foot of the steps there. I had either started down myself and met him coming up, or he had started down and met me coming up, I am not sure about that; but anyhow we met at the top of the steps, and he asked me something about the case, and I told him I was ready to hear it then. He said, 'Let's step into the district clerk's office, my client is in there and the papers are there, and hear it.' I don't think I asked him; but anyhow, in connection with telling me that his client was in the clerk's office and the papers were there and we could go in there and try it, he told me there would be no contest in the case. I think I asked him then if the party had been properly served, and he said that he had or she had. I am not right certain whether I asked him whether there had been an answer filed or not, but I think I did; but anyhow, when he told me there would be no contest in the case, mechanically almost, I reckon, I asked him if the party had been served, and he assured me that she had, and upon that statement I went into the clerk's office with him and found his client there and I heard the case. 'At that time I had no information whatever that the defendant in that case, Mrs. McConkey, was represented by counsel. From what Mr. Featherstone had stated to me on the steps I was led to believe and did believe that there was no attorney representing the defendant in that case. In hearing the case the way I did and where I did and under the circumstances that I did hear it I relied implicitly on Mr. Featherstone's statements as being true about there being no contest, etc. I did not see any answer in that case at any time prior to the time I heard the evidence in the case and granted the divorce.'

"After hearing the appellant's testimony Col. Henry was in doubt as to whether he was entitled to judgment for divorce, and delayed until the following day to look up some authorities, but on the next day entered an order granting the divorce as prayed for.

"Mr. Featherstone testified as a witness for appellant upon the trial of this case, and the testimony of Col. Henry as to the statements made by him to the effect that there would be no contest in the case was not denied or contradicted by him.

"On the day the case was tried, February 24, 1914, an amended petition, was filed by plaintiff in the case. This petition was signed by E. B. Featherstone and J. O. Lockett as attorneys for plaintiff. J. O. Lockett testified on the trial that Featherstone discussed with him on two occasions the question of calling up the case in controversy without notice to appellee's attorneys, and that he stated to him that he could not pass on that for him; that Featherstone said that he did not consider that it was his duty to notify appellee or her counsel; that there was no agreement to not call the case, and that he was coming over to the courthouse, have the case called up, and have it tried; that he left the office and said he was going to call it up, and that he was not going to give the other side notice; that he did not deem it his duty so to do. After these conversations Mr. Lockett took no further part in the case, and was not present when it was tried or when the judgment was entered, and was not a party to any of the transactions alleged by appellee to have been fraudulent representations by which a trial of the case was secured without notice to appellee's counsel.

"On February 25th an entry was made by Judge Henry upon the trial docket granting the decree of divorce, and a judgment was accordingly entered in the minutes of divorce cases, which were kept in a separate book from the other minutes of the court. The transactions with reference to the purported trial of the case and the entry of the order mentioned all took place in the office of the district clerk, and none in the district court room. On the day the case was heard by Judge Henry W. M. Odell, one of the appellee's attorneys, was

engaged in the trial of a case in the county court, and W. F. Ramsey, Jr., the other member of said firm, was at his office in Cleburne, and no notice of any character was given to either of them that the case would be called for trial on that date, or at any other time, after the original setting for February 11th. On the day that the January term of said court adjourned appellee's attorneys examined the minutes of the court for ordinary civil business for the purpose of seeing that orders in cases in which they were interested were properly entered, but, having no other divorce case on the docket, and having no reason to believe that any order had been entered in the McConkey case, no examination was made of the divorce minutes, and neither appellee nor her counsel had any notice or knowledge of the purported trial and decree until May 1st, when appellee accidentally heard at Temple that appellant had obtained a divorce from her. This fact was immediately communicated by her to her counsel, who wired her to come to Cleburne, which she did on Tuesday, May 5th, and on that date this suit was filed by her to set aside the purported decree of divorce and to restrain the appellant from attempting to remarry. A writ of injunction was obtained on that date, was not served upon appellant, and on the following day, May 6th, appellant went to Ft. Worth and procured a marriage license, and a marriage ceremony was performed between him and a Mrs. Hill.

"The appellee continued the prosecution of her suit to set aside the divorce, and the case was tried at the May term, 1916, of the district court of Johnson county.

"The testimony of the appellee abundantly supports all of the material allegations in her petition, and was to the effect: That in May, 1910, at the request of the appellant, she went to visit her parents in Denton. That shortly after going there their home in Brownwood was burned. That appellant collected insurance upon their furniture amounting to \$500, and since that time had wholly failed and refused to provide a home for her children and herself, in face of repeated requests and entreaties that he do so. That she had gone to Temple, where appellant was then residing, for the purpose of seeing appellant and requesting him to provide a home for them. Appellant had asked her, 'What in the hell did you come here for?' and, when she replied that she came to get a home for herself and her children, he remarked, 'He did not give a damn what became of me and the kids; that he had others to look after.' That she had never refused to live with appellant, and that, to quote her language: 'I always loved Mr. McConkey dearer than any human being on earth, and would do anything in the world for him, and would have until this day, but he did not treat me right and provide for myself and children as he should do.'

"The case was submitted to the jury by the court on special issues, in response to which the jury found that the appellee had not abandoned the appellant; that appellant had refused to live with appellee after she went to her home in Denton in May or June, 1910; that appellant was unwilling to live with appellee, and would not have consented to have lived with her as husband and wife if she had been willing to do so; that appellee prior to the filing of the suit requested appellant to provide a home for her children and herself, and offered to live with him as his wife; that the divorce case was not tried during the time set apart for the hearing of civil cases, and appellee's attorneys had no notice that said case was to be tried at the time and place it was tried; that there had been an agreement between one of the attorneys for appellee and the attorney for appellant to pass said divorce case from time to time during the trial of the civil docket; that it had been agreed between said attorneys that the jury fee might be paid at any time before the case

was tried; and that appellee's attorneys were not guilty of negligence in not discovering during the term of court at which the divorce judgment was rendered that said judgment had been rendered.

"Upon the findings of the jury a judgment was rendered setting aside the decree of divorce as being null and void, and denying the appellant's petition for divorce. From that judgment this appeal has been prosecuted."

[1] As a counter proposition to all of appellant's assignments of error appellee insists that the decree of divorce is absolutely void under the circumstances of its rendition. It is true, as we must hold from the verdict, that the cause was called out of its regular order and determined, without notice to appellee or her counsel, in a room other than the room designated for the trial of causes. While these circumstances, other necessary things being shown, were sufficient to authorize a setting aside of the decree, they would not of themselves render the judgment a nullity in the strict sense of the term. They are rather in the nature of irregularities of procedure, and do not extend to a want of jurisdiction on the part of the court which rendered the judgment. By the terms of the statutes (Revised Statutes, arts. 4630 and 4631) the court was expressly empowered to try the divorce cause upon the ground set forth in the plaintiff's petition in that case, and such power is in no wise made dependent upon or abridged by the absence of counsel, through want of notice, or the particular room of the courthouse in which the trial took place. See *Niagara Ins. Co. v. Lee*, 73 Tex. 641, 11 S. W. 1024; *Helm v. Weaver*, 69 Tex. 143, 6 S. W. 420; *Holliday v. Holliday*, 72 Tex. 581, 10 S. W. 690.

[2] Nor can it be said, as asserted in one of appellee's propositions, that for other reasons no judgment other than one setting aside the divorce decree could have been rendered, and that hence the judgment below must be affirmed, regardless of errors committed during the course of the trial. It is to be remembered that it was necessary for the plaintiff in this suit, in order to entitle her to the relief sought, to allege and prove, not only circumstances of unfairness or fraud in the trial of the divorce case and that through no want of diligence on her part such unfairness or fraud was not discovered during the term of the court at which the divorce decree was rendered, but also that she had a meritorious defense to the suit for divorce. See *Holliday v. Holliday*, 72 Tex. 581, 10 S. W. 690. More or less all such allegations relied upon by appellee were made issuable below, both in the pleadings and by the evidence, so that the court would not have been authorized to take the case away from the jury, direct a verdict, or enter up a judgment on the undisputed evidence. It therefore becomes necessary for us to consider the proceedings below for the purpose of determining whether material error in such proceedings has been committed, and whether the evidence supports the verdict

and judgment in appellee's favor. This brings us to and requires of us a consideration of appellant's assignments of error.

[3] For the purpose of showing that the divorce decree had been procured fraudulently appellee alleged, in substance, that in that case she had duly filed an answer denying the abandonment upon which appellant had based his suit, and that the case had been placed upon the jury docket for trial, appellant's attorney having agreed that the jury fee might be paid at any time before the trial, and that the case had been postponed from time to time by agreement of counsel and because of the sickness of the regular judge until February 16, 1914, the last week of the term set apart for the trial of jury civil cases, at which time the jury for the week was discharged because of the continued illness and absence of the regular judge. It was further alleged that the following three weeks of the term beginning on February 23, 1914, by the regular practice and order of the court, was set apart and devoted to the trial of criminal cases only; that on February 20, 1914, Hon. J. F. Henry was duly elected by the practicing attorneys as special judge to discharge the duties of the court for the remainder of the term. It was further alleged that, notwithstanding the agreements and course of practice set forth, appellant's attorney, W. B. Featherstone, without any notice to appellee or her counsel, secured a trial and decree of divorce in a detached room of the courthouse, upon assurances to the judge that there was no contest, etc.

For the purpose of showing why no effort was made during the remainder of the term to set aside the decree, and of diligence after its discovery, it was alleged, in substance, that the decree of divorce was entered in a separate book kept for that purpose and of which counsel for appellee was ignorant; that counsel for appellee at the end of the term examined the regular minute entries of the court to see what orders had been made in cases in which they were interested, and failed to find any entry in the divorce case, or to otherwise acquire any notice of the trial and decree of divorce. Appellee further alleged that she did not learn of the trial and divorce until about May 1, 1914, when she wrote informing her attorneys thereof, who at once instituted this suit to vacate the decree. It was also averred that the allegations of abandonment in the petition for divorce were false, and that appellant testified falsely to such alleged abandonment on the trial. There are other allegations of like purpose on the part of the pleader, and copies of the petition and answer in the divorce case and of correspondence between appellee and her counsel relating to the jury fee, the discovery of the divorce decree, etc., were attached to appellee's petition herein as exhibits.

To very many of the several allegations of

appellee, as hereinbefore noted, appellant in his answer directed specific exceptions, and here presents numerous assignments of error to the action of the court in overruling them. Appellant likewise objected to the introduction of all evidence offered in support of said allegations and numerous assignments of error go to the action of the court in overruling such objections. All of these assignments have been severally considered, but we find no prejudicial error in any of the indicated rulings. In the main at least the allegations are relevant to the necessary elements of appellee's case, and that there may perhaps be some unnecessary averments, or some in the nature of mere evidentiary facts, do not in our judgment, require a reversal of the judgment under the operation of rule 62a (149 S. W. x), which provides:

"No judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court. * * *

As before stated, it was necessary to show that the divorce trial and decree was unfairly or fraudulently secured without fault on appellee's part, that the failure to earlier discover the rendition of the decree was not attributable to negligence of appellee or her counsel, and, finally, that she had a good defense, in that the testimony upon which the decree was founded was false. Mere averments to these effects would have been objectionable as simple conclusions of the pleader. It was hence correct to set forth the circumstances leading to such conclusions, rather than the conclusions themselves. The allegations therefore of the agreements of counsel, the placing of the case on the jury docket, the trial in the district clerk's office, without notice, the false assurances to the judge, etc., and the proof of these circumstances all tended to support the conclusion that the trial of the divorce case was unfairly or fraudulently obtained.

[4] Nor was petition or proof insufficient because appellant himself is not made to appear cognizant of the agreements, want of notice, etc. It affirmatively appears that his counsel was, and appellant cannot here stand excused on the ground of ignorance.

[5] Nor is it material that the agreement for the payment of the jury fee was oral, and hence not enforceable as such under our decisions. Appellee's testimony shows that the agreement was in fact made, and the case in fact placed upon the jury docket, called up out of its regular order without notice. If these facts were true, and it must be so imputed to the verdict of the jury, it was grossly unfair, and, while our courts have held that verbal agreements of counsel

will not be enforced, they have never held, so far as we know, that a violation of a gentleman's agreement of the kind may not be considered as a circumstance of fraud. Indeed, new trials have often been granted upon such grounds. See *Medlin v. Commonwealth Bonding & Casualty Ins. Co.*, 180 S. W. 899.

[8] There was an exception to allegations in the appellee's petition to the effect that at the alleged inception of her abandonment she had upon appellant's insistence gone on a mere visit to her father in another county; that soon thereafter their home burned; that appellant collected the insurance money and refused to supply a new home, though she insisted thereon, but spent the money in riotous living with other women, etc. These allegations, however, seem to be in reply to appellant's averments in his petition for divorce that appellee had left with intent to abandon him, notwithstanding that "during all the time he lived with his said wife, the defendant herein, he treated his said wife with affectionate regard, consideration, and kindness, and provided for her as his means would justify." While it is doubtless true that proof of the allegations could have been made under the general denial, we fail to see how the specific allegations could operate to appellant's prejudice in a legal sense.

[7] Exception was also taken to the action of the court in sustaining appellee's objections to allegations showing that appellant entered into another marriage relation with another woman the day after his suit was filed. But we fail to see how these facts could defeat appellee's right to the relief she sought, however innocent the other woman might be. If the material allegations of appellee's petition are true, and the jury have in effect so found, she was entitled to be restored to the status of a lawful wife with legal right to appellant's protection and support for herself and the four children that the evidence shows were the fruits of her marriage with appellant. These rights were at least equal with those of the other woman, and she cannot be deprived of them against her will by means of fraud and perjury, as found by the jury, unmixed with negligence or fraud on her part. Appellant certainly under the findings is not in position to profit by the innocence of the woman he later married, and her rights or status are not before us for determination. There was no error, therefore, in the court's ruling on the exceptions and in excluding evidence on this question. See *Stephens v. Stephens*, 62 Tex. 337; *Simpkins v. Simpkins*, 14 Mont. 386, 36 Pac. 759, 43 Am. St. Rep. 641; *Medina v. Medina*, 22 Colo. 146, 43 Pac. 1001; *Holmes v. Holmes*, 63 Me. 420; *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. 341; *Wortman v. Wortman*, 17 Abb. Prac. (N. Y.) 86; *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Rush v.*

Rush, 46 Iowa, 648, 26 Am. Rep. 179; *Olmstead v. Olmstead*, 41 Minn. 297, 43 N. W. 67; *Allen v. Maclellan*, 12 Pa. 323, 51 Am. Dec. 608; *Crouch v. Crouch*, 80 Wis. 687; *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393; *True v. True*, 6 Minn. 458 (Gil. 315); *Comstock v. Adams*, 23 Kan. 513, 33 Am. Rep. 191; *Adams v. Adams*, 51 N. H. 388, 12 Am. Rep. 184.

[8, 9] We think the court properly excluded appellant's offered testimony of a quarrel between himself and appellee some eleven years before as a result of which she then left him. It appears that a reconciliation soon thereafter took place, and that appellee thereafter continued to live with appellant until the final separation, during which time four of their children were born. The circumstance and particulars of the brief separation therefore were too remote and were of no probative force on the issue of the three years' abandonment on which alone appellant's suit for divorce was based. Nor do we think appellant's reasons for filing the divorce suit other than the ground alleged material. As stated, the divorce suit was based on abandonment, and not upon any conduct on appellee's part that may have humiliated appellant or constituted cruelty in any degree.

[10] Appellant presented numerous exceptions to the special issues presented to the jury. These have all been examined, and we have found no material error in this respect. In most instances the objection was because of some omission in the issue submitted which, as it seems to us, clearly called for a requested issue embodying the additional finding desired. To illustrate: The first issue submitted by the court was as follows:

"Was there any agreement between W. M. Odell and W. B. Featherstone that the jury fee might be paid at any time before the case was tried; that is, the case of C. B. McConkey v. Clara L. McConkey for divorce pending in the district court of Johnson county, in January or February, 1914, or did W. B. Featherstone require that the fee should be paid at the time of the conversation between him and W. M. Odell in the rear of the National Bank of Cleburne."

To which appellant excepted on the following grounds:

"(a) Same does not submit to the jury all the facts and issues which go to make up negligence on the part of W. F. Ramsey or W. M. Odell, either or both of them, in not being present and presenting defense to the said case of C. B. McConkey v. Clara L. McConkey, and same does not present all of the facts which would make fraud on the part of the said Featherstone in preventing the said W. F. Ramsey and W. M. Odell from being present at the time said cause was tried and judgment rendered.

"(b) The court in this case should have submitted to the jury the question as to whether the fact that W. M. Odell and W. B. Featherstone had an agreement that the jury fee could be paid at any time before the case was tried prevented the said W. M. Odell or W. F. Ramsey from being present on the trial of said cause."

[11] No special issues were requested by appellant soliciting the findings desired, and

all such exceptions will therefore be overruled. See *Vernon's Sayles' Texas Civil Statutes*, art. 1985; *Johnson v. Fraser*, 92 S. W. 49. Nor do we think there was error in the court's definition of abandonment, nor in so amending a special charge as to require a finding that the alleged abandonment on appellee's part was "permanent." While the statute does not use the term "permanent," we think it is necessarily implied that an abandonment which is not intended as permanent, but which is temporary only, will not constitute sufficient cause for divorce upon the ground of abandonment. *Speer's Law of Marital Rights*, § 527.

[12] Appellant also presents a number of assignments to the action of the court in refusing to submit certain special issues presented for that purpose. These also have been examined and found to present no error. Some of the requested findings were merely speculative. As, for instance, one of them is:

"If W. M. Odell, attorney for the plaintiff in this case, had paid the clerk the jury fee, after the same had been received, would said divorce case have been tried and said divorce judgment rendered?"

So far as we are able to judge, the question thus presented is speculative merely, and presents no material issue necessary for the determination of the jury.

[13] Another one is:

"Did C. E. McConkey at or before the time of the rendition of the judgment for a divorce have any knowledge or notice of any agreement with reference to paying the jury fee, setting the case, or passing the case of C. E. McConkey v. Mrs. Clara L. McConkey for divorce. If so, state specifically which of said agreements he had notice of."

[14] This, as we think, was wholly immaterial. If the agreements relating to the payment of the jury fee and to the passing of the case were in fact made by appellant's attorneys, as submitted by the court, it was wholly immaterial that appellant was without knowledge of such agreement. Yet others of the requested issues, we think, so far as proper, were sufficiently comprehended in the special issues the court in fact submitted. So that, on the whole, all such assignments will be overruled.

[15] A number of assignments are presented complaining of the action of the court in refusing to allow appellant's counsel reasonable time, as alleged, within which to prepare and file objections to the special issues submitted to the jury by the court, and to prepare and present special issues which it is claimed it desired to have submitted. It seems that the court in all gave appellant's counsel an hour or an hour and a half for the purposes stated, and we feel unable to state that the court abused his discretion in respect to the matters complained of. The record shows that numerous objections to the issues submitted by the court, which were

but six, were in fact prepared and presented, and that numerous special issues were also prepared and presented. Appellant's brief, as we interpret it, fails to point out what other or further valid objections to the issues as submitted could have been made, or what other or farther special issues not submitted should have been, and for anything that we are able to discover all of the material controverted issues in the case were submitted to and passed upon by the jury.

[16] In this connection we should perhaps notice an objection that the court failed to submit the issue or require a finding of fraud. As it seems to us, however, the court's charge required a finding of the material facts alleged, which, if true, as found by the jury, would constitute fraud. If so, it would be immaterial that fraud *eo nomine* was not named in the verdict or in the charge. This was a necessary inference or conclusion to be drawn from the facts actually submitted and found.

No other question of moment now occurs to us, and we accordingly conclude that all assignments of error should be overruled without further discussion, and the judgment affirmed.

W. B. CLARKSON & CO. v. GANS S. S.
LINE. (No. 7210).*

(Court of Civil Appeals of Texas. Galveston.
June 2, 1916. Rehearing Denied
June 29, 1916.)

1. PLEADING \S 214(1)—DEMURRER—EFFECT—ADMISSION OF ALLEGATIONS OF PETITION.

On general demurrer, the allegations of the petition must be regarded as true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525, 529; Dec. Dig. \S 214(1).]

2. CORPORATIONS \S 426(1) — RIGHT TO CONTRACT IN ANOTHER NAME.

Where the contract has been partly performed, recognized, or ratified by a corporation for whom in fact it was made, suit may be brought by such corporation thereon, notwithstanding that the contract was made in a name other than the true name of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702; Dec. Dig. \S 426(1).]

3. CORPORATIONS \S 453—CONTRACTS EXECUTED BY CORPORATION UNDER A NAME OTHER THAN ITS CORPORATE NAME.

In the absence of statutory prohibition, a corporation may recover on a contract executed by it in a name other than its corporate name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1798, 1799; Dec. Dig. \S 453.]

4. SHIPPING \S 108—CONTRACTS—VALIDITY—UNILATERAL CONTRACTS.

A shipping contract, binding the shipper to pay for space unused in a vessel by reason of the shipper's failure to furnish a cargo according to contract, held not unilateral, though drawn, since the maritime rules expressly included in contract made plaintiff liable for failure to furnish ships specified in contract.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 404, 406-410; Dec. Dig. \S 108.]

5. CORPORATIONS \Leftrightarrow 648—FOREIGN CORPORATIONS—PERMIT TO DO BUSINESS IN STATE—INTERSTATE COMMERCE.

A statute, requiring foreign corporations to secure a permit for doing business in the state, held to have no application to a corporation engaged in carrying on interstate commerce.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2516; Dec. Dig. \Leftrightarrow 648.]

6. COMMERCE \Leftrightarrow 69 — REGULATION AND CONTROL—LICENSING—FOREIGN CORPORATION.

The state cannot control or regulate interstate commerce by requiring a foreign corporation engaged in such business to secure a permit to do business within the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 118-119; Dec. Dig. \Leftrightarrow 69.]

7. SHIPPING \Leftrightarrow 145—CONTRACTS—ACTIONS ON—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to support a judgment for plaintiff, a corporation carrying on interstate commerce, for damages consisting of the rental of unused space in a vessel against a shipper failing to furnish merchandise for shipment pursuant to contract requirements.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 502-505; Dec. Dig. \Leftrightarrow 145.]

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Action by the Gans Steamship Line against W. B. Clarkson & Co. From a judgment for plaintiff, defendants appeal. Affirmed.

W. F. Kelly and Geo. G. Clough, both of Galveston, for appellants. Edw. F. Harris and Harris & Harris, all of Galveston, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against appellants to recover damages for breach of contracts for the shipment of cotton from Galveston to Havre, France, and Bremen, Germany.

Plaintiff's petition, after alleging that it is a corporation organized under the laws of the state of New York and having its domicile in said state, and that it was engaged in the business of transporting merchandise in ships owned and chartered by it between ports in the United States and foreign countries, and that its transportation business between Galveston, Tex., and Havre, France, and Bremen, Germany, was carried on under the name of Globe Line, sets out the cause of action sued on as follows:

"On the 26th day of July, 1913, the plaintiff, acting through S. Sgitcovich & Co., of Galveston, Tex., steamship agents, and the defendants under the name of W. B. Clarkson & Co., shipper, entered into a written contract No. 38, whereby the defendants engaged room for and bound themselves to deliver, at Galveston, Tex., unto the plaintiff, during the months of September, October, and November, 1913, 1,500 bales of standard compressed cotton; 500 bales thereof to be so delivered during each of said months to be transported per S. S. Globe line, or other 100 A-1 steamer, by plaintiff from Galveston, Tex., to Havre, France; said cotton to be by defendants delivered alongside the vessel or at her loading berth in Galveston, not later than the 26th day of each month stated; the defendants to pay the plaintiff for such transportation at the rate of 54 cents per hundred pounds, first-class basis, the defendants, shippers, paying the wharfage. The said contract was, upon its

face, made subject to the rules of the maritime committee of the Galveston Cotton Exchange and Board of Trade, printed on the back of the contracts, and made a part thereof, and upon the express understanding that the contract was subject to all the clauses and conditions contained in the ocean bill of lading used by the vessel, which bill of lading and which rules were made part of the contract. A substantial copy of said contract is made a part hereof as Exhibit A.

"The third paragraph is in all things similar to paragraph 2, except the contract is described as No. 41, and is for 3,000 bales of cotton, destination Bremen, rate 50 cents per hundred pounds; 1,000 bales to be delivered in each of the months of September, October, and November, 1913.

"That one of the rules of said maritime committee, so made part of each of the above contracts, was and is in the following language: 'The parties to this contract obligate themselves to pay each to the other in cash at Galveston, Texas, all costs and fines stipulated in these rules, and all other damages proven under this contract'—whereby the defendants obligated themselves to pay the plaintiff in cash at Galveston, Tex., all costs and fines stipulated in said rules, and all other damages proven under the contract.

"That another of the rules of said maritime committee, made a part of said contract above set forth was, and is in the following language: 'If the goods are not shipped or delivered within the period stipulated in this contract, the ship agent at his option may cancel the same or carry forward to a later position or steamer, or re-engage at best rate obtainable, the shipper paying any freight difference and demurrage incurred. If no other cargo of such nature as the ship can carry can be secured in a similar position, the shipper shall be responsible for dead freight.'

"That the plaintiff, on its part bound itself by said contracts to carry and transport with due diligence said 3,000 bales of cotton from Galveston to Bremen, and said 1,500 bales of cotton from Galveston to Havre, France; and the plaintiff fully performed its part of said contracts, and was ready with its steamships at the proper times and places so to transport with due diligence; but the defendants, ignoring their contracts, utterly failed to keep and perform the same, and utterly failed and refused to deliver any part of said 1,500 bales of cotton under contract No. 38; and said defendants delivered to plaintiff on said contract No. 41 the total amount of 2,450 bales of cotton only, leaving 550 bales undelivered on said contract—all to the damage of the plaintiff in the sum of \$3,500."

"That on or about the 15th day of October, 1913, the defendants in writing notified plaintiff, through said S. Sgitcovich & Co., that the defendants were then unable to ship any cotton to Havre, and asked the plaintiff to transfer the engagement of the 1,500 bales of cotton called for by contract No. 38, above pleaded, from Havre destination to Bremen destination, at the price of 50 cents per hundred pounds, transportation to be paid to the plaintiff by the defendants; and, to wit, on the 17th day of October, 1913, plaintiff in writing notified defendants that it granted said request, and then and there the plaintiff declared the steamship Bjornstjerne Bjornsen to lift said engagement of cotton, and notified defendants thereof, and that said vessel was due to arrive in Galveston about the 4th or 5th day of November, 1913, and due to sail from Galveston about the 8th day of November, 1913, and notified the defendants to send on to Galveston the cotton aforesaid; that on or about the 20th day of October, 1913, the defendants in writing thanked the plaintiff, through said S. Sgitcovich & Co., for transferring defendants' Havre engagement to destination Bremen at said 50 cents per hundred pounds, and promised

to get as much cotton down to said vessel as possible; and thereafter from time to time, by written correspondence which passed between the plaintiff, through said S. Sgitcovich & Co., and the defendants, and by the occasional shipment on account of contract No. 41 of cotton in fulfillment of said contract by the defendants to the plaintiff, the time of delivery of all the cotton remaining due and unshipped by defendants to the plaintiff, was extended continuously up to and until the month of March, 1914, when the defendants, on or about the 5th day of said month of March, 1914, wrote the plaintiff through said S. Sgitcovich & Co., that defendants did not see any chance to ship the balance of cotton due on said contracts, and thereupon S. Sgitcovich, for plaintiff, in writing, notified defendants by letter dated the 18th day of March, 1914, that plaintiff had instructed said S. Sgitcovich to relet for account of the defendants, and the plaintiff rendered bills to defendants, showing such reletting and the price thereof, and demanded payment of defendants in the sum of \$2,557.25 due plaintiff on default and breach by the defendants of said contracts Nos. 38 and 41, which bills the defendants then failed and refused to pay, and have since failed and refused to pay, to the damage of the plaintiff in said sum of \$3,500."

The defendants, by their third amended original answer, excepted generally to plaintiff's second amended original petition, and excepted specially for the following reasons: (1) Because it appeared that plaintiff was a foreign corporation doing and soliciting business and maintaining an office in Texas, there being no allegation that it had a permit; (2) because it appeared from the pleadings and exhibits attached thereto that plaintiff, a foreign corporation, was transacting business in Texas, generally and especially in the transaction sued upon, in another and a different name from its corporate name; (3) because it appeared that the transaction sued upon was between defendants and the Globe Line, and there is nothing in the instruments sued upon attached to the petition to show or indicate that plaintiff had any interest in or connection with the transaction; (4) because it appeared from the petition and exhibits that plaintiff, if it be identified with the contract, had the option of canceling at any time after September 25, 1913; therefore the contracts were unilateral and unenforceable against plaintiff and void for want of mutuality; (5) because no proper measure of damage was alleged.

The defendants further answered by general denial, and further admitted the execution of the instruments sued upon, and specially pleaded a part of rule 3 of the Rules of the Maritime Committee of the Galveston Cotton Exchange, printed on the back of the instruments and made part thereof as follows:

"If the goods are not shipped or delivered within the period stipulated in this contract, the ship agent at his option may cancel the same or carry forward to a later position or steamer, or re-engage at the best rate obtainable, the shipper paying any freight difference and demurrage incurred. If no other cargo of such nature as the ship can carry can be secured in a similar position the shipper shall be responsible for dead freight."

And, further, that on account of unprecedented rainfall in 1913, the defendants were unable to deliver the cotton, whereupon the contract was breached, and that, under the terms of said contracts and rule No. 3 thereof, it became the duty, and plaintiff was required, to immediately elect which of the options it would exercise; that plaintiff failed to exercise either of said options, but simply postponed the day of accounting; then, the option to cancel being always open to it, the contract was unilateral and void for want of mutuality.

Defendants further denied that the contracts sued upon were for or in behalf of plaintiff, and that it was engaged in business under the name of the "Globe Line," or was authorized to transact its business, and further denied that plaintiff was bound or obligated by such contracts or damaged by the breach thereof. They also pleaded in reconvention for the sum of \$349.36.

The trial court overruled the general demurrer and all special exceptions, to which appellant excepted.

By supplemental petition plaintiff denied that it had exercised the option to carry said contracts forward to later position or steamer denied that "Globe Line" was a trade-name of S. Sgitcovich & Co., and denied that the identity and connection of plaintiff with the contracts was not disclosed, and alleged that the plaintiff had been doing business out of Galveston as the Globe Line for the past seven years, and notoriously advertised as such in the public press of Galveston; alleged the making of many contracts with the defendants, through Beno Sproule, broker, by such name, prior to the contracts sued upon.

The cause was tried with a jury upon the following special issues:

First. Were S. Sgitcovich & Co. authorized by the Gans Steamship Line, a corporation, to use the name of the "Globe Line" in making contracts for freight shipments on vessels owned or controlled by the Gans Steamship Line at the port of Galveston?

Second. Did S. Sgitcovich & Co. make the contracts sued upon for and on behalf of the Gans Steamship Line?

The jury answered both of these questions in the affirmative, and upon the return of such verdict judgment was rendered in favor of plaintiff for the difference between the amount of charges received by plaintiff for the substituted cotton and the amount agreed to be paid by defendants for the cotton contracted to be shipped by them, less the offset on counterclaim of \$349.36 pleaded by defendants, the net amount of the judgment being \$2,384.52.

The findings of the jury are amply sustained by the evidence. The contract for shipment of the 1,500 bales to Havre is evidenced by the following instrument:

"S. Sgitcovich & Co., Steamship Agents, Cable Address, 'Stephen,' Globe Line to Bre-

set forth engaged in sailing various cargo or freight ships under the name of the Globe Line, from Galveston, Tex., to Bremen, Germany, and Havre, France, and the contracts hereinafter set forth made and entered under the name of Globe Line were made and entered into by the plaintiff under said name, and said contracts were made for and in behalf of the plaintiff herein in the language hereinafter set forth, and to the extent hereinafter set forth the duties imposed by said contracts upon the Globe Line were duties imposed upon this plaintiff, and were by this plaintiff duly carried into effect and performed by the plaintiff to the full extent permitted by the defendant herein."

[1, 2] These allegations being true, and as against a general demurrer they must be so regarded, the fact that the contracts were made in the name of the Globe Line is immaterial. The plaintiff having authorized the execution of the contracts and recognized and adopted them after their execution, they became plaintiff's contracts, and it was bound thereby. When a contract has been partly performed, recognized, or ratified by a corporation for whom the contract was in fact made, suit may be brought by the corporation on such contract, notwithstanding there is nothing on the face of the contract to connect the corporation therewith. It seems to be well settled that a corporation may have more than one name. In addition to the name given it by its charter it may acquire other names by user or reputation. In *Clark & Marshall on Corporations*, page 152, cited by appellants it is said:

"It has been said that when a certain name is given to a corporation by its charter and adopted, the corporation can, in general, act by no other name. This, however, is not true unless there is a statutory provision to such effect. A corporation may have more than one name. It may have one name in which to contract, etc., and another in which to sue and be sued. It may thus acquire several names, either by express provision of the statute creating it, or by user and reputation."

In *Ency. Law*, vol. 7, p. 688, it is said:

"It has long been settled that it is not necessary, in order that a corporation may be bound by its contracts, that the contract shall be made in its exact corporate name. If it appears from the allegations and proof that the obligation sued upon is intended to be the obligation of the corporation sued, a recovery will not be defeated by reason of a misnomer alone."

See *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158, 51 Am. Dec. 59. The text further says the general rule is that a misnomer of a corporation has the same effect as the misnomer of an individual, and when the true name is to be collected from the instrument involved, or is shown by proper averments, the contract is not invalidated thereby.

[3] There is no statute in this state which requires a corporation to contract in the name given it by its charter and, in the absence of such statute, we cannot hold that a

contract executed by a corporation in a name other than that given it by its charter is not binding on the corporation.

[4] The contracts pleaded by plaintiff are not unilateral. The instrument is not prepared with technical skill, but is a sufficient memorandum of the agreement of the parties to constitute a valid contract. It confirms an engagement by defendants of space in ships to be furnished by plaintiff, and gives the dates of the sailings of the ships. This binds the plaintiff to furnish the ships on the dates stated, and one of the maritime rules which is made a part of the contract provides that the parties to the contract shall pay each to the other all damages proven under the contract. We do not think it can be doubted that under these contracts plaintiff would have been liable for any damages that defendants might have sustained by the failure of plaintiff to furnish the ships as specified in the contracts, or to receive the cotton when offered under the contracts.

[5, 6] The second assignment of error complains of refusal of the court to sustain defendants' special exception to the petition, on the ground that it appears from the petition that plaintiff is a foreign corporation, and there is no allegation that it had obtained a permit to do business in this state. The exception was properly overruled. Our statute requiring foreign corporations doing business in this state to secure a permit has no application to interstate or foreign commerce, and we think it clear that plaintiff was not required to obtain a permit to conduct its business of carrying merchandise from ports of this state to foreign ports. Such business is essentially foreign commerce, and is beyond control or regulation by this state.

None of the other special exceptions of the petition which we have before set out should have been sustained, and the several assignments complaining of the ruling of the court on the exceptions are overruled without discussion.

[7] Our findings of fact before set out dispose of the assignments complaining of the insufficiency of the evidence to support the verdict and judgment. In our opinion the evidence upon every material issue in the case authorized, if it did not require, a judgment in favor of plaintiff.

The remaining assignments present no material question, and each of them is overruled without discussion.

It follows from the conclusions above expressed that the judgment of the court below should be affirmed; and it has been so ordered.

Affirmed.

CAIN, County Attorney, v. GARVEY et al.
(No. 156.)

(Court of Civil Appeals of Texas. Beaumont.
June 22, 1916.)

1. INTOXICATING LIQUORS \S 34(5)—LOCAL
OPTION—BALLOTS.

Rev. St. 1911, art. 5719, prescribing the form of local option election ballots, is mandatory.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 42; Dec. Dig. \S 34(5).]

2. INTOXICATING LIQUORS \S 25—LOCAL
OPTION—ELECTION.

The local option law (Rev. St. 1911, art. 5715 et seq.) is penal, and, unless its provisions are strictly followed, an election thereunder is void.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 31; Dec. Dig. \S 25.]

3. STATUTES \S 218—CONSTRUCTION—
CONTEMPORANEOUS CONSTRUCTION.

Where a statute is ambiguous, great weight will be given to its contemporaneous construction by other departments of the government.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 294, 295; Dec. Dig. \S 218.]

4. INTOXICATING LIQUORS \S 34(5)—LOCAL
OPTION—FORM OF BALLOT.

Rev. St. 1911, art. 5719, requiring local option ballots to bear the words "Official Ballot," "For Prohibition," and "Against Prohibition," requires a three-line, not a five-line, ballot, especially where it also requires voters to draw "a line" through one of the last two phrases.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 42; Dec. Dig. \S 34(5).]

5. INTOXICATING LIQUORS \S 34(5)—LOCAL
OPTION—BALLOTS—AUTHORITY TO FURNISH.

Under Rev. St. 1911, art. 5719, requiring the clerk of the county court to furnish local option ballots, *held*, that the duty cannot be delegated to another.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 42; Dec. Dig. \S 34(5).]

6. INTOXICATING LIQUORS \S 34(5)—LOCAL
OPTION—"OFFICIAL BALLOTS."

Under Rev. St. 1911, art. 5719, requiring the clerk of the county court to furnish local option ballots, and prohibiting the use or counting of any except official ballots, the term "official ballots" refers to those furnished by the clerk.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 42; Dec. Dig. \S 34(5).]

For other definitions, see Words and Phrases, First and Second Series, Official Ballot.]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Action by Ed Garvey and others against C. H. Cain, County Attorney. Judgment for the plaintiffs, and defendant appeals. Affirmed.

C. H. Cain, of Liberty, and Townes & Vinson, of Houston, for appellant. George G. Clough, of Galveston, and E. B. Pickett, Jr., of Liberty, for appellees.

CONLEY, C. J. This suit was instituted by appellees to contest the local option election held in commissioners' precinct No. 3, Liberty county, on the 29th day of December, 1915, in substance upon the grounds that the ballots used in two of the voting

boxes were not official ballots furnished by the clerk of the county court of Liberty county, as provided by law, but were ballots furnished by some other persons in confederation with the active Prohibition party in said precinct, and that they were fraudulently and wrongfully inserted in the election boxes with the election supplies; that such ballots were trick or deceptive ballots, and were formed and devised to deceive and trick persons in voting the same; that as a result of the use of the said ballots the voting box of Dolen gave a majority of 13 in favor of prohibition, and the voting box at Hightower gave a majority of 26 in favor of prohibition; that large number of the voters of said precinct were illiterate working people and unused to the interpretation and construction of the English language; that they were deceived by said ballot, and that they were prevented by the presiding officers of the election, who were active Prohibitionists, from expressing their true wishes in said election, and that they were wrongfully advised and solicited by the officers of said election in the manner and way they should vote said ballot to express their voice as they desired; that by reason of the wrongful conduct on the part of the officers of said election and the furnishing of such ballots more than 50 voters were deprived of their votes, and that but for such illegal action of said officers the result of said election would have been materially different, and a different result would have been obtained, and that by reason of the confusion arising out of the premises a large number of the voters were deprived of the right to vote fairly and honestly, and that it is impossible to arrive at the true result of the election, and that the total number thus deprived of their legal vote through said deceptive ballot fully exceeded the number found in favor of prohibition. The contestant also challenged at the various voting boxes the votes of 17 voters as having voted for prohibition as being illegal voters for various grounds named in the petition. The contestants likewise challenged the election because of lack of uniformity and mutuality in the form of the ballot.

The contestee answered, denying generally and specially the allegations in the petition, and specially answered in substance affirming the legality of the election, and specially denying the charges made by the contestants.

The trial of this cause consumed five days, and the record is voluminous. The trial court found the election void, and entered judgment accordingly, from which the appellant has perfected an appeal in due season to this court. Upon request of the contestee the trial court filed the following findings of fact and conclusions of law:

"Findings of Fact.

"(1) That an election was held December 29, 1915, in and for commissioners' precinct No.

3, Liberty county, to determine whether the sale of intoxicating liquor should be prohibited, and that in due season the result was declared by the commissioners' court to be For Prohibition by a majority of 49 votes.

"(2) That contestants filed their contest of said election, and served a true copy of the grounds of contest on the contestee within 30 days after the date of the declaration of result.

"(3) That contestants are duly qualified voters in and residents of commissioners' precinct No. 3 of Liberty county, and were on the 29th day of December, 1915, and at the filing of the contest, and in all things qualified to bring said contest.

"(4) That there are four voting boxes in said precinct, to wit, Cleveland, Tarkington, Hightower, and Dolen.

"(5) That there was first ordered an election to be held November 6, 1915, but the same enjoined because of illegal requirements in said order mentioned, and the same was not held.

"(6) That on or about October 26, 1915, the county judge of Liberty county ordered from Clark & Courts, of Galveston, four sets of election supplies for such election, and in said order expressly requested Clark & Courts not to send any ballots, stating that he then had a sufficient number on hand.

"(7) That Clark & Courts filled said order, but that such supplies come in sets and include 2 packages of 200 ballots each, in each set, and that Clark & Courts did send to the county judge the ballots included in the supplies, and a total of 1,000 ballots reading as follows:

Official Ballot
For Prohibition
Against Prohibition

—and that said supplies and ballots were received about November 15, 1915.

"(8) That on the date November 5, 1915, there was on hand in the office of the county judge 26 packages of 200 each of the same ballots, 501 of the same form, but different size and type, and about 400 of the same form, but of different type and size, together with a lot of sundry other official ballots used and to be used in road, special school, and irrigation district elections.

"(9) That on and about the 30th day of December, 1915, there was printed at Conroe, in Montgomery county, at the solicitation of the Prohibition campaign committee, and with their campaign literature, a blank form purporting to be an official ballot, of the following form:

Official Ballot
For
Prohibition
Against
Prohibition

"That said alleged ballot was upon a form made up without the knowledge, consent, or approval of the county clerk, county judge, or clerk of the county court, and that the county clerk had no knowledge of the transaction.

"(10) That the five-line ticket referred to in finding No. 9 was a private ballot or ticket designed and intended to be used by the prohibition committee, that the same was delivered by the printer to the Prohibition party, and by the Prohibition party delivered to C. N. Smith, who was county judge, and an active member of said Prohibition party, and that the same was designed, printed, and furnished for the purpose of having the same fraudulently and surreptitiously inserted in the ballot boxes with the regular election supplies to deceive ignorant voters of either voting a mutilated ballot or voting contrary to their choice.

"(11) That after said fictitious ballots had been printed said C. N. Smith, as county judge, without any authority whatever from the county clerk, sought to ratify the printing of said fictitious ballots by the campaign committee of

the Prohibition party by delivering an order therefor to the Prohibitionists under date of December 21, 1915, and after this contest had been commenced, and on, to wit, February 4, 1915, the printers presented a bill to the said C. N. Smith, county judge, for \$3 for printing said tickets, and the same was presented to the commissioners' court and ordered paid after this trial had commenced.

"(12) That in the voting boxes of Dolen and Hightower the alleged five-line ballot so privately printed and furnished by the Prohibitionists was used exclusively by the voters in voting, and that in the voting boxes of Tarkington and Cleveland the three-line ballot furnished by the clerk of the county court of Liberty county was used exclusively.

"(13) That the five-line ballot so privately printed and furnished at the instance of and by the Prohibition party was surreptitiously inserted in the election boxes so as to make it appear that the same was an official ballot, without the knowledge, consent, or approval of the clerk of the county court of Liberty county, Tex.

"(14) That the intent to use the five-line ballot so used in voting in the boxes of Dolen and Hightower was unknown to the county clerk, and the printing thereof and the form of the same concealed from him, that he was not consulted about the form of the ballot, the arrangement of the words thereon, and was not asked to and did not furnish the form or request any one else to do so, or to have any such ballots printed, and that had he been so consulted or had he been requested to have the ballots printed, or, had he requested some one else to do so, he would have furnished the form, and had the ballots printed in the following form, to wit:

Official Ballot
For Prohibition
Against Prohibition

"(15) That the official ballots which were furnished by clerk of the county court to be used in this election were brought to him with and as a part of the election supplies by the county judge, and that the ballots so brought to him with such election supplies, exhibited to him, and inserted in the boxes by him, and in his presence, and with his consent, were the three-line ballots which were used in holding the election in Cleveland and in Tarkington, and which were not used, but returned as unused ballots in the voting boxes of Dolen and Hightower, and that no other ballots except such three-line ballots were put in said boxes either by himself or by any other person in his presence or with his knowledge and consent.

"(16) That the returns of said election show the following result:

Cleveland.....	For Prohib.	90	Against Prohib.	15
Tarkington.....	"	66	"	21
Dolen.....	"	26	"	13
Hightower.....	"	49	"	23
Totals.....		231		132

—and that the result as shown by opening the boxes and counting the ballots in open court in the Dolen and Hightower boxes is as follows: Dolen, 13 ballots of which the fourth and fifth lines were struck, 7 ballots of which the second and third lines were struck, and 19 ballots which could not be counted, because so defectively marked that the same could not be counted. Hightower, 89 ballots of which the fourth and fifth lines were struck, 21 ballots, of which the second and third lines were struck, and 12 ballots which could not be counted because defectively marked.

"(17) That in the Dolen and Hightower boxes there was great confusion arising out of the form of ballot and the manner in which the proposition to be voted on was printed thereon, that the judges of election were not sufficiently

advised how to properly mark said ballots, and that in the Dolen box Mr. Shaw, a judge, and Mr. Langston, a clerk, did not know how to vote and how to mark the tickets, and each of them voted For Prohibition when they intended to vote Against Prohibition, and that Mr. Shaw was appointed to assist the voters in marking said ballot.

"(18) That in the voting boxes of Dolen and Hightower, where the private 5-line ballot was exclusively used, a large number of qualified voters, 23 in number, voted a ballot either reading 'For Prohibition' or mutilated, but all of which ballots were received by the election judges and counted as votes 'For Prohibition,' when in truth and in fact they intended to vote against prohibition, and would have voted against prohibition had they been given the official ballot to scratch, as furnished by the clerk of the county court.

"(19) That in all elections heretofore held in Liberty county (save and except that one set aside by the court about the year 1910 known as the for and against 'local option' ballot) the ballots used were the conventional three-line official ballots.

"(20) That on the 28th day of December, the day before the election, L. A. Isaacks, in conjunction with other active Prohibitionists, had privately printed for use in the election in the boxes of Dolen and Hightower and Tarkington approximately 600 of the five-line ballots for the purpose of having the same used, if possible or necessary, in the said Hightower, Dolen, and Tarkington precincts, for the purpose of deceiving and tricking negroes and ignorant persons either to mutilate their ballot or into voting for prohibition instead of against prohibition as might be their wish, and that said ballots were printed and intended to be used in such election without the knowledge, consent, or approval of the clerk of the county court of Liberty county, who was not consulted with reference thereto.

"(21) That the three-line ballot as used in Cleveland and Tarkington and the five-line ballot as used in Dolen and Hightower are not uniform either in quality of paper, size of ballot, size of type, style, and form.

"(22) That J. J. Whatley, who voted by scratching the fourth and fifth lines of the ballot used at Hightower, and whose vote was counted for prohibition, was 69 years of age on January 1, 1914, and that at said date he resided in Liberty county, Tex., and that he was not exempt from paying a poll tax to Liberty county and the state of Texas on said date, and that he voted in said election on the honestly erroneous impression that, if he became 60 years of age during the year, he would be exempt from paying poll tax.

"(23) That D. W. Jackson, Jr., who voted at Tarkington for prohibition, had not been a resident of commissioners' precinct No. 3 for six months prior to the date of election, but that he moved from another commissioner's precinct into commissioners' precinct No. 3 only about two weeks before the date of said election.

"(24) That Solly Gillen, who voted in Tarkington precinct for prohibition, had no poll tax receipt, and had not paid his poll tax for the year 1914, that on January 1, 1914, he was a resident of Liberty county, Tex., in no way exempt, and liable for a poll tax to Liberty county and the state of Texas, and that he voted in said election. He voted upon a 1915 poll tax receipt under the impression that the possession of the 1915 poll tax receipt authorized him to vote.

"(25) L. A. Buckaluw, who voted in Cleveland precinct for prohibition, voted upon a poll tax receipt for 1914 issued by San Jacinto county, but that Buckaluw was an adult January 1, 1914, and actually resided at said date in Walker county, Tex., and was liable to Walker county for a poll tax.

"(26) That O. J. Wullschlager, who voted in Dolen by striking the fourth and fifth lines of the ballot, was a resident of Liberty county January 1, 1914, and liable for a poll tax therein, and that he did not pay said poll tax, being under the impression because one of his limbs was withered that he was not liable therefor, that said voter is capable of and is earning a living as a telegraph operator, and is not totally disabled, and that he has not lost either of his hands or his feet or any part thereof by severance from the body.

"Conclusions of Law.

"(1) That the act of 1909 providing for the form of official ballot, being article 5719 of Vernon's Sayles' Texas Civil Statutes, is mandatory, and must be strictly followed to give validity to an election having for its purpose the prohibiting of the sale of intoxicating liquors within a given territory.

"(2) That the five-line form of ballot which was used and voted in the voting boxes of Dolen and Hightower is not authorized by the law, and that article 5719, providing for the form of the ballot, contemplates that such form shall be of three lines, and that upon the top line there shall be the words 'Official Ballot,' and that on the next line shall be the words 'For Prohibition,' and that on the third line or last line shall be the words 'Against Prohibition.'

"(3) That the term 'Official Ballot,' as used in article 5719, means the ballot officially furnished by the clerk of the county court, and of the form prescribed in said article.

"(4) That the fact of printing the words 'Official Ballot' at the top of the privately furnished five-line ballot used in Dolen and Hightower boxes and handed out to the voters by the officers of election does not constitute it an official ballot within the terms of the law.

"(5) That J. J. Whatley was an illegal voter of Hightower voting precinct.

"(6) That D. W. Jackson and Solly Gillen were illegal voters of Tarkington precinct.

"(7) That L. A. Buckaluw was an illegal voter in the Cleveland precinct.

"(8) That O. J. Wullschlager was an illegal voter in the Dolen precinct.

"(9) That the local option election held December 29, 1915, in and for commissioners' precinct No. 3 of Liberty county is void, and should be set aside: (a) Because of the use of illegal and unofficial ballots in two of the four voting boxes of said precinct; (b) because of lack of uniformity in the printing, style, and form of the ballots used in said election; (c) because of the use of ballots in two of the voting boxes privately furnished by the Prohibitionists and surreptitiously inserted in the election supplies and designed and furnished with the intent to and which did deceive and confuse all parties using it, voters and officials alike; (d) because of the failure of the election judges to use the three-line official ballot in the Dolen and Hightower boxes, though furnished and on hand in and with the election supplies for such use; (e) because it is impossible to ascertain the true and probable result of this election, due to the use of a defectively marked five-line ballot illegally used in the Dolen and Hightower boxes to the exclusion of the official and statutory three-line ballot used in Cleveland and Tarkington, and a sufficient supply of which were furnished to the election officers in Dolen and Hightower, and which they did not use."

The first 122 pages of appellant's brief, being assignments of error 1 to 11, inclusive, constitute an attack upon the court's fifth, ninth, tenth, eleventh, twelfth, fourteenth, seventeenth, eighteenth, nineteenth, and twentieth findings of fact. In these assignments it is contended that such findings are either not supported by the evidence or are contrary

to the evidence. It would serve no good purpose to set out in detail the evidence, which we have carefully examined, bearing upon these various findings of fact, and which is relied upon by the contending parties to sustain or refute said assignments, but suffice it to say that, although the evidence upon the issues in controversy is conflicting, still there is ample support to be found in the testimony to sustain all of the court's findings, except perhaps the fifth which is upon an immaterial matter. Under such circumstances we would not be authorized nor justified in disturbing the trial court's action. The law has wisely placed in the trial court the power to determine conflicting issues of fact, and it, having had an opportunity to see and observe the witnesses as they testified, and to study their demeanor and conduct while on the stand, is in a much better position to arrive at a true and correct conclusion affecting the contention of the parties than we would be, who must, of necessity, rely only upon the motionless and impersonal words of the witnesses to guide us. A cold and lifeless record can never give a true and perfect reproduction of the effect of evidence, nor convey the unsaid and secret purposes and motives which are reflected in the expression, conduct, demeanor, and general appearance of the witnesses. These assignments of error, and the others leveled at the conclusions of law based thereon, are overruled.

There seem to be three other fundamental questions presented by appellant's brief in the remaining assignments of error. We shall consider such questions in the following order and regardless of the numerical assignments as found in the brief, to wit:

First, whether or not the statutes of this state require the official ballot used in local option elections to be written or printed in three-line form, to wit:

"Official Ballot
For Prohibition
Against Prohibition."

Second, a proper construction of the terms of article 5719 of the Revised Statutes requiring:

"That the clerk of such court shall furnish the presiding officer of each voting box within the proposed limits with a number of such ballots to be not less than twice the number of the qualified voters at such voting box."

Third, whether all of the ballots to be used in the different voting boxes in a local option election are required by law to be printed in the same number of lines and uniform in paper, style and printing.

Article 5719, Revised Statutes of Texas, reads as follows:

"*Form of Ballot, Etc.* At said election the vote shall be by official ballot, which shall have printed or written at the top thereof, in plain letters the words 'Official Ballot.' Said ballot shall have also written or printed thereon the words, 'For Prohibition' and the words 'Against Prohibition,' and the clerk of the county court shall furnish the presiding officer of each voting

box within the proposed limits with a number of such ballots, to be not less than twice the number of qualified voters at such voting boxes; and the presiding officer of each such voting box shall write his name on the back of each ballot before delivering the same to the voter, and the person offering to vote at such election shall, at the time he offers to vote, be furnished by such presiding officer with one such ballot; and no voter shall be permitted to depart with such ballot, and shall not be assisted in voting by any person except such presiding officer or by some officer assisting in the holding of such election, under the direction of such presiding officer when requested to do so by such voter.

"Those who favor the prohibition of the sale of intoxicating liquors within the proposed limits, shall erase the words, 'Against Prohibition' by making a pencil mark through same. No ballot shall be received or counted by the officers of such election that is not an official ballot, and that has not the name of the presiding officer of such election written thereon in the handwriting of such presiding officer, as required by this article."

The courts have had occasion to consider the provisions of this statute in recent decisions. *Gomez v. Timon*, 128 S. W. 656; *Griffin v. Tucker*, 51 Tex. Civ. App. 522, 119 S. W. 338; *Griffin v. Tucker*, 102 Tex. 420, 118 S. W. 685.

In the *Griffin* Case, 119 S. W. supra, the ballots, instead of containing the words required by statute, to wit, "For Prohibition" and "Against Prohibition," had printed on them "For Local Option" and "Against Local Option." Referring to this failure to comply with the express provisions of the statute, the court said:

"The statute prescribing the form of the ballot is mandatory and must be strictly followed. It may be a reasonable inference that those who voted for local option intended to vote for prohibition and those who voted against local option intended to vote against prohibition, but the literal meaning of the words is entirely different, and, under the mandatory provisions of the statute before quoted, the intention of the voter must be expressed by writing or printing upon his ballot the words prescribed in the statute, and cannot be left to inference or be shown by parol evidence. The local option law is a penal law, and it has been uniformly held by our Court of Criminal Appeals that, unless it is strictly followed in all of the proceedings necessary to put it into operation, the order declaring it to be in force in the particular territory is void. In the case of *Ex parte Kremer*, 19 Tex. App. 128, that court, in passing upon the validity of a local option election, says: 'If the election was not conducted in accordance with the requirement of the law, it is void, and not merely voidable, and all proceedings had under and by virtue of such void election are absolutely void, and may be questioned not only directly but collaterally.' *Boone v. State*, 10 Tex. App. 418, 38 Am. Rep. 641; *Prather v. State*, 12 Tex. App. 401; *Ex parte Conley* (Tex. Cr. App.) 75 S. W. 301. While the ballots reading 'For Local Option' and 'Against Local Option' cannot be counted for or against prohibition, they were votes polled at the election, and neither the ballots reading 'For Prohibition' or 'Against Prohibition' are a majority of all the votes polled, and therefore the result of the election is impossible of ascertainment from the face of the returns. The use of these illegal ballots which were furnished the voters by the officers of the election, being such an irregularity as renders the result of the election impossible to be arrived at, under the provisions of article 3397, before quoted, the election must be de-

clared void, and the proper officer ordered to order a new election."

This cause was certified to the Supreme Court (*Griffin v. Tucker*, 102 Tex. 420, 118 S. W. 683), and that court affirmed the holding of the Court of Civil Appeals on the question involved.

In the *Gomez* Case, *supra*, the ballots were all on separate pieces of paper. On one was printed "For Prohibition" and on the other "Against Prohibition", and neither contained the words "Official Ballot." In considering this matter the court said:

"Whether or not the court erred in sustaining the demurrer and special exceptions to the petition of contestant depends on whether the act above quoted prescribing the form of ballots to be used in local option elections is mandatory. If it is, then, according to the plain allegations of the petition, the ballots used in the election were not official ballots as prescribed by the act, and should not have been received or counted. In *State v. Connor*, 86 Tex. 133, 23 S. W. 1108, Judge Brown for the Supreme Court, construing articles 1694 and 1697, Rev. St. 1879, brought forward in the revision of 1895 as articles 1738 and 1741, which provide that one of the judges of elections shall write upon each ballot the voter's number corresponding with the number on the clerk's poll list, and that ballots not so numbered should not be counted, says: 'It is unnecessary to discuss the difference between directory and mandatory statutes. The law commands that the number shall be written on the ballot, and forbids those not numbered to be counted. Taking the two articles together, and especially in connection with section 4, art. 6, of the Constitution, there can be no doubt that they are mandatory. A clause is directory when the provision contains mere matter of direction and no more; but not so when followed by words of positive prohibition.' *Bladen v. Philadelphia*, 60 Pa. 468; *Pearce v. Morris*, 2 Ad. & El. 96. Prohibitory words can rarely if ever be directory. There is but one way to obey the command 'thou shalt not,' which is to abstain altogether from doing the act forbidden."

"Tested by the above rule, we think that the requirements of the act under discussion as to the character of the ballots to be used are mandatory; and, treating the allegations of the petition to be true, as we must as against the demurrer and exceptions, it stated a good cause of action, and that the action of the court in sustaining the demurrer and special exceptions was error, for which the judgment of the court below must be reversed and the cause remanded."

[1, 2] It is to be seen that these authorities determine: First, that Revised Statute, § 5719, prescribed the form of the ballot; second, that the provisions of the said statute prescribing said form are mandatory; and, third, that the local option law is penal in its nature, and the provisions must be strictly followed, or the election thereunder is void. There are other rules of instruction bearing upon this issue which it may be well here to state.

A statute of this nature, in so far as it affects the sovereign right of suffrage, should receive such a construction as would tend to assist, promote, and protect the honest and open expression of the voter's mind, and not one which by any sort of circumstances would create a condition or open up an opportunity for the unscrupulous and evil

mind by trick and chicanery to interfere with the expression of the voter's will. *Hanscom v. State*, 10 Tex. Civ. App. 638, 81 S. W. 549.

[8] Where there may exist a doubt as to the meaning of a statute, the courts will adopt and follow the contemporaneous and practical construction put upon such statute by other departments of the government, and by those charged with the execution thereof and with the performance of duties thereunder. Acquiescence by the people for many years in such construction and their formed habit of action and custom arising by virtue of such construction are entitled to great weight with the courts and such construction ought to be undisturbed except for manifest error. 8 Cyc. 736 et seq.

[4] The above statute expressly deals with the form of the ballot. The statute says so in express terms, and also by inference. The courts have already declared that the statute prescribes the form of the ballot, and that such statute is mandatory, and that its provisions as affecting the form of the ballot should be strictly construed. It is to be noticed that the statute: First, provides that the election shall be by official ballot, and that the ballot shall have written or printed at the top the words (as expressly stated in one quotation and conjunctively) "Official Ballot"; second, that it also shall have written or printed thereon (as expressly provided, in one quotation and conjunctively) "For Prohibition"; third, that it shall also have written or printed thereon (as expressly provided, in one quotation and conjunctively) "Against Prohibition." In the natural order of the English language, this will make a ballot of three lines, and there can be no doubt that this was the intent and purpose of the Legislature. This intent is further manifested by the other provisions of the act which prescribes the manner of voting the ballot. Those who favor the prohibition of the sale of intoxicating liquors within the proposed limits shall erase the words "Against Prohibition" by making a pencil mark through the same, and those who oppose it shall erase the words "For Prohibition" by making a pencil mark through the same," thus:

Official Ballot	Official Ballot
For Prohibition	For Prohibition
Against Prohibition	Against Prohibition

This form is a literal compliance with the statute, and can be voted by making a pencil mark through the same. The form of the ballot used in the Hightower and Dolen boxes was as follows:

Official Ballot
For
Prohibition
Against
Prohibition

Under this form of ballot, it would be impossible to comply with the terms of the statute expressly providing that a line should be run through the words "For Prohibition" or

"Against Prohibition," in accordance with the way the voter wanted to express himself on the issue. It would take two lines to run through the words so as to erase them.

The court ought to be guided by the language of the statute and to give expression to the free and natural meaning which the words convey, and not to give the language such an interpretation as would lead to an unnatural and absurd conclusion, as we necessarily would do if we should allow any sort of ingenious combination to be molded out of the words contained in the statute, as contended for by the appellant.

We cannot follow the assertion that the statute only requires certain words to appear upon the ballot, and that it gives no heed to the form of the words or to the construction of such words into phrases; but, on the other hand, we believe that the act contemplates a three-line ballot, such as above set out, and which is known and referred to in the evidence as the "standard form," and which has been almost universally prescribed in local option elections, and in universal and practical use by the people since the original enactment of the statute. It is certainly the simplest form and one most likely to give true expression to the voice of the voter.

[5, 6] Article 5719 of the statutes contains a provision which reads as follows:

"The clerk of such court [the county court] shall furnish the presiding officer of each voting box within the proposed limits with a number of such ballots, to be not less than twice the number of qualified voters at such voting box."

The statute also prohibits the use of any except official ballots, and declares that none except such official ballots shall be received or counted.

There is nothing uncertain or ambiguous about the language used in these provisions. It was the purpose of the law to do away with the furnishing of all private ballots as had theretofore been the practice. For many reasons the privately furnished ballot was unsatisfactory and was open to much fraud and manipulation. This law names a responsible officer as the person to furnish all the official ballots. It declares what should be upon the official ballot, declares what words should be upon such ballot, and fixes the form of such words by quoting them in parenthetical pairs. It fixed the source from which the ballot should come, and prohibited the use of any except such official ballots; that is to say, such ballots as were furnished to the election officers by the county clerk. Clearly, then, the clerk having the duty of furnishing such ballots, it was incumbent upon him to make up and prepare the form thereof, in compliance with the statute. This is a personal trust reposed in him by the law. He cannot delegate this duty to the county judge, nor to any other officer of the government. The trial court did not err in holding that the term "Official Ballot," as used in article 5719, means the ballot officially furnished by the county clerk.

Having already reached the conclusion from our investigation of the questions considered that this cause must be affirmed, we do not deem it necessary at this time to express an opinion on the third question above referred to; that is, as to the requirements of uniformity of the ballot in all of the boxes in precinct No. 3, the number of lines, style, printing, quality of paper, etc.

The court did not err in holding the election void and this cause is therefore affirmed.

AMERICAN EXPRESS CO. v. FOX.

(Supreme Court of Tennessee. June 8, 1916.
On Petition to Rehear, Aug. 15, 1916.)

1. INJUNCTION \S 33—FOREIGN COURTS—INJUNCTION AGAINST PROCEEDINGS—RELIEF—EQUITABLE REMEDIES.

The courts of the forum may restrain a citizen of the state of the forum from prosecuting a suit against a citizen of the same state in a foreign state.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 70, 71; Dec. Dig. \S 33.]

2. INJUNCTION \S 33—RELIEF—RIGHT TO.

Defendant, a resident of Tennessee, will not be enjoined from suing a complainant in the state of Mississippi on a cause of action arising in Tennessee, because it would be to complainant's convenience to be sued in Tennessee, or because the rules of law in Mississippi are slightly different, for probably the laws of Tennessee would be applied, and such an injunction should be granted only in a very special case, and not one merely where the practice in two states differed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 70, 71; Dec. Dig. \S 33.]

3. INJUNCTION \S 33—RELIEF—RIGHT TO.

The courts of the forum will not, at the suit of a nonresident corporation which might remove a suit brought by a resident of the state to the federal courts, enjoin a resident from suing in a foreign state, for such corporation could not be compelled to submit to the jurisdiction of the local courts.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 70, 71; Dec. Dig. \S 33.]

Certiorari to Court of Civil Appeals.

Bill by the American Express Company against Sam Fox. From a decree for complainant, defendant appealed to the Court of Civil Appeals, which affirmed the decree, and he prays certiorari. Writ granted, and decree reversed.

Burch & Minor and C. H. McKay, all of Memphis, for complainant. W. G. Cavett and H. S. Buchanan, both of Memphis, for defendant.

GREEN, J. Sam Fox, a citizen of Shelby county, Tenn., brought a suit for \$20,000 damages for personal injuries in a circuit court of that county, against the American Express Company, a New York corporation or joint stock company, having an office and place of business in Shelby county, Tenn. The accident happened in Shelby county. This suit was removed to the district court of the United States at Memphis on petition of the American Express Company. Before trial in the federal court, Fox took a nonsuit.

Three months later, Fox began a new action on account of the same matters in the circuit court of De Soto county, Miss., for \$3,000 damages.

This bill was filed by the American Express Company in the chancery court of Shelby county to enjoin the prosecution by Fox of his said damage suit in the circuit court of De Soto county, Miss. A demurrer was interposed by Fox, which was overruled by the chancellor and the injunction was granted

as prayed. The Court of Civil Appeals affirmed the chancellor's decree, and the case is before us on petition for certiorari, which has been granted.

[1] Notwithstanding a dictum to the contrary in *Lockwood & Co. v. Nye*, 32 Tenn. (2 Swan) 515, 58 Am. Dec. 73, we think there is no doubt that the courts of one state have the power in a proper case to restrain a citizen of that state from prosecuting a suit against another citizen of the same state in the courts of another state. This jurisdiction rests on the theory that the injunction operates in personam and is not an interference with the proceedings of the courts of a sister state. High on Injunctions (4th Ed.) \S 108-107; Story's Eq. Jurisp. \S 899, 900; Pomeroy's Eq. Remedies, \S 670.

Two of the leading cases in America announcing this rule are *Dehon v. Foster*, 4 Allen (Mass.) 545, and *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 35 L. Ed. 538. In the last case it was held that such proceedings were not in derogation of section 1, art. 4, of the Constitution of the United States providing that full faith and credit shall be given in each state to the judgments of another state.

This question has received elaborate consideration in recent years and the cases on the subject are collected and classified in notes in 10 Ann. Cas. 28, 21 L. R. A. 71, and 25 L. R. A. (N. S.) 267. Two recent cases are *Jones v. Hughes*, 156 Iowa, 684, 137 N. W. 1023, 42 L. R. A. (N. S.) 502; *Freick v. Hinkly*, 122 Minn. 24, 141 N. W. 1086, 46 L. R. A. (N. S.) 693. It appears, from an examination of the authorities referred to, that injunctions have been granted against suits in the courts of another state to prevent embarrassment, oppression, or fraud, to prevent evasion of domiciliary laws, where insolvency proceedings are pending, where the local court had prior jurisdiction, and perhaps other cases.

[2] The decisions do not appear to be altogether agreed as to what circumstances justify such relief. It would be perhaps impossible to state a rule to which all the cases would conform. We are impressed with the idea that such injunctions have in some of the cases been improvidently granted.

We indulge ourselves in quotations from the opinions of three eminent judges who have had occasion to consider this jurisdiction of courts of equity.

Chancellor Pitney, of New Jersey, observed:

"But on general principles, equity will not interfere with the right of any person to bring an action for the redress of grievance—the right preservative of all rights—except for grave reasons, and on grounds of comity the power of one state to interfere with a litigant who is in due course pursuing his rights and remedies in the courts of another state ought to be sparingly exercised. * * * They must be very special circumstances that will justify this court in restraining the prosecution of an equitable action already pending in a court of ample ju-

jurisdiction. I speak not of any limitation upon the power of this court, but upon the propriety of its exercise in the particular case. Its exercise is not to be properly based upon any theory that this court knows better how to do justice than the court of last resort of that commonwealth; that it can weigh evidence better or more justly apply to the facts any general principle of law or equity, nor upon the ground that this court recognizes different rules of law or of equity from those which obtain in the commonwealth." *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 74 N. J. Equity, 457, 71 Atl. 153.

Chief Justice McClain of Iowa said:

"But, beyond the prevention of some threatened evasion of the specific laws of the state intended to regulate the relations of its citizens to each other in some definite manner, courts have been reluctant to interfere with the exercise of the undeniable right of a resident to go into the courts of another state to secure such relief as may there be available to him, and have not felt justified in scrutinizing his motive in doing so." *Jones v. Hughes*, 156 Iowa, 684, 137 N. W. 1023, 42 L. R. A. (N. S.) 502.

Judge Brewer, while on the Supreme Court of Kansas, used this language:

"The question is: Under what circumstances will a court of equity restrain a party from invoking the aid of the courts and processes of another state? It certainly will not do that, simply to compel him to carry on his litigations at home. It will not act upon the basis of any distrust of the courts of a sister state." *Cole v. Young*, 24 Kan. 435.

Tested by the rules expressed in the above quotations from these three learned jurists, we think that the bill of complaint does not state a case which entitles it to the relief here sought.

It is said for the complainant that it will be unable to compel the attendance of any of its witnesses in the Mississippi court and unable to procure the attendance of some of them; that Fox's contributory negligence will only mitigate his damages in Mississippi and will not bar his recovery there as it would in Tennessee; that in Mississippi all questions of negligence and contributory negligence must go to the jury, while in Tennessee a defendant is entitled to peremptory instructions as to these matters, under certain circumstances. Other reasons are set out why it would be more convenient for the complainant, and more to its advantage, to have Fox's damage suit tried in Tennessee. While some of the decided cases would apparently justify an injunction in favor of the complainant, we do not think it entitled to such relief on the showing it has made. So far as we can see, every defense available to the American Express Company against this damage suit in Tennessee will likewise be available to it in Mississippi. The accident occurred in Tennessee, and Tennessee law will doubtless be applied. The fact that the procedure in Mississippi differs somewhat from procedure in Tennessee does not authorize the exercise of the jurisdiction invoked. We cannot doubt that justice will be administered in the Mississippi courts, nor would we feel authorized in restraining

the suit in Mississippi merely because it is more convenient for the complainant to litigate such matters in Tennessee, or because our practice may be more favorable to it. It may be more convenient for Fox to litigate in Mississippi, and more to his advantage. We see no evidence of fraud or oppression, nor any attempt to evade domiciliary laws.

[3] What we have heretofore said, however, is not absolutely necessary to a decision of this case. Such injunctive relief as is here sought by the complainant, in all the cases to which our attention has been called, has been accorded to citizens of a particular state in proceedings against citizens of the same state. We know of no case, reaching a court of last resort, where an injunction has been issued in behalf of a nonresident by the courts of any state to restrain a citizen of that state from suing the nonresident in another state.

We are not aware that this identical question has heretofore arisen, but we think there are very good reasons why the jurisdiction invoked should not be exercised in favor of a nonresident, at least in a case involving such facts as the present one.

We pass the suggestion that the courts of a given state have enough to do when they protect the rights of their own citizens and citizens of other states within their borders. It is obvious, however, that our citizens should not be restrained from asserting their rights against any person in other forums, and compelled to litigate with such person in our own courts, unless we can also restrain that person from litigating elsewhere, and force him to yield to the jurisdiction of our courts.

From the statement of the case, it appears that the American Express Company has not been willing to submit its rights to the courts of Tennessee in the matter of Fox's claim for damages. Fox first sued the complainant in the circuit court of Shelby county, and the complainant—the defendant in that suit—forthwith removed the case to the federal court. If we enjoin Fox's suit in Mississippi and he brought another suit in the Tennessee courts for more than \$3,000 or for \$20,000, we would be utterly without power to compel the American Express Company to surrender to this jurisdiction. It would be entitled by reason of diverse citizenship to remove the controversy to the courts of the United States, and judging from its previous course, the American Express Company would do that very thing.

If the case were removed to the federal court, Fox would be inconvenienced in certain particulars, just as the complainant claims it will be inconvenienced by the suit in Mississippi. The quantum of evidence necessary to take the case to the jury is greater in the federal courts than in the Tennessee courts. The fellow-servant rule has broader application in the federal courts.

Proceedings in the federal courts are more expensive and cannot be carried on upon the oath of a poor person.

It is true that, inasmuch as the complainant has qualified to do business in Tennessee, it is a resident of Tennessee for certain purposes. *Turcott v. Railroad*, 101 Tenn. 108, 45 S. W. 1067, 40 L. R. A. 768, 70 Am. St. Rep. 661; *Adams v. Chattanooga Co., Ltd.*, 128 Tenn. 505, 161 S. W. 1131. The American Express Company, nevertheless, is still a resident of the state of New York for jurisdictional purposes, so as to enable it to remove this controversy to the courts of the United States.

Inasmuch, therefore, as we would be unable to compel the complainant to submit to our jurisdiction, should we enjoin Fox's suit in Mississippi, we must decline for that reason, if for no other, to grant the relief here sought. The result would be an injustice to a citizen of this state. It would force him without doubt to suffer much of the very trouble and inconvenience which the complainant seeks to obviate for itself.

The decree of the Court of Civil Appeals and the decree of the chancellor will be reversed, and the bill dismissed at complainant's cost.

On Petition to Rehear.

A petition to rehear is filed, which points out that the case was submitted on demur-

rer to the complainant's bill, and challenges the accuracy of the statement in the opinion that "no fraud or oppression nor any attempt to evade domiciliary laws" appears, on the part of defendant herein. If it be conceded that on the former hearing the court did not give adequate force to certain charges of the bill confessed by the demurrer, nevertheless the result must remain the same. As noted in the opinion, that portion criticized as just indicated was not "absolutely necessary to a decision of this case."

We remain unshaken in the belief that such an injunction as is herein sought should not be granted to a nonresident complainant, under the circumstances appearing in this case. The observation in the opinion that litigation might not be pursued in the courts of the United States upon the pauper's oath was founded upon the practice that has prevailed therein within the knowledge of the writer. Our attention is moreover called to a rule of the federal District Court for the Western Division of Tennessee, absolving the clerk of that court from the duty of docketing any case until the plaintiff makes a deposit to cover costs. Whether such practice and rule be authorized by federal law, it is not for us to say. This matter is not determinative of the controversy before us.

We are the better satisfied upon reconsideration that we properly decided this case, and the petition to rehear is dismissed.

RITSCHY v. GARRELS. (No. 14306.)

(St. Louis Court of Appeals. Missouri. July 14, 1916. Rehearing Denied July 31, 1916.)

1. LIBEL AND SLANDER §47—QUALIFIED PRIVILEGE—SELF-DEFENSE.

Where plaintiff had attacked the character of defendant's father, the defense of qualified privilege was not available to defendant, who published a libelous affidavit defending his father's character.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 131, 132, 154; Dec. Dig. §47.]

2. LIBEL AND SLANDER §105(3)—EVIDENCE—ADMISSIBILITY.

Where an action for libel is based upon a part of an affidavit, the defendant may introduce its remaining portions to explain the paragraphs directly involved and to mitigate the damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 294; Dec. Dig. §105(3).]

3. APPEAL AND ERROR §1170(7)—DETERMINATION OF CAUSE—REVERSAL—FORMAL DEFECTS—RECEPTION OF EVIDENCE.

The court's failure to require plaintiff to introduce the entire affidavit, or the pamphlet in which it was published, is not reversible error, under Rev. St. 1909, § 2082, forbidding reversals except for material errors, where the remaining matter was immaterial and defendant did not offer it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4543; Dec. Dig. §1170(7).]

4. TRIAL §323—VERDICT—SIGNATURE—STATUTE.

Rev. St. 1909, § 7280, requiring all agreeing jurors to sign the verdict unless unanimously rendered, when the foreman alone signs it, refers to a three-fourths verdict authorized by the amended Constitution, and is inapplicable to one returned by 11 jurors under a stipulation that the case might proceed with them the same as with 12 jurors.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 759; Dec. Dig. §323.]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

"To be officially published."

Action by Lewis J. Ritschy against William L. Garrels. Judgment for plaintiff, and defendant appeals. Affirmed.

T. Percy Carr, of St. Louis, for appellant. W. B. & Ford W. Thompson, of St. Louis, for respondent.

NORTONI, J. This is a suit for damages on account of a libel. Plaintiff recovered, and defendant prosecutes the appeal.

Defendant made and caused to be printed and published, about December 28, 1910, an affidavit which, through some of the statements therein, cast a reflection upon plaintiff, and hence this suit. The affidavit so made and published by defendant refers to "lying affidavits" made by plaintiff; that is, as if to charge plaintiff with having made lying affidavits. The affidavit of defendant also refers to plaintiff, Ritschy, as one who would readily "play the crooked game," etc.

The petition prays a recovery of \$10,000 compensatory damages and also the same

amount in punitive damages. It appears to have been drafted as in two counts, but the court treated with the averments as though both related to the same grievance. The actual damages claimed are because of the publication of the libel on December 28th, while what appears to be the second count claims punitive damages on account of a libel said to have been published on December 19th of the same year. It is argued that, as the publication of each libel is a separate tort, no recovery whatever may be had as for punitive damages on account of a libel published as of that date; but obviously the argument is not well grounded, for it appears from an examination of the record that the petition was amended, so as to show the punitive damages were claimed on account of a libel of December 28th—that is, the same libel for which compensatory damages are claimed in the preceding paragraph of the petition. Therefore both the compensatory damages and the punitive damages sued for relate to the same and identical publication—that is, that made on December 28th. It is said the date December 19th was inadvertently inserted as a clerical error. That the petition was amended during the proceedings as above indicated, in order to make it conform to the proof, is abundantly clear from the record.

[1] It appears that defendant's father, who was president of the Franklin Bank in St. Louis, became involved in some litigation in New Mexico over the sale of certain collateral securities held by the bank. In a proceeding to set this sale aside, plaintiff made an affidavit which was utilized in court, and the substance of plaintiff's affidavit was published in St. Louis in connection with the court proceedings. Defendant's father thereupon set about accumulating certain facts with respect to the subject-matter to be published in a pamphlet and issued by him to business associates and others in explanation of his conduct touching the sale. Defendant made an affidavit in respect of this matter and caused it to be printed and published in the pamphlet prepared by his father. In other words, defendant aided his father in the preparation of the pamphlet and admits in his testimony that he caused the affidavit so made by him to be printed and published at the time in question. The libel sued on relates alone to the language employed by defendant in the affidavit made and published by him in aid of his father's defense. Among other things defendant invoked throughout the trial a qualified privilege in respect of this matter; that is to say, that he was merely defending his father. The court excluded this defense by repeated rulings and refused instructions predicated on that theory in the view that, though defendant's father might make a defense against charges made by plaintiff

against him, defendant was not privileged to do so in defense of another.

It is argued the court erred in this view, but we are not so persuaded. It is said:

"The law justifies a man in repelling a defamatory charge by a denial or by an explanation. He has a qualified privilege to answer the charge, and if he does so in good faith, and what he publishes is fairly an answer, and is published for the purpose of repelling the charge, and not with malice, it is privileged, although it be false. But the privilege under this rule is limited to retorts or answers which are necessary to the defense, or fairly arise out of the charges made; and hence, if the defamatory matter published by defendant is not a proper reply to the matter published by plaintiff which provoked its publication, it will be actionable irrespective of the question of malice." 25 Cyc. 391, 392.

See also *Fish v. St. Louis County Printing & Publishing Co.*, 102 Mo. App. 6, 74 S. W. 641.

But, though defendant's father may have been justified in publishing a retort in defense against the aspersions against his character contained in plaintiff's affidavit filed in the litigation in New Mexico, we perceive no reason why the principle should extend to the case in hand, which is that of a libel prepared, printed, and published by defendant. No authority is cited, and we are aware of none, which extends the privilege invoked to the case of the son, whom the jury found made a libelous attack on plaintiff. Obviously, though the father were justified, the defendant, who prepared and published the libel, must respond from the falsity of the accusations made by him, if he sees fit to personally print and publish them as he did. There is certainly no self-defense in the case in so far as defendant is concerned.

[2, 3] The pamphlet in which the libel was carried is printed in 59 pages, and plaintiff introduced in evidence only a portion of that prepared and published by defendant, which contained the published matter complained of. It is argued the court erred in not requiring plaintiff to introduce the entire pamphlet, with all of its pages, and especially the entire affidavit printed and published by defendant. There is no doubt that defendant was entitled to have the entire affidavit prepared and published by him read in evidence, to explain the paragraphs upon which the suit is founded, and to show the motive and intent of the publication, and to mitigate damages, if he chose to do so. See *Morehead v. Jones*, 2 B. Mon. (Ky.) 210, 36 Am. Dec. 600. But, though such be true, we are forbidden by the statute (section 2082, R. S. 1909) from reversing a judgment except for error materially affecting the merits of the action against the appellant, and this statute is to be adhered to according to its spirit. See *Shinn v. United Rys. Co.*, 248 Mo. 173, 154 S. W. 103. On reading the entire article prepared and published by defendant, it appears plaintiff introduced so much as was immediately relevant to the libel com-

plained of, and defendant did not see fit to read the remainder in evidence, either at that time or subsequently, when putting in his defense. The court did not deny defendant's right to have the entire article before the jury, and defendant should be regarded as having waived the matter. At any rate, there is nothing in the portions of the article not read which would either tend to explain or mitigate the charges complained of. The judgment ought not to be reversed for the mere failure of plaintiff to read immaterial matter to the jury, when the defendant did not deem it of sufficient importance to even offer it in evidence.

[4] It is argued the verdict is erroneous, for that it was signed by but one juror as the foreman, when the record discloses only 11 members of the jury participated therein. Obviously this argument is without merit, when the facts on which it is founded are considered. It appears that during the trial one of the jurors became ill and was excused by consent of the parties. In connection with this the parties stipulated and agreed "that the case may proceed with 11 jurors the same as with 12." Prior to the adoption of our constitutional amendment authorizing three-fourths of the members of a jury to return a verdict in a court of record on the trial of a civil cause, the concurrence of the full panel was required. After the adoption of the amendment referred to the Legislature provided that if a verdict be rendered by the entire panel the foreman alone may sign it, but if rendered by a less number than the panel such verdict shall be signed by all of the jurors who agree to it. Section 7280, R. S. 1909. This statute reckons with and contemplates the matter of carrying into effect the amendment to the Constitution authorizing a three-fourths verdict, and is not designed to control a situation such as this, where one of the jurors is excused by consent of parties and it is stipulated that the case shall proceed as if 12 jurors continued to act throughout the trial. It would, indeed, be not only highly technical, but unjust as well, to thwart the result of the trial and set aside the verdict, which appears to have been unanimous, when considered under the stipulation solemnly entered into of record by the parties to continue with the trial as if a jury of 12 men were in the box. The substance of the stipulation is "that the case may proceed with 11 jurors the same as with 12." If 12 were present, the signing of the verdict by one juror as the foreman was the proper course to pursue. The parties treated the 11 jurors as a full panel of 12, and should be held to account accordingly.

We see no error in the instructions given, and none in the action of the court in refusing those denied defendant. All competent matters of defense were submitted by the instructions given on the part of defendant.

There are some 30 assignments of error

set forth in the brief, but due regard to expedition of the public business forbids that they should all be separately discussed in the opinion. However, we have treated with the more important arguments advanced, and considered all of those put forward in connection with the entire record.

We see nothing further which merits discussion, and it appears the judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

STATE ex rel. WAGENER v. COOK, Probate Judge. (No. 15318.)

(St. Louis Court of Appeals. Missouri. July 24, 1916.)

1. INSANE PERSONS §18—CUSTODY AND CONTROL—DISCRETION OF PROBATE COURT.

Under Rev. St. 1909, § 519, providing that if affidavits are filed to the effect that one in custody of unsound mind has been restored, the court shall hold inquiry as to his sanity, and that if the court on such inquiry finds that he has not been restored, but such person within ten days thereafter files a duly verified allegation that he is of sound mind and is aggrieved by the finding of the court, the court shall then cause the facts to be inquired into by a jury, the court must set the last provided hearing within a reasonable time, and it is an abuse of discretion to postpone the hearing for four months.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 27; Dec. Dig. §18.]

2. MANDAMUS §28—FUNCTION OF WRIT—INTERFERENCE WITH "DISCRETION OF COURT."

While ordinarily discretion of courts will not be interfered with by mandamus, that discretion is a sound legal discretion and not an unlimited license to act, irrespective of restraint, and if it appears that there has been an abuse of discretion, mandamus is the proper remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 64; Dec. Dig. §28.]

For other definitions, see Words and Phrases, First and Second Series, Discretion.]

"Not to be officially published."

Mandamus by the State, on relation of F. L. Wagener, against W. B. M. Cook, Judge of the Probate Court of Montgomery County. Peremptory writ awarded.

See, also, 185 S. W. 758, 187 S. W. 621.

Ball & Ball, of Montgomery City, for relator. E. P. Rosenberger, of Montgomery City, for respondent.

NORTONI, J. This is an original proceeding in mandamus directed to the probate court of Montgomery county. Relator is a resident of that county, and respondent, W. B. M. Cook, is judge of the probate court.

It appears relator, F. L. Wagener, was, on June 17, 1915, adjudged to be a person of unsound mind by the probate court, Judge Cook, presiding. A. J. Henton was on that date appointed guardian of his person and curator of his estate. Subsequently, on Au-

gust 10, 1915, relator and also his daughter, Etta Wagener, filed in the probate court their affidavits under section 519, R. S. 1909, alleging therein that relator had been restored to his right mind, and an inquiry touching this matter was had before the probate judge on August 17, 1915, which was decided adversely to relator. Thereafter, and within ten days—that is, on August 26, 1915—relator filed with the probate court an allegation in writing duly verified by his own oath, and also that of his daughter, Etta Wagener, that he was of sound mind on that date and aggrieved by the action of the court. Moreover, he prayed an inquiry into the facts by a jury as is contemplated in the statute. Although this motion for a trial of the fact by jury was filed in due time, the matter was not disposed of for the reason that such other proceedings were had which necessarily delayed the investigation. In other words, relator sought to have the inquiry certified to the circuit court by the probate judge, and mandamus proceedings touching that ensued. After the mandamus was finally disposed of, relator then appeared in the probate court on July 17, 1916, and moved an early setting of the inquiry by jury, but the court declined this and instead set the matter down for hearing November 14, 1916. Thereupon relator sued out the mandamus involved here. There are several matters set up in the return, but none of them are of sufficient merit to warrant comment in the opinion save one and this relates to the right to control by mandamus the discretion of the probate court in the premises.

[1, 2] It is argued that as the probate court has set the matter down for hearing on November 14th—that is, about four months from this time—this court is without authority to direct otherwise for that the matter involves a judicial discretion which is immune from control by mandamus, but obviously the argument is without avail where a clear abuse of judicial discretion and an arbitrary ruling appears as on the facts before us. The statute is as follows:

"If any person shall file in the probate court of any county in this state an allegation in writing, verified by oath or affirmation, that any person who has heretofore been declared by such court to be of unsound mind, or insane, has been restored to his right mind, the court shall hold an inquiry as to the sanity of such person: Provided, that if the court, upon such inquiry, shall find that such person is not restored to his right mind, and such person, or any one for him, shall, within ten days after such finding, file with the court an allegation in writing, verified by oath or affirmation, that such person is of sound mind and is aggrieved by the action and finding of the court, the court shall then cause the facts to be inquired into by a jury."

Relator more than a year ago was declared to be of unsound mind, and, as before said, has sought to have that adjudication set aside. This was denied him by the court.

and within ten days thereafter he filed his proper motion, reciting that he was aggrieved by the action and finding of the court, and requested an inquiry as to the facts by a jury. The statute manifestly contemplates an immediate inquiry touching this matter; that is to say, at least within a reasonable time after the filing of the motion, for obviously it is not designed that one shall suffer a continued restraint of his liberty and his person and property remain in guardianship for an unnecessary period of time until at least every inquiry concerning the facts provided for is had when invoked. The purpose and intent of the statute is so manifest as to indicate a clear abuse of discretion and an arbitrary exercise of power on the part of the probate court in the premises. Ordinarily the exercise of judicial discretion is not to be interfered with by mandamus. But the discretion delegated to an officer or court is a sound legal discretion, the meaning of which is well known and understood in the law, and it is not an unlimited license to act irrespective of restraint. See *State ex rel. Adamson v. Lafayette County Court*, 41 Mo. 221. Therefore, when it appears that the judicial discretion has been abused and arbitrarily exercised, the field of discretion is regarded as abandoned, and the superintending court will control the matter by mandamus. See *State ex rel. Kelleher v. Board, etc., Public Schools*, 134 Mo. 298, 25 S. W. 617, 58 Am. St. Rep. 503; *State ex rel. McCleary v. Adcock*, 206 Mo. 550, 557, 105 S. W. 270, 121 Am. St. Rep. 681. In the case last cited, the Supreme Court says, in respect of the right to control a judicial tribunal by mandamus where its discretion has been arbitrarily exercised, that:

"We have always so held in matters of granting a continuance and similar matters, and a citation of cases would be superfluous."

See, also, *State ex rel. Journal Ptg. Co. v. Dreyer*, 183 Mo. App. 463, 167 S. W. 1123. The postponement of the matter of a jury trial concerning the facts on relator's application to be restored to his liberty and given possession of his property, if found to be of sound mind, until November 14th, or a period of about four months, is unreasonable in itself. The action of the court in respect of this appears to be arbitrary and is clearly such an abuse of judicial discretion as invokes the aid of the extraordinary remedy of mandamus.

Although we may not designate a particular day for the trial, the alternative writ should be amended so that the matter shall be set down in the probate court for a hearing within a reasonable time, not exceeding thirty days from this date, and as so amended awarded in peremptory form. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

SIMPSON et al. v. FEDERAL LEAD CO.

(No. 14873.)

(St. Louis Court of Appeals. Missouri. July 10, 1916.)

1. ATTORNEY AND CLIENT — 192(2) — LIEN FOR COMPENSATION — PETITION — SUFFICIENCY.

A petition setting out a compensation contract between plaintiff attorneys and their client, and alleging that a copy thereof was duly served in writing upon defendant, sufficiently alleges a notice to defendant under Rev. St. 1909, § 965, requiring written notice of the attorney's lien claim for compensation to be served, especially after verdict.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 427; Dec. Dig. — 192(2).]

2. ATTORNEY AND CLIENT — 180 — LIEN FOR COMPENSATION — SERVICE OF NOTICE — STATUTE.

Where attorneys handed a copy of a written compensation contract to defendant, there was a sufficient compliance with Rev. St. 1909, § 965, requiring written notice of an attorney's interest in his client's cause of action.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 390-392; Dec. Dig. — 180.]

3. ATTORNEY AND CLIENT — 180 — LIEN FOR COMPENSATION — NOTICE TO CORPORATION — SERVICE — WAIVER.

Where notice of attorneys' claim to lien for compensation was served upon the defendant's claim agent, who was authorized to settle the case, and he afterwards attempted to do so with the attorneys, *held*, that defendant waived any defects in the manner of service.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 390-392; Dec. Dig. — 180.]

Appeal from Circuit Court, St. Francois County; Peter H. Huck, Judge.

"Not to be officially published."

Action by Arthur E. Simpson and others against the Federal Lead Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Holland, Rutledge & Lashly, of St. Louis, and Parkhurst Sleeth, of Flat River, for appellant. Arthur E. Simpson and T. E. Gayeski, both of St. Louis, and Clyde Morsey, of Farmington, for respondents.

ALLEN, J. This is an action by a firm of attorneys to recover the sum of \$175, upon the theory that plaintiffs, by virtue of compliance on their part with the provisions of section 965, Revised Statutes 1909, had an attorney's lien upon a claim or cause of action in favor of a client of plaintiffs and against defendant, which defendant compromised and settled without plaintiffs' knowledge or consent. The cause was tried below before the court without the intervention of a jury, resulting in a judgment in plaintiffs' favor for the amount demanded, from which the defendant appeals.

It appears that one Andro Pomerko was injured while in defendant's employ, and that thereafter, to wit, on June 16, 1913, plaintiffs entered into a written contract with him whereby, in consideration of services to be

rendered by plaintiffs in the prosecution of his claim against defendant for such personal injuries, he agreed to pay plaintiffs one-half of the proceeds of all moneys received or collected upon such claim, either by way of settlement or otherwise, before or after the institution of a suit thereupon. On the following day, to wit, June 17, 1913, plaintiffs wrote a letter to defendant company advising defendant that they represented Pomerko. This letter, however, did not purport to comply with the terms of the statute respecting the written notice required to be given thereunder. On June 19, 1913, the defendant replied to plaintiffs' letter, stating that defendant's claim agent would call upon plaintiffs some time during the following week. Thereafter, on or about June 25, 1913, defendant's claim agent called at the office of plaintiffs in the city of St. Louis for the purpose of undertaking to effectuate a settlement of the Pomerko claim with plaintiffs. The testimony in behalf of plaintiffs is to the effect that while in plaintiffs' office the claim agent inquired concerning plaintiffs' contract with Pomerko and was handed a signed copy of the contract which he read; that the claim agent then undertook to make a settlement of the claim with plaintiffs, but did not succeed in this. Thereafter defendant compromised and settled Pomerko's claim by paying him the sum of \$350, without the knowledge or consent of plaintiffs; and thereupon plaintiffs brought this action to recover of defendant one-half of the amount so paid by it.

[1] It is argued for appellant that the petition states no cause of action in that it does not allege that plaintiffs gave defendant notice in writing of the existence of the contract between them and Pomerko, as required by section 965, supra. The petition sets out the contract between plaintiffs and Pomerko, and avers that a copy of said agreement was, on the 25th day of June, 1913, duly served in writing on defendant, Federal Lead Company, "and that thereafter negotiations towards a settlement of said claim were had between plaintiffs and the representatives of defendant, but that no settlement of said claim was then reached." It is conceded, as it must be, that the contract itself fully sets forth the interest of plaintiffs in the claim or cause of action; and the averment of the petition that a copy of this written agreement was duly served on defendant is manifestly a sufficient allegation of notice to defendant under and in compliance with the statute. Certainly the petition is, in this respect, good after verdict.

[2] Appellant contends that the court erred in refusing to give the peremptory instruction in the nature of a demurrer to the evidence, offered by it, for the reason, as is said, that the proof shows that no "notice in writing" of the existence of the contract between plaintiffs and their client was ever served

upon defendant, in compliance with the statute, supra. The argument is that merely handing defendant's claim agent a signed copy of the contract, and telling him that it was plaintiffs' contract with Pomerko, was no notice in writing that plaintiffs had such an agreement with their client, but constituted merely oral notice of the existence of a written contract. We think that the argument is unsound. We take it that the purpose of the notice required by the statute is to notify. It is true that the statute requires that the notice be in writing; but service by an attorney of a copy of his contract with his client, at least under such circumstances as here appear, ought to be held sufficient notice in writing to satisfy the statute. We think the point is without merit.

[3] According to plaintiffs' evidence, the contract was handed to and read by defendant's claim agent who had been sent to plaintiffs by defendant's general manager, and who thereupon undertook to effectuate a settlement with plaintiffs. It cannot be doubted that in thus negotiating with plaintiffs the claim agent was acting within the scope of his authority. Regarding the signed copy of the contract as sufficient "notice in writing" of its own existence, any defect in the manner of service thereof upon defendant corporation, we think, was waived by defendant. See *Abbott v. United Railways Co.*, 138 Mo. App. 530, 119 S. W. 964. The facts constituting such waiver are sufficiently averred in the petition, and plaintiffs' evidence tends to establish them. Under the facts pleaded and which plaintiffs' proof tended to establish, defendant, in our opinion, could not, after such notice of plaintiffs' interest in the cause of action, make a settlement with Pomerko without liability to plaintiffs under the statute.

It follows that the judgment should be affirmed, and it is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

DE MUN ESTATE CORP. v. FRANKFORT GENERAL INS. CO. (No. 14195.)

(St. Louis Court of Appeals. Missouri. July 18, 1916. Rehearing Denied July 26, 1916.)

1. INSURANCE §435—LANDLORD'S CONTINGENT POLICY—CONSTRUCTION—"OCCUPATION"—"POSSESSION."

Where every part of the habitable portion of a building was let to and occupied by tenants when the cornice of the roof fell and injured pedestrians, the policy, stipulating indemnity for the owner, for sums paid the injured parties, providing that it was issued with the understanding that assured was the owner of the property, but not in occupation or control of it, covered the case, though the owner was in possession of the roof, as "occupation" is not synonymous with "possession," while the language of an insurance policy is to be con-

strued in aid of the insurance rather than to defeat it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144; Dec. Dig. ¶435.]

For other definitions, see Words and Phrases, First and Second Series, Occupation; Possession.]

2. INSURANCE ¶146(1)—CONSTRUCTION OF POLICY.

A policy of insurance is to be given effect, if permissible, as if it was intended to cover and include the subject of the insurance for which the premium was paid, rather than to aid an escape from liability thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 296, 297; Dec. Dig. ¶146(1).]

3. NEGLIGENCE ¶121(3)—RES IPSA LOQUITUR—FALLING CORNICE.

Ordinarily the presumption of negligence attending the falling of a building's cornice into the street on a practically windless evening would alone show negligence on the part of the owner of the building, under the rule of *res ipsa loquitur*, casting the burden on the owner to rebut the *prima facie* showing.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217, 218, 225; Dec. Dig. ¶121(3).]

4. INSURANCE ¶665(4)—LANDLORD'S CONTINGENT POLICY—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action by the owner of a building against an insurance company for indemnity for amounts paid to persons injured when a cornice of the building fell into the street, evidence held sufficient to support finding that the injuries were caused by the negligence of the insured, and that they were properly chargeable to it by law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1722; Dec. Dig. ¶665(4).]

5. INSURANCE ¶435—LANDLORD'S CONTINGENT POLICY—LIABILITY OF INSUREE.

There can be no recovery on a landlord's contingent policy for amounts paid persons injured by the falling of a cornice, unless the cornice was defective when leases of the building were executed by the owner and the property passed into the hands of tenants.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144; Dec. Dig. ¶435.]

6. INSURANCE ¶435—LANDLORD'S CONTINGENT POLICY—OWNERSHIP OF BUILDING.

Where a building was leased by the agent of the heirs of an estate, and thereafter such heirs incorporated, one of them being president and another secretary and treasurer, etc., the company was liable to pedestrians, injured by the falling of a cornice from the building into the street, though the property was under lease when the company acquired it, so that an insurance company, which had insured the heirs against such liability, the name of the assured being changed to that of the company, was liable to it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144; Dec. Dig. ¶435.]

Appeal from Circuit Court, Lincoln County; Edgar B. Woolfolk, Judge.

"To be officially published."

Suit by the De Mun Estate Corporation against the Frankfort General Insurance Company. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

Holland, Rutledge & Lashly and Seddon & Holland, all of St. Louis, and Avery, Young, Dudley & Killam, of Troy, for appellant L. L. Leonard, of St. Louis, R. H. Norton, of Troy, and Grover C. Sibley, of St. Louis, for respondent.

NORTONI, J. This is a suit on a policy of insurance. Plaintiff recovered, and defendant prosecutes the appeal.

The insurance contract is what is known as a "landlord's contingent policy." It vouchsafes indemnity to the owner of the building, who is neither in the occupation nor control of it, for such expenditures as he may make in liquidation of claims arising on account of personal injuries received because of defects in the building or the neglect of the owner which are chargeable to him at law. The building on which the policy covers is situate on the west side of North Sixth street in St. Louis, between Olive and Pine, numbered 207, 209, 211, 213, and 215. It consists of three stories, is constructed of brick, and is known as the Mona Hotel. It is an old building, having been erected about 1843, and was occupied first by De Mun as a residence. About 1855 it was converted into business property, but during all the time has continued as the property of the De Mun estate; that is, it was owned by the heirs of Isabel De Mun. The policy was originally issued to Julius S. Walsh, agent for himself and the other heirs, on the 20th day of December, 1909, for one year; that is, to December 20, 1910. In the meantime the interests of all of the heirs in the property were incorporated in the name of De Mun Estate Corporation, the plaintiff, and on January 28, 1910, the change of the name of the owner was indorsed on the policy as follows:

"It is hereby understood and agreed that the name of the assured in this policy is changed to read De Mun Estate Corporation, and ceasing to cover in the name of Julius S. Walsh, agent for himself and other owners as originally written."

At the time the policy was issued—and indeed, at all times relevant to the questions for consideration here—the building was in possession of tenants. William J. Milford was the lessee, under a lease of date June 29, 1908, for a period of four years, of all of the second and third floors of the building, and also the storerooms numbered 207, 209 North Sixth street, that is, on the ground floor, in which Milford conducted a hotel, the Mona House, and restaurant. Moreover, it appears Milford had possession of a small basement under the building as well. Joseph Fireside & Co. were the lessees under a lease of date August 12, 1907, for a period of five years, of storerooms numbered 211, 213 North Sixth street on the ground floor while one Joyce was a tenant and occupied the remaining storeroom, that is, No. 215

North Sixth street, as a dramshop. With the property thus occupied, the policy was issued to the heirs of the De Mun estate, Julius S. Walsh, agent, and continued in force under the change of name after the incorporation of the estate as above indicated.

[1, 2] On a quiet evening in June, 1910, a considerable portion of the cornice on the front of the building fell from position into the street, and injured several pedestrians. Plaintiff expended about \$3,700 in settlement of the claims of persons so injured preferred against it, and sues upon the policy for indemnity. It is argued the subject-matter in suit is not within the terms of the policy, for that plaintiff owner was in possession and control of the roof of the building and the cornice which fell, whereas the policy stipulates indemnity only in those cases where the insured is not in such possession and control. The question thus made is to be determined by a construction of the following provision of the policy:

"This policy is issued with the understanding that the assured is the owner of the property, but is not in occupation or control of it, the actual occupation or control being vested in a lessee or lessees, and it is hereby agreed that the company shall not be responsible for any loss, excepting such as may be occasioned by some fault or neglect on the part of the assured, or may be chargeable to him by law, notwithstanding the fact that the property is leased or beyond his control, and this policy is accepted by the assured accordingly."

We regard the argument as more specious than sound, in that it reckons with the words "occupation or control" contained in the policy apart from the entire property as tenements, and seeks to confine them to a mere infinitesimal portion of the subject-matter insured; that is, to the roof, or rather, the cornice, which fell to the ground and injured the several pedestrians. Moreover, the argument proceeds in the view that the word "occupation" is synonymous with the word "possession," which is in no wise true, and as if possession intends, in part at least, a constructive possession which draws to it the right of control touching the cornice. It appears that every part of the building, that is, the habitable portions, was let to and occupied by tenants at the time the policy was issued and throughout the whole period involved here. This being true, no portion of it was in the "occupation or control" of the owner according to the intentment of the policy contract when interpreted under the principle of law relevant to insurance matters. No one can doubt that the language employed in an insurance policy is to be construed in aid of the insurance rather than to the end of defeating it, for, indeed, the insurance vouchsafed is the very object and purpose of the contract. See *Stix v. Travelers' Indemnity Co.*, 175 Mo. App. 171, 177, 157 S. W. 870. Moreover, the policy is to be given effect, if permissible, as if it was intended to cover and include the subject of

the insurance for which the premium was paid, rather than to aid an escape from liability thereon. See *Still v. Connecticut Fire Ins. Co.*, 185 Mo. App. 550, 172 S. W. 625. The provision above copied proceeds:

"This policy is issued with the understanding that the insured is the owner of the *property*, but is not in occupation or control of *it*, the actual occupation or control being vested in a lessee or lessees." (The italics are our own.)

In so far as these words are concerned they relate to the *property* and not merely to the roof or the cornice. It is certain that this *property*, considered as the subject-matter insured, was not in the occupation or control of the owner, for it was under lease and occupied by the several tenants, and, indeed, the leases stipulate that it was given over to the lessees in its present condition without any obligation on the landlord to make repairs for their benefit. Obviously plaintiff owner did not occupy the roof of the building, nor the cornice, and it cannot be said, in the sense of the policy, that it even controlled them. Whether Milford, who occupied two of the storerooms on the ground floor as a restaurant and the second and third stories of the building as a hotel, is to be regarded in occupation and control of the roof and cornice as appurtenances to his tenement is immaterial under this policy, for it is clear plaintiff was neither in occupation nor control of the *property*, that is, the habitable portions of it, which as a whole is the subject of the insurance. The concluding words of the provision of the policy above copied, that is, the words "notwithstanding the fact that the *property* is leased or beyond his [the owner's] control," imply too that the stipulation relates to the property as property for the uses intended, rather than to a mere isolated portion such as the roof or the cornice, which in no sense is either occupied or controlled at all for the uses of either the tenant or the landlord. In this view the subject-matter in suit, i. e., the payments made to the injured persons, is clearly within the terms of the policy, and it is unnecessary to consider the argument directed against the instruction touching the question as to the occupation or control; for the court should have directed as a matter of law that plaintiff was not in the occupation or control of the cornice which fell, in that all the habitable portions of the property were in the occupation and control of the tenants.

[3, 4] But it is argued that though such be true, it does not sufficiently appear that the damages liquidated by plaintiff were occasioned by some fault or neglect on the part of the assured, or that they are chargeable to it by law according to the purport of the provision of the policy above set forth. There is no question about the fact that the cornice because of its own defects fell into the public street on a quiet evening, when it is said the current of air was not to exceed three miles per hour. It is conceded

too that all of the parties to whom the payments were made received injuries from the fall of the cornice without fault on their part while passing the way. Ordinarily the presumption of negligence which attends such a state of facts would alone suffice, in that the rule *res ipsa loquitur* applies. See *McNulty v. Ludwig*, 125 App. Div. 291, 292, 109 N. Y. Supp. 703. For, as said by the court in *Mullen v. St. John*, 57 N. Y. 567, 571, 15 Am. Rep. 530, it is similar to the case of a ship thought to be seaworthy which should go to the bottom in a tranquil sea and without collision. The mind in such circumstances necessarily seeks for a cause of the occurrence. Apparently it is the defective condition of the structure. This, of course, leads to the inference of neglect of duty which suffices as a *prima facie* showing and casts the burden to rebut it on defendant. But the presumption is to be put aside here, for that, to cast liability at law upon the owner of the property, there must be some showing that the building was defective at the time possession was given over to the tenants under the leases, and it appears the leases were made about 3 years before. It appears that the cornice which fell was placed on this old building about 25 years before the occurrence. It was constructed by means of placing 2 by 4 pine timbers in the brickwork of the walls above the roof, and these were covered with a metal sheet. The whole was made fast by means of certain iron braces. In the course of all these years the elements had caused this metal sheeting, which constituted the outside and covering of the cornice, to disintegrate, and thus permitted the rain and snow to reach the wooden supports and iron braces within. The 2 by 4 pine pieces had decayed, and the iron bolts rusted until they broke. The mortar between the brickwork to which the whole was affixed had, through thus being exposed to the elements, lost its bond until it had disintegrated into a mere sandy substance without resisting power. Expert evidence, given by experienced builders and men engaged in the business of wrecking buildings, tended to prove that this condition was of long standing, and it sufficiently appears that it was discoverable by ordinary care for a period of several years before, at least antedating the leases in question. This evidence is abundant as tending to prove that this old, dilapidated, and weatherworn cornice thus overhanging a sidewalk on a public street was a nuisance, for injuries from which the owner of the property was liable even at the time the property was let to the tenants. The finding to the effect that the injuries received by the pedestrians in the street were caused by some fault or neglect on the part of the insured, and that they were properly chargeable to it by law, is amply supported by the evidence. The question concerning this matter was sufficiently submitted to the jury by plaintiff's

instruction No. 3 and defendant's instruction No. 7.

[5, 6] But it is argued plaintiff, De Mun Estate Corporation, the insured under the policy as it now stands, is in no view liable at law to the persons injured in the street by the falling of the cornice, for that the property was under lease at the time it acquired it. The leases were made by the De Mun heirs through Julius S. Walsh, agent, one in 1907 and the other in 1908, and plaintiff De Mun Estate Corporation came into being subsequent thereto, that is, late in the year 1909. This argument proceeds in the view that, though the evidence sufficiently shows fault and neglect on the part of the De Mun heirs even prior to the date of the leases, such fault and neglect may not be attributed to plaintiff, De Mun Estate Corporation, which, it is said, succeeded to the property subject to the leases. We put aside entirely the argument that he who knowingly continues a nuisance is responsible as well as his predecessor for permitting it in the first instance, as of doubtful import here because in no view may liability be cast secondarily against defendant insurance company, unless the cornice was defective at the time the leases were executed and the property passed into the hands of the tenants, for that the owner of the property is not to be held for a dereliction of duty thereafter. Be this as it may, however, it is abundantly clear that plaintiff, De Mun Estate Corporation, is, both in spirit and substance, a mere continuation of the prior owner; that is, the several heirs of the De Mun estate. The property was owned by the heirs of Isabel De Mun, and the leases were made by them through their agent, Julius S. Walsh, for himself and the other owners. In the latter part of the year 1909 the estate was incorporated and the property turned over to it as capital, while shares of stock were issued to each heir, representing his proportionate part of the property. One of the heirs was president, another secretary and treasurer, etc., of the corporation, and it amounts to no more than encasing the estate in a corporate charter, for, as said before, in both spirit and substance the assured and lessor remained the same. In other words, the name of the assured and owner was merely changed, and, indeed, such is recognized as the fact by defendant in the indorsement on the policy to that effect. By the express words of this indorsement it is recited of date January 28, 1910, that "the name of the assured in this policy is changed to read De Mun Estate Corporation." Obviously, though a corporate charter was obtained and as incident thereto a franchise for the property interests of the several heirs to continue and subsist as a corporate entity rather than as individual private rights, the interests of the heirs remained the same throughout, in that the De Mun Estate Corporation represented the same rights of prop-

erty as did the lessors, the heirs of the De Mun estate at the time the leases were executed. It is a benign precept that the common law heeds the substance rather than the mere shadow of things. In such circumstances, the plainest principles of natural justice impel that the corporation should be regarded as a mere change of name of the owner. In other words, as is well said in the brief, it is similar to the case of an owner going into court after the lease is executed and before the loss and having his name changed by decree, or a feme sole owner and lessor taking a different name as the name of her husband through marriage. In either event the owner lessor and assured remains the same person. The principle declared in *Winkleman v. Des Moines & Mississippi Levee Dist.*, 171 Mo. App. 49, 153 S. W. 539, and more recently vindicated in *Wilson v. Drainage District*, 257 Mo. 266, 165 S. W. 734; s. c., 176 Mo. App. 470, 158 S. W. 931, is reflected and finds appropriate application here.

We see nothing further in the case that merits discussion in the opinion. All of the arguments advanced for a reversal of the judgment have been duly considered, but we regard them as insubstantial.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

WAGNER v. BINDER et al. (No. 17614.)

(Supreme Court of Missouri, Division No. 1.
July 1, 1916. Rehearing Denied
July 18, 1916.)

1. FRAUD \S 41—PLEADING—PETITION—SUFFICIENCY.

In an action for fraud, a petition alleging that defendants conspired to defraud plaintiff out of a large part of the value of shares of stock; that, by false and fraudulent representations willfully and knowingly made, they induced her to sign an option contract to sell for \$80 per share stock worth \$136 per share; that plaintiff was ignorant of the conspiracy and falsity of such representations; that defendants had full knowledge of such value, while plaintiff was a widow without business experience, and had practically no knowledge of such value; that defendants intended that plaintiff should rely and act on such misrepresentations as true, that she did act on them as true, and that she was thereby damaged in the sum of \$9,352, *held* to sufficiently state a cause of action.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 36, 37; Dec. Dig. \S 41.]

2. FRAUD \S 49—PLEADING—ISSUES, PROOF AND VARIANCE.

Evidence introduced in support of the allegations of such complaint *held* not to constitute a variance between the pleadings and proof.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 44, 45; Dec. Dig. \S 49.]

3. ACTION \S 53(2)—SPLITTING CAUSES OF ACTION.

Where the issue of 350 shares of corporate treasury stock had been authorized but never in fact issued and sold until the entire property

was sold to one purchaser, *held* such shares of stock were assets of the corporation to such extent that the plaintiff in an action for fraud in inducing her to sell her shares of stock for less than their value was under no necessity of bringing a separate action against one of the defendants who was president and majority stockholder, for an accounting for her interest in the proceeds of the sale of such treasury stock, since under Rev. St. 1909, \S 1727, providing but one form of civil action, and section 1794, providing that the petition shall contain a clear and concise statement of facts without repetition, a single cause of action cannot be split.

[Ed. Note.—For other cases, see Action, Cent. Dig. \S 586-592; Dec. Dig. \S 53(2).]

4. ACTION \S 53(2)—SPLITTING CAUSE—EFFECT AS BAR.

Under R. S. 1909, \S 1794, in an action for fraud plaintiff must demand judgment for all the damages sustained by reason of the wrongful acts, or be forever barred from suing for the remainder in another action.

[Ed. Note.—For other cases, see Action, Cent. Dig. \S 586-592; Dec. Dig. \S 53(2).]

5. FRAUD \S 64(1)—ACTIONS—JURY QUESTION—STATEMENTS AS TO MATERIAL FACTS.

In an action for fraud whereby plaintiff was induced to sell shares of corporate stock for less than their value, *held* that the question whether statements made by defendants as to the value of such stock were mere expressions of opinion not constituting actionable fraud, or whether such statements were of material facts known to be untrue, was properly a jury question.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 65½, 67, 71; Dec. Dig. \S 64(1).]

6. FRAUD \S 58(2)—ACTION—EVIDENCE—SUFFICIENCY.

In an action for fraud for inducing plaintiff to sell shares of corporate stock for less than their value, evidence *held* sufficient to warrant a finding that statements made by defendants with reference to the value of plaintiff's stock were statements as to material facts and known to be untrue, and not mere expressions of opinion not constituting actionable fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 56, 57; Dec. Dig. \S 58(2).]

7. FRAUD \S 58(1)—ACTION—EVIDENCE—SUFFICIENCY.

Evidence *held* sufficient to sustain a judgment for plaintiff for damages against defendants for fraudulently inducing plaintiff to sell corporate shares of stock for less than their true value.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 55; Dec. Dig. \S 58(1).]

8. FRAUD \S 65(1)—ACTION—INSTRUCTION.

In an action for fraud whereby plaintiff was induced to sell corporate shares of stock for less than their value, an instruction that plaintiff's measure of damages is such sum as would fairly compensate her for the damages directly suffered as a result of the fraud and misrepresentation, and that the jury should consider the difference between the reasonable value of plaintiff's stock and the price which she received, *held* proper.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 72-74; Dec. Dig. \S 65(1).]

9. APPEAL AND ERROR \S 882(13)—REVIEW—INSTRUCTIONS.

Appellants cannot complain of the measure of damages fixed by an instruction to the jury where in another instruction requested by them the same measure of damages was adopted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3603; Dec. Dig. \S 882(13).]

10. TRIAL \S 252(20)—ACTION—MEASURE OF DAMAGES — INSTRUCTIONS SUPPORTED BY EVIDENCE.

In an action for fraud in inducing plaintiff to sell shares of corporate stock for less than their value, an instruction that the evidence as to the value of the property and assets of the company, together with all other evidence as to the value of such shares of stock, should be considered in arriving at the value of such stock when she disposed of it *held* properly supported by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 610; Dec. Dig. \S 252(20).]

11. FRAUD \S 65(1)—ACTION — INSTRUCTIONS SUPPORTED BY EVIDENCE.

Such instruction is not erroneous as against the objection that the measure of damages would be the value of such stock at the time the misrepresentations culminated in a written option to sell her stock and not at the time the stock was actually sold, where there was no evidence introduced tending to show that there was any change in the value of the stock between such dates, and where no such contention was made.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 72-74; Dec. Dig. \S 65(1).]

12. FRAUD \S 65(1)—ACTION — INSTRUCTIONS NOT JUSTIFIED BY EVIDENCE.

In an action for fraud in inducing plaintiff to sell shares of corporate stock for less than their true value, where the evidence showed that one of the defendants executed an option for the sale of his stock merely for the purpose of deceiving plaintiff into believing that he intended to sell his stock on the same terms, which option was never performed, *held*, that an instruction that such option only purported to be the price for which such defendant was ready and willing to sell his stock at that time, and that although relied upon by plaintiff it did not constitute false and fraudulent representations for which recovery could be had, was properly refused as not justified by the evidence.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 72-74; Dec. Dig. \S 65(1).]

13. TRIAL \S 193(2)—INSTRUCTIONS — INVADING PROVINCE OF JURY.

Such instruction was properly refused for the further reason that it was not a proper statement of the law, the question whether such misrepresentation was false and fraudulent as to a material fact being for the determination of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 437; Dec. Dig. \S 193(2).]

14. TRIAL \S 296(2)—INSTRUCTION—CURE.

Such instruction was also properly refused for the further reason that the court in another instruction charged the jury that, if such option was given in good faith at the time it was executed, and not executed for the purpose of deceiving and defrauding the plaintiff, plaintiff could not recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 708; Dec. Dig. \S 296(2).]

15. TRIAL \S 252(17)—ACTION — INSTRUCTION SUPPORTED BY EVIDENCE.

In an action for fraud in inducing plaintiff to sell shares of corporate stock for less than their true value, an instruction that there was no evidence that one of the defendants had any greater knowledge of the value of plaintiff's stock than had plaintiff or her agent, and that therefore plaintiff had no right to rely upon such defendant's expressions of opinion as to the value of the stock, *held* properly refused as unsupported by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 607; Dec. Dig. \S 252(17).]

16. TRIAL \S 193(2)—INSTRUCTION—INVADING PROVINCE OF JURY.

In an action for fraud in inducing plaintiff to sell shares of stock for less than their value, instruction that defendants' statements as to the value of such stock were mere expressions of opinion, not authorizing a recovery, *held* properly refused as invading the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 437; Dec. Dig. \S 193(2).]

17. WITNESSES \S 92 — COMPETENCY — PERSONS INTERESTED IN RESULT.

At common law persons having a legal, certain, and immediate interest in a contract or cause of action were incompetent to testify in their own behalf or in behalf of any person claiming under them.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 250, 252; Dec. Dig. \S 92.]

18. WITNESSES \S 92—COMPETENCY—"INTEREST OF WITNESS."

The true test of interest of a witness is, will he either gain or lose by the direct legal operation and effect of the judgment, or will the record be legal evidence for or against him in some other action.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 250, 262; Dec. Dig. \S 92.]

19. WITNESSES \S 141—COMPETENCY—INTEREST OF WITNESS IN RESULT—AGENT OF PARTY—TRANSACTIONS WITH DECEASED PARTY.

Under Rev. St. 1909, § 6354, providing that no person shall be disqualified as a witness by reason of his interest, but that such interest may be shown as affecting his credibility, and providing that, where an original party to a contract or cause of action in issue is dead, the other party shall not testify in his own favor, or in favor of any party claiming under him, *held* an agent of plaintiff who is not a party to the suit is not disqualified from testifying to conversations with a deceased defendant regarding the value of plaintiff's stock.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 576-579; Dec. Dig. \S 141.]

20. WITNESSES \S 128—COMPETENCY—TRANSACTIONS WITH DECEASED—INTEREST IN RESULT—CHARACTER OF ACTION.

The rule as to the exclusion of the testimony of a witness, interested in the result as to conversations with a party since deceased, applies with equal force to actions in tort and in contract.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 553-555, 562-564, 570; Dec. Dig. \S 128.]

21. WITNESSES \S 154—COMPETENCY—INTEREST IN RESULT — TRANSACTIONS WITH DECEASED.

A corporation can speak only through its officers and agents, and, upon their death, an adverse party cannot testify as to conversations with them in regard to the cause at suit.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 661; Dec. Dig. \S 154.]

22. WITNESSES \S 144(2) — COMPETENCY — CONVERSATIONS WITH PERSON SINCE DECEASED—INTEREST IN RESULT.

In an action for fraud in inducing plaintiff to sell shares of corporate stock for less than their value, plaintiff is disqualified, under Rev. St. 1909, § 6354, as a witness to conversations with a defendant since deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 627; Dec. Dig. \S 144(2).]

23. WITNESSES \S 140(1)—COMPETENCY—CONVERSATIONS AS TO PERSON SINCE DECEASED.

In an action for fraud for inducing plaintiff to sell shares of corporate stock for less than

their value, where her agreement of sale was made on condition that another stockholder should sell his shares at the same time and on the same terms, *held*, that such shareholder was not disqualified by interest as a witness to conversations with a defendant since deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 598; Dec. Dig. ¶140(1).]

24. FRAUD ¶52—ACTION—EVIDENCE—ADMISSIBILITY.

In an action for fraud for inducing plaintiff to sell corporate shares of stock for less than their value, evidence designed to throw light upon the value of the corporate property, the value of the shares of stock, and the charges of fraud *held* properly admitted.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 48; Dec. Dig. ¶52.]

25. WITNESSES ¶148—COMPETENCY—WHERE ONE OF SEVERAL DEFENDANTS IS DEAD.

In an action for fraud for inducing plaintiff to sell shares of corporate stock for less than their value, where one of the defendants was dead, plaintiff was a proper witness against a living defendant although not as against the deceased defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 650; Dec. Dig. ¶148.]

26. APPEAL AND ERROR ¶216(1)—INSTRUCTION—FAILURE TO REQUEST INSTRUCTION.

The failure of the court to instruct the jury that plaintiff's testimony can be considered only as against defendants living, and not as against the defendant since deceased, cannot be complained of on appeal where no such instruction was requested.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶216(1); Trial, Cent. Dig. §§ 627, 631.]

27. FRAUD ¶57—ACTION—EVIDENCE—MEASURE OF DAMAGES.

In an action for fraud in inducing plaintiff to sell shares of corporate stock for less than their value, evidence as to the price for which a defendant sold plaintiff's stock as her agent *held* admissible on the measure of damages, where the evidence tended to show a fraudulent scheme on his part to secure the agency, and that he had defrauded her of the difference between the price paid her and the price for which he sold the stock.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 54; Dec. Dig. ¶57.]

28. FRAUD ¶52—EVIDENCE—ADMISSIBILITY.

Such evidence was also admissible as tending to prove fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 48; Dec. Dig. ¶52.]

29. FRAUD ¶62—MEASURE OF DAMAGES—EXCESSIVENESS OF VERDICT.

In an action for fraud for inducing plaintiff to sell shares of corporate stock for less than their value, a verdict for plaintiff for \$9,352 *held* not excessive where the evidence showed that she owned 167 shares of stock worth at least \$136 per share for which she received \$80 per share.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. ¶62.]

Appeal from Circuit Court, Cole County; J. G. Slate, Judge.

Action by Lena Wagner against Frederick H. Binder, administrator, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

This suit was brought by the respondent against Frederick H. Binder, and others, to

recover the sum of \$9,352 damages sustained by her through the alleged fraud and deceit perpetrated by them upon her, in the sale by her of 167 shares of the capital stock of the Jefferson City Waterworks Company to Hugo Monnig. During the pendency of the suit said Binder died, and the suit, as to his estate, was revived in the name of his administrator. A trial was had before the court and jury, which resulted in a judgment for the respondent for the amount sued for. In due time and in proper form the appellants appealed the cause to this court.

The record is very voluminous, and the questions presented for determination are numerous; and the character of some of them, among others, that there is a departure between the pleadings and proof, and that the evidence did not establish the allegations of the petition, necessitate that those parts of the petition which charge the fraud and deception be set out, as well as the substance of the evidence pro and con, regarding such charges. But the statement of the case may be materially curtailed by first stating the undisputed facts; second, those parts of the petition charging fraud and deception; and, third, the substance of the respondent's evidence introduced regarding the controverted facts. Before doing that, however, it should be stated that the pleadings are unusually lengthy, and in order to shorten the statement of the case as much as possible, and still comply with the mandate of section 2088, R. S. 1909, I have adopted the above arrangement.

The undisputed facts are as follows:

The Jefferson City Waterworks Company (which will hereinafter be designated as the Water Company) was duly incorporated under the laws of this state in the year 1888, with its office and place of business at Jefferson City, and with a capital stock of \$100,000, divided into 1,000 shares of the par value of \$100 each. On June 27, 1908, the capital stock of the Water Company was duly increased from \$100,000 to \$135,000, in the manner, for the purpose, and with the limitations as stated in the following minutes of the records of the board of directors of the company, viz.:

"Jefferson City, Missouri, June 27, 1908.

"Directors' Meeting.

"At a meeting of the board of directors of the Jefferson City Waterworks Company, held this day pursuant to adjournment, there were present F. H. Binder, F. C. Binder, W. A. Dallmeyer, Fred Knaup, W. J. Edwards (Victor Wagner written in lead pencil on margin), and J. C. Fisher, a quorum of said board. Absent: none.

"The proceedings of the stockholders' meeting held June 27, 1908, was laid before the board by the president of the company, Mr. F. H. Binder.

"The following resolution was offered by J. C. Fisher and duly seconded, to wit:

"Whereas, it was voted by the stockholders of this company at its meeting held June 27th

increase the capital stock of this company from \$100,000 to \$135,000; and

"Whereas, this company has ascertained, as shown by its records, that the paid in value of the assets of this company amount to \$287,250; and

"Whereas, notwithstanding the fact that said increased capital of \$35,000 now fully paid up by such surplus assets, it is the desire of the board of directors that said increased capital stock shall not be issued and distributed, but that it be reserved as treasury stock to be hereafter sold at such price for cash as the board of directors may from time to time determine: Therefore be it

"Resolved, Fred H. Binder, as trustee, be and he is hereby authorized, empowered, and directed to subscribe for said \$35,000 of stock, being 350 shares of the par value of \$100 each; and that said stock be credited upon the books as fully paid up out of the surplus assets, and that said stock be issued to Fred H. Binder, as trustee, without personal liability as fully paid-up nonassessable; and

"Resolved, further, that said Fred H. Binder turn said shares over to the treasurer of this company to be held by him in trust for the use and benefit of this corporation of providing additional and necessary funds for the future addition and improvements; and

"Resolved, further, that said certificate shall not be transferred until all or part of said shares shall be ordered sold, and when so ordered sold by the board of directors at such price per share as the board shall name. Each stockholder of this company shall have the option and privilege of purchasing the pro rata number of shares as his or her shares shall bear to the whole number of shares now issued and outstanding; provided, however, if said option to purchase is not exercised within 30 days from the date of the order of the board offering said stock and cash paid for said shares, then said stock may be sold to other stockholders at the price named therefor, and if not taken by other stockholders, then the same shall be sold in open market, but said shares shall not be sold for less than \$25 per share, and the money realized from the sale of all such treasury stock shall be paid to the treasurer of the company— which resolution was adopted.

"The president next reported that the 350 shares had been subscribed for by F. H. Binder as trustee, and thereupon a motion was made and adopted that the stock be issued to him fully paid up and nonassessable when increase of stock has been duly certified."

As a matter of fact, this 350 shares of stock had never been issued, as I understand the record, but that is wholly immaterial; because, if issued, they were never sold, delivered, or transferred to any one, but remained in the hands of the treasurer of the company at all times.

The deceased, Frederick H. Binder, was the principal promoter of the Water Company and was the owner of 709 shares of the stock of the company. W. W. Wagner was the owner of 167 shares, W. J. Edwards and the Edwards estate owned 114 shares, and W. A. Dallmeyer and E. W. Cox owned 5 shares each, making a total of 1,000 shares. Some years prior to the matters complained of in this suit said W. W. Wagner departed this life, and through proper legal proceedings, the respondent, his widow, became the owner of his stock. For many years prior to his death, Frederick H. Binder had been a resident of Jefferson City, and had from the date of the incorporation of the Water

Company been a member of its board of directors, as well as the president and general manager of the same. His son was the assistant manager.

Thomas & Co. were also old residents of Jefferson City, and for many years had been engaged in real estate, brokerage, and were general promoters of business deals. Prior to March 24, 1911, Thomas & Co. conceived the idea of negotiating a sale of the Water Company to some third party, not clearly identified at that time. On the last-mentioned date they procured from Binder a written authority to sell his stock, within 120 days, at the price of 80 cents on the dollar, less 5 per cent. commission for making the sale. On May 13, 1911, Thomas & Co. also procured from the respondent written authority to sell her stock within 70 days, at the price of 80 cents on the dollar, less 5 per cent. commission for making the sale. Said written authority was in the following words and figures, to wit:

"Jefferson City, Missouri, May 13, 1911.

"In consideration of \$1 to me paid, the receipt of which is hereby acknowledged, I give to Thomas & Price, Agents, an option on my shares of stock in the Jefferson City Waterworks Company at \$80 per share, consisting of the sum of 167 shares, and agree to pay them a commission of 5 per cent. for handling same, this option to be in force and effective for a period of 70 days from date. I also agree to assist Thomas & Price in any way that they may request in effecting a sale of the property, and also agree to resign as officer and director in said company if a sale is consummated. This option is void unless the 114 shares owned by the heirs of J. R. Edwards is taken in conjunction with mine.

"[Signed]

Lena Wagner."

The Binder authority mentioned was lost or destroyed by him before the trial, and was not introduced in evidence; but the uncontradicted evidence shows that it was exactly the same in language as the Wagner authority just copied, with the exception of the dates, amounts, name, and the last clause thereof, which was inserted at the suggestion of Wagner and Edwards. Dallmeyer executed a similar authority, except it authorized the sale of his 5 shares at 60 cents on the dollar, less 5 per cent. commission. No authority was obtained from Cox, nor was his stock sold. George W. Wagner was the son and duly constituted agent of the respondent, and as such represented her in all of the negotiations and transactions regarding the sale of her stock.

On May 25, 1911, all of the stock of the Water Company was sold to Monnig, for the sum of \$136,000, with the exception of the five shares owned by Cox, the value of which was deducted from the purchase price. Four or five days prior to said sale to Monnig, Thomas & Co. surrendered to Binder the written authority he had given them to sell his stock for 80 cents on the dollar, less 5 per cent. for commission. The respondent and Edwards were paid \$80 respectively for each share of their stock, the former amount-

ing to \$13,360 and the latter to \$9,120, less 5 per cent. commissions for making the sale. Dallmeyer was paid 60 cents on the dollar for his 5 shares, amounting to \$300, less 5 per cent. commission, and Binder sold his 709 shares at a fraction over \$134 per share, amounting to \$95,000, without paying any commission.

After stating all of the foregoing facts, the petition proceeds to charge the fraud and deceit in the following language:

"That [on May 25, 1911] said Frederick H. Binder and Cecil W. Thomas, the original defendants hereto, desiring and intending to induce plaintiff to sell and dispose of her aforesaid shares of stock in said Jefferson City Waterworks Company at a price far below the real worth and value of the same, and confederating and combining and conspiring to accomplish that end, they, said defendants, and each of them, did (at divers times between March 1, 1911, and May 25, 1911) knowingly, falsely, and with the intention of misleading, deceiving, and defrauding plaintiff, represent and state to plaintiff and particularly to one George W. Wagner, her son and agent, that said corporate stock was worth not to exceed \$80 a share; that \$80 a share was more than the stock was worth; that said sum was the 'top' price, that is, the highest price it would sell for; that he (said Thomas) had caused an engineer to come to Jefferson City and to examine the plant of said Jefferson City Waterworks Company, and that said engineer had reported that the stock was not worth \$80 a share; that said Frederick H. Binder was willing and had agreed to sell the stock so owned by him in said corporation at said price aforesaid; that, if plaintiff sold her stock at \$80 a share, she would receive the same price for her minority stock which Frederick H. Binder would receive for his majority stock in said corporation, and for which he was willing to sell the same; that the deal for the sale of Frederick H. Binder's majority stock was being closed at \$80 a share, and that 'you (meaning said George W. Wagner, plaintiff's agent, and one Wm. J. Edwards) would be foolish not to get on the ground floor on said proposition.'

"That in furtherance of their plan and purpose, and to mislead and deceive plaintiff, and to cause her to sell and dispose of her said corporate stock at \$80 a share and greatly below its real value, and to thereby entail upon plaintiff great pecuniary loss and injury, said original defendants Frederick H. Binder and Cecil W. Thomas did, on or about March 24, 1911, prepare or cause to be prepared and to be executed by said Frederick H. Binder a written agreement, bearing said date last aforesaid, to the effect and purport that in consideration of the sum of \$1 paid by Thomas & Price to said Frederick H. Binder he had given to Thomas & Price, as his agents (said Price being a copartner of the codefendant Cecil W. Thomas herein) an option or privilege to sell said 709 shares of stock so owned by the said Frederick H. Binder at \$80 a share; said option to be effective and in force for 120 days from the date thereof, said Thomas & Price to receive a commission of 5 per cent. for handling said stock; said Frederick H. Binder also agreeing to resign as an officer and director of said corporation if his stock should be sold, and to help in any way he could in making a sale of the same.

"That said defendant Frederick H. Binder did execute said option agreement, and said defendant Thomas did unite and join in its preparation and making for the purpose of showing and exhibiting the same to this plaintiff and her agent George W. Wagner, and to thereby cause plaintiff and her said agent (as well as other

holders of said corporate stock) to erroneously believe that Frederick H. Binder was willing and had agreed to sell his said corporate stock at the price and sum of \$80 a share, and to thereby induce plaintiff to agree to sell her said stock at the same price at which said Frederick H. Binder had so agreed to sell said stock owned by him, as indicated by his purported contract with Thomas & Price hereinbefore referred to. That, pursuant to said plan and conspiracy of said original defendants Cecil W. Thomas and Frederick H. Binder and as had been agreed upon by them, said defendant Cecil W. Thomas did take said option agreement to the First National Bank of Jefferson City, Mo., and did leave the same with O. G. Burch, the president thereof, with directions to show and exhibit to plaintiff or to her agent, George W. Wagner, and to one Wm. J. Edwards, another owner and holder of said corporate stock, and the same was thereupon exhibited and shown to said George W. Wagner and Wm. J. Edwards by said O. G. Burch, as directed by said Cecil W. Thomas.

"That said option contract was not made and executed by the said Frederick H. Binder in good faith or as a genuine and binding document, but was concocted and devised by said Frederick H. Binder and Cecil W. Thomas, and was executed by said Frederick H. Binder to be shown and exhibited to plaintiff and to her agent and representative, George W. Wagner, and to thereby cause her and her said agent to erroneously believe that said defendant Frederick H. Binder (who was the owner of more than two-thirds of all the stock of said corporation and had special and expert knowledge of its real value) had agreed and was willing to sell said corporate stock so owned by him at \$80 a share and thus and thereby, as already hereinbefore indicated, to influence and induce plaintiff to sell and dispose of her said corporate stock at the same price a share at which said Frederick H. Binder had so offered and agreed and was willing (as falsely represented by said Binder & Thomas) to sell his said stock, which price was far below its real value and worth. That plaintiff was ignorant of the real value of her said stock and did not have the same means and opportunity as defendants, especially said Frederick H. Binder, possessed of knowing its value.

"That, relying on the truth and accuracy of said material deception and false representations and statements, both oral and written (and especially on the statement and contents of said purported option agreement executed by Frederick H. Binder, bearing date March 24, 1911, and already more particularly hereinbefore referred to), so knowingly, falsely and fraudulently made by said defendants, Frederick H. Binder and Cecil W. Thomas, with the intention and purpose on their part of misleading and deceiving plaintiff as aforesaid, and being ignorant of their falsity, plaintiff did, on or about May 13, 1911, give to said Thomas & Price, as her agents, an option or right for them to sell at the price of \$80 a share said 167 shares of corporate stock of the Jefferson City Waterworks Company so owned by plaintiff as aforesaid.

"That said option agreement so made by plaintiff with said Thomas & Price was in writing, bearing date May 13, 1911, and was to the effect and purport and so recited that in consideration of \$1 paid to plaintiff she gave to Thomas & Price, agents, an option to sell her shares of stock in the Jefferson City Waterworks Company at \$80 a share, consisting of 167 shares thereof, and that plaintiff agreed to give them (meaning said Thomas & Price) a commission of 5 per cent. for handling said stock; that said option was to be in force and effective for a period of 70 days from its date; that plaintiff agreed to assist said Thomas & Price in any way they might request in effect-

ing said sale, and also to resign as an officer and director of said corporation if a sale of plaintiff's stock should be consummated.

"That thereafter, pursuant to said agreement and the authority conferred by it, said Thomas & Price, as plaintiff's agents, did negotiate with one Hugo Monnig, a resident of Jefferson City, Mo., for the sale to and the purchase by the latter of plaintiff's said 167 shares of corporate stock of the Jefferson City Waterworks Company. That said defendant Cecil W. Thomas was the active agent and negotiator of plaintiff in said transaction with said Hugo Monnig.

"That, pursuant to further negotiations had by said Thomas & Price, brokers and agents as aforesaid, with said Hugo Monnig in reference to the purchase by him of the corporate stock of said Jefferson City Waterworks Company, there resulted an agreement on the part of said Hugo Monnig to purchase through said agents and brokers from the various owners of said stock the entire capital stock of said corporation (consisting of 1,000 shares) for the sum of \$136,000, that is to say, at the price and sum of \$136 a share. That all said corporate stock (except five shares thereof held and owned by one E. W. Cox) was through said brokers and agents sold to said Hugo Monnig and was purchased and received by him on said terms aforesaid, and settlement therefor (including for plaintiff's said 167 shares) was made by said purchaser with said brokers and agents on the foregoing named basis.

"That said defendant Cecil W. Thomas reported and represented to plaintiff that said agents (Thomas & Price) had sold plaintiff's 167 shares of corporate stock to said Hugo Monnig at the price of \$80 a share, aggregating \$13,360, and said defendant thereupon paid and accounted to plaintiff on account of said sale the sum of \$13,360; said agents retaining therefrom the sum of \$608 as their broker's commission in said transaction.

"That plaintiff being ignorant of the fact that her said stock was sold to said Hugo Monnig at a greater price than \$80 a share, and being misled, deceived, and influenced by the false and fraudulent statements and representations of defendants and their fraudulent conduct as hereinbefore set out, did settle with her said agents on the foregoing named terms and basis for her 167 shares of the corporate stock of the Jefferson City Waterworks Company so sold to Hugo Monnig through her said brokers and agents, Thomas & Price.

"That plaintiff did not learn or become informed of the falsity of the representations made to her by the said Frederick H. Binder and Cecil W. Thomas, and of their fraudulent conduct in connection with the sale of her said stock, as hereinbefore set out, until on or about the time of the filing of the original petition in this cause, that is, on July 1, 1911, last past.

"That all of said stock of the Jefferson City Waterworks Company (representing all the property assets and values of said corporation) was really and reasonably worth the sum of \$136,000 (exclusive of all its outstanding indebtedness secured and unsecured) being at the rate of \$136 a share as per the original issue of said 1,000 shares of stock.

"That said Frederick H. Binder, instead of selling the said corporate stock (consisting of 709 shares) so owned by him as aforesaid at \$80 a share, sold it to said Hugo Monnig (the same person to whom plaintiff's stock was sold as aforesaid) at the aggregate price and sum of \$96,424, being at the rate of \$136 a share for said stock so owned and sold by him, the said Frederick H. Binder, and did so sell the same on the same day on which plaintiff's stock was so sold as aforesaid. That defendant Cecil W. Thomas was also the active agent and negotiator of defendant Frederick H. Binder in the matter of the sale of his stock to said Hugo Monnig.

"That it was a part of the aforesaid conspiracy, purpose, and plan of said Frederick H.

Binder and Cecil W. Thomas to induce plaintiff to agree to sell her said corporate stock at the price of \$80 a share, and then to so manage and manipulate the matter as to obtain from the purchaser thereof the sum of \$136 a share for said stock, and then to secretly and wrongfully appropriate to themselves, that is, to defendants or to defendant Frederick H. Binder especially, the difference between the proceeds of the sale of said stock at \$80 a share and such proceeds at \$136 a share, the price really paid therefor by the purchaser Hugo Monnig.

"That the said Frederick H. Binder and said Cecil W. Thomas wrongfully co-operated and worked together for the accomplishment of said end and purpose, and pursuant thereto they did (in the lifetime of said Frederick H. Binder) obtain and retain (and the same is still retained) on the said sale of plaintiff's stock to said Hugo Monnig said moneys aforesaid, that is to say, the difference between the proceeds of the sale of plaintiff's said 167 shares of said stock at \$80 a share, namely \$13,360, and said proceeds at the price of \$136 a share, namely \$22,712; the difference in said proceeds being the sum of \$9,352.

"That plaintiff, by the fraud and deceit of defendants as hereinbefore set out and herein complained of, has been caused a loss and has been injured and damaged in said sum of \$9,352, being the difference as aforesaid between the value of said 167 shares of said stock, so sold by plaintiff as aforesaid, at \$136 a share (the latter sum being its reasonable market value a share at the time of its sale by plaintiff to Hugo Monnig as aforesaid) and the sum of \$13,360, the value of plaintiff's said stock at \$80 a share.

"Wherefore, plaintiff prays judgment against the defendants hereto in the sum of \$9,352, with her costs in this action laid out and expended."

The separate answer of Thomas, after admitting practically all of the undisputed facts before mentioned, proceeds as follows:

"Further answering, this defendant says that on the 13th day of May, 1911, the plaintiff executed and delivered to this defendant and T. L. Price, doing business as Thomas & Price, an option to purchase her said shares of stock in the Jefferson City Waterworks Company; that said option was to remain in force for a period of 70 days; that while said option was in force and effect defendant and his partner, T. L. Price, availed themselves of the privilege to purchase said stock in accordance with the terms of said option and paid to plaintiff the sum of \$12,692, as therein provided; that said sum of money was accepted by plaintiff with full knowledge that the said purchase price so paid to her was to be in full payment for her said shares of stock."

The separate answer of the administrator, after admitting the undisputed facts, proceeds as follows:

"This defendant especially denies that the said Frederick H. Binder was guilty of any of the fraudulent acts or conduct imputed to him in plaintiff's petition, or that he directly or indirectly received any part of the money for which the stock of the plaintiff was sold, or that he in any way profited or agreed to profit or attempted to profit by the sale of the stock of plaintiff.

"This defendant denies each and every allegation made in regard to the acts or conduct of the said Frederick H. Binder imputed to him or mentioned or set out in plaintiff's fourth amended petition, not herein specifically admitted to be true, and having fully answered he prays to be discharged and go hence without day, and recover his costs herein laid out and expended."

Reply to separate answer of Thomas was as follows:

"Now comes the plaintiff, and for her reply to the separate answer of defendant Cecil W.

Thomas to plaintiff's fourth amended petition in this case denies that on the 13th day of May, 1911 (or at any other time), the plaintiff executed and delivered to defendant Cecil W. Thomas and Thomas L. Price (doing business as Thomas & Price) an option to purchase plaintiff's one hundred and sixty-seven (167) shares of stock in the Jefferson City Waterworks Company; denies that any option whatever was given by plaintiff to said Thomas & Price to buy or purchase said stock so owned by plaintiff; denies that while said alleged option was in force and effect defendant and said Thomas & Price availed themselves of the privilege of purchasing said stock in accordance with the terms of said alleged option, and paid to plaintiff the sum of \$12,692 in accordance with the terms of said alleged option; denies that said money was accepted by plaintiff with full or any knowledge that said money was paid to her by said Thomas & Price in payment for her said shares of stock as purchased by said Thomas & Price.

"And further replying to said separate answer of defendant Cecil W. Thomas to plaintiff's fourth amended petition in this cause, plaintiff alleges and charges the fact to be that said alleged option, referred to in said answer of defendant Cecil W. Thomas, was one in writing and was executed and delivered to said Thomas & Price to sell said stock of plaintiff as her agents, said Thomas & Price to receive a commission of 5 per cent. for their services as said agents in handling said stock, all of which was fully expressed and set forth in said written instrument.

"And having fully replied to said separate answer of said defendant Cecil W. Thomas to plaintiff's fourth amended petition herein, plaintiff prays judgment as heretofore prayed in said amended petition."

Reply to separate answer of Frederick C. Binder, administrator, was as follows:

"Now comes the plaintiff and for her reply to the separate answer of Frederick C. Binder, administrator of the estate of Frederick H. Binder, deceased, denies that the option (referred to in said answer as having been given by said Frederick H. Binder to Thomas & Price to buy seven hundred and nine [709] shares of stock owned by said Frederick H. Binder in the Jefferson City Waterworks Company) was an option for said Thomas & Price to sell said stock as the agents of said Frederick H. Binder, said Thomas & Price to receive a commission of 5 per cent. for their services as said agents in handling said stock, all of which was expressed and set forth in said written instrument.

"And having fully replied to said answer of Frederick C. Binder, deceased, plaintiff prays judgment as heretofore prayed for in her said fourth amended petition in this cause."

The substance of the evidence as to the disputed facts:

For the respondent, George W. Wagner testified as follows:

That he remembered the fact and the circumstances of the respondent signing the contract authorizing Thomas & Co. to sell her stock in the Water Company. That he knew Frederick H. Binder well during his life. He died in the fall of 1911. That he represented the respondent in the sale of her stock, and consulted with Binder regarding the sale. "I first saw Mr. Binder between the 15th and the last of March of last year, 1911. I went to Mr. Binder's office to see him and ask him if he had given an option, or had authorized anybody to sell his stock. He said no, and asked me why I asked him, and says, 'Has anybody been to see you?' I said, 'Yes, Mr. Thomas has tried to secure an option or the right to sell mother's stock;' or, rather, he asked me if Mr. Thomas had been to see her—if Mr. Thomas wanted to

sell her stock, or had tried to secure an option, and I told him yes, and he says, 'How much did they figure on paying for it?' I said, 'Sixty dollars,' and he said, 'Sixty dollars?' Apparently was very much surprised. He said he was surprised that anybody would offer \$60 a share for that stock. He said, 'That is a great deal more than I would give,' and he said, 'If anybody should offer me a little more than that for mine, I believe I would sell it.' This occurred in the office of Mr. Binder.

"Q. What was Mr. Binder's relation to the company? A. He was president and general manager of the company, and had been for as far back as I can remember; at least, 12 or 15 years. I told him I had, at mother's suggestion, come to see him to learn what he had done in the matter, if anything, and he said he hadn't done anything, but he said that some time back Mr. Thomas had, possibly a month or six weeks before, asked him if the waterworks company was for sale, and he says, 'Well, if I can get my price for it I will sell it,' but he said, 'He has not seen me since then, and there has been nothing further done in the matter,' and he began then and told me a great deal about the Water Company; said the stock was not valuable and that it never would be, and that he had spent practically all of their earnings—put back into the plant—that he didn't consider it a very good proposition to hold that stock, and he talked on there for an hour in reference to that. He said, 'Now, I will explain all of these facts to you,' he says, 'and then your mother can do as she thinks best.' That was on the \$60 proposition. He said he was going out to the plant, and told me if I wanted to go I could go along, so I went along out with him, and he talked—explained some things about the plant to me out there. I didn't understand very much about it, but everything that he said was discouraging.

"Mr. Silver: State anything he said.

"The Witness: Well, he talked about the enormous expense of putting this—buying new machinery; they had to buy new machinery all the time, and he says they had to dig a tunnel under the railroad out there which they were building, and that cost so much money, and he says, 'You have always got to pay out more money.' He says, 'You have always got use for more than you can get your hands on.' I asked Mr. Binder if he would accept \$60 a share for his stock; he says, no, he wouldn't; I asked him then if he would accept \$65 a share for his stock, and he looked at me and said he would not. I told him that he had always asked father before he sold his stock to come and see him, give him the right to buy it before he would ever sell it to anybody else, and father told him he would; he asked me the same thing, and I assured him we would do that, and I recalled that to him at that particular time, and I said, 'Now, Mr. Binder, won't you do as much for me in this particular case? Would you consider a proposition from me for a short time to pay you \$75 a share?' He seemed to be very much excited when I said that, and he got red in the face and grew nervous, and said that when I came to him with a bonded offer he would tell me whether he would accept \$75 or \$150 for his stock. That was the end of our conversation. I had nothing further to do with Mr. Binder in reference to the sale of this stock until in May of last year, just a short time before the sale was made.

"Q. Now, what occurred between you and Mr. Thomas? A. Well, I saw Mr. Thomas sitting in Will Edwards' automobile in front of the Exchange Bank. I can't recall the exact day, but it was just about May 13, 1911. I was walking across the street and, as I was near the machine, Thomas beckoned for me to get in, and I got in. and Mr. Thomas said, 'Get in here; we are talking about this water stock; we want to talk with you about it;' and Mr. Thomas said that

he had the right to sell, or an option on Mr. Binder's stock at \$80 a share, less a commission to him of 5 per cent. for handling it. He says, 'Now, I want to handle you boys' stock the same way. You have an opportunity here; now, get in on the ground floor,' and added, 'There is a deal being closed for the sale of Mr. Binder's stock at \$80 a share,' and 'I want the right to sell you boys' stock,' meaning mother's stock. I said, 'Mr. Thomas, I will be frank with you. I don't know what this stock is really worth,' 'Well,' he says, 'I do.' He says, 'I have had an engineer in here and gone over this whole thing, and he says your stock isn't worth 80 cents on the dollar. It is only by making liberal allowances for the value to the franchise that your stock could be put in at anything like \$80 a share.' He said, 'You are making a mistake if you don't sell this stock. I want to tell you now,' he says, 'as friends who have known each other all our lives, I tell you this is an opportunity to sell that stock, and it is an opportunity that you will never have again to get more money than that stock is really worth, and I advise you to take it and don't lose this chance.' He says it wasn't worth \$80 a share, and it was only by making a liberal value for the franchise that you could get anything like \$80 a share for that stock. He said he had Mr. Binder's right, or option, to sell Mr. Binder's stock at \$80, and I told him at the time that I didn't know what the stock was worth, but that I did feel that Mr. Binder knew more about it than any other man on earth, and that his actions in the matter would be the best example to follow; in other words, if Mr. Binder was willing to sell his stock for 80 cents on the dollar that I judged that that must be something about what it was worth. He wanted us to go right up stairs and close the deal with him for—that is, to sell that stock. I told him no, I would have to first see mother and explain the proposition to her. And Mr. Edwards told him he would have to see his people first; and we told him, though, we would come up to see him the next day. I told mother all about the conversation I had with Thomas as well as the conversation with Mr. Binder. I went to see Mr. Binder—met him in front of his office. I wanted to see the by-laws of the Water Company, see what the rights of a minority stockholder were. I asked him to tell Fred to let me see what I wanted, and he says, 'Why, no; that's all right. I will go right back up and show you what you want.' He tied his horse and went back upstairs and stayed there and talked. 'Now,' he says, 'does your mother want to sell her stock?' I told him no, she wasn't particularly anxious to sell it, anyway just like selling it for \$80 a share; and I told him I had seen his contract, or his option, at the First National Bank, which was left with Mr. Burch, and he says, 'Yes.' I had seen that before. Mr. Burch had it, and he sent for me through Will Edwards and I went to the bank and he showed it to me; said that Mr. Thomas had left it with him to be shown to me and to Will Edwards.

"Mr. Irwin (for appellants): We admit the contract was destroyed by Mr. Binder.

"The Court: It is admitted that the notice to produce the option was served on the defendants?

"Mr. Silver: Yes, sir; that is, to produce the Binder, Thomas, and Price option—agreement—or whatever you call it. I give it.

"Judge Williams: I suppose it is sufficient to admit that the paper was destroyed.

"The Witness: Well, sir, the contract recited that for and in consideration of \$1 paid to Mr. Binder he agreed to give Thomas & Price, agents—the word 'agent' being written there—the right to sell, or an option, on his 700 shares of stock in the Jefferson City Waterworks Company for \$80 a share, less a commission of 5 per cent. to Thomas & Price for handling the same, and he agreed to resign as officer and director of said

Waterworks Company if a sale should be consummated, and was signed by Frederick H. Binder, and I knew his signature; and he admitted to me that he had signed the agreement. It was dated March 24, 1911, and run for 120 days from date.

"Q. After seeing that contract, what did you do? A. I met Mr. Binder and told him; I think it was either yesterday or day before, or two days before that I saw Mr. Thomas. I said, 'Mr. Thomas saw me and he wants the right to handle our stock on the same basis that he is handling yours,' and he says, 'Well, I am surprised,' he says, 'I am surprised to think that anybody would figure on paying \$80 a share for your stock. Why,' he says, 'that's as much as they are paying me for my majority stock.' 'Well,' I said, 'our stock ought to be worth as much as yours, Mr. Binder; one share is as good as another,' and he says, 'Yes, but I have got the controlling interest.' I says, 'That is true,' I says, 'Seven hundred and nine shares represents 208 shares more than the controlling interest; but,' I said, 'it looks like, if anybody was wanting to buy your stock and pay you for that extra 208 shares more than a majority, they might just as well buy our little 167 and Mr. Edwards' hundred and something, and take the whole thing in.' 'Well,' he said, 'of course, if somebody wanted all of it.' I said it seemed in this case the prospective purchasers wanted all the stock. 'Well,' he says, 'I don't know what they want with it,' and he began talking about the plant. 'Now,' he said, 'I am surprised'—again—that they would offer you that much for your stock; so,' he says, 'you will get just as much for yours as I will get for mine, and at the same time I want to tell you that the Wagners never had such a chance as this before in reference to that waterworks stock,' and he says, 'They will never have such a chance again.' He says, 'You tell your mother I advise her by all means not to let this chance get by—to sell that stock.' He says, 'She will never have such a chance.' He says, 'She is getting more than that stock is worth, and you tell her I advise her by all means to sell,' and I argued with him a bit. I said, 'Mr. Binder, I don't know.' I says, 'Of course, you know what that stock is worth better than I do, but,' I says, 'at the same time, that stock ought to be worth more money than that.' He says, 'No, it is not.' And I said, 'What is this whole proposition worth?' 'Well,' he said, 'it was worth—the whole thing, all the assets of the company, including everything, was worth around \$225,000.' 'But,' he said, 'you have got to figure that some of that must come off for deterioration,' and he says, 'You must also figure when you want to sell something you can't expect to get just exactly what it may be worth.' He says, 'These fellows who are buying this thing know what they are doing,' and he says, 'They know what things are worth,' and he says, 'They are not going to pay you too much for it.' 'Well,' I says, 'it looks to me the franchise would be worth something.' He says, 'That franchise isn't worth a dollar.' I says, 'That's funny; it has got about 18 years to run yet.' 'Yes,' he says, 'I know it has; but,' he says, 'at the price we are getting for our water that franchise is not worth a dollar.' He says, 'Again, the city can buy it at the end of 15 years,' and he says, 'if they do the people are never fair.' He says, 'They never would pay you anything like that stock is worth,' and he recited that the St. Charles people had practically lost control of their plant because the people wouldn't pay them anything like the thing was worth, and they practically had it on their hands worth nothing.

"Q. Do you remember what next was said, if anything more, in that same conversation? A. Yes, sir. In the first place, I asked him for the by-laws. He said, 'What do you want with them?' I said, 'I just want to see a copy of

the by-laws. I want to see what it says in reference to the election of directors, and what the rights of a minority stockholder are.' I says, 'Mr. Edwards and our stock, together with the present number of directors, can elect one director, whoever might happen to buy this stock.' I says, 'I want to see just what our rights are as stockholders in this company.'

"Q. You mean under the accumulative system? A. Yes, sir. 'Well,' he says, 'I will tell you, those by-laws are scattered all through the books.' He says, 'Jake Fisher drew them up away back,' and he says, 'They have been amended from one time to another, and they are scattered all through the books.' He says, 'So you will have to look through this whole book here to find them.' And then he began to talk this conversation I have just related here. He began to talk about the plant. That is the substance of what he said. I reported that whole conversation to mother.

"Q. What did Mr. Binder say in reference to what he was getting for it—how much? A. He said he was selling his—he said he was selling it and was going to get \$80 a share, less a commission of 5 per cent, to Thomas & Price as his agents for handling it. And he says he was awfully glad to learn that the Wagners could get that much for their stock. I said to Mr. Binder, 'Now, this plant has gotten on its feet and is in pretty good shape,' I said. 'It looks to me like from now on this plant ought to be able to pay pretty fair dividends,' and he says, 'Well, I don't know,' he says. 'No, it won't' and he said, 'one thing is certain, that if this sale don't go through and I have to retain my stock and stay in charge of this plant there won't be any dividends to amount to anything for years to come.' I said to Mr. Binder, 'Now, there is going to be a new capitol built here—that matter came up there—and I said, 'the town is going to have a good substantial growth,' and I said, 'that ought to stimulate the value of this thing here and make it a better proposition,' and he said then to me, 'this water company will make more money if that capitol bond issue is beaten than it will if it carries.' 'Well,' I said, 'that's a funny proposition,' I said, 'I don't understand.' I says, 'This town will certainly grow faster and get along better.' He says, 'Yes, but you will have to extend your mains, too, and it will cost more money.' He said, 'If we could close down right now without extending any more mains, then,' he said, 'we would have all this revenue coming in and we could declare a dividend.'

"Q. Now, you reported that to your mother? A. Yes, sir. Q. What else occurred? A. I, in company with Mr. Edwards, saw Mr. Thomas again. Q. What occurred between you and Mr. Edwards and Mr. Thomas? A. Well, sir, Mr. Edwards hadn't heard from his mother yet, and his sisters—they were part owners of the stock—and we went to Mr. Thomas' office the next morning and he was very anxious to have us sign up a contract authorizing him to sell it, but we told him we wouldn't do it; that we would see him the next day; and the next day, in keeping with that agreement, we went to see Mr. Thomas in his office; and I had drawn up a contract authorizing Thomas & Price to sell our stock. This is the contract. It is dated May 13th, but it was not signed by mother until May 16th. (The contract of respondent, heretofore copied, was produced and read in evidence.)

"In the conversation at Thomas' office between him, Edwards, and myself, I told Mr. Thomas mother was not anxious to sell her stock; in fact, disliked to sell it; she was thoroughly disheartened and discouraged. Q. About what? A. To learn her stock was not worth but \$80 a share. He says, 'Of course, your mother doesn't have to sell if she doesn't want to, but,' he says, 'I will tell you that this is the chance to sell that stock.' Something

came up in reference to the commission. I told Mr. Thomas he ought to handle that kind of a proposition without any commission if it was necessary to sell Mr. Binder's. He says the deal was on for Mr. Binder's interest at \$80 a share. He said, 'It was only through my efforts,' he says. 'These people—he told Mr. Edwards and I he was selling to some St. Louis people—he says, 'These people at first didn't want but the majority stock, a controlling interest. But,' he said, 'I persuaded them to take the whole thing,' and he said, 'If it hadn't been for the way I worked with these people you would not have been able to sell your stock at all.' And he says, 'Mr. Binder has given me 5 per cent, for handling his stock,' and he says, 'You are getting exactly the same money for your stock that Mr. Binder is getting for his, and certainly you ought to be willing to pay 5 per cent.' 'Well,' I says, 'I guess that is right; we ought not to expect to share any better than Mr. Binder; if we get what he does we will get what is right,' and he wanted to go right out to see mother—wanted to take me right down into the machine and go out and see her and have her sign up. Mr. Thomas said, 'Now, this deal is going to be closed for the sale of Mr. Binder's stock,' and he says, 'You people will be very foolish if you don't get in on it.' Mr. Edwards said to him at the time: 'Now, Mr. Thomas, we want it understood that if any one share of this stock sells for any more than we are supposed to get, we want to get the same amount of money for our stock.' Mr. Thomas told me to—he wanted to go out and see mother. I told him that was not necessary; I would explain the whole thing to mother. 'Well,' he says, 'you tell her— You tell your mother I strongly advise her to sell that stock.' He says, 'It is a splendid opportunity; she will never have another chance like this to sell it.' Q. What did she do? A. I took it out to mother and after explaining in full to her she signed it.

"Q. What became of the contract then? A. I took it back up town and met Mr. Thomas at the Madison Hotel; he asked me if I had it signed; I told him I had and gave it to him. That was on the 10th day of May, just nine days before the sale was made. I met Mr. Thomas three or four days before the sale was made, which was on May 25, 1911, and he told me that the deal was just about to be closed. He says, 'I wish you would leave your mother's stock with Mr. Gus Dallmeyer, at the Exchange Bank, so that when we are ready to close this deal we will have it there.' And I told him all right, I would; and the next day I met Mr. Thomas again and he said he wanted that stock left up there; that he had that deal just about closed. I told him I would leave it there, and I saw Gus Dallmeyer sitting on the steps a short time afterwards and I said, 'Gus, Thomas has asked me to leave the stock with you.' He says, 'Yes, bring it in and I will give you a receipt for it.' So I prepared a receipt for Gus Dallmeyer to sign. I took the stock the next day to the bank and left it there with him. He gave me a receipt and kept the stock. Now, then, the sale was made on May 25th.

"Q. How was the payment made to your mother? A. The payment was made through Gus Dallmeyer. Q. How much did your mother receive then on her stock? A. She received \$12,692. It was deposited in the Exchange Bank to her credit on the 26th day of May, one day after this sale was made. Q. That was for your mother's stock less 5 per cent, commission, which Thomas & Price held for handling the stock? A. One hundred and sixty-seven shares.

"Q. What did you next do? A. Now, I met Mr. Binder about that time. I think it was the very day that I left that stock in the bank; it was either that day or a day or two before that sale—not more than three or four days before the sale—I met him at the corner of Main and High streets one evening after sup-

per, and I stopped there and talked with him a few minutes, and I said to him, 'Mr. Thomas has said something about wanting me to leave the stock in the bank in escrow; he says he has a deal about closed for the sale of the plant.' I said, 'Do you know anything about it?' He says, 'No; he has not said anything to me about it; he says, 'I don't think he has.' He says, 'You know Mr. Thomas talks too much.' He says, 'He did the same thing on the bridge deal. He came to me three different times and he said he had that bridge sold,' and he said, 'He said he was going to sell it to St. Louis people and he fell down on that, and then he finally got in with some Jefferson City people and did sell it after awhile.' I didn't see Mr. Thomas any more after that until after the sale had been completed.

"Q. Well, did you have any conversation with him about it then? A. Yes, sir. He had been up to Tom Antrobus' office in the Old Exchange Bank building, and I met him coming down the steps, and he put his arm around my shoulder and he says, 'George, you ought to take me out and buy me a bottle of wine.' I says, 'What for, Cecil?' 'Why,' he says, 'for the work I did on this waterworks sale.' He says, 'I will tell you, I never worked so hard in all my life on a deal and got so little out of it.' I had heard in the meantime that Mr. Monnig paid \$138,000 for it. I looked at him right straight in the face and I says, 'Cecil, from some things I have heard, that don't sound right.' He got real red in the face and flushed up and walked on down the steps without saying a word. That was the last I had to do with Mr. Thomas in reference to this proposition. This occurred four or five days after the sale was made.

"By Mr. Silver: Q. The last conversation you spoke of just before the adjournment with Mr. Binder on the street—when did you say that was, about how long before the sale? A. About three or four days before the sale.

"Q. And then, if I understand you, you had three conversations with Mr. Binder about the sale of your mother's stock? A. Yes, sir. Q. State whether or not, after the last conversation, he ever told you or informed you in any wise that he had canceled his contract he had with Thomas & Price for the sale of his stock at \$80? A. No, sir; he never at any time said anything to me in reference to having canceled his contract to sell for \$80 a share. The last conversation I had with Mr. Binder regarding the sale of the stock was not more than two or three days prior to the sale.

"Mr. Silver: Do you remember anything about Mr. Binder going to Hot Springs or Eureka Springs? A. Yes, sir; I remember him taking a trip to Arkansas with Mr. Cook and Mr. Winston.

"Do you remember how long he was gone? A. He returned about the 1st of May. Q. 1911? A. Yes, sir. Q. And state whether or not he was here from that time on. A. He was here from that time until this sale was made. Q. Do you know what Mr. Binder's occupation had been; what he was originally? A. Originally he was a contractor and builder. Q. A mechanic? A. Yes, sir. In this conversation I had with Mr. Binder in his office in which he advised mother to sell for \$80 a share, less that commission of 5 per cent., was after his return from the Springs, in Arkansas, and it was at least ten days or two weeks after his return—just about two weeks after his return from these springs.

"Q. Did you have any further conversation with Mr. Thomas than the one on the steps that you referred to just before noon? A. No, sir. Mr. Binder, also, in the conversation I had with him in his office, said, when I told him, in discussing the matter, that I didn't know what the stock was worth—he says, 'Well, I do,' and that he had 'thought, and thought, and thought about this thing a great deal, and that he had figured on it from one time to another, and con-

sidered it from every side, and I will tell you the best thing to do is to sell; and if I can get 80 for my stock I am going to sell, and you would be foolish not to do the same thing.' I relied entirely on the representation made by Mr. Binder in the sale of this stock. Q. State whether or not you advised your mother to sign the contract bearing date May 13, 1911, authorizing Thomas & Price to sell her stock, as agents, A. Yes.

"Mr. Silver: What induced you to advise her to sell that stock? A. The statement of Mr. Binder to the effect that he was selling for \$80 a share, less a commission of 5 per cent., and his recommendation to mother to sell at the same price, and the statement of Mr. Thomas that the deal was being closed for the sale of the stock at \$80. Q. How about the written contract that Mr. Burch showed you? A. I saw that. Q. State whether or not that influenced you. A. Yes, sir, it did; yes, sir."

On cross-examination, Mr. Wagner testified:

"Q. How come you to be in Mr. Binder's office? A. I went there to see him in reference to this matter. I went there because Mr. Thomas had showed me a contract or an option which Mr. Thomas had sent out from Mr. Binder wanting to sell that stock at 60 cents on the dollar, and mother asked me about it, and I told her not to sign it, and she said for me to go and see Mr. Binder, and see if he had done anything in the matter, and ask him about it, and I went there in keeping with that suggestion. I discussed with him in these conversations the value of the stock, the value of the plant, the incumbrance on the plant, the earnings of the plant, and the expenses of running the plant. Mr. Binder told me about those matters; that he never attended but one meeting of that company in his life, and didn't know anything about its earnings. We always relied on Mr. Binder; father did, and mother did. Q. How do you know your mother relied on him? A. Why, she certainly did. She said she did. She said so immediately before she signed that contract. She hesitated about signing it. Q. You attempted to tell her all you could remember? A. I told her—what I told her chiefly was Mr. Binder's recommendation that she sell. I couldn't tell the jury what Mr. Binder said in reference to all those things. I couldn't remember that, but I tried to tell her the gist and the substance of the conversations I had with Mr. Binder and with Mr. Thomas—tried to tell her the whole of it just as well as I could remember it. Q. Now, you knew that Mr. Thomas was a broker and trying to buy that stock from the start, didn't you? A. Mr. Thomas couldn't have bought that stock. Mr. Thomas never represented—never at any time, during that whole transaction, did Mr. Thomas ever represent that he wanted to buy that stock. Every time I spoke with him he said, 'I am selling it. I am selling Mr. Binder's stock and I want to sell your stock.' Q. Didn't he represent that he wanted to acquire the stock, so that if he made a deal, or could make a deal to sell the waterworks, that he could use it? A. He positively did not; no, sir, not in any way.

"Mr. Pope: Your mother did finally sign the paper that has been introduced here in evidence? A. Yes, sir; she signed that. Q. She signed that? A. Yes, sir. Q. How long had you been investigating the question of selling that stock? A. Not at all until they brought it up. We never figured on selling our stock. Q. How long was it from the time you first commenced making investigation of the value of this stock until that paper was signed? A. Well, now, I didn't do anything to speak of towards investigating the stock, or trying to learn anything about it. I figured on it when talking with Mr. Binder up here after I saw Mr. Binder was going to sell. We were not

going to sell until Mr. Binder did, and we had resolved that we would not sell our stock for a dollar less than Mr. Binder sold his for. Q. You put in the paper you would not sell your stock without Mr. Edwards sold his stock? A. Yes, sir; that is true. Q. Didn't you require that to be put in the paper? A. That was done because Mr. Thomas, when he first wanted this contract for \$60 a share—I went to see Mr. Edwards—Q. Yes, sir. A. —and asked him if he had signed up a contract to sell for \$60 a share, and he said no, but Mr. Thomas had been out there to see him. Well, I asked him if Mr. Thomas had said anything about Mr. Binder's stock. He said he hadn't Mr. Binder's but he was going to get it. I said, 'It looks like a funny way to start, I think. I don't see what they want to come to the smallest stockholders until they get the biggest ones.' I said, 'It don't look right, Bill; there's something wrong with that.' Q. Your suspicions had been aroused? A. It had at that time. Q. Before this contract was signed? A. It had; yes, sir. I was a little suspicious when I saw Mr. Thomas coming around wanting that for \$60, with the statement that Gus Dallmeyer had agreed to sell his for \$60; why, I seen there was something wrong. I was a little suspicious and I didn't know why they would start a deal on that way. Q. That caused you to make the investigation more particular than you otherwise would, didn't it? A. Well, no; I didn't make the investigation to speak of; the matter was dropped—practically dropped."

Said writing expresses the contract made, based upon the representations they made; and the contract would never have been signed had it not been for those representations. He did not consult with Gus Dallmeyer as to the value of the stock.

"Q. And this is the receipt you took from Mr. Dallmeyer? A. Yes, sir. Q. And this contains what you authorized Mr. Dallmeyer to do? A. Yes, sir. That was the receipt he gave me when I turned over the stock to him; yes, sir. Q. And it told him what to do with that stock, didn't it? A. Yes, sir; that—I left that with Mr. Dallmeyer at Mr. Thomas' suggestion. Q. You prepared this receipt? A. Yes, sir; I prepared that three days before I received the pay for the stock. Q. You received the pay on the 26th? A. Yes, sir; I received the pay on the 26th. Q. You are a lawyer, Mr. Wagner? A. Yes, sir; but I have not been actively practicing for the last couple of years. Q. Do you know whether your mother took any other advice than yours? A. No, I don't suppose she did. I consulted these people and told her, and she relied on that.

"Judge Williams: We move to strike out all the voluntary remarks of the witness.

"The Court: Yes.

"The Witness: No, it was not.

"Mr. Silver: Answer yes or no.

"Mr. Pope: How long was it from the time he delivered you the paper until it was signed? A. About three hours."

O. B. Burch testified as follows:

That he knew the respondent, Mr. Binder, and Mr. Thomas. "Q. Now state, Mr. Burch—State whether or not you recall the circumstances of Cecil Thomas leaving with you at the bank a paper writing, purporting to authorize Thomas & Price—signed by Frederick H. Binder—purporting to authorize Thomas & Price to sell his 700 shares of stock in the Jefferson City Waterworks Company. Do you recall that circumstance? A. I do. Q. He signed 'Fred H. Binder'? A. Yes, sir. It gave them an option to sell his—that number of shares of stock at \$80 a share I suppose, and authorizing a commission of 5 per cent., and that he would assist them in every way he could to make the sale. Mr. Thomas gave me the paper and he left it there for the purpose of

having Mr. W. J. Edwards and, I think, Mr. George Wagner to see it. Q. Well, now, state the circumstance of Mr. Edwards and Mr. Thomas coming there; how they happened to come. Mr. Wagner—George W. Wagner—and Mr. Edwards visited the bank, did they? A. Yes. Q. And you exhibited them that paper? A. Yes, sir. Q. Why did you exhibit it to them? A. Just as I stated, sir. I don't know what Mr. Thomas desired any more than he expressed that he wanted they should see that stock (the paper). And I know I took the steps to have them see it, Mr. Edwards more particularly. The paper remained in my hands several days, because I didn't see Mr. Edwards right away. I handed it back to Mr. Thomas. It was left with me in May of 1911. Q. State whether or not you knew Frederick H. Binder's signature in his lifetime. A. I did. Q. Was that his signature to the option? A. Undoubtedly. I incidentally asked him about this stock, about the value of it. And he says, 'Didn't you see the option—that paper I signed?' And I think in that way he admitted his signature to that."

Cross-examination by Mr. Pope:

"I had repeatedly asked Mr. Binder, on various occasions, the value of the stock, extending back for a good many years. Q. Had he given you his opinion as to the value of the stock? A. Yes. The highest was about 45 cents. Q. Now, do you know whether it was a dividend paying stock? A. I think it was a very small dividend."

Hugo Monnig testified in substance:

"I have lived in Jefferson City about 30 years. I am the manager of the Water Company, and have been for several months. I purchased the stock of the company some time in May, 1911. I think it was the 25th of May, as near as I can recollect. Q. How many shares did you get altogether? A. I had 1,345 transferred. I contracted for the original 1,350, but there is five shares he couldn't deliver. Q. Now, tell the circumstances connected with that transfer in regard to the 350 shares, as you stated before? A. Three hundred and fifty? Q. Thirteen hundred and fifty. You first thought there was 1,000 shares, didn't you? A. No, sir; I never thought there was 1,000; it never was represented the capital stock of the company. Q. State the circumstances at that meeting. A. What meeting? Q. Mr. Thomas and you, when you closed the deal. A. I had closed the deal with Mr. Thomas? Q. Yes, sir. A. After the deal was closed Mr. Binder and Mr. Dallmeyer and I went up to Mr. Thomas' office to transfer the stock, but our deal was already closed prior to that time. Q. How much did you pay? A. I paid \$136,000 for it, and then after Mr. Thomas stated he couldn't deliver the five shares we took off a pro rata part for the five shares—five hundred and some odd dollars—I don't know just how much. I received 1,345 shares. Did not know what the original issue was. I took their statement regarding that matter.

"Mr. Silver: Q. Didn't you hear, when you were closing the matter, of the issuance of some treasury stock? A. After we had closed the deal and were ready to transfer it he said, Mr. Thomas, I think, that part of it (350 shares) was held by him as trustee. Q. Yes, sir. A. I knew nothing of the nature of the trusteeship, and I told Mr. Binder—he wanted to transfer it to me as trustee. I says, 'I bought 1,350 shares of stock and I propose—' Q. Thirteen hundred and fifty? A. Yes, sir; at that time I didn't know about the five shares I couldn't get; and I propose to pay for it and in paying for it I expect to have them, because I expect them to be my property exclusively. Q. Wasn't that treasury stock issued to you there? A. No, sir. Q.

In your presence? A. No, sir. The stock was all issued in the bulk. I didn't know who the names of the parties were that formerly owned it. The stock was issued to me in one certificate. I got the whole plant; all the assets and everything of that kind, with the exception of five shares. They carried with it the whole thing. Q. And you paid \$136,000, less the deduction for five shares? A. Yes, sir. Q. At \$136 a share, I believe? A. No, sir; I paid par and \$1,000 bonus. Q. And that way you paid par? A. Yes, sir. That was my proposition. I made Mr. Thomas that proposition and he wanted \$5,000 more, and finally we compromised for \$1,000. My proposition was upon paying par for the stock. Q. Whatever that was? A. Yes, sir. Q. Where did the \$1,000 come in? A. Mr. Thomas wanted \$5,000 more. There was a difference of \$5,000 between us. Finally we compromised upon \$1,000. In other words, he decreased his price \$4,000 and I increased mine \$1,000. Q. So you were out \$136,000 less the five shares? A. Five shares; yes, sir. Q. How did you pay for that stock, in what way? How much money did you pay? A. I paid him in cash."

Cross-examination by Mr. Pope:

"Q. From whom did you buy this stock, Mr. Monnig? A. Messrs. Thomas & Price. It was delivered to me in their office. I don't know exactly who handed me the certificate. I paid Thomas & Price for it. Q. How long had you been negotiating for the purchase of this stock? A. I can't recall, but I judge about two or three weeks—I would judge. Q. You bought the whole plant from them; that was the negotiation? A. My negotiations were for the entire capital stock. Q. You waived when he couldn't deliver the 5 shares? A. Yes, sir. Q. That was afterwards? A. I was led to believe it was in more or less of a trusteeship."

"Mr. Silver: Who told you that? A. I understood Mr. Thomas to say that, but I probably misunderstood him. Q. Now, did you pay for this in cash, Mr. Monnig? A. Not all; I paid partly cash."

"Mr. Pope: How much cash did you pay? A. I paid \$25,000 less than pro rata of that 5 shares, and I paid \$41,000 in securities, and gave notes for— Q. What kind of securities? A. They were bonds—different kinds of bonds; and then I gave notes for \$70,000, payable within six months."

Redirect examination by Mr. Silver:

"Q. Now, these securities—state whether they were taken as cash or the equivalent. A. Yes, sir; they were taken at a little bonus I think; a little more than their par value. Q. The securities were good as cash and a little better? A. Yes, sir; and Mr. Thomas took them. Q. Seventy thousand dollars in notes? A. Yes, sir. And I subsequently paid the notes."

The record of the minutes of the board of directors and stockholders was identified by the witness.

Victor L. Wagner, a son of respondent testified:

"Q. State whether or not, some time in the early part of the year 1911, you had a conversation with Mr. Thomas—Cecil Thomas—in reference to the disposition or sale of your mother's stock in the Jefferson City Waterworks Company, and what was said and done. A. I don't know the date, Mr. Thomas came to me at the post office, in the early part of the year 1911, I don't remember just exactly what month, and asked me to have my mother to sign an option for the waterworks stock, and he handed it to me. I was assistant postmaster. He came over and asked me to have my mother sign the option for the stock, that he had—was going to try to sell it, he thought he had a sale for it, and he said he wanted it back as soon as he

could get it; I should take it home when I went to dinner and bring it right back; he wanted to leave town and go East I think he said. I took the stock home to my mother and told her about it. I gave her the option and went back over to my house for dinner, and she said she wanted to consult George, my brother, about it. I told her, 'All right,' and I left and went over to dinner, and she brought the stock over to me, and said she would not sign it. Q. How much did that call for a share? A. Sixty dollars, I think. Q. Well, now, did Mr. Thomas make any statement to you as to who he was buying this property for? A. Why, Eastern capital I think he said; anyway, he wanted to leave town. He had a sale for it, and he wanted to get the options all up there, so he could go. Some Eastern capitalists wanted to buy it; that is my recollection about it. Q. Did he make any other statement to you in connection with the matter? A. Yes, sir; he showed me an option on Mr. Dallmeyer's stock. He had Mr. Dallmeyer's stock, 10 shares I think—5 or 10—and he told me to see Mr. Dallmeyer. Q. Did you have anything further to do with the sale of the stock? A. No; only Mr. Thomas came back to the post office and asked me for that option. I told him then that it was not signed. 'Well,' he says, 'give it back to me.' And I went in and got it and gave it to him. Q. Did you ever have any further conversation with him about the matter? A. Well, after the stock was sold, he said something to me about he heard that my mother was going to sue him, and that she had better be careful, that she was 21 years old, and could sue and be sued. I told him I had nothing to do with the matter. That was the last talk I had with him."

Cross-examination by Mr. Pope:

"Q. You say that was in the early part of the year 1911? A. Yes, sir; the early part of the year. I think it was February, along in there somewhere."

"Mr. Pope: And that is when he told you he was negotiating with Eastern parties for the sale of the Waterworks Company? A. Yes, sir; he was trying to sell the waterworks to some parties in the East, and she refused to sign an option at that price. Q. And after that you say you had no more conversation with him in regard to the matter until after the sale had been consummated by your mother? A. When I brought the option back, he said then: 'I think you are making a mistake. Your mother ought to sell this.' I remember now. He said the stock is only paying 1 per cent., and that she ought to sell that stock. She would get close on to \$10,000 for it, and she could put that out on 6 per cent. interest and make more than what the stock was paying."

Lena Wagner, plaintiff, upon examination testified as follows:

"By Mr. Silver: Q. Where do you live? A. I live on Dunklin street. I knew Frederick H. Binder in his lifetime; also Cecil W. Thomas. I owned the 167 shares of Water stock we have been talking about."

"Judge Williams: We object to the competency of this witness, as against Mr. Binder's estate, for the reason that this is a suit against his administrator, and she is the other party to the cause of action and on trial."

"Mr. Silver: She would be competent as to Mr. Thomas. You will have to limit that I guess as to the instructions. That would not exclude her altogether."

"Mr. Silver: Well, her competency should be sustained as against the administrator."

"The Court: Objection sustained as to defendant—the administrator defendant."

"Mr. Silver: The administrator of Frederick H. Binder: the rule is she is competent as to the other defendant."

"The Court: Well, the objection is sustained"

as against the administrator, and overruled as to Mr. Thomas.

"Mr. Silver: Do you remember the circumstances of your signing a paper in May, 1911, authorizing the sale of your stock in the Jefferson City Waterworks Company? A. Yes, sir. Q. Who brought you that paper? A. George. Q. Had George had any previous conversation with you in reference to the sale of the stock? A. Well, after I saw the option—Q. What option did you first see? Begin at the beginning. A. The \$60 option. Q. Who had that? A. Yes, sir; Victor brought that to me. Q. What year? What part of last year? A. It was in May some time, I think. Q. The first option was some time before the second, wasn't it? A. Yes, sir. Q. How long before the second? A. Oh, it was quite a while; I don't remember. Q. Several months? A. Yes, sir. Q. Well, now, what did you do in reference to that option? A. I did not sign that option. Q. Why didn't you sign it? A. Well, I spoke to George about it, and George advised me not to sell it. I felt it was worth more than that sum. Q. Now, state whether or not you authorized George to act for you in the matter? A. I did. Q. And to do what? A. See Mr. Binder in regard to it, and get his advice, and I acted upon Mr. Binder's advice.

"Mr. Pope: I object to that question, and move to strike it out, because she cannot testify as against Mr. Binder.

"The Court: Objection sustained.

"Mr. Silver: That is, against Mr. Binder. Now, what did George report to you about the matter? A. Well, he reported Mr. Thomas also advised us to sell very strongly. His advice was to sell. Q. Well? A. I signed it then by the advice of Mr. Thomas and Mr. Binder.

"Mr. Pope: Well, now I object to Mr. Binder.

"The Witness: Yes, sir.

"Mr. Pope: And move to strike it out because she is not competent as a witness against Mr. Binder.

"The Court: Yes; objection sustained.

"Mr. Silver: State whether or not George told you of Mr. Binder having signed a contract to sell at 80 cents on the dollar. A. He did. George told me about that.

"Mr. Pope: I object to that because it is incompetent—anything about Mr. Binder.

"Mr. Silver: That bears on Mr. Thomas, too. That contract bears on Mr. Thomas, too. He left it there.

"Mr. Pope: I object to anything in regard to Mr. Binder, because she is not competent to testify against Mr. Binder for any purpose, or about anything.

"The Court: Well, that will have to be controlled by an instruction.

"Mr. Silver: What information did you receive as to the Binder option? A. George told me about it. (Objected to.)

"The Witness: I signed it because I was advised by Mr. Thomas and Mr. Binder to sign it.

"Mr. Silver: What information had you about Mr. Binder selling his stock at 80 cents on the dollar? A. The information George gave me. Q. That he had signed a contract to that effect? A. Yes, sir.

"Mr. Pope: Well, let her testify.

"Mr. Silver: How long before you signed your option did George tell you that? A. I don't remember just how long that was. Q. A short time? A. When George told me about it? Yes, sir; it wasn't very long. Q. You may tell the jury whether or not that caused you—induced you—to sign the contract? A. It did."

Cross-examination by Mr. Pope:

"Q. Mrs. Wagner, you say that you acted upon the information of Cecil Thomas? A. The advice of Cecil Thomas. Q. Were you acquainted with Cecil Thomas? A. I have known him quite a good many years; yes, sir. Q. What personal acquaintance did you have? A. Well, he had been to the house a good many

times. I have always known Mr. Thomas, but never had any business with him."

Redirect examination by Mr. Silver:

"Q. When you say you did this on the advice of Mr. Thomas, where did you get that—through whom? A. Through George. Q. That is what you meant? A. Yes, sir.

"Mr. Pope: How is that?

"Mr. Silver: She said that information or advice came through George. I want the jury to understand."

"Mr. Silver: Now, here is the deposition of William J. Edwards. They object to about nearly all of it. The court will have to take it and read it.

"Judge Williams: We object to the statements made by Mr. Edwards to him about the purchase of his stock, for the reason that it is wholly disconnected with this matter, and could not influence these people, because they did not hear it, and then to the statements made by Mr. Burch and Mr. Edwards, because they took place between third parties—in other words, it was an entirely different sale on which he acted, and no such statements were communicated to these people.

"Mr. Silver: Your honor will remember this contract that was signed included the Edwards stock in conjunction, and if it is a part of the scheme, and part of the plan, it throws light on it all. You may remember the contract. Where is that contract?"

The deposition of Will J. Edwards was then handed to the court, with the objections marked on the margin, and the same were passed on by the court, and the deposition was then read to the jury by Mr. Dumm:

William J. Edwards, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposeeth and saith:

Direct examination by Mr. Silver:

"Q. Mr. Edwards, state your full name. A. William J. Edwards. I have lived in Missouri practically all my life. My father died in 1902, and I was the executor of his estate.

"Q. You know the defendants, Frederick H. Binder and Cecil W. Thomas, of this city? A. Yes, sir. Q. You know Mrs. Lena Wagner? A. Yes, sir. Q. State whether or not your father in his lifetime owned any shares in the Jefferson City Waterworks Company, and how many? A. He owned 114 shares. Q. What became of those shares—to whom did they go in your family? A. Before he died he—I bought 14 shares from him, he gave me 10, and he gave my sister 10, and my mother 10. Q. How many in your care now as executor? A. 70.

"Q. Now, state whether or not you remember of the defendant Thomas approaching you some time in the spring of 1911 with a view to having you and members of your family dispose of this stock in the Jefferson City Waterworks Company. Do you recall the circumstance? A. Yes, sir. In March, on the 24th day of March, I think. Q. Now, state what the conversation was between you and him. A. He came out to the house to see me, and said he wanted an option on the stock in the Water Company, and I laughed at him. I told him I didn't want to sell the stock, I didn't think that my mother or sister wanted to sell theirs, and I asked him who was it that wanted to sell; that I didn't know of any one that wanted to get rid of that stock; and he answered me by saying that nobody in particular, but that the people expected him to be doing something all the time, and he thought if he could sell that plant that he was going East and might have an opportunity to make a deal, and he then handed me an option, I believe, he wanted me to sign, offering 60 cents on the dollar for the stock. Q. That would be how much a share? Sixty dollars a share? A. Yes, sir; \$60 a share. I told him that I didn't want to sell the stock,

and wouldn't think of selling at any such figure as that, and he pulled out an option of the same kind that Mr. W. A. Dallmeyer had signed for his stock in the company, and Thomas intimated that he thought that was a pretty good price for the stock. Well, I told him that I wouldn't sell at that price, and anyhow I couldn't sign that option that day if I wanted to, because I would have to communicate with my mother and sister first in reference to their stock, and he insisted so on it, he seemed to be very anxious. He said he was going East that night, I believe, to inspect the street cars that were going to be shipped here, and wanted to take the options on this stock with him, and I then asked him if he had secured Mr. F. H. Binder's option—Mr. Binder held a majority of the stock—and he said he had not, and I told him I didn't see what benefit it would be to get the minority stock unless he could get the majority; that I didn't think it possible that he could get Mr. Binder's stock.

"Q. Now, state who Mr. Binder was. A. He was president and general manager of the Waterworks Company, and had been ever since the company was organized. I told him that it had always seemed to be Mr. Binder's pet hobby, that water plant, and that I couldn't believe he would sell the stock, at that or any other figure. Q. Well, go ahead. A. So we talked quite awhile there about it, and I wouldn't sign the option. Q. Now, go right along and state what next occurred. A. Well, some time, about the first part of May, 1911, he again spoke to me about the stock. Q. Where did he speak to you, and what did he say? A. I think I met him on the street, or I probably went down to his office—I was down there several times at his office—and we talked about it there several times; I think on the street, too; and he then had a proposition to pay 80 cents on the dollar and allow him 5 per cent. commission for selling it. Well, we talked it over, and it never was decided definitely whether I would sign it or not, and I in the meantime called up my mother and sister and talked to them about it over the 'phone. They were in St. Louis, and they told me to do whatever I thought was best.

"Q. Now, was there anything said about what Mr. Binder said by Mr. Thomas? A. Well, I asked Mr. Thomas if he had Mr. Binder's proxy. Q. His what? A. His option; and he said he had not then. And one day I passed him on the street, I believe, and he says, 'I have got that;' and I says, 'What?' and he says, 'I have got Mr. Binder's option;' and I says, 'I don't believe it;' and he said he had. So a day or two after that they telephoned me from the First National Bank to come down there, that Mr. Burch wanted to see me, and I went down, and when I went in Mr. Burch called me into the back room, and when we went back there, and when we sat down to the table, he just handed out an option.

"Q. You mean a written paper—in typewriter? A. Yes, sir; it was written in typewriter. Q. What was that paper? A. It was an option signed by Frederick H. Binder, agreeing to sell his stock at 80 cents on the dollar, and allow Thomas & Price a commission of 5 per cent. for selling it. I do not remember just the exact words and figures, but that was the purport of it. Q. Who was that signed by? A. Fred H. Binder. Q. You mean 80 cents on the dollar, or \$80 a share? A. Yes, sir. Q. Did you recognize Mr. Binder's handwriting? A. Yes, sir. I have seen it hundreds of times. Worked in the waterworks office with him when the company was first organized, and I think I know his signature, and if it wasn't his it was a mighty good forgery. I recognized his signature.

"Q. What did Mr. Burch say to you when he handed it to you? Anything? A. Well, I asked him what he thought of it, and he seem-

ed to be surprised. Q. Mr. Burch did? A. Yes, sir; he didn't understand it at all. He said he thought that stock was worth more money than that, and he didn't think Mr. Binder would sell at that figure. And I said, 'Well, that kind of puts me in a peculiar position, too. I do not know; Mr. Binder ought to know what that stock is worth better than anybody else in the world. He is right there, has got charge of the plant, knows every detail about it, and he is an expert man in that line, and if he is going to sell for 80 cents it looks to me like that is about all the stock would be worth;' and I asked Mr. Burch what he thought about it, and would he advise me to sell—to sign an option at that figure, or not, and he said it was hard to say; he didn't know, of course, it might be for the best and it might not; so we talked it over, and I got to talking about the extensions that probably would be asked for. I was given to understand all the time by Mr. Thomas that this was an outside corporation or outside money that was coming here to buy the plant.

"Q. Did he tell you that? A. He told me—I understood it was St. Louis people, and so I thought, if it was, and they had outside capital coming in here, with plenty of money, that they could come in here and order these extensions. Q. Which would add materially to the expenses of the company? A. Well, of course, there would have to be assessments made to pay for it, and they could virtually keep that up until we would have to sell out stock for whatever they would be willing to give us for it; so I talked the matter over with Mr. Burch along those lines, and he said he thought that was true; that they could force us to sell the stock for whatever they would give for it, and I left him undecided as to what to do, and he told me, when I left, if I saw George Wagner, to tell him to come down there, the son of Mrs. Lena Wagner. Q. Did Mr. Burch tell you how that option happened to be left at the bank? A. He said that Mr. Thomas had left it there with him to show to me. This was about the first part of May, 1911, between the first and the middle.

"Q. Had you had any conversation previous to this time with Mr. Binder about the value of this stock? A. About two weeks, I guess it was, after Mr. Thomas had spoken to me, and before this bank incident—Q. Before this bank incident? A. Yes, sir; and I told him about Mr. Thomas. Q. Told him about Mr. Thomas, what? A. Coming out and wanting an option on my stock, and asked him if Mr. Thomas had spoken to him in reference to the matter, and he said he had come up there a month or two before (that is, before the time I was talking to him), and asked him if he would give an option on his waterworks stock, and he told Mr.—asked Mr. Thomas what would he give him, and Mr. Thomas said he had no definite proposition at that time, but only wanted to know if he would give an option, an option to sell. Mr. Binder said—He told me that he told Mr. Thomas that if he would come to him with a straight out and out proposition he would tell him yes or no, and he says, 'I haven't heard anything from him since; in fact,' he says, 'I didn't pay much attention to it, because I thought it was one of Mr. Thomas' schemes to sell something, like he has been doing.' I never spoke to him again about the matter after that.

"Q. Now, as a result of this, you sold the stock, did you? A. I later on signed an option; after being at the bank and seeing this option, I later signed an option and sold the stock. I signed an agreement with Thomas & Price giving them the right to sell the stock at 80 cents on the dollar and allow them 5 per cent. commission for selling it. Q. As your agents? A. Yes, sir; I told Mr. Thomas several times when we were talking about it that was pretty

low for that stock, and if there was anybody got more than 80 cents on the dollar on that stock that I wanted him to understand that I expected the same thing. Q. Well, what induced you to sell at 80 cents now? A. Well, it was mainly Mr. Binder—I relied on his judgment and on what Mr. Thomas said. I thought, if he sold at 80 cents, I had better do it, too, as he knew more about the value of that stock than I did. I relied on his judgment entirely. I didn't know what the stock was worth.

"Q. State whether or not that paper to which you refer as having been signed by Mr. Binder stated that he would sell all of his stock at that figure. A. I believe it mentioned the number of shares, 709. Q. Well, now, did you receive the money on that sale? A. Yes, sir. Q. You mean \$80 and their allowance of 5 per cent. commission? A. Yes, sir. Q. Who paid you that money? A. It was left at the First National Bank, and I delivered the stock to Mr. Burch, and he delivered the money to me.

"Q. Now, about what was the date of this last transaction and sale? A. May 25, 1911. Q. Did Mr. Thomas ever tell you whether that was all Mr. Binder was getting or not, in terms, do you remember? A. Well, I said it to him. (The next question and part of the answer to said questions is marked objected to and objection sustained, to wit:) That if I gave him the option, and the stock sold for more than \$80 a share—that is, anybody sold the stock for more than that—that I wanted the same amount that anybody else got, and he told me that I was getting the same amount Mr. Binder was, the man that had the majority of the stock. In fact, one morning I was coming uptown in the machine, and he stopped me right in front of the Exchange Bank and talked about it, and he said—in the meantime George Wagner came by and he called him to the machine and tried to induce us to sign the option, and he said, 'Boys, this is the best opportunity you will ever have in your life for getting easy money.' He says, 'You are getting the same amount for your minority stock that Mr. Binder is for his majority stock;' and he said, 'Now, we have been friends, and have been boys together here, and I advise you to sell the stock at this figure; it is the best thing you will ever do;' and says, 'I think you will regret it if you don't;' and one of us asked him then—he said then, '\$80 on the share is more than the stock is really worth.'

"Q. Thomas said that? A. Yes, sir, and I don't know whether Mr. Wagner or I asked him how he arrived at the value of that stock, and he said he had an engineer come in here and go over the plant, and that the engineer had made a report, and that it didn't show that the stock was worth that much, and that the only way he had gotten it up to \$80, and gotten these people that were going to buy to agree to give the minority stock the same as the majority, was through his own personal influence, and he had also gotten them to agree to allow something for the value of the franchise. Q. Now, who was present at this conversation? A. He and George Wagner and myself. Q. How long before the deal was closed? A. That was in the morning, and I believe it was that afternoon that we signed the option. Q. And it occurred in an automobile—you were all sitting in an automobile? A. Yes, sir. Q. Where was that? A. In front of the Exchange Bank.

"Q. Did you ever have any other conversation, you and Mr. Thomas and Mr. Wagner, when Mr. Wagner's stenographer was present? Do you recall anything of that kind? A. Mr. Wagner and I went down there together when we signed the option to sell. Q. Down where? A. To Mr. Thomas' office. Q. What was said there? A. Just about the same as had been said before; that if any of the shares brought more than 80 cents we expected to get our part of it, and Mr. Wagner and I agreed between

ourselves after Mr. Thomas' first visit out to my house that neither one of us would take any action without the knowledge of the other. Q. That you would confer about it? A. Yes, as we owned the minority, if we held together, we had enough stock to entitle us to a representation, while if we didn't we wouldn't have any representation. Q. You mean in electing directors? A. Yes, sir.

"Q. Now, as to this 350 shares of treasurer's stock, did you know anything about that? A. Well, that was disposed of, I think, at a meeting in January. Q. January of what year? A. January, 1911—that stock should be placed in the treasury, and if it became necessary to sell that stock that the stockholders of the company at that time would have the privilege of buying pro rata according to the number of shares that they then held at, I believe, \$25 a share. The records will show. Q. Well, you never did see anything of that stock? A. No, sir. Q. You, nor your mother, nor any one? A. No, sir. Q. If it was sold or disposed of, you never got any of the proceeds? A. No, sir. Q. You only got the proceeds for these 114 shares in the way you mention? A. Yes, sir."

Hiram Phillips, of St. Louis, Mo., upon examination testified as follows:

"By Mr. Silver: How long have you been living in St. Louis—about? A. About 20 years. Q. What is your business? A. I am— A. A hydraulic and civil engineer. Q. What public position connected with your profession have you held in St. Louis? A. I was president of the board of public improvements for four years. Q. Now, what were your duties connected with that office? What did you do? A. I had general supervision of all public work of the city—streets, sewers, water, and things of that kind. Q. What experience have you had in connection with the examination and investigation of water plants, I mean as a hydraulic engineer—what places in this state? A. Well, I have made a list to refresh my memory here of places I have recently made—in the last few years have made—examinations of their water plants. Q. Yes, sir; what are they? Name them. A. Quincy, Ill.; Hannibal, Mo.; Emin, Ill.; St. Charles, Mo.; Marshall, Mo.; Wichita, Kan.; Wahoo, Neb.; Boonville, Mo.; Pueblo, Colo.; and Victor, Colo.; and I have designed plants for Columbia, Mo., and Waterloo, Ill., and at present am at work on a plant for Elkhart City, and at the present time in charge of the water plant at Nevada, Mo., as receiver. Q. Appointed by the court? A. Yes, sir; the St. Louis court—the circuit court. I have drawn plans also for Grand Junction, Colo.; Ouray, Mo.; Oregon, Mo.; Cameron, Mo.; and at the present time at work on some engineering work at Colorado Springs and at Harrisonville, Mo., and those are the recent places.

"Q. Are you acquainted with the plant of the Jefferson City Waterworks Company? A. I am. Q. Have you examined it recently? A. Well, within the last three or four months. Q. What did you do in examining it? A. Well, I had a map of their distribution system, or the map of the city showing their pipe lines—had a copy of this map, which purported to be a copy of the map which I have since found was recognized as a copy of the one that was on file here in the office. I found it here on the table; it was handed to me here in the courtroom; and a visit to the plant in connection with Mr. George Wagner and a former employee of the water department, whose name I have forgotten, made a full and thorough investigation at that time. Q. Now, from the examination you made of that plant and the data you gathered, can you tell, can you form an opinion, or have you an opinion, as to the value of the plant—property assets?

"Mr. Pope: Now, Mr. Phillips, what kind of an examination did you make—merely visited the

power house? A. Why, I measured up, or I took a note of everything they had in their power house, and measured up their reservoir, and the dimensions of their standpipe. I took their map of their distribution system here, and took off the size of the mains and the lengths of them that were on there.

"Mr. Silver: Oh, no. What do you estimate the value of that property, in your opinion, to be? A. In my opinion the fair valuation of the property is \$275,000. Q. How long have you been acquainted personally with this waterworks plant here? A. Well, over 15 years. Q. And you have observed it, haven't you, off and on? A. I have visited it quite a number of times before. As I am in the waterworks business, whenever I visit a town and I have leisure I always visit the waterworks plant. That is a part of my duty. Q. You are a waterworks man, are you? A. Yes, sir; Yes, sir; and I knew Mr. Binder, and discussed the matter with him in his lifetime, and talked it over with him, as he was very proud of his plant, and I had occasion to discuss these matters with him at times, and, as I say, I was interested in the plant as a general waterworks proposition.

"Q. In your estimate of \$275,000, what did you include in a general way? Did you include the franchise? A. In answer, if I may be permitted to answer it in my own way, in making an examination or investigation of a water plant, we first take into consideration the general condition of the town, whether the town is growing or retrograding, and take the public opinion, as was testified here, as to the good will, and what it is earning above its operating expenses. Now, in examining the plant here I found the conditions, as far as I could find out, that public opinion was favorable to the plant. I found that Mr. Binder stood—had the reputation of being a good builder. He always claimed that he built it in first-class shape, and I corroborated that in looking over the plant. I looked for and found a good plant, with favorable opinion as to the water company. Now, this estimate is made up, first—I took in going over and examining the plant, first, as to its physical condition, I arrived at the conclusion that it was worth in the neighborhood or reproduction about \$250,000. Q. That is, it could be reproduced for that? A. Yes, sir; somewhere in that neighborhood. Q. All the mains laid and everything? A. Everything to be done here, including engineering and all, about \$250,000 would be a pretty fair value. In looking over the reports that purported to be from the minutes of the waterworks; that is, the minutes of the board, reports of Mr. Binder here—I found that the plant in, I believe it was in 1907, it purported to have earned— Q. 1908—June 27, 1908. A. Well, for the year—the year 1907, I believe—it purported to have earned \$34,000, and I see afterwards a letter from Mr. Binder to a Mr. Dallmeyer corroborating that. That is a statement of what the income and expenditures were, and I find in that statement for the year 1907 that the net earnings were three— net earnings over all expenses from all sources— was \$34,732.01. I think it was thirty-two— eighty-two—

"Mr. Irwin: What did you say that showed? It shows the earnings from all sources \$34,732.01, and it gives the expenditures, including an interest charge of \$6,704.70, a net expenditure of \$25,918.03, leaving a surplus of \$8,873.98.

"Mr. Silver: On a plant of \$250,000 would over 5 per cent? A. Yes, sir; it would be per cent.—would be like one-half, or 175,000, something like that.

"Mr. Silver: You said \$250,000. Did you include the franchise as a going concern? A. No. Q. How much would that be worth in your estimation? A. I put that down at least \$25,000, arriving at the \$375,000. If you will per-

mit me to finish, I say then I find in 1910, I think it was, that the net earnings—that is, the gross earnings—had been raised to \$44,000. Of course, there were a great deal of expenditures—that is, of expenses—that I thought I was justified in saying it was a going concern. It was a plant that was in a growing town, and its business was growing, and therefore it made it more valuable than it would be if it was in a dead town. I also found the franchise in my judgment, I mean as far as rates charged was— looked like at a rate that should be—money should be made out of it in distributing water, and it was this way that I said I considered that \$275,000. It would be a good investment for that amount of money. Q. Do you know how long the franchise has to run? A. No, sir; I don't. It is only hearsay. I have never seen it. I understand it is a 20-year franchise. Q. Now, state what next you took into consideration in arriving at this property's value? A. I took in the land. Q. How much did you put the land at? A. \$12,000. Q. How much did you put the standpipe at to reproduce it? A. Oh, \$10,000. Q. Pumps? A. Three pumps, \$14,500. Q. Boilers? A. \$3,700. Q. Smokestack and heaters? A. Heaters, \$850. Q. Smokestack? A. \$2,700; yes, sir; \$2,700. Q. Tunnel? A. \$1,700. Q. Pump pit? A. Two of them, \$3,700 and \$2,100. Q. Piping steam and water? A. \$5,200. Q. The power house, how much? A. \$5,200. Q. Dwelling house? A. \$1,200. Q. Railroad switch? A. \$1,200. Q. Dynamo? A. \$100. Q. Coal shed? A. \$300. Q. Reservoirs? A. \$28,500. Q. Pump suction and pipe lines from reservoir to power house? A. \$12,500. Q. Coagulating equipment? A. Yes, sir. Q. Distribution system, pipe, valves, hydrants—what is the extent of that? How many patrons have they? A. Oh, this distribution system, that's pipe lines, valves, the entire—\$102,992. Q. Well, some maps; they are worth something? A. The office maps figure at about \$1,000. Q. Tools? A. Tools, about \$300. Q. Cast iron pipes? A. \$2,500. Q. Bulk pipe? A. About \$300. Q. Horse and wagon? A. \$150. Q. What other matters did you take into consideration? A. Engineering and incidentals. Q. Add all those together, you got at what it could be reproduced for? A. About \$250,000; yes, sir. Q. And then you add \$20,000 or \$25,000 as the value of the franchise and a going concern? A. Yes, sir.

"Q. Mr. George Wagner employed you?

"Mr. Silver: Yes, sir; George Wagner employed him.

"Mr. Pope: To do what? A. To make an estimate. Q. And to come here and give testimony? A. Yes, sir. Q. Well, how did you arrive at the rate the water—the rate at which the water sold? A. That was exhibited to me by Mr. Wagner, who I understood was a stockholder, a list of their charges—their rates, a list of which they charged for the water. Q. How did you get at that? A. I say I have taken his opinion or his information in regard to the number of consumers, and this rate, that was handed, if I remember, was a printed rate that was handed to me, purporting to be their charge. The number of consumers. The amount of income is what really would put a value on it. Q. Where did you get that income? Who did you get the amount of the income from? A. From the statement that was purported to be from the minutes of the board, or the minutes of the records. The board of directors. Q. You took Mr. Binder's estimate upon his own plant? A. No; I said it might have influenced me somewhat. Q. You don't know enough of the conditions here to place a value upon the stock of this company? A. No, sir. Q. A great many things enter into the question of the value of stock, don't it? A. Yes, sir. Q. And isn't it one of the conditions, and one of the main conditions, the dividends that the stock is paying? A. No; I can't say that it is. If the dividends

—if the earnings are put into the plant, and the plant—that increases the stock, and then it might affect the dividends. It might affect the value of the stock if a man was a minority holder and there was a row in the company; if a majority stockholder and those that held the majority stock was unfriendly to the minority it would affect it; but, as I say, I didn't pass upon that, but I just mention that as what might influence the value of the stock. Q. And the value of the property assets? A. And the value of the property assets; yes, sir. Now, this is based, as I say, upon figures and the experience I have in constructing and estimating plants. My \$25,000 I put on there as a going value is a kind of a composite idea, based upon what has been allowed in cases of appraisals of plants, and such, and as my individual judgment that it is well worth that, and I am placed in the attitude of, if a person was buying a plant, what would I possibly think would be a fair value; if they wanted an invoice of this kind of material, what would be a fair value of that plant. Q. How much did you say that was? A. \$275,000.

Q. Did you see a report of Mr. Binder given about 1907 or 1908 as to the value of the plant; is that in there? A. Yes, sir. Q. What did he give it? A. Communication—Mr. Fred H. Binder, statement and report as follows: On June 27, 1908, he gave at that time as the cost of construction of the plant up to that date, \$150,000; the value of a 20-year franchise estimated at \$50,000—that made \$200,000. The 20-year charter having expired on January 1, 1908, by limitation, he marks off \$50,000 and 5 per cent. depreciation, which makes a total of \$57,500; that added—that subtracted from the \$200,000 gives \$142,500, which is net, leaving the net value of the first investment of \$142,500. Now, since that time—this was the value of the plant in 1888. Q. 1908? A. Yes, sir; 1908. And then since that time there has been added an additional horse power—150 horse power boiler and connections; new heater and feed water pump; addition to boiler and coal house; new engineer's residence and machine shop; coagulation plant and buildings, inclusive of 700 feet pipe line for same; storage buildings; new brick 160-foot smokestack and connection; railroad switch, etc.—a total of \$13,350. There is a new settling basin; reconstruction of reservoir and tower base, \$29,500; and the new work done on the distributing system, eight miles of 12, 10, 8, 6, and 4 inch cast iron water mains, inclusive of 54 hydrants, with connections; gate valves, etc., of which 8 miles are four miles in solid rock excavation from 4 to 13 feet depth, \$92,700. Q. What is the total? A. \$92,700. The increase in the company's real estate he puts down at \$9,000, makes a \$144,750, which added to his \$142,500, gives the total value of the property as given by Mr. Binder, \$287,250. 'The above, to the best of my knowledge and information, is a correct valuation of the company's property, value of new 20-year franchise not included.' The bonded indebtedness of the Water Company is \$135,000, bearing interest.

Mr. Irwin: What did you say the earnings were during the year 1910? A. I find a statement here, which I am testifying about: 'President's and Superintendent's Report. Jefferson City, Missouri, January 9, 1911. To the Stockholders and Board of Directors of the Jefferson City Waterworks Company—Gentlemen: We respectfully submit for your consideration and approval our annual report of the business of your company from January 10, 1910, to January 9, 1911. Earnings from all sources, \$40,151.69. Amount collected during the year, \$39,631.21.' Now, that is what I aim to testify. That was my authority.

Mr. Irwin: What were the expenditures during that year? A. This is the statement here, 'To the amount of superintendent's checks, \$30,-

000'— 2. In cash? A. — '\$30,419.89; cash paid out \$889.63, making a total of \$31,307.52.' Q. What was the surplus that year? A. \$8,333.69."

This witness testified more in detail as to the value of the plant, but the foregoing is sufficient for the purposes of this case.

P. A. Bertrand, upon examination, testified as follows:

"By Mr. Silver: What is your business here? A. Manager of the Jefferson City Light, Heat & Power Company. Q. Do you know Cecil Thomas? A. I do. Q. State whether or not you ever had any conversation with him some time in March, or in April or May, 1911, in reference to the value of all the stock of the Jefferson City Waterworks Company? Had some conversation with him about it, did you? A. Mr. Thomas offered the plant for sale at that time, or some time in the early part of 1911. Q. What did he ask for it? A. \$300,000. I am not a hydraulic engineer, I am an electrical engineer. I made a rough estimate of the value of the Water Company's plant, and offered \$200,000. There was a mortgage on it securing an indebtedness for \$135,000."

Thos. L. Price, upon examination, testified as follows:

"By Mr. Silver: Q. What connection have you with the firm of Thomas & Price? A. A partner, and have been for 10 years. Q. State if you knew Frederick H. Binder in his lifetime. A. Yes, sir. Q. State do you know how much the Jefferson City Waterworks Company stock, all except 5 shares, sold for to Mr. Monnig; how much Mr. Monnig gave for it? A. For the entire plant he paid \$135,000 or \$136,000; I am not right sure. Q. Of that money, how much did Mr. Binder get? A. Why, I think he got about \$95,000, not giving the exact dollars and cents. Q. There was a mortgage indebtedness on that of how much? A. \$135,000."

Cross-examination by Mr. Irwin:

"Q. Mr. Price, how much of that was paid in cash to Mr. Binder? A. I couldn't say positively just how much cash he did get, for I don't remember exactly how much cash he did get. Q. Mr. Price, do you remember about Mr. Binder giving an option upon his shares of stock? A. Yes, sir. I think it was given some time in January, or the first of February, 1911. That was three or four months before Wagner and Edwards gave their option.

"Mr. Silver: What time are you speaking about?

"Mr. Irwin: When you took the option, or shortly after you took the Binder option? A. Yes, sir.

"Mr. Irwin: With whom were you negotiating?

"The Witness: Eastern parties. I don't know the place; Mr. Thomas went East; he made several trips, I know. Q. Now, did you have, before you conceived the idea of purchasing the minority stock, did you have Mr. Binder's option at 80 cents in good faith? A. Yes, sir. Q. Who paid the money for the stock that you purchased? A. The firm of Thomas & Price.

"Mr. Irwin: Did you and Mr. Thomas procure an estimate of the value of the property from an expert? A. Well, I say I think Mr. Thomas did, but I didn't. He came in and told me what he done, being a partner, but I wasn't actively— Q. Do you know what the value was placed on the plant at that time?

"The Court: Mr. Price, you say your firm obtained the option from Mr. Binder in January, 1911? A. I said I thought it was about that time. Q. What became of that? In the first place, how long did it run? A. Well, that option I think run for 120 days. Q. Four months?

A. Yes, sir; and if I am allowed to tell what became of it—

"The Court: No; I just asked you what became of it? A. It was given back to Mr. Binder. Q. It was surrendered before it expired, you say? A. Yes, sir.

"Mr. Irwin: Well, now, tell the court how it came, and the jury, how it came to be surrendered, if you know? A. Well, we thought we had the deal on hand for the sale of the plant, and all we cared for was Mr. Binder's interests, controlling interest, and Mr. Thomas came back from his trip and said he thought it was off, which was the fact. The deal was off, the contract was returned to Mr. Binder.

"Mr. Irwin: Now, when the plant was finally sold, some time after that, did you make an entire new deal with Mr. Binder? A. That part I am not familiar with. Q. Mr. Thomas carried that out; but after the surrender of his stock did you have any other agreement or understanding in any way with Mr. Binder, after you surrendered his option? A. We had an understanding to a certain extent, but no option. Q. And at the time you surrendered this option did you have Mr. Monnig in view as a probable purchaser? A. No, sir; he came into the case two or three weeks before we sold the plant to him."

Redirect examination by Mr. Silver:

"Q. Mr. Price, about what time was that option surrendered to Mr. Binder? A. Well, I don't exactly know the date, Mr. Silver."

Jacob F. Gmelich, upon examination testified as follows:

"By Mr. Silver: Q. Where do you live, Governor? A. I live in Jefferson City. Have lived here past 3 years.

"Mr. Silver: Did you know Frederick H. Binder in his lifetime? A. Yes, sir. Q. You knew him for several years, didn't you, before his death? A. Yes, sir; I knew him quite a number of years. Q. Did you ever have any conversation with him—you needn't tell what was said until we get to that—about the value of the Jefferson City waterworks plant? A. Yes, sir. Q. About how long before—how long ago was it? A. Well, that has been two years.

"Mr. Silver: Yes. In that conversation did he communicate or state to you the value of the Jefferson City waterworks plant? * * * Well, what did he state the value was? A. Mr. Binder told me that the value of this plant was worth about \$300,000. Q. Where was that stated? Where were you then? A. Right in this city."

Cross-examination by Mr. Irwin:

"Q. You have known Mr. Binder for a number of years, haven't you? A. Yes, sir; I have known him for many years. * * * Q. Did he go on to tell you how he fixed that value? A. Well, I couldn't explain it, unless I made the explanation that I intimated. * * * Q. Did he say anything about the franchise? A. Why, yes. Q. How much did he say he was valuing that at? A. Well, he didn't talk about the value of the franchise. Q. He didn't talk about the value? A. No, sir. If I may be permitted—

"Mr. Silver: I have no objection to the Governor stating what he wants to about it.

"The Witness: If you will permit me to say to—

"Mr. Silver: Yes, sir.

"The Witness: You see, we have had trouble in Boonville about waterworks. Mr. Binder has always been very kind to Boonville people—always—he has come up there at his own expense, and has helped them out and suggested. The franchise had run out, the plant was run down, and the city wanted to build new waterworks, or wanted to purchase that waterworks, and seemingly the city—that they were asking

too much—that was it, and that is the way we come about talking values.

"Mr. Silver: And you got to talking to Mr. Binder about the value of waterworks? A. About values; yes, sir. Ours, of course, is a small city, and nothing in comparison. That was the way we got at it. Q. And that led up to the conversation in which he made this statement? A. Yes, sir; that is just the way it happened."

George W. Wagner, recalled, and on cross-examination, testified:

"Q. Did you attend the meeting held in January, 1911, just before the stock was sold? A. Yes; I went up there and attended the meeting. Q. There present at the meeting? A. I was present, but not— Q. Heard the financial statement read? A. Yes, sir. Q. Did you ever go up there and examine the books at any time? A. No, sir. I went up there to look over them, as I stated yesterday, the book—I did, and Mr. Binder told me the by-laws were scattered all through the books. Q. You found that was true, didn't you? A. No, sir; I found that the by-laws are all on one page, and they are on the page directly opposite that statement of Mr. Binder's, where he says the plant was worth \$287,000. Q. When did you read it? A. I found that after the court mandamus gave me the right."

The respondent then introduced the records of the meetings of the board of directors of the Water Company, dated January 9, 1911, and July 22, 1911. Here the respondent rested her case.

The reason, before stated, for setting out so much of the evidence for the respondent, does not require that we should set forth that of the appellants, further than to state that the testimony of Mr. Thomas fully and squarely contradicted that of the respondent regarding the charges of fraud and deception made in the petition (except as will be noted in the course of the opinion), and tended to prove the allegations of the separate answers of the appellants, and that of Mr. Dallmeyer, which tended to show that the stock of the Water Company was not worth more than \$80 per share, that the plant had grown in magnitude with the growth of the city, that the stock of respondent was deposited in his bank for the purpose of delivery to Mr. Monnig upon the payment of the purchase price, according to the terms of the following receipt:

"Jefferson City, Mo., May 23, 1911.

"For and in consideration of the sum of one (\$1.00) dollar to me in hand paid by Mrs. Lena Wagner, the receipt of which is hereby acknowledged, I agree to hold in escrow certificate No. 49 for 167 shares of stock in the Jefferson City Waterworks Company, which certificate is now in the name of Mrs. Lena Wagner, and was this day received by me from the said Mrs. Lena Wagner, to be delivered to Thomas & Price, agents, when paid for under the terms of the option attached thereto and given to the said Thomas & Price on May 13, 1911. Said certificate of stock to be returned to Mrs. Lena Wagner if not taken up and paid for as per the terms of the option within the option period. I agree, in the event this stock is taken up under the option, to collect for the same as per the terms of the option, and to deposit the amount in full in the Exchange Bank of Jefferson City, Mo., to the credit of Mrs. Lena Wagner, and to promptly notify the said Lena Wagner that the stock has been taken up and the money de-

posited to her credit. Deliver on payment of \$76.00 per share.

"Signed this 23d day of May, 1911.

"W. A. Dallmeyer."

The witness further testified as to the date of the construction of the plant, the character of the material which entered into its construction, its size and magnitude, what it consisted of, the kind and capacity of the engines, mains, etc.; also regarding the issuance of the bonds of the company, etc.

Various annual reports, showing the earnings, expenses, and financial condition, were also introduced in evidence.

Thereupon the plaintiff, in rebuttal, recalled George W. Wagner, who testified as follows:

"By Mr. Silver: Q. Mr. Wagner, you heard Mr. Thomas' statement to the effect that Mr. Binder told him that shortly before the conclusion of the sale of your mother's stock that he (Binder) met you on the street and told you that the deal was off—gave you to understand he was out of it? A. Yes, sir; I heard it. Q. Now, state if that is true, or not—whether Mr. Binder ever made any such a statement as that. A. He positively said nothing of that kind to me."

Appellants offered separate demurrers and a joint demurrer to the evidence, which were by the court overruled. The court gave six instructions for the respondent and seven for the appellants, and refused to give three instructions requested by the latter.

Instruction 1, given for the respondent, told the jury that if they found and believed from the evidence, first, that on or prior to May 25, 1911, respondent was the owner of 167 shares of stock; second, that prior to said time Thomas and Binder formed a conspiracy—that is, an agreement to act in concert and with a common design and purpose—to induce and cause plaintiff to sell her 167 shares at a price below their real worth and value; third, that in carrying out and executing said conspiracy and plan Thomas and Binder, or either of them, did knowingly, falsely, and fraudulently state to her or her agent that Binder was willing and had agreed to sell his stock at \$80 a share, that if she sold her stock at \$80 a share she would receive the same price for her minority stock that Binder would receive for his majority stock, and for which he was willing to sell his stock, and that the deal for the sale of Binder's stock was being closed at \$80 a share; fourth, that in furtherance of said alleged conspiracy, and in aid of its alleged plan and purpose, Binder and Thomas prepared the Binder option (describing it); fifth, that the Binder option was not executed in good faith and as a genuine document, but was a pretended one, and was made by Binder, with the sanction and concurrence of Thomas, for the purpose of having the same exhibited to respondent or her agent, and to thereby fraudulently mislead and deceive her, by causing her to erroneously believe that Binder was willing and had agreed to sell his majority stock at \$80 a share, and to thereby influence and induce her to sell and dispose

of her stock at the same price; sixth, and that respondent, being ignorant of the real value of her stock, "and relying on the truth and accuracy of the aforesaid statements and representations, so falsely and fraudulently made (if such was the case) and on the genuineness and good faith of" the Binder option, and being directly influenced and induced thereby, executed the option for the sale of her stock, and sold her stock at \$80 a share, and was thereby damaged and injured in the sale of her stock—then they would find for her and assess her damages at such sum (not to exceed the sum of \$9,352 prayed for in the petition) as would fairly compensate her for the pecuniary loss (if any) she suffered, and naturally and directly caused by the alleged false and fraudulent representations and alleged fraudulent acts and conduct of the defendants, and that in arriving at respondent's damages the jurors should take into consideration the difference between the reasonable value of her stock at the time she parted with it and the price or money value she received for it.

Respondent's instruction No. 2 was to the effect that before she could recover she must satisfy the jury, by the greater weight of the credible evidence, that the alleged false representations and fraudulent acts of Thomas and Binder, on which she founds her right of recovery, and referred to in instruction No. 1, were material ones—that is, had substantial bearing and influence on the matter of the sale and disposition of her stock; that she believed said alleged representations of Thomas and Binder to have been true, and their said alleged acts and conduct to have been genuine ones, and to have been done by them sincerely and in good faith; that respondent's reliance on them (if such was the case) was the act of an ordinarily prudent person, and that said alleged representations, acts, and conduct directly influenced her in her action in selling or disposing of her stock, and induced her so to do.

Respondent's instruction No. 3 told the jury that the evidence as to the value of the property and assets of the company (together with all the other evidence and circumstances in evidence relating to the value of the stock) should be taken into consideration in arriving at the value of her stock when she disposed of it.

Respondent's instruction 4 covers the questions of weight of evidence and credibility of the testimony. By No. 5 the jury were instructed that "to establish fraud it is not necessary to prove the same by direct or positive evidence, but the same may be shown inferentially; that is, by facts and circumstances tending to show the same." No. 6 is as to the authority of nine or more jurors to return a verdict.

Appellant's refused instruction H told the jury that the Binder option only purported to be the price for which Binder was ready at

that time and willing to sell his stock, and that, although it was relied upon by plaintiff, it did not constitute a false and fraudulent representation, upon which a recovery could be had.

Appellants' refused instruction I told the jury that there is no evidence that Thomas had any greater knowledge of the value of respondent's stock than that possessed by her and her agent, and there is no evidence that at the time Thomas obtained her option he occupied a position of trust or confidence toward her, and that she and her agent had no right to rely upon any opinions expressed by Thomas as to the value of the stock, and that any such opinion, if expressed to her, does not constitute such fraudulent representations, even if untrue, as will authorize a recovery.

Appellant's refused instruction J told the jury that the statements of Binder and Thomas to respondent's agent as to the value of her stock were mere matters of opinion, and will not authorize a recovery.

W. M. Williams, of Boonville, and W. C. Irwin and Pope & Lohman, all of Jefferson City, for appellants. A. T. Dumm, of Jefferson City, for respondent.

WOODSON, J. (after stating the facts as above). [1] I. We will first dispose of the contention of counsel for the appellants to the effect that the petition does not state facts sufficient to constitute a cause of action. The character of this contention is such that it demands a careful consideration of the petition. By reading those portions of the petition before set out, it will be seen that it alleges that the respondent was on and prior to the 13th day of May, 1911, the owner of 167 shares of the capital stock of the Water Company, the total number of which was 1,000, and of the par value of \$100 each, but actually worth \$136 per share, all of which the appellants well knew; that prior to said date the appellants conspired and confederated together for the purpose of defrauding her out of a large part of their value; that by false and fraudulent representations, knowingly made by appellants to respondent as to the true value of her said stock, they induced and caused her to sign the option contract, or authority, dated May 13, 1911, to sell her stock for 80 per cent. of its par value, less 5 per cent. commission for selling the same; that respondent had no knowledge of said conspiracy, and was ignorant of the falsity of said representations; that Thomas and Binder had full knowledge of the true value of respondent's stock, and that she had practically no knowledge of the same; that said false and fraudulent representations were made by the appellants with the intention and belief that she would rely upon them as being true and that she would act upon them as being such; that she did believe said false representations to be true,

and acted upon them by executing said option contract of May 13, 1911; and that by reason of said conspiracy, false representations, and sale of her said stock by Thomas, under said contract, she was damaged in the sum of \$9,352. These allegations of fact, under the law of this state, clearly state a cause of action against the appellant of fraud and deception, the text-books and adjudged cases require to be alleged in order to state a good cause of action of this character. This is elementary and needs the citation of no authority to support it. We are therefore of the opinion that the petition states a good cause of action against the appellants.

[2] II. Counsel for appellants next insist that there is a departure between the petition and the proof. In the consideration of this insistence the allegations of the petition, as previously considered, should be borne in mind, and careful attention given to the evidence introduced regarding the charges of fraud and deception—all the other facts being practically undisputed. In brief, the respondent's evidence tended to show that Frederick H. Binder was the owner of more than two-thirds of the capital stock of the Water Company; that he had constructed and operated the plant from the time of its construction to the date of the sale, May 24, 1911, and also that he was thoroughly conversant with the value of the plant; that respondent was the owner of 167 shares of the capital stock of the company, and that the total number of the shares of the stock was 1,000, of the par value of \$100 each, but their actual value was \$136 or more per share; that appellants conspired and confederated together for the purpose of cheating and defrauding the respondent out of a large sum of money, to wit, \$9,352, by fraudulently inducing her to sell her stock for \$80 per share, less 5 per cent. commission; that the appellants well knew the true value of said stock and respondent, a widow without business experience, was wholly ignorant of its real value; that in pursuance of that fraudulent design Frederick H. Binder, one of the original defendants, executed to Thomas, as his agent, a written contract, dated March 24, 1911, authorizing the latter to sell the stock of the former, 709 shares, at \$80 per share, less 5 per cent. commission, and had Thomas to deposit the same in the hands of O. G. Burch, cashier of the First National Bank of Jefferson City, with instructions to show it to respondent or her agent, and to one W. J. Edwards, who owned other shares of said stock, for the purpose of making them believe that the stock was worth only \$80 per share, less 5 per cent. commission, and that he had authorized Thomas to sell his stock at that price, which was not true; that, some time after said Binder contract had been placed in the hands of Burch, Thomas, in furtherance of said

conspiracy, approached a son of the respondent and asked him if she would sell her Water Company stock, and said he wanted an option to sell it for \$60 per share, less 5 per cent. commission for selling it for her, and stated that was all it was worth, and requested him to see his mother, which he did, but she declined to sell at that price, and she so notified Thomas through George W. Wagner, another son and her agent.

The relations between the Wagners and Binder had been intimate, and the latter, at various times prior to the year 1911, requested the respondent to give him the first chance to purchase her stock, if she should ever desire to sell the same; that, shortly after the respondent declined to authorize Thomas to sell her stock at \$60 per share, George W. Wagner, the agent of respondent, in pursuance to said requests, went to see Binder regarding said proposed sale, to inquire of him the real value of the stock of the company. In reply to his inquiry, Binder stated to him that respondent's stock was not worth more than \$60 per share, less the commission. Some time after said conversation between Wagner and Binder regarding the value of the stock took place, Thomas again approached George W. Wagner, respondent's agent, and wanted him to see his mother and ascertain if she would authorize him to sell her stock at \$80 per share, less 5 per cent. commission, and insisted upon an early answer, within a few hours. That proposition was laid before the respondent by her said agent. Respondent again declined to authorize the sale until her agent, George W. Wagner, could see and consult with Mr. Binder. George again went to see Binder regarding the advisability of authorizing Thomas to sell the stock at that price. At that time Binder visited the plant with Wagner, and went into the whole matter in detail, stating the character of the plant, its costs and dimensions, or magnitude, earning capacity, and its operating expenses, as well as the extension of mains and the cost thereof, also the smallness of the net profits and dividends, and finally told him that the stock was not worth \$80 a share, and that he had authorized Thomas to sell his stock at the same price.

In the meantime, Wagner and Edwards had gone to the First National Bank and inspected the Binder optional contract left there by Thomas, for the sale of his stock at \$80 per share, less the commission. Proceeding, Binder, in strong language, advised Wagner to sell respondent's stock, and stated it was not worth \$80 per share, and that she would never have another opportunity to sell it so advantageously. After several other conversations of like character had with Thomas regarding the matter, respondent signed the option hereinbefore copied, but it was not delivered until the 16th of May. The Binder option was dated March 24, 1911, and was to run for 120 days, and that of respondent was dated May 18, 1911, though not delivered until the 16th,

and had 70 days to run, each of which authorized Thomas to sell their respective shares of stock at \$80 per share, less 5 per cent. commission. The negotiations between Thomas and Monnig, for the sale of the stock to the latter, began 2 or 3 weeks before the sale was completed. On May 19 or 20, 1911, 4 or 5 days before the sale was consummated, which was on May 24th of the same year, Thomas surrendered to Binder his stock; and upon the completion of the sale Thomas paid to Binder \$95,000 for his stock—\$134 and a fraction per share, and charged him no commission for making the sale, which at 5 per cent. would have been \$4,750, but he did charge respondent the 5 per cent. commission.

The evidence also tended to show that the representations made by Binder and Thomas to respondent's agent were false, and made for the purpose of deceiving her as to the real value of stock, which they well knew, and which she did not know, and thereby induce her to sell it for much less than it was actually worth. The evidence also tended to show that respondent and her agent believed said false representations to be true, and for that reason authorized Thomas to sell the stock for \$80 per share, less the commission, which was deducted from the purchase price. The evidence also tended to show that respondent was damaged in the sum sued for.

This brief statement of what the evidence tends to prove is fully supported and amplified by the evidence heretofore set out in the statement of the case; and by comparing this statement and that evidence with the allegations of the petition, it will be readily seen that they are in full accord with each other, and that there is no variance between them and the petition, much less a total departure. We therefore rule this insistence against the appellants.

[3] III. The next contention by counsel for appellants, if I correctly understand their position, is that two suits should have been brought by respondent in order to have redressed her alleged injury, namely, one against Thomas and Binder for fraudulently inducing her to sell her 167 shares of stock for less than it was worth, and one against Binder alone for an accounting for her proportional part of the proceeds of the sale of the 350 shares of treasury stock mentioned in the evidence and sold by him to Monnig. There is no merit in this contention, for the reason that, if I correctly understand the evidence, that 350 shares of stock were in fact never issued or disposed of until it was issued and sold to Mr. Monnig on May 24, 1911, and if not issued, then it in fact had no existence at the date of the sale; but, be that as it may, it is perfectly clear that, if it was issued as a matter of fact, then at the date of the sale it was in the hands of the treasurer of the company as treasury stock, and held as a part of the assets of the company, and could not have been sold to anyone, under the resolution of the board of directors of

June 27, 1908, authorizing its issuance, prescribing the purposes for which it should be used, and prohibiting it from being transferred until sold by an order of the board of directors.

This record fails to show that any such order was ever made, but it does show that they were never sold or transferred until they were sold and transferred to Monnig, along with all of the other stock of the company, on May 24, 1911. The record also shows that Binder and Thomas, at the time of the transfer of the stock to Monnig, endeavored to induce him to accept the stock just as it stood on the books of the company at the date of sale, namely, the 1,000 shares, which had been previously issued and transferred to others, should be transferred to him, and the 350 shares of treasury stock still in the treasury should pass to him as such treasury stock. This he declined to do, stating that he had heard nothing about treasury stock, and stated that his contract for the purchase of the stock was for 1,350 shares of stock; and thereupon the entire 1,350 shares were issued to him, as shown by the evidence, less the 5 shares owned by Cox, which could not be procured. From this evidence it clearly appears that Binder, Thomas, Wagner, Edwards, and Dallmeyer all understood and believed that said treasury stock had no legal existence, but belonged to and was held by the company in its treasury as assets of the company, just as any other of its assets were held, and that the sale of the lawfully issued stock carried with it all of the assets of the company, including this treasury stock, in the same manner that it carried all the other assets of the company.

Moreover, under section 1727, R. S. 1909, there is in this state but one form of action for the enforcement or protection of private rights and to redress or prevent private wrongs, and section 1794, R. S. 1909, provides that the petition shall contain a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition. The first statute contemplates the bringing of but one suit for the protection of private rights, or to redress private wrongs; and the second section contemplates and provides that all of the facts constituting the cause of action, which is to protect private rights or to redress private wrongs, shall be plainly and concisely stated in the petition in that one suit. If we now look at the facts of this case, it will be seen that the appellants at the same time and by the same acts and representations induced the respondent to sell and part with all of her interest in the Water Company, which was represented by her 167 shares of stock, which of course included her proportional part of said treasury stock.

[4] It is wholly immaterial to the appellants and the respondent which her damage grew out of, the sale of the one class of stock

or both, for the reason that her damage, from whichever source it arose, was caused by one and the same acts of the appellants, and in no event could they be injured by suing for all of the damage in one suit. Besides that, said section 1794 contemplates that, where one brings a suit for damages against another, he shall ask judgment in the same suit for all the damages he has sustained by reason of the wrongful acts complained of, and if he fails to do he will be forever barred from suing for the remainder in a subsequent suit. In other words, one cannot split up his cause of action. This contention is also decided against appellants.

[5] IV. Counsel for appellants insist that the acts of Thomas and Binder, and their representations made to respondent as to the value of her stock, were but expressions of opinions, and consequently they did not constitute actionable fraud, and that the court should have so instructed the jury. That insistence is untenable. The evidence for the respondent tended to show that the appellants made the representations, not as expressions of opinion as to the value of the stock, but they were statements of material facts in the case, which they knew to be untrue, and that they had Binder execute and exhibit to respondent's agent the optional contract mentioned in the evidence, authorizing Thomas to sell his stock for \$80 per share, less 5 per cent. commission, and thereby adding additional weight and credence to their said fraudulent representations, for the purpose of more completely deceiving her as to the real value of the stock, with no intention on the part of Binder and Thomas that the former should sell his stock at that price.

Moreover, Thomas, in that connection, testified that, after his prospective deal with some Eastern parties for the sale of the stock had failed, he took the matter up with Mr. Monnig, and had been negotiating with him for two or three weeks before he finally consummated the sale to him; that it was during those two or three weeks that he approached the respondent's agent the second time and solicited and procured her option to sell her stock for \$80 per share, less the 5 per cent. commission, and that after procuring her option and that of Mr. Edwards, which was on May 16, 1911, Mr. Thomas surrendered to Mr. Binder his option on May 19th or 20th, only four or five days before the sale was made to Monnig, which was on May 24, 1911; and that between May 20 and 24, 1911, Mr. Thomas again went to Mr. Binder and made another—an oral—agreement with him, by which he was to sell his stock for him at a fraction over \$134 per share, without commission.

The jury might well have inferred from that testimony that Binder's option was not executed in good faith, but was given as a basis of the fraudulent representations made by him and Thomas to the respondent; and especially the jury might have so inferred

when the record shows that the deal to Monnig was practically completed at a price of \$136 per share, when Thomas surrendered to Binder his optional contract to sell his stock for \$80 per share. If that was true, how could Thomas sell and deliver to Monnig the 1,000 shares after releasing the 709 shares belonging to Binder?

Again, if Thomas was not acting as the agent of respondent, Binder, and others in the sale of the stock, but was purchasing it for himself for \$80 per share and reselling it to Monnig for \$136 per share, which he contends was the case, why did he then voluntarily surrender the Binder stock, just on the very threshold of the completion of the sale, long before his written option had expired, and then within a day or so thereafter enter into an oral agreement with Binder to pay him a fraction over \$134 per share without commission, and thereby lose his profit of more than \$41,000 on the Binder stock alone? Not only that, but, had Binder declined to have entered into said oral agreement with Thomas, the sale to Monnig would have fallen through, for his contract was for the purchase of the entire stock of the company, and not simply the minority shares owned by Edwards and the respondent, which were less than one-third of the whole. In that event Thomas would have lost his entire profits or commissions, as the case may have been.

[6] While this court has no authority to weigh the evidence, yet it is our duty to decide whether there was sufficient evidence introduced to make a case for the jury; and when we consider all of the evidence in the case, and the various inferences the jury was warranted in drawing therefrom, we are clearly of the opinion that the question of fraud was properly submitted to the jury, and the jury having found that said statements of Binder and Thomas were not mere expressions of opinions, but statements of material facts in the case, of which they had full knowledge, and being false and fraudulent, as the jury found, they were actionable. *Kendrick v. Ryus*, 225 Mo. 150, loc. cit. 166, 123 S. W. 937, 135 Am. St. Rep. 585; *Judd v. Walker*, 215 Mo. 312, loc. cit. 324, 335, 114 S. W. 979; *Sawyer v. Walker*, 204 Mo. 133, 102 S. W. 544; *Bank v. Byers*, 139 Mo. 627, loc. cit. 652, 41 S. W. 325; *Dulaney v. Rogers*, 64 Mo. 201, loc. cit. 204; *Hardwood Lumber Co. v. Dent*, 121 Mo. App. 108, loc. cit. 113, 114, 98 S. W. 814; 20 Cyc. pp. 12, 17, 18; 14 Am. & Eng. Ency. Law (2d Ed.) 23; *Bigelow on Law of Fraud*, p. 446; *Kerr on Fraud and Mistake*, pp. 53, 91, 12.

[7] V. Counsel for appellants also contend that: "The evidence, considered all together, fails to make plaintiff's case as pleaded. * * * The suit is for damages. The allegations in the petition are not proven, but disproven"—and therefore the demurrer to the evidence should have been sustained. This contention is untenable, as is clearly

shown by the evidence heretofore set out, and ruled upon by us in the foregoing paragraphs of this opinion.

[8] VI. Instruction numbered 1, given for the respondent, is assailed by counsel for appellants, for the reason assigned that it did not properly state the rule regarding the measure of damages. In brief, that instruction told the jury to assess the respondent's damages at such a sum, not exceeding the amount sued for, as would fairly compensate her for the pecuniary loss, if any, she had suffered as the direct result of the alleged false and fraudulent acts and representations of the appellants, and that in arriving at the damages so suffered by plaintiff the jury should take into consideration the difference between the reasonable value of the stock plaintiff parted with at the time of so doing and the price she received for the same.

[9] Instruction numbered 3, given for the respondent in this connection, told the jury that in arriving at the value of her stock they should consider the evidence introduced as to the value of the property and assets of the company. There was no error committed by the court in giving that instruction. The stock represented all of the assets of the company, and both parties introduced a great deal of evidence tending to show their real values. The original cost of the plant, its magnitude, the extensions and improvements made to the same, the character of the materials and labor used in its construction, their cost, its then state of preservation, its earnings and the expenses of operation, and its annual net profits, were all shown. Both parties resorted to that means to prove the real value of the stock. That introduced for the respondent tended to show that the plant, with all of its assets, was worth, over and above the indebtedness, more than the price for which the stock was sold for, and that introduced for the appellants tended to show that it was not worth more than \$80 per share, less 5 per cent.

Moreover, instruction numbered 2, given for the appellants, recognizes the correctness of the rule stated in respondent's instruction numbered 1, and adopted the same measure of damages.

[10, 11] VII. Instruction numbered 3 was also objected to by counsel for appellants, for the reasons assigned: First, that "there was no evidence to sustain such an instruction; and, second, if there was, the measure of the damages would be the value of the stock on May 13, 1911, and not May 25, 1911." As regards the first objection, it is sufficient to state that counsel are mistaken as to there being no evidence upon which to base that instruction. The evidence was full and complete as to the value of the plant, and all of its assets. And as to the second objection, there was no evidence introduced tending to show that there was any change in the value

of the stock between May 13, and 25, 1911, nor was any such contention made at the trial of the cause in the circuit court. There is no merit in this objection.

VIII. Counsel for appellants complain of the action of the trial court in refusing instructions marked H, I, and J, requested by them. The grounds of this complaint are stated in this language:

"The mere fact that Binder was willing to sell his stock at \$80 a share, under the circumstances and conditions surrounding him in March, 1911, did not amount to a representation that plaintiff's stock on May 13th of that year was only worth the same amount, and plaintiff had no right to treat this as a representation as to the value of her stock. Many things other than the intrinsic value of the stock might, and according to the evidence in this case did, affect Binder's desire to sell, and would and did induce the execution of such an option as he gave. The plaintiff had no right to treat this as a representation by Binder of the value to be placed upon her stock."

In my opinion all of those instructions were properly refused.

[12-14] Instruction H was properly refused, for the reasons: (1) That it states that the Binder option only purported to be the price at which Binder was ready at that time and willing to sell his stock. That statement is not justified by the evidence, as before shown. (2) That it further states that the Binder option, "although relied upon by plaintiff, does not constitute a false and fraudulent representation upon which a recovery can be had." That was not, under the evidence, a proper declaration of the law, as shown in a previous paragraph of this opinion. And (3) that this instruction was covered by instruction B, already given for the defendants, which told the jury that if they believed that the Binder option was given in good faith at the time it was executed, and was not made and entered into for the purpose of deceiving and defrauding the plaintiff, then the plaintiff could not recover.

[15] Instruction I was properly refused, for the reason that it told the jury that there was no evidence that defendant Thomas had any greater knowledge of the value of plaintiff's stock than that possessed by plaintiff and her agent, and that plaintiff and her agent had no right to rely upon any opinions expressed by Thomas as to the value of said stock. This statement finds no support in the evidence, and is disproved by the testimony of Thomas himself as to the examination and valuation he had caused to be made of the plant, and his knowledge of the value of the stock.

[16] Instruction J was properly refused, for the reason that it told the jury that the statements and representations of Thomas and Binder as to the value of plaintiff's stock were mere matters of opinion and would not authorize a recovery, although plaintiff relied upon them. This instruction was, practically, a demurrer to the evidence, and the trial court correctly refused to give

it, for the reasons stated in paragraph IV of this opinion.

IX. It is next insisted by counsel for appellants, that:

"The court erred in allowing George W. Wagner, the agent of the plaintiff, to testify as to conversations had with F. H. Binder, deceased, in his lifetime, in regard to the subject-matter of this suit over objections of defendants."

This objection is based upon section 6354, R. S. 1909, which, in so far as it is here material, reads as follows:

"(1) No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility: (2) Provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, (3) and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor. * * *

For convenience I have designated the provisions of this statute into three parts, indicated by the figures 1, 2, and 3. The first is an enabling act, and the two latter are limitations upon the enabling clause; that is, the first clause enabled interested parties to testify where both parties to the contract or cause of action were living, which could not be done at common law, and the two latter retained the common-law rule in force when one of the parties was dead. This should be carefully borne in mind for it will receive further consideration later.

[17,18] Mr. Greenleaf, in his most excellent work on Evidence (volume 1, §§ 386 and 390, 14th Ed.), states the character of the interest of a person in the result of a suit, which at common law disqualified him as a witness therein, in the following language:

"Sec. 386. *Disqualification by Interest in the Result.*—Another class of persons incompetent to testify in a cause consists of those who are interested in its result. The principle on which these are rejected is the same with that which excludes the parties themselves, and which has already been considered, namely, the danger of perjury, and the little credit generally found to be due to such testimony, in judicial investigations. This disqualifying interest, however, must be some legal, certain, and immediate interest, however minute, either in the event of the cause itself, or in the record, as an instrument of evidence, in support of his own claims, in a subsequent action. It must be a legal interest, as distinguished from the prejudice or bias resulting from friendship or hatred, or from consanguinity, or any other domestic or social or any official relation, or any other motives by which men are generally influenced; for these go only to the credibility. Thus, a servant is a competent witness for his master, a child for his parent, a poor dependant for his patron, an accomplice for the government, and the like. Even a wife has been held admissible against a prisoner, though she believed that his conviction would save her husband's life. The rule of the Roman law—*Idonei non videntur esse testes, quibus imperari potest ut testes*

fient'—has never been recognized in the common law, as affecting the competency; but it prevails in those countries in whose jurisprudence the authority of the Roman law is recognized. Neither does the common law regard as of binding force the rule that excludes an advocate from testifying in the cause for his client: 'Mandatis cavetur, ut Præsidēs attendant, ne patroni, in causa cui patrocinium præstiterunt, testimonium dicant.' But on grounds of public policy, and for the purer administration of justice, the relation of lawyer and client is so far regarded by the rules of practice in some courts, as that the lawyer is not permitted to be both advocate and witness for his client in the same cause."

"Sec. 390. *Test of Interest.*—The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him, in some other action. It must be a present, certain, and vested interest, and not an interest uncertain, remote, or contingent. Thus the heir apparent to an estate is a competent witness in support of the claim of his ancestor, though one who has a vested interest in remainder is not competent. And if the interest is of a doubtful nature, the objection goes to the credit of the witness, and not to his competency. For, being always presumed to be competent, the burden of proof is on the objecting party to sustain his exception to the competency; and if he fails satisfactorily to establish it, the witness is to be sworn."

The exceptions to the rule laid down in the sections just quoted are stated by the author in sections 411 and 416, vol. 1 (14th Ed.), in this language:

"Sec. 411. *Exceptions to Rule Disqualifying by Interest.*—The general rule, that a witness interested in the subject of the suit, or in the record, is not competent to testify on the side of his interest, having been thus stated and explained, it remains for us to consider some of the exceptions to the rule, which, for various reasons, have been allowed. These exceptions chiefly prevail either in criminal cases, or in the affairs of trade and commerce, and are admitted on grounds of public necessity and convenience, and to prevent a failure of justice. They may be conveniently classed thus: (1) Where the witness, in a criminal case, is entitled to a reward, upon conviction of the offender; (2) where, being otherwise interested, he is made competent by statute; (3) the case of agents, carriers, factors, brokers, or servants, when called to prove acts done for their principals, in the course of their employment; and (4) the case of a witness, whose interest has been acquired after the party had become entitled to his testimony. To these a few others may be added, not falling under any of these heads."

"Sec. 416. *Agents, Factors, Brokers, Etc.*—The third class of cases, excepted out of the general rule, is that of agents, carriers, factors, brokers, and other servants, when offered to prove the making of contracts, the receipt or payment of money, the receipt or delivery of goods, and other acts done within the scope of their employment. This exception has its foundation in public convenience and necessity; for, otherwise, affairs of daily ordinary occurrence could not be proved, and the freedom of trade and commercial intercourse would be inconveniently restrained. And it extends, in principle, to every species of agency or intervention, by which business is transacted; unless the case is overborne by some other rule. * * *

And the same author, in discussing the enabling statute which removed the interest disability, where all were living, and which

prescribed its limitation in section 333b, vol. 1 (16th Ed.), says:

"Sec. 333b. *Survivors of a Transaction with a Deceased Person.* [In almost every jurisdiction in this country, by statutes enacted in connection with or shortly after the statute removing the disqualification of parties and of interested persons in general, an exception was carved out of the old disqualification and allowed to perpetuate its principle within a limited scope. The theory of the original disqualification was that persons interested were likely to bear false witness. The reasons for abolition were in brief (1) that this was true to a limited extent only; (2) that, even if true, yet, so far as they did not testify falsely, the hardship of exclusion was intolerable; (3) that, in any case, the test of cross-examination and the other processes of investigation would with fair certainty expose falsehood; (4) that no exclusion could be so defined as to be simple, consistent, and workable. The reformers in this country did not accept these arguments to their fullest extent, and they preferred to maintain the disqualification for the situation in which it seemed to them that the means of refuting a false claim would be wanting; i. e., a claim by one whose adversary was deceased, since, in the vague metaphor often invoked by way of a reason, 'If death has closed the lips of the one party, the policy of the law is to close the lips of the other.' This exception is wholly a creation of statute; for, as all interested persons were excluded at common law, the whole embraced a part, and there was no occasion to define the terms of any such partial exclusion. So far as the notion of interest is involved, the principles of the common law survive, and its precedents might have a bearing; but they are rarely resorted to, and the limits of this rule of exclusion depend almost entirely on the varying terms of the local statute—these differences being such that the precedents in one jurisdiction are rarely of use in another. It is enough here to note two lines of distinction between the various statutes, viz.: (1) Some exclude only parties to the cause, while others exclude any person interested in the issue; (2) some exclude only testimony to a specific transaction or communication with the deceased person, while the others exclude the disqualified persons from testifying at all in the cause. As a matter of policy, this survival of the now discarded interest disqualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more injustice than it prevents, and it incumbers the profession with a mass of barren quibbles over the interpretation of mere words.]"

[18] If we test the competency of the witness George W. Wagner, the agent of the respondent, to testify to the conversations he had with the deceased, Mr. Binder, regarding the value of his mother's stock, etc., by the rules of the common law before stated and the statute quoted, it seems to me that there can be no question but what he was a competent witness. In the first place, George W. Wagner was not a party to the suit, nor was he interested in the result of it, directly or remotely, contingently or otherwise; consequently he was not disqualified on account of being an interested party by the common law or the statute mentioned. Moreover, even though it should be conceded, for argument's sake, that he was an interested party, yet he being the agent of the respondent, and having acted for her in that capacity, he comes squarely within the letter and spir-

it of the third exception to the disqualification on account of interest stated by Mr. Greenleaf in sections 411 and 416, before mentioned. This precise question has been before this court in a number of cases:

The facts in the case of *Bates v. Forcht*, 89 Mo. 121, 1 S. W. 120, were briefly these: T. G. Sharp & Co., for value received, executed a promissory note to the Macon Savings Bank, for \$3,000, due in four months. For value, before maturity, the bank indorsed the note to the plaintiff. The note was signed and delivered to the bank by T. G. Sharp, one of the members of the firm of T. G. Sharp & Co. Prior to the date of the trial, said T. G. Sharp died, and T. E. Sharp, the son of T. G. Sharp, and a stockholder and cashier of the bank, was offered as a witness to prove the signature of his father to the note. The defendant, the other member of the firm of T. G. Sharp & Co., objected to his testimony on the ground that T. G. Sharp, the party who executed the note, was dead, and the witness, being an interested party in the suit, was disqualified under the statute as a witness to testify in case. The trial court sustained the objection, and on appeal this court held that ruling to be erroneous, and in discussing the question said:

"Plaintiffs, in rebuttal, introduced a number of witnesses to prove that the signature of T. G. Sharp & Co. was in the handwriting of T. G. Sharp, and among them one, T. E. Sharp, the son of T. G. Sharp. His evidence was excluded on the objection of defendants that he was a stockholder, corporator, and cashier of the Macon Savings Bank. In this we think the court committed error. Among the exceptions to the common-law rule, that a witness interested in the subject of the suit is not competent to testify on the side of his interest, is the case of agents, carriers, factors, brokers, and servants, when called upon to prove facts done for their principals in the usual course of business. 1 Greenl. on Evid. §§ 411, 416. In the last section quoted it is said that 'a cashier or teller of a bank is a competent witness for the bank, to charge the defendant on a promissory note, or for money lent or overpaid or obtained from the officer without the security which he should have received, and even though the officer has given bond to the bank for his official good conduct.' But whatever the rule is at common law as to the interest of a witness disqualifying him, it is superseded by section 4010, Revised Statutes, which declares that no person shall be disqualified as a witness by reason of his interest in the event of a suit as a party or otherwise. The rejected evidence was clearly competent under our statute, if not under the rule at common law."

In the case of *Clark v. Thias*, 173 Mo. 628, 73 S. W. 616, the facts were precisely the same as those in the *Bates-Forcht* Case, supra, with the exception in that case the note was made to a bank through its cashier, and in the latter it was made to a mercantile company through one of its clerks. In holding that the clerk was a competent witness, Judge Fox, in discussing this question on page 643 of 173 Mo. (73 S. W. 620), said:

"It is next insisted, and very earnestly urged, that the court committed error in permitting witness Martin, who was acting as clerk or

agent for *Clark & Martin* at the time this note was taken, to testify in regard to transactions between himself and Mary Larkin. It will be observed that witness Martin had no interest in the note, nor has he any interest in this suit. In the case of *Stanton v. Ryan*, 41 Mo. 510, this court clearly announced the rule that an agent in making a contract is a competent witness, notwithstanding the party with whom the contract was made was dead. In that case the wife was introduced in pursuance of the provisions of the statute which makes her competent in cases where she is acting as the agent of the husband; the party with whom the wife had contracted was dead; the court held she was competent, and placed her in the same position as any other agent. The court said: 'It cannot be gainsaid that, if the defendant had given a full delegation of power to an ordinary agent to make a contract for and superintend the building, such agent would have been competent to prove the contract when a dispute arose concerning the same, whether the person with whom he contracted was dead or not. The statute expressly authorizes the wife to give testimony in all transactions where she acted in the matter as agent for her husband, whether she is joined with him as a party to the record or not. There is no distinction recognizable between her and any other agent as regards capacity to be a witness.' To the same effect is the case of *Leahy v. Simpson's Adm'r*, 60 Mo. App. 83. The court in that case very tersely announces the rule: 'The fact that the agent of an individual makes a contract on behalf of his principal with a third party, who subsequently dies, does not render the agent incompetent to testify in a suit brought by his principal to enforce such contract against the administrator of the deceased.' In the case of *Baer v. Pfaff*, 44 Mo. App. 35, the question, identical with the one urged in this contention, is very fully and ably discussed. The court in that case very aptly and appropriately applied the rule. It said: 'It is insisted that the plaintiff's clerks were incompetent witnesses, in so far as they had personal transactions with the deceased in the sale of goods. We think that the case of *Stanton v. Ryan*, 41 Mo. 510, settles this question adversely to the defendants. It was there decided that, where a contract was made by an agent, the latter was a competent witness to prove the contract, whether the other contracting party was dead or not. The doctrine of this case was substantially reaffirmed in the case of *Leeper v. McGuire*, 57 Mo. 360. The subsequent case of *Williams v. Edwards*, 94 Mo. 447 [7 S. W. 429], only decided that, where a contract is made by a corporation and its contracting agent dies, this renders the other contracting party an incompetent witness. In construing and applying the statute to that case, the court makes the 'agent' take the place of the corporation, upon the ground that a corporation can only act and speak through its agents and officers. In the case of *Robertson v. Reed*, 38 Mo. App. 32, the Kansas City Court of Appeals applied the same rule, and the plaintiff was held disqualified to testify, where it appeared that the contract on trial had been made with him by the defendant's deceased agent. But those cases are unlike this. The test to be applied is: Would the plaintiff's clerks have been incompetent witnesses at common law? They certainly would. They had no interest in the suit, and there is no rule, that we are aware of, that would have disqualified them. Our statute was only intended to modify the common law so as to permit a party in interest to testify in his own behalf, provided the other party to the contract in issue and on trial is alive, or is not shown to be insane. If either party to the contract is dead, or shown to be insane, the statute has no application, and the common-law rule must govern.' The case of *Banking House v. Rood*, 182 Mo. 256 [33 S. W.

816], relied upon by appellants, is not in conflict with the cases herein referred to. On the contrary, the case of Stanton v. Ryan, supra, is quoted approvingly by nearly all the cases upon the questions involved in this particular contention. Martin was not a party in interest, either in the note or suit; hence we are of the opinion that he was a competent witness."

The same question was presented in the case of Baer v. Pfaff, 44 Mo. App. 34, and on page 39 the court said:

"II. It is insisted that the plaintiff's clerks were incompetent witnesses, in so far as they had personal transactions with the deceased in the sale of goods. We think that the case of Stanton v. Ryan, 41 Mo. 510, settles this question adversely to the defendants. It was there decided that, where a contract was made by an agent, the latter was a competent witness to prove the contract, whether the other contracting party was dead or not. The doctrine of this case was substantially reaffirmed in the case of Leeper v. McGuire, 57 Mo. 360."

In the case of Stanton v. Ryan, 41 Mo. 510, loc. cit. 514, Judge Wagner, in discussing this question, said:

"The defendant offered to prove that his wife, acting as his agent, attended to the erection of the building, and let out the contract for the same, and then proposed to prove by her that she contracted with the deceased, Mr. Stanton, to do the work and furnish the material, and the price and terms stipulated between the parties. This the court rejected, on the ground that the wife was necessarily disqualified with the husband. The fifth section of the act already referred to provides that no married woman shall be disqualified as a witness, in any civil suit or proceeding prosecuted in the name of or against her husband, whether joined or not with her husband as a party, in matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband. In support of the decision in the court below, it is contended that as the husband was incompetent on account of the death of the adverse party, with whom the contract purported to be made, the wife could not be admitted to testify to prove a contract, when the deceased party was powerless to be heard on the other side. This view of the question might furnish excellent reasons for changing or modifying the law; but, if the statute declares differently, we are not warranted by judicial legislation in perverting the plain meaning of the statute to conform to what we might consider sound policy. It cannot be gainsaid that, if the defendant had given a full delegation of power to an ordinary agent to make a contract for and superintend the building, such agent would have been competent to prove the contract when a dispute arose concerning the same, whether the person with whom he contracted was dead or not."

Brim v. Fleming, 135 Mo. 597, 37 S. W. 501, is to the same effect. There are many other cases of like import, but it would serve no good purpose to here review them, as those considered clearly support the contention that George W. Wagner was a competent witness for the respondent regarding the conversations he had with Binder, notwithstanding the death of the latter.

[20] Counsel for appellants do not contend that the cases just considered do not hold that Wagner was a competent witness, but cite numerous other cases which they contend hold to the contrary, which are as follows:

"Diggs v. Henson, 181 Mo. App. 34, loc. cit. 42, 43 [163 S. W. 565]; Williams v. Edwards, 94 Mo. 447, loc. cit. 451 [7 S. W. 429]; Banking House v. Rood, 132 Mo. loc. cit. 262 [33 S. W. 816]; Charles Green R. E. Co. v. Bldg. Co., 136 Mo. loc. cit. 369 [93 S. W. 1111]; Taylor v. George, 176 Mo. App. 215, loc. cit. 222 [161 S. W. 1187]; Carroll v. Railroad, 157 Mo. App. 247 [137 S. W. 303]; Green v. Ditsch, 143 Mo. 1 [44 S. W. 799]; McClure v. Clement, 161 Mo. App. 24 [143 S. W. 82]; Real Estate Co. v. Building Co., 196 Mo. 358 [93 S. W. 1111]; Robertson v. Reed, 38 Mo. App. 32; Nichols, Shepard Co. v. Jones, 32 Mo. App. 657; Weiermueller v. Scullin, 203 Mo. 466 [101 S. W. 1088]; Carroll v. United Ry. Co., 157 Mo. App. 247, loc. cit. 277 [137 S. W. 803]; Taylor v. George, 176 Mo. App. loc. cit. 220 [161 S. W. 1187]; Diggs v. Henson, 181 Mo. App. loc. cit. 46 [163 S. W. 565]. The rule above stated applies with equal force to actions in tort, as actions on contract. Darks v. Scudder-Gale Co., 146 Mo. App. 246 [130 S. W. 430]."

By a careful consideration of these cases it will be seen that there is but little conflict between them and those cited by counsel for the respondent. The case of Diggs v. Henson, 181 Mo. App. 34, 163 S. W. 565, was an action to recover damages for a breach of warranty, and the facts of the case were briefly these: One Henson, by a general warranty deed, conveyed certain lands to one Shead. Thereafter Shead conveyed the same lands to Diggs, the plaintiff in that case. Henson was not seised of an indefeasible estate in fee to the land, etc. Henson died, and that suit was brought against his administrator. At the trial Shead, the grantee of Henson, was offered as a witness for Diggs, the plaintiff, the grantee of the witness. The defendant objected to Shead testifying, almost in the language of the statute, which reads:

"Provided that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or * * * the other party to such contract or cause of action shall not be permitted to testify either in his own favor or in favor of any party to the action claiming under him."

Under the plain and unambiguous words of the statute italicized by us, the witness Shead was clearly disqualified to testify against his grantor, Henson, and in favor of Diggs, the plaintiff, who was the grantee of the witness. In other words, Diggs claimed under Shead, and, the latter being the grantee of Henson, he was disqualified to testify in behalf of Diggs and against Henson. That is both the letter and the spirit of the statute. But that is not the case at bar. Wagner was not a party to the contract of sale of the respondent's stock to Monnig; he was only her agent, and therefore was not disqualified under the statute. I am not unmindful of the fact that there are cases which hold that the agent who makes the contract for his principal is a party to the contract within the meaning of that statute, and I will consider that phase of the question as we proceed.

The case of Williams v. Edwards, 94 Mo. 447, 7 S. W. 429, was an action of eject-

ment. Edwards executed a deed of trust conveying the land to one Russell, for the use of an insurance company. The land was sold under this deed, and the plaintiff through mesne conveyances became the owner of the paper title thereto, who brought the suit in ejectment. The defense was that defendant had satisfied the deed of trust, through one Sharp, the agent of the insurance company, before the land was sold under the deed of trust. Sharp died prior to the trial. At the trial the defendant was offered as a witness to testify as to the satisfaction of the deed of trust with Sharp, the agent of the company. In discussing that question the court on page 451 of 94 Mo. (7 S. W. 430), said:

"III. Further objection was made to the defendant testifying as to conversations had with Sharp, on the ground that Sharp, according to the testimony of the defendant, was the 'contracting agent' of the corporation, and that, he being dead, the defendant was not a competent witness as to any admissions, declarations, or contracts he may have made. According to the rule laid down by Wharton, this point was valid. That writer says: 'Under statutes which exclude the surviving party to a contract, the death of a contracting agent excludes the surviving party who contracted with him.' 1 Whart. Evid. § 469. This principle is recognized in *Stanton v. Ryan*, 41 Mo. 510, where surviving partners brought an action quantum meruit, and the defendant set up a special contract made by a deceased partner as agent of the firm; the surviving partners were permitted to testify touching the facts constituting their cause of action, and so also was the defendant in rebuttal; but he was not permitted to testify respecting the special contract, which if enforced would have defeated the action of the plaintiffs; and this ruling was affirmed, *Wagner, J.*, remarking: 'The suit was not instituted on the contract, it was denied that any contract existed; the surviving plaintiffs knew nothing about it; and to permit Ryan, by his own testimony, to come in and set it up and prove its terms, when Stanton's lips were sealed by death, and could not be there to contradict, qualify, or explain his statements, is at war with justice, and certainly not authorized by law.' The same doctrine was announced in *Butts v. Phelps*, 79 Mo. 302, where the facts sought to be introduced in evidence were virtually the same as in the former case. The object of the statute is to guard against false testimony by the survivor, and in order to do this it establishes a rule of mutuality by which, when the lips of one contracting party are closed by death, the lips of the other party are closed by law. And this principle remains unaltered as well where the contracting agent of a corporation dies as where the contracting agent of a firm dies; and the dangers and the mischiefs of any other rule would be as great in the former as in the latter case. A corporation can only speak and act through agents; the agent represents the corporation, and if, after the death of an agent of a corporation, it were admissible for a party to come in and testify to a contract made with such deceased agent, testify to facts unknown to the corporation or any of its other agents, it is easy to see that corporations would be without protection where others, in like circumstances, are fully protected. I believe the statute in theory and in reason is broad enough to include within its beneficent provisions, the contracting agent of a corporation, as well as the contracting agent of a firm."

[21, 22] That case is not applicable to the case at bar, for the reason that in that case

it was Sharp, the agent of the company, who was dead, with whom the defendant contended he had satisfied the deed of trust. Sharp was the company in so far as that transaction was concerned, and he spoke and acted for it, and when he died the voice of the company was forever silenced as to that transaction, and to have permitted the defendant, the surviving party, not his agent to it, to have testified to the settlement, would have been a plain violation of the spirit and meaning of the statute. This is true, for the reason that a corporation can only speak and act through its officers or agents, and when their mouths are closed in death the law stays the tongues of those who deal with the corporation through them. But the converse of that proposition is not true, for we have heretofore shown that the statute was an enabling act and was not designed to disqualify a witness who was competent to testify at common law. The death of Mr. Binder disqualified the respondent as a witness, and the trial court so held upon the objection of counsel for appellants, and only permitted her to testify against Thomas, the other appellant.

That ruling was proper, as shown by all the authorities; but that is not this case, nor is there a well-considered case that holds that, where one of the parties to a contract or cause of action in issue and on trial is dead, the statute will disqualify, not only the survivor, the other party thereto, but also his agent, who represented him in the transactions of said matters. And why should it not be the law that the agent, Mr. Wagner, in this case, should be a competent witness? He was competent at common law, as previously shown; and clearly there is nothing in the statute that disqualifies him. He was neither an interested party nor, in the language of the statute, did he "testify in favor of any party to the action claiming under him." The mere fact that he was acting as the agent of the respondent should no more disqualify him under the statute than if he had not been so acting, but had been present and saw the things done and heard the conversations about which he testified. It is not the policy of the law or of good morals that, because a party to a contract or a cause of action is dead, his estate should be excused from the performance of the former or relieved from the liability as to the latter; nor is it the policy of the law to destroy competent testimony showing his liability thereon. The law is to the contrary, and said enabling statute was enacted for the purpose of preserving rights and not to destroy them. The statute is satisfied when death silences the mouth of one of the parties and the courts close the lips of the other, without going further and destroying competent testimony showing the liability of the deceased party.

The next case cited by counsel for appellants is that of *Banking House v. Rood*, 132

Mo. 256, 33 S. W. 816. The facts in that case are not clearly stated, but after a careful consideration of the same I gather that they were substantially as follows: The plaintiff was an incorporated bank, and James M. Wilcoxson and Harrison Wilcoxson were stockholders therein. The former was its cashier and the latter its president. The defendant Rood executed his note to the bank for money borrowed, and subsequently died. The Wilcoxsons testified over the objection of defendant that the note was signed by Rood, and that they saw him sign it. On appeal to this court it was held that the Wilcoxsons were not competent witnesses. While the case of *Bates v. Forcht*, 89 Mo. 121, 1 S. W. 120, was reviewed by the court, yet in terms it was neither overruled nor confirmed; and I confess I do not understand the opinion in the light of the conclusion reached and the cases cited and relied upon in support of it. And Judge Fox evidently encountered the same difficulty when he wrote the opinion in the case of *Clark v. Thias*, 173 Mo. 628, for on page 646, 73 S. W. 616, on page 620, in considering said case he said:

"The case of *Banking House v. Rood*, 182 Mo. 256 [33 S. W. 816] relied upon by appellants, is not in conflict with the cases herein referred to. On the contrary, the case of *Stanton v. Ryan*, supra, is quoted approvingly by nearly all of the cases upon the questions involved in this particular contention. Martin was not a party in interest, either in the note or suit; hence we are of the opinion that he was a competent witness."

It may be added in this connection that the opinion in the case of *Banking House v. Rood*, supra, does not notice any of the cases cited by Judge Fox in support of his ruling upon this question, with the exception of the case of *Stanton v. Ryan*, supra, which holds directly to the contrary to what was ruled in that case, notwithstanding the fact that all of them were earlier cases. In addition to the *Stanton-Ryan* Case, Judge McFarland also cited the following cases in support of his conclusions reached in the *Banking House-Rood* Case: *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429; *Orr v. Rode*, 101 Mo. 398, 13 S. W. 1066; *Leach v. McFadden*, 110 Mo. 587, 19 S. W. 947; *Bank v. Payne*, 111 Mo. 296, 20 S. W. 41; and *Miller v. Wilson*, 126 Mo. 54, 28 S. W. 640.

We have already reviewed the *Williams-Edwards* Case, which clearly does not support the conclusions announced by Judge McFarland. That was a case where the agent who represented the insurance company was dead.

The next case cited in support of the *Banking House-Rood* Case is *Orr v. Rode et al.*, supra. A most casual reading of that case will show that it has no bearing upon the question for which it was cited. The facts of that case in brief were these: John H. Rode conveyed to James W. Strong certain real estate, in trust for certain purposes,

and on the same day Strong executed a deed of trust to Ira Brown, trustee, to secure \$4,000 borrowed by him from Orr, the plaintiff. The question involved in the case was the power of Strong to mortgage the property under the deed from Rode to him. Rode was dead at the date of the trial, and over the objection of the defendants the plaintiff, Orr, was by the trial court permitted to testify as to what was said to Mr. Strong regarding the loan, but not as to what was said to Mr. Rode. In discussing that question the court on page 399 of 101 Mo., on page 1068 of 13 S. W., said:

"The reason and spirit of the law do not sanction the exclusion of the evidence here in question, even if Strong be regarded as a mere agent of the grantor, Rode. Though the latter was dead, Strong, at the time of the trial, was living and competent. The statute, when given its rational interpretation, does not exclude the evidence of one party to a contract when the transaction on the other part was had with an agent, still living and competent, though the principal (for whom the business was transacted) may be dead. *Ward v. Ward*, 37 Mich. 253. But, as we have already remarked, Strong was no mere agent of Rode. He was trustee of an express trust, and might have sued in his own name to enforce his rights as trustee, and, within the scope of the trust, had power to contract as such as a principal. Having done so, the testimony of Orr, as to dealings with him in that capacity, were admissible, even under the strict letter of the statute."

If that case has any application to the case under consideration, or to the one at bar, it is against, rather than in favor, of the appellants.

The next case cited in support of the *Banking House-Rood* Case is *Leach v. McFadden*, supra. The facts of that case were these: John K. Ragland bequeathed to Leach, the plaintiff, about \$5,000, which the probate court ordered the executors to pay, which the plaintiff claimed was never done. The plea of the executors was payment through James Q. Ragland, an attorney of plaintiff. The attorney was dead, and Johnson, one of the defendants, was offered as a witness to prove that the legacy had been paid to said attorney for the plaintiff. On appeal to this court it was properly held that Johnson was not a competent witness. But this ruling did not support the *Banking House-Rood* Case, nor the position of the counsel for appellants in this case. In the former the agents, the cashier and president of the bank, were living and testified at the trial, and so in this case Mr. Wagner, was living and testified at the trial; but in the *Leach-McFadden* Case the agent or attorney was dead, and therefore he could not testify. That is the distinguishing feature between the two classes of cases, which will be specially considered later.

The next case cited in support of the *Banking House-Rood* Case is that of *Bank v. Payne*, supra. The facts of that case are substantially the same as those in the case of *Leach v. McFadden*, and the holding of the court was substantially the same as it was in that case.

The last case cited in support of the Banking House-Rood Case is that of *Miller v. Wilson* supra. In that case one Cochran, sold certain lots to one Towne, and the latter executed a deed of trust on said lots to secure two notes of \$387 each, a part of the purchase money. Subsequently Towne sold and conveyed all of said lots, except lot No. 119, by a general warranty deed to Mrs. Miller, one of the plaintiffs, and took back from her a deed of trust to secure a part of the purchase money. On the same day Towne sold to and conveyed by general warranty deed said lot 119 to Mrs. Miller and her coplaintiff, and took back from them a deed of trust on the same to secure two notes, of \$125 each, a part of the purchase money. These sales were made by one Hall, as agent for the vendors, and the notes given in the hands of Hall as agent for collection, with instructions to apply the proceeds of the same in payment of the notes he had executed to Cochran. Afterwards plaintiffs heard of said first deed of trust and the arrangements made for its payment, and were satisfied therewith; and thereafter the plaintiff paid to Hall \$369, with which he paid one of the Cochran notes, but failed to pay the other. Cochran died, and thereafter the plaintiff paid Hall an additional \$50. Subsequently the plaintiffs brought that suit against Wilson, administrator of Cochran's estate, to have said first deed of trust declared satisfied and canceled. Over the objection of defendant, Mrs. Miller was permitted to testify in her own behalf, and upon appeal to this court that ruling was sustained, upon the ground that Hall, the agent of Cochran, with whom she transacted the business, was living, and the fact that Cochran was dead was immaterial, and Hall's testimony in no sense violated the statute under consideration. That ruling was clearly correct, but it in no manner lent support to the ruling made in the Banking House-Rood Case; nor has it any bearing on the question here under consideration. The last case was also written by Judge McFarland, and the same authorities were cited in support of his ruling that were cited in support of the ruling in the Banking House-Rood Case.

This review of the cases upon which Judge McFarland based his rulings clearly shows the error into which he fell and the reason therefor, viz., that it was not just to permit the agent of the living party to a contract or cause of action to testify in his own behalf when the other party thereto was dead, and could not testify, and therefore he ruled that an equitable construction should be placed upon the statute which would not only close the lips of the surviving party to the transaction, as was done in the case at bar, but would also seal the mouth of her agent, who acted for her in the transaction, and thereby prevent redress for her injury. I am unable to see any justice in such a ruling or any authority to support it. At common law George W. Wagner, the agent of the respondent, was clearly

a competent witness for her, as stated by all of the text-writers, and as universally announced by the adjudications; and if he was not a competent witness in this case, it must be because section 6354, R. S. 1909, an enabling act, disqualified him as such.

That statute in plain and unambiguous terms provides that, when one party to the contract is dead, the other party thereto shall not be permitted to testify, etc. This language in no sense refers to the agent of the real party to the contract; and especially may that be affirmed when viewed in the light of the common law and public policy which permitted agents, brokers, etc., to testify in behalf of their principals, and the further fact that said statute is an enabling statute as practically all of the authorities hold. *Weiermueller v. Scullin*, 203 Mo. 466, loc. cit. 471, 101 S. W. 1088; *Southern Bank v. Slatterly*, 166 Mo. loc. cit. 633, 60 S. W. 1006; *Lynn v. Hockaday*, 162 Mo. loc. cit. 122, 61 S. W. 885, 85 Am. St. Rep. 490. In other words, the first clause of said statute was designed to remove the common-law interest disability of all parties to a contract or cause of action to testify in their own behalf, while the second and third provisions thereof were designed to limit the first to cases where both parties were living, by retaining said common-law disability in full force where one of the parties was dead. *Weiermueller v. Scullin*, supra, loc. cit. 473, 101 S. W. 1088; *Curd v. Brown*, 148 Mo. 95, 49 S. W. 990. *Valliant, C. J.*, in the case of *Griffin v. Nicholas*, 224 Mo. 275, at page 288, 123 S. W. 1063, in considering this statute, expressed the same idea in this language:

"Section 4652, Revised Statutes of 1899, first removes the common-law disability which disqualified a witness on account of his interest in the suit, then it excepts from those whom that statute, without the exception, would render qualified, a party to a contract in issue and on trial when the other party was dead."

According to the ruling in the latter case, the respondent herself was a competent witness upon the theory that the cause of action was for fraud and deceit and not upon contract.

Counsel also cite the following cases in support of that ruling: *Stewart v. Glenn*, Adm'r, 58 Mo. 481, loc. cit. 487, 488; *Snider v. McAtee*, 165 Mo. App. 260, 147 S. W. 136, affirmed by Supreme Court July 6, 1915, 178 S. W. 484; *Baer v. Pfaff*, 44 Mo. App. 35; *Clark v. Thias*, 173 Mo. 628, 73 S. W. 616; *Darks v. Scudder-Gale Gro. Co.*, 146 Mo. App. 246, loc. cit. 255, 130 S. W. 430; *Morse v. Low*, 44 Vt. 561; *Magee v. Burch*, 108 Mo. 336, loc. cit. 342, 18 S. W. 1078; *Bank v. Scofield*, 39 Vt. 590; *Brim v. Fleming*, 135 Mo. 597, 37 S. W. 501; *Cole v. Shurtleff*, 41 Vt. 311, 98 Am. Dec. 587; *Poquet v. North Hero*, 44 Vt. 91, loc. cit. 95, 96; *Ford v. McClain*, Adm'r, 164 Mo. App. loc. cit. 178, 179, 148 S. W. 190; *Dawson v. Wombles*, 104 Mo. App. 272, 78 S. W. 823.

The ruling in the *Griffin-Nicholas* Case was

by a divided court, four to three. I did not then think the ruling there announced was sound, nor have I changed my opinion in that regard. But, be that sound law or not, it is not necessary in this case to go the lengths of that one in order to hold Wagner, the respondent's agent, was a competent witness. In short, according to practically all of the authorities, where one of the parties is dead, the common-law disqualification remains in full force and effect; but that in no manner affects the agent, factor, clerk, attorney, etc., of the living party through whom the transaction was negotiated.

If, as contended for by counsel for appellants, and as decided in the Banking House-Rood Case, that said statute disqualified both the surviving party and her agent, then there is not a bank in the state, which holds the note of a deceased person that can collect the same, where the execution of the note is denied, or where infirmities are shown to exist, without perchance an outside person might be found who knows the signature, or who happened to be familiar with the transaction out of which the note grew. The same would be true of merchants, who sell goods on credit, and subsequently the purchaser should die, as was clearly shown by Judge Fox in the case of *Thias v. Clark*, supra. Had the ruling in the latter case been the same as announced in the Banking House-Rood Case, then clearly neither Thias nor his clerk could have testified to the execution of the note, nor to the sale of the goods out of which the note was given; but recognizing the existence of the common-law rule as to the competency of one's clerks, brokers, etc., to testify in his behalf, was still in full force, enabled Judge Fox to rightfully hold that Martin, the clerk, was a competent witness, notwithstanding the maker of the note was dead, and thereby enabled the plaintiff to recover his just debt, which otherwise would have been forever lost. And if the rule announced in the Banking House-Rood Case is sound, then in all personal injury cases resulting in death, against railways, other corporations and persons, growing out of wrecks, negligence, etc., then all of their officers, agents, and employes would be disqualified as witnesses therein. That certainly cannot be the law.

We have carefully examined all of the other cases in support of this proposition, and find none of them, except *Green v. Ditsch*, 143 Mo. 1, 44 S. W. 799, and two or three cases in the Court of Appeals, which are based upon and follow the Banking House-Rood Case, which lend support thereto; and it would be a useless waste of time to review them here, as they contain nothing new. There is no case in the books which better shows the wisdom and justice of the common-law announcement made by Judge Fox than does the case of *Thias v. Clark*, supra, and for that reason, in my opinion,

the rule there stated should be adhered to, and that decided in the case of *Banking House v. Rood*, supra, should be overruled, which is accordingly done.

[23] K. The same objections that were urged against the competency of Wagner as a witness were also made against the competency of Edwards. There is no merit in this objection. While the optional contract of respondent provided that the sale of her stock was not to be made thereunder without the Edwards stock was to be sold at the same time and upon the same terms as her own, yet the evidence clearly shows that each of them owned their shares in severalty, and that they sold them severally; the condition mentioned was inserted for the protection of their respective rights in the matter of voting for members of the board of directors of the company, and not to authorize a joint sale of their shares of stock. Edwards, therefore, was neither a party to the contract sued on, nor interested therein, within the meaning of said statute.

This same question was presented to Division No. 2 of this court in the case of *Snider v. McAtee*, 178 S. W. 484. The only difference in the facts of the two cases were that in that case the parties separately purchased the shares of stock, while here they separately sold them. The court, in discussing this question in that case, on page 488, said:

"The statute (section 6354, R. S. 1909) provides that in actions where one of the original parties to the contract or cause of action is issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or that of any other party to the action claiming under him. The inhibition above quoted is without influence here, for the witness Sperling is in no sense a party to plaintiff's cause of action, or to the contract by which plaintiff acquired title to the 22 shares of stock which he purchased. Plaintiff did not acquire title through Sperling or through any contract by which they jointly purchased the stock, for each party individually purchased from Quinn and paid for a certain number of shares of stock. Neither is plaintiff's right derived in any sense through Sperling, the witness, but, on the contrary, it arises from his individual contract of purchase entered into with Quinn in the presence of Sperling and Schwab. Obviously the witness Sperling was competent to speak of the contract made in his presence by plaintiff and Quinn."

The same is true here; the sale of the Wagner and Edwards stock was not a joint sale, but several, depending upon a collateral condition, designed to protect each other in their rights as minority stockholders in the election of the board of directors of the company, in case the sale of the stock of either party was not completed.

XI. There were scores of objections made to questions propounded to the witnesses George W. Wagner and W. J. Edwards. These questions were designed to throw light upon the value of the plant and the shares of stock sold, as well as to the charges of fraud presented by the pleadings. The objections were of the same general character, raising

the questions of competency, relevancy, and materiality of the testimony solicited.

We have carefully read this entire record, and have stated the evidence objected to, and when we consider the character of the suit, and how difficult it is to prove fraud and deception by direct evidence, the courts permit a rather wide inquiry into the facts and circumstances of the case, in order that the jury may draw proper inferences therefrom, which could not otherwise be proven.

[24] This is a well-settled rule of evidence, and is frequently resorted to when the question of fraud is involved; and in our opinion the evidence objected to in this case, under that rule, was properly admitted. *Smalley v. Hale*, 37 Mo. 102, loc. cit. 104; *Stewart v. Severance*, 43 Mo. 322, loc. cit. 334, 97 Am. Dec. 392; *Hopkins v. Sievert*, 58 Mo. 201; *Mosby v. Commission Co.*, 91 Mo. App. 500, loc. cit. 507, and cases cited; 14 Am. & Eng. Ency. Law (2d Ed.) pp. 195, 196; *Sawyer v. Walker*, 204 Mo. 133, loc. cit. 160, 102 S. W. 544; *Derby v. Donahoe*, 208 Mo. 684, loc. cit. 688, 106 S. W. 632; 20 Cyc. p. 110.

[25] XII. Counsel next insist that the trial court erred in permitting the respondent to testify as a witness in the case, upon the ground that Mr. Binder, one of the parties to the cause of action on trial, was dead. The record shows that the court sustained the objection as to Mr. Binder and to his estate, but overruled it as to Mr. Thomas, the other party to the cause of action, who was living at the time of the trial and is still living. That ruling as to both Binder and Thomas was correct, and has the repeated approval of this court. *Fulkerson v. Thornton*, 68 Mo. 468; *Babb v. Ellis*, 76 Mo. 459; *Nugent v. Curran*, 77 Mo. 323; *Sotebier v. Transit Co.*, 203 Mo. 702, loc. cit. 721, 102 S. W. 651.

[26] If appellants desired the effect of the testimony of the witnesses limited to the defendant Thomas alone, they should have requested an instruction so limiting it; and, having failed to do so, they cannot now complain. It was not the duty of the court to give such an instruction without a request. *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481; *Babb v. Ellis*, 76 Mo. 459; *Garesche v. College*, 76 Mo. 332; *Sotebier v. Transit Co.*, 203 Mo. 702, loc. cit. 721, 102 S. W. 651, and cases cited; *Standard Milling Co. v. Transit Co.*, 122 Mo. 258, 26 S. W. 704; *Wright v. Gillespie & Co.*, 43 Mo. App. 244, loc. cit. 253; *Woods v. Ry. Co.*, 51 Mo. App. 500, loc. cit. 503.

[27] XIII. The action of the court in permitting respondent to show what price Thomas sold the stock for was not erroneous. The evidence for the respondent tended to show that Thomas undertook to sell her stock as her agent, and that prior thereto he had entered into a fraudulent scheme with Binder, with whose assistance he was to secure that agency, for the purpose of defrauding her;

also that by means thereof she was defrauded out of the sum sued for, which he retained for his own use.

[28] The evidence also tended to show that by said conduct Mr. Binder realized forty-odd thousand dollars more for his stock than he had previously authorized Thomas to sell it for. Clearly that evidence was admissible upon the question of fraud, and as the extent of respondent's damages.

[29] XIV. It is finally insisted that the verdict was excessive. This insistence is untenable. The evidence clearly tended to show that the stock of respondent was worth at least \$136 per share, if not more, and the difference between that price and the price she received for it was more than she sued for, and exceeded the amount of the verdict, when we consider the additional 5 per cent. commission Mr. Thomas charged her for selling the stock.

Finding no error in the record, the judgment of the circuit court is affirmed. All concur, BOND, J., in result only, except GRAVES, J., not sitting.

MILLER et al. v. STAGGS et al.

(Supreme Court of Missouri. In Banc. December 22, 1915.)

For majority opinion, see 181 S. W. 116.

WOODSON, C. J. (dissenting). I dissent from the per curiam opinion: First, because, when it is said that the case is here tried as an equity case, it includes all the incidents thereto, without specially mentioning them; and, second, because this being an equity cause, this court is not bound by any legislation which prescribes the judgment it shall enter. If the Legislature can control the judgment, then the cause is not tried by a court of equity only in name, and the whole proceeding must therefore yield to the statutory judgment to be entered, which would destroy its character as an equitable proceeding.

STRAUGHAN v. MEYERS. (No. 19328.)

(Supreme Court of Missouri. In Banc. July 8, 1916. Rehearing Denied July 18, 1916.)

1. STATUTES \S 101(1)—LOCAL OR SPECIAL LAWS—ELECTIONS.

Laws 1913, p. 323, relating to the manner in which voters who are absent from their place of residence may cast their vote, is not obnoxious to Const. art. 4, \S 53, subd. 12, providing that the General Assembly shall not pass any local or special law "for the opening and conducting of elections, or fixing or changing the places of voting," such law not being applicable solely to the city and county of St. Louis, although section 1 thereof gives the privilege of nonresident voting to one who may, on the occurrence of any general election, be unavoidably absent "from the county or city of St. Louis in which he resides," since such section is at most merely ambiguous and the title to the act reading "An

act to enable railroad employes, traveling salesmen, and other persons required by their duties or occupation to be absent from their voting precincts on the day of any general election, to cast their votes wherever within the state they may be, and providing for the counting of such votes and prescribing penalties for violations thereof," is clear and unambiguous and unmistakably expresses the applicability of the act to the whole state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 113; Dec. Dig. ¶101(1).]

2. STATUTES ¶211—CONSTRUCTION—TITLE.

Where certain terms of a statute are ambiguous, courts are at liberty to go to the title as a clue or a guide to the legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. ¶211.]

3. STATUTES ¶188—CONSTRUCTION—WORDS—ENLARGING OR RESTRICTING MEANING.

Doubtful words of a statute may be enlarged or restricted in their meaning to conform to the true intent of the lawmakers, when manifested by the aid of sound principles of interpretation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276; Dec. Dig. ¶188.]

4. CONSTITUTIONAL LAW ¶48—CONSTRUCTION OF STATUTES—FAVORING CONSTITUTIONALITY.

Courts are reluctant to declare statutes unconstitutional and resolve all doubt in favor of their validity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ¶48; Statutes, Cent. Dig. § 56.]

5. CONSTITUTIONAL LAW ¶48—VALIDITY OF STATUTE—BURDEN OF PROOF.

It being the presumption that the Legislature did not intend to violate the Constitution, the burden is upon one asserting the unconstitutionality of a law to prove that fact.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ¶48; Statutes, Cent. Dig. § 56.]

6. CONSTITUTIONAL LAW ¶48—CONSTRUCTION OF STATUTES—HARMONIZING WITH CONSTITUTION.

Legislative acts and constitutional provisions must be read together and so harmonized as to give effect to both when this can be consistently done.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ¶48; Statutes, Cent. Dig. § 56.]

7. STATUTES ¶81½(1)—SPECIAL LAWS.

Laws 1913, p. 323, relating to the manner in which voters who are absent from their place of residence may cast their vote, is of general application and not special or local, and therefore not offensive to Const. art. 4, § 54, requiring notice of intention to apply for enactment of special laws.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6; Dec. Dig. ¶81½(1).]

8. ELECTIONS ¶25—CONDUCT—STATUTORY AND CONSTITUTIONAL PROVISIONS—"VOTE"—"BALLOT."

Laws 1913, p. 323, relating to the manner in which voters who are absent from their place of residence may cast their vote, is not violative of Const. art. 8, § 2, requiring as a qualification to vote of every male citizen that "he shall have resided in the county, city, or town where he shall offer to vote at least 60 days immediately preceding the election," since under such law, which specifically provides that the ballot shall not be deposited in the ballot box nor entered upon the pollbooks, but that the same shall under certain safeguards and regulations be transmitted to the clerk of the county where the voter

resides and be there counted, the vote takes effect, as required by the constitutional provision, only in the place of his residence, although the voter exercises the means of voting elsewhere; the word "voting" meaning suffrage, voice, or choice of a person for or against a measure or the election of any person to office, and not being synonymous with "ballot," which is merely the means or instrument by which the person votes or rather expresses his choice or exercises his right of suffrage.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 16; Dec. Dig. ¶25.]

For other definitions, see Words and Phrases, First and Second Series, Ballot; Vote.]

9. CONSTITUTIONAL LAW ¶208(3)—CLASS LEGISLATION—VOTING—ABSENT VOTERS.

Such act is not class legislation because it applies alike to all persons who, by reason of their business duties, are unavoidably absent from their county, and this is not an objectionable classification.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 650; Dec. Dig. ¶208(3).]

10. ELECTIONS ¶27—CONDUCT—CONSTITUTIONAL AND STATUTORY PROVISIONS—"ELECTION OFFICERS."

Such act does not offend against that part of Const. art. 8, § 3, which provides that all ballots shall be numbered in the order in which they shall be received and the number recorded by the election officers on the list of the voters opposite the name of the voter who presents the ballot, since there is nothing in the act providing that the ballots of the absent voters shall not be numbered, nor anything which would make the numbering thereof as contemplated by the Constitution inconsistent with its provisions, and the provision in the act that "the county court or board of election commissioners shall open said envelope or envelopes and record said ballot upon the poll sheet of the proper precinct or ward in their possession in the same manner as clerks of elections record votes," can reasonably be so construed as to indicate an intention by the Legislature that these ballots should be numbered by the county court or the board of election commissioners; such officers being "election officers" within the meaning of this provision of the Constitution.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 17; Dec. Dig. ¶27.]

For other definitions, see Words and Phrases, First and Second Series, Election Officers.]

11. ELECTIONS ¶198—CONDUCT—TRAVELING VOTERS' ACT—REQUIREMENTS.

Under such act, the requirements that the voter make and subscribe to the affidavit and that the ballot have the names of all the judges on the back thereof are mandatory and not merely directory.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 170; Dec. Dig. ¶198.]

12. STATUTES ¶181(2), 184—CONSTRUCTION—LEGISLATIVE PURPOSE.

In construing statutory provisions, the object and purpose which induced their enactment, and the mischief they are intended to prevent, must be given effect, as must also the results and consequences of a proposed interpretation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 262, 263; Dec. Dig. ¶181(2), 184.]

Faria, J., dissenting.

Appeal from Circuit Court, Sta. Genevieve County; R. G. Ranney, Judge.

Election contest by Thomas B. Straughan against Charles W. Meyer. From a judg-

ment for contestant, contestee appeals. Affirmed.

This is a contested election case. At the last general election in Ste. Genevieve county, held on November 3, 1914, the contestant and contestee were opposing candidates for the office of presiding judge of the county court of said county. Both parties are eligible under the law to hold the office. The notice and counter notice of contest, in addition to the necessary averments as to the nomination of candidates and the holding and results of the election as declared by the election officials, contain numerous averments charging specific objections to many of the votes cast, based on the alleged nonresidence, nonage, and other disqualifications of the voters, as well as numerous irregularities of many of the ballots. In addition to the foregoing grounds of contest, the contestant attacks the constitutionality of the act of the General Assembly, approved March 14, 1913, relating to the manner in which voters who are absent from their place of residence may cast their vote. Laws 1913, p. 323.

Applications to the circuit court were made by both parties for writs directed to the clerk of the county court, commanding him to open, count, compare with the lists of voters, and examine the ballots in his office which were cast at the election in contest, and to certify the result of such count back to said court. This was done, and according to the count made by the county clerk, as shown by his report, the contestant received a total of 1,121 votes, and the contestee received a total of 1,130 votes, a majority of nine votes in favor of contestee. A certificate of election was accordingly issued to contestee, and he was duly commissioned as presiding judge of that court. Such other facts as are material and essential to a determination of the questions presented will be noted in the opinion.

Thomas B. Whitley, of St. Marys, Samuel Bond, of Perryville, and Wm. C. Boverie, of Ste. Genevieve, for appellant. Jerry B. Burks, of Farmington, for respondent.

REVELLE, J. (after stating the facts as above). In this action the legislative act (Laws 1913, p. 325) relating to absent voters, and prescribing the manner in which they may vote, is challenged as being obnoxious to the Constitution, and the facts are such that a determination of this question is essential to a decision. The title to the act is:

"An act to enable railroad employes, traveling salesmen, and other persons required by their duties or occupation to be absent from their voting precincts on the day of any general election, to cast their votes wherever within the state they may be, and providing for the counting of such votes and prescribing penalties for violations thereof."

The body of the act provides that employes of railroad companies, traveling salesmen, college students, and all other persons

who are qualified electors of this state, and who, by reason of their business, occupation, or duties, are on the day of the general election unavoidably absent from the county in which they reside, may cast their ballots in any voting precinct of the state where they may present themselves on the day of the election. The act then proceeds to name the conditions and regulations under which the absent voter may avail himself of the privilege, and enjoins upon him certain duties, among which are: That he present himself during voting hours and make and subscribe, before one of the election judges, an affidavit relative to his residence and qualifications as an elector; the reasons of his absence from his county; and that he has not voted and will not vote elsewhere. This being done, the act provides that he is then entitled to a ballot of a certain and specifically defined kind, to wit, a blank ballot with the names of all the judges written on the back thereof. This ballot he is then authorized to mark, fold, and hand to the judge in like manner as a resident voter. The act further provides that such ballot shall not be deposited in the ballot box nor entered upon the pollbooks, but shall, together with the affidavit, be sealed in an envelope, which is signed by one of the judges and be filed with the clerk of the county where the ballot was cast, and be by him transmitted to the clerk of the county where the voter resides. Ample provisions are then made for recording and counting such votes in the county of the voter's residence, as well as for the preservation of the ballots and penalties for violation of the Act.

[1] The court nisi held the act invalid upon the ground that it contravenes the twelfth subdivision of section 53, art. 4, of the state Constitution, which is as follows:

"The General Assembly shall not pass any local or special law * * * for the opening and conducting of elections, or fixing or changing the places of voting."

This conclusion was a sequence of the construction which the court placed upon the act that, by its terms and title, it was applicable only to the city and county of St. Louis, and was therefore local and special. The conclusion is unassailable if the construction placed upon the act be correct, but in this we disagree with the learned trial judge. The title, instead of limiting the effect of the act to those two subdivisions and persons residing therein, in no uncertain terms, and as clearly as language can express, makes it applicable to all counties and all absent electors, wherever they may reside or be on the date of election, provided both places are in this state. In fact, the title so unmistakably expresses the applicability of the act to the whole state that it would be fatally defective as a title to an act applicable only to the city or county of St. Louis.

[2-8] It is urged, however, that the terms of section 1 do so limit and restrict it. It is

true this section is not drawn with the nicety and precision which characterizes the work of a linguist, but its intent and meaning is not difficult of understanding when read with other parts. The worst that can be said of it is that certain of its terms are ambiguous, and in that case we are at liberty to go to the title as a clue or guide to the intention of the Legislature. The title is clear, unambiguous, and expressive, and, when invoked as an aid in the construction, removes all doubt as to the meaning. We have frequently said that doubtful words of a statute may be enlarged or restricted in their meaning to conform to the true intent of the lawmakers, when manifested by the aid of sound principles of interpretation. *State ex rel. Aull v. Field*, 112 Mo. 554, 20 S. W. 672; *Glaser v. Rothschild*, 221 Mo. loc. cit. 211, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576; *Bingham v. Birmingham*, 103 Mo. 345, 15 S. W. 533. In dealing with subjects of this character, we have also other well-established rules which cannot be ignored. We are reluctant to declare statutes unconstitutional, and we resolve all doubt in favor of their validity. We indulge the presumption that the Legislature did not intend to violate the organic law of the state, and we place the burden upon him who asserts the contrary to convince us. Acts of the Legislature and the provisions of the Constitution must be read together, and so harmonized as to give effect to both, when this can be consistently done.

[7] We are of the opinion that the Legislature clearly intended this law to be of general application, and that it is not special or local, and therefore not offensive to section 54, art. 4, of the state Constitution.

[8] It is next urged by respondent that the act violates that part of section 2, art. 8, of the state Constitution, which reads as follows:

"Every male citizen * * * possessing the following qualifications shall be entitled to vote at all elections by the people. He shall have resided in the county, city, or town where he shall offer to vote at least 60 days immediately preceding the election."

It is clear that this section does not undertake to prescribe the manner in which a choice shall be expressed, or a vote cast, or the ballots prepared, deposited, or counted, but merely the qualifications of the voters. It is true, under this provision, a person can vote only in the place of his residence, but this constitutes no inhibition against any particular method the Legislature may provide to enable him to so vote. The word "vote" means suffrage, voice, or choice of a person for or against a measure or the election of any person to office. It is not synonymous with "ballot," which is merely the means or instrument by which the person votes, or rather expresses his choice or exercises his right of suffrage. *Clary v. Hurst*, 104 Tex. 423, 138 S. W. 566; *State v. Blaisdell*, 18 N. D. 31, 119 N. W. 360; *State v. Custer*, 28 R. L.

222, 66 Atl. 306-308; *Gillespie v. Palmer*, 20 Wis. 544; *Davis v. Brown*, 46 W. Va. 716, 34 S. E. 839.

Had this measure provided that such absent voter could vote, that is, could exercise a right of choice for or against matters relating to the place where he did not reside, for instance, candidates of a county or district other than that of his residence, there would be no doubt of its invalidity; but it does not so undertake. The act specifically provides that the ballot shall not be deposited in the ballot box, nor entered upon the pollbooks, but that same shall, under certain safeguards and regulations, be transmitted to the clerk of the county where the voter resides, and be there counted. The act of legally voting, as the term is understood in law, embodies the right to have the vote counted. This act does not undertake to authorize a person to vote in a place other than that of his residence, but merely provides a system or method through which he may vote in the place of his residence.

[9] It is not class legislation, because it applies alike to all persons who, by reason of their business duties, are unavoidably absent from their county. It is our opinion that this classification is not objectionable, and that the act does not violate the constitutional provisions heretofore pointed out.

[10] It is next said that the act offends against that part of section 3, art. 8, of the state Constitution, which provides that all ballots shall be numbered in the order in which they shall be received, and the number recorded by the election officers on the list of the voters opposite the name of the voter who presents the ballot. The only provision in this act bearing upon this phase is the following:

"The county court or board of election commissioners * * * shall open said envelope or envelopes and record said ballot upon the poll sheet of the proper precinct or ward in their possession, in the same manner as clerks of election record votes."

There is nothing whatever in the act providing that the ballots of the absent voters shall not be numbered; nor is there anything in the act which would make the numbering thereof for the purposes contemplated by the Constitution inconsistent with its provisions. The most that could be said is that this part of the Constitution requiring ballots to be numbered is as much a part of this act as if it were employed therein; and, there being nothing in the act inconsistent therewith, it cannot, for this reason, be said to be in conflict with the Constitution. In fact, the provision of the act heretofore quoted can reasonably and logically be so construed as to indicate an intention on the part of the Legislature that these ballots should be numbered by the county court or the board of election commissioners. These officers are election officers within the meaning of this provision of the Constitution, and

there is nothing therein contained which prevents the numbering of these ballots by such officers. This constitutional section does not undertake to point out what particular election officers shall perform this duty. It must also be borne in mind that the purpose of this section is to provide a means of contesting elections and so preserve evidence that it may be used for this purpose. The provisions of this act, when construed as above, accomplishes the very object intended by the section.

[11, 12] Having disposed of the constitutional objections, we come now to the question of construction from another angle. Are the requirements that the voter make and subscribe to the affidavit and that the ballot have the names of all the judges on the back thereof mandatory or merely directory, and does failure of compliance in these respects vitiate the ballot? In construing statutory provisions the object and purpose which induce their enactment and the mischief they are intended to prevent must be given effect (*Spitler v. Young*, 63 Mo. 42), as must also the results and consequences of a proposed interpretation (*Glaser v. Rothschild*, 221 Mo. loc. cit. 210, 120 S. W. 1, 22 L. R. A. [N. S.] 1045, 17 Ann. Cas. 576).

Counsel for appellant urge that the doctrine announced in *Bowers v. Smith*, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. Rep. 491, *Hehl v. Guion*, 155 Mo. 76, 55 S. W. 1024, and *Gass v. Evans*, 244 Mo. 329, 149 S. W. 628, that the omission of the initials of the judges from the ballot, under the general election laws, does not invalidate the ballot, should be applied to these requirements. We again approve the conclusion reached in those cases, as well as the reasons which induced it; but do they apply here? As with statutes, so with decisions; their underlying reasons must not be overlooked. The conclusion in those cases is based chiefly upon the propositions: (1) That when the legal voter has performed his own duty, and his ballot has been received and finally deposited in the box, and his name entered in the pollbooks, this being done in his presence, he is justified in doing nothing more, and that his rights should not be defeated through the remissness and dereliction of the election officers. (2) That the object in requiring the initials on the ballot "was not to guard against the counting of an illegal ballot, but * * * to guard against fraud while the election was in progress." In the leading of these cases (*Hehl v. Guion*) the court announces that this requirement is addressed to the election judges, and says to them:

"Examine the ballot and see if it is properly indorsed, and if not do not deposit it; do not mislead the voter, but give him another ballot that is properly marked, and while he is present, and let him cast it. This, officer, is your duty, and the opportunity for its performance is readily at hand. If you do not accept the opportunity and do not do your duty when the voter

has done his, your conduct shall not defeat his rights."

It must also be remembered that, under the general election laws, the regular election officers are residents of the immediate community in which those entitled to vote also reside and have more or less knowledge of the qualifications of the voters, as have also the local challengers and others having the right to be present and participate.

Let us now consider the requirements and character of the act under review. In the first place, it was enacted to provide the means and machinery through which a certain class of citizens might enjoy a privilege which, under the general laws, could not be exercised. Its beneficiaries are of one class and specially favored, and they vote under conditions altogether different to others. The act itself declares (section 1) that they can avail themselves thereof only upon the conditions and under the regulations specified. As early as *Smith v. Haworth*, 58 Mo. loc. cit. 89, this court said:

"It is a very salutary rule, long sanctioned by reason, experience, and authority, that the special laws that give origin to new and unexpected departures from general rules should be closely scrutinized, and the powers therein conferred strictly construed."

When we turn to the act we find that a stranger to the election officers and residents is authorized to present himself for the purpose of securing something which under the general laws only a resident is entitled to, and something which is carefully guarded by the law, namely, a ballot of a certain form. The act provides that before he is so entitled he, himself, shall perform certain duties. It prescribes that he, not the election officers, shall make and subscribe to an affidavit, in which he recites the conditions which entitle him to a ballot. When he has performed this duty he is then, and not before, entitled to receive a ballot of a specified kind, to wit, one bearing the names of all the election judges. With this ballot the election judges from whom he receives same have nothing whatever to do in the way of finally accepting or rejecting same. They perform merely the ministerial duty of preserving and forwarding same to the authorized election officers. When this ballot is received at the place of the voter's residence and by the election officers who are authorized to act thereon, they have no opportunity to give him another or different ballot, as has the election officer under the general election laws. In fact, the election officers from whom he receives his ballot are but his agents for the purpose of enabling him to get his ballot to the proper election officers. For the purpose of his ballot, the authorized election officers are the members of the county court or board of election commissioners at the place of his residence, and when his ballot reaches them they have neither power nor opportunity to do anything towards meeting the requirements created by

the act and enjoined upon him and his agents. This being a special privilege conferred upon such person, and being available only under certain conditions, it seems to us that, until these conditions are complied with, the privilege cannot be exercised and that the voter has not performed his full duty until they have been met. Special privileges usually enjoin additional duties, and so it is with this act.

Again, when the ballot of the absent voter is received and counted, it is not done by the local resident election officers, who generally know the qualifications of the voters, but by officers whose opportunity to so know is not equally available. For these reasons it is not strange that the Legislature would purposely provide regulations and safeguards different to those under the general election laws and where the conditions are different.

It has been urged against this act that it is vicious and dangerous, because capable of being made an instrument of fraud, and therefore a means of defeating the public will. In the absence of proper safeguards we can conceive of such consequences, but when the provisions of the act are strictly complied with we think they afford a fairly sufficient shield against this. These safeguards should, however, not be destroyed by construction, but should be carefully preserved, in order to give life, force, and beneficial effect to the act. The affidavit of the voter and the names of the judges where the ballot is procured are essential to guard against fraud and to properly identify the ballot and voter, as well as to warrant the county court or election board in acting thereon. Unlike the requirement of the general election law that the ballot contain the initials, the object of these requirements is to guard against the counting of illegal ballots, rather than against fraud while the election is actually in progress. It is our opinion that, before a voter can avail himself of this special privilege, it is incumbent upon him to see that these provisions are complied with, and that failing to so do, his ballot should not be counted. These provisions, relating to the duties of the authorized election officers after the receipt of a properly prepared ballot, should be construed as were the provisions of the general election laws in the cases heretofore cited.

In the instant case, the trial court rejected the ballots of 16 absent voters without regard to their regularity or irregularity, basing his action upon the alleged invalidity of the act. Of the 16 thus rejected, 13 were deducted from the total vote of the contestee, and 3 from the total vote of contestant. Of the 13 deducted from contestee, the record discloses that eight were cast at Commerce, Scott county, Mo., and that no affidavit was made or subscribed to at that time, and that the ballots did not have the names of all the judges indorsed thereon. Some time after the date of the election, and before the bal-

lots had been forwarded, one of the persons who had acted as an election judge at that precinct went to the county where these parties were employed and there undertook to take their affidavit. This was after the day of the election and at a time when his functions as a judge had terminated.

Another of the votes deducted from contestee's total was that of E. F. Owen, who did not subscribe to the affidavit, and with whose ballot no affidavit was transmitted; also the vote of one L. W. Donze, with whose ballot appears an affidavit, but which discloses that it was made in a county different to the one in which the ballot was cast; also the vote of J. J. Shafer, whose ballot did not have indorsed thereon the names of all the judges, and with whose ballot was a purported affidavit to which said Shafer had not subscribed. The votes of the absent voters M. H. Harmon and A. E. Lottes, whose ballots are in regular and proper form, and with which were transmitted sufficient affidavits, were also deducted.

From the total vote of contestant the court deducted three votes of absent voters. Of these, one was cast at Commerce under the same conditions and with the same irregularity as the eight heretofore mentioned as having been deducted from the total of contestee; also the vote of C. B. Rickard, whose ballot did not have indorsed thereon the names of all the judges; also the vote of Lon Graves, whose ballot and affidavit are in regular form and free of irregularity. In our opinion the court should have deducted from contestee's total vote 11, instead of 13, votes; and from contestant's total two, instead of three, these being the votes of absent voters whose ballots wholly failed to conform to the requirements, which we hold to be mandatory. In addition to the above-mentioned changes in the official returns, the court found that the election judges wrongfully rejected and refused to count for contestant two votes which had been cast for him, and which should have been counted; also that they received and counted for contestee eight votes which were irregular and not entitled to be counted, because the persons casting same were disqualified as electors, either because of nonresidence or nonage. The court further found that nine votes should be deducted from the total vote of contestant, because the persons casting same were likewise disqualified as electors on account of nonresidence and nonage. Besides the persons whose votes the court found to be illegal on account of disqualification, both the contestant and contestee challenge in their pleadings the votes of numerous other electors, but these grounds were rejected because of failure of proof.

The record in this case is necessarily somewhat lengthy, and it would serve no useful purpose, and would unduly lengthen the opinion, to enter into a discussion of the court's findings relative to the qualifications

or disqualifications of the various challenged voters. It is sufficient to say that we have carefully gone through the entire record and are entirely satisfied with the findings and conclusion of the trial court on these questions. The trial court reduced its findings to writing, and we have had the benefit thereof, and it is due this learned judge to say that his findings in these respects are, in our opinion, entirely correct and disclose such fairness that same cannot be challenged. In fact, we find but little complaint from either party relative thereto.

By deducting the 13 votes of absent voters from contestee's total, and three of such votes from contestant's total, and by adding to and subtracting from the remaining vote the number which the court found should be deducted from each party on account of disqualifications of certain persons who voted, the result as found by the trial court was as follows: Contestant, 1,111 votes; contestee, 1,109 votes. Making the calculations according to the views herein expressed, the result is: 1,112 votes for contestant, 1,111 votes for contestee; leaving contestant a majority of one vote.

From this it follows that the judgment of the lower court that the contestant was legally elected at said election to the office of presiding judge of the county court of Ste. Genevieve county, Mo., should be, and the same is, affirmed.

BLAIR, WALKER, and GRAVES, JJ., concur. BOND, J., concurs in result. FARIS, J., dissents. WOODSON, C. J., absent.

MAGINNIS v. MISSOURI PAC. RY. CO. (No. 14,680.)

(Supreme Court of Missouri, Division No. 2.
July 6, 1916. Rehearing Denied
July 18, 1916.)

1. RAILROADS — 320 — OPERATION — ACCIDENTS AT CROSSINGS—LIABILITY.

If deceased so suddenly transformed his position of safety near a railroad crossing to one of danger that an accident could not be avoided by the railroad, when exercising the degree of care called for by the circumstances, there can be no recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1014-1016, 1019; Dec. Dig. — 320.]

2. RAILROADS — 338 — OPERATION — ACCIDENTS AT CROSSINGS—INJURIES AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Where deceased, though himself careless, was in a perilous position at a railroad crossing and oblivious thereto, and this was known or should have been known to the railroad's employees, and they failed to use the means reasonably at hand to avert injury, the railroad is liable under the last chance doctrine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1096-1099; Dec. Dig. — 338.]

3. RAILROADS — 320 — OPERATION — ACCIDENTS AT CROSSINGS—LIABILITY.

Where a pedestrian was proceeding parallel with a railroad track toward the station, and

the engineer of the approaching train had given the crossing signal within 80 rods, and warning signal when within 40 to 70 feet of crossing, and the pedestrian suddenly turned to cross the track, and was struck and killed, there could be no recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1014-1016, 1019; Dec. Dig. — 320.]

4. WITNESSES — 402 — CONTRADICTION OF WITNESS.

That plaintiff in an action against a railroad for causing the death of a pedestrian introduced the engineer as his own witness does not preclude him from establishing a case by other testimony, though it is contradictory to that of the engineer, but he would not be permitted to impeach his witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1268; Dec. Dig. — 402.]

5. APPEAL AND ERROR — 927(5)—REVIEW—QUESTIONS OF FACT—DEMURRER TO EVIDENCE.

The Supreme Court, in reviewing the grant of a new trial for error in not sustaining a demurrer to the evidence, must make every inference of fact in favor of plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. — 927(5).]

6. TRIAL — 156(3) — QUESTIONS OF FACT—SUFFICIENCY OF EVIDENCE.

A demurrer to the evidence admits the facts the evidence tends to prove, and the court must make every inference of fact in favor of the party offering the evidence which the jury might with any degree of propriety have inferred in his favor, and if, when viewed in this light, it is sufficient to support a verdict, the demurrer should be overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 356; Dec. Dig. — 156(3).]

7. RAILROADS — 348(1)—OPERATION—ACCIDENTS AT CROSSINGS—EVIDENCE.

In an action for causing the death of a pedestrian at a railroad crossing, evidence held to authorize a verdict for plaintiff on the theory that defendant's engineer observed deceased's danger in time to have prevented his injury by reasonable care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138, 1140, 1141; Dec. Dig. — 348(1).]

Appeal from St. Louis Circuit Court; Geo. C. Hitchcock, Judge.

Action by Mary W. Maginnis against the Missouri Pacific Railway Company. From a judgment affirming an order granting a new trial after verdict for plaintiff, she appealed to the St. Louis Court of Appeals which affirmed the judgment. 190 Mo. App. 534, 176 S. W. 416. Certified on dissent to the Supreme Court. Reversed, with directions to enter judgment on the verdict.

This is an action for damages on account of the death of plaintiff's husband, who was killed by defendant's train while attempting to cross over the tracks of its railroad at Glendale, in St. Louis county. The negligence charged is that the defendant's servants in charge of the train failed to keep a careful and vigilant watch for the deceased as he was approaching and crossing the tracks, and in failing to slow down or slacken the speed of said train, so as to permit the

deceased to cross in safety, and in failing to warn the deceased of the approach of the train after defendant's servants saw, or by the exercise of ordinary care could have seen, the deceased while approaching and attempting to cross the tracks. The answer, in addition to containing a general denial and an admission of the incorporation of defendant, pleaded contributory negligence and an unavoidable accident.

Upon the first trial a verdict for \$2,000 was returned by a jury in plaintiff's favor, and upon an appeal the judgment, in accordance therewith, was reversed, and the cause remanded by the St. Louis Court of Appeals because of erroneous instructions. *Maginnis v. Missouri Pacific Ry. Co.*, 182 Mo. App. 694, 165 S. W. 849. Upon the second trial, a verdict in the sum of \$2,000 was again returned; but this was set aside by the trial court, and a new trial ordered, on the ground that the court should have sustained a demurrer to the evidence. From this action the plaintiff appealed, and upon the second hearing a majority of the St. Louis Court of Appeals sustained the action of the trial court, while one member dissented, and the cause was, at the instance of the dissenting judge, certified to us for final decision. Since the case involves but one question, namely, the sufficiency of the evidence, the facts will be stated and dealt with in the opinion.

Glendy B. Arnold, of St. Louis, for appellant.

REVELLE, J. (after stating the facts as above). It is difficult, indeed, to arrive at a full and complete understanding of the question presented for our decision, owing to the failure of the parties to incorporate in the record or file for our inspection the numerous photographs and diagrams admitted in evidence and constantly referred to by the witnesses. This renders a portion of their evidence so vague and indefinite as to make it almost unintelligible.

[1, 2] The members of the Court of Appeals differed as to the facts disclosed; the majority holding there was no substantial conflict in the evidence, and under it plaintiff could not recover, while one member was of the mind that there was a conflict, and that the case was one for the jury. When reduced to its last analysis, we find the controversy in a narrow compass. There is no difficulty in determining the principles of law applicable to the case. If the deceased so suddenly transformed his position of safety into one of danger that the accident could not have been avoided by defendant, when exercising the degree of care called for by the circumstances, the plaintiff cannot recover. On the other hand, if the deceased, although himself careless, was in a perilous position and oblivious thereto, and this was known, or should have been known, to the defendant, and it failed to use the means

reasonably at hand to avert the injury, it is liable under the last chance doctrine.

The accident occurred at a recognized and authorized crossing of the railroad tracks by a public highway, a place where a clear track could not be expected or relied upon. This phase, however, so important and decisive in many cases, is unimportant here, because the engineer admits that he actually saw and carefully observed the actions of the deceased while he was approaching the point of the accident, and at the times, upon plaintiff's theory, when warnings should have been but were not given.

As against the demurrer the following facts are established without question: Respondent was maintaining double railroad tracks through Glenwood, the locus in quo, running east and west, and intersecting at about right angles a public dirt road running north and south, and known as "Berry road." East-bound trains are operated on the south track, and west-bound trains on the north track; these being 10 or 12 feet apart. The view from the track for at least a half mile west of the crossing is unobstructed, and the train at the time in point was coming from the west. On the south side of defendant's tracks and right of way, and abutting the west side of Berry road, is located the store of one John P. Evers facing the east. The northeast corner thereof is about 15 feet from the south line of defendant's right of way, and about 56½ feet south of the south rail of the south, or east-bound, track. In front of this store, and along the west side of Berry road, is a plank sidewalk extending to within 22 feet of the southwest point of the railroad crossing, and to within 17 feet of the south rail on the direct line; the southwest point of said crossing being east and north of this terminus of the foot walk. Between the end of this walk and the railroad crossing the ground surface was of cinders and dirt. The crossing consisted of the tracks and planks laid both inside and outside of the rails; these planks being 16 feet in length and lying parallel with the rails. On the north side of the tracks the board sidewalk was on the east side of Berry road, so that the ordinary course of a pedestrian going from the south to the north would be north along the plank walk to the end thereof, thence northeast in a diagonal direction across the tracks to the east side of Berry road, where he would reach a plank walk extending north; there being no sidewalk on the east side of Berry road south of the track, and no sidewalk on the west side of Berry road north of the track. Berry road was 40 feet in width, but only about 10 feet thereof was generally used for travel. At a point 17 feet south of the east-bound track, and about 30 feet east of the traveled part of Berry road, is located a small stationhouse for the use of defendant's patrons; the northwest corner thereof being at

so about 90 feet from the northeast corner of Evers' store. The plank sidewalk at a point 20 or 30 feet south of the track makes a bend or turn towards the northeast, and in the direction of the southwest corner of the railroad crossing.

The evidence is undisputed that, immediately preceding the accident, the deceased walked north on the plank sidewalk to *some* point beyond the northeast corner of Evers' store and south of the east-bound track. The point to which he thus walked and the course he then took are the questions on which it is said by the plaintiff and one member of the Court of Appeals there is a conflict of evidence; it being contended that a part of the evidence shows that he proceeded on the plank walk to or near the end thereof, thence to the southwest corner of the crossing, thence down the tracks for a distance of 16 feet to the end of the planks on the crossing, and there killed. The defendant contends, and in this a majority of the Court of Appeals concurs, that all the evidence shows that he did not so proceed, but that when near the northeast corner of Evers' store he crossed the Berry road, going east in the direction of the station house, and so continued until he reached a point on the east line of Berry road, when he suddenly, and without previous manifestation of such an intention, turned directly north onto the track, where he was killed. There seems but little difference of opinion as to the point where he was struck by the train, this being at the northeast end of the railroad crossing.

As we read and understand the testimony of Evers, it is that immediately after the train struck the deceased, and after it had passed over the crossing, he saw the remains lying on the north or west-bound track. It had rained during the preceding night, and there was mud on the road, cinders, and crossing. After the train finally left he and others located and traced the footprints of deceased, identifying them by means of a break or hole in the sole of his shoe, which left definite impressions on the muddy cinders and planks. The first of these footprints were found at or near the southwest corner of the railroad crossing; the others (there being six in all) were on and along the crossing going east and parallel with the tracks to the east end of the crossing boards at the northeast corner of the crossing, where he was struck.

The engineer testified that he first observed the deceased as he emerged from in front of the Evers store, when about 3 feet from the east end thereof; that he was in a run, and going north on the plank walk, but after advancing three or four steps thereon, and before reaching the end of the walk, he diverted his course, turning eastward and diagonally in the direction of the station house. He proceeded in that general course until he crossed the Berry road and reached

a point just opposite the plank walk located on the north side of the track, this placing him on the east side of Berry road, when he suddenly turned north and went onto the track where he was struck. He further says that, from the conduct and actions of the deceased, it was his impression that he was endeavoring to reach the station, with the intention of boarding a train; that he gave the crossing signal when within 80 rods of the crossing, and when within from 40 to 70 feet of the crossing he gave the alarm signal or warning. There is evidence from other witnesses that he did not give a crossing signal, and that the only warning or signal given at any time was the aforesaid alarm signal.

[3] There can be but little doubt that, if the engineer's evidence is to be accepted as the *only* probative evidence, the plaintiff cannot recover, because, if the deceased took the course described by the engineer and the engineer gave the warnings and signals to which he testified, he could have done nothing more that would have prevented the accident, and the last chance doctrine would not apply. Under the facts detailed by him he was warranted in acting on the presumption that the deceased heard the warnings and knew of the approach of the train, and that he would not suddenly, and without any manifestation of such an intention, change his then position of safety into one of danger. *King v. Railroad*, 211 Mo. 1, 109 S. W. 671; *McGee v. Railroad*, 214 Mo. 530, 114 S. W. 33; *Burge v. Railroad*, 244 Mo. 76, 148 S. W. 925; *Guyer v. Railroad*, 174 Mo. 344, 73 S. W. 584; *Dyrcz v. Railroad*, 238 Mo. 33, 141 S. W. 861.

[4] While it is true the plaintiff introduced the engineer as his own witness, this does not preclude him from establishing a case by other testimony, even though it is contradictory of that which he first offered. While he would not be permitted to impeach his witness, he may show by other witnesses what he contends to be the true facts. *Phelan v. Paving Co.*, 227 Mo. 666, 127 S. W. 318, 137 Am. St. Rep. 582; *Knorpp v. Wagner*, 195 Mo. 637, 93 S. W. 961; *State v. Shapiro*, 216 Mo. 359, 115 S. W. 1022.

[5-7] The trial court sustained the motion for new trial upon the ground that it had erred in not sustaining a demurrer to the plaintiff's evidence, and in reviewing such action it is well settled that we must make every inference of fact in favor of the plaintiff. A demurrer to the evidence, so run the rulings, admits the facts the evidence tends to prove, and in passing upon it the court is required to make every inference of fact, in favor of the party offering the evidence, which the jury might with any degree of propriety have inferred in his favor, and if, when viewed in this light, it is sufficient to support a verdict, the demurrer should be overruled. *Troll v. Drayage Co.*, 254 Mo. 332, loc. cit. 337, 162 S. W. 185. To give full ef-

fect to this rule we cannot weigh conflicting evidence, nor can we make inferences of fact in favor of the defendant to countervail or overthrow inferences of fact in favor of the plaintiff.

After careful consideration of the evidence, it is our opinion that the facts testified to by other witnesses offered by plaintiff are clearly contradictory of the statements of the engineer, and if such are believed by the fact triers, as they evidently were in this and the preceding trial, the plaintiff is entitled to recover. If the deceased's footprints were as described by other witnesses, it was impossible for him to have pursued the course or gone upon the track in the manner and at the place testified to by the engineer. In the first place, the point at which the engineer says the deceased suddenly turned, and from which he went onto the track, is, according to the testimony of one of defendant's employes, about 12 feet east of the east end of the railroad crossing, where the deceased was killed. According to his testimony the deceased was at no time on the west side or end of the crossing, whereas his footprints disclose that it was at this place that he entered upon the track. They further show that he proceeded down the track to the east end of the crossing, a distance of 16 feet, all of which was impossible, if the engineer is correct in his statements. Another thing which the jury had a right to consider, in determining whether the engineer was telling the truth, is that, according to his testimony, he saw the deceased when he was within about 3 or 4 feet from the northeast corner of Evers' store.

A. S. Butterworth, who was an employe of the defendant, and who made measurements in this case at its instance, testified that, owing to the manner in which the Evers store was located, the rear thereof being within a few inches of the right of way, while the front was about 15 feet away, and owing to a certain billboard located to the rear of this store, a person would have to be approximately at the north end of the board walk before he could have a clear view 500 feet west. If this testimony is true, then the deceased proceeded north on the sidewalk approximately to the end thereof, otherwise he could not have been seen by the engineer when the engineer says, and this would tend to corroborate the theory of the footprints; or if he left the sidewalk at the place where the engineer says, then, in taking the course by him described the measurements show that the deceased, a man of 69 years of age, traveled on foot, and over muddy ground, a distance of 87 feet, while the train, running at a speed of 45 miles per hour, covered 500 feet. While this is not utterly impossible, it is capable of an inference decidedly favorable to plaintiff's cause.

Unless we reject as unworthy of belief,

or as having no probative force, the evidence of witness Evers relative to the footprints and the course they indicate the deceased pursued, we find there is substantial evidence tending to show that the deceased walked north on the plank walk to some point, and from there to a point from which he passed upon the defendant's tracks at the west end of the crossing, and then proceeded east on the track to the northeast end of said crossing, a distance on the track of 16 feet. The testimony of the engineer shows that he actually observed the deceased from the time he was within at least 60 feet of the crossing, if he traveled as the footprints indicate, and until he came upon or near the tracks. His evidence also shows that the deceased was apparently oblivious to his danger and unconscious of the approach of the train. Under such circumstances his duty was plain, and began when it became apparent to a prudent operator that the deceased was intent on so acting as to place himself in a position of danger. He could not defer action until the man actually went upon the tracks, because, under the circumstances detailed, the danger zone extended beyond these limits. He should have at least given a warning when the impending danger first became apparent, thereby bringing the unwary traveler to a realization of his danger and duty to act, and this, according to some of the evidence, the engineer did not do. *Eppstein v. Railroad*, 197 Mo. 720, 94 S. W. 967; *Degonia v. Railroad*, 224 Mo. 564, 123 S. W. 807.

The circumstances and physical facts show, assuming, as we think the evidence justifies, that the deceased traveled the course indicated by the footprints, the engineer saw, and under the law governing this case was bound to see, because charged with looking, and looking was seeing, the deceased in a perilous position in sufficient time to have given proper warnings, thereby preventing the accident. Surprise on the part of the engineer at the appearance of the deceased, and that consequent mental confusion which sometimes prevents instant action in the most intelligent way (*Underwood v. Railroad*, 182 Mo. App. 252, 168 S. W. 803, *McGee v. Railroad*, 214 Mo. 580, 114 S. W. 33), cannot be pleaded here, because, during the time the deceased was traveling on foot a distance of from 70 to 87 feet, he was constantly under the eye of the engineer. Instead of expecting a clear track at this public crossing, the engineer had to anticipate the possible, and even probable, presence of persons, and he was required to be in a position to not be surprised, and to act quickly and intelligently.

The evidence also shows that the air or emergency brakes were not applied until the train was within 40 feet of the deceased, and that the train was brought to a stop within 600 feet after the application of such

brakes. It is also in evidence that the speed of the train could have been reduced to 20 miles an hour within a distance of from 300 to 400 feet, which is less than the distance at which the deceased could be seen by the engineer while approaching the track.

Finding from the present record the facts as above stated, the Court of Appeals in its opinion on the first appeal of this case, where a judgment for the plaintiff was reversed because of erroneous instructions, found that the case was one for the jury. The law applicable to these facts and inferences is well and fully stated in that opinion (*Maginnis v. Missouri Pacific Railway Co.*, 182 Mo. App. 694, 185 S. W. 849), and a repetition would be but fruitless toil for both ourselves and the profession. Giving to the plaintiff the favorable inferences which the facts reasonably warrant, and this we are required to do, it is our opinion that the court erred in holding the evidence insufficient to sustain the verdict.

It is accordingly ordered that the action of the trial court in setting aside the verdict and granting a new trial, because of the insufficiency of the evidence, be reversed and set aside, and that a judgment in accordance with the verdict be rendered. All concur.

MULLINS v. MT. ST. MARY'S CEMETERY ASS'N et al. (No. 19011.)

(Supreme Court of Missouri, Division No. 2, July 5, 1916. Rehearing Denied and Motion to Transfer to Court in Banc Overruled July 18, 1916.)

1. MUNICIPAL CORPORATIONS §568(1)—ORDINANCES—REASONABLENESS—PRESUMPTIONS—SEWER DISTRICTS.

There is a presumption, which must be overcome in the most satisfactory manner, of the reasonableness of an ordinance including a cemetery with other property in the creation of a sewer district.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1282; Dec. Dig. § 568(1).]

2. MUNICIPAL CORPORATIONS §439—PUBLIC IMPROVEMENTS—PROPERTY BENEFITED.

Regarding the propriety of assessing a cemetery for construction of a sewer, it is benefited if the sewer drains it, preventing noxious substances being disseminated from it into and over other lands.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1053; Dec. Dig. § 439.]

3. CONSTITUTIONAL LAW §290(3)—"DUE PROCESS OF LAW"—HEARING—PUBLIC IMPROVEMENTS.

Special tax bills for sewer construction being legislative assessments, no notice to property owners of proceedings resulting in their issuance is necessary, within the inhibition against depriving one of property without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 871, 872; Dec. Dig. § 290(3).]

For other definitions, see *Words and Phrases*, First and Second Series, *Due Process of Law*.]

4. CONSTITUTIONAL LAW §233—"EQUAL PROTECTION OF LAW."

A cemetery company being for purpose of assessment for sewer construction owner of all the land in the cemetery, notwithstanding sale of some of the lots for burial purposes, issuance of the special tax bills against the cemetery as an entirety does not deny the company equal protection of the laws, contrary to Const. U. S. Amend. 14, § 1.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 686; Dec. Dig. § 233.]

For other definitions, see *Words and Phrases*, First and Second Series, *Equal Protection of the Law*.]

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.

Action by W. C. Mullins against the Mt. St. Mary's Cemetery Association and others. From an adverse judgment, the named defendant appeals. Affirmed.

Plaintiff recovered judgment on special tax bills for sewer construction. The defendant has appealed. This is the third appeal in the case. See 239 Mo. 681, 144 S. W. 109, and 259 Mo. 142, 168 S. W. 685. The petition is in two counts, the first being based on a tax bill issued October 12, 1904, for \$17,598.28, and the second on a tax bill issued September 1, 1905, for \$1,531.71. Both bills bear interest, in case of default, from date at 10 per cent.

Sewer district No. 218, in which the work was done, was established by ordinance on August 2, 1901. It is the largest in the city, containing about 407 acres. It is over 1½ miles long north and south, and nearly ¼ of a mile wide in the middle. The land slopes from the east and west sides to the middle line, and there is a general incline to the north. The cemetery is composed of a square sixteenth of a section, except four acres belonging to the Home of the Sisters of the Good Shepherd in the northwest corner, and excepting such part as may be in the streets on the east, south, and west sides of it, the cemetery proper containing about 34 acres. The evidence on the point is not clear, but tends to show that the most of the surface water of the cemetery runs to the west, gathering considerably towards the part just south of the Home of the Good Shepherd. When unrestrained it passes on to and over the adjoining land. To what extent such surface water flows northward onto adjoining land is not shown.

The tax bills in controversy were issued for the construction of lateral sewers, some of which with manholes and catch basins therein extend along the south and west sides of the cemetery and along the north fourth of the east side. There is no street along the north side; but there are three streets and four alleys extending from the north and terminating in culs-de-sac at the cemetery line. Sewers were placed in those alleys with manholes in each close to such line. None of those sewers were laid in the

cemetery grounds. No openings in the sewer pipes were made on the sides next the cemetery for house connections, but the evidence shows that such openings are often made by the plumbers when the connections are made.

In grading the street on the west, a 10-foot fill was made near the northwest corner of the cemetery. The grading contractor placed a 10-inch pipe so as to lead the water from the cemetery into the manhole at that point, thus preventing the formation of a pond. There are two water-closets in the defendant's grounds, neither of which connects with the sewers. The defendant has an 8-inch pipe about 400 feet long laid in the cemetery for the purpose of drawing the water towards the west.

The cemetery's existence began in 1877. The corporation is a charitable one and has no capital stock. About half the land in the cemetery has been disposed of in lots to purchasers for burial purposes prior to 1904. There had been about 9,000 interments, the number being about 15,000 at the time of the last trial. The lots sell at from 55 to 70 cents a square foot. The by-laws of defendant provide that one-third of the money received for lots sold shall constitute a maintenance fund to be loaned at interest, the income to be used in caring for the cemetery. The evidence shows that the land in that vicinity, for other than cemetery purposes, is worth from \$1,250 to \$5,000 an acre. Witnesses both for plaintiff and defendant testified that the location of the cemetery affected the value of the land in the vicinity, but they did not say whether it enhanced or depreciated it. The defendant offered to prove that two other cemeteries in Kansas City had each been made a separate sewer district, but the evidence was excluded. The trial court also excluded evidence offered by defendant to show that two other special tax bills for the construction of sewers in that district had been issued against defendant prior to those in suit, one for \$9,104.30, and the other for \$1,611.15. The plaintiff was put on the stand by the defendant and testified that when he made his bid for the work he knew that the land of the defendant was used for a cemetery. He also testified that he had built some sewers for Elmwood Cemetery.

On the two questions, as to whether and to what extent sewers are necessary to cemeteries generally and to this one in particular, and as to whether the inclusion of this cemetery in such district was a reasonable exercise of the power of the common council, there was no evidence offered except as shown in the above statement.

McCune, Harding, Brown & Murphy, William Moore, and Clarence S. Palmer, all of Kansas City, for appellant. *Fyke & Snider*, of Kansas City, for respondent.

ROY, C. (after stating the facts as above).

[1] I. The first point in appellant's brief is therein stated as follows:

"As to the property of this defendant, the imposition of the special assessments in question could result in no possible benefit, actual or potential. The acts were manifestly oppressive and an unreasonable exercise of municipal authority, and therefore void. The trial court erred in not so finding and deciding."

In its printed argument is this statement:

"The testimony shows from the topography of the district that there was no engineering reason why this tract of land might not have been established as a sewer district by itself and thus relieved of all burden of the construction of lateral sewers which are essential to the comfort and health of the living, but which are entirely useless for the city of the dead."

There is a presumption in favor of the reasonableness of such an ordinance, and the burden of establishing the contrary rests upon the objector. *Hislop v. Joplin*, 250 Mo. 588, 157 S. W. 625; *St. Louis v. Theater Co.*, 202 Mo. 690, 100 S. W. 627. That prima facie case must be overcome "in the most satisfactory manner." *Morse v. City of West Port*, 110 Mo. 502, 19 S. W. 831.

[2] The language of appellant's counsel is an unequivocal claim that it has no need for sewers and is under no obligation to furnish them to others; in other words, that its cemetery, for the purpose of sewer construction at least, has ceased to be a part of the city within whose vitals it is situated.

We will first consider the question as to whether such a cemetery is benefited by the construction of sewers.

"Drainage of a district for sanitary purposes is the ground upon which the compulsory construction of sewers, and the imposition of special taxes to pay the cost thereof, is authorized." *Johnson v. Duer*, 115 Mo. loc. cit. 377, 21 S. W. 802.

In *Prior v. Construction Co.*, 170 Mo. 439, 71 S. W. 205, it was held that plaintiff's property, located on high ground, was benefited by the construction of a sewer which prevented its sewage from being cast upon the streets and sidewalks and into the cellars in a lower part of the district. In other words, each tract of land in a city should bear its portion of the burden of preventing the passage of any noxious thing from it into or onto other lands. Whatever discharges that burden is a benefit to the property whence the noxious substance emanates. Concede that the dead are indifferent to the question, the living have a right to demand that noxious substances shall not be disseminated from a cemetery into and over other lands. "Thou shalt not bury a dead man in the city" was one of the laws of the Twelve Tables.

In *Kincaid's Appeal*, 66 Pa. 411, 5 Am. Rep. 377, *Sharswood, J.*, said:

"No one can doubt the power of the Legislature to prohibit all future interments within the limits of towns or cities. In ancient times, in Greece and Rome, such was the universal rule."

In *Lowe v. Prospect Hill Cemetery Ass'n*, 58 Neb. 94, 78 N. W. 488, 46 L. R. A. 237, the defendant was enjoined from using a tract of ground in Omaha as a cemetery. The evidence showed that the ground in that vicini-

ty was very pervious. Expert witnesses testified that disease germs often existed and multiplied in dead bodies, and were disseminated thence through the ground into neighboring lands, contaminating them, and rendering the water in the wells noxious to the health of the inhabitants. Other cases of like import are *Clark v. Lawrence*, 59 N. C. 83, 78 Am. Dec. 241; *Jung v. Neraz*, 71 Tex. 396, 9 S. W. 344; *Los Angeles v. Hollywood Cem. Ass'n*, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75; *Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14; *Sohler v. Trinity Church*, 109 Mass. 1; *Partridge v. First Independent Church of Balt.*, 39 Md. 631. See also *Joyce's Law of Nuisances*, § 398.

In *Town of Lake View v. Letz*, 44 Ill. 81, the court had under consideration an ordinance which prohibited the opening of any cemetery in the town (township) without the permission of the trustees. It was there said:

"There are some things which, in their nature, are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this respect depending on circumstances. Now, the town of Lake View is a rural township, containing about 11 sections or square miles of territory. It is therefore impossible to hold that a cemetery, anywhere within the limits of the town, must be necessarily a nuisance, and can be prohibited in advance as such. A cemetery may be so placed as to be injurious to the public health, and therefore a nuisance. It may, on the other hand, be so located and arranged, so planted with trees and flowering shrubs, intersected with drives and walks, and decorated with monumental marbles, as to be not less beautiful than a public landscape garden, and as free from all reasonable objection."

In *Lake View v. Rose Hill Cem. Co.*, 70 Ill. 191, 22 Am. Rep. 71, is the following:

"Burial places are indispensable. Convenient to the city of the living, a depository of the dead must be established and maintained. It concerns the public health, and if such places were not prepared by private enterprise, it would be the duty of the state to act in the premises."

It will be noticed that the court does not there approve the location of cemeteries in populous cities. It speaks of them in places "convenient to the city of the living." On the other hand, it was said in *Ellison v. Commissioners*, 58 N. C. 57, 75 Am. Dec. 430:

"If the grounds be arranged and drained and the burial of the dead be conducted as elsewhere in such establishments, we incline decidedly to the opinion it will not be a nuisance, either public or private."

We cite those cases only for the purpose of showing that the defendant is not justified in asserting that its land should have been excluded from the sewer district merely because it is a cemetery. There is no evidence in the case to show that sewers are not beneficial in the sanitation of this cemetery. In the absence of a showing to the contrary, we must presume that the common council was fully informed on that subject, and acted properly in accordance with that information. The evidence does show that the sew-

ers for the construction of which the tax bills were issued serve to carry away the surface water from the cemetery.

Appellant claims that the cemetery might have been made into a sewer district by itself, so as to relieve it of the burden of construction of the lateral sewers. True, it might have been done; but there is no reason appearing why it should have been done. The appellant complains, not that a discrimination was made against it, but that no discrimination was shown in its favor. We have seen that the law has, through all the past, discouraged the location of cemeteries in populous districts. Real estate men who were witnesses on both sides in this case testified that the cemetery affected the value of real estate in that vicinity. We feel justified in assuming that such value was thus affected adversely. There is no sound reason why the cemetery should be relieved of its share of the burden of getting rid of a condition, caused to some extent by its presence there. The district, so far as we can understand the situation, is homogeneous, a proper "unit" in the general system of sewers. By carrying out the work of sanitation, the cemetery may become more and more a comfort and an ornament to the community, and that community may become a more attractive framework for the cemetery.

There is another fact in the case which deserves consideration. The tax bills against the land of the defendant seem very large. That is caused by the fact that there are 35 acres in the cemetery. The "area rule" is firmly grounded in our law. The common council had no choice in the matter except to tax the cemetery in proportion to its area, or relieve it altogether. It doubtless appreciated the serious difficulties in the matter, but its judgment must stand in the absence of evidence sufficient to show that it was unreasonable. Complaint is made that the court excluded evidence offered by defendant to show that in two other cases cemeteries were made separate districts. Whether the facts connected therewith were similar to those in this case is not shown. It may have been found by experience that such discrimination in favor of the cemeteries was not just to the other land in the vicinity.

[3] II. Appellant contends that, as there was no provision in the law for giving it notice of the proceedings resulting in the issuing of the special tax bills in question, an enforcement of such tax bills will result in taking its property without due process of law. It is sufficient to say that such tax bills are legislative assessments, and no notice is necessary unless required by "some charter, ordinance, or statutory provision to the contrary." *Embree v. Road District*, 257 Mo. 593, 166 S. W. 282. That opinion was affirmed on writ of error to the Supreme Court of the United States. 240 U. S. 243, 36 Sup. Ct. 317, 60 L. Ed. —.

[4] III. Appellant makes the following point:

"The judgment of the trial court in enforcing the whole amount of the special tax bills as a single lien against the property now owned by defendant, including that part of the amount of said tax bills computed on the area of land already sold by defendant, amounts to a denial to the defendant of the equal protection of the laws, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States."

We are furnished with no authorities or even argument on that proposition. On the last appeal it was held, in effect, that the ownership of all the land in the cemetery for the purpose of such taxation is in the appellant. Such being the case, the tax bills were properly issued against the cemetery as an entirety.

IV. Complaint is made that the trial court erred in excluding evidence as to two other tax bills for sewer purposes issued against its property. We are bound to presume that all other property in the district paid in the same proportion. Without deciding whether such exclusion was error, we hold that it was not such error as calls for a reversal herein.

The judgment is affirmed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

ZINN et al. v. SIDLER et al. (No. 17632.)
(Supreme Court of Missouri, Division No. 2.
July 5, 1916. Rehearing Denied
July 18, 1916.)

COVENANTS §1—RESTRICTIVE COVENANT—BUILDING LINES.

A covenant as to restricted use of property imposing a limitation on the fee, necessary to prevent the owner building on it where he will, can be created only by the express words or by reasonable implication from words employed clearly indicative of such a purpose; and so not by broken lines on a plat, marked "building lines," neither the acknowledgment to the plat, nor the deeds conveying the lots, as marked and designated on the plat, making reference to such lines.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 1; Dec. Dig. §1.]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Suit by Charles E. Zinn and others against Balthazar Sidler and others. From an adverse judgment, defendants appeal. Reversed and remanded, with directions.

Cook & Gossett, Beardsley & Beardsley, and Stubenrauch & Hartz, all of Kansas City, for appellants. Smart & Strother, Fyke & Snider, and E. E. Steele, all of Kansas City, for respondents.

WALKER, J. This is a suit in equity brought in the circuit court of Jackson county at Kansas City to enjoin defendants from erecting a building on a lot in McKinney Heights in said city.

A restraining order was granted and later dissolved. After its dissolution and before the trial, defendants erected a building on said lot. In September, 1912, a trial was had resulting in a judgment for plaintiffs, requiring defendants, within 90 days thereafter, to remove so much of said building as projected over the building line on the lot and restraining defendants from erecting or maintaining a building on the lot nearer the adjacent streets than 20 feet in one instance and 15 feet in the other—the lot being on a corner. Jurisdiction to make further orders was retained to enforce compliance with the judgment then rendered. From this judgment the defendants have appealed.

In June, 1886, Marshall P. Wright owned a tract of land of 31 acres adjacent to the corporate limits of Kansas City. He laid it out in lots and blocks and streets and alleys, dedicating the latter to public use, acknowledged the plat and recorded the same, as required by the statute, designating the addition as "McKinney Heights." In 1897 it was made a part of Kansas City.

Across the lots and blocks on this plat, 20 feet from the street lines and parallel thereto—except along St. John Avenue, where the distance is 15 feet—checked or broken lines were drawn, designated as "building lines." Defendants' lot, described as "lot 14 of block 4, McKinney Heights," against which this particular proceeding is directed, is situated on the northwest corner of Jackson and St. John avenues, the former running north and south, and the latter east and west. The lot has a frontage of 50 feet on St. John avenue.

Plaintiffs' lots are in the same block as that of defendants, also fronting on St. John avenue. Plaintiffs contend that the lines on this plat marked "building lines" are restrictions upon all persons erecting buildings upon any of these lots, and that the action of the defendants in violating same is to plaintiffs' damage and injury in that it tends to depreciate the value of their property and interferes with the uniformity of the location of buildings on said tract or addition, which was intended, and is principally used, for residential purposes.

Defendants, in opposition to this plea, contend that at the time this plat was made and recorded the land platted was outside of the corporate limits of Kansas City, and the building lines marked thereon were in no wise mentioned except by marking them on the plat; that neither the acknowledgment to the plat nor any deed conveying the lots therein designated has any reference to same, and that these lines constitute merely a sug-

gestion to owners of property in said addition and have no binding force or effect as a restriction; that they acquired possession of the lot against which this proceeding is directed without any knowledge of the pretended claims or demands of plaintiffs that there was a building line restriction on the property and that they purchased the same believing it to be unrestricted and unincumbered in any manner; that the enforcement of the restriction would constitute a taking of their property without due process of law. The reply admitted that McKinney Heights when platted was not in the corporate limits of any city or town, and that the defendants' title was through mesne conveyances under Wright, who platted the property, but denied all the other allegations in the answer.

In July, 1886, soon after recording the plat, Marshall P. Wright and wife conveyed the entire addition to William McKinney, describing it as follows:

"All lots in McKinney Heights, being originally the L. P. Browne tract, consisting of 31 acres in the east end of the south half of the northeast quarter of section 34, township 50, range 33, Jackson county, Mo.; the plat of said McKinney Heights being recorded in Book B, page —, June 17, 1886, to which further reference is hereby made."

January 20, 1887, William McKinney and wife conveyed the addition to Thomas A. Harris, describing it as follows:

"All of McKinney Heights (except certain blocks therein named) as the same is marked and designated on plat 5 in the office of the recorder of deeds for the county of Jackson, state of Missouri."

January 28, 1887, Thomas A. Harris and wife conveyed the addition to Calvert R. Hunt, describing it as follows:

"All of McKinney Heights, an addition to the city of Kansas, as the same is marked and designated on the plat filed in the office of the recorder of deeds for the county of Jackson, state of Missouri (except certain lots therein named)."

At different times subsequent to the conveyance to Hunt deeds were made to different persons to lots in this addition.

McKinney Heights was a residence district before the erection of the building by defendants, and at the time of the trial there were 95 buildings on the addition, including that of defendants, 82 of which conformed to the building lines; the remaining 13 having been built in disregard of same. There was testimony in detail as to the conditions under which the different buildings were erected so far as concerned the builders' knowledge and observance of the building lines, tending to show, in the majority of cases, that when notified of the restriction parties complied with same. It was also shown that plaintiffs in no case expressly acquiesced in any violations of the restriction, but when notified protested against same.

A covenant as to the restricted use of the property in question is necessary to sustain the plaintiffs' contention; the creation of

such a covenant may be by express words or by reasonable implication from words employed clearly indicative of such a purpose.

The owner, Wright, who subdivided the property and recorded a plat of same, may have had such a purpose in contemplation in designating certain lines on the plat as building lines; but this purpose was never consummated. Aside from the absence from the plat of any other reference to this proposed restriction, there is nothing in the conveyance made by him of the entire tract to indicate such a purpose. It is true the description of the property contains a reference to same as subdivided, adding, as regards the plat, "to which further reference is hereby made." The two subsequent transfers of the entire addition are no more definite and the later transfers of particular lots, except in one instance, bear no reference to any restricted use. The excepted instance referred to is not determinative of the matter at issue; it is simply a recognition in one of the transfers of a single lot of the existence of a restriction. At best the references in these deeds to the plat are matters of description, and if otherwise intended, at least some definite indication of the grantor's purpose should appear, especially in the conveyance made by Wright in the first transfer of the entire property after its subdivision.

As a general proposition a plat of land shown to be correct and properly recorded becomes a part of subsequent deeds to same. *Lindsay v. Smith*, 178 Mo. App. loc. cit. 193, 166 S. W. 820. This ruling, however, has reference, unless there are other limitations, to the location or description of the property (*Ferguson v. Dent*, 8 Mo. 687; *Dryden v. Holmes*, 9 Mo. 135), and so far as our investigation has led us, a mere designated line drawn upon a map or plat of property, without more, will not suffice to create a covenant.

It has often been held that in construing plats "effect must be given to the plain meaning and intent they exhibit by their outlines as well as by their words," as in *Caruthersville v. Huffman*, 262 Mo. loc. cit. 375, 171 S. W. 323; *Whitehead v. Atchison*, 136 Mo. loc. cit. 495, 37 S. W. 928; and *St. Louis v. Railroad*, 114 Mo. loc. cit. 22, 21 S. W. 202. These cases and others of like character in the application of the rule have reference to the subdivision of property into lots and blocks and streets and alleys in which the subdivision becomes fixed upon the filing of the plat in the recorder's office, the block and lot lines being designated as a measure of convenience and necessity and the street and alley lines as defining portions of the tract dedicated by the owner to the public. Section 10290 et seq., R. S. 1909. These are essentials of every plat; they exist as a necessary part of it and no transfer can be made of the property therein without express reference to such subdivisions.

A covenant, however, is not a necessary part of a plat, but is dependent for its creation on the will of the owner of the property subdivided. That will cannot, by reason of the very nature of a covenant, be declared by a designated line and nothing more. It must be expressed in words, either definitely defining the covenant or making apt reference to the designated line, thus giving formal expression to the covenantor's purpose. 13 Cyc. 718, and notes.

This conclusion is sustained by an almost unbroken line of cases, if not by express rulings by the facts themselves showing on the face of the instruments affecting the property, either in express words or by clear implication, a purpose to create a restriction. *King v. Union Trust Co.*, 228 Mo. loc. cit. 367, 126 S. W. 415; *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668; *Hisey v. Church*, 130 Mo. App. 566, 109 S. W. 60; *Kitchen v. Hawley*, 150 Mo. App. 497, 131 S. W. 142; *Miller v. Klein*, 177 Mo. App. 557, 160 S. W. 562; *Bolin v. Tyrol Inv. Co.*, 178 Mo. App. 1, 160 S. W. 588, 164 S. W. 259.

An exception to this rule is found in *Simpson v. Mikkelsen*, 196 Ill. 575, 63 N. E. 1036, which we decline to follow in the presence, especially in our own jurisdiction, of a strong current of authority to the contrary. The reason for the ruling of the majority is evident. A restrictive covenant lessens the fee and is not favored in law. It should therefore be made manifest in no uncertain manner and not be left entirely to implication, as in this case. It has been expressly ruled elsewhere, and is in accord with our reasoning, that a covenant not to use property except in a certain way will not be inferred from the absence of words of restriction. *Madore's Appeal*, 129 Pa. 15, 17 Atl. 804.

In the presence of the concrete facts, in the instant case, these general deductions are authorized: That to create the limitation on the fee herein contended for, a covenant must have been created; and it is not material whether it be termed an equitable easement, as in *King v. Union Trust Co.*, supra, or a servitude or a restrictive covenant. If express, it must be in writing; i. e., declared in so many words (*Fuhr v. Dean*, 26 Mo. loc. cit. 119, 69 Am. Dec. 484; *Petty v. Church of Christ*, 70 Ind. loc. cit. 297; if implied (and here also note the necessity of the use of words by the covenantor), the implication from the words used must be such as will clearly authorize the inference or imputation in law of the creation of the covenant. The only exception to this rule is in the case of implied covenants, classified as covenants in law, or those which the law implies or intends from the nature of the transaction, although not given form in words in the instrument containing them. Thus in conveyances in fee containing the words "grant, bargain, and sell," a covenant

of warranty is implied. *Stoepler v. Silverberg*, 220 Mo. 258, 119 S. W. 418; *Waldermeyer v. Loebig*, 222 Mo. 540, 121 S. W. 75. Express recognition of this rule is given by our statute (section 2793, R. S. 1909); but it existed at common law (*Coke Lit.* 384b; *Rawle Cov.* 5); the statute, and others of like nature, being merely declaratory of same (2 *Reeves Hist. Eng. Law*, 54); and in a lease the term "demise" is held to import a covenant on the part of the lessor of right and title to make the lease and for quiet enjoyment (*Crouch v. Fowle*, 9 N. H. 219, 32 Am. Dec. 850).

But no such rule exists in regard to covenants carrying a restriction. These, for the reasons stated, must be defined. This has not been done; and while the tendency of the courts is to disregard restrictive covenants, we would be inclined to sustain the plaintiffs' contention if the facts showed that by so doing the intent of the original grantor would thereby be effected. But we do not so interpret the evidence. We therefore decline, on the proof alone of a designated line appearing on the plat, to read into the conveyances of the property subdivided an express restriction, the effect of which would be to limit the use of and lessen the tenure by which the owners hold these lots.

From the foregoing it follows that the judgment below should be reversed and the case remanded, with directions to the trial court to dismiss plaintiffs' action, and to enter judgment for the defendants; and it is so ordered. All concur.

IN RE PUBLISHING DOCKET IN LOCAL NEWSPAPER.

(Supreme Court of Missouri. In Banc. March 28, 1913. Certified for Publication July 16, 1915.)

APPEAL AND ERROR ~~6~~—808—SUPREME COURT—PRINTING AND PUBLISHING DOCKET—"PRINT"—"PUBLISH."

The verb "print" means "to make an impression with inked type," and is not synonymous with "publish" which means "to make public"; so that the requirement of Rev. St. 1909, § 2079, that the Supreme Court docket be printed in the county where court is held, does not require publication in newspaper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3189; Dec. Dig. ~~6~~—808.

For other definitions, see Words and Phrases, First and Second Series, Print; Publish.]

Graves, Bond, and Woodson, JJ., dissenting.

In the matter of publishing the docket of the Supreme Court in local newspaper. Publication ordered not to be made.

FARIS, J. Since the administrative order, made by a majority of the court in banc, touching the matter in the caption may be said with historical truth to overrule a former holding of this court on this question, a decent respect for the diverse views entertained by other members of the court (and

mayhap by the public likewise) requires a setting forth of the points which induced the conclusions reached.

At the threshold we are met by the question as to whether the language of the statute is clearly mandatory and requires that the docket of the Supreme Court be "published in a newspaper," which newspaper is printed in Cole county. If the language does so require, we must needs acquiesce, and further comment is "weary, stale, flat, and unprofitable." If the language to which we shall presently call attention be directory only, then we may exercise a sound discretion, influenced by an expediency which fits the means to the end. In thus asserting we bear in mind the certainly elastic and perhaps inherent power of the court to make rules inuring toward orderliness and expedition of business. The section under discussion is as follows:

"Sec. 2079. It shall be the duty of the judges of the Supreme Court and Courts of Appeals, at the end of each term of said courts, to direct the number of cases to be docketed by the clerks for the next succeeding terms of the courts, and the clerks shall docket all cases from the same judicial circuit in succession, in the order of the circuits, setting not more than 10 cases for each day, and a copy of the docket shall be printed in the county wherein such Supreme Court and Courts of Appeals shall be held at least 40 days before the commencement of the term: Provided, that if for any cause any cases are not reached for hearing at the first term at which they are docketed, then it shall be the duty of the clerk to place all cases undisposed of at any term first upon the docket of the succeeding term; and provided, further, that if any case has, or shall hereafter, come before any of said courts by appeal or writ of error, and has been or shall be reversed and remanded, and said case shall again come before any of said courts for further trial, it shall be the duty of the clerk of said court to docket such case for trial among the first cases for trial at the next term of the court, if it reaches the court in time, and if not it shall be docketed at the next term of such court, and it shall be the duty of the court to hear and determine the case at the same term it is docketed, unless continued for cause."

The only words of the above section which concern us, because they are the only words having any reference to the matter in hand, are: "A copy of the docket shall be printed in the county wherein such Supreme Court . . . is held." If we can read into this section by construction the additional requirement that such printing shall be "in a newspaper published" in the county wherein the Supreme Court is held, then such publication must be so had. We must give to the word "print" as used by the lawmaking power, its ordinary meaning when used as a verb (and it so occurs in this statute), which is "to make an impression with inked type." The word "publish" ordinarily means "to make public." A book, a paper, or a pamphlet might be "printed" but never "published." A paper might be "printed" in St. Louis and "published" in Chariton County. *E. g. vide, Julian v. Kansas City Star*, 209 Mo. 35, 107 S. W. 496; *Cook v. Globe Printing Co.*, 227 Mo. 471, 127 S. W. 332. We hold, therefore,

that upon its face the statutory language is not clearly mandatory in requiring publication of our docket to be made in any newspaper.

But we need not engage in such analytical splitting of hairs. We need only consider the legislative history of the governing words of the section, *supra*. The requirement as to the printing of the docket came into the statute by an act approved February 28, 1871 (Laws 1871, § 21, p. 48), and was couched in the following words: "A copy of the docket shall be printed in some newspaper printed in the county wherein such Supreme Court shall be held." The wisdom of this provision at that time is not difficult to see, when we bear in mind that there were then held six terms of court each year; that such terms were held in St. Louis, Jefferson City, and St. Joseph. The March and October terms were held in St. Louis; the January and July terms at Jefferson City; the February and August terms at St. Joseph. The court was ambulatory; the mountain came to Mohammed. The court was carried to the bar.

By the Constitution of 1875, the place of sitting of the Supreme Court was permanently fixed at Jefferson City. So, as we might expect, the language under discussion was changed in 1877 to read thus: "A copy of the docket shall be printed in the county wherein such Supreme Court shall be held at least 10 days." Laws 1877, p. 232. The language used in the Act of 1877, *supra*, and last above quoted was carried, without change, into the revision of 1879. Section 3763, R. S. 1879. In 1883, the above section was amended to read: "The clerk shall cause a copy of the docket to be printed in some newspaper published in the county where such Supreme Court shall be held at least 35 days before the commencement of said term." Laws 1883, p. 123. The above language is clear and needs no comment. It will be noted also that the period of publication was 35 days, whereas before it had been but 10 days.

In 1889 the entire Practice Act was revised and re-enacted. As re-enacted, the provision under discussion, being section 3763, Revised Statutes 1879, was changed to read as follows: "And a copy of the docket shall be printed in the county wherein such Supreme Court and Courts of Appeals shall be held at least 40 days before the commencement of the term." Laws 1889, p. 208. This language was carried from the revised and amended act, above quoted and cited, into the Revised Statutes of 1889, as section 2293, and this language has come down to us unchanged through the revisions of 1899 (section 855, R. S. 1899), and 1909 (section 2079, R. S. 1909), and now occurs in the section last cited just as it was re-enacted in 1889.

From this it is clear that the Legislature eliminated the requirement as to publication in a newspaper, and that it did so with premeditation. This is clear from the fact that

in the revised bill, as set out in the Session Laws of 1889, the amendment of 1883 (requiring and directing publication in a newspaper), is referred to in the parenthetic footnote. Furthermore, the period of publication is changed from 35 days to 40 days. It follows that the rules of statutory construction will not allow us to say that the Legislature did not intend to repeal the requirement of publication in a newspaper.

Another consideration, in its logic equally convincing and decisive, is the fact that by section 2079 is conferred the sole authority for this court, through its clerk, to print and distribute to the bar the bound pamphlet dockets. This being so, has this court, or the clerk of this court, under the provisions of section 2079, power both to publish the docket of this court in a newspaper printed in Cole county, and to print paper-bound pamphlet dockets for the benefit of and to be sent out to counsel over the state having causes set for trial in the court? Unless the power comes from this section, we are then clearly lacking in any legal authority under the statute quoted, to either print in a pamphlet or publish in a newspaper. We may do one, but not both. The authority specifically conferred (history of the legislative changes being kept in mind, and expediency and publicity considered), would then seem to be to print in a pamphlet the docket of the court, and to publish such docket in every county and place where interested counsel reside.

The administrative rule heretofore adopted, since it entails upon the state an almost useless expense of some \$800 a year, and requires to uphold it a construction of the statute which is wrong, ought to be followed no longer. Ordered, therefore, that the publication of the docket of this court be not hereafter published in any newspaper in Cole county.

LAMM, C. J., and BROWN and WALKER, JJ., concur. WOODSON, J., dissents in opinion filed. GRAVES, J., dissents in an opinion filed, in which BOND, J., concurs.

GRAVES, J. I dissent from the opinion of my learned and esteemed Brother in this matter. The question arose upon the business side of our duties. The particular occasion is immaterial. Whilst, as I have stated, and as stated by the principal opinion, the matter was one more particularly addressed to the business side of the court, and not especially to the judicial side, yet in determining our duties it became necessary to construe a statute of this state. Such construction bespeaks judicial action, and but for this my dissent to the order made would be a silent rather than a written dissent. By our order we have said that under section 2079, Revised Statutes 1900, the clerk has no right to have our docket published in a Cole county paper, or any other paper. The majority

opinion of Judge FARIS so holds. To this order and this opinion I dissent.

I do not place this dissent upon the absolute necessity of such a publication, nor specially upon the advisability of the same, but I do place it upon what I deem a plain statutory duty. If the statute, set out in my Brother's opinion, means that our clerk should publish our docket in a paper in the county where the court is held, then it should be done, because it is mandatory in terms. And it should be done notwithstanding our view of the necessity of publication. That question was one for the Legislature and not for this court, and much might be said upon both sides of the question. With this view of our duties and the Legislature's duties, we shall not discuss the question of necessity.

As indicated by the principal opinion, for years we have had upon our books a statute somewhat similar in import. It is true that in the revision of 1889 the verbiage was changed and the meaning was clouded to a certain extent, and this cloud is the thing which now gives rise to the difference of opinion among the members of this court. To start with, we can safely agree that from 1889 to this date the statute has remained the same—a period of 23 years. During this period it has been construed by the officers upon whom the duty devolved to construe it. It has been construed: (1) By the clerk of this court; (2) by this court as the auditor of its own bills; and (3) by the disbursing officers of the state. All have said the statute means the publication of the docket in some newspaper in Cole county, such as the clerk of the court may direct. The clerk has so construed it by making such publication. The court has at least tacitly construed it by auditing such bills, and the disbursing officers of the state have so construed it by auditing and paying such bills, and this for 23 years. Not only so, but once since I have had the honor of a presence upon this bench the matter was raised in the court in banc, and it was then held to mean a publication of the docket in a Cole county paper. No opinion was written, and this is a further reason for me now to speak. I am unwilling to now sit in silence, and in that way say that for 23 years we, as a court, have been paying bills without authority of law. Nor am I willing to say that the construction of the statute in question by the other officers of the state for these years has been wrong. I concede that the interpretation of statutes given by officers who are called upon to interpret them does not bind the courts, but it is at least persuasive. Such officers are not always mistaken in their reading and understanding of the law.

But, going to this act itself and giving to it our own construction, I cannot concur in the majority opinion. It is true that in revisions changes were made, but these must be considered in the light of the circum-

stances surrounding. This is a cardinal principle of statutory construction. That at one time the statute clearly provided for publication, but in a revision thereof used clouded language, does not of necessity indicate a purpose of changing the effect of the statute. Because the Legislature used the more explicit word of "publication" in the previous act, and the less explicit word of "printed" in the oftentimes hurriedly drawn revision bill, does not, of itself, necessarily bespeak a change of legislative intent. Before the revision of 1889 the legislative intent was expressed in plain terms. That revision is not so definite and plain, but to my mind there is no such radical change in language as to indicate a change of legislative intent. So after all it strikes me that we are forced to consider the effect of the language used in section 2079, *supra*, with the usual lights, furnished by the law, for statutory construction. The language of the statute now in dispute, is "and a copy of the docket shall be printed in the county where in such Supreme Court * * * shall be held." As has been said, this clause for 23 years has been construed to mean the publication of our docket in some newspaper in Cole county, because during that time the court has had a permanent abode here. I think the whole trouble arose by the unfortunate use of the word "printed" in the revision of 1889, instead of the word "published." Had the statute used the word "published," the term "in a newspaper," would necessarily follow, because in this usage of the word such would be the natural meaning of the word. The word "printed" has a varied meaning according to the connection in which it is used. If we are referring to an imprint upon calico rags, it has a fixed meaning. If we refer to an imprint upon a stone, it has a fixed meaning. So I might go through a long list. Vide Century Dictionary, vol. 4, pp. 4731, 4732, under the verb "print." But if we go to the word "print," used as a noun on the latter page of the citation, we find this:

"4. A printed publication, more especially a newspaper or other periodical.

"What I have known

Shall be as public as a print."

—Beau. and Fl., Philaster, ii, 4.

"The prints, about three days after, were filed with the same terms."—Addison.

There is at least some relation between the verb and the noun, and the definition of the one sheds some light upon the definition of the other. But, after all, we know that the word "print" has a varied meaning, and its meaning in a particular law must of necessity depend upon the context of the whole act. So, after all, the real question is, What is the meaning of the word "printed" in this law? From time almost out of memory this court has had three "printed" forms of the docket; i. e.: (1) A large-size, substantially bound book for the use of the judges of the

court; (2) a pamphlet or paper covering (in a more diminutive form), which the clerk mails to counsel upon both sides of the cases printed in the particular docket; and (3) a publication of the same docket form in a newspaper where the court was held. These were existing conditions when the present law was passed. Now, it can hardly be said that the law refers to the printed docket prepared for the use of the individual members of the court, because there would be no sense in compelling that to be printed for 40 days prior to the beginning of the term. The judges only need this form of the printed docket when the court begins, and not sooner. Nor can it be reasonably said that it refers to the little pamphlet form of the docket mailed by the clerk to the lawyers. If the Legislature had in mind that kind of a "printing," it would not only have directed the printing, but likewise directed the publication, by saying that the docket when thus "printed" should be mailed to the parties to the suit. The fact that the law makes no provisions or requirement for the mailing out of these pamphlet dockets is conclusive that this kind of printing was not in the legislative mind. We have never had but the three forms as indicated above. If the law does not refer to our private docket, or to those pamphlet dockets, what form of printing could it refer to other than a publication in a newspaper? We repeat that it is unreasonable to say that the Legislature had reference to the pamphlet docket, because if so they would not only have directed the printing, but likewise the distribution by mail. Think for a moment of a legislative body directing the printing of a lot of dockets without any direction for their distribution. The only reasonable conclusion is that in the revision of 1889 they unfortunately used the word "printed" instead of the word "published," but meaning all the time a publication of our docket in a local newspaper.

Section 10340, Revised Statutes 1909, is one of the sources of our power to audit and pay each and all of the three classes of bills which we have heretofore audited and paid. If additional authority is sought, it can be found in chapter 23, pertaining to "Clerks of Courts of Record." In the circuits of this state, we find the clerks of the court furnishing the court with a docket such as we have here. We also find him furnishing the bar with pamphlet form of the same just as we have here. His authority so to do is under this chapter pertaining to "Clerks of Courts of Records." This court happens to fall within the class and therefore our clerk falls within the class. What is there paid for by the county is here paid for by the state, as provided for by section 10340, *supra*. This disposes of two printed forms of our docket, and leaves only the publication of the docket as the only reasonable intent of

the Legislature in formulating section 2079, *supra*. The act may be improvident. The necessity for the publication may not exist, but these matters should be addressed to the Legislature and not the court. My conviction is that the word "printed" as used in section 2079, *supra*, was intended by the Legislature to mean a publication in a newspaper in Cole county, the place where the court is held. There could be no reason for requiring the other class of printing to be done here. Our individual dockets, as well as the pamphlet form thereof, have to be printed, under the law, by the public printer, and he may or may not have that part of his business domiciled here.

To conclude, I am unwilling to say that this court and the other public officials who were called upon to construe this act for the past 23 years have been in error, and have for this length of time audited and paid out \$300 per annum without authority of law. The amount above paid is from my Brother's investigations, rather than my own. I think the reasonable construction of this section 2079 justifies the construction heretofore given, and I therefore dissent to the able and exhaustive opinion of my Brother. Legislative intent is the overshadowing question in the construction of statutes, and I cannot conceive why a Legislature would direct the printing of our docket, except on the ground that by such printing it was to be made public. If it was the legislative intent to make it public in any way, then, if they had ordered a printing, they would have suggested some means of making that printing public. I therefore desire to be recorded as dissenting from the majority opinion, as well as the unauthorized order which we have made. The authority of the order could well be questioned upon grounds other than the opinion or the dissenting opinion, but these should be held subservient to the more vital question of the meaning of the statute.

BOND, J., concurs. WOODSON, J., concurs in separate opinion.

WOODSON, J. (dissenting). While I have not had the time or opportunity to investigate the statutes governing this question and reviewed by my learned associate Judge FARIS, nevertheless, almost as far back as I can remember, the docket of this court, under the supervision and control of this court, has been published in a newspaper printed in Cole county; and when I stop to consider the score or more of able jurists who have occupied this bench during that time, it causes me to hesitate, and ask the question, Are we right, and were they wrong, or were they right and we wrong?

For myself, I am going to follow the footprints of the fathers, and therefore concur with all that has been said upon this subject

by my Associate, Judge GRAVES, in his dissenting opinion.

PER CURIAM. The court is of opinion that the publication of the docket in a local newspaper or any newspaper at public expense is not required by statute; that the amendment to the statutes, pointed out in the opinion of FARIS, J., herewith filed, have, when properly construed, taken away the necessity for such publication. It is therefore ordered that hereafter the clerk shall not cause to be published in a newspaper at public expense the docket of this court, to wit, the list of cases set down for hearing in banc or in division at any term or call of this court.

GRAVES, J., dissents in an opinion filed, in which BOND, J., concurs, and in which WOODSON, J., concurs in a separate opinion.

STATE v. KAPP. (No. 19332.)

(Supreme Court of Missouri, Division No. 2
July 5, 1916.)

1. HOMICIDE — 250 — EVIDENCE — SUFFICIENCY.

Evidence held to sustain a conviction of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. — 250.]

2. CRIMINAL LAW — 1129(3) — APPEAL — RESERVING GROUNDS FOR REVIEW — STATING GROUNDS FOR NEW TRIAL — INSTRUCTION.

An instruction is not subject to review where the record does not show that the defect was pointed out to the trial court, and only a general assignment was made on the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2957, 2959; Dec. Dig. — 1129(3).]

3. CRIMINAL LAW — 695(2) — APPEAL — NECESSITY OF SPECIFIC OBJECTIONS.

An objection that certain testimony was immaterial held insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1634, 1638; Dec. Dig. — 695(2).]

4. CRIMINAL LAW — 385 — EVIDENCE — COMPETENCY.

That testimony tended to belittle accused's attorney does not warrant its exclusion if otherwise competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 865-868, 870, 878; Dec. Dig. — 385.]

5. CRIMINAL LAW — 1119(2) — APPEAL — RECEPTION OF EVIDENCE — OFFER OF PROOF — NECESSITY.

The statement of accused's attorney that he desired to show certain facts presents nothing for review, where no offer of the evidence to be introduced was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2928; Dec. Dig. — 1119(2).]

6. HOMICIDE — 178(1) — ADMISSIBILITY OF EVIDENCE — ATTEMPT TO FASTEN CRIME ON ANOTHER.

In a trial for committing murder after holding up a hotel, testimony that another hotel had been held up previously by some one who was

presumably also responsible for the hold up and murder in issue is incompetent as attempting to fasten the crime on one not on trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 807; Dec. Dig. § 178(1).]

7. CRIMINAL LAW § 1129(3)—APPEAL—REMARKS OF PROSECUTING ATTORNEY—ASSIGNMENT OF ERROR.

That the verdict was influenced "by the prosecuting attorney's improper remarks" is not an effective assignment, unless the record affirmatively shows that the verdict was influenced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2957, 2959; Dec. Dig. § 1129(3).]

Appeal from St. Louis Circuit Court; Thomas C. Hennings, Judge.

George Kapp was convicted of murder, and appeals. Affirmed.

The instruction on reasonable doubt is as follows:

"The law presumes the defendant to be innocent, and this presumption continues until it has been overcome by evidence which establishes his guilt to your satisfaction and beyond a reasonable doubt; and the burden of proving his guilt rests with the state. If, however, this presumption has been overcome by the evidence and the guilt of the defendant established to a moral certainty and beyond a reasonable doubt, your duty is to convict. If, upon consideration of all the evidence, you have a reasonable doubt of the defendant's guilt, you should acquit; but a doubt to authorize an acquittal on that ground ought to be a substantial doubt touching the defendant's guilt, and not a mere possibility of his innocence."

On September 10, 1914, the assistant circuit attorney of the city of St. Louis filed in the circuit court of that city an information, charging defendant with murder in the first degree. He was duly tried and convicted, and his punishment assessed at imprisonment in the penitentiary for his natural life.

The evidence on the part of the state tends to prove the following: During an early morning hour on August 11, 1914, approximately 3 o'clock, F. W. Arney, clerk, and John Hawkins, bell boy, were in the Metropole Hotel, at High and Morgan streets in the city of St. Louis, the clerk sitting in a chair in the lobby, the bell boy asleep on a bench near the elevator. A person identified as the defendant entered and asked for a room, whereupon the clerk arose and started towards the office, which was located in one corner of the lobby. When he reached the swinging door entrance thereto, he turned and beheld two guns pointed directly towards him, and at the same time came the command: "Throw up your hands." With this he promptly complied. The clerk's money was then demanded, but he seems to have had none. He was directed to open the safe, but did not know the combination, and so proved to the robber by both the bell boy and his apparent willingness to unlock it if in his power. Without resistance the robber was given entire control of the situation, the clerk and bell boy courteously yielding

to his every direction. He remained 20 or 30 minutes, and being seemingly convinced that no money was accessible, departed through the Morgan street exit. The hotel was located on High and Morgan streets, there being an entrance thereto from each of these streets. High street is east of Thirteenth and Fourteenth streets, which run north and south, while Morgan street runs east and west. Linden street also runs east and west, and is one block south of Morgan street. The hotel occupies about half of the block on Morgan street between High and Thirteenth streets. After leaving the hotel the defendant, who was followed by the bell boy, ran west to Thirteenth street, then south to Linden street, then west on Linden street to a vacant lot located about half a block west of Fourteenth street. Through this vacant lot he passed north to a point on the south side of Morgan street, which was the place where the bell boy saw him stop. The bell boy then returned to the hotel, and in the meantime police officers had been called. The bell boy, in company with one of the police officers, returned to near the point where the bell boy had last seen the robber, they going up and crossing Fourteenth street. Some person thereupon announced from a window that "he" had crossed the street and gone into the gangway. The officer, who was the deceased, crossed the street and "flashed" his light into the gangway, which was located at about 1415 Morgan. The report of a shot was thereupon immediately heard. Notwithstanding this the deceased entered the passageway and commenced shooting. The bell boy ran to Fourteenth, and then to an alley, and then to the front end of the gangway on Gay street, where he saw a man emerge from the gangway running in a stooping position and holding to a fence. The premises were not well lighted, and the bell boy was unable to identify that person. Six or seven shots were heard.

Nonie Martin (colored), who lived in the rear of 1414 Morgan street, and on the gangway about halfway between Morgan and Gay streets, testified that at the time in question she heard five shots, and soon thereafter saw a man come out of the gangway where the deceased was shot. She says that he was "stooped" and walked within a few feet of her; that the light was on, and that she could plainly see this person. She was positive that the person emerging from the gangway was the defendant.

Ella Smith, who was dead at the time of the trial, but whose testimony had been taken at a previous hearing and duly preserved, said, according to her testimony as read, that at about the time of the robbery at the hotel the defendant ran by her, and that the bell boy was following him; she saw defendant enter the second lot, and then cross the street to about the place where the

shooting occurred. She did not see the shooting, but heard five shots.

Certain police officers testified that at the time they arrested the defendant he stated that on the night of the 11th of August he was at the home of his mother from 8 o'clock in the evening until 8 o'clock in the morning, being asleep during that time. He also gave his name as Edward Powers, but later admitted that his true name was George Kapp.

The officer soon died after being shot, and an examination of his body disclosed that he had been shot but once.

The defendant offered the testimony of a man and his wife and son and daughter, which was to the effect that it was raining on the night of August 11th, and that the defendant went to bed at their home at about 10 o'clock that night, and was there the next morning in his room at about 6 o'clock asleep.

Defendant testified that he remained there during the whole night, and that he not only was not at the Metropole Hotel during the night of the robbery and did not attempt to rob same, but also that he did not know that there was such a hotel in St. Louis, and that he did not shoot and kill the deceased officer. He gave his reasons for going under the name of Edward Powers instead of his true name. He also testified that he had never been in trouble before and had never carried a revolver.

Berthold & Lister, of St. Louis, for appellant. John T. Barker, Atty. Gen. (Kenneth C. Sears, Asst. Atty. Gen., of Counsel), for the State.

REVELLE, J. (after stating the facts as above). [1] I. Defendant strikes at the vitals of the verdict, urging there is no evidence upon which it can rest. He cites us cases declaring that convictions of crime cannot be founded upon mere suspicion, and that where circumstantial evidence is relied upon, it must be of such character as points with moral certainty to guilt, to all of which, and without reservation, we again give our approval; but, as we view the record disclosures, this avails defendant nothing. If the facts adduced in evidence and the inferences reasonably deducible therefrom were believed by those who are by law made the triers thereof, the same are sufficient to warrant their conclusion, and, under such conditions, we are inhibited from interfering therewith.

The credibility of some of the state's witnesses is attacked, but with that we have nothing to do; the evidence not so conclusively showing their unworthiness as to warrant a reversal of the jury's finding thereon.

[2] II. Complaint is also made of the instruction on reasonable doubt, but an examination of the motion for new trial shows that the assignment as to the given instruction is only general, and nowhere in the rec-

ord is this alleged defect pointed out, and the ruling thereon so preserved as to justify a review. In the recent case of *State v. Gifford*, 186 S. W. 1058 (not yet officially reported), Faris, J., in speaking to this point, and after citing numerous cases, said:

"The trial court is to be allowed the last clear chance to correct its own errors, and thereby, perhaps, save the delay and expense of an appeal. The above cases, and many others which we might cite, but follow the analogous statutory rule in civil cases which requires motions to be specific, * * * and they accentuate the idea that at some stage of the trial of a criminal case the defendant is saddled with the duty of taking the trial court measurably into his confidence."

Notwithstanding the insufficiency of the objection and exception to the instructions, we have examined the one complained of, and find it to be in substance of the kind frequently approved. *State v. Holloway*, 156 Mo. 222, 56 S. W. 734; *State v. Cushenberry*, 157 Mo. loc. cit. 181, 56 S. W. 737; *State v. Christian*, 253 Mo. loc. cit. 397, 161 S. W. 736.

[3] III. It is next insisted that the court erred in permitting witness Hawkins to testify that he had a conversation with defendant's attorney some time prior to the trial. The record in this connection discloses that the only objection made was that the evidence was immaterial. This, as frequently held by this court, was insufficient.

[4] It is here urged that this evidence was not admissible because it tended to "belittle the defendant's attorney in the eyes of the jury." No such objection was made during the trial, and had it been, it was not a sufficient one to warrant the exclusion, provided the evidence was otherwise competent for any purpose. Neither do we agree that the testimony was calculated to have this effect. It is our opinion that the testimony was of such little consequence that it could not have resulted in substantial prejudice to the defendant.

[5, 6] During the examination of William R. Owensby, a witness for defendant, defendant attempted to bring out that some nights prior to the attempted robbery of the Metropole Hotel a similar attempt was made to rob the Holland Hotel. In a conversation between defendant's attorney and the court, the attorney stated that he wanted to show this as a circumstance tending to establish that some person other than the defendant had attempted that robbery, and that, for that reason, such other person, and not the defendant, was the one who attempted to rob the Metropole Hotel, and who shot the deceased. No offer was made of the evidence which would tend to form such a connection, or have the effect stated. We therefore cannot review the assignment, but if it were open, it is our opinion that such evidence was incompetent; it being merely an effort to show the guilt of another person who was not upon trial.

[7] During the cross-examination of defendant's witness Roberts the state asked whether he had not been convicted of attempting to cast a fraudulent vote at a general election held in this state. His answer discloses that he was found guilty by a jury, but that upon an appeal to this court, the judgment was reversed, and the case subsequently dismissed. In that connection he also stated it was true that he had attempted, at that election, to cast a ballot under the name of another person. No objection whatever was made to this evidence, but during the argument of the case the prosecuting attorney made reference thereto. The record discloses the following:

"State's Counsel: He fixes his alibi by a self-confessed election crook—

"Mr. Lester: I object to that. There was no conviction of that kind whatever.

"Mr. McDaniel: He said he tried to vote the name of some man.

"The Court: The evidence shows that the case against him was nolle prossed.

"Mr. Daniel: I understood the witness. I am as positive as I am sitting here, I will say that the worst man on earth is a man who violates the election law, who does not receive any benefit for it. There is no reason on earth for him to do that—

"Mr. Lister: I object to that.

"The Court: We are not trying this man for election fraud; we are trying this man for murder."

Following this statement of the court, no further reference was made thereto by counsel, and no further objections or exceptions were saved. No request that the jury be directed to disregard this, or that counsel be reprimanded, was made. The assignment in the motion for new trial is merely: "Because the verdict was influenced by improper remarks made by the prosecuting attorney." This is not a proper assignment against alleged improper remarks, but an affirmative one that the verdict was influenced thereby.

We are unable from this record to declare that the verdict was, as alleged in the motion, so influenced, and this assignment is accordingly ruled against defendant.

It is our opinion that the defendant has been thoroughly tried, and that the judgment should be affirmed. It is so ordered. All concur.

STATE ex rel. McCULLOCH v. TAYLOR,
Circuit Judge. (No. 19380.)
(Supreme Court of Missouri. In Banc. July 3, 1918.)

1. PROHIBITION §20—PROCEEDINGS—PLEADING—ADMISSIONS.

Though there is nothing in the abstract of the record in the proceedings for prohibition to prevent a judge from compelling the attendance of relator as a witness before a special commissioner appointed to take depositions, to show that the relator was ever served with process as a witness and to produce certain letters as required by orders of the circuit court, the statement of the relator in his petition for the writ of prohibition that the subpoena was issued

and served, not being challenged by the respondent, will be taken as true.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 69; Dec. Dig. §20.]

2. PROHIBITION §34—PROCEEDINGS—PRESUMPTIONS.

Where the abstract of the record in proceedings to prohibit a judge from compelling the relator to attend as a witness at the taking of a deposition and produce certain letters does not contain a copy of the subpoena issued and served on the relator, it will be presumed that it conforms to the requirements of the court's order authorizing its issuance.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 83; Dec. Dig. §34.]

3. DEPOSITIONS §57—ATTENDANCE OF WITNESSES—ORDER OF COURT.

Under Rev. St. 1909, § 6390, providing that a special commissioner appointed to take depositions shall possess the same powers and be subject to the same obligations as are imposed on officers authorized to take depositions, and section 6404, providing that every officer required to take depositions shall have power to issue subpoenas for witnesses and to compel their attendance as in a court of record, an order by the court for the issuance of subpoenas requiring the attendance of a witness before a special commissioner is not necessary and has no greater efficacy than if issued by the commissioner himself.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 125; Dec. Dig. §57.]

4. DEPOSITIONS §58—PRODUCTION OF BOOKS AND PAPERS—STATUTORY PROVISION.

Rev. St. 1909, §§ 1944-1949, conferring on courts the power to require the production by witnesses of books and papers, does not authorize such a requirement for the purpose of depositions in the absence of express statutory provision therefor.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 126, 127; Dec. Dig. §58.]

5. PROHIBITION §5(2)—SUBJECTS OF RELIEF—ENFORCEMENT OF SUBPENA.

Where a subpoena to a witness requires him to appear before a special commissioner appointed to take depositions as a witness as well as to produce certain letters, the requirement as to the production of letters being a mere nullity, does not affect the validity of the remainder of the subpoena, and the witness is not entitled to writ of prohibition to prevent its enforcement.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 23; Dec. Dig. §5(2).]

Proceedings by the State, on the relation of Richard McCulloch, for prohibition to Wilson A. Taylor, Judge of Division No. 1, Circuit Court, City of St. Louis. Preliminary writ quashed.

F. K. Ryan, G. T. Priest, and T. E. Francis, all of St. Louis, for relator. Henry M. Walsh, of St. Louis, for respondent.

WALKER, J. This is a proceeding by prohibition directed against one of the judges of the circuit court of the city of St. Louis to prevent him from compelling the attendance of relator as a witness before a special commissioner theretofore appointed by said court to take depositions under section 6390, R. S. 1909, and to require said witness to produce at the time of his attendance, for use in evidence, two certain letters alleged to have been received by him

about March 25, 1914, from Frank E. Goodwin and wife, containing facts relevant and material to the issue in a certain libel suit pending in the court in which said Judge presides wherein John R. Hillhouse is the plaintiff and Frank E. Goodwin and wife are defendants. In declining to comply with the order made herein the relator seeks refuge in this writ.

The original application for a subpoena for the relator as a witness and requiring him to produce the letters referred to is as follows:

"Comes now the plaintiff and represents to this honorable court that there is pending in this court, the aforesaid suit; that Thomas E. Mulvihill has been appointed commissioner to take depositions in this cause on the 10th day of February, 1916; that Richard McCulloch has in his custody or under his control two letters, one of which purports to be signed by Frank E. Goodwin and the other by Mrs. Frank E. Goodwin; that said letters are addressed to Robert McCulloch and are dated about the 25th day of March, 1914. Plaintiff states that the letters aforesaid are necessary evidence in the matters to be heard before the commissioner aforesaid, and he therefore prays that a subpoena duces tecum be issued directed to the said Richard McCulloch, requiring him to produce the said letters before the said commissioner on the 10th day of February, 1916, at 11 o'clock a. m. in the offices of Thomas E. Mulvihill, the commissioner aforesaid, Room 814, Rialto Bldg., the northeast corner Fourth and Olive streets."

This application was verified before the clerk of the court, and on February 8, 1916, the judge of said court entered of record an order for the issuance of the subpoena applied for, which is as follows:

"Upon consideration of plaintiff's verified application for a subpoena duces tecum, this day filed, and submitted to the court, it is ordered that a subpoena issue as prayed for, directed to Richard McCulloch, commanding him to appear as a witness and produce for use in evidence at the taking of depositions in this cause, before Thomas E. Mulvihill, special commissioner, on the 10th day of February, 1916, at 11 o'clock a. m., two letters, one of which purports to be signed by Frank E. Goodwin and the other by Mrs. Frank E. Goodwin, dated about March 25, 1914."

February 10, 1916, plaintiff Hillhouse was granted leave to file an amended petition, and on the application of the defendants, Goodwin and wife, the issuance of the subpoena to relator was stayed. The succeeding day the amended petition was filed, and on February 24, 1916, on the application of plaintiff, the court made and entered of record the following order:

"Now at this day comes again the plaintiff, by his attorney, and upon his motion it is ordered that the order entered herein February 8, 1916, directing the issuance of a subpoena duces tecum for Richard McCulloch, commanding him to produce certain letters before the special commissioner in this cause, taking depositions, be, and the same is, hereby set aside and vacated; thereupon plaintiff again submits to the court his verified application for a subpoena duces tecum, filed herein February 8, 1916, upon consideration of which it is ordered that the subpoena issue as prayed for directed to Richard McCulloch, commanding him to appear as a witness and produce, for use in evidence, before Thomas E. Mulvihill, special commissioner, tak-

ing depositions, on the 25th day of February, 1916, at 11 o'clock a. m., the two letters dated about March 25, 1914, addressed to Robert McCulloch and purporting to be signed by Frank E. and Mrs. Frank E. Goodwin."

[1, 2] This order was stayed from day to day until the application for and issuance of the preliminary writ in the instant case. There is nothing in the abstract of the record to show that the relator was ever served with process as a witness and to produce the letters as required in the orders made in the circuit court, but the statement of the relator in his petition for this writ is to the effect that said subpoena was issued and served upon the witness. That fact not being challenged by the respondent, it will be taken as true. Nor does the record contain a copy of the subpoena issued and served upon the relator, and it will therefore be presumed that it conforms to the requirements of the court's order authorizing its issuance.

It is urged in support of this application that the taking of depositions is of purely statutory creation, in derogation of the common law, and that an officer clothed with power to take testimony in this manner cannot exceed the express authority under which he acts; that there are no intendments in favor of jurisdiction in such a proceeding; that an order to produce books and papers of a third party can only be made for their introduction at the trial; that there is no authority for the issuance of an order for discovery or the inspection of the papers designated; that an application for same should describe with particularity the contents of the papers sought to be produced; that the court may be enabled to determine its materiality to the issue; and that the attempted enforcement of such an order constitutes an unreasonable search and seizure of papers in violation of the state and federal Constitutions.

[3] The special commissioner appointed to take depositions in this case was clothed with ample authority to issue subpoenas and compel the attendance of witnesses; the language of the statute conferring this power being that:

"For the purposes of taking such depositions and of certifying and returning same * * * he shall possess the same power and authority and be subject to the same duties and obligations as now are or hereafter shall be conferred and imposed by law upon officers authorized to take depositions." Section 6390, *supra*.

The pertinent portion of the general statute above referred to, as conferring the power stated upon the commissioner, is as follows: Every person, judge or other officer required to take depositions shall have power to issue subpoenas for witnesses to appear and testify and to compel their attendance in the same manner and under like penalties as in a court of record. Persons summoned as witnesses who refuse to give evidence lawfully required may be committed to prison by the officer or person authorized to take their depositions etc. Section 6404, R. S. 1906.

Under the power thus conferred there was no necessity for the application made in this case to the circuit court for the issuance of the order requiring the attendance of the witness McCulloch before the special commissioner. The order made by the court based on said application, if possessed of the same, at least had no greater efficacy or force than if it had been issued by the commissioner himself. This is true because the right of litigants to take depositions is purely statutory, and the power of the court, as well as the commissioner or other officer authorized to take depositions, is limited to the express terms of the statute.

[4] While ample power has been conferred on the courts to require, on the application of a litigant, the production by the adversary party of books and papers (article 12, § 21, R. S. 1909) and by the process of a subpoena duces tecum to require of other witnesses a like production (Shull v. Boyd, 251 Mo. loc. cit. 473, 158 S. W. 313), there is no statute authorizing this procedure in the taking of depositions. In an early case decided by this court (Ex parte Mallinkrodt, 20 Mo. 493) it was held that a notary public had no power to commit a witness for refusing to produce books and papers under a subpoena duces tecum; the reason stated being that the power conferred to take depositions is purely of statutory creation and its terms cannot be extended. This ruling made more than half a century ago has never been questioned, and the statute (now section 6384, R. S. 1909) it construed has not been changed since the revision of 1835, except in other sections to authorize the appointment in cities of over 50,000 inhabitants of commissioners to take depositions, who, except as to the right conferred upon them to rule upon the relevancy of testimony offered, are given no greater authority than that conferred upon other officers authorized to take depositions.

There is no room here for the application of the doctrine of the inherent power of the court; this, in a general way, is applicable only when it is necessary to the court's existence and in the proper exercise of its duties imposed by law. The power conferred is an added one, viz.: The appointment of a commissioner to take and certify to the court, depositions. The statute creating this power, being ancillary in its nature, is not in any degree necessary to the court's existence, and except for its enactment, the exercise of the power it confers would constitute no part of the court's duty. Moreover, the statute is complete in itself, and when complied with, as it has been in this case, the power of the court is ended in so far as it is sought to regulate the manner in which the depositions shall be taken.

[5] While the course pursued to secure the production before the commissioner of the letters in question was unauthorized, the rec-

ord discloses a substantial ground why the writ prayed for should not issue. Relator was required to appear before the commissioner as a witness as well as to produce the letters designated. The last requirement, while a mere nullity, because it could not be enforced, did not affect the validity of the first, and upon the subpoena being served upon the witness it became his duty to appear as therein directed and testify. Nor was it any concern of his that the process was, in compliance with the order of the court, under the hand of its clerk instead of simply being signed by the commissioner. While a commissioner, as is the case with a notary public, may issue his own subpoenas, the local practice obtains for the commissioner or notary to direct the issuance of subpoenas by the clerk of the court in which the process is pending. A witness can suffer no injury from this method, but on the contrary is given proof on its face of the verity of the process, in that it is issued under the hand of the clerk attested by the court's seal. It lies at the foundation of good government that its citizens shall respond without delay when their services are required in the administration of justice. This was not done in the instant case, and we find no such lack or excessive exercise of jurisdiction as to warrant our interference. This conclusion renders unnecessary a discussion of other grounds urged for the issuance of the writ.

For the reasons stated, our preliminary writ is quashed; and it is so ordered. All concur; BLAIR, J., in result.

WOODSON, C. J., absent.

HARRISON v. JACKSON COUNTY. (No. 17931.)

(Supreme Court of Missouri, Division No. 2.
July 5, 1916. Rehearing Denied
July 18, 1916.)

1. COURTS — §231(2) — JURISDICTION — MISSOURI.

Courts of Appeals are of last resort, and, when acting within their jurisdiction and not in violation of decisions of the Supreme Court, which questions can be reviewed only by certiorari, or when certified, can, without interference, decide cases as their judgment dictates, whether correct or not.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 643, 650; Dec. Dig. §231(2).]

2. JUDGMENT — §552 — RES JUDICATA — DECISION OF COURT OF APPEALS — EFFECT.

The Supreme Court cannot, on appeal by the county in an action for compensation of attorney, relieve him from a prior adverse judgment of the Court of Appeals in a mandamus proceeding to enforce such payment, but, the merits then having been investigated, his remedy was by certiorari.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 997; Dec. Dig. §552.]

3. JUDGMENT — §670 — RES JUDICATA — PERSONS CONCLUDED.

That a former action was against members of the county court in their official capacity,

whereas the instant action is directly against the county, does not remove the bar of adjudication.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181, 1185; Dec. Dig. § 670.]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by Allan O. Harrison against Jackson County. Judgment for defendant on plaintiff's refusal to plead further after demurrer to his amended petition was sustained, and plaintiff appeals. Affirmed.

On the 27th day of February, 1912, plaintiff filed in the circuit court of Jackson county, Mo., his amended petition, alleging that on September 22, 1908, he was duly appointed special prosecuting attorney of Jackson county, Mo., by Hon. William H. Wallace, judge of the criminal court, the regular prosecutor having refused to recognize or assist the grand jury then in session, and to perform the duties required of him in that relation; that he accepted the appointment, and in pursuance thereof duly qualified and entered upon the discharge of the duties thereto relating, devoting all of his time to same until the 12th day of December, 1908; that at divers times subsequent thereto, and prior to the institution of this action, he made demands on the county court of Jackson county to issue to him a county warrant in payment for said services, but that it refused, and still so refuses; and that he has not been otherwise compensated for any part of said service.

The amended petition is in three counts, the first framed upon the hypothesis that when the judge of the criminal court appointed him as special prosecutor, it, by reason of that act alone, acting for and in behalf of the county, agreed and promised to pay for his services at the rate of \$5,000 per annum. The second count is evidently predicated upon the theory that as a special prosecutor he was entitled, under the statute, to the compensation which the statute prescribes for the regular prosecuting attorney. The third is upon the plea that the exigencies of the situation were such that the appointment of a special prosecutor was necessary and to the public good, and that he ought to therefore be compensated even in the absence of any statutory provision to that effect.

While the petition makes no reference to the facts hereafter stated, it appears that the demurrer which was filed and sustained by the court was treated by the parties and court as a plea of former adjudication, the facts in relation thereto being admitted and duly considered, and the case accordingly decided. We are asked by both parties here to so treat the pleadings, and to determine the issues upon the same theory as was presented below, and this we shall do. *Thompson v. Marley*, 102 Mich. 479, 60 N. W. 976; *Lindley v. Railway Co.*, 47 Kan. 433, 28 Pac. 201; *Oscanyan v. Winchester Arms Co.*, 103 U. S. 261, 26 L. Ed. 539.

Prior to the institution of this suit the plaintiff filed in the circuit court of Jackson county a mandamus proceeding against the judges of the county court to compel them to issue a county warrant to pay him for the identical service for which he in this suit asks recovery. He prevailed in the lower court, whereupon the case was appealed to the Kansas City Court of Appeals. That court duly and fully considered the merits of the whole case, and held that neither under the statute nor the common law could the plaintiff recover for such service. The judgment of the trial court was accordingly reversed. *State ex rel. Harrison v. Patterson et al.*, 152 Mo. App. 264, 132 S. W. 1183.

In appellant's original brief we find the following statement which discloses the theory upon which he seeks to maintain this action. He says:

"Has appellant stated a cause of action? If the Kansas City Court of Appeals is right in their decision, appellant has not and cannot state a cause of action."

And in his reply brief, we find the following:

"If appellant is entitled to recover on the merits of this case, surely he should not be barred because the Kansas City Court of Appeals rendered an erroneous decision."

Allan O. Harrison and James M. Chaney, both of Kansas City, and James F. Green, of St. Louis, for appellant. A. L. Cooper, County Counselor, of Kansas City (M. J. O'Sullivan, of Kansas City, of counsel), for respondent.

REVELLE, J. (after stating the facts as above). [1] I. While this court has recently done considerable writing and its members expressed divergent views as to the extent and limitation of our power of review of the decisions of our courts of appeals on certiorari, we all yield assent to the one proposition that such courts are courts of last resort, and, when acting within their jurisdiction and not in violation of our decisions, which questions we can review only by certiorari, or when certified to us, they can without interference, decide cases as their judgment dictates, and in so doing can, without correction on our part, commit error and decide incorrectly, just as we can. *State ex rel. Delano v. Ellison*, et al., 181 S. W. 78; *State ex rel. Pedigo v. Robertson*, 181 S. W. 987; *State ex rel. Iba v. Ellison*, 256 Mo. loc. cit. 666, 165 S. W. 369; *Majestic Mfg. Co. v. Reynolds et al.*, 186 S. W. 1072 (not yet officially reported).

[2] If we conceded, which we do not, that the Kansas City Court of Appeals was in error in its decision of this case, we would nevertheless be powerless to give relief in a proceeding such as plaintiff has here brought. The cases cited by him, wherein this court has determined that upon a second appeal of the same case to the same court and between the same parties it will not ad-

here to incorrect principles of law or mistakes of fact announced on the first appeal of the same case, have no application to the subject under consideration. In such cases there has been no final adjudication, as is readily apparent from the fact itself that such cases are still legally pending and under legitimate judicial review. The present case belongs to that class dealt with in *Strottman v. Railroad*, 228 Mo. 154, 128 S. W. 187, 30 L. R. A. (N. S.) 377, and *Ginnocchio v. Railroad*, 264 Mo. 516, 175 S. W. 196. The *Strottman Case*, supra, was decided by Division No. 1 of this court, all members concurring; and the *Ginnocchio Case*, supra, by Division No. 2 of this court, all members concurring. These cases are so recent and contain such an exhaustive review of the authorities on the question here presented that any additional discussion of the point would be but dropping buckets into old wells and drawing up nothing refreshing with the new. It is easy of determination that the merits of this controversy were fully investigated and adjudicated in the former case; and, had the plaintiff desired any modification of that judgment or a review of that decision, he should have proceeded in the orderly and recognized way. In *Kansas City v. St. Louis Land Co.*, 260 Mo. loc. cit. 410, 169 S. W. 66, this court said:

"It must be apparent that if there was a general rule allowing two hearings on the same questions, it would be a blazing infirmity in the law. If courts put themselves in a limbo of nonsense and set themselves continuously to planting and then pulling up, weaving and then unraveling (vide the classical legend of Penelope's web), to stitching and then ripping, or, what amounts to the same thing, to deciding and then setting aside their own solemn adjudications, men and their posterity would think ill of our understanding."

[3] While it is true the former action was against the members of the county court, and this is directly against the county, this is of little consequence. In that case the defendants were not sued in their individual, but their official capacity, and the things which the plaintiff sought to compel them to do were things which they could do only in an official capacity, and in behalf of the county. If plaintiff should prevail in this suit, then in satisfying the judgment awarded him the same members of the county court who were defendants in that action, or their successors, would have to do the identical things, namely, draw a county warrant, which he in that action unsuccessfully attempted to force them to do. They did not defend that action for their own personal benefit, but in the right of the county and as the custodians of its fund. No judgment rendered therein would have affected them individually, but same would have gone directly to the principal who was being proceeded against through the county judges as its authorized

agents. The purpose of that suit was to compel payment from the funds of Jackson county on the claim involved, and the purpose and effect of this action is identically the same, notwithstanding the nominal parties defendant are different. *Ransom v. City of Pierre*, 101 Fed. loc. cit. 668, 41 C. C. A. 585; *Nave v. Adams*, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421.

The judgment is affirmed. All concur.

BOYER et al. v. CITY OF ST. JOSEPH.
(No. 19044.)

(Supreme Court of Missouri, Division No. 2.
July 5, 1916.)

EMINENT DOMAIN \Leftrightarrow 219—NOTICE OF HEARING—CONTINUANCE—LOSS OF JURISDICTION.

Notice to property owners in proceedings to open a parkway notified them that a jury would be impaneled to assess damages and benefits on a certain day, but the court took no action on that day and made no order continuing it to another day, but on the following day the court without notice impaneled the jury and proceeded in the matter. Held not to invalidate such proceeding, in view of Rev. St. 1909, § 1954, providing that every suit that shall not be otherwise disposed of according to law shall be continued at the term at which the defendant is bound to appear until the next term thereafter, since, if a cause will go from term to term without an entry or a continuance, it will go from day to day without such entry.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 556, 557; Dec. Dig. \Leftrightarrow 219.]

Appeal from Circuit Court, Buchanan County; Chas. H. Mayer, Judge.

Suit by Josie Boyer against the City of St. Joseph, in which William Pape became party plaintiff upon his application. From a judgment for defendant, plaintiffs appeal. Affirmed.

This action was instituted by appellant Josie Boyer for herself and all other persons similarly interested to enjoin the enforcement of a judgment of condemnation entered in the circuit court of Buchanan county, in what are known locally as the "parkway proceedings," and to remove from the title of appellant Josie Boyer the apparent lien of an assessment for benefits made in said proceeding. A few months later William Pape became a party plaintiff upon his application, he being one of the persons similarly interested and for whose benefit the action was originally brought. The trial court denied appellants any relief, and found the issues for respondent city.

The petition makes no objection to the regularity of the proceedings of the circuit court in the Parkway matter except this: That the notice to the property owners notified them that a jury would be impaneled in Division No. 1 of the circuit court on June 20, 1912, to assess the damages and benefits, but that the court took no action in the matter on that day and made no order continu-

ing it to another day, and that on the following day, June 21, 1912, the court without any further notice impaneled a jury and proceeded in the matter. The petition then alleges that by reason of such failure to act on June 20, 1912, the proceedings thereafter were void and resulted in an effort to take the property of plaintiff and of others similarly situated without due process of law. It alleges that said proceedings constituted a cloud on the title of the property of plaintiffs and of others similarly situated. The petition prays that such proceedings be adjudged null and void and that the city be enjoined from proceeding to enforce the judgment therein, and for the removal of said cloud on the title.

The answer alleges that plaintiff herein was in court on June 20, 1912, in answer to the summons issued to her in the proceedings; that the circuit court in which the proceedings were pending took no action on June 20, 1912, in said matter because it was busy in trying another case.

Coplaingiff William Pape was placed upon the stand and testified that upon June 20th, in response to the order of publication, he attended upon division No. 1 of the circuit court of Buchanan county, Mo., and remained a considerable time, but that no appointment of commissioners being made, and being informed by a representative of the office of the city counselor that the parkway matters would not come up at that time, and that said representative did not know when they would come up, witness left the courtroom and went home.

Charles F. Strop and Graham & Silverman, all of St. Joseph, for appellants. Fulkerson & Fulkerson and Chas. L. Faust, City Counselor, all of St. Joseph, for respondent.

ROY, C. (after stating the facts as above). Section 1954, R. S. 1909, provides:

"Every suit that shall not be otherwise disposed of according to law shall be continued at the term at which the defendant is bound to appear, until the next term thereafter."

In *Horn v. Excelsior Springs Co.*, 52 Mo. App. 548, final judgment was rendered and a motion for a new trial was filed at the same term. No further entry was made at that term, nor was there any order of continuance. At the following term, the motion for a new trial was overruled and an appeal taken. The point was made that the proceedings at the last term were void because there was no order of continuance to that term. The Court of Appeals in that case said, "A cause undisposed of will go to the succeeding term, though no formal order of continuance is entered."

Certainly if a cause will go from term to term without an entry of a continuance, it will go from day to day without such entry. Ordinarily, when a party to a suit is properly summoned or notified so as to give the court

jurisdiction of his person, that jurisdiction continues until the cause is disposed of or he is discharged by the court.

The judgment is affirmed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

LA VEINE v. TIFFANY SPRINGS & LAND CO. et al. (No. 17631.)

(Supreme Court of Missouri, Division No. 2. July 5, 1916.)

1. CORPORATIONS §240(1)—CREDITOR.

Where the organizers of a corporation paid for their stock by a conveyance of land of inferior value, plaintiff, who purchased stock from one organizer, was not a creditor of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 934, 939-942, 1099-1100½; Dec. Dig. §240(1).]

2. CORPORATIONS §240(1)—STOCKHOLDERS—RIGHTS.

Where the organizers of a corporation paid for their stock by conveyance of land of inferior value, plaintiff, who purchased stock from one organizer with notice that it was so paid for, had no right, as against another stockholder and organizer, based on the ground that the latter's stock was not fully paid for.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 934, 939-942, 1099-1100½; Dec. Dig. §240(1).]

3. CORPORATIONS §312(6)—DIRECTOR AND OFFICER—FIDUCIARY RELATIONSHIP—PURCHASE UNDER DEED OF TRUST.

The director and president of a corporation owning land subject to a deed of trust was not in a position of trust which prohibited him from purchasing at trustee's sale under a deed of trust, where he purchased the notes secured, because the holder was threatening foreclosure and held them about two years, during which time the corporation might have prevented a sale by paying the notes had it been able to do so.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1384, 1388; Dec. Dig. §312(6).]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Proceedings by E. M. La Veine against the Tiffany Springs & Land Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This is a proceeding by a stockholder in said corporation. The petition alleges the sale of the real estate of the corporation under a deed of trust and its purchase by the president of the corporation at such sale. The prayer of the petition is "for such relief as to the court in equity and good conscience may seem meet and proper." The judgment was for the defendants.

In June 1905, Dr. Samuel P. Ford was the owner of 70 acres of land in Platte county about seven miles from a railroad. It was

rough farm land, very little of it being in cultivation, and worth about \$40 an acre for farm purposes. It had mineral springs on it. It was incumbered with a deed of trust originally for \$2,100, but which was reduced to \$1,500, payable to the Exchange Bank of Platte City. The defendants Dr. Tiffany, McLaughlin, and Engleman agreed to form a corporation to purchase that land, plat it into lots and blocks, sell the lots, and sell water from the springs, and to establish a "watering place." They purchased the land from Ford subject to said deed of trust. In consideration therefor they paid Ford \$8,650 as follows: \$1,050, in cash, each paying a third thereof; they executed a deed of trust on the land, dated May 18, 1906, to secure two notes payable to said Ford, one for \$1,500, with interest from date at 6 per cent. per annum payable semiannually, and the other for \$4,100, with interest from maturity at the same rate, both payable June 19, 1912. There was the usual power of sale in case of default. The other \$600 of the purchase money was paid by a conveyance of four lots at \$150 each.

The capital stock of the corporation amounted to \$20,000. The shares were \$100 each. Tiffany and McLaughlin each received 67 shares, and Engleman 66 shares. The only payment made for that stock was the conveyance by those parties of the land in question to the corporation. Both those deeds of trust were then on the land and on record. Very soon after those transactions McLaughlin sold and transferred 30 shares of the stock held by him to the plaintiff for the consideration of \$40 per share. Prior to the transfer of that stock to the plaintiff the latter was in full possession of all the facts as to the financial condition of the corporation, after an investigation by his attorney, and was advised by his attorney not to purchase the stock. He purchased the stock and became a director in the corporation and served as such for several years. The purpose for which that corporation was organized could not be carried out. Very few lots were sold, and the water did not meet with any considerable demand. About 1907 the holder of the notes secured by the last deed of trust threatened foreclosure because of the nonpayment of the interest on the \$1,500 note. Tiffany, to protect his interests, purchased all the notes secured by both the deeds of trust, and, in 1909 caused the land to be sold under the last deed of trust, and had the land purchased for his benefit. He paid \$6,881.50 for those notes, and in addition thereto he paid other items for the corporation, so that the total amounted to \$7,841. In addition to that judgments were rendered against the corporation and said Tiffany for about \$1,000. During the trial the defendant Tiffany offered plaintiff that he (Tiffany) would accept the money which he was out on behalf of the corporation, in-

cluding interest at 5 per cent., and convey the land to the plaintiff. The offer was not accepted.

New, Miller, Camack & Winger, of Kansas City, for appellant. Harding, Murphy & Harris, of Kansas City, for respondents.

ROY, C. (after stating the facts as above).

[1] Appellant makes the bold claim that Tiffany had no right under the law to purchase the land under the deed of trust, because he was a stockholder who had not paid full value for his stock. He has cited a long line of cases, holding that a creditor of a corporation may recover from a stockholder the balance which should have been paid on stock which was not fully paid in money or money's worth. The plaintiff is not a creditor of the corporation and, for that reason, has no right to rely on that line of authorities.

[2] II. Plaintiff purchased his stock from McLaughlin with full knowledge of the financial condition of the corporation. Under the circumstances, that implies that he knew that the conveyance of the land to the corporation was the only payment made for the stock. Having such notice, his rights were the same as those of McLaughlin from whom he purchased. McLaughlin was one of the original subscribers for the stock, and "stood in the same boat" with Tiffany, as held in *Meyer v. Mining & Milling Co.*, 192 Mo. loc. cit. 196, 90 S. W. 821. That case holds that stockholders who have not paid in full for their stock are in *pari delicto*. In that case it was held that the plaintiff was assignee of the stock by operation of law, and was in no better position than the one from whom he got his stock. Here the plaintiff took his stock from McLaughlin with notice that it was not fully paid for. The fact that the stock was not fully paid for gives plaintiff no right whatever as against Tiffany.

[3] III. Appellant contends that Tiffany, as director and president of the corporation, was in a position of trust which prohibited him from purchasing at the sale made by the trustee. Tiffany purchased the notes secured by the second deed of trust because the holder was threatening foreclosure. He held those notes about two years, during which the corporation might have prevented a sale by paying the notes had it been able to do so. The corporation was a failure. The enterprise did not "go through." All parties were doubtless disappointed. There was no course left for Tiffany but to save himself in any way consistent with his duty to the corporation. The corporation had no right to demand that he should release those deeds of trust without payment, nor that he should allow them to stand indefinitely without enforcing their payment by sale under them. His conduct was reasonable and considerate for all concerned, and he showed his good faith at the trial by offering to convey the land to the plaintiff, on being refunded his

money with 5 per cent. interest. The offer was not accepted. It was held in *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328, that a director is not prohibited from lending money to the corporation when it is needed for the benefit of the corporation, when the transaction is open and free from blame; and that he has the right to purchase the property at a sale made by the trustee under a deed of trust made to secure the payment thereof. See, also, *Foster v. Belcher's Sugar Refining Co.*, 118 Mo. 238, 24 S. W. 63; *Heldbreder v. Cold Storage Co.*, 184 Mo. 446, 83 S. W. 466.

The judgment is affirmed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

WILLIAMS v. SANDS et al. (No. 18740.),
(Supreme Court of Missouri, Division No. 2,
July 5, 1916.)

1. APPEAL AND ERROR § 934(1)—PRESUMPTION—APPROVAL OF JUDGMENT BY COURT.

Where no effort was made on appeal to show that the judgment was not approved by the court, the docket entry being only a brief statement of the judgment, and not contradictory of the full entry made in the record by the clerk, there being nothing to show that the clerk made any mistake in entering the judgment, it will be presumed that the entry as made by the clerk was approved by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777, 3780, 3781; Dec. Dig. § 934(1).]

2. APPEAL AND ERROR § 1096(3) — SUBSEQUENT APPEALS—SCOPE OF REVIEW.

The contention that part of the judgment was not supported by any evidence should have been presented on the former appeal from the original judgment, which was affirmed, and cannot be considered on appeal from an order of the trial court striking out such part of the judgment after affirmance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4355; Dec. Dig. § 1096(3).]

3. JUDGMENT § 315—AMENDMENT—GROUNDS—MISTAKE—RECORD TO AMEND BY.

An order striking out part of an original judgment after affirmance on appeal was erroneous, where there was nothing in the record, or the judge's docket, or the clerk's minutes or papers on file, to show a mistake in the entry.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 613; Dec. Dig. § 315.]

Appeal from Circuit Court, Benton County; C. A. Calvird, Judge.

Action by John Hall Williams against M. L. Sands and another. From an order striking out part of the entry of judgment previously made in favor of plaintiff, the latter appeals. Judgment reversed.

See, also, 251 Mo. 147, 158 S. W. 47.

The trial court, on motion of defendants, struck out a part of the entry of judgment

previously made in favor of the plaintiff herein. From that order the plaintiff has appealed.

The petition in the original suit was in two counts, the first to quiet title to real estate, the second in ejectment as to the same land. The petition alleged the value of the monthly rents and profits to be ten dollars per month. It asked judgment for possession and for the monthly rents and profits. The cause was tried without a jury. There was evidence that the land was wild, rocky, unfenced timber land, with a house on it which cost five or six hundred dollars. There was no other evidence as to its rental value. After hearing the evidence, the trial court on August 14, 1909, made the following entry on its docket in the cause: "Decree declaring title in plaintiff on first count. Judgment for plaintiff on second count. Motion for new trial." The judgment as actually written in the records of the court found the value of the monthly rents and profits of the land to be ten dollars per month and adjudged that the plaintiff recover possession and value of the monthly rents and profits until the plaintiff should be restored to the possession of said lands.

The defendants appealed from the original judgment of the circuit court to this court, resulting in an affirmance, as shown in 251 Mo. 147, 158 S. W. 47. Nothing is there said as to the rents and profits. After the determination of that appeal, the defendants, on December 8, 1913, filed their motion in the circuit court for an amendment of the original judgment as entered on the records, by striking out the part in reference to monthly rents and profits. The grounds of the motion were that part of the judgment was not rendered by the court, but was entered by mistake of the clerk. The evidence on the hearing of that motion shows that no evidence was introduced at the original trial as to the value of the rents, except as above stated. The docket entry of the court, as above shown, was put in evidence; but there is nothing in the record before us to show at what time the original entry of judgment was written by the clerk, nor to show whether the entry as to the rents and profits was made at the same time that the remainder of the entry was made.

W. S. Jackson, of Warsaw, for appellant.
G. W. Barnett, of Sedalia, for respondents.

ROY, C. (after stating the facts as above).

[1] I. Section 3849, R. S. 1909, provides that the court docket "shall be arranged appropriately, with spaces for the names of attorneys, and brief statements of the orders and judgments of the court in the respective cases." Section 3851 provides that the full entries of the orders and proceedings of each day shall be read in open court on the morning of the succeeding day, etc. In *Kreisel v. Snavely*,

135 Mo. App. 155, 115 S. W. 1059, it was held that, in the absence of any showing to the contrary, it will be presumed that the law was complied with, and that the record of the judgment as entered by the clerk was read in open court, and approved by the court, as provided by the statute. Not the slightest effort has been made in this case to show that the judgment in controversy was not so approved. The docket entry was only a *brief* statement of the judgment, and not at all contradictory of the *full* entry made in the record by the clerk. There is nothing to show that the clerk made any mistake in entering the judgment; but, on the other hand, the presumption is that the entry as made by him was approved by the court. The docket entry does not show what evidence was introduced, nor whether that evidence entitled plaintiff to recover possession of all, or only a small part, of the land. It does not show what the evidence was on the value of the monthly rents and profits. It does not show how much land, or what rents and profits, the plaintiff recovered; but, as far as it goes, it is in harmony with, and does not contradict, any part of the judgment as entered. *Belken v. Rhodes*, 76 Mo. 643, says that there must be something in the record, or the judge's docket, or the clerk's minutes or papers on file, to show such mistake and in what it consists. See, also, *Wooldridge v. Quinn*, 70 Mo. 370.

[2, 3] II. The proposition that the judgment for the value of the monthly rents and profits was not supported by any evidence is one which could have been presented on the former appeal. It has no place here.

The judgment striking out that portion of the original judgment in regard to rents and profits is reversed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

STATE v. OWENS. (No. 19383.)

(Supreme Court of Missouri, Division No. 2.
July 5, 1916.)

1. ESCAPE §1 — ELEMENTS OF OFFENSE — CHARACTER OF CUSTODY.

A prisoner placed in the custody of a street commissioner for the purpose of working on city streets, and who escapes, is guilty of no offense under Rev. St. 1909, § 4381, which defines and applies only to the escape of persons confined in the county jail, or held in custody going to such jail.

[Ed. Note.—For other cases, see *Escape*, Cent. Dig. § 1; Dec. Dig. §1.]

2. STATUTES §241(1)—PENAL PROVISIONS—CONSTRUCTION.

Criminal statutes must be strictly construed.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 322; Dec. Dig. §241(1).]

Appeal from Circuit Court, Howell County;
W. N. Evans, Judge.

Ted Owens was convicted of violating Rev. St. 1909, § 4381, as to escapes, and he appeals. Reversed, and defendant discharged.

Under an indictment attempting to charge the defendant with a violation of section 4381, R. S. 1909, defendant was tried in the circuit court of Howell county, found guilty, and his punishment assessed at two years in the penitentiary. Defendant has duly perfected an appeal to this court.

Due to the conclusion which we have reached in this case, it will only be necessary to consider the indictment, which, omitting caption and formal parts, was as follows:

"The grand jurors for the state of Missouri, summoned from the body of Howell county, impaneled, sworn, and charged to inquire within and for the body of the county of Howell, now here in court, upon their oath present and charge that at the March term, 1915, at and in the county of Howell and state of Missouri, one Ted Owens, was then and there duly convicted and found guilty by a jury of the offense of felonious assault, and his punishment fixed at a fine of \$100, in default and failure to pay which in accordance with said conviction, he, the said Ted Owens, was by the said court duly committed to the county jail of said county, and it was ordered by the court that he, the said Ted Owens, be placed in custody of the street commissioner of the city of West Plains, a city of the third class, and required to work on the streets of the said city until said fine and costs of said action be paid, and he be discharged by due course of law; and that in accordance with the orders of said court the said Ted Owens was so committed to the custody of one N. F. Webster, who was then and there duly qualified and acting street commissioner and guard, to be worked as a prisoner on the streets of the city of West Plains, as aforesaid, and that afterwards, to wit, on the — day of May, 1915, at and in the said city of West Plains, in the county of Howell and state of Missouri, the said Ted Owens, while then and there in the custody of the said N. F. Webster, street commissioner and guard aforesaid, did then and there unlawfully, willfully, and feloniously break custody, run away, and escape from the said N. F. Webster, street commissioner and guard aforesaid, and that the said N. F. Webster was then and there duly authorized and empowered to act, and was then and there acting as such officer, street commissioner, and guard under and by authority of law; and that the said Ted Owens did then and there unlawfully and feloniously break away, run, and escape from the custody of the said N. F. Webster, street commissioner, officer, and guard as aforesaid; contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state."

M. E. Morrow, of West Plains, for appellant. John T. Barker, Atty. Gen. (Kenneth O. Sears, Asst. Atty. Gen., of counsel), for the State.

WILLIAMS, C. (after stating the facts as above). [1] Section 4381, R. S. 1909, upon which this prosecution was based, reads as follows:

"If any person confined in any county jail upon conviction for any criminal offense, or held in custody going to such jail, shall break such prison or custody, and escape therefrom,

he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years, or in a county jail not less than six months, to commence at the expiration of the original term of imprisonment."

It will be noted that the above section limits the violation to a breaking and escaping from a "county jail" or from "custody going to jail," and the statute in no manner undertakes to prescribe a penalty for escaping from a street commissioner into whose custody he is placed for the purpose of being worked upon the streets, as charged in the present indictment. Our attention has not been called to a statute, nor have we been able to find one, making the acts charged in the present indictment a criminal offense. As much is virtually conceded by the brief of the learned Attorney General. This being true, we need not determine whether the information sufficiently charges a lawful custody in said street commissioner.

[2] It is a well-established rule that criminal statutes must be strictly construed. Very appropriate to the discussion here is the language used by the Kansas Supreme Court in discussing a section (182) of the Kansas Code, which appears to be almost an exact duplicate of section 4381, R. S. 1909. The court said:

"Section 182 has reference to persons confined in a county jail, or held in custody going to such jail. As a rule, penal statutes must be strictly construed, and they cannot be extended beyond the grammatical and natural meaning of their terms, upon the plea of a failure of justice. *Remington v. State*, 1 Or. 281; *State v. Lovell*, 23 Iowa, 304; *Gibson v. State*, 38 Ga. 571. We are not at liberty to interpolate into the statute 'city prison,' nor can we judicially determine that a 'city prison' is a 'county jail.' It is therefore our opinion that the matters charged in the information do not constitute any offense within the statute. The omission is one for which the Legislature is responsible. It is probably a casus omissus, which the Legislature may, but the court cannot, supply." *State v. Chapman*, 33 Kan. 134, 5 Pac. 768.

The judgment is reversed, and defendant discharged.

ROY, C., concurs.

PER CURIAM. The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All of the Judges concur.

STATE ex rel. CITY OF MONETT v. THURMAN, Circuit Judge. (No. 19331.)

(Supreme Court of Missouri. In Banc. July 3, 1916. Rehearing Denied July 18, 1916.)

1. STATUTES § 77(2)—SPECIAL LAWS—LOCAL OPTIONS—ELECTIONS.

Treating local option elections as a class being justified, Rev. St. 1909, § 7242, authorizing contest of such an election, is not a special law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 80, 81; Dec. Dig. § 77(2).]

2. STATUTES § 85(4)—SPECIAL LAWS—REGULATING COURT PRACTICE.

Rev. St. 1909, § 7242, providing for contest of local option elections in the same manner as is provided by law for contest of elections of officers, though providing that the action shall be brought against the municipal body holding the election, is not special legislation regulating practice, in courts, in violation of Const. art. 4, § 53, par. 33, by partial repeal of a general law, though the general law provides that all suits shall be prosecuted by the real party in interest.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 94; Dec. Dig. § 85(4).]

3. INTOXICATING LIQUORS § 37—LOCAL OPTION ELECTION—CONTESTS.

Contests of local option elections and legislation regulating them is not precluded by Const. art. 8, § 9, providing for trial of contested elections of officers by such courts or judges and under such procedure as shall be fixed by general law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.]

4. INTOXICATING LIQUORS § 37—LOCAL OPTION ELECTION—CONTEST.

Local option does not have to be adopted to have the provision of Rev. St. 1909, § 7242, for contest of a local option election in effect, any more than it does to have the provision for holding the election in effect.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.]

5. MUNICIPAL CORPORATIONS § 870—PUBLIC FUNDS FOR PRIVATE PURPOSE—LOCAL OPTION CONTEST.

Rev. St. 1909, § 7242, making the city holding a local option election defendant in a contest thereof, is not void as requiring it to expend public money for a private purpose; the only expenditure, if any, devolved on it being payment of costs.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1817; Dec. Dig. § 870.]

6. EVIDENCE § 82—REGULARITY OF JUDICIAL PROCEEDINGS.

It will, in a proceeding to prohibit enforcement of an order for production of the ballots in a contest for fraud of a local option election, be assumed that the judge will not disregard the law as to secrecy of the ballot.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. § 82.]

Original proceedings in prohibition by the State, on the relation of the City of Monett, against Hon. B. G. Thurman, Judge of the Barton County Circuit Court. Petition discharged.

I. V. McPherson, of Aurora, and T. D. Steele, of Monett, for relator.

BLAIR, J. By this proceeding the exercise of our original jurisdiction in prohibition is invoked. The pertinent allegations of the petition for the writ are that a local option election was duly called and was held in the city of Monett; that the result of the election was a majority for the sale of intoxicating liquors; that thereafter certain citizens of Monett, proceeding under section 7242, R. S. 1909, gave notice of contest, in which notice it was charged, among other things, that the pollbooks, returns, canvass

and recorded result of the election were false by reason of mistakes and frauds in the election and the voting and in the ascertainment of the result; that the majority of the lawful votes were cast against the sale of intoxicating liquors, and that the result so should have been declared, and that the court now so should declare the result upon a fair count. Then followed a prayer that the pollbooks, returns, ballots, and results be purged of errors, frauds, and mistakes. The notice then stated that "contestants further specify grounds for the contest of the said election * * * as follows." Thereupon it was charged that 88 named persons, alleged to be disqualified for various reasons, cast ballots which were counted for the sale of intoxicating liquors.

A counter notice was filed which attacked, on various grounds, the constitutionality of the election contest provision in section 7242, R. S. 1909, and charged that the pollbooks, returns, canvass, and declared result were false and incorrect by reason of mistakes and frauds of disqualified persons who cast ballots which were counted against the sale of intoxicating liquors, and prayed that the court purge the pollbooks, canvass, ballots, and declared result of such frauds and mistakes. The counter notice then named 21 persons and alleged they were disqualified, but cast ballots which were counted against the sale of intoxicating liquors. The counter notice also contained charges of irregularities of various kinds during the election.

After the filing of the notice and counter notice, the venue was changed from Barry to Barton county. Respondent is the judge of the circuit court of Barton county. In the course of the proceedings, the circuit court of Barton county entered its order as follows:

"Now, on this day, come said parties by their respective attorneys, and upon hearing plaintiffs' application for orders concerning the preservation and production of evidence, it appears to the court, viz.:"

Then follows a paragraph naming the city officers who are in charge of the "ballot boxes, ballots, pollbooks, and certificates used and made at and concerning and returned from the 'local option election' mentioned." Another paragraph names the city clerk and recites that he has charge, for the city, as agent and custodian, of the boxes, books, certificates, and returns and the journal of the proceedings of the mayor and council purporting to show the canvass of the returns and the ascertainment and declaration of the result of the election, and proceeds:

"That for the proper and fair trial of the issues presented by the pleadings in this case, each and all of the above-mentioned boxes, ballot boxes, certificates, journals, and records are material and necessary items of evidence for the establishment of the truth of the issues and opposing contentions presented for trial by the court."

Another paragraph names the judges of election who are in charge of the duplicate

pollbooks, and the final paragraph is as follows:

"Now, therefore, the court does now order and require of the defendant city and its mayor and councilmen and its clerk and of the said election officers, the production by them respectively of the said ballots and ballot boxes, pollbooks, certificates, returns, records, journals, documents and things so in their possession or control at the trial of this cause for use therein as evidence, and that they, each and all, be, and they are ordered and required in the meantime, to safely and securely hold, retain, preserve, and maintain the same intact and free from injury in any way, and that these orders be and continue effective in all respects until further ordered by this court, and that mandates accordingly issue to them, and that they each and all be summoned by subpoena duces tecum as witnesses, and respectively required to produce the said instruments of evidence at such times and places as shall be fixed or designated by the further docketing of the cause or under the order of this court or of its judge, for the taking of evidence or for the trial of the issues in this cause, and that such subpoenas issue by the clerk of this court on request of plaintiffs."

The petition alleges that unless respondent is prohibited he will enforce the order set out, and then sets forth the various legal objections to which the order is thought to be obnoxious, and prays that respondent be prohibited from proceeding with it.

The return disclaims any intent on respondent's part to violate any of the numerous constitutional provisions invoked by relator in its petition, and then advances argument in support of the validity of the order. This last is in response to the numerous constitutional questions tendered by the petition.

Upon the coming in of the return, relator moved for judgment on the pleadings. Further references to the pleadings will be made in the opinion as the necessity may arise.

[1] I. It is contended the portion of section 7242, R. S. 1909, purporting to authorize the contest of a local option election is a special law, and therefore unconstitutional. The argument is that a general law providing for the contest of elections, under the initiative and referendum, elections involving city charters, tax levies, bond issues, acquisition of public utilities, extension of city limits, approval of franchises, to provide public buildings, organization of school and road districts, adoption of the stock laws and the like could have been made to apply, and that there is no distinction between elections of these sorts and local option elections of a character justifying the treatment of the latter as a separate class for the legislative purpose evinced by the contest amendment to the section mentioned.

To the local option law itself objection was strenuously made that it was special and local, and therefore void by force of the constitutional provision relator now invokes. This court held that objection untenable (*Ex parte Swann*, 96 Mo. 44, 9 S. W. 10; *State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469), and that conclusion carries with it another which is that the contest provision add-

ed in 1909, being germane to the subject-matter of the act, is no more local or special than the rest of the act. Further, the grounds justifying the treatment of local option elections as a distinct class for legislative action are the same as those justifying the submission of the act to an election in the first place. The general rule (*State ex rel. v. Roach*, 258 Mo. loc. cit. 564, 167 S. W. 1008), requiring classification for legislative action to be based upon some distinctive feature germane to the subject-matter of the legislation sought to be applied exclusively to such class, is satisfied in this case.

[2] II. It is next insisted the amendment of 1909 to section 7242, R. S. 1909, is violative of the constitutional inhibition (section 53, art. 4, Const.) upon the passage of local or special laws regulating practice in the courts. The basis of this contention is that the general law provides that all suits shall be prosecuted by the real party in interest, and, relator asserts, the city, made defendant by the statute (section 7242, R. S. 1909) is without interest in the matter. Thus relator concludes this particular proceeding is made an exception to the general law, and the amendment is therefore void. Article 4, § 53, par. 33, Const. Whatever of substance there is in this argument is answered by the fact that the amendment to section 7242 incorporates, by reference, the general contest provision as to practice in contest proceedings, for the enactment of which provision there is direct constitutional authority. Section 9, art. 8, Constitution of Missouri. We see no reason for doubting the existence of legislative authority to provide that the city (or county) shall be named as defendant in local option contest proceedings and proceeded against as the representative of all persons interested. *State ex rel. v. Carter*, 257 Mo. 52, 185 S. W. 773.

[3] III. Another contention is that the contest provisions of section 7242 are unconstitutional because of conflict with section 9, art. 8, Constitution of Missouri, reading as follows:

"The trial and determination of contested elections of all public officers, whether state, judicial, municipal or local, except Governor and Lieutenant Governor, shall be by the courts of law, or by one or more judges thereof. The General Assembly shall, by general law, designate the court or judge by whom the several classes of elections shall be tried, and regulate the manner of trial and all matters incident thereto; but no such law, assigning jurisdiction or regulating its exercise, shall apply to any contest arising out of any election held before said law shall take effect."

The General Assembly long ago passed the general law intended by this section, and section 7242 adopts its provisions as to jurisdiction and procedure in local option contests. The section of the Constitution set out does not restrict contests to elections of officers. As to such contests it provides the sole method and excludes other methods (*Henderson v. Koenig*, 168 Mo. loc. cit. 309, 68 S. W.

72, 57 L. R. A. 659 et seq.), but we find no authority for the conclusion that a constitutional direction with reference to procedure as to a particular and specified matter precludes all legislative action upon another and different matter.

[4] IV. It is urged that the local option law could not take effect until adopted; that the contest provision in section 7242 is a part of that law; that it, therefore, could not take effect until the law was adopted; that election contests are unknown to the common law; that the law has not been adopted in Monett; hence, it is contended, it follows there is no law in force authorizing a contest of the Monett election.

This argument proves too much. Strictly applied it would prevent the holding of local option elections. The provision for the election is as much a part of the act as is the amendment to section 7242. So far as concerns the contest proceedings, they are in pari materia with the provisions concerning the procedure prior to the calling of the election and the holding of the election, and simply constitute a part of the machinery provided for determining the result of the election.

[5] V. It is insisted the city has no real interest in a local option election contest, and that the statute making it a party thereto is void, since, it is said, it requires the city to expend public funds for a private purpose. The payment of costs, if exacted, is the only expenditure which could be said to be devolved upon the city by the act. This record does not present the question whether the city could be compelled to pay costs. Whether it could be so compelled can be determined when the question is presented.

[6] VI. So far as concerns the argument that the enforcement of the order above set out necessarily includes the violation of the constitutional provisions guaranteeing the secrecy of the ballot, we are of the opinion the order does not require such construction. The return disclaims any intent of that kind. We shall not assume that respondent will disregard the law upon this subject, but, on the contrary, shall assume that he will be guided by our decisions (*Gantt v. Brown*, 238 Mo. 560, 142 S. W. 422) in the enforcement of the order. The issues made seem to call for a general recount of all the ballots and a more particular examination of over 100 against which specific objection is lodged. The duty and power of the trial court in such circumstances is well defined, and the learned trial judge was right in preserving the evidence necessary to the performance of that duty and the exercise of that power.

The preliminary rule is discharged, and the petition dismissed. All concur, except WOODSON, C. J., absent, and BOND, J., not sitting.

ORDELHEIDE v. MODERN BROTHERHOOD OF AMERICA. (No. 16841.)

(Supreme Court of Missouri, Division No. 1.
July 3, 1916.)

1. INSURANCE — 788(1)—MUTUAL BENEFIT ASSOCIATION—SUICIDE—"LEGAL REPRESENTATIVES."

Where a fraternal beneficiary association was chartered under a law of another state, limiting beneficiaries to husband, wife, relative, "legal representatives, heir or legatee" of members, its certificate, payable to "legal representatives," not being authorized by, and therefore not included within, the exemption of Rev. St. 1909, § 7109, as to fraternal beneficiary associations, providing that payments of death benefits shall be to the families, heirs, blood relatives, affianced husband or affianced wife, or to persons dependent upon the member, and that such associations shall be exempt from the provisions of the insurance laws, was an insurance policy to which, by direct provision of section 6945, suicide was no defense, unless it was shown that insured contemplated suicide when taking out the policy, although the association was licensed to do business in Missouri as a fraternal beneficiary association, since the statute, not the license, is the true test, and since the term "legal representatives" must be construed to mean personal representatives, and not "heirs," in view of the language of the law under which the association was chartered, which used both the terms "legal representatives" and "heirs" to denote different classes.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. 788(1).]

For other definitions, see Words and Phrases, First and Second Series, Legal Representative.]

2. INSURANCE — 795—MUTUAL BENEFIT ASSOCIATION—BENEFICIARIES—LEGAL REPRESENTATIVES OF BENEFICIARY.

The proceeds of a fraternal beneficiary association, certificate payable to "legal representatives," go to the estate of deceased member.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1973; Dec. Dig. 795.]

Appeal from Circuit Court, Warren County; James D. Barnett, Judge.

Action by F. A. Ordelheide, administrator, against the Modern Brotherhood of America. Judgment for plaintiff affirmed by St. Louis Court of Appeals (139 S. W. 269), and case certified to the Supreme Court. Affirmed.

David A. Ball, of Louisiana, Mo., and Sam Sparrow, of Kansas City, for appellant. Emil Roehrig, of Warrenton, for respondent.

GRAVES, P. J. This is the second appearance of this case in this court. It was first here upon the theory that a constitutional question was involved. Ordelheide, Adm'r, v. Modern Brotherhood of America, 226 Mo. 203, 125 S. W. 1105, 32 L. R. A. (N. S.) 965. We held that there was no constitutional question involved, and certified the case to the St. Louis Court of Appeals. About the same time we likewise recertified the case of Dennis v. Modern Brotherhood of America to the Kansas City Court of Appeals. Dennis v. Modern Brotherhood, 231 Mo. 211, 132 S. W. 698. When the Dennis Case, supra, was pending here, it was suggested that there

were adverse views upon the question involved by the St. Louis and Kansas City Court of Appeals. Dennis v. Modern Brotherhood of America, supra. These differences seem to have been at least partially settled by the opinion of the majority of the St. Louis Court of Appeals in the instant case, for that opinion cites approvingly the Kansas City Court of Appeals opinions. Judge Reynolds, however, dissents, and certifies. The contention is sharply drawn. Plaintiff contends that whilst defendant was chartered in Iowa as a fraternal beneficiary association, and whilst it was licensed in Missouri, as such, yet the policy actually issued was an old-line insurance policy, and the statute exempting it from our general statute as to suicides has no bearing. Defendant contends, contra. To make the issue plainer, the plaintiff contends that, under the laws of Missouri, pertaining to fraternal beneficiary associations, a certificate payable to the "legal representatives" could not be issued, and, if so issued, it then becomes an insurance policy within the purview of our general insurance laws, and suicide is no defense, unless it be shown that the insured contemplated suicide at the time of taking out the certificate or policy. In the record there was no evidence tending to show that suicide was contemplated by Leek when his certificate was issued. The record shows plaintiff entitled to the full amount, if entitled to recover at all. The judgment of the trial court was for plaintiff for the \$1,000 and some accrued interest, and the majority opinion, of the Court of Appeals by Caulfield, J., affirm this judgment. The case is here in the constitutional way.

The facts of the case are few and simple, and might well be gathered from Ordelheide, Adm'r, v. Modern Brotherhood of America, 226 Mo. 203, 125 S. W. 1105, 32 L. R. A. (N. S.) 965, supra. A restatement will take but short space, and we will therefore restate the facts. The defendant is chartered in the state of Iowa as a fraternal beneficiary association, and for some years prior to, and at the time of, issuing a beneficiary certificate to one Walter L. Leek, of Missouri in 1903 was licensed in Missouri as a fraternal beneficiary association. The certificate was for the sum of \$1,000, as thus expressed therein:

"The Modern Brotherhood of America issues to Walter L. Leek of Warrenton, county of Warren, state of Missouri, this membership certificate, which entitles him to membership in said fraternity, and in case of the death of said member while in good standing, permits his beneficiary to participate in the mortuary fund to the amount of one full assessment on all members in good standing in the fraternity not to exceed one thousand dollars, which shall be paid to legal representatives, related to the member as * * * within ninety days after said satisfactory proofs of such member's death shall have been furnished by the beneficiary to the board of directors at Mason City, Iowa."

The certificate contains the usual suicide clause found in most certificates issued by associations of kindred character. Suicide, whilst sane or insane, voided the certificate. Leek suicided, and his administrator brings this suit.

[1] I. In our judgment the majority opinion of the St. Louis Court of Appeals, which accords with the Kansas City Court of Appeals upon this question, is right. Our statute (R. S. 1909, § 7109) contains this provision:

"Payments of death benefits shall be to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member."

This clause was likewise in the statute at the date of the issuance of the certificate sued upon. The same section contains an exemption clause, in this language:

"Such association shall be governed by this article, and shall be exempt from the provisions of the insurance laws of this state, and shall not pay a corporation or other tax, and no law hereafter passed shall apply to them unless they be expressly designated therein."

This exemption clause was likewise in the statute at the issuance of the certificate involved here. In some particulars the old statute (Acts 1897, p. 132; section 1408, R. S. 1899) was amended in 1909, but not so as to touch the question at issue in the instant case. The last clause is one purely of exemption. In *Schmidt v. Foresters*, 228 Mo. loc. cit. 700, 129 S. W. 653, we practically so said. We then used this language in discussing the act of 1897:

"The act of 1897 simply exempts fraternal beneficiary associations from the general insurance laws. By thus exempting them the Legislature recognized that but for the exemption, their contracts would be governed by the general laws, for if not, there would be no reason for the exemption.

"Nor is it unreasonable to say, as was said in the Jarman Case, that the defendant in the case at bar cannot claim the benefits of an exemption provided by a law until such time as it places itself in a position to claim the benefits of the law, it cannot claim the benefits of the law merely because its contracts are of the character mentioned in the law, but to claim the exemption given, it must come under the law, and make its contracts under the law. If it does that, then the law is read into and becomes a part of the contract, but until it does do that, the general law is and must be read into each and every one of its contracts made with a citizen of Missouri. Not only so, but if such general law once becomes a material constituent part of the contract, it cannot be eliminated therefrom by the subsequent act of the defendant. And we are of opinion that the suicide statute is substantial law, and not merely a statute of procedure."

There, as here, we had an association which in its organization was clearly a fraternal beneficiary association. There, as here, the certificate was in the form usually issued by such an association. There is this difference, however, in the *Schmidt* Case: The beneficiary named was the mother of the insured, whilst here the beneficiary named is "legal representatives." We held in the *Schmidt* Case that the defendant could not

avail itself of this exemption clause, because it had not availed itself of our fraternal beneficiary association laws by taking out a state license prior to the issuance of the certificate. We held, further, that the general law as to suicide applied, notwithstanding the character of the association issuing the certificate, and notwithstanding the form of the certificate. And all this for the reason the defendant was not protected by this exemption clause, because not acting under our law pertaining to fraternal beneficiary association. We then said, and now repeat, "But to claim the exemption given, it [the association] must come in under the law, and make its contracts under the law." The italics have been added in making the quotation here, but our language was carefully measured then, because we were then, as now, settling a dispute between the two courts of appeals.

In the case at bar the defendant did not issue its contract of insurance under our fraternal beneficiary association act, because under that act it could not make "legal representatives" beneficiaries in the contract. It is true that it had license to issue policies under our law, but it did not see fit so to do. It preferred, in violation of our law, to issue a policy authorized by its charter powers in Iowa, rather than one authorized by its license in Missouri. Its measure of authority for legitimate business in Missouri is our statute. The test of the character of the policy it issues is the statute, and not the license it may have obtained. In *State ex rel. v. Vandiver*, 213 Mo. loc. cit. 198, 111 S. W. 913, 15 Ann. Cas. 283, Valliant, J., well said:

"The character of the relator is an essential fact to be shown in this case, because unless it is a fraternal society, as defined by the statute, it has no right to do even the limited kind of life insurance that the statute authorizes; but the fact that it does entirely fill that definition does not authorize it to go beyond the limit prescribed by the statute. If the relator, while issuing only such life insurance policies as the statute authorizes and holding a license from the insurance department, should be called into court to answer by what authority it is issuing such policies, it would be sufficient to say: We are a fraternal society, with our lodge system, our ritual, our representative form of government and we are not doing this for profit. But if it is issuing policies of a character not authorized by the statute, then its fraternal character, its lodge system, its ritual, its form of government, and its no-profit plan, would be no answer or justification of its conduct."

In *Toomey v. Supreme Lodge*, 147 Mo. 129, 48 S. W. 936, it was held that the defense of suicide was unavailing because, although the defendant was a fraternal beneficiary society, yet the policy sued on was an old-line policy of life insurance, and therefore subject to the general statute, and the defendant was liable as an old-line company would be. In *Aloe v. Fidelity M. Life Ass'n*, 164 Mo. 675, 55 S. W. 993, it was held that, although the defendant was chartered to do business only on the assessment plan, yet the policy

It had issued in that case was not on that plan, but an old-line policy, and therefore the defendant was held liable as an old-line company. Other cases to the same effect are referred to in the opinions in those cases. We have underscored some pointed language of the distinguished judge writing that opinion. In that case the relator was clearly a fraternal beneficiary association, and was chartered as such, but it was seeking license to do business, not authorized by our law pertaining to fraternal beneficiary associations. This emphasizes the fact that the character of the business done, and the policy issued, is not measured by the character of the organization, but by the law which prescribes the character of the policy which can be issued under that law. If the policy issued is not one authorized by the law, the association issuing it cannot avail itself of the exemption given in the law. This is reasonable, because an exemption is in the nature of a privilege granted, and such privilege ought not to be granted unless the association in all its doings comes in fairly and squarely under the law giving the exemption or privilege. Such seems to be the view taken by the majority opinion of the St. Louis Court of Appeals, and also by the Kansas City Court of Appeals in some three cases, cited in that opinion. If such foreign fraternal beneficiary society is duly licensed in this state, it can issue certificates or policies, as authorized by our laws, and as to such can claim the benefits of the exemption, but if it issues a policy not authorized by our law, it has no right to claim the exemption. For a fuller discussion I leave this question to the majority opinion of the St. Louis Court of Appeals in this case, and to the following cases by the Kansas City Court of Appeals: *Herzberg v. Modern Brotherhood of America*, 110 Mo. App. 328, 85 S. W. 986; *Wilson v. Benevolent Association*, 125 Mo. App. 597, 103 S. W. 109; *Kroge v. Modern Brotherhood of America*, 126 Mo. App. 693, 105 S. W. 685; *Dennis v. Modern Brotherhood of America*, 119 Mo. App. loc. cit. 214, 95 S. W. 967.

[2] II. In the dissenting opinion it is learnedly argued that the construction of the words "legal representatives" as given by the majority opinion contravenes certain rulings of this court. We do not think so. We are cited to *Loos, Guardian, v. Life Insurance Co.*, 41 Mo. 538, and *Ewing v. Shannahan*, 113 Mo. 194, 20 S. W. 1065, and some cases from our Courts of Appeals. The meaning of words must be gathered from the context. Generally speaking, "legal representatives" do not mean "heirs," but in some cases, owing to the peculiar manner in which the words have been used, they have been construed to mean "heirs." But let us get the situation here. It is clear that this defendant was issuing policies or certificates under

its charter powers. Its charter powers must be sought from the Iowa fraternal beneficiary association act. As to beneficiaries, that law reads:

"No fraternal association created or organized under the provisions of this act shall issue any certificate of membership to any person under the age of 15 years, nor over the age of sixty-five years, *nor unless the beneficiary under said certificate shall be husband, wife, relative, legal representative, heir or legatees of such member.*"

Note the language of this law. It not only uses the term "legal representative," but also the term "heir." In the connection in which the term "legal representative" is here used, it cannot be said to mean "heir" without convicting the Legislature of pure ignorance. The Legislature was determining who should be made beneficiaries coming under the law, and it proceeded to name the different classes. In so doing the Legislature made "legal representative" one class of beneficiaries and "heirs" another class. These two are, and were intended to be, just as distinct as the classes of "husband," "wife," "relative," or "legatee." Under this statute the term "legal representative" cannot be construed to mean "heir." It can only be construed as the majority opinion construed it. When Leek applied for the certificate he named "legal representative" as the beneficiary. The certificate was so issued; and, when we consider the Iowa law under which defendant was chartered, it is clear that the parties understood "legal representative" in the sense of personal representatives and not in the sense of heirs. On this state of facts, this court has never adjudged "legal representatives" to mean "heirs," nor have we so done under any similar state of facts. That this policy was issued with the Iowa law in view there is no question. That the Legislature of that state never used the term "legal representative" in the sense of "heirs" is apparent, because of the use of both terms. The fact that under our law a "legal representative" cannot be made a beneficiary does not change the situation. It is clear that the parties intended the amount of the policy to go to the estate. By the judgment of the circuit court, it so went.

Let that judgment be affirmed. It is so ordered. All concur, except WOODSON, J., absent.

STROTHER v. MISSOURI, K. & T. R. CO.
(No. 17917.)

(Supreme Court of Missouri, Division No. 2.
July 5, 1916.)

APPEAL AND ERROR ~~FROM~~ WRIT OF ERROR TO
SUSTENSION OF MOTION FOR NEW TRIAL—
STATUTES.

Under Rev. St. 1909, § 2038, giving the right to appeal from an order granting a new trial, and in other cases, and section 2054, providing for a writ of error only on a final judgment, the propriety of the trial court's action in sustaining a motion for new trial cannot be listed under a

writ of error, as such an order is not a final judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. ¶ 5.]

Error to Circuit Court, Jackson County; Wm. O. Thomas, Judge.

Action by Homer S. Martin against the Missouri, Kansas & Texas Railroad Company. To review an order sustaining defendant's motion for new trial, Sam B. Strother, administrator of plaintiff's estate, in whose name the cause was revived after plaintiff's death, brings error. Writ of error quashed.

Homer S. Martin recovered judgment against the defendant in error for \$14,000 as damages for personal injuries. A motion for a new trial on the part of the defendant was sustained. From the order sustaining that motion the plaintiff came to this court on a writ of error. Since the writ issued the plaintiff died, and the cause has been revived in the name of his administrator.

Yates & Mastin and Geo. B. Strother, all of Kansas City, for plaintiff in error.

ROY, C. Defendant in error makes the point that the propriety of the trial court's action in sustaining a motion for a new trial cannot be listed under a writ of error. We think the point well taken. Section 2054 of our Revised Statutes provides for a writ of error only on a final judgment. Section 2038 gives the right to appeal from an order granting a new trial from an interlocutory judgment in an action of partition and in other cases there mentioned. Those sections were construed in *Kroeger v. Dash*, 82 Mo. App. 332, in a short but sound opinion, holding that a writ of error cannot be brought on an order granting a new trial, for the reason that such order is not a final judgment. That opinion was cited with approval by this court in *Padgett v. Smith*, 205 Mo. 122, 103 S. W. 942.

The writ of error issued herein is quashed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

LESLIE v. CARTER. (No. 17968.)
(Supreme Court of Missouri, Division No. 2.
July 5, 1916.)

1. COURTS ¶ 231(51)—SUPREME COURT—JURISDICTIONAL AMOUNT.

The amount sued for fixes the jurisdiction of the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 659; Dec. Dig. ¶ 231(51).]

2. COSTS ¶ 172—EXPENSES OF LITIGATION—ATTORNEY'S FEES.

In Missouri, taxable costs are fixed by statute, and do not embrace expenses of litigation, including attorney's fees.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 665-687; Dec. Dig. ¶ 172.]

3. COSTS ¶ 282—RECOVERY OF EXPENSES OF LITIGATION—INDEPENDENT ACTION.

An independent action will not lie to recover the expenses of litigation, including attorney's fees, incurred by plaintiff in a former proceeding against defendant to set aside a deed for fraud and for an accounting, whether the action was *ex contractu* or *ex delicto* being immaterial.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 4, 1077-1081; Dec. Dig. ¶ 282.]

4. JUDGMENT ¶ 590(1)—RES ADJUDICATA—RECOVERY OF EXPENSES OF LITIGATION.

Where plaintiff, in suit to set aside a deed for fraud, etc., neglected to claim the expenses of the litigation, including attorney's fees, the rule of *res adjudicata* applies to bar an independent action to recover such expenses of litigation, the claim, if recoverable, belonging to and arising out of the original cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1064, 1102; Dec. Dig. ¶ 590(1).]

5. JUDGMENT ¶ 502—SPLITTING CLAIM.

An entire claim, arising either upon contract or in tort, cannot be divided up and made the subject of several suits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1107; Dec. Dig. ¶ 592.]

6. JUDGMENT ¶ 592—SPLITTING CLAIM.

It is not ground for a second action on the same claim upon a contract or arising in tort that the plaintiff, in the first action, was not able to prove all the items of his demand, or that all damages were not then suffered, since he was bound to prove, not only actual, but prospective, damages.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1107; Dec. Dig. ¶ 592.]

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by Mary E. Leslie against S. E. Carter. From a judgment sustaining demurrer to the petition, plaintiff appeals. Judgment affirmed.

Thomas Hackney, of Kansas City, and A. L. Thomas, of Carthage, for appellant. Gray & Gray, of Carthage, for respondent.

WALKER, J. This is an action to recover the expenses of litigation, including attorneys' fees, alleged to have been incurred by the plaintiff in a former proceeding against the defendant to set aside a deed for fraud, and for an accounting. In the latter action, brought, as was the one at bar, in the circuit court of Jasper county, plaintiff had judgment, and upon an appeal to this court the same was affirmed except as to a correction in the allowance of interest. 240 Mo. 552, 144 S. W. 797.

[1] Defendant demurred to the petition filed in the suit at bar, and from the judgment sustaining this demurrer plaintiff appeals. The amount sued for fixes the jurisdiction of this court.

The grounds on which the sufficiency of the petition was challenged were: (1) That the damages sued for, to wit, the expenses in preparing for trial and attorney's fees, were not recoverable in an action of this

nature; and (2) if recoverable they should have been included in the original suit.

[2, 3] I. The weight of authority here and elsewhere is against the right of recovery in actions of this character. Here taxable costs are fixed by statute and do not embrace expenses of litigation, including attorney's fees. The exceptions to this rule created by statute or established by the usage of the courts and familiar to every lawyer are fully stated by Lamm, J., in *Johnson v. United Railways*, 247 Mo. loc. cit. 348, 152 S. W. 362, 374, and need not be set out here or further adverted to, except to say that expenses of the character here sued for are not included therein. Color for the claim here made is sought in the ruling of this court in *State v. Tittmann*, 134 Mo. loc. cit. 170, 35 S. W. 579, an action to recover damages for the breach of a curator's bond, in which it was held, more by implication than a direct ruling, that "counsel fees and other expenses of prior litigation were recoverable as damages." Subsequently this court, in *Albers v. Merchants' Exchange*, 138 Mo. 140, 39 S. W. 473, thus distinguished the *Tittmann* Case:

"The obligation to pay the attorney's fee in the case did not arise out of the fact that the ward was successful in his suit against his curator, but the liability was determined by the terms of the curator's bond, which, it was properly held, stood good as an indemnity against all the natural and proximate consequences of a breach of duty which the curator owed the ward."

In the *Albers* Case the plaintiff was attempting to recover attorneys' fees alleged to have been paid by him in resisting the effort of the *Merchants' Exchange* to remove him therefrom as a member. The conclusion of the court in that case was that costs of the character there sued for could not be classified as damages, and were therefore not recoverable. The court in so ruling declares that:

"The law of this state, in denying a party the right to recover from his adversary the expenses of litigation other than statutory taxable costs, is in harmony with the laws of our sister states."

In the discussion of this case Judge Gantt, speaking for the court, says *arguendo*:

"Did the circuit court err in holding that the plaintiff was not entitled to recover back this fee because there was no evidence that the directors were actuated by malice in suspending plaintiff from membership, and that in the absence of malice the attorney's fees could not form an element of his damages?"

This language, as was said in *Winstead v. Hulme*, 32 Kan. 568, 4 Pac. 994, might seem to imply that if it had been shown that malice or oppression had mingled in the controversy, then such costs as are under consideration might be recovered. It is evident, however, from the entire opinion that what the court meant was that if the evidence disclosed that the original action was prompted by malice or oppression, punitive damages might be recovered, and that the amount shown to have been expended by the prevailing party

in the litigation could be taken into consideration in fixing the whole amount of the judgment. The court's language sustains our conclusion. We have reference to its declaration "that in the absence of malice attorney's fees will not form an element of plaintiff's damages." Why an element if it constitutes the basis of the plaintiff's right of action? But it does not, and, being only an element thereof, it may simply be taken into account in the presence of malice, in determining the total amount of plaintiff's damages in the event of his recovery. Construed otherwise, the conclusion reached in the *Albers* Case would not be consonant, as the court declares it to be, with the strong current of authority elsewhere.

The rule announced in the *Albers* Case has been affirmed in principle in *Pickel v. Pickel*, 243 Mo. loc. cit. 665, 147 S. W. 1059, the court holding that a fee would not be allowed to plaintiff's attorney as a part of the decree in a suit to set aside a fraudulent transfer of corporate stock. And in *Johnson v. United Railways*, 247 Mo. loc. cit. 348, 152 S. W. 362, 374, involving the liability of a corporation for rights of action existing against another corporation which had transferred its franchise and assets to the former, the court held that a claim for attorney's fees for prosecuting to final judgments this class of claims against the transferee company would not be allowed, the application therefor being held to be without any authority.

Courts of last resort in many other jurisdictions are not less emphatic in declaring the existence of the rule. In fact many of them, not only hold that expenses of litigation, including attorney's fees will not be recognized as forming the bases of independent actions, but that they will not be allowed in the principal suit as an element of damages even where punitive or exemplary damages are allowable. Nor is it material as to the character of the action whether it be *ex contractu* or *ex delicto*, the application of the rule is the same, and nothing except costs ordinarily taxable can be allowed or recovered. *Day v. Woodworth*, 54 U. S. (13 How.) 363, 14 L. Ed. 181; *Railroad Co. v. Citizens' Traction Power Co.*, 16 N. M. 163, 113 Pac. 813; *Earl v. Tupper*, 45 Vt. 275; *Fairbanks v. Witter*, 18 Wis. 301, 86 Am. Dec. 765; *Winkler v. Roeder*, 23 Neb. 706, 37 N. W. 607, 8 Am. St. Rep. 155; *Bull v. Keenan*, 100 Iowa, 144, 69 N. W. 433; *Landa v. Obert*, 45 Tex. 539; *Evans v. Ins. Co.*, 87 Kan. 641, 125 Pac. 86, 41 L. R. A. (N. S.) 1130.

[4] II. Moreover, if the damages here sued for were recoverable, a claim therefor should have been included in the principal suit. The splitting up of causes of actions tends to unnecessarily burden the court and increases the cost of litigation. If, therefore, plaintiff's right of action be conceded, there was nothing in the nature of her claim not rea-

sonably ascertainable at the time of the trial of the principal suit, and under proper pleadings the entire matter could have been determined. As we said in *St. Louis v. United Railways*, 263 Mo. 387, 174 S. W. 78:

"The doctrine as now recognized directly forbids the retrial of an issue, and necessarily involves the bar of a suit brought on a cause of action which should have formed the basis of a prior suit and been tried therein. And this bar is held to apply even where the subsequent suit is for a claim or relief arising out of the same cause of action, and not asked for in the former suit."

Plaintiff's claim as asserted here, if recoverable, belonged to and arose out of her original cause of action, and by a reasonable exercise of her rights it could have been made a part of same. This not having been done, the rule of *res adjudicata* will apply with as much force as if the matters now sought to be adjudicated had been put in issue. *Summet v. R. & B. Co.*, 208 Mo. loc. cit. 511, 106 S. W. 614; *Cook v. Globe Ptg. Co.*, 227 Mo. loc. cit. 524, 127 S. W. 332.

In *Van Horne v. Treadwell*, 164 Cal. 620, 130 Pac. 5, the plaintiff had instituted a former suit to recover pledged stock claimed to have been fraudulently appropriated by the defendant, and obtained a decree. He afterwards instituted a separate suit for expenses and attorney's fees incurred in the former proceeding. The Supreme Court of California denied him the right to maintain the second suit on the ground that it was *res adjudicata*, holding that the plaintiff could not split his demand for relief so as to entitle him to recover a part of same in one action and the remainder in another; that the demand for the repayment of the expenses of the suit, including attorney's fees, if a proper element of damages at all, was such as flowed from the single wrongful act of withholding the delivery of the stock.

[5, 6] In *Abbott v. 76 Land & Water Co.*, 161 Cal. 42, 118 Pac. 425, it was sought to recover damages plaintiff claimed to have sustained by reason of a former suit. The court denied the plaintiff the right to maintain the second suit, saying, in effect, that under elementary principles he was bound to obtain all his relief in one action, and could not recover part in one and part in another. Resorting, as he did, to an action in equity, the court had power to give him all the relief he was entitled to, and his subsequent action on the same contract was therefore barred. This is the necessary result of the application of the well-settled principle that an entire claim, arising either upon contract or in tort, cannot be divided up and made the subject of several suits. In such a case it is not ground for a second action that the party may not be able to actually prove in the first case all the items of the demand, or that all of the damages may not then have been actually suffered. He is bound

to prove in the first action, not only such damage as has been actually suffered, but also such prospective damages by reason of the breach as he may be legally entitled to; for the judgment he recovers will be a conclusive adjudication as to the total damages on account of the breach. A like doctrine is announced in *Bracken v. Trust Co.*, 167 N. Y. 510, 60 N. E. 772, 82 Am. St. Rep. 731, *Head v. Meloney*, 111 Pa. 99, 2 Atl. 195, *Marvin v. Prentice*, 94 N. Y. 295, and *Lovell v. House of Good Shepherd*, 14 Wash. 211, 44 Pac. 253.

Except to show that the doctrine of *res adjudicata* is everywhere uniformly applied, the citation of authorities from other jurisdictions would have been unnecessary because its application here has been settled beyond question, if not before, certainly in the cases of *Spratt v. Early*, 199 Mo. 491, 97 S. W. 925; *Summet v. R. & B. Co.*, and *St. Louis v. United Railways Co.*, supra; in each of which it is emphatically held that all of the issues which might have been raised and determined in a given case, but were not, are as completely barred as if they had been adjudicated and included in the verdict.

Plaintiff's petition showed on its face that she was not entitled to recover. The demurrer was therefore properly sustained, which results in an affirmance of the judgment. It is so ordered. All concur.

MEMORANDUM DECISIONS

FOSTER v. SAYMAN. (No. 19,356.) (Supreme Court of Missouri. In Banc. July 3, 1916. Rehearing Denied July 18, 1916.) Appeal from St. Louis Circuit Court; James E. Withrow, Judge. Action by William H. Foster, administrator of the estate of Bertram J. Busiere, deceased, against T. M. Sayman. Judgment for defendant, dismissing the action, was affirmed by the Court of Appeals (181 S. W. 1186) and plaintiff appeals. Affirmed. Charles A. Houts and Frank A. Habig, both of St. Louis, for appellant. Matt G. Reynolds, Thos. B. Harlan, and George E. Mix, all of St. Louis, for respondent.

BLAIR, J. This cause was transferred here by the St. Louis Court of Appeals because one of the judges deemed the decision of the majority in that court contrary to the decision of this court in *Foster, Adm'r, v. Sayman*, 257 Mo. 303, 165 S. W. 796. After an examination of the majority and dissenting opinions in the case (*Foster v. Sayman*, 181 S. W. 1186 et seq.), we conclude there is no conflict with the decision mentioned, and that the majority opinion of the St. Louis Court of Appeals is the law of the case. In that opinion the authorities are cited and discussed, and, we think, correctly applied to the facts in the record. It is unnecessary to do more than refer to that opinion. For the reasons given in it the judgment is affirmed.

GRAVES, WALKER, and REVELLE, JJ., concur. FARIS, J., dissents. BOND, J., not sitting. WOODSON, C. J., absent.

BASHAM v. STATE. (No. 4141.) (Court of Criminal Appeals of Texas. June 23, 1916.) Appeal from Tarrant County Court; Jesse M. Brown, Judge. Will Basham was convicted of aggravated assault, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction for aggravated assault, but without a statement of facts or bills of exception. In the absence of these, there is nothing we can review. The judgment is affirmed.

COLEMAN v. STATE. (No. 4120.) (Court of Criminal Appeals of Texas. June 14, 1916.) Appeal from Bexar County Court; Nelson Lytle, Judge. W. P. Coleman, Sr., was convicted of negligent homicide, and appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of negligent homicide, and his punishment assessed at a fine of \$200. The record contains no bill of exceptions, and no statement of facts; consequently there is no question presented we can review, the information charging an offense under the law. The judgment is affirmed.

RAMOS v. STATE. (No. 4159.) (Court of Criminal Appeals of Texas. June 23, 1916.) Appeal from District Court, Galveston County; Robt. G. Street, Judge. J. Ramos was convicted of murder, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of murder, and his punishment assessed at imprisonment in the penitentiary for life. The record contains no bill of exceptions, and no statement of facts accompanies the record. No complaint is made to the charge of the court, and no special charges requested. The indictment properly charges the offense, and under such circumstances there is no question presented we can review. The judgment is affirmed.

WORSHAM v. STATE. (No. 4145.) (Court of Criminal Appeals of Texas. June 23, 1916.) Appeal from District Court, Collin County; M. H. Garnett, Judge. Waddell Worsham was convicted of pursuing the occupation of selling intoxicating liquors in local option territory, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of pursuing the occupation of selling intoxicating liquors in local option territory; his punishment being assessed at three years' confinement in the penitentiary. The record is before us without a statement of facts or bill of exceptions. In this attitude there is nothing presented to this court requiring revision. Therefore the judgment will be affirmed.

BULLARD et al. v. LANIUS PRESSED BRICK CO. et al. (No. 7579.) (Court of Civil Appeals of Texas. Ft. Worth. April 15, 1916. Rehearing Denied June 17, 1916.) Appeal from District Court, Taylor County; Thomas L. Blanton, Judge. Action by the Lanius Pressed Brick Company against George P. Bullard and others. From a judgment for plaintiff, certain defendants appeal. Reversed and rendered as to appellants only. J. L. Gammon and G. C. Groce, both of Waxahachie, for appellants. Ben L. Cox and A. H. Kirby, both of Abilene, for appellee.

DUNKLIN, J. The Lanius Pressed Brick Company furnished the brick used in the construction of a house of worship for the First Baptist Church of Abilene. E. S. Boze was the contractor who erected the building, and the brick were furnished to him as such contractor. Boze executed a bond, with sureties thereon, to the trustees of the church, and to all persons who might become entitled to liens upon the building, to insure the completion of the work in accordance with the terms of the contract, and also to insure the payment by the contractor of all indebtedness that might be incurred by him in the construction of the building. The present suit was instituted by the Brick Company against the contractor, the trustees of the church, and the sureties on the bond, to recover a balance due for brick so furnished, and to establish and foreclose a furnisher's lien on the building. From a judgment granting plaintiff the relief so prayed for, certain of the sureties on the bond alone have appealed. The case is a companion to the case of Bullard v. Norton, decided by our Supreme Court, whose opinion appears in 182 S. W. 668, and the facts of the two cases are the same, except that in the case last mentioned the plaintiff's claim was that of a subcontractor, instead of that of a furnisher of material. Upon the authority of that decision the judgment rendered by the trial court in the present suit against appellants is reversed, and judgment is here rendered in favor of those appellants. In all other respects the judgment is undisturbed.

ARKANSAS VALLEY TRUST CO. v. CORBIN et al. (Kansas City Court of Appeals. Missouri. May 3, 1915.) Action by the Arkansas Valley Trust Company against W. D. Corbin and another. Judgment for plaintiff, and defendants appeal. Motion for affirmance of judgment denied (192 Mo. App. 153, 179 S. W. 484), and case certified to the Supreme Court as being deemed in conflict with the decision of another Court of Appeals.

ELLISON, P. J. The court deeming the decision herein to be in conflict with Hill v. Keller, 157 Mo. App. 710, 139 S. W. 523, decided by the Springfield Court of Appeals as above stated (see 192 Mo. App. 156, 179 S. W. 485), this case will be certified to the Supreme Court as required by the Constitution.

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Under Rev. St. 1909, § 1794, in an action for fraud plaintiff must demand judgment for all the damages sustained by reason of the wrongful acts or be forever barred from suing for the remainder in another action.—*Id.*

⚡53(3) (Mo.App.) An open continuous running account constitutes a single demand which cannot be split.—*Peper Automobile Co. v. St. Louis Union Trust Co.*, 187 S. W. 109.

Evidence held sufficient to show that various items of debit for balance due on the price of an automobile and for oils, repairs, and supplies, etc., constitutes a running account, which cannot be split, although a portion thereof had been entered in a separate book and presented by a separate bill.—*Id.*

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⚡2 (Tex.Cr.App.) Acts 29th Leg. c. 108, as amended by Acts 30th Leg. c. 131, relating to pure feeding stuffs and prescribing as a punishment for its violation a fine and imprisonment, is not void because it makes agent of principal guilty of offense instead of making principal so only.—*Guild v. State*, 187 S. W. 215.

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(A) Acquisition of Rights by Prescription in General.

⚡11 (Tex.Civ.App.) Adverse possession cannot ripen into title unless accompanied by an intent by the occupant to make it exclusive and hostile.—*Houston Oil Co. of Texas v. Stepney*, 187 S. W. 1078.

⚡12 (Tex.Civ.App.) Claim of title or claim of right by the occupant is necessary in all cases where title is established by adverse possession.—*Houston Oil Co. of Texas v. Stepney*, 187 S. W. 1078.

⚡13 (Mo.) Under 10-year statute of limitations, all that law requires is that claimant's possession shall be taken and continued in good faith, and be exclusive, open, and notorious, adverse to the world and continuous for a period of 10 years or more, prior to the date of suit by the owner of the title to recover the possession.—*Schofield v. Harrison Land & Mining Co.*, 187 S. W. 61.

Under express provision of thirty-year statute of limitations (Rev. St. 1909, § 1884), possession of defendant under color of title of tax deeds, held to establish defendant's title.—*Id.*

(B) Actual Possession.

⚡25 (Mo.) While possession of land may be maintained by a tenant, such possession can extend no further than the terms of the lease or contract by which the tenant holds.—*Schofield v. Harrison Land & Mining Co.*, 187 S. W. 61.

(C) Visible and Notorious Possession.

⚡29 (Tex.Civ.App.) To constitute adverse possession, the person occupying the land must appropriate it to some purpose in order to support the statute.—*O'Hanlon v. Morrison*, 187 S. W. 692.

⚡31 (Tex.Civ.App.) To make title by adverse holding the true owner must have actual knowledge of the claim, or it must be so open and notorious that his knowledge will be presumed.—*Houston Oil Co. of Texas v. Stepney*, 187 S. W. 1078.

(D) Distinct and Exclusive Possession.

⚡36 (Tex.Civ.App.) Under Rev. St. art. 5681, defining adverse possession, defendant's acts in using vacant lot to store lumber, and tie stock in common with others, in a manner at first not inconsistent with the title of the owner although he bought tax title and later fenced it, held not sufficient to show continuous or exclusive use of the property.—*O'Hanlon v. Morrison*, 187 S. W. 692.

(E) Duration and Continuity of Possession.

⚡50 (Mo.) In ejectment for a slough, deed from plaintiff of right of way across his land running from "center" or "middle" of slough, held recognition by him of defendant's title to slough to the center line.—*Whiteside v. Oasis Club*, 187 S. W. 27.

(F) Hostile Character of Possession.

⚡60(4) (Tex.Civ.App.) Under Rev. St. art. 5681, defining adverse possession, where the defendant, claiming under a tax title, used a vacant lot for pasturing stock in common with others, storing lumber and wire in a manner consistent with subordination to title of owner, and gave no notice of his change of intention to a hostile possession under a claim of right until a year or so before he fenced land three years

before beginning of action, *held* he could not claim title under the ten-year statute of limitations.—*O'Hanlon v. Morrison*, 187 S. W. 692.

⚡66(2) (Mo.) Where an adverse possessor limits his claim to the true boundary, his possession beyond that line, when ascertained, is subject to correction.—*Whiteside v. Oasis Club*, 187 S. W. 27.

⚡68 (Tex.Civ.App.) Color of title is not necessary to perfect title by adverse possession, in the absence of statutory provisions expressly or by clear implication requiring it.—*Houston Oil Co. of Texas v. Stepney*, 187 S. W. 1078.

Entry and possession without a claim of right can never ripen into good title, no matter how long continued.—*Id.*

⚡70 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5681, entry under "claim of right" means an entry not subordinate to another's title, but with claim of right to the land, hostile and adverse to the true owner, although the person so entering knows he has no title except such as possession may confer.—*Houston Oil Co. of Texas v. Stepney*, 187 S. W. 1078.

⚡71(2) (Tex.Civ.App.) A void deed does not constitute color of title required by the three-year statute of limitations.—*O'Hanlon v. Morrison*, 187 S. W. 692.

⚡79(4) (Tex.Civ.App.) Possession under a tax deed is not adverse to title of owner, and cannot be used as a basis for possession under statute of limitation until after the period of two years allowed for redemption.—*O'Hanlon v. Morrison*, 187 S. W. 692.

⚡84 (Mo.) Good faith in taking possession of and holding land under deeds means honesty, the absence of fraud or deceit; and "lawful possession" means entering upon and holding land and claiming to be the owner and not as an intruder or trespasser.—*Schofield v. Harrison Land & Mining Co.*, 187 S. W. 61.

Where defendant and its predecessors took possession of land under color of title derived through tax deeds, the question of its good faith was immaterial.—*Id.*

⚡85(1) (Mo.) The burden is upon a claimant by adverse possession of land, to which he has no color of title, to prove actual, open, visible, and adverse possession during the required period.—*Whiteside v. Oasis Club*, 187 S. W. 27.

⚡85(2) (Tex.Civ.App.) On the issue of title by adverse possession the inquiry is whether claimant has actually claimed adversely to the owner, and it is not material whether his claim would have been different if his knowledge of the title had been correct.—*Houston Oil Co. of Texas v. Stepney*, 187 S. W. 1078.

⚡85(3) (Mo.) In ejectment for a slough, fact that plaintiff had been accustomed at one time to use slough for pasturage by repairing his own and defendant's predecessor's fence on high land on two sides, running fence across low ground to inclose it, *held* not to show assertion of title.—*Whiteside v. Oasis Club*, 187 S. W. 27.

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⚡100(1) (Tex.Civ.App.) The rule that possession by the true owner of a part of a tract gives constructive possession of all not actually adversely held does not apply where true owner cuts from land logs sold him by adverse occupant.—*Houston Oil Co. of Texas v. Stepney*, 187 S. W. 1078.

⚡101 (Mo.) Possession of a part of "tract" of land, with a claim of the whole, and the usual acts of ownership over the entire tract, establishes possession of the whole which will ripen into title under Rev. St. 1909, § 1882.—*Schofield v. Harrison Land & Mining Co.*, 187 S. W. 61.

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⚡115(1) (Tex.Civ.App.) On the issue of adverse possession, evidence of occupation by defendants and their predecessors, and conflicting evidence as to interruption thereof, *held* not to warrant peremptory instruction for plaintiff.—*Houston Oil Co. of Texas v. Stepney*, 187 S. W. 1078.

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⚡116(7) (Mo.) In suit at law under Rev. St. 1909, § 2535, to ascertain and adjudge title to land, refusal of instruction on extent of possession by tenant, *held* proper when considered with reference to the evidence.—*Schofield v. Harrison Land & Mining Co.*, 187 S. W. 61.

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I. NATURE AND FORM OF REMEDY.

¶2 (Tex.) Rev. St. 1911, art. 1972, providing that the charge, after presentation of objections, shall constitute part of record and be regarded as excepted to and subject to revision without necessity of bill of exceptions, was not repealed by implication by Acts 33d Leg. c. 59, amending Rev. St. 1911, arts. 1974, 2061.—*Gulf, T. & W. Ry. Co. v. Dickey*, 187 S. W. 184.

¶5 (Mo.) Under Rev. St. 1909, § 2038, giving right to appeal from order granting new trial, etc., and section 2054, providing for a writ of error only on a final judgment, propriety of trial court's action in sustaining motion for new trial cannot be listed under writ of error.—*Strother v. Missouri, K. & T. R. Co.*, 187 S. W. 1195.

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(D) Finality of Determination.

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(E) Nature, Scope, and Effect of Decision.

¶110 (Mo.) Under Rev. St. 1909, § 2038, an order overruling motion for new trial is not appealable.—*Wehrs v. Sullivan*, 187 S. W. 825.

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¶170(2) (Mo.App.) Under Rev. St. 1909, § 2081, question of validity of municipal ordinances regulating speed of motor vehicles cannot be raised on appeal where not raised below.—*Carradine v. Ford*, 187 S. W. 285.

¶171(1) (Mo.) The trial theory cannot be abandoned on appeal.—*Chicago, R. I. & P. Ry. Co. v. Lydik*, 187 S. W. 891.

¶171(2) (Mo.) Where plaintiff pleaded in his reply that the appraisal relied upon by defendant was fraudulently procured, held, that defendant cannot object on appeal that plaintiff's only relief was in equity, where a jury trial was had without objection.—*Young v. Pennsylvania Fire Ins. Co.*, 187 S. W. 856.

¶173(9) (Mo.App.) Objections that recovery cannot be had on running accounts because a portion thereof had already been recovered cannot be raised for the first time on appeal.—*Peper Automobile Co. v. St. Louis Union Trust Co.*, 187 S. W. 109.

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¶193(9) (Mo.App.) The sufficiency of a petition to state a cause of action may for the first time be raised on appeal, a petition stating a cause of action being necessary to give the court jurisdiction.—*Carradine v. Ford*, 187 S. W. 285.

¶197(2) (Tex.Civ.App.) Where a railway company and its contractor litigated with a subcontractor's creditors the amount due such subcontractor, they cannot urge upon appeal, for first time, that the issue was not presented by the pleadings.—*Texas Bldg. Co. v. Collins*, 187 S. W. 404.

¶213 (Tex.Civ.App.) Where a request to submit a special issue contained two propositions, one of which was submitted to the jury, the failure to submit the other is not reversible error, in the absence of a separate request to do so.—*Jenkins v. Morgan*, 187 S. W. 1091.

¶213 (Tex.Civ.App.) In wife's action to set aside decree of divorce fraudulently obtained by husband, husband's exceptions to special issues submitted on ground of omissions calling for requested issues in absence of requests for such special issues would be overruled.—*McConkey v. McConkey*, 187 S. W. 1100.

¶215(1) (Tex.Civ.App.) White passengers suing because forced to ride in a coach partly occupied by negroes, not having objected below to instructions which made recovery contingent upon the suffering of actual damages, cannot assert on appeal that they should have been allowed nominal damages in any event.—*Weller v. Missouri, K. & T. Ry. Co.*, 187 S. W. 374; *Connally v. Same*, Id. 376.

¶216(1) (Mo.) The failure to instruct that plaintiff's testimony can be considered only as against defendants living, and not as against a defendant since deceased, cannot be complained of on appeal where no such instruction was requested.—*Wagner v. Binder*, 187 S. W. 1128.

¶230 (Tex.Civ.App.) Error cannot be predicated upon remarks of counsel not excepted to when made.—*Black v. Wilson*, 187 S. W. 493.

¶231(3) (Mo.App.) An objection that an ordinance was not admissible under the petition is so general that it presents nothing for review on appeal.—*Carradine v. Ford*, 187 S. W. 285.

¶232(3) (Mo.) In railroad servant's action for injuries, where plaintiff's counsel stated that his objection to an instruction was the only one he had, he was precluded on appeal from mak-

ing any other, having waived all but the excepted one.—*Reid v. St. Louis & S. F. R. Co.*, 187 S. W. 15.

⚡233(1) (Tex.) Procedure by defendant in trial court relative to presentation of objection to erroneous charge held substantial compliance with Acts 33d Leg. c. 59, amending Rev. St. 1911, arts. 1954, 1970, 1971, 1973, 1974, 2061 and adding article 1984A.—*Gulf, T. & W. Ry. Co. v. Dickey*, 187 S. W. 184.

⚡233(1) (Tex.) In action for personal injuries, objections to instructions, held substantial compliance with Acts 33d Leg. c. 59, relative to the time and manner of submitting instructions to jury and assignment of error embodying objection to instruction presented to trial court was entitled to be considered.—*Gulf, T. & W. Ry. Co. v. Dickey*, 187 S. W. 189.

⚡236(2) (Ark.) Even if defendant was surprised by a trial amendment, it was its duty to have asked the court to suspend the trial or continue the case before it could complain.—*Butler County R. Co. v. Exum*, 187 S. W. 329.

(C) Exceptions.

⚡253 (Tex.Civ.App.) Where trial court's attention was not called to the conflicting allegations of the petition by exception thereto, the question could not be raised on appeal.—*Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, 187 S. W. 681.

⚡261 (Mo.App.) It is essential for a review by an appellate court as to improper remarks of counsel in argument, that there be an exception to the court's refusal to reprimand.—*Citizens' Bank of Senath v. Douglass*, 187 S. W. 158.

⚡263(1) (Tex.Civ.App.) Although the Court of Appeals considers exceptions to rulings on requested instructions necessary, yet an assignment of error without such exception will be considered where the Supreme Court's action in granting writs of error renders the necessity of exceptions doubtful.—*Hill v. Staats*, 187 S. W. 1039.

⚡268(1) (Tex.Civ.App.) Under Acts 33d Leg. c. 59, the complaint as to the sufficiency of the evidence to support a verdict would not be considered where no exception was taken to the trial court's charge submitting the issue.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

(D) Motions for New Trial.

⚡281(1) (Ark.) On appeal the court can consider, in the absence of motion for new trial and bill of exceptions, only errors apparent on the face of the record.—*Equitable Surety Co. v. Wilson*, 187 S. W. 940.

⚡286 (Mo.App.) A motion to dismiss, regarded as a demurrer, preserves itself without the aid of a motion for a new trial.—*Southwest Nat. Bank of Kansas City v. McDermand*, 187 S. W. 121.

⚡301 (Mo.App.) Where a motion to strike out, if granted, would dispose of the case, the court's action thereon is saved without being embodied in motion for new trial.—*Butterfield v. Butterfield*, 187 S. W. 295.

⚡302(3) (Ark.) Where the exception to the introduction of evidence is not preserved in the motion for a new trial, it cannot be considered on appeal.—*Miller v. Summers*, 187 S. W. 664.

⚡302(4) (Ark.) It is the purpose of a motion for a new trial to point out and define with reasonable certainty the particular objection urged, that the court's attention may be definitely directed to it, and an assignment of error "in each ruling of law" was not sufficient to require a review of instructions.—*Miller v. Summers*, 187 S. W. 664.

⚡302(5) (Ark.) On the contest of a county seat election, where the court made a general finding for contestees and against contestants'

general assignment in contestants' motion for new trial, that verdict was contrary to law and evidence, was sufficient to challenge the correctness of finding and judgment.—*Webb v. Bowden*, 187 S. W. 461.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(B) Petition or Prayer, Allowance, and Certificate or Affidavit.

⚡363 (Mo.App.) Under Rev. St. 1909, § 2043, a showing that judgment was rendered on an amended complaint not served on the defendant as required by the rules of that circuit warrants allowance of appeal by a judge of the Court of Appeals.—*Vassilopoulos v. Fabianoff*, 187 S. W. 106.

⚡364 (Mo.App.) Where, pursuant to Rev. St. 1909, § 2043, one of the judges of the Kansas City Court of Appeals granted an appeal in March, such appeal is returnable to the following October term.—*Vassilopoulos v. Fabianoff*, 187 S. W. 106.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

⚡384(1) (Tex.Civ.App.) Clerical defects in an appeal bond as to the number of the judicial district of a county named in which the action is pending do not deprive the appellate court of jurisdiction to hear the appeal.—*Birchfield v. Bourland*, 187 S. W. 422.

(D) Writ of Error, Citation, or Notice.

⚡420 (Tex.Civ.App.) The appellate court held to have jurisdiction to review an original order granting an injunction, although the notice of appeal recited that it was taken from the order dissolving the injunction; no notice of appeal as required by Rev. St. 1911, art. 2084, in ordinary cases being necessary under *Vernon's Sayles' Ann. Civ. St. arts. 4643, 4644*.—*Birchfield v. Bourland*, 187 S. W. 422.

⚡430(1) (Mo.App.) Where the evidence disclosed respondent's address, and appellant failed to serve notice of an appeal allowed by a judge of the Kansas City Court of Appeals within the time fixed by Rev. St. 1909, § 2046, the appeal must be dismissed.—*Vassilopoulos v. Fabianoff*, 187 S. W. 106.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

(A) Powers and Proceedings of Lower Court.

⚡436 (Tex.Civ.App.) An appeal or writ of error clothes the appellate court with exclusive jurisdiction of the case, and the lower court cannot make any orders in reference thereto excepting those necessary to protect the subject of the appeal.—*Birchfield v. Bourland*, 187 S. W. 422.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

⚡458(3) (Tex.Civ.App.) Under Rev. St. 1911, arts. 2078, 2084, 2097, 2101, giving a right to appeal from every final judgment in Civil Cases, and providing for bonds, a prohibitory injunction may be suspended during appeal by supersedeas bond.—*Ætna Club v. Jackson*, 187 S. W. 971.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

⚡499(1) (Mo.App.) Objection to the remarks of counsel in his argument could not be considered, where the record did not show that objection was made at the time of the remarks or that an exception was taken to the ruling of the court thereon.—*Winkleblack v. Great Western Mfg. Co.*, 187 S. W. 95.

—499(3) (Tex.Civ.App.) An assignment of error is insufficient, where neither it nor the bill of exceptions to which it refers states what objections were made to the evidence in question.—*Jenkins v. Morgan*, 187 S. W. 1091.

—499(4) (Tex.Civ.App.) Under the express provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 1971, assignments of error in the court's charge could not be considered, where the record did not show either objection or exception in the court below.—*Fireman's Ins. Co. v. Jesse French Piano & Organ Co.*, 187 S. W. 691.

—502(1) (Mo.) Appellant, in his abstract of record where matters of exception are relied on, must show by the record proper that his motion for new trial was filed within time, and must set out as part of bill of exceptions the motion or by appropriate language call for it, else the court can consider only the record proper.—*State ex inf. Wright v. Morgan*, 187 S. W. 54.

(B) Scope and Contents of Record.

—518(1) (Tex.Civ.App.) Where both parties pleaded a special law by giving its title and the date of its approval, as authorized by Rev. St. 1911, art. 1823, and the entire act was before the court, it must be considered a part of the record on appeal, although not copied into the statement of facts.—*Altgelt v. Gutzelt*, 187 S. W. 220.

—524 (Ark.) Bill of exception, showing statement of defendant's counsel, consenting to the use of a copy of a contract in evidence following testimony, that the original had been lost, held to sufficiently show the proper reception of such copy in evidence, where the transcript of the record contained copies of the contract.—*J. W. York & Sons v. Powell*, 187 S. W. 628.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

—544(1) (Ark.) On appeal the court can consider, in the absence of motion for new trial and bill of exceptions, only errors apparent on the face of the record.—*Equitable Surety Co. v. Wilson*, 187 S. W. 940.

—544(1) (Tex.) Under Rev. St. 1911, arts. 1970-1972, to obtain review of charge of court on appeal, objection in particular complained of must be presented to trial court before reading to the jury, and, when such objection is made, complaining party can have error considered by appellate court without reserving formal bill of exceptions to the charge.—*Gulf, T. & W. Ry. Co. v. Dickey*, 187 S. W. 184.

—544(2) (Mo.) Where it did not appear that any bill of exceptions was taken embodying proceedings resulting in appointment of a receiver or in the court's refusal to revoke such appointment, defendant's appeal from the refusal presented only such questions as arose on the record proper.—*Miller v. Falloon*, 187 S. W. 839.

If judgment appealed from is within scope of petition, and court has jurisdiction to act, its judgment is not open to review, where only such questions as arise upon the record proper are presented by the appeal, from absence of bill of exceptions.—*Id.*

(E) Abstracts of Record.

—585(1) (Mo.) Respondent's counter abstract, not being controverted, must be taken as true.—*Woods v. St. Louis & S. F. R. Co.*, 187 S. W. 11.

—586(1) (Mo.App.) An abstract of the record was fatally defective, where it failed to show any motion for a new trial, or that the bill of exceptions was signed and filed and made a part of the record, so only the pleadings and the judgment could be considered.—*Fitzgerrell v. Federal Trust Co.*, 187 S. W. 600.

(F) Making, Form, and Requisites of Transcript or Return.

—597(1) (Tex.Civ.App.) Under rule 101 District and County Courts (169 S. W. xi), cross-

assignments of error need not be copied in the transcript, and an objection that they were not filed in the trial court without other showing is not sufficient to prevent their consideration.—*Yates v. Watson*, 187 S. W. 548.

(H) Transmission, Filing, Printing, and Service of Copies.

—627(1) (Mo.) Under statute providing no other way of appealing from final judgment than by filing certified copy of judgment itself in appellate court in statutory time, appeal from order overruling motion for new trial could not be considered by implication an appeal from final judgment in case where no copy of judgment was filed in Supreme Court until nearly four years after order overruling motion and such copy was merely an uncertified copy in appellant's printed abstract.—*Wehrs v. Sullivan*, 187 S. W. 825.

That respondents do not call attention to appellant's failure to file in time certified copy of judgment appealed from does not excuse appellant.—*Id.*

—627(3) (Tex. Civ. App.) Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 1608, 1610, where judgment was entered in favor of appellee December 18, 1915, and motion for new trial was overruled December 28th, and notice of appeal and appeal bond were filed January 18, 1916, but transcript was not filed in the Court of Civil Appeals within 90 days, judgment will be affirmed.—*Tyler v. Smith*, 187 S. W. 697.

(I) Defects, Objections, Amendment, and Correction.

—638 (Tex.Civ.App.) Under Rev. St. 1911, art. 2069, providing that, where parties cannot agree upon a statement of facts, the judge shall certify a correct statement from statements furnished by the parties and from his own knowledge, held, that a statement of facts in an injunction suit, based in part upon recollection of a bystander, is not reversible error, where the record contains a stipulation that the statement so prepared is correct.—*Commissioners' Court of Trinity County v. Miles*, 187 S. W. 378.

—639(1) (Mo.App.) Fatal defect in the abstract of the record proper, though not pointed out by the respondent, might be noticed by the court ex mero motu.—*Fitzgerrell v. Federal Trust Co.*, 187 S. W. 600.

(J) Conclusiveness and Effect, Impeaching and Contradicting.

—665 (Mo.App.) A statement in defendant's abstract, that a general denial was filed to an amended petition during the trial, will be accepted.—*Roaring Fork Potato Growers v. C. C. Clemons Produce Co.*, 187 S. W. 617.

(K) Questions Presented for Review.

—671(5) (Mo.App.) Exception that deposition did not show that it had been taken before an authenticated notary public, that no notarial seal appeared, and that there was no statement as to duration of notary's commission could not be sustained, where caption and certificate attached to deposition were not brought to the Court of Appeals.—*Toberman, Mackey & Co. v. Gidley*, 187 S. W. 593.

—690(4) (Tex.Civ.App.) In the absence from the record of any statement of facts, error alleged in admission of testimony will not be reviewed, there being no way to determine whether the admission was error.—*Hunter v. Hunter*, 187 S. W. 1049.

—692(1) (Mo.) Rulings sustaining objections to questions where the record did not disclose what the testimony of witnesses would have been are not reviewable.—*Chicago, R. I. & P. Ry. Co. v. Lydik*, 187 S. W. 891.

—692(3) (Tex.Civ.App.) Error, if any, in excluding testimony of plaintiff's manager as to value of piano covered by policy and as to plaintiff's profit, held not reviewable error, where

bill of exceptions showed that manager did not know what plaintiff gave for piano, and did not show that he could or would have stated the profit.—*Fireman's Ins. Co. v. Jesse French Piano & Organ Co.*, 187 S. W. 601.

⇒707(1) (Mo.App.) Where the record did not show that the bill of exceptions was ever signed, filed, and made a part of the record, and the former judgment set up as res judicata was not in evidence, nothing could be predicated upon the former judgment.—*Fitzgerrell v. Federal Trust Co.*, 187 S. W. 600.

(L) Matters Not Apparent of Record.

⇒714(1) (Mo.) On appeal in suit to quiet title, Supreme Court was warranted in turning to a compromise agreement, not formally in evidence, upon which defendants based their objection that the patent under which plaintiff claimed was void.—*Heagy v. Miller*, 187 S. W. 889.

XI. ASSIGNMENT OF ERRORS.

⇒722(1) (Tex.Civ.App.) Assignment of error held not to comply with rules 25 and 26 for Courts of Civil Appeals (142 S. W. xii), and not to require consideration.—*Wichita Falls Traction Co. v. Berry*, 187 S. W. 415.

⇒728(1) (Tex.Civ.App.) Assignment of error, in that services alleged to have been rendered by plaintiff, a broker, were different from those stated in the hypothetical question as to their reasonable value, was too general, where it did not point out what should have been changed in the question.—*Brady v. Richey & Casey*, 187 S. W. 508.

⇒728(1) (Tex.Civ.App.) An assignment of error, which complains of evidence rulings as to several witnesses, and fails to set out the objections made to such rulings, is insufficient.—*Jenkins v. Morgan*, 187 S. W. 1091.

⇒730(2) (Tex.Civ.App.) Assignment of error complaining of material omissions from court's general charge, not containing charge objected to, or any reference to page of record where charge might be found, presented nothing for consideration.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

⇒731(5) (Tex.Civ.App.) An assignment of error because the verdict was against the great preponderance of the evidence, specifying the same, held sufficient.—*Texas & N. O. R. Co. v. Jones*, 187 S. W. 717.

⇒731(5) (Tex.Civ.App.) An assignment of error in that "the verdict was not sustained by the evidence, the facts proven being insufficient on which to base a verdict for the plaintiff," was too general to require consideration.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

⇒736 (Tex.Civ.App.) An assignment of error, which is a combination of several assignments contained in the motion for a new trial, is insufficient.—*Jenkins v. Morgan*, 187 S. W. 1091.

⇒742(1) (Tex.Civ.App.) In an action against a railroad company for mingling white and colored passengers, assignments of error not raising the question cannot be extended by propositions to raise the question that the white passengers suffered mental anguish by reason of proximity of negroes.—*Weller v. Missouri, K. & T. Ry. Co.*, 187 S. W. 374; *Connally v. Same*, Id. 376.

⇒742(1) (Tex.Civ.App.) A proposition subjoined to an assignment of error, but not germane thereto, cannot be considered.—*Brady v. Cope*, 187 S. W. 678.

⇒742(1) (Tex.Civ.App.) Assignments of error, not followed by the statement required by the rules, cannot be considered.—*League v. Brazoria County Road Dist. No. 13*, 187 S. W. 1012.

⇒742(4) (Tex.Civ.App.) A proposition on the admission of evidence under an assignment of error to the sufficiency of the petition is in vio-

lation of the rule as not germane to the assignment.—*Blount, Price & Co. v. Payne*, 187 S. W. 990.

⇒742(5) (Tex.Civ.App.) Assignment of error to refusal to give charge, not followed by any proposition or statement of facts, held not a compliance with rules for Courts of Civil Appeals 29, 30, 31 (142 S. W. xii, xiii).—*Galveston Electric Co. v. Hanson*, 187 S. W. 533.

XII. BRIEFS.

⇒756 (Tex.Civ.App.) Where appellant's brief contains no statement of the nature and result of the suit, nor any assignment of error, proposition of law, or statement of fact, no issue is presented for consideration.—*Commonwealth Bonding & Casualty Ins. Co. v. Hendricks*, 187 S. W. 698.

⇒758(3) (Tex.Civ.App.) Giving numbers to assignments of error in the brief not corresponding to the numbers of the same assignments in the motion for new trial is expressly permitted by Court of Civil Appeals rule 29 (142 S. W. xiii).—*St. Louis, I. M. & S. Ry. Co. v. Landa & Storey*, 187 S. W. 358.

⇒761 (Mo.) Under Supreme Court rule 15 (169 S. W. ix) the points and authorities of appellants' brief should contain a brief statement of facts relating to each point separately presented, showing the page of record where testimony can be found, and by appropriate language should apply the authorities cited to each point.—*Summers v. Cordell*, 187 S. W. 5.

⇒773(2) (Tex.Civ.App.) Under rules 42 and 43 (142 S. W. xiv), upon failure of appellant to file brief and of appellee to file brief before submission of case, an appeal will be dismissed for want of prosecution.—*Southwestern Oil & Gas Co. v. Denny*, 187 S. W. 973.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

⇒797(3) (Tex.Civ.App.) Under rule 8 (142 S. W. xi) motion to dismiss for failure to file briefs in time not filed within 30 days after filing the transcript is too late.—*Hamlet v. Leicht*, 187 S. W. 1004.

XIV. DOCKETS, CALENDARS, AND PROCEEDINGS PRELIMINARY TO HEARING.

⇒808 (Mo.) The verb "print" means "to make an impression with inked type," and is not synonymous with "publish" which means "to make public"; so that the requirement of Rev. St. 1909, § 2079, that the Supreme Court docket be printed in the county where court is held does not require publication in newspaper.—*In re Publishing Docket in Local Newspaper*, 187 S. W. 1174.

XVI. REVIEW.

(A) Scope and Extent in General.

⇒837(3) (Tex.Civ.App.) An appeal from an order granting a temporary writ of injunction will be determined upon the allegations of the petition, in the absence of any denial thereof at the time of granting the writ.—*Birchfield v. Bourland*, 187 S. W. 422.

⇒839(1) (Tex.Civ.App.) The appellate court will not go outside of pleadings to inquire into matters not properly before the court, and which cannot affect the questions involved.—*Brown v. Uhr*, 187 S. W. 381.

⇒840(1) (Mo.) Where defendant in personal injury suit acquiesced in judgment for plaintiff, the judgment was conclusive as to his negligence and plaintiff's freedom from contributory negligence, and the only question on plaintiff's appeal was the adequacy of the judgment.—*Craton v. Huntzinger*, 187 S. W. 48.

⇒854(6) (Mo.App.) Though no reasons are given by a trial court for sustaining a motion for

a new trial, appellee may show that the order was right under any of the grounds stated in the motion.—*King v. Missouri Dairy Co.*, 187 S. W. 284.

⚡856(5) (Mo.) Where the court, in sustaining motion for new trial on specific grounds which were erroneous, impliedly overruled all other grounds, it was plaintiff's right to have such other grounds examined on defendant's appeal from the order granting new trial.—*Craton v. Huntzinger*, 187 S. W. 48.

If a motion for new trial contains several grounds, and the court sustains it as to one ground, without passing upon others, its decision will not be disturbed, even if the ground on which it was sustained was not well taken, if there is substantial evidence that motion ought to have been sustained upon another ground alleged.—*Id.*

⚡866(3) (Mo.) In proceedings to contest a will for undue influence, the question on appeal from a judgment entered upon instruction for defendants is whether there is any evidence tending to prove undue influence.—*Ryan v. Rutledge*, 187 S. W. 877.

(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.

⚡874(2) (Tex.Civ.App.) Since an order refusing to dissolve a temporary injunction is not appealable, no proceedings on the hearing at which such order was made can be considered on appeal from the order granting the injunction.—*Birchfield v. Bourland*, 187 S. W. 422.

(C) Parties Entitled to Allege Error.

⚡877(2) (Mo.) Only errors that are prejudicial to appellant will be reviewed.—*Summers v. Cordell*, 187 S. W. 5.

⚡878(2) (Mo.) The refusal of respondent to appeal from a judgment of the trial court, affirming the report of a referee on issues of fact, closes the door to any reinvestigation of the facts at the instance of respondent.—*Weber Implement Co. v. Acme Harvesting Mach. Co.*, 187 S. W. 874.

⚡882(7) (Mo.) In suit to quiet title between parties claiming under a county, where defendant's counsel treated a compromise agreement, on which the authority of the commissioner who executed the county's patent to plaintiffs' predecessor depended, as before the court, basing objections on it, etc., counsel for defendant invited the court to consider and rule upon the agreement, and will not be heard to say on appeal that it erred in accepting his invitation.—*Heagy v. Miller*, 187 S. W. 889.

⚡882(12) (Ark.) Act of defendant in requesting instruction substantially the same as one given plaintiff was an acquiescence in the latter.—*Southern Woodmen v. Davis*, 187 S. W. 638.

⚡882(12) (Mo.) In action on fire policy, where defense was arson, error in charge as to presumption of innocence held not invited by defendant's request.—*State ex rel. Detroit Fire & Marine Ins. Co. v. Ellison*, 187 S. W. 23.

⚡882(12) (Mo.) Instructions given at request of the plaintiffs were binding upon them, whether they correctly declared the law or not.—*Schofield v. Harrison Land & Mining Co.*, 187 S. W. 61.

⚡882(12) (Mo.App.) Where plaintiff's instruction correctly declared the law, and defendant's instruction was more favorable than it was entitled to, defendant cannot complain of an inconsistency between the instructions; it having invited the error.—*Pickard v. William J. Burns Detective Agency*, 187 S. W. 614.

⚡882(13) (Mo.) Appellants cannot complain of the measure of damages fixed by an instruction to the jury, where in another instruction requested by them the same measure of damages

was adopted.—*Wagner v. Binder*, 187 S. W. 1128.

⚡882(14) (Tex.Civ.App.) In action for injuries at railroad crossing, where pleadings and facts did not warrant submission by court of issue as to whether defendant was guilty of negligence in failing to ring bell and blow whistle 80 yards from crossing, error was invited by defendant's requesting its submission by offering special issue to same effect.—*Kansas City, M. & O. Ry. Co. of Texas v. Durrett*, 187 S. W. 427.

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

⚡889(3) (Ark.) Where there was no objection to any evidence introduced by plaintiff, the complaint will on appeal be treated as amended to conform to the proof.—*Clow v. Watson*, 187 S. W. 175.

(E) Presumptions.

⚡901 (Ark.) Every judgment of a court of competent jurisdiction is presumed right, unless the party aggrieved affirmatively shows it was erroneous.—*Clow v. Watson*, 187 S. W. 175.

⚡926(7) (Tex.Civ.App.) Under an assignment of error in the admission of testimony of a witness as to a reasonable commission for effecting a lease, not objecting that the witness had not qualified himself to state his opinion on that matter, it would be assumed that he was duly qualified.—*Brady v. Richey & Casey*, 187 S. W. 508.

⚡927(5) (Mo.) Supreme Court, in reviewing grant of new trial for error in not sustaining defendant's demurrer to evidence, must make every inference of fact in favor of plaintiff.—*Marinis v. Missouri Pac. Ry. Co.*, 187 S. W. 1165.

⚡927(5) (Mo.App.) In reviewing the sustaining of a demurrer to the evidence, plaintiff's evidence can be accepted as true.—*Linden v. McClintock*, 187 S. W. 82.

⚡927(7) (Ark.) On appeal from a direction of verdict, the evidence must be viewed in the light most favorable to appellants.—*Neely v. Wilmore*, 187 S. W. 637.

⚡927(7) (Mo.) In passing upon a peremptory instruction for defendant, the plaintiff's evidence, and every reasonable inference therefrom, will be accepted as true.—*Meenach v. Crawford*, 187 S. W. 879.

⚡930(3) (Tex.Civ.App.) By specific requirement of *Vernon's Sayles' Ann. Civ. St.* 1914, art. 1985, if an issue made by pleadings is not submitted to jury, and no request therefor was made, it will be deemed to have been found by court to support the judgment.—*Myers v. Grantham*, 187 S. W. 532.

⚡930(4) (Tex.Civ.App.) Where no special issues are submitted and the jury returns a general verdict, it is presumed that the jury found in favor of appellee on every issue to sustain the judgment.—*Southern Traction Co. v. Wilson*, 187 S. W. 536.

⚡934(1) (Mo.) Where it was not shown that judgment was not approved by the trial court, the docket entry being only a brief statement, and not contradictory of the full entry made in the record by the clerk, there being nothing to show that the clerk made any mistake in entering the judgment, approval will be presumed.—*Williams v. Sands*, 187 S. W. 1188.

⚡934(2) (Mo.) In absence of bill of exceptions taken below, the presumption is that judgment was justified by evidence.—*Miller v. Falloon*, 187 S. W. 839.

⚡934(2) (Tex.Civ.App.) It is the duty of the court in reviewing proceedings to indulge in support of the judgment every reasonable inference arising from the facts proven.—*Tankersley v. Jackson*, 187 S. W. 985.

⚡934(3) (Ark.) Only in cases of appeal from a default will the court determine whether the averments of the complaint are sufficient to up-

hold the judgment.—Clow v. Watson, 187 S. W. 175.

(F) Discretion of Lower Court.

—959(1) (Ark.) Allowance of amendments before trial, during trial, and even after the evidence has all been taken, to conform to the proof, will be sustained, unless there is a manifest abuse of discretion.—Butler County R. Co. v. Erum, 187 S. W. 329.

—959(3) (Tex.Civ.App.) The discretion of the court in refusing an amendment offered after trial has begun, which would probably cause delay in trial, is not reviewable.—Bender v. Bender, 187 S. W. 735.

—962 (Mo.App.) The reinstatement of a dismissed cause was within the discretion of the trial court, where nothing appeared in the record proper to show that it was forbidden by law or rule of court or that its discretion was unsoundly exercised.—Southwest Nat. Bank of Kansas City v. McDermand, 187 S. W. 121.

—978(3) (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2021, the trial court's discretion in overruling motion for new trial on ground of misconduct of jury, while reviewable on appeal, will not be disturbed where it seems that it acted fairly in its investigation.—Kaker v. Parriah, 187 S. W. 517.

—978(3) (Tex.Civ.App.) Where trial court fully investigates alleged misconduct of jury, and finds it was not such as influenced the jury in returning verdict, his action in overruling motion for new trial for such alleged misconduct will not be disturbed.—Galveston Electric Co. v. Hanson, 187 S. W. 533.

(G) Questions of Fact, Verdicts, and Findings.

—987(1) (Mo.App.) On appeal, the court will not examine the weight of conflicting testimony.—De Wolff v. Morino, 187 S. W. 620.

—994(2) (Tex.Civ.App.) In suit on policy defended on the ground of nonliability by reason of failure to pay assessments, the credibility of the witnesses and the weight to be given their conflicting testimony was for the jury, and its verdict could not be disturbed.—Modern Woodmen of America v. Yanowsky, 187 S. W. 723.

—994(3) (Mo.) In a cause tried to the court which has the witnesses before it, the court is the sole judge of their credibility.—Ledbetter v. Phillips, 187 S. W. 9.

—994(3) (Tex.Civ.App.) On trial by the court, it is the sole judge of the credibility of witnesses.—Derry v. Harty, 187 S. W. 343.

—995 (Mo.) The Supreme Court is not concerned with the weight of evidence on an appeal.—Reid v. St. Louis & S. F. R. Co., 187 S. W. 15.

—995 (Tex.Civ.App.) On trial by the court, it is the sole judge of the weight of testimony.—Derry v. Harty, 187 S. W. 343.

—997(2) (Mo.App.) In action for personal injuries where demurrer to evidence was overruled, question is did plaintiff adduce substantial evidence, which, if accepted by jury, will point to the pleaded cause as the proximate and sole cause of injury.—Summers v. Chicago, R. I. & P. Ry. Co., 187 S. W. 125.

—999(1) (Mo.App.) In a servant's action for personal injury, a verdict for him settled all controverted issues of fact in his favor.—Winkleblack v. Great Western Mfg. Co., 187 S. W. 95.

—1002 (Ark.) Where the evidence is conflicting, but there is evidence of a substantial character to support a verdict, judgment thereon will be affirmed.—Brown v. Morrow, 187 S. W. 449.

—1002 (Mo.) Verdict on conflicting evidence in an action upon an accident policy is conclusive on appeal.—Fay v. Aetna Life Ins. Co., 187 S. W. 861.

—1002 (Mo.App.) The weight of negative testimony of the defendant and positive testimony of the plaintiff is for the jury.—Toberman, Mackey & Co. v. Gidley, 187 S. W. 593.

—1002 (Tex.Civ.App.) A verdict on conflicting evidence will not be disturbed.—Townsend v. Pilgrim, 187 S. W. 1021.

—1003 (Tex.Civ.App.) The appellate court will set aside a verdict, where it has the conviction that the verdict is clearly against the preponderance of evidence.—Texas & N. O. R. Co. v. Jones, 187 S. W. 717.

Although there may be sufficient evidence to carry a case to a jury, yet, if the verdict is so against the preponderance of the evidence as to show that manifest injustice has been done, it may be set aside on appeal.—Id.

—1008(1) (Mo.) In a purely legal action, such as ejectment, the Supreme Court is concluded by the trial court's finding of fact.—Williamson v. Roberts, 187 S. W. 19.

—1009(2) (Mo.App.) Partition suit findings as to advances made by deceased to a daughter cannot be reviewed, if supported by substantial evidence.—Pitts v. Metzger, 187 S. W. 610.

—1010(1) (Mo.) On appeal from the judgment in a law action, if there is any substantial testimony in the record to sustain the judgment, it is the duty of the court to affirm it.—Ledbetter v. Phillips, 187 S. W. 9.

—1011(1) (Mo.App.) A finding of the trial court on conflicting evidence is conclusive.—Diehr v. Dean, 187 S. W. 602.

—1011(1) (Tex.Civ.App.) The finding of the trial court under conflicting evidence on disputed claims allowed the guardian of a minor's estate is conclusive.—Yates v. Watson, 187 S. W. 548.

—1018 (Mo.) In an action which is neither an equitable action nor one wherein a reference of the issues would have been compulsory under the statute, findings of fact by a referee, if supported by any substantial evidence, are conclusive on appeal.—Weber Implement Co. v. Acme Harvesting Mach. Co., 187 S. W. 874.

—1018 (Mo.App.) A referee's finding on the issues supported by the evidence is conclusive on such issues in the Court of Appeals.—Commercial Bank v. American Bonding Co., 187 S. W. 90.

—1018 (Mo.App.) On appeal involving referee's findings of facts, the court may fully review them if the matter was subject to compulsory reference regardless of consent given; but, if referred by agreement and not compulsory, the referee's report operates as a special verdict, and if supported by substantial evidence cannot be set aside.—Craig v. McNichols Furniture Co., 187 S. W. 793.

—1019 (Mo.App.) Where the evidence directly conflicts and the question becomes one of credibility of witnesses, the finding of the referee will be deferred to.—Craig v. McNichols Furniture Co., 187 S. W. 793.

—1022(1) (Mo.App.) Findings of fact by the referee who had the witnesses before him, approved by the circuit court, are entitled to deference and respect, but may be set aside if clearly erroneous.—Craig v. McNichols Furniture Co., 187 S. W. 793.

—1022(2) (Mo.App.) A referee's finding approved by the trial court is a special verdict, and, where supported by substantial evidence, is binding on the Court of Appeals.—Commercial Bank v. Maryland Casualty Co., 187 S. W. 103.

(H) Harmless Error.

—1033(5) (Mo.App.) Where instructions, although conflicting, are favorable to appellant, their conflict is not error of which he can complain.—Allaire, Woodward & Co. v. Cole, 187 S. W. 816.

⇒1046(3) (Tex.Civ.App.) Error, if any, in refusing defendant the right to open and close the evidence and argument was harmless, where the court properly took the case from the jury.—*Abernathy Rigby Co. v. McDougle, Cameron & Webster Co.*, 187 S. W. 503.

⇒1048(6) (Tex.Civ.App.) In an action for personal injuries, where plaintiff unintentionally obtained information on cross-examination of defendant's witnesses that defendant was insured, error *held* not reversible.—*Carter-Mullaly Transfer Co. v. Bustos*, 187 S. W. 396.

⇒1048(7) (Tex.Civ.App.) In action for personal injuries, error in permitting physician, witness for plaintiff, to testify that he had testified for certain railroads in similar cases, was not reversible, where defendant had asked witness if plaintiff was going to pay him, and other physicians testified to plaintiff's injuries.—*Kansas City, M. & O. Ry. Co. of Texas v. Durrett*, 187 S. W. 427.

⇒1048(7) (Tex.Civ.App.) In personal injury action, the exclusion of testimony of doctors on former trial as impeaching evidence *held* not prejudicial.—*Missouri, K. & T. Ry. Co. v. Gilcrease*, 187 S. W. 714.

⇒1050(1) (Mo.) Admission of evidence, showing visual conditions at time and point of plaintiff's injury, is not prejudicial; such facts being material to a determination of liability.—*McWhirt v. Chicago & A. R. Co.*, 187 S. W. 830.

⇒1050(1) (Tex.Civ.App.) Allowing expert to testify as to grading cotton from copy of his books *held* not reversible error.—*Townsend v. Pilgrim*, 187 S. W. 1021.

⇒1050(2) (Tex.Civ.App.) In broker's action for a commission for effecting a lease for a term, admission of lessee's testimony that he was able to carry out the lease contract *held* prejudicial.—*Brady v. Richey & Casey*, 187 S. W. 508.

⇒1050(3) (Mo.App.) An erroneous admission of incompetent evidence as to a matter concerning which there was no dispute is harmless.—*Pickard v. William J. Burns Detective Agency*, 187 S. W. 614.

⇒1050(3) (Tex.Civ.App.) In an action by white passengers because placed in the same coach with negroes, the admission of evidence as to the cause of the commingling of the races *held* harmless, if erroneous.—*Weller v. Missouri, K. & T. Ry. Co.*, 187 S. W. 374; *Connally v. Same*, *Id.* 376.

⇒1051(1) (Tex.Civ.App.) Any error in permitting a witness to testify to facts already proved by defendant's letter was harmless.—*Black v. Wilson*, 187 S. W. 493.

⇒1051(2) (Mo.) In statutory suit at law to ascertain and adjudge title to land, error, if any, in admission of uncontroverted evidence of defendant's good faith in taking possession of the land, *held* not reversible.—*Schofield v. Harrison Land & Mining Co.*, 187 S. W. 61.

⇒1051(3) (Tex.Civ.App.) In action for broker's commission, where defendant admitted an option to the purchaser procured, admission of secondary testimony on the subject was harmless to defendant.—*Black v. Wilson*, 187 S. W. 493.

⇒1052(8) (Tex.Civ.App.) In suit for partition, error in admission of evidence incompetent because relating to transactions with decedent *held* harmless, where the other independent evidence was not such as to require court to render different judgment.—*Peil v. Warren*, 187 S. W. 1052.

⇒1056(4) (Ark.) In fireman's action for injury from defendant's negligence in leaving too large a hole in floor of tender, error in exclusion of evidence of custom of other railroads *held* not cured by fact that jury might have found for plaintiff upon evidence showing that hole's edges were battered, or by evidence of use of such holes on defendant's road.—*St. Louis & S. F. R. Co. v. Keathley*, 187 S. W. 319.

⇒1058(2) (Tex.Civ.App.) Exclusion of grantee's testimony that he would not have taken the deed in question as a mortgage is harmless, where he is permitted to repeatedly state that it was an absolute conveyance.—*Alexander v. Conley*, 187 S. W. 254.

⇒1058(2) (Tex.Civ.App.) Excluding evidence of instructions by plaintiff's deceased grantor to his agent to allow defendants to occupy permissively was not error, in view of similar testimony given without objection.—*Houston Oil Co. of Texas v. Stepney*, 187 S. W. 1078.

⇒1060(1) (Tex.Civ.App.) In an action for personal injuries, error of plaintiff's counsel in asking two jurors, who did not serve on jury, if they represented an insurance company, was harmless, where bill of exceptions fails to show that question was asked in the presence and hearing of persons who afterwards served on jury.—*Carter-Mullaly Transfer Co. v. Bustos*, 187 S. W. 396.

⇒1061(3) (Mo.) Plaintiff not having been entitled to go to the jury either on the issues of negligence or contributory negligence, any error in nonsuiting him on the ground of his not producing sufficient evidence to overcome a release will not work a reversal.—*Woods v. St. Louis & S. F. R. Co.*, 187 S. W. 11.

⇒1061(4) (Mo.App.) Where the direction of a verdict for plaintiff in replevin for a player piano was proper, defendant cannot object that the jury were not required to find that his possession was unlawful, etc.—*R. L. Burke Music Co. v. Miller*, 187 S. W. 141.

⇒1062(1) (Tex.Civ.App.) In an action against sleeping car company for loss of passenger's money by theft of porter or failure to keep watch over it, where the evidence tending to show negligence on the part of the company in failing to keep watch was extremely meager, the erroneous submission of the issue of theft by the porter *held* reversible error.—*Pullman Co. v. Franks*, 187 S. W. 501.

⇒1062(1) (Tex.Civ.App.) The submission of an interrogatory the answer to which becomes immaterial by the submission and answer of other interrogatories is harmless.—*Houston Oil Co. of Texas v. Stepney*, 187 S. W. 1078.

⇒1062(2) (Tex.Civ.App.) In trespass to try title, the refusal to submit special issues as to appellee's diligence in not discovering a prior deed to appellant is harmless, where the jury found that such deed was a mortgage, thereby preventing appellant from maintaining his form of action.—*Alexander v. Conley*, 187 S. W. 254.

⇒1062(2) (Tex.Civ.App.) In action for injuries at railroad crossing, error of court in failing to submit question as to whether or not driver of automobile in which plaintiff was riding was agent or under control of plaintiff, so as to charge plaintiff with his negligence, was harmless, where jury found driver was not negligent.—*Kansas City, M. & O. Ry. Co. of Texas v. Durrett*, 187 S. W. 427.

⇒1062(2) (Tex.Civ.App.) Under an issue of breach of warranty, failure to submit an issue whether plaintiff agreed to send defendant an expert to rig and operate the stump puller in question is not reversible error, where the jury found that the only warranty made related to what stumps the machine could pull.—*Jenkins v. Morgan*, 187 S. W. 1091.

⇒1064(1) (Mo.App.) An instruction, in an action on a covenant contained in a deed to assume an incumbrance, *held* harmless, though erroneous.—*Johnson v. Maier*, 187 S. W. 143.

⇒1064(1) (Mo.App.) In an action on a note, instruction that if plaintiff's cashier agreed to extend the time of payment he was estopped to deny his authority thereto, though erroneous, *held* not reversible error.—*Citizens' Bank of Senath v. Douglass*, 187 S. W. 158.

⇒1064(1) (Tex.Civ.App.) Where no harm resulted to defendant by unnecessarily correcting a proper charge and re-reading it to the jury.

there was no error.—Galveston Electric Co. v. Hanson, 187 S. W. 538.

⇒1064(2) (Mo.App.) In action for injuries in collision between wagons, where the fact of collision was not disputed, the defect in an instruction that it assumed the collision was not important.—Burns v. Polar Wave Ice & Fuel Co., 187 S. W. 145.

⇒1066 (Mo.) In action for double indemnity under provision of accident insurance policy in case insured was injured while a passenger in or on a public conveyance, instruction attempting to state relation of passenger as between insured and carrier as well as relation of passenger under the policy *held* harmless.—Fay v. Aetna Life Ins. Co., 187 S. W. 861.

⇒1066 (Mo.App.) An instruction regarding defendant's duty to slow up when he saw plaintiff's pony in the way of his automobile *held* prejudicial, where plaintiff claimed the pony was at the side of the road and backed into the automobile while it was passing.—Priebe v. Crandall, 187 S. W. 605.

⇒1066 (Mo.App.) In action for goods delivered to defendant's agent, an instruction, submitting defendant's liability upon delivery to him or his agent or "partner," the word "partner" is immaterial, it appearing delivery was made to defendant's agent.—Wells v. Vallo, 187 S. W. 621.

⇒1066 (Tenn.) In action against railway for injuries, where, under evidence, there was no material issue for jury on question of defendant's negligence, error in charging doctrine of *res ipsa loquitur* was harmless.—Memphis St. Ry. Co. v. Cavell, 187 S. W. 179.

⇒1066 (Tex.Civ.App.) Where the master was not required to warn a minor servant to be careful of stobs standing in ground between doors inclosing merry-go-round, charge that a failure to warn if a man of ordinary prudence would have done so was material error.—Dallas Fair Park Amusement Ass'n v. Barrentine, 187 S. W. 710.

⇒1066 (Tex.Civ.App.) Where the beneficiary gave a receipt in full for two life policies which recited that she voluntarily made and understood the settlement, the question whether her relatives, who negotiated the compromise, were her authorized agents, is immaterial, and an instruction that they were her agents, even if erroneous, is harmless.—McDonald v. Aetna Life Ins. Co. of Hartford, Conn., 187 S. W. 1005.

Where the beneficiary voluntarily gave a receipt in full of two life policies for one-half their face value, the question whether the controversy as to cause of deceased's death between the insurer and her relatives was to be considered as if between herself and the insurer was immaterial, and an instruction that it should be so considered was without prejudice.—*Id.*

⇒1067 (Mo.) In statutory suit at law to ascertain and adjudge title to land, error, if any, in refusal of plaintiff's requested instruction on defendant's good faith, *held* not reversible, where there was no evidence tending to show defendant's bad faith.—Schofield v. Harrison Land & Mining Co., 187 S. W. 61.

⇒1068(1) (Mo.) Plaintiff, who recovered judgment, cannot complain of erroneous instructions as to negligence or contributory negligence; such questions having been resolved in his favor by the jury.—Craton v. Huntzinger, 187 S. W. 48.

⇒1068(4) (Mo.App.) In an action for personal injuries where the petition alleged that plaintiff expended \$700 for medical assistance, error in instruction authorizing an assessment for any money spent in this way, without restricting the assessment to the pleaded sum, was harmless, where the only evidence could not have induced a higher assessment.—Summers v. Chicago, R. I. & P. Ry. Co., 187 S. W. 125.

⇒1068(5) (Tex.Civ.App.) Rejection of a requested charge is immaterial where the jury by its verdict did the precise thing the charge would have required, if given.—Nanny v. Vaughn, 187 S. W. 499.

⇒1069(1) (Tex.Civ.App.) In passenger's action for personal injury, discussion of jurors in the jury room, as to whether plaintiff had really been injured and as to the probability that defendant would appeal, *held* not prejudicial to defendant.—Wichita Falls Traction Co. v. Berry, 187 S. W. 415.

⇒1071(8) (Mo.App.) The omission of the findings of fact in replevin to find that defendant was in possession of the property when the action was instituted is rendered harmless by the testimony of the defendant, admitting that possession was in his agent or servant at the time.—De Wolff v. Morino, 187 S. W. 620.

⇒1073(1) (Tex.Civ.App.) It was not prejudicial error to order personal judgments against a railway company in favor of a subcontractor's creditors, where the decree relieves it from liability upon payment of the amount due from it to the subcontractor.—Texas Bldg. Co. v. Collins, 187 S. W. 404.

(I) Error Waived in Appellate Court.

⇒1078(1) (Mo.App.) Assignments of error not raised in the appellants' original brief, but presented by their reply brief, need not be considered.—Carradine v. Ford, 187 S. W. 285.

(K) Subsequent Appeals.

⇒1096(3) (Mo.) The contention that part of the judgment was not supported by any evidence should have been presented on the former appeal from the original judgment, which was affirmed, and cannot be considered on appeal from an order of the trial court striking out such part of the judgment after affirmance.—Williams v. Sands, 187 S. W. 1188.

⇒1099(7) (Mo.App.) Where the evidence in the second trial, for failure to accept produce shipments, shows a state of facts different from that on which the case was first decided, the doctrine of *res adjudicata* is inapplicable.—Roaring Fork Potato Growers v. C. O. Clemons Produce Co., 187 S. W. 617.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(B) Affirmance.

⇒1140(2) (Mo.) The Supreme Court cannot affirm a judgment by eliminating an item of damages where conflicting evidence renders it a jury question unless the plaintiffs consent.—Stone v. McConnell, 187 S. W. 884.

⇒1140(3) (Mo.) Where a verdict for plaintiffs is proper except as to items of damages which plaintiffs agree to eliminate, judgment will be entered in the Supreme Court for the reduced amount.—Stone v. McConnell, 187 S. W. 884.

(D) Reversal.

⇒1170(1) (Tex.Civ.App.) Under rule 62a (149 S. W. x), the court will not reverse judgment for errors not reasonably calculated to cause, or not causing, rendition of improper judgment.—Myers v. Grantham, 187 S. W. 532.

⇒1170(3) (Tex.Civ.App.) Under rule 62a (149 S. W. x) nonprejudicial error in overruling a demurrer *held* not ground for reversal.—Blount, Price & Co. v. Payne, 187 S. W. 990.

⇒1170(3) (Tex.Civ.App.) In wife's suit to set aside decree of divorce fraudulently obtained by husband, allegations of petition, if unnecessary or in the nature of evidentiary facts, *held* not to require a reversal of judgment for her, in view of rule 62a for Courts of Civil Appeals (149 S. W. x).—McConkey v. McConkey, 187 S. W. 1100.

⇒1170(7) (Mo.App.) In a libel action based upon a portion of an affidavit, the court's failure

to require plaintiff to introduce the entire affidavit, or the pamphlet in which it was published, is not reversible error under Rev. St. 1909, § 2082, forbidding reversals except for material errors, where defendant did not offer the remaining matter.—Ritschy v. Garrels, 187 S. W. 1120.

⇨1170(9) (Mo.App.) Under Rev. St. 1909, § 2082, authorizing reversals for substantial errors only, the failure of charge to require the value of certain unburned tools to be deducted from the total insured value is not reversible error, where the pleadings admit that the burned goods were worth more than the amount recovered.—Maggard v. Pacific Fire Ins. Co. of City of New York, 187 S. W. 569; Same v. Stuyvesant Ins. Co., *Id.* 571.

⇨1171(2) (Tex.Civ.App.) An assignment of error to an allowance of \$172.55, of which \$34 was possibly erroneous, will be entirely overruled when the \$34 deduction would make no appreciable difference in the result, especially where there is no assignment specifying the \$34 item.—Texas Bldg. Co. v. Collins, 187 S. W. 404.

⇨1172(2) (Tex.Civ.App.) Under rule 62a for Court of Civil Appeals (149 S. W. x), and where policy showed that parties intended that it should be a severable contract, judgment for plaintiff would be reversed in so far as it affected interest claimed as an heir and by assignment of other heirs of deceased joint beneficiary.—Modern Woodmen of America v. Yanowsky, 187 S. W. 728.

⇨1173(2) (Mo.App.) In partition, where plaintiff did not appeal, and the only appeal was by a defendant, who had sought to enforce a vendor's lien against the proceeds of the sale, the Court of Appeals will not enter such judgment as plaintiff claims the trial court should have entered.—Hodges v. Bryant, 187 S. W. 623.

⇨1178(2) (Mo.) The action of the Court of Appeals in remanding a cause after reversal will not be disturbed even though the evidence be insufficient to support a recovery, where there is a possibility that sufficient evidence may be adduced on another trial, since the appellate court under Rev. St. 1909, § 2083, has authority to remand in such cases.—State ex rel. Scullin v. Robertson, 187 S. W. 34.

The Court of Appeals, in reversing a judgment, may under Rev. St. 1909, § 2083, look into the entire record and remand the case if errors appear therein, though such errors are not raised by the respondent by cross-appeal.—*Id.*

⇨1178(8) (Mo.App.) Where plaintiff failed to prove a specific act of negligence alleged, but proved another act which may have been negligent, judgment in his favor would be reversed, and the cause remanded for amendment.—Gilbert v. Hilliard, 187 S. W. 594.

(F) Mandate and Proceedings in Lower Court.

⇨1191 (Tex.Civ.App.) Where a cause was reversed and remanded by a Court of Civil Appeals, and no mandate issued within a year, the district court properly dismissed the cause and refused to reinstate it.—Pevito v. Southern Gas & Gasoline Engine Co., 187 S. W. 1009.

⇨1195(1) (Ark.) Where on second appeal it was adjudged there could be no recovery under the by-laws of a fraternal insurer where a violation of law on part of member resulted in his death, such holding is the law of the case on a subsequent trial.—Eminent Household of Columbian Woodmen v. Howle, 187 S. W. 176.

APPEARANCE.

⇨4 (Tex.Civ.App.) Where suit is brought to a term too late for service, defendant waives his right not to answer at that term by filing a plea of privilege before adjournment thereof, under Rev. St. 1911, art. 1882.—Smith v. First Nat. Bank of Waco, 187 S. W. 283.

⇨9(3) (Tex.Civ.App.) Under Rev. St. 1879, art. 1243, a special appearance of defendant in motion to attack a service operates as a general appearance.—Oswald v. Williams, 187 S. W. 1001.

⇨24(1) (Tex.Civ.App.) Although not served or served with void process, appearance of a nonresident defendant, however limited, operates as a general appearance at the succeeding term under Rev. St. 1879, art. 1243, conferring jurisdiction over his person.—Oswald v. Williams, 187 S. W. 1001.

⇨24(5) (Mo.App.) Fact that no summons was issued and served upon party made defendant after submission of the case upon assignment to him of the subject-matter could not be relied upon by him to destroy the judgment, where, by filing motion to strike out amended petition, he voluntarily entered his general appearance to the merits.—Bush v. Block, 187 S. W. 153.

APPLICATION.

See Payment.

APPOINTMENT.

See Charities, ⇨47; Elections, ⇨51; Executors and Administrators, ⇨17-31; Municipal Corporations, ⇨131; Sheriffs and Constables, ⇨18.

APPROPRIATION.

See States, ⇨130, 131.

APPROVAL.

See Appeal and Error, ⇨1022.

ARBITRARY POWER.

See Carriers, ⇨18.

ARBITRATION AND AWARD.

See Insurance, ⇨574, 579, 612.

I. SUBMISSION.

⇨2 (Mo.App.) Disputants may agree to a common-law arbitration, the statutory and common-law methods of arbitration being regarded as distinct and concurrent remedies aiming at the same result.—Thatcher Implement & Mercantile Co. v. Brubaker, 187 S. W. 117.

A submission to arbitration in writing is within statute, although there is no clause authorizing a circuit court judgment upon the award made pursuant to the submission, although at common law the submission agreement may be either parol or in writing.—*Id.*

Where parties by writing agreed to submit to arbitration a controversy arising out of a contract under law of Indiana which governs the agreement, the contract not containing a provision "that such submission be made a rule of any court of record designated in the instrument," it was an agreement for common-law arbitration.—*Id.*

⇨3 (Mo.App.) All that is required of a submission to arbitration is that a cause of action shall appear to exist.—Thatcher Implement & Mercantile Co. v. Brubaker, 187 S. W. 117.

⇨12 (Mo.App.) Where a submission to arbitration was to be decided according to rules of an association, arbitrators not being presumed to know the law, unless partiality, corruption, or gross miscalculation exists, the courts will not interfere.—Thatcher Implement & Mercantile Co. v. Brubaker, 187 S. W. 117.

⇨18 (Mo.App.) A contract of submission to arbitration, in writing, not made in Missouri, and to be performed in Indiana, is governed by laws of Indiana.—Thatcher Implement & Mercantile Co. v. Brubaker, 187 S. W. 117.

III. AWARD.

⚡85(3) (Mo.App.) In an action upon an award made upon a common-law agreement of arbitration, burden is on plaintiff to plead and prove not only award but submission, since arbitrators have no power to bind parties beyond terms of submission.—*Thatcher Implement & Mercantile Co. v. Brubaker*, 187 S. W. 117.

A formal agreement of submission to arbitration, treated by committee as a bill of particulars, it being assumed, in the absence of evidence to the contrary, that particulars equaled in scope subject-matter and cause defined in formal agreement, *held* sufficient proof of the agreement of arbitration.—*Id.*

The same presumptions being indulged in favor of an award on an agreement of arbitration as apply to judgments of courts of record, award will be presumed to be within submission, unless contrary expressly appears.—*Id.*

ARGUMENT OF COUNSEL.

See Appeal and Error, ⚡261, 1060; Criminal Law, ⚡706-730; Trial, ⚡129, 132.

ARSON.

See Criminal Law, ⚡406; Witnesses, ⚡52.

⚡41 (Tex.Cr.App.) In a prosecution for arson, in view of evidence, inclusion, in charge on principals, of words "whether in point of fact all were actually bodily present or not," *held* not erroneous.—*Arensman v. State*, 187 S. W. 471.

In a prosecution for arson, where the court told the jury under what circumstances they could consider defendant's wife's statements in his absence tending to show by them a common design, purpose, or intent to burn "said stock of millinery," he should have said "said building."—*Id.*

ASSAULT AND BATTERY.

See Homicide, ⚡100, 257, 310; Rape, ⚡16.

ASSESSMENT.

See Insurance, ⚡191, 362; Municipal Corporations, ⚡407-578; Taxation, ⚡466, 493.

ASSETS.

See Executors and Administrators, ⚡46, 53.

ASSIGNMENT OF ERRORS.

See Appeal and Error, ⚡722-742; Criminal Law, ⚡1129.

ASSIGNMENTS.

See Alteration of Instruments; Bills and Notes, ⚡317; Fraudulent Conveyances; Insurance, ⚡222; Judgment, ⚡683; Landlord and Tenant, ⚡79; Patents; Venue, ⚡27.

I. REQUISITES AND VALIDITY.

(A) Property, Estates, and Rights Assignable.

⚡12 (Tex.Civ.App.) A building contractor may assign a debt which is to accrue in his favor under his contract.—*King v. Hardin Lumber Co.*, 187 S. W. 401.

(B) Mode and Sufficiency of Assignment.

⚡58 (Tex.Civ.App.) An order by a building contractor to the owners to pay a materialman a certain sum operates without acceptance as an equitable assignment of the fund to accrue in favor of the contractor.—*King v. Hardin Lumber Co.*, 187 S. W. 401.

IV. ACTIONS.

⚡131 (Tex.Civ.App.) In actions by assignee to enforce payment of the fund assigned, the alleged invalidity of the assignment due to restriction in assignor's contract against assignment is defensive matter which defendant must plead and prove.—*King v. Hardin Lumber Co.*, 187 S. W. 401.

ASSOCIATIONS.

See Exchanges; Insurance, ⚡693-819.

ASSUMPTION OF DEBT.

See Mortgages, ⚡280, 283; Partnership, ⚡239.

ASSUMPTION OF RISKS.

See Master and Servant, ⚡203-226, 280.

ATTACHMENT.

See Exemptions; Garnishment; Homestead.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

⚡265 (Mo.) Under Rev. St. 1909, § 2298, authorizing attachments without bond against nonresidents, etc., a nonresident defendant's plea to the jurisdiction, without answer to the merits, did not affect the attachment made without bond.—*Donovan v. Gibbs*, 187 S. W. 46.

Under Rev. St. 1909, § 2298, attachment against nonresident, plaintiff having given no bond, was not automatically dissolved by defendant's filing answer, but required a motion and action thereon.—*Id.*

Under Rev. St. 1909, § 2298, in suit by attachment against a nonresident, in which plaintiff gave no bond, where cause had been taken under advisement by court when defendant's answer was filed, filing without leave and without setting aside submission of case did not render applicable the proviso of the section relative to dissolution of attachment by answer, though construed to automatically dissolve the attachment upon filing of defendant's answer.—*Id.*

ATTORNEY AND CLIENT.

See Appeal and Error, ⚡261, 1060; Costs, ⚡172; Criminal Law, ⚡706-730; Insurance, ⚡602; Interpleader, ⚡35; Trial, ⚡129, 132.

II. RETAINER AND AUTHORITY.

⚡81 (Mo.App.) An attorney has authority as agent to bind his client for the price of printing briefs.—*Mendenhall v. Sherman*, 187 S. W. 271.

Where attorney gives order for briefs to be printed in case, *prima facie* the client, and not the attorney, is liable therefor.—*Id.*

⚡86 (Tex.Civ.App.) If agreements of counsel relating to payment of jury fee in husband's action for divorce and to the passing of the case were in fact made by defendant's counsel, it was immaterial that defendant was without knowledge thereof.—*McConkey v. McConkey*, 187 S. W. 1100.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(B) Lien.

⚡180 (Mo.App.) Where attorneys handed a copy of a written compensation contract to defendant, there was a sufficient compliance with Rev. St. 1909, § 965, requiring written notice of an attorney's interest in his client's cause of action.—*Simpson v. Federal Lead Co.*, 187 S. W. 1123.

Where notice of attorney's claim to lien for compensation was served upon the defendant's claim agent, who was authorized to settle the case, and he afterwards attempted to do so with

the attorneys, *held*, that defendant waived any defects in the manner of service.—*Id.*

—192(2) (Mo.App.) A petition setting out a compensation contract between plaintiff attorneys and their client, and alleging that a copy thereof was duly served in writing upon defendant, sufficiently alleges a notice to defendant under Rev. St. 1909, § 965, requiring written notice of the attorney's claim to be served.—*Simpson v. Federal Lead Co.*, 187 S. W. 1123.

AUTOMOBILES.

See Evidence, —535; Exemptions, —44; Highways, —172-184; Municipal Corporations, —705, 706; Street Railroads, —112.

AUTOPSY.

See Insurance, —549.

AUTOPTIC PREFERENCE.

See Evidence, —192.

AWARD.

See Arbitration and Award.

BAILMENT.

See Pledges.

BANKS AND BANKING.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(E) Insolvency and Dissolution.

—71 (Ark.) Acts 1913, p. 462, concerning the organization and control of banks, governs the sale of an insolvent bank's assets not under mortgage or other lien, and Kirby's Dig. § 6236, providing the manner of foreclosure of mortgages and other liens, has no application.—*Citizens' Bank & Trust Co. v. Raines*, 187 S. W. 932.

Under Acts 1913, p. 462, touching the organization and control of banks, where the court ordered the assets of an insolvent bank to be sold at private sale, and the deputy commissioner held a public sale, but recommended to the court that it be not approved, because of a larger offer subsequently made, the court's approval of the public sale *held* an abuse of its discretion.—*Id.*

Where the probate court ordered the sale of the assets of an insolvent bank at private sale under Acts 1913, p. 462, although a public sale was made, in considering the question of confirmation it should be treated as a private sale, and the rule that inadequacy of price in the absence of fraud does not afford grounds for withholding confirmation of a public judicial sale does not apply.—*Id.*

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

—119 (Ark.) A general deposit of money in a bank passes the title immediately to the bank, and establishes the relation of debtor and creditor between the bank and depositor.—*State Nat. Bank v. First Nat. Bank of Atchison*, 187 S. W. 673.

(D) Collections.

—159 (Ark.) A bank receiving a draft for collection merely is the agent of the remitter, drawer, or forwarding bank, and takes no title to the paper or the proceeds when collected, but holds the same in trust for remitting.—*State Nat. Bank v. First Nat. Bank of Atchison*, 187 S. W. 673.

No intention that the bank, to which a draft was sent for collection, should take title to the proceeds, is indicated by the drawer, living in Little Rock, instructing it to remit the proceeds by Little Rock exchange.—*Id.*

—161(3) (Ark.) The rule that an agent, having for collection obligations due his principal, can receive only money in payment, unless otherwise instructed, applies to a bank holding drafts for collection.—*State Nat. Bank v. First Nat. Bank of Atchison*, 187 S. W. 673.

—166(1) (Ark.) The drawer of draft *held* entitled to a preference out of money going into hands of collecting bank's receiver, its check, by which it remitted, not having been paid.—*State Nat. Bank v. First Nat. Bank of Atchison*, 187 S. W. 673.

Payment by check to a bank collecting a draft from a depositor *held* to be in cash, so that proceeds could be followed into receiver's hands.—*Id.*

The drawer of a draft sufficiently identifies and traces the proceeds, to be entitled to preference, by showing that after the collection the collecting bank always had, and there went into the hands of its receiver, money exceeding the draft.—*Id.*

—175(3) (Tex.Civ.App.) Evidence in an action against a bank for negligence in not collecting a draft *held* sufficient to exonerate it of negligence.—*First Nat. Bank of Roswell, N. M., v. Browne Grain Co.*, 187 S. W. 489.

BAR.

See Judgment, —552-662.

BENEFICIAL ASSOCIATIONS.

See Insurance, —693-819.

BENEFITS.

See Municipal Corporations, —439.

BEST AND SECONDARY EVIDENCE.

See Evidence, —183.

BIAS.

See Jury, —97.

BILLIARD TABLES.

See Licenses, —5½.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF LADING.

See Carriers, —218.

BILL OF REVIEW.

See Guardian and Ward, —165; Judgment, —335.

BILLS AND NOTES.

See Evidence, —423, 445; Judgment, —683; Pledges, —44; Release, —28.

I. REQUISITES AND VALIDITY.

(C) Execution and Delivery.

—63 (Ark.) Under Uniform Negotiable Instruments Law 1913, § 16, and under the law merchant, negotiable instruments are incomplete and revocable until delivery.—*Ard v. Bowie*, 187 S. W. 1066.

(F) Validity.

—106 (Ark.) Contract between husband and wife, whereby part consideration for his note was that wife should not file answer to his cross-complaint for divorce and should make no defense to the action, was void as against public policy, notwithstanding existence of legal grounds for divorce.—*Hood v. Roleson*, 187 S. W. 1059.

II. CONSTRUCTION AND OPERATION.

—132 (Mo.App.) Maker of note for amounts advanced by plaintiff under an agreement that

after maker had raised money for a mining company, and after it had purchased maker's property maker would reimburse plaintiff, was not liable where plaintiff failed to pay it over to the maker.—*Keller v. Yzabal*, 187 S. W. 576.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(A) Indorsement Before Delivery to or Transfer by Payee.

⇒242 (Ark.) One indorsing a note before delivery becomes, so far as the face of the note is concerned, a joint maker thereof.—*Tancred v. First Nat. Bank of Ft. Smith*, 187 S. W. 160.

⇒254 (Tex.Civ.App.) An indorser's liability may be fixed by protest or by bringing suit at the first term of court to which the suit can be brought after it becomes due or by suit at the second term of court after it becomes due, and showing why suit was not instituted at the first term; and, if not so fixed, he is discharged.—*Barger v. Brubaker*, 187 S. W. 1025.

An indorser, requesting an indorsee to give the maker of notes further time, waived the bringing of any suit to fix his liability as indorser until after he notified indorsee that he denied liability as indorser.—*Id.*

Where the indorser by unequivocal words or acts misleads the holder, and induces him to dispense with notice, suit, etc., required by law to fix liability of an indorser, he may be regarded as having waived his right under the law to have the note protested, suit brought, etc.—*Id.*

⇒256 (Ark.) An accommodation indorser on a note is released from obligation thereon by release of one of the principal makers by the holder with knowledge of such indorsement.—*Tancred v. First Nat. Bank of Ft. Smith*, 187 S. W. 160.

(B) Indorsement for Transfer.

⇒296 (Mo.App.) An indorser of a draft "for collection" warrants that the instrument is genuine, that he had good title to it, etc., both under Rev. St. 1909, § 10034, or the law merchant.—*In re Ziegenhein*, 187 S. W. 893.

⇒299 (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St. 1914, art. 579*, there was no cause of action against the indorser of a note where suit thereon was not filed before the first term to which suit could be brought after right of action accrued, or before the second term of such court.—*McCamant v. McCamant*, 187 S. W. 1096.

An indorser is ordinarily only secondarily liable, and only in a case where the indorsement was made at execution and delivery of the instrument is he primarily liable so as to dispense with the necessity of fixing his liability by compliance with the statute regulating the bringing of such suits at a given term.—*Id.*

To bind an indorser where suit has not been brought within the time required by law, matters of excuse must be alleged and proven.—*Id.*

(C) Assignment or Sale.

⇒317 (Mo.App.) A negotiable certificate of deposit, assigned after maturity, is taken subject to defenses available against the payee.—*State ex rel. Hadley v. Greenville Bank*, 187 S. W. 597.

(D) Bona Fide Purchasers.

⇒327 (Tex.Civ.App.) A "holder in due course" is one who has taken an instrument complete and regular on its face, and has become the owner of it before it was overdue.—*McCamant v. McCamant*, 187 S. W. 1096.

An innocent or bona fide holder for value of negotiable paper is one who has taken it in good faith for a valuable consideration in the ordinary course of business, and when it was not overdue.—*Id.*

⇒342 (Mo.App.) Under Negotiable Instruments Law, one who takes a negotiable certificate of deposit with the words "payment refused" stamped thereon is not a holder in due course.—*State ex rel. Hadley v. Greenville Bank*, 187 S. W. 597.

⇒342 (Tex.Civ.App.) Corporation accepting notes under subscription contract for its stock to be issued, with notice of the conditions contained in the contract and notes, held not a bona fide holder of such notes.—*Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, 187 S. W. 681.

⇒357 (Mo.App.) Assignment of notes, made long before maturity to a bank, as collateral for a loan, without notice of any equities existing between the original parties, rendered the bank a holder in good faith.—*McLean County Bank v. Brown*, 187 S. W. 785.

⇒362 (Mo.App.) Under Negotiable Instruments Law, giving one who holds under a holder in due course all his transferor's rights, a transferee after maturity from a holder in due course is himself a holder in due course if not a party to any fraud in its procurement.—*State ex rel. Hadley v. Greenville Bank*, 187 S. W. 597.

VI. PRESENTMENT, DEMAND, NOTICE AND PROTEST.

⇒404(1) (Tex.Civ.App.) Instruments indorsed and transferred after maturity must be presented within reasonable time to charge an indorser; the holder not being strictly bound by *Vernon's Sayles' Ann. Civ. St. 1914, art. 579*.—*Barger v. Brubaker*, 187 S. W. 1025.

⇒408 (Tex.Civ.App.) An indorser's liability may be fixed by protest or by bringing suit at the first term of court to which the suit can be brought after it becomes due, or by suit at the second term of court after it becomes due, and showing why suit was not instituted at the first term; and, if not so fixed, he is released.—*Barger v. Brubaker*, 187 S. W. 1025.

⇒422(1) (Tex.Civ.App.) Where the indorser by unequivocal words or acts misleads the holder, and induces him to dispense with notice, suit, etc., required by law to fix liability of an indorser, he may be regarded as having waived his right under the law to have the note protested, suit brought, etc.—*Barger v. Brubaker*, 187 S. W. 1025.

VIII. ACTIONS.

⇒452(1) (Tex.Civ.App.) An indorser cannot escape liability by showing that he had an understanding that his indorsement was to be without recourse on him, that he was ignorant of the legal effect of signing his name on the back of the note, and that he was told that signing his name was only a formal matter necessary to transfer.—*Barger v. Brubaker*, 187 S. W. 1025.

⇒452(3) (Mo.App.) Under Negotiable Instruments Law, lack or failure of consideration for the execution of negotiable paper is a defense against all but holders in due course.—*State ex rel. Hadley v. Greenville Bank*, 187 S. W. 597.

⇒467(3) (Tex.Civ.App.) Petition in action against the maker and the payee and indorser of a note held to aver that plaintiff acquired the note before maturity.—*McCamant v. McCamant*, 187 S. W. 1096.

⇒484 (Mo.App.) In an action on a note, answer held to sufficiently allege that plaintiff agreed to raise money for a mining company out of which defendant should be paid, and out of which payment he was to repay plaintiff the amount advanced represented by the note in suit.—*Keller v. Yzabal*, 187 S. W. 576.

⇒497(2) (Ark.) The holder of a negotiable note, showing that he purchased it in the usual course for value, makes a prima facie case of bona fide purchaser, and the burden shifts to

defendant to show notice.—Holland Banking Co. v. Haynes, 187 S. W. 632.

—503 (Ark.) In action on note, defense being that defendants signed as sureties without consideration, exclusion of plaintiff's evidence, that at the execution of the note the principal on the note sold a horse on which plaintiff had a lien, as showing surrender of such lien and a new trade made as a consideration for the note, was error.—High v. Reed, 187 S. W. 168.

—523 (Ark.) In a foreclosure suit, evidence held to show that a defendant signed a note to the plaintiff as accommodation indorser.—Tancred v. First Nat. Bank of Ft. Smith, 187 S. W. 160.

—527(2) (Ark.) Evidence held sufficient to prove payment of note by check, although payee's cashier testified the amount of such note had been subsequently included in a larger note, such testimony not being entitled to much weight, where such cashier was confidential agent for the maker who executed such papers as he directed.—Evans v. Williams, 187 S. W. 446.

—537(1) (Ark.) Plaintiff in an action on a note making a prima facie case, and the testimony disclosing no legal defense, verdict should be directed.—Holland Banking Co. v. Haynes, 187 S. W. 632.

BOARDS.

See Taxation, —466, 493.

BONA FIDE PURCHASERS.

See Bills and Notes, —327-362; Vendor and Purchaser, —232.

BONDS.

See Appeal and Error, —384; Attachment, —265; Counties, —182; Highways, —90; Insurance, —250; Mandamus, —35; Railroads, —150; Sheriffs and Constables, —168.

BOOKS.

See Corporations, —181.

BOUNDARIES.

See Adverse Possession, —66.

I. DESCRIPTION.

—8 (Tex.Civ.App.) An excess of 1,500 varas in an 18-mile line is not so great as to require rejection of all calls in the survey.—Nanny v. Vaughn, 187 S. W. 499.

—14 (Mo.) Whether description states that land extends "to" a stream or "from" it, is immaterial, since both forms equally imply that it is in contact with the water course.—White-side v. Oasis Club, 187 S. W. 27.

A description of land as "all the land lying west of the lake," means the same as if it were "the land bounded on the east by the lake."—Id.

—25 (Tex.Civ.App.) Where the eastern tiers of surveys were located before the western tiers and their east lines can be ascertained, their calls should prevail over the western calls even if there is a slight variance.—Nanny v. Vaughn, 187 S. W. 499.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

—33 (Tex.Civ.App.) The law presumes that surveys were made as stated in field notes approved by the General Land Office.—Nanny v. Vaughn, 187 S. W. 499.

—37(5) (Tex.Civ.App.) In action to quiet title, the issue being a disputed boundary, evidence held to show valid agreement and location of boundary between defendant and a predecessor in title of plaintiff.—Bigham v. Stamps, 187 S. W. 733.

—40(1) (Tex.Civ.App.) In trespass to try title, evidence of the location of boundary lines of county school lands held to raise a question for the jury.—Cross v. Wilkinson, 187 S. W. 345.

BREACH OF MARRIAGE PROMISE.

—22 (Tex.Civ.App.) In an action for damages for the breach of a promise of marriage, where there was no attack upon the character of the defendant's present wife, evidence for defendant that her general character was above suspicion was inadmissible.—Kaker v. Parrish, 187 S. W. 517.

—23 (Tex.Civ.App.) Evidence held to sustain a finding that there had been a contract of marriage as alleged.—Kaker v. Parrish, 187 S. W. 517.

Evidence held to sustain a finding that the contract had not been mutually rescinded or abandoned.—Id.

—34 (Tex.Civ.App.) That plaintiff in action for breach of promise, in answer to defendant's statements that he did not know that he would ever marry and that he did not have the same affection for her as formerly, said that they had better quit, was not, as a matter of law, a waiver or surrender of her rights under the contract.—Kaker v. Parrish, 187 S. W. 517.

BRIEFS.

See Appeal and Error, —756-773; Attorney and Client, —81.

BROKERS.

See Customs and Usages, —11, 18; Evidence, —130, 317, 471, 472, 553; Exchanges; Pleading, —237.

II. EMPLOYMENT AND AUTHORITY.

—8(3) (Tex.Civ.App.) In broker's action for commission for effecting a lease, evidence held to show defendant's express authority to secure a contract to rent to a certain party on the terms finally embraced in the contract.—Brady v. Richey & Casey, 187 S. W. 508.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

—38(5) (Ark.) Where landowner had intimated that if he could not secure price named he would be willing to consider less, broker's remark to prospective purchaser that if purchaser would let the broker work it out for him he might be able to buy it for less was not fraudulent conduct as a matter of law toward the landowner.—Hight v. Marshall, 187 S. W. 433.

IV. COMPENSATION AND LIEN.

—49(1) (Tex.Civ.App.) Landowner, who contracted to pay plaintiff commission if she sold, was liable therefor, though the buyer procured was buying for a company.—Black v. Wilson, 187 S. W. 493.

A landowner, who agreed to pay commission if plaintiff sold his land, was liable therefor, plaintiff having procured a purchaser, though plaintiff's agency was not exclusive.—Id.

—53 (Tex.Civ.App.) Broker employed to procure purchaser could recover commission, though the purchaser procured desired the land and was interested before he was procured by the broker.—Black v. Wilson, 187 S. W. 493.

—54 (Tex.Civ.App.) Where a broker alleged a contract to procure a responsible lessee, the defendant, who accepted the lessee procured and entered into a lease with him, was estopped from alleging anything against the lessee's responsibility, except fraud on the part of broker's employé, inducing his acceptance.—Brady v. Richey & Casey, 187 S. W. 508.

—56(2) (Ark.) Where realty brokers procure a purchaser without notice of revocation of authority, they are entitled to commission, though sale is made directly by owner to the purchaser

procured by them, without owner's knowledge that they brought about the sale.—*Hight v. Marshall*, 187 S. W. 433.

§57(1) (Tex.Civ.App.) Where party employed to sell land discovered a purchaser and the owner sold to such party, it was immaterial, in relation to right to commission, that agent only gave an option to purchase.—*Black v. Wilson*, 187 S. W. 493.

§57(2) (Ark.) Landowner, who himself sold to purchaser procured by realty broker at a price satisfactory to himself, was liable for commission, though he had only authorized broker to accept a higher price for the land.—*Hight v. Marshall*, 187 S. W. 433.

§63(1) (Mo.) Real estate commissions become due, when no other time is specified, upon the intending purchaser and defendant executing the contract of purchase, although defendant's defective title prevents him from completing the transaction.—*Stone v. McConnell*, 187 S. W. 884.

§69 (Tex.Civ.App.) Under an agreement that a broker's services should be rendered to an owner, directly soliciting such services, to effect a lease, or under an implied agreement showing the owner's appropriation of such services, and where the compensation was not agreed upon, the law implied a promise to pay a reasonable amount.—*Brady v. Richey & Casey*, 187 S. W. 508.

Where no custom binding on the parties is pleaded and proven, a broker is entitled to reasonable compensation, in the absence of agreement as to amount.—*Id.*

V. ACTIONS FOR COMPENSATION.

§82(4) (Tex.Civ.App.) In action for a commission for effecting lease of defendant's property for term, petition's failure to show that the lease contained a provision under which it might be canceled by the lessee on the forfeiture of a certain amount did not prevent a recovery on a ground of a variance between allegation and proof.—*Brady v. Richey & Casey*, 187 S. W. 508.

A pleading that defendant became liable to pay the fair and usual commission for broker's services was sufficient to authorize proof of what was the reasonable value of the services performed.—*Id.*

§85(1) (Tex.Civ.App.) In an action for broker's commission, where plaintiff knew whether she had sold to a particular party, and whether defendant had authorized her to sell, she admitting that he had employed her to sell, she was properly allowed to testify to such facts.—*Black v. Wilson*, 187 S. W. 493.

§85(3) (Tex.Civ.App.) In a broker's action for commission for procuring a lessee for a term, evidence that lessee was able to carry the lease contract held irrelevant.—*Brady v. Richey & Casey*, 187 S. W. 508.

§85(6) (Tex.Civ.App.) In a broker's action for commission against the seller, the court properly rejected statements made by partner of purchaser, which could not bind plaintiff.—*Black v. Wilson*, 187 S. W. 493.

In action for commission by party employed to sell realty, testimony of the plaintiff that she had been offered by a third person 5 per cent. to sell the land, and that defendant said "he would be as good as" the third person and would give the 5 per cent., was not improper.—*Id.*

§85(7) (Tex.Civ.App.) In action for commission by party employed to sell land, where owner did not deny he executed deed to purchaser procured by plaintiff, and evidence was sufficient to show delivery, such deed was admissible to show owner accepted purchaser procured by plaintiff and delivered a deed to him.—*Black v. Wilson*, 187 S. W. 493.

In action for broker's commission, deeds which

would not disprove anything testified to by the purchaser procured by plaintiff, and had no tendency to show that plaintiff was not the procuring cause of sale, held properly excluded.—*Id.*

§85(9) (Ark.) In realty broker's action for commission, broker's action in telling prospective purchaser he might be able to buy for less than price fixed by owner held a circumstance for consideration in determining question of good faith.—*Hight v. Marshall*, 187 S. W. 433.

§85(10) (Tex.Civ.App.) In broker's action for commission for effecting lease, where no custom binding on the parties was pleaded and proven, the end accomplished, as well as effort expended, were to be considered, but evidence of customary rate for leasing property for term and of custom for landlord to pay such commission was inadmissible.—*Brady v. Richey & Casey*, 187 S. W. 508.

In broker's action for commission for effecting lease for term, fact that such services had procured a lessee who had paid seven months' rent might be considered by jury in estimating reasonable value of the services of plaintiffs' employé.—*Id.*

§86(1) (Tex.Civ.App.) In an action for a commission for effecting a lease of defendant's theater property through negotiations carried on by plaintiff and his employé at defendant's solicitation and with defendant's acquiescence and acceptance of benefits, evidence held to sustain a verdict for the plaintiff.—*Brady v. Richey & Casey*, 187 S. W. 508.

§88(6) (Mo.) Where a contract for real estate commissions provided that, if owners became liable to other agents, such liabilities should be deducted from the amount due plaintiffs, and there was evidence of such liabilities, a peremptory instruction for plaintiffs on the amount of damages was error.—*Stone v. McConnell*, 187 S. W. 884.

§88(9) (Mo.) An instruction in a real estate commission case that plaintiffs were entitled to a verdict if the evidence showed a contract to pay a certain amount per acre was proper when within the issues and supported by plaintiffs' evidence, though defendants' evidence tended to show a different agreement, as to which defendants might have requested an instruction.—*Stone v. McConnell*, 187 S. W. 884.

BUILDING CONTRACTS.

See Assignments, §12, 58.

BUILDING RESTRICTIONS.

See Covenants, §1.

BUILDINGS.

See Damages, §111.

BULK SALES LAW.

See Chattel Mortgages, §186.

BURGLARY.

II. PROSECUTION AND PUNISHMENT.

§22 (Tex.Cr.App.) Indictment for burglary, averring that accused broke and entered the house of C. S. with intent to steal, held sufficient, though the evidence showed that the son of C. S., of a similar name, resided with him.—*Coleman v. State*, 187 S. W. 481.

§45 (Tex.Cr.App.) Where accused was proven to have been in recent possession of stolen goods, the question whether his explanation was sufficient is for the jury.—*Coleman v. State*, 187 S. W. 481.

BY-LAWS.

See Corporations, **655**; Insurance, **693**.

CANCELLATION OF INSTRUMENTS.

See Insurance, **235**; Reformation of Instruments; Sales, **124**; Schools and School Districts, **30**.

I. RIGHT OF ACTION AND DEFENSES.

10 (Mo.App.) Where the remedy at law by way of action for damages is adequate, complainant is not entitled to cancellation, although respondents default, and thus confess the averments of the petition.—*Albers v. Moffitt*, 187 S. W. 903.

24(1) (Mo.App.) One who seeks cancellation of an instrument must tender back what he received under it, or offer to do so.—*Davidson v. Gould*, 187 S. W. 591.

II. PROCEEDINGS AND RELIEF.

35(1) (Mo.App.) All parties to a written instrument, which one party seeks to have canceled, are necessary parties to the suit, either as plaintiffs or defendants.—*Davidson v. Gould*, 187 S. W. 591.

47 (Mo.) In suit to cancel a deed on ground that it was procured by deceit and conspiracy to defraud, evidence held insufficient to show knowledge or connection of a defendant with an antecedent trade between a plaintiff and a Kansas corporation.—*Bross v. Rogers*, 187 S. W. 38.

In suit to cancel deed or other solemn instrument, whether by establishment of trust, showing of fraud and deceit, or any other impeaching method, proof to justify such action on part of court must be so clear, convincing, and complete as to exclude any reasonable doubt in chancellor's mind.—*Id.*

CARRIERS.

See Appeal and Error, **1050, 1069**; Commerce, **8, 35**; Courts, **97**; Customs and Usages, **17**; Evidence, **106, 314**; Insurance, **527**; Limitation of Actions, **24, 46**; Pleading, **180, 248, 420**; Principal and Agent, **171**; Railroads, **253**; Shipping; Statutes, **98**; Trial, **191, 194, 208, 251**.

I. CONTROL AND REGULATION OF COMMON CARRIERS.**(A) In General.**

2 (Ky.) Ky. St. § 829, limiting evidence which can be heard in circuit court to that heard before Railroad Commission, is constitutional.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

12(1) (Ky.) Fixing of rates to be charged by a railroad carrier in its intrastate commerce is within power of the legislative department of government within constitutional limitations.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

The Railroad Commission in establishing a rate order exercises a legislative power delegated to it by Legislature, and its acts, if done in accordance with law, are valid and enforceable pieces of legislation, and hence a rate charged in excess of that fixed is unlawful and extortionate.—*Id.*

Under Ky. St. § 829, Railroad Commission does not declare illegal legal rates imposed before, since an extortionate charge by a carrier is illegal at time it was exacted.—*Id.*

13(1) (Tex.Civ.App.) A carrier will not be required on the ground of estoppel to perform its part of a contract, illegal as giving a rebate, because of the shipper having performed his part.—*St. Louis, I. M. & S. Ry. Co. v. Landa & Storey*, 187 S. W. 358.

13(2) (Ark.) Under Const. art. 17, §§ 3 and 6, and Kirby's Dig. §§ 6802 to 6805, inclusive, prohibiting unreasonable discrimination in freight charges, an agreement that in consideration for a right of way and plaintiffs' services in obtaining a charter defendant was to haul plaintiff's lumber then owned at a specified rate fixed by parties, and after-acquired lumber at a price to be fixed by arbitration, was void.—*Bryant Lumber Co. v. Fourche River Lumber Co.*, 187 S. W. 455.

13(2) (Ky.) Ky. St. § 829, is not violative of Const. § 218, prohibiting discrimination by carriers in transportation charges and providing that a carrier shall not charge more for a short than for a long haul, in that the enforcement of an award compels such discrimination.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

13(2) (Tex.Civ.App.) A carrier's agreement to pay a certain amount in settlement of a disputed claim for negligence, in consideration of future interstate shipments over its road, held violative of the law against rebating.—*St. Louis, I. M. & S. Ry. Co. v. Landa & Storey*, 187 S. W. 358.

18(1) (Ky.) Under Ky. St. § 829, providing that, if an award by a Railroad Commission in a proceeding to fix rates of transportation is not satisfied within ten days, chairman shall file a copy in circuit court, and summons shall be issued as in other cases, does not require filing of a petition.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

When Legislature exercises its power to establish rates, the act by which establishment is effected becomes a law, and, unless violative of the constitutional limitations that rates established for carriers of intrastate commerce shall not be confiscatory, reasonableness of rates is not a judicial question.—*Id.*

Ky. St. § 829, is not violative of Const. § 2, providing that absolute and arbitrary power does not exist in a republic, since it does not vest in the Railroad Commission any absolute or arbitrary power over the property of a carrier.—*Id.*

18(3) (Ky.) An act of Railroad Commission can only be assailed as confiscatory in an action for that purpose, as by suit in equity, in a court having jurisdiction, which can finally determine its validity.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

Under Ky. St. § 829, averments of want of evidence before Railroad Commission to support its findings or of evidence that the shipper suffered damages in the amount of the award did not constitute a defense to recovery of judgment upon award.—*Id.*

Under Ky. St. § 829, carrier has no right to require shipper to file records of proceedings before Railroad Commission other than the copy of award and evidence required by statute.—*Id.*

II. CARRIAGE OF GOODS.**(A) Delivery to Carrier.**

39 (Mo.App.) Although, under federal Interstate Commerce Act, defendant would ordinarily be required to take interstate shipment, it might refuse to do so unless shipper would make it subject to delay on account of a bridge which was out, if it notified plaintiff before accepting shipment.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

44 (Tex.Civ.App.) A complaint in action for penalties prescribed by Rev. St. 1911, art. 6680 (Vernon's Sayles' Ann. Civ. St. 1914, art. 6680), for alleged failure to furnish a car, alleging application for car to be placed on a spur track of another railroad, not designating as the place where the car was desired one at some station or switch of defendant, is demurrable under Vernon's Sayles' Ann. Civ. St. 1914, art. 6679.—*Missouri, K. & T. Ry. Co. of Texas v. Harrell Gin Co.*, 187 S. W. 376.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

§62 (Mo.App.) Where shipment was subject to delay on account of bridge of connecting carrier being out, contract that shipment was subject to delay on account of bridge, not agreed to before shipment was accepted for transportation, was without consideration, and plaintiff's subsequent ratification could not give it vitality.—*Bowles v. Quincy, O. & K. O. R. Co.*, 187 S. W. 131.

(D) Transportation and Delivery by Carrier.

§88 (Ark.) An actual "delivery" is made when the possession is turned over to the consignee or his duly authorized agent and a reasonable time given him to remove the goods.—*Yazoo & M. V. R. Co. v. Altman*, 187 S. W. 656.

§89 (Ark.) The consignee's refusal to accept a shipment from the carrier does not discharge it from all liability, but it owes a duty to take care of the goods and cannot abandon them or convert them to its own use.—*Yazoo & M. V. R. Co. v. Altman*, 187 S. W. 656.

§94(5) (Ark.) In a suit to recover the value of goods which a carrier had failed to deliver, evidence held to make the delivery a question for the jury.—*Yazoo & M. V. R. Co. v. Altman*, 187 S. W. 656.

(F) Loss of or Injury to Goods.

§108 (Mo.App.) At common law, the carrier is liable for any loss or damage to a shipment not the act of God or the public enemy, or not caused by a vice or infirmity in the goods.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 187 S. W. 149.

§114 (Ark.) The liability of a carrier ceases upon delivery of the goods at the point of destination in accordance with the direction of the shipper or according to the usage and custom of the trade.—*Yazoo & M. V. R. Co. v. Altman*, 187 S. W. 656.

§119 (Mo.App.) While federal legislation upon liability of carriers in interstate commerce supersedes state regulations and policies, it did not destroy but was intended to continue in force any right which shipper had under common law, not inconsistent with federal, and the common-law rule, making carrier liable for any loss or damage not the act of God or the public enemy, was not affected.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

§131 (Mo.App.) Under Carmack Amendment, requiring that contract for shipment in interstate commerce be in writing, but not stating that if contract is not in writing it shall be void, plaintiff is not compelled to plead written contract of shipment.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

§131 (Mo.App.) At common law, in action against a carrier for loss or damages to goods shipped the shipper need not allege or prove the carrier's negligence.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 187 S. W. 149.

§132 (Mo.App.) At common law, the burden is on the carrier to show that a loss or damage to goods shipped comes within one of the recognized exceptions to liability.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 187 S. W. 149.

In action against carrier for damage to shipment, the plaintiff has the initial burden of showing that he delivered the goods to the carrier in good condition properly prepared for shipment.—*Id.*

§132 (Tex.Civ.App.) In action for value of cotton destroyed by fire while in transit, upon establishment of plaintiffs' prima facie case that cotton was destroyed while in defendant's possession, burden was on defendant to show want of negligence.—*Texas & P. Ry. Co. v. R. W. Williamson & Co.*, 187 S. W. 854.

§133 (Mo.App.) In action for damages to meat shipped, defendant carrier, to prove the meat spoiled from inherent defects or improper preparation, may introduce direct evidence or circumstantial evidence tending to eliminate every other cause.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 187 S. W. 149.

Where meat shipped was delivered to the carrier sealed in plaintiff's refrigerator car, evidence by defendant, that the capacity of ice bumpers in plaintiff's refrigerator cars is not sufficiently large to keep the meat cool enough to preserve it from decay, is admissible.—*Id.*

§134 (Mo.App.) Under common law, a prima facie case against a carrier for loss or damages to goods shipped is made by showing a delivery to the carrier in good condition and properly packed, and subsequent delivery after transportation in bad condition.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 187 S. W. 149.

Where meat shipped was delivered to the carrier sealed at plaintiff's plant in plaintiff's own refrigerator car, bill of lading for the car acknowledging receipt in "apparent" good order, contents and condition of contents unknown, and packer's certificate of United States inspection held not to show that the meat was shipped in good order and properly prepared for shipment.—*Id.*

§136 (Mo.App.) Where meat shipped was delivered to the carrier sealed in plaintiff's refrigerator car, and there is evidence that there was no delay or failure to ice, the question of the cause of the spoiling of the meat is for the jury.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 187 S. W. 149.

(H) Limitation of Liability.

§158(1) (Mo.App.) A contract provision limiting the amount of recovery in case of loss or damage to an interstate commerce shipment is valid.—*Donoho v. Missouri Pac. Ry. Co.*, 187 S. W. 141.

§159(1) (Mo.App.) The provision of a contract of shipment in interstate commerce between carrier and shipper requiring written notice of loss or damage is valid.—*Donoho v. Missouri Pac. Ry. Co.*, 187 S. W. 141.

§159(3) (Mo.App.) The provision of a contract of shipment in interstate commerce between carrier and shipper requiring written notice of loss or damage cannot be waived.—*Donoho v. Missouri Pac. Ry. Co.*, 187 S. W. 141.

§160 (Mo.App.) A contract between shipper and carrier limiting the time in which actions may be brought for loss or damage to an interstate shipment is valid and reasonable.—*Donoho v. Missouri Pac. Ry. Co.*, 187 S. W. 141.

(I) Connecting Carriers.

§177(3) (Mo.App.) The common-law rule of liability of a carrier for goods shipped was not changed by the Carmack Amendment, the purpose of which was to make the first carrier liable as at common law.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 187 S. W. 149.

III. CARRIAGE OF LIVE STOCK.

§207(1) (Mo.App.) A shipper of live stock is precluded from contending that his shipment was not made under the bill of lading, in view of his signature thereto and the Carmack Amendment requiring a written contract of shipment.—*Johnson v. Missouri Pac. Ry. Co.*, 187 S. W. 282.

§207(2) (Mo.App.) Under Interstate Commerce Act, § 1, as amended by 34 St. at L. 584, providing that shipper may accompany live stock if it is accepted for shipment, fact that a carrier's conductor told plaintiff's agent, who was accompanying a shipment, that he could not do so unless he signed a contract did not

furnish consideration for the contract.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

⇨212 (Tex.Civ.App.) Under live stock shipping contract, carrier *held* not exempt from the results of its own negligence and, if ordinary care required, bound to protect the stock from injury until the shipper could unload it, or to unload the stock itself.—*Chicago, R. I. & G. Ry. Co. v. Pavillard*, 187 S. W. 998.

⇨217(1) (Tex.Civ.App.) Where a shipper of live stock was negligent in failing to unload it on arrival so that it was injured, he could not recover for such injury.—*Chicago, R. I. & G. Ry. Co. v. Pavillard*, 187 S. W. 998.

⇨218(3) (Mo.App.) A bill of lading provision, requiring written notice of claim for damages to the carrier within a certain time after live stock is delivered and before mingled with other stock, is valid.—*Johnson v. Missouri Pac. Ry. Co.*, 187 S. W. 282.

⇨218(5) (Mo.App.) A bill of lading provision, requiring written notice of claim for damages to carrier within a certain time after live stock is delivered and before mingled with other stock, requires no special consideration to support it.—*Johnson v. Missouri Pac. Ry. Co.*, 187 S. W. 282.

⇨218(6) (Tex.Civ.App.) Under live stock shipping contract, carrier *held* not exempt from the results of its own negligence.—*Chicago, R. I. & G. Ry. Co. v. Pavillard*, 187 S. W. 998.

⇨218(10) (Mo.App.) Consignee's written receipt for the delivery of live stock is not the written notice of claim for damages required under the bill of lading.—*Johnson v. Missouri Pac. Ry. Co.*, 187 S. W. 282.

A failure to give written notice of claim for damages to the carrier, within a certain time after live stock was delivered, bars the shipper's right of action.—*Id.*

A written notice of claim for damages to the carrier within a certain time after live stock is delivered is not given by bad-order notations on the freight bill.—*Id.*

Where bill of lading requires written notice of claim for damages to the carrier within a certain time after live stock is delivered, oral notice to a station agent is ineffectual.—*Id.*

A written notice of claim for damages to the carrier within a certain time after live stock is delivered, as required by the bill of lading, is not rendered unnecessary because a station agent at destination knows of the injury to the stock.—*Id.*

⇨218(11) (Mo.App.) A bill of lading provision, requiring written notice of claim for damages to the carrier within a certain time after live stock is delivered and before mingled with other stock, cannot be waived.—*Johnson v. Missouri Pac. Ry. Co.*, 187 S. W. 282.

⇨227(2) (Mo.App.) In action against carrier for damages to an interstate shipment of hogs, if defendant wished to rely on defensive terms in written contract not pleaded by plaintiff, it could set up written contract to obtain benefit of its provisions.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

⇨228(1) (Tex.Civ.App.) Where a carrier accepts uninjured cattle for shipment and delivers them injured, its negligence is presumed.—*San Antonio & A. P. Ry. Co. v. Jackson & Allen*, 187 S. W. 488.

⇨228(3) (Tex. Civ. App.) Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 708, 731, all portions of a shipping contract relating to reciprocal rights and duties of the parties are inadmissible in action for damages to live stock shipment.—*San Antonio & A. P. Ry. Co. v. Jackson & Allen*, 187 S. W. 488.

⇨228(3) (Tex.Civ.App.) In action for damages to shipment of live stock, evidence of carrier's former custom to unload stock on arrival at certain place was incompetent as against carrier on issue of its negligence in not unloading stock upon arrival there.—*Chicago, R. I. & G. Ry. Co. v. Pavillard*, 187 S. W. 998.

⇨228(5) (Tex.Civ.App.) A prima facie showing of negligence of the carrier in action for damages to live stock shipped is not met by proof that the cattle when shipped were securely tied by the shipper, and while in the exclusive charge of the carrier became untied.—*San Antonio & A. P. Ry. Co. v. Jackson & Allen*, 187 S. W. 488.

⇨230(1) (Tex.Civ.App.) In suit for damages to shipment of live stock, *held*, that whether the shipper in the exercise of ordinary care should have been present to receive and unload it was for the jury.—*Chicago, R. I. & G. Ry. Co. v. Pavillard*, 187 S. W. 998.

⇨230(3) (Mo.App.) In action against succeeding carrier for damages to interstate shipment of hogs because of delay in delivery, whether an understanding between shipper and defendant, that shipment should be subject to delay because of bridge being out, was made before defendant accepted shipment for transportation *held* for jury.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

⇨230(4) (Mo.App.) In action against carrier for damage to interstate shipment of hogs, where there was evidence that hogs had become very warm by piling up in car, and then were unloaded into pens over protest of plaintiff's agent, question as to disease from which hogs died, or what caused it, *held* for jury.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

⇨230(8) (Mo.App.) In action against succeeding carrier for damages to an interstate shipment of hogs, instruction which told jury that, before verdict for plaintiff could be returned, they must find that defendant failed to transport hogs in reasonable time, and that by reason of said failure hogs were injured so that some of them died, was not improper.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

⇨234 (Tex.Civ.App.) Performance of agreement of release by news agent to his employer, made in Texas where agent and defendant road were residents, *held*, in part at least, to involve interstate commerce.—*Nevill v. Gulf, C. & S. F. Ry. Co.*, 187 S. W. 388.

Whether news agent entitled to transportation on defendant's roads, under contract with his employer involving interstate commerce, was a passenger when injured through negligence of defendant's servants was to be determined by the federal law.—*Id.*

⇨241 (Tex.Civ.App.) Under the state or local law, a news agent employed by a news service, and entitled under a contract between his employer and the road to free transportation upon passenger trains, was entitled to the rights, privileges, and protection of a passenger.—*Nevill v. Gulf, C. & S. F. Ry. Co.*, 187 S. W. 388.

(D) Personal Injuries.

⇨280(3) (Tenn.) Degree of care imposed on a street railway, by law and on grounds of sound public policy, is the exercise of the utmost diligent skill and foresight.—*Memphis St. Ry. Co. v. Cavell*, 187 S. W. 179.

⇨280(5) (Mo.App.) Passengers carried in a mixed train are entitled to be carried with as high a degree of safety as is compatible with the management of such a train.—*Rissmiller v. St. Louis & H. Ry. Co.*, 187 S. W. 573.

⇨284(1) (Ark.) Under Acts 1909, p. 99, making conductors peace officers with power to arrest drunken persons on their trains, it was the duty of a conductor, when a woman passenger called his attention to the intoxicated condition of other passengers, to have arrested them and handed them over to some peace officer at the first opportunity.—*Butler County R. Co. v. Exum*, 187 S. W. 329.

⇨284(1) (Tex.Civ.App.) It is the absolute duty of a carrier of passengers to protect them

by the exercise of the highest degree of care, from the willful misconduct and violence of their fellow passengers and strangers.—*Nevill v. Gulf, C. & S. F. Ry. Co.*, 187 S. W. 388.

⇒284(2) (Tex.Civ.App.) While a carrier is not ordinarily liable for unauthorized acts of third parties, nonemployees, it may become liable for negligence in permitting such acts to be done or the consequences thereof to continue, if knowledge has been brought to its servants.—*Wichita Falls Traction Co. v. Berry*, 187 S. W. 415.

⇒298(1) (Mo.App.) If the operatives of a street car had neither knowledge that a passenger had arisen, nor reason to suppose she would arise, from her seat to leave the car, it was not negligence to accelerate the speed of the car with such a jerk as would not injure a passenger who was seated, although sufficiently violent to throw one down if standing.—*Modrell v. Dunham*, 187 S. W. 561, 564.

Motorman held negligent in causing a car to suddenly jerk after it had slowed up, and the conductor had called the street after telling a passenger she would be let off at such street.—*Id.*

⇒298(2) (Mo.App.) A railroad is liable for damages suffered by a passenger on a mixed train only when the injury results from an unusual or extraordinary jerk, jolt, jar, or sudden movement.—*Rissmiller v. St. Louis & H. Ry. Co.*, 187 S. W. 573.

⇒300 (Tenn.) Street railway whose conductor attempted railroad crossing with motor and trailer without making certain that no train was approaching on straight tracks, held guilty of negligence.—*Memphis St. Ry. Co. v. Cavell*, 187 S. W. 179.

Any negligence of railroad in running freight over street railway crossing did not excuse such street railway, whose conductor was negligent in not making sure of approach of freight before attempting to cross, from liability to injured passenger.—*Id.*

⇒307(1) (Tex.Civ.App.) News agent, entitled to transportation on defendant road, who had released his employer and all roads from liability for accidents, negligence, etc., held not a passenger, and not entitled to benefits of inhibition against stipulations limiting carriers' liability for damages from negligence of their employees.—*Nevill v. Gulf, C. & S. F. Ry. Co.*, 187 S. W. 388.

⇒307(5) (Tex.Civ.App.) A news agent riding upon a pass issued by road under arrangement with his employer would not be precluded from recovering under the state law for injury from negligence of road's employees, by an agreement releasing road from such liability.—*Nevill v. Gulf, C. & S. F. Ry. Co.*, 187 S. W. 388.

⇒314(5) (Tex.Civ.App.) Petition in an action for personal injury, by the overturning of a box, on which plaintiff stepped in alighting from a car, held to state a cause of action.—*Wichita Falls Traction Co. v. Berry*, 187 S. W. 415.

⇒316(5) (Mo.App.) Injuries through derailment raise presumption of negligence.—*Jackmann v. St. Louis & H. Ry. Co.*, 187 S. W. 786.

⇒318(1) (Ark.) In a passenger's action for damages for the cursing and abuse received from drunken passengers, the damage to a basket of clothes, and sickness from smoke in the car, evidence held to sustain a verdict for plaintiff for \$100.—*Butler County R. Co. v. Exum*, 187 S. W. 329.

⇒318(4) (Mo.App.) That a street car increased its speed with a jerk while going up a slight incline was sufficient to prove that the operatives did it, and sufficient to prove the specific negligence charged.—*Modrell v. Dunham*, 187 S. W. 561, 564.

⇒318(9) (Tex.Civ.App.) Evidence held not to support verdict for plaintiff.—*Texas & N. O. R. Co. v. Jones*, 187 S. W. 717.

⇒318(11) (Ark.) In passenger's action for injuries received by stepping off the train onto a box provided by train porter, evidence of insufficient lighting of station platform and improper placing of box by porter, causing plaintiff's foot to turn, held to support verdict for plaintiff.—*Lusk v. Craft*, 187 S. W. 176.

⇒318(11) (Tex.Civ.App.) Evidence in passenger's action for personal injury while alighting from car held to sustain finding that the defendant and its conductor knew that the box on which plaintiff stepped in alighting had been placed on the ground under the step.—*Wichita Falls Traction Co. v. Berry*, 187 S. W. 415.

⇒319(3) (Ark.) A verdict for \$100 in a woman passenger's action for damages from the cursing and abuse of drunken passengers, the sickness from the smoke in the car, and damage to a basket of clothes, was not excessive.—*Butler County R. Co. v. Exum*, 187 S. W. 329.

⇒320(1) (Tenn.) In action against street railway for injuries to passenger, where no reasonable difference of opinion can exist, but that act of defendant's employees was negligent, such act was negligent in law, and there is no issue for jury on question of negligence.—*Memphis St. Ry. Co. v. Cavell*, 187 S. W. 179.

⇒320(8) (Tex.Civ.App.) Evidence in a newsboy's action for damages for personal injury by a passenger held to make the negligence of the conductor in failing to protect him a question for the jury.—*Nevill v. Gulf, C. & S. F. Ry. Co.*, 187 S. W. 388.

Where the evidence bearing upon railroad's negligence favorable to the plaintiff suing for injury by a passenger, discarding all evidence favorable to the defendant, was sufficient to support a verdict for the plaintiff, defendant's liability was for the jury.—*Id.*

⇒320(19) (Mo.App.) In an action against a street railroad for personal injuries, caused by a fall, the question whether the car jerked held for the jury.—*Modrell v. Dunham*, 187 S. W. 561, 564.

⇒320(28) (Tex.Civ.App.) On evidence in an action for personal injury while alighting from car, held that whether defendant's employees knew that the box on which plaintiff stepped was there when she alighted or by ordinary care could have known that it was not a safe step was for the jury.—*Wichita Falls Traction Co. v. Berry*, 187 S. W. 415.

In passenger's action for personal injury while alighting from car held that whether a box, about which a witness testified, was the same box used to assist plaintiff to alight was a question for the jury.—*Id.*

(E) Contributory Negligence of Person Injured.

⇒333(2) (Mo.App.) Where after a street car passenger had been told by conductor that she would be let off at a street, the conductor called the street and the car slowed up, it was not negligence to arise and approach door.—*Modrell v. Dunham*, 187 S. W. 561, 564.

(H) Palace Cars and Sleeping Cars.

⇒413(2) (Tex.Civ.App.) Sleeping car companies are required to use only reasonable or ordinary care to guard the property of passengers from theft, and are not held to that high degree of care applicable to common carriers generally.—*Pullman Co. v. Moise*, 187 S. W. 249.

⇒417 (Tex.Civ.App.) In an action for damages for the loss of wearing apparel stolen from a sleeping car berth, and for consequent mental anguish and embarrassment, defendant's negligence held a question for the jury.—*Pullman Co. v. Moise*, 187 S. W. 249.

Woman passenger whose clothes were stolen from berth in sleeping car, obliging her to walk lightly clad through train to her trunk in bag-

gage car, might recover, as an element of damages, for her consequent humiliation and embarrassment.—*Id.*

In action against sleeping car company for loss of passenger's clothes stolen from her berth, damages were not recoverable for her mental anxiety or fear of some contingency, when the anxiety was unfounded and the contingency never came to pass.—*Id.*

In an action against a sleeping car company for loss of passenger's clothes, testimony of plaintiff as to mental anxiety or fear which was in fact unfounded held inadmissible.—*Id.* ¶417 (Tex.Civ.App.) In action against sleeping car company for loss of passenger's money by theft of porter or failure to keep watch over it, evidence that the money was lost and that the porter had opportunity to take it, there being others in the car with equal opportunity, held not to raise an issue of theft by porter.—*Pullman Co. v. Franks*, 187 S. W. 501.

In action against sleeping car company for loss of passenger's money by theft, when there was no evidence of the porter's theft, held error to submit that issue.—*Id.*

CERTAINTY.

See Contracts, ¶9.

CERTIFICATE.

See Contracts, ¶287, 289.

CERTIFIED QUESTIONS.

See Courts, ¶247.

CERTIORARI.

See Courts, ¶207; Highways, ¶60; Justices of the Peace, ¶202.

I. NATURE AND GROUNDS.

¶5(1) (Mo.) Under Rev. St. 1909, § 10440, touching appeals to circuit court from judgment of county court opening any road, etc., relator, petitioning for certiorari to review action of county court in establishing public road, had adequate remedy by appeal, so that he could not resort to certiorari proceedings.—*State ex rel. Combs v. Staten*, 187 S. W. 42.

¶28(2) (Ark.) Certiorari is an appropriate remedy to review a county court's judgment where its lack of jurisdiction is urged.—*Griffin v. Boswell*, 187 S. W. 165.

II. PROCEEDINGS AND DETERMINATION.

¶57 (Mo.) On certiorari to review the judgment of the Court of Appeals in remanding a cause after reversal, the finding of the appellate court that evidence was sufficient to warrant a submission to the jury of separate counts alleging defendant's liability under the humanitarian doctrine, will not be reversed where the record does not contain all the evidence.—*State ex rel. Scullin v. Robertson*, 187 S. W. 34.

¶64(2) (Ark.) In a certiorari proceeding, a county court's jurisdiction is determined solely by an inspection of its record.—*Griffin v. Boswell*, 187 S. W. 165.

¶70(4) (Mo.) In certiorari proceedings to review action of county court in establishing road, certified copies of county court records, as well as documentary evidence, and all other evidence considered at trial, should be incorporated in bill of exceptions in order to become part of record, and without bill of exceptions the Supreme Court can only consider the record proper, petition, respondents' return, relator's motion to quash, and judgment.—*State ex rel. Combs v. Staten*, 187 S. W. 42.

CHALLENGE.

See Jury, ¶131.

CHANCERY.

See Equity.

CHARACTER.

See Criminal Law, ¶722; Evidence, ¶106; Witnesses, ¶337-361.

CHARGE.

See Trial, ¶191-296.

By carriers, see Carriers, ¶12.

To jury, see Criminal Law, ¶770-841; Trial, ¶191-296.

CHARITIES.

I. CREATION, EXISTENCE, AND VALIDITY.

¶10 (Mo.) Provision of a will that land or its value be put on interest for the use of worn-out preachers in Methodist Episcopal Church in North Missouri Conference is sufficient in every respect to create a valid charitable use.—*Buckley v. Monck*, 187 S. W. 31.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

¶34 (Mo.) Indefiniteness as to the individual recipients of the bounty is one of the elements of a charitable trust; otherwise it would be a private trust.—*Buckley v. Monck*, 187 S. W. 31.

¶43 (Mo.) If the use is so expressed in a charitable trust that the court may judge of the donor's motive so as to give specific effect to his general directions, he failing to name a trustee, the court will appoint one and administer the trust.—*Buckley v. Monck*, 187 S. W. 31.

¶47 (Mo.) A charitable trust being lawful and sufficiently specific and definite to enable the court to execute it, it will name a trustee; the will having failed to do so.—*Buckley v. Monck*, 187 S. W. 31.

If the use is so expressed in a charitable trust that the court may judge of the donor's motive so as to give specific effect to his general directions, he failing to name a trustee, the court will appoint one and administer the trust.—*Id.*

CHATTEL MORTGAGES.

See Corporations, ¶123; Limitation of Actions, ¶168; Reformation of Instruments, ¶28, 36.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

¶18 (Ark.) Mortgages may be made to cover future acquired property of the mortgagor, when an intent to that effect clearly appears; and it will be enforced against the mortgagor and all others, except purchasers for value without notice.—*Murray Co. v. Satterfield*, 187 S. W. 927.

Lien of chattel mortgage on "all machinery" that may hereafter be added to said premises was good and enforceable as between the parties to the mortgage.—*Id.*

(B) Form and Contents of Instruments.

¶48 (Tex.Civ.App.) A mortgage of the crops to be grown on the "Lewis Place" owned by mortgagor, in a certain county, held sufficiently to describe the premises to be noticed.—*Spiller v. W. J. Mann & Co.*, 187 S. W. 1014.

III. CONSTRUCTION AND OPERATION.

(B) Parties and Debts or Liabilities Secured.

¶108 (Ark.) Chattel mortgage, given to mortgagor's landlord, a farmer, and to a merchant who were not jointly interested in their business relations with the mortgagor, reciting that it was given as security, for moneys, etc., held

broad enough to embrace an indebtedness to either the landlord or the merchant, or a joint indebtedness to both.—*Livingston v. Pugsley*, 187 S. W. 925.

⇒110 (Tex.Civ.App.) A chattel mortgage, with a printed clause covering future indebtedness up to \$150, held not to cover an indebtedness of \$155 for a stump puller, where the parties intended the clause to cover future indebtedness for store supplies.—*Jenkins v. Morgan*, 187 S. W. 1091.

(C) Property Mortgaged, and Estates and Interests of Parties Therein.

⇒117 (Tex.Civ.App.) A mortgage of the crops to be grown and the rent note on a place for a year held to cover all interest of the mortgagor in the rents.—*Spiller v. W. J. Mann & Co.*, 187 S. W. 1014.

(D) Lien and Priority.

⇒138(1) (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5644, in force when oil well's chattel mortgage on machinery, etc., was given, lien of laborers engaged in drilling well, if given by the statute, was prior to that of the chattel mortgage, article 5671 not applying.—*Barton v. Wichita River Oil Co.*, 187 S. W. 1043.

⇒144 (Ark.) In absence of countervailing equities, rule as to priority between two mortgages on same property, given to different mortgagees, is that one first filed for record is a superior lien to the other, whether executed before or after.—*Murray Co. v. Satterfield*, 187 S. W. 927.

Where parties borrowed to purchase machinery, giving mortgage to secure lender, and manufacturer took back mortgages to secure price, lender filing his mortgage nine days after execution, whereas manufacturer waited from one to two months before recording its mortgages, mortgage of lender had priority.—*Id.*

⇒150(1) (Ark.) By Kirby's Dig. § 5396, all mortgages, whether on realty or personalty, are a lien on the property as against third parties from the time filed for record.—*Murray Co. v. Satterfield*, 187 S. W. 927.

⇒152 (Ark.) Under Kirby's Dig. § 5396, as to recording chattel mortgages, an instrument creates no lien and is not effective against third persons until duly acknowledged and recorded.—*Merchants' & Farmers' Bank v. Citizens' Bank*, 187 S. W. 650.

⇒155 (Ark.) The mere fact that the mortgagor of bank stock informed the bank, which under Kirby's Dig. § 853, had a lien thereon for his debts to it, of the giving of a mortgage thereon to plaintiff, and the bank did not object, would not estop it to assert its lien for money thereafter loaned the mortgagor, if the mortgage was never recorded.—*Merchants' & Farmers' Bank v. Citizens' Bank*, 187 S. W. 650.

⇒157(2) (Tex.Civ.App.) The assignee of claims of laborers engaged in drilling an oil well, who after foreclosure asserted a lien under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5644, superior to that of an existing chattel mortgage, had the burden of showing that such a lien was given by the statute.—*Barton v. Wichita River Oil Co.*, 187 S. W. 1043.

IV. RIGHTS AND LIABILITIES OF PARTIES.

⇒173(3) (Tex.Civ.App.) A petition alleging that defendant wrongfully withheld possession of mules which were the subject of the chattel mortgage given by another defendant, which failed to express the mutual intent of the parties, is sufficient as against general demurrer interposed by the defendant in possession of the mules.—*Blount, Price & Co. v. Payne*, 187 S. W. 990.

V. RIGHTS AND REMEDIES OF CREDITORS.

⇒186 (Mo.App.) Saloon keeper's chattel mortgage of his stock and fixtures to secure a note held fraudulent as to creditors, where the mortgagee did not demand a list of the mortgagor's creditors, notify them, etc., as required by the Bulk Sales Law.—*Semmes v. Ruediger*, 187 S. W. 604.

⇒202 (Mo.App.) On holding chattel mortgage of saloon stock and fixtures fraudulent as to creditors for failure to comply with the Bulk Sales Law, the decree should constitute the mortgagee a receiver under section 2 thereof.—*Semmes v. Ruediger*, 187 S. W. 604.

VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

⇒240 (Tex.Civ.App.) Where a creditor held chattel mortgages on a debtor's cotton and stump puller, a credit obtained by delivering some of the mortgaged cotton to the mortgagee should be applied on the cotton mortgage.—*Jenkins v. Morgan*, 187 S. W. 1091.

⇒244 (Ark.) It was a sufficient consideration for release of a team and wagon from the lien of a trust deed also covering other property, for the mortgagor to borrow money on the team and pay it to the trustee, although the entire debt was due and the payment equaled only one-half of it.—*Horton v. Thompson*, 187 S. W. 027.

IX. FORECLOSURE.

⇒277 (Tex.Civ.App.) Where the petition sufficiently alleged the facts to entitle plaintiff to recover on note and mortgage, he was not required to anticipate defenses, but the burden was upon the defendant to plead and prove them.—*Blount, Price & Co. v. Payne*, 187 S. W. 990.

In an action to reform and foreclose a chattel mortgage, it is not necessary for the petition to allege that it was registered; for as between the parties it was a valid and binding obligation without registration.—*Id.*

CHECKS.

See Bills and Notes, ⇒527.

CHILDREN.

See Divorce, ⇒300-312; Electricity, ⇒14; Guardian and Ward; Infants; Master and Servant, ⇒95; Negligence, ⇒85; Parent and Child; Railroads, ⇒282.

CIRCUMSTANTIAL EVIDENCE.

See Criminal Law, ⇒814; Husband and Wife, ⇒333; Intoxicating Liquors, ⇒236; Railroads, ⇒482.

CITATION.

See Process.

CITIES.

See Municipal Corporations.

CIVIL RIGHTS.

See Constitutional Law, ⇒209-247.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

See Executors and Administrators, ⇒206-256; Mechanics' Liens, ⇒157.

CLASS LEGISLATION.

See Constitutional Law, ⇒208.

CLERICAL ERRORS.

See Appeal and Error, ¶384.

CLERKS OF COURTS.

¶33 (Tex.Civ.App.) Vernon's Sayles' Ann. Civ. St. 1914, arts. 3881, 3882, 3889, and 3893, authorize the commissioners' court to allow the clerk of the county court in counties having between 25,000 and 88,000 inhabitants compensation for ex officio services, where it with the fees under articles 3881, 3882, and 3889, does not amount to more than \$3,650, and such compensation for ex officio services cannot be regarded as "excess fees" of which officers can retain only one-fourth, article 3888 not applying.—Anderson County v. Hopkins, 187 S. W. 1019.

CLOUD ON TITLE.

See Quieting Title.

COCAINE.

See Poisons, ¶4, 9.

CODICIL.

See Wills, ¶476.

COERCION.

See Trial, ¶314.

COLLATERAL ATTACK.

See Judgment, ¶475, 485.

COLLATERAL SECURITY.

See Pledges.

COLLATERAL UNDERTAKINGS.

See Guaranty.

COLLECTION.

See Banks and Banking, ¶159-175.

COLOR OF TITLE.

See Adverse Possession, ¶68-79, 100, 101.

COMMERCE.

See Carriers; Shipping.

I. POWER TO REGULATE IN GENERAL.

¶8 (Mo.App.) The effect of failure to give written notice of claim for damages to live stock within a certain time, as required by the bill of lading, is determined exclusively, as to interstate shipment, by federal statutes and decisions.—Johnson v. Missouri Pac. Ry. Co., 187 S. W. 282.

II. SUBJECTS OF REGULATION.

¶35 (Mo.App.) Where shipment of hogs was consigned from one point in Missouri to another, but route of connecting carrier went into state of Kansas passing through several towns therein, at which hogs were unloaded and fed, it was an interstate shipment.—Bowles v. Quincy, O. & K. O. R. Co., 187 S. W. 131.

Where shipper and succeeding carrier made additional contract for transportation of shipment of hogs, this did not change the shipment from an interstate to an intrastate transaction, but it became a part of original contract of through shipment.—Id.

¶40(3) (Ark.) Where goods were shipped to a point within the state, where defendant secured them, broke the original packages, and peddled the contents from house to house, his distribution constituted intrastate business.—J. R. Watkins Medical Co. v. Williams, 187 S. W. 653.

III. MEANS AND METHODS OF REGULATION.

¶69 (Tex.Civ.App.) The state cannot control or regulate interstate commerce by requiring a foreign corporation engaged in such business to secure a permit to do business within the state.—W. B. Clarkson & Co. v. Gans S. S. Line, 187 S. W. 1106.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION AND COMMISSIONERS.

See Carriers, ¶18.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

¶6 (Tex.Civ.App.) The law merchant is part of the common law adopted by the state of Texas.—McCamant v. McCamant, 187 S. W. 1096.

¶12 (Mo.) When Missouri came into the Union under its first Constitution, it brought with it the common law which it had adopted as a territory in 1816.—Elks Investment Co. v. Jones, 187 S. W. 71.

COMMON SCHOOLS.

See Schools and School Districts.

COMMUNITY PROPERTY.

See Husband and Wife, ¶248, 276.

COMPARATIVE NEGLIGENCE.

See Negligence, ¶101.

COMPENSATION.

See Contracts, ¶232, 234; Attorney and Client, ¶180, 192; Brokers, ¶49-53; Clerks of Courts, ¶33; Corporations, ¶308; Counties, ¶74; Eminent Domain, ¶102, 150; Insurance; Principal and Agent, ¶84, 89; Sheriffs and Constables, ¶28; States, ¶60.

COMPETENCY.

See Criminal Law, ¶385; Evidence, ¶535, 543; Jury, ¶97, 131; Witnesses, ¶37-219.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

¶13 (Tex.Civ.App.) Secret understanding between one of largest creditors of partnership, the party who was to take over its stock of goods, and the partnership, that such creditor should be paid its debt in full, was a fraud upon other creditors, which would defeat a composition agreement, if any had in fact been made.—Abernathy Rigby Co. v. McDougle, Cameron & Webster Co., 187 S. W. 503.

¶27 (Tex.Civ.App.) In suit to recover balance due on a partnership note, facts held not to show a composition agreement between debtor and creditors, whereby the creditors were to take 60 cents on the dollar.—Abernathy Rigby Co. v. McDougle, Cameron & Webster Co., 187 S. W. 503.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Compositions with Creditors; Evidence, ¶213; Release.

¶6(3) (Mo.) Where an injured railroad employé, after negotiating with the company's representative, accepted \$675 in money as compensation for his injuries, there was a set-

tlement of his claim unaided by his written release.—*Reid v. St. Louis & S. F. R. Co.*, 187 S. W. 15.

COMPUTATION.

See Limitation of Actions, ¶45-127.

CONCLUSION.

See Pleading, ¶8.

CONCLUSIVENESS.

See Account, Action on, ¶12; Appeal and Error, ¶990, 1008; Judgment, ¶648-743; Pleading, ¶36.

CONCURRENT NEGLIGENCE.

See Master and Servant, ¶201, 226.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL SALES.

See Sales, ¶474.

CONDITIONS.

See Bills and Notes, ¶182; Cancellation of Instruments, ¶24; Executors and Administrators, ¶431; Insurance, ¶612; Mortgages, ¶292; Sales, ¶124, 347.

CONFESSION.

See Criminal Law, ¶520.

CONFLICT.

See Courts, ¶247.

CONFLICT OF LAWS.

See Arbitration and Award, ¶18; Carriers, ¶234; Insurance, ¶147, 712; Negligence, ¶103½; Property.

CONNECTING CARRIERS.

See Carriers, ¶177.

CONSCIOUSNESS.

See Homicide, ¶219.

CONSENT.

See Assignments, ¶58; Landlord and Tenant, ¶75, 76; Larceny, ¶13; Release, ¶15.

CONSIDERATION.

See Accord and Satisfaction, ¶5; Contracts, ¶57; Bills and Notes, ¶106, 503; Cancellation of Instruments, ¶24; Compromise and Settlement, ¶6; Deeds, ¶19; Fraudulent Conveyances, ¶74-96, 277; Release, ¶24; Trusts, ¶77-89; Vendor and Purchaser, ¶13.

CONSOLIDATION.

See Corporations, ¶590, 591.

CONSPIRACY.

See Criminal Law, ¶422; Witnesses, ¶52.

CONSTABLES.

See Sheriffs and Constables.

CONSTITUTIONAL LAW.

See Appeal and Error, ¶170; Courts, ¶231.

For validity of statutes relating to particular subjects, see also the various specific topics. Enactment and validity of statutes in general, see Statutes, ¶8½. Special and local laws, see Statutes, ¶67-101. Subjects and titles of statutes, see Statutes, ¶108, 125.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

¶26 (Tex.Civ.App.) A state Constitution should be liberally construed in contradistinction to a strict construction of the federal Constitution.—*Terrell v. Middleton*, 187 S. W. 367.

¶43(1) (Mo.App.) A constitutional question should be raised as soon as it may be under the circumstances of the given case, or it will be waived.—*Carradine v. Ford*, 187 S. W. 285.

¶43(1) (Tex.Civ.App.) Acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the Constitution and appointed judicial tribunals to enforce it.—*Terrell v. Middleton*, 187 S. W. 367.

¶48 (Mo.) Courts resolve all doubt in favor of the constitutionality of statutes.—*Straughan v. Meyers*, 187 S. W. 1159.

The burden is upon one asserting the unconstitutionality of a law to prove that fact.—*Id.*

Legislative acts and constitutional provisions must be read together and so harmonized as to give effect to both when this can be consistently done.—*Id.*

¶48 (Tex.Civ.App.) Where the court has a serious doubt whether the Legislature exceeded its power by embracing more than one subject in a bill, such doubt must be resolved in favor of the validity of the law.—*Altgelt v. Gutzelt*, 187 S. W. 220.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

¶50 (Tex.Civ.App.) A Legislature has plenary powers subject only to constitutional limitations.—*Terrell v. Middleton*, 187 S. W. 367.

¶52 (Ky.) Ky. St. § 829, touching the regulation of transportation rates by Railroad Commission, does not invest commission with judicial powers in making an award in contravention of Const. §§ 27, 28, 109, 135, 209, concerning separation of powers of government into legislative, executive, and judicial departments and establishment of courts.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

Under Const. § 28, allowing persons belonging to one division of government to exercise duties belonging to one of the others when directly permitted by the Constitution and Const. § 209, authorizing Railroad Commission to perform certain duties, commission has power to hear and determine claims by shipper for amounts charged and collected in excess of the rate thereafter fixed by commission.—*Id.*

¶55 (Ark.) Acts 1915, p. 98, §§ 2, 3, touching intoxicating liquors and providing a fixed penalty for its violation, are not violative of constitutional powers of judiciary in prohibiting the suspension of sentence upon conviction.—*Wilson v. State*, 187 S. W. 440.

(B) Judicial Powers and Functions.

¶67 (Tex.Civ.App.) When discretion is confined to any one branch of the government, a decision upon that particular point cannot be questioned or revised.—*Terrell v. Middleton*, 187 S. W. 367.

☞70(1) (Tex.Civ.App.) It is settled beyond recall that the courts, state and federal, have the power to pass upon the constitutionality of statutes and the authority to ultimately destroy or enforce laws passed by the legislative branch of the government.—*Terrell v. Middleton*, 187 S. W. 367.

☞70(3) (Tex.Civ.App.) It is not the province of the court to declare a law invalid because it is unwise or unjust, or because opposed to public policy or the spirit of the Constitution, but it must violate some express provision of the Constitution.—*Altgelt v. Gutzeit*, 187 S. W. 220.

V. PERSONAL CIVIL AND POLITICAL RIGHTS.

☞82 (Ky.) Stat. § 829, is not violative of Const. U. S. art. 4, § 4, guaranteeing a republican form of government.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

VI. VESTED RIGHTS.

☞101 (Tex.Cr.App.) Where an individual acquired pool hall and fixtures and licenses after prohibitory penal statute was adopted and declared valid by the Court of Criminal Appeals, but after Supreme Court declared it invalid, he had no vested property rights to entitle him to enjoin enforcement of the statutes.—*State v. Clark*, 187 S. W. 760; *Same v. Nabers*, 1d. 783, 784.

Where pool halls become inherently vicious and properly subject to police power, the license granted them does not create a vested right, since no one has a vested right to carry on a business hurtful to public welfare.—*Id.*

VII. OBLIGATION OF CONTRACTS.

(C) Contracts of Individuals and Private Corporations.

☞165 (Mo.) Rev. St. 1909, § 7068, providing that insurance companies vexatiously refusing to pay losses may be assessed punitive damages and attorney's fees, does not unconstitutionally impair the policy contract.—*Barber v. Hartford Life Ins. Co.*, 187 S. W. 867, 874.

☞175 (Tex.Civ.App.) No person has a vested right in the rules of evidence, which may be changed by the state, if its action relates only to evidence, without violating the contract clause of the Constitution.—*Sovereign Camp of Woodmen of the World v. Robinson*, 187 S. W. 215.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

☞208(8) (Mo.) Laws 1913, p. 323, relating to votes by absent voters, is not class legislation, since it applies alike to all voters unavoidably absent.—*Straughan v. Meyers*, 187 S. W. 1159.

X. EQUAL PROTECTION OF LAWS.

☞209 (Tex.) Acts 33d Leg. (Sp. Sess.) c. 39, § 34 (Vernon's Sayles' Ann. Civ. St. 1914, art. 3174w), is not unconstitutional as violating Const. art. 1, § 3, relating to equal rights.—*Beene v. Waples*, 187 S. W. 191.

☞225(1) (Mo.) Sess. Acts 1913, p. 721, providing for organization of consolidated schools and rural high schools, and providing state aid therefor, is not violative of the Fourteenth Amendment of Const. U. S. § 1, as denying equal protection of the laws, etc.—*State ex inf. Wright v. Morgan*, 187 S. W. 54.

☞233 (Mo.) Issuance of special tax bills for sewer construction against a cemetery as an entirety, notwithstanding sale of some lots for burial, held not to deny the cemetery company equal protection of law, contrary to Const. U. S. Amend. 14, § 1.—*Mullins v. Mt. St. Mary's Cemetery Ass'n*, 187 S. W. 1169.

☞247 (Mo.) Rev. St. 1909, § 7068, providing that insurance companies vexatiously refusing to pay losses may be assessed punitive damages and attorney's fees, does not deny equal protection of the laws.—*Barber v. Hartford Life Ins. Co.*, 187 S. W. 867, 874.

XI. DUE PROCESS OF LAW.

☞251 (Tex.) Acts 33d Leg. (Sp. Sess.) c. 39, § 34 (Vernon's Sayles' Ann. Civ. St. 1914, art. 3174w), is not unconstitutional as violating Const. art. 1, § 19, providing for due course of law.—*Beene v. Waples*, 187 S. W. 191.

☞290(3) (Mo.) Special tax bills for sewer construction being legislative assessments, no notice to property owners of proceedings resulting in their issuance is necessary, within the inhibition against depriving one of property without due process of law.—*Mullins v. Mt. St. Mary's Cemetery Ass'n*, 187 S. W. 1169.

☞298(2) (Ky.) Ky. St. § 829, in limiting evidence which can be heard in circuit court to that heard before Railroad Commission, is not violative of the Fourteenth Amendment of the federal Constitution, in denying due process of law.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

☞303 (Mo.) Rev. St. 1909, § 7068, providing that insurance companies vexatiously refusing to pay losses may be assessed punitive damages and attorney's fees, does not deny due process of law.—*Barber v. Hartford Life Ins. Co.*, 187 S. W. 867, 874.

☞306 (Tex.Civ.App.) Appointment of a temporary administrator to take charge of all of community property belonging to plaintiff and estate of his deceased wife made under Rev. St. art. 359, providing that an executor or administrator shall acquire possession of all common property of a community estate, is not violative of Const. Tex. Bill of Rights, §§ 9 and 13, or Const. U. S. Amend. 14, as to due process of law.—*Huth v. Huth*, 187 S. W. 523.

XII. RIGHT TO JUSTICE AND REMEDIES FOR INJURIES.

☞326 (Mo.) Rev. St. 1909, § 7068, providing that insurance companies vexatiously refusing to pay losses are liable for punitive damages and attorney's fees, does not violate Const. art. 2, § 10, providing that justice shall be administered without sale, etc.—*Barber v. Hartford Life Ins. Co.*, 187 S. W. 867, 874.

☞328 (Ky.) Ky. St. § 829, is not violative of Const. § 14, providing that all courts shall be opened to every person, and that he shall have a remedy by due course of law for any injury done him.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

CONSTRUCTION.

See Contracts, ☞147-234; Arbitration and Award, ☞18; Bills and Notes, ☞132; Boundaries, ☞14; Chattel Mortgages, ☞108-157; Constitutional Law, ☞26-48; Corporations, ☞77; Criminal Law, ☞822; Deeds, ☞90-189; Guaranty, ☞30-38; Indemnity; Insurance, ☞146-179½; Landlord and Tenant, ☞79; Mortgages, ☞114-171; Pleading, ☞34; Release, ☞24, 23; Statutes, ☞181-241; Trial, ☞296, 343; Trusts, ☞151; Wills, ☞439-682.

CONSTRUCTIVE POSSESSION.

See Adverse Possession, ☞100.

CONSTRUCTIVE TRUSTS.

See Trusts, ☞100-110.

CONTEMPT.

See Intoxicating Liquors, ¶279.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

¶21 (Mo.App.) Where certain heirs of an estate refused to indorse her collection drafts payable to the estate for a fire loss on property of the estate, they could not be compelled by court order to do so, or sign receipts attached thereto, in view of Rev. St. 1909, § 9980, and an order so to do will not sustain commitment for its violation.—In re Ziegenhein, 187 S. W. 893.

CONTEST.

See Elections, ¶291; Intoxicating Liquors, ¶37.

CONTINUANCE.

See Appeal and Error, ¶236; Criminal Law, ¶594-603, 917; New Trial, ¶34.

¶11 (Tex.Civ.App.) In a consolidated suit to quiet title, request of defendants, made after various dismissals and interlocutory judgment against them, for permission to withdraw their announcement of ready for trial and continue the case that they might again add parties as to whom they had dismissed, *held* properly refused.—Brady v. Cope, 187 S. W. 678.

¶30 (Tex.Civ.App.) Where defendant made no showing that a continuance would enable it to secure evidence to rebut a reply to a defense urged, the denial of a continuance, though the reply was first made at trial, is not an abuse of discretion.—New Jersey Fire Ins. Co. v. Baird, 187 S. W. 356.

¶31 (Mo.) Where a case was once tried on the theory that plaintiff was struck by cars attached to a switch engine, introduction of evidence at the second trial, tending to show that he was struck by a single car shunted onto a crossing, is not ground for continuance for surprise, where the case was submitted on the same theory as at the first trial.—McWhirt v. Chicago & A. R. Co., 187 S. W. 830.

Continuance on the ground of surprise can be granted only when the evidence introduced is of such character or the circumstances of its being withheld are such as to indicate that the other party has not only been misled, but prejudiced.—Id.

¶51(4) (Tex.Civ.App.) In action on note refusal of defendant's second motion for a continuance *held* not an abuse of trial court's discretion, where there was evidence in the record entitling plaintiff to recover, and where the testimony of defendant, if present, would only have raised a conflict in the evidence.—Ball v. Miller, 187 S. W. 688.

CONTRACTS.

See Accord and Satisfaction; Alteration of Instruments; Assignments; Bills and Notes; Breach of Marriage Promise; Cancellation of Instruments; Carriers, ¶13, 62, 158-160, 207, 218, 307; Chattel Mortgages; Compromise and Settlement; Constitutional Law, ¶185, 175; Corporations, ¶70, 77, 453; Covenants; Customs and Usages; Damages, ¶23, 40, 62, 124; Evidence, ¶420-461, 471, 498; Executors and Administrators, ¶206; Frauds, Statute of; Guaranty; Husband and Wife, ¶278; Indemnity; Insurance; Judgment, ¶594; Landlord and Tenant; Limitation of Actions, ¶24, 46; Logs and Logging, ¶8; Novation; Partnership; Payment; Pledges; Principal and Agent; Reformation of Instruments; Release; Sales; Set-Off and Counterclaim; Shipping, ¶103; Specific Performance; Subrogation; Vendor and Purchaser.

I. REQUISITES AND VALIDITY.**(A) Nature and Essentials in General.**

¶9(2) (Ark.) Where an alleged contract for the repair work of the defendant railroad did not bind the railroad company to give plaintiff its repair work for any length of time, did not fix a price for the work, and it did not appear who was to furnish materials, the contract was too indefinite to be enforceable.—Ashley, D. & N. Ry. Co. v. Baggott & Boyd, 187 S. W. 649.

¶10(4) (Tex.Civ.App.) A contract for the sale of onion sets to be grown "subject to crops" is not unilateral, and will not excuse reasonable efforts on the part of the seller, since contracts should provide against hardships and performance will not be excused if the hardship is not anticipated.—Texas Seed & Floral Co. v. Chicago Set & Seed Co., 187 S. W. 747.

A contract for the sale of onion sets to be grown, providing that the seller should not be held to delivery if onion sets were damaged or destroyed from any cause not resulting from its negligence, was not a unilateral contract, but a promise for a promise.—Id.

¶10(5) (Tex.Civ.App.) Contract for sale of land which was an ordinary land sale contract providing for earnest money, examination of title, and making title good *held* not lacking in mutuality.—Bender v. Bender, 187 S. W. 735.

(B) Parties, Proposals, and Acceptance.

¶28(1) (Mo.App.) Burden of showing that proposed contract was accepted as made is on plaintiff.—Crossley v. Summit Lumber Co., 187 S. W. 113.

¶29 (Mo.App.) The legal effect of correspondence between parties in question of law for court and whether defendant accepted contract as proposed may become question of fact for jury.—Crossley v. Summit Lumber Co., 187 S. W. 113.

(D) Consideration.

¶57 (Ark.) Where defendant hired plaintiff to haul logs at certain rates, as plaintiff alleged, for an entire year, the contract was not enforceable where plaintiff was in no way bound to perform; there being no mutuality of consideration.—Grayling Lumber Co. v. Hemingway, 187 S. W. 327.

(F) Legality of Object and of Consideration.

¶127(1) (Tex.Civ.App.) A by-law of a fraternal beneficiary society declaring that a member's disappearance should be no evidence of his death, and that the by-law should be construed as a waiver of any statute, etc., thereon, *held* invalid, as a stipulation as to the admission of evidence ousting the court of its jurisdiction.—Sovereign Camp of Woodmen of the World v. Robinson, 187 S. W. 215.

¶131 (Ark.) Under Kirby's Dig. §§ 6545, 6546, providing for the granting of railroad charters, a contract whereby plaintiff, in consideration of building of a railroad over its land and hauling of its freight for a certain price, was to grant defendant a right of way and join with incorporation of railroad in their efforts to procure a charter, *held* void as against public policy, as being a purchase of influence of officers.—Bryant Lumber Co. v. Fourche River Lumber Co., 187 S. W. 455.

Under Kirby's Dig. §§ 6802, 6803, a contract whereby plaintiff agreed to grant a right of way, in consideration in part of carrying of its lumber then owned by railroad to be incorporated at a specified rate, and after-acquired lumber at a rate to be fixed by arbitration, was void, in that it interfered with official action.—Id.

¶134 (Tex.Civ.App.) If a contract for the sale of onion sets to be grown could be defeated by failure of crops or destruction while being held, was unilateral, part performance by the

buyer in growing a crop and holding it for shipment, being that upon which mutuality depends, relates back and makes contract good from the beginning.—*Texas Seed & Floral Co. v. Chicago Set & Seed Co.*, 187 S. W. 747.

⚡137(1) (Ark.) Where a contract containing illegal covenants, and consideration furnishes no basis for a separation of covenants and apportionment of consideration, it is wholly invalid, as courts cannot make contracts for parties.—*Bryant Lumber Co. v. Fourche River Lumber Co.*, 187 S. W. 455.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⚡147(1) (Mo.App.) In construing a contract, intent of the parties, rather than its letter, governs.—*Pickard v. William J. Burns Detective Agency*, 187 S. W. 614.

⚡147(2) (Tex.Civ.App.) The term "construction" implies uncertainty as to the meaning of a contract, and, when the language employed in a contract is unequivocal, though the parties have failed to express their real intention, its legal effect will be enforced as written.—*Pierce-Fordyce Oil Ass'n v. Warner Drilling Co.*, 187 S. W. 516.

⚡170(1) (Ark.) An ambiguous written contract may be interpreted according to the construction given it by the parties.—*J. R. Watkins Medical Co. v. Williams*, 187 S. W. 653.

(B) Parties.

⚡182(1) (Ark.) A promise made to several jointly cannot be enforced as a separate obligation to one of the obligees.—*Livingston v. Pugsley*, 187 S. W. 925.

(F) Compensation.

⚡232(3) (Tex.Civ.App.) One employed to superintend building may recover reasonable compensation for extra services in superintending the building and improvements, performed at defendant's instance, if such extra services were not provided for by his contract.—*Shear v. Bruyere*, 187 S. W. 243.

⚡234 (Tex.Civ.App.) A contract provision between a railway contractor and a subcontractor held to authorize the contractor to pay only such claims against the subcontractor as might become liens on the railway.—*Texas Bldg. Co. v. Collins*, 187 S. W. 404.

A railway company held authorized, by various contract provisions, to pay for posts used by its subcontractor and for which a lien might be filed against the railway, and to charge such cost to the subcontractor, irrespective of his creditors' claims to any amount due him.—*Id.*

IV. RESCISSION AND ABANDONMENT.

⚡270(2) (Mo.App.) Where a party claiming fraud in his contract waited over two years after discovery of the alleged fraud, without effort at rescission, the delay was unwarrantable, and he could not have the contract canceled.—*Davidson v. Gould*, 187 S. W. 591.

V. PERFORMANCE OR BREACH.

⚡287(1) (Tex.Civ.App.) Under contracts providing that the amount due from a railway company to a subcontractor should be fixed by an estimate signed and certified by the railway company's chief engineer, held that an unsigned and uncertified instrument was not the contemplated final estimate.—*Texas Bldg. Co. v. Collins*, 187 S. W. 404.

⚡289 (Mo.App.) Where plaintiffs contracted to plaster a building in good workmanlike manner and replace any defective work in two years, and did replace some, which was accepted, they could recover in quantum meruit for work done, within limit of the contract price, although the architect refused his certificate.—

Craig v. McNichols Furniture Co., 187 S. W. 793.

⚡322(4) (Mo.App.) Evidence held to sustain referee's finding against plaintiffs' claim on an oral contract for extra plaster work replacing that which fell and which by written contract, they were bound to replace.—*Craig v. McNichols Furniture Co.*, 187 S. W. 793.

Evidence held insufficient to support judgment for defendants for cost of repairing plastering not attended to for four years, which plaintiffs, in putting in, agreed to repair in two years.—*Id.*

VI. ACTIONS FOR BREACH.

⚡328(1) (Ark.) It is a defense to action for defendant's breach of contract with a firm that after one partner had attempted to cancel it, and had abandoned it, the other had not ability to perform.—*W. D. Reeves Lumber Co. v. Davis*, 187 S. W. 171.

⚡332(1) (Tex.Civ.App.) In action for extra services in superintending building, petition alleging it would have taken 8 or 9 months to perform the work as originally planned, whereas it required 18 to 19 months because of the alterations, held sufficiently specific.—*Shear v. Bruyere*, 187 S. W. 243.

⚡333(6) (Mo.App.) Where contracts are modified by waiver the waiver must be alleged except in the case of insurance policies.—*Roaring Fork Potato Growers v. C. C. Clemons Produce Co.*, 187 S. W. 617.

⚡337(2) (Mo.App.) Plaintiff's petition, setting forth defendant's contract to protect him in case fictitious charges were made against him as the result of his detective work, held to charge a breach.—*Pickard v. William J. Burns Detective Agency*, 187 S. W. 614.

⚡346(3) (Tex.Civ.App.) In an action for extra services in superintending building, where plaintiff sues in the alternative upon either express or implied contract, evidence as to reasonable value of such services is admissible.—*Shear v. Bruyere*, 187 S. W. 243.

⚡349(1) (Mo.App.) In action on agreement to furnish counsel and funds in defending plaintiff from charges made against him as result of detective work, plaintiff could testify as to his arrest, etc.; it bearing on his right to employ counsel other than one furnished.—*Pickard v. William J. Burns Detective Agency*, 187 S. W. 614.

⚡349(6) (Ark.) Evidence of indebtedness and attempt to borrow held evidence in support of defense to action for breach of contract with a firm that after one partner had attempted to cancel and had abandoned it the other had not ability to perform.—*W. D. Reeves Lumber Co. v. Davis*, 187 S. W. 171.

⚡350(2) (Tex.Civ.App.) Testimony that a subcontractor did not challenge bills charging it certain sums for railway equipment, hire, and that such bills were computed from a contract with the subcontractor, is insufficient to establish an express agreement to pay such sums as against the subcontractor's creditors.—*Texas Bldg. Co. v. Collins*, 187 S. W. 404.

CONTRADICTION.

See Witnesses, ⚡402.

CONTRIBUTORY NEGLIGENCE.

See Negligence, ⚡83-101.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Chattel Mortgages; Deeds; Fraudulent Conveyances; Mortgages.

CORPORATIONS.

See Action, ¶53; Banks and Banking; Carriers; Commerce, ¶69; Electricity; Exchanges; Ferries; Insurance; Judgment, ¶701; Municipal Corporations; Railroads; Street Railroads; Telegraphs and Telephones; Witnesses, ¶154.

I. INCORPORATION AND ORGANIZATION.

¶1 (Ark.) A corporation is an entity separate and distinct from its stockholders and from other corporations with which it may be connected.—*G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 187 S. W. 1068.

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS, AND RECORDS.

¶47 (Mo.App.) Change in corporation name works no change in corporate entity.—*Terminal Ice & Power Co. v. American Fire Ins. Co.*, 187 S. W. 564; *Same v. Home Ins. Co.*, Id. 568; *Same v. Lumbermen's Ins. Co.*, Id.; *Same v. Security Ins. Co.*, Id.; *Same v. Commercial Fire Ins. Co.*, Id. 569; *Same v. Stuyvesant Ins. Co.*, Id.

¶55 (Ark.) Majority stockholders may impose upon the minority additional by-laws not inconsistent with the charter.—*G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 187 S. W. 1068.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) Subscription to Stock.

¶76 (Tex.Civ.App.) Subscription contract to stock of a corporation to be organized under laws of Texas, with powers limited by Vernon's Sayles' Ann. Civ. St. 1914, art. 1121, held not a contract for stock of corporation organized under laws of another state.—*Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, 187 S. W. 681.

¶77 (Tex.Civ.App.) Conditions prescribed by Legislature, under which charters of corporations may be granted, must be noticed by subscribers, and they are conclusively presumed to contract with reference thereto.—*Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, 187 S. W. 681.

¶80(2) (Tex.Civ.App.) Where agreement between plaintiff, subscribing to stock in defendant company, and defendant's agent was not notice of alleged misrepresentations with references to amount of capital stock, etc., plaintiff could not rescind without showing that before subscription was accepted defendant had notice thereof.—*Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, 187 S. W. 681.

Corporation accepting subscription contract and notes held not affected by fraud inducing the subscription of which it had no actual notice.—*Id.*

¶80(10) (Tex.Civ.App.) In suit to cancel notes given upon a stock subscription, to recover vendor's lien notes given as collateral to such notes, and to recover money paid to defendant company, evidence held to sustain a finding that plaintiff was not guilty of laches in not instituting his suit earlier.—*Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, 187 S. W. 681.

Executing proxy by subscriber to stock of corporation, to be organized in Texas, held not to estop him from rescinding his subscription, where the corporation was organized in another state.—*Id.*

¶82 (Tex.Civ.App.) Promise of corporation to establish loan agency and to make plaintiff its agent, alleged as consideration of plaintiff's contract of subscription, was a condition precedent to plaintiff's liability on his subscription contract.—*Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, 187 S. W. 681.

(D) Transfer of Shares.

¶123(3) (Ark.) Where one party transferred pledged corporate stock as security, giving the lender the right to redeem from the prior pledge, the transaction was a chattel mortgage, and not a pledge, since delivery is an essential of a valid pledge.—*Merchants' & Farmers' Bank v. Citizens' Bank*, 187 S. W. 650.

V. MEMBERS AND STOCKHOLDERS.

(A) Rights and Liabilities as to Corporation.

¶174 (Ark.) The relative rights of majority and minority stockholders must be measured by the charter and by-laws.—*G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 187 S. W. 1068.

¶181(1) (Ark.) A stockholder may have an examination of the corporation books made only at the corporation's office, and cannot require removal of the books from the office to some other place.—*G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 187 S. W. 1068.

¶186 (Ark.) Majority stockholders may not cause the corporation to pay gratuities, unauthorized by by-laws or charter, to one of their number, whether or not such payment is for valuable services rendered.—*G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 187 S. W. 1068.

(D) Liability for Corporate Debts and Acts.

¶240(1) (Mo.) Where the organizers of a corporation paid for their stock by a conveyance of land of inferior value, plaintiff, who purchased stock from one organizer, was not a creditor of the corporation.—*La Veine v. Tiffany Springs & Land Co.*, 187 S. W. 1186.

Where the organizers of a corporation paid for their stock by conveyance of land of inferior value, plaintiff, who purchased stock from one organizer with notice that it was so paid for, had no right, as against another stockholder and organizer, based on the ground that the latter's stock was not fully paid for.—*Id.*

VI. OFFICERS AND AGENTS.

(A) Election or Appointment, Qualification, and Tenure.

¶294 (Tex.Civ.App.) Evidence held insufficient to show mismanagement of a surety corporation sufficient to warrant, on a stockholder's petition, removal of the president as trustee for stock sales.—*Bounds v. Stephenson*, 187 S. W. 1031.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

¶308(11) (Tex.Civ.App.) Where the commission agent testified that the president of the corporation principal orally authorized departure from terms of a written contract, that question was for the jury.—*Channell Chemical Co. v. Hall*, 187 S. W. 704.

¶312(1) (Ark.) A corporation officer is a trustee for the corporation as to its funds received by him without right.—*G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 187 S. W. 1068.

¶312(1) (Tex.Civ.App.) Where a corporation was authorized to act as surety, and its officers in its name signed an undertaking for the brother of the president, and on default suffered judgment against it, but took judgment over against the brother and secured a lien on land to secure it, but did not release the judgment, such facts were insufficient to show mismanagement.—*Bounds v. Stephenson*, 187 S. W. 1031.

¶312 (3) (Tex.Civ.App.) The mere fact that, where by-laws required 10 days' notice of meeting to stockholders, officers sent with the notice two proxy slips, one of which ran to the officers, and sent also a stamped envelope for return of the proxy, is insufficient to show mis-

management; the additional expense being slight.—*Bounds v. Stephenson*, 187 S. W. 1031.

—312(6) (Mo.) Director and president of corporation owning land subject to deed of trust was not in trust position which prohibited him from purchasing at the trustee's sale, where he purchased notes secured by deed of trust because holder threatened foreclosure, and held about two years, during which the corporation could have prevented sale by paying.—*La Veine v. Tiffany Springs & Land Co.*, 187 S. W. 1186.

—317(3) (Tex.Civ.App.) Officers of corporation, who executed undertaking as surety for president's brother in name of corporation, and on recovery of judgment obtained judgment against the brother and secured a lien on land, held not guilty of fraud.—*Bounds v. Stephenson*, 187 S. W. 1031.

—318 (Ark.) That two corporations have directors or other officers in common does not of itself prevent one from maintaining an action at law against the other.—*G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 187 S. W. 1068.

—320(11) (Tex.Civ.App.) Evidence held insufficient to show that defendant corporation president hired attorneys without proper authority, or without necessity for their employment, so that he could not be held liable to stockholders for the fees paid them.—*Bounds v. Stephenson*, 187 S. W. 1031.

Evidence held insufficient to show that corporation officers were in collusion in fixing their salaries at an exorbitant figure.—*Id.*

—322 (Tex.Civ.App.) Salary of a corporation president cannot be held excessive, where there is nothing to show the duties exacted from him.—*Bounds v. Stephenson*, 187 S. W. 1031.

(D) Liability for Corporate Debts and Acts.

—340(3) (Ark.) Under Acts 1909, p. 643, requiring corporate officers to make statements to the county clerk of financial condition of the corporation or stand liable for debts, the duty imposed ceases when the individual ceases to be an officer, and his civil liability applies only to debts contracted while in office.—*Breitzke v. Bank of Grand Prairie*, 187 S. W. 660.

Under Acts 1909, p. 643, requiring corporate officers to make statements of financial condition of the corporation, outgoing officers are not liable on failure to do so for debts contracted after their terms of office.—*Id.*

Where newly elected officers failed for one year to file report required by Acts 1909, p. 643, they could not escape liability on the ground that the debt was contracted under former officers, where it was represented by an overdraft which was frequently during their terms reduced to practically nothing and later increased.—*Id.*

—344 (Ark.) Although officers on giving their note for a corporate debt secured the promise of the payee that it would not hold them personally liable thereon, the payee was not estopped to claim the statutory liability imposed by Acts 1909, p. 643, for failure to make required financial reports.—*Breitzke v. Bank of Grand Prairie*, 187 S. W. 660.

VII. CORPORATE POWERS AND LIABILITIES.

(B) Representation of Corporation by Officers and Agents.

—426(1) (Tex.Civ.App.) Where the contract has been partly performed, or ratified by a corporation for whom in fact it was made, suit may be brought by such corporation thereon, though the contract was made in a name other than the true name of the corporation.—*W. B. Clarkson & Co. v. Gans S. S. Line*, 187 S. W. 1106.

—429 (Mo.App.) Secret instructions given by lumber company to its officer, not known to buyer who dealt with such officer, did not affect company's liability, unless buyer had knowledge

of such facts that a reasonably prudent man would have been led to make inquiry.—*Crosley v. Summit Lumber Co.*, 187 S. W. 113.

Whether plaintiff buyer had knowledge of facts that would have led a reasonably prudent man to make inquiry as to authority of general manager of defendant company to take orders for his own sawmill in name of company held for jury.—*Id.*

—432(12) (Tex.Civ.App.) A corporation president, who signed a written contract of employment of plaintiff, is sufficiently shown to be the agent of the corporation.—*Channell Chemical Co. v. Hall*, 187 S. W. 704.

(D) Contracts and Indebtedness.

—453 (Tex.Civ.App.) In the absence of statutory prohibition, a corporation may recover on a contract executed by it in a name other than its corporate name.—*W. B. Clarkson & Co. v. Gans S. S. Line*, 187 S. W. 1106.

(F) Civil Actions.

—522 (Ark.) Judgment rendered in an action by one corporation against another, the directorates being interlocking, is valid if free from fraud.—*G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 187 S. W. 1068.

VIII. INSOLVENCY AND RECEIVERS.

—544(1) (Ark.) By Kirby's Dig. § 949, insolvent corporations cannot prefer their creditors, and a conveyance that has such effect is fraudulent and void as to the latter.—*Morgan Co. v. Buena Vista Veneer Co.*, 187 S. W. 640.

—553 (1) (Tex.Civ.App.) Power to appoint receiver, especially of corporation, will not be exercised, except upon very grave necessity, and clear showing that applicant's rights imperatively demand it, and that he has no other adequate remedy, and is in danger of suffering irreparable loss.—*Bounds v. Stephenson*, 187 S. W. 1031.

X. CONSOLIDATION.

—590(1) (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1137, authorizing the consolidation of two or more corporations, where two corporations formed a new corporation which took the name of one and assets of both, they did not defeat obligations of old companies, and where new corporation, although nothing was said at time of consolidation, paid all but contested debts of old corporation, there was an implied promise to pay its obligations.—*Texas Seed & Floral Co. v. Chicago Set & Seed Co.*, 187 S. W. 747.

—591 (Tex.Civ.App.) In an action on a contract for onions to be grown, brought against a corporation formed by consolidation of corporation with which the contract was made with another, evidence held sufficient to justify a finding that new corporation agreed to assume indebtedness of constituent companies.—*Texas Seed & Floral Co. v. Chicago Set & Seed Co.*, 187 S. W. 747.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

—615 (Ark.) In suit to wind up a corporation and obtain satisfaction of a judgment due complainant corporation, which owned 857 out of 1,000 shares of defendant corporation where ample notice of suit for the prior judgment was given to holder of 170 shares associated with holder of 30 shares, and the latter heard of the judgment shortly after rendition but took no steps to set it aside, he could not attack it for fraud.—*G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 187 S. W. 1068.

XII. FOREIGN CORPORATIONS.

—648 (Tex.Civ.App.) A statute, requiring foreign corporations to secure a permit for doing business in the state, held to have no application to a corporation engaged in carrying interstate

commerce.—*W. B. Clarkson & Co. v. Gans S. S. Line*, 187 S. W. 1106.
 ⚡661(3) (Ark.) Under Laws 1907, p. 744, a foreign corporation, which has not filed its articles of incorporation, cannot sue one of its agents engaged in peddling its wares from point to point within this state.—*J. R. Watkins Medical Co. v. Williams*, 187 S. W. 653.

CORRECTION.

See Judgment, ⚡315.

CORROBORATION.

See Witnesses, ⚡318, 410.

COSTS.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

⚡2 (Mo.App.) The allowance and collection of the costs of litigation are governed entirely by statute, and such statutes must be strictly construed.—*Van Trump v. Sanneman*, 187 S. W. 124.

⚡13 (Ark.) The matter of costs is within the sound discretion of the chancellor.—*G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 187 S. W. 1068.

It was an abuse of discretion for chancellor to tax a large unnecessary expense of auditing corporation books against parties who gave no cause for it.—*Id.*

⚡70 (Mo.App.) In action for accounting with a reference and a report, finding an amount due plaintiff, to which exceptions were overruled, but no judgment entered, there was no ground upon which a fee bill could be issued against plaintiff for defendant's cost, and defendant's silence was a confession of error therein.—*Van Trump v. Sanneman*, 187 S. W. 124.

Under Rev. St. 1909, § 2016, the fees of defendant's witnesses and the fees of the referee's stenographer were not properly included in a fee bill issued after reference and report, but before judgment had been entered.—*Id.*

III. PERSONS, PROPERTY, AND FUNDS LIABLE.

⚡98 (Ark.) Where the items in a suit against a corporation were *res judicata* so that there was no necessity for examination of its books, and examination showed no impropriety therein, expense of examination was taxable against intervenor causing it to be made.—*G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 187 S. W. 1068.

V. AMOUNT, RATE, AND ITEMS.

⚡172 (Mo.) Taxable costs are fixed by statute, and do not embrace expenses of litigation, including attorney's fees.—*Leslie v. Carter*, 187 S. W. 1196.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

⚡260(4) (Tex. Civ. App.) Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1629, damages will not be allowed unless grounds of alleged error are so frivolous that there could have been no reasonable expectation of reversal.—*Commonwealth Bonding & Casualty Ins. Co. v. Hendricks*, 187 S. W. 698.

VIII. PAYMENT AND REMEDIES FOR COLLECTION.

⚡279 (Mo.App.) Without a judgment for one or the other of parties to a cause, an incidental judgment for costs cannot be rendered, and, as an execution for costs must run in the name of the party in whose favor the judgment was rendered, a fee bill cannot be treated as an ex-

ecution for costs.—*Van Trump v. Sanneman*, 187 S. W. 124.

A fee bill is the proper remedy of officers and witnesses to recover fees for services rendered by them.—*Id.*

⚡282 (Mo.) Independent action will not lie to recover expenses of litigation, including attorney's fees, incurred by plaintiff in former proceeding against defendant to set aside a deed for fraud and for an accounting, whether the action was *ex contractu* or *ex delicto* being immaterial.—*Leslie v. Carter*, 187 S. W. 1196.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

See Elections, ⚡51; Limitation of Actions, ⚡66; Municipal Corporations; Statutes, ⚡125.

II. GOVERNMENT AND OFFICERS.

(B) County Seat.

⚡35(1) (Ark.) Where, prior to a county seat election, the election commissioners appointed judges who did not possess requisite qualifications and were all partisans of a particular location, such conduct of the commissioners did not invalidate the election.—*Webb v. Bowden*, 187 S. W. 461.

⚡35(3) (Ark.) Evidence held insufficient to warrant finding that the election commissioners were responsible for the loss of the pollbooks of the election.—*Webb v. Bowden*, 187 S. W. 461.

Though election commissioners were parties to a theft by which the loss of pollbooks of a county seat election was brought about, that did not justify circuit court, in an election contest, in ignoring official returns made by judges of election.—*Id.*

Contestants were not relieved of burden of proving their allegations that election returns were fraudulent and void, though the proof connected contestees, election commissioners, with a theft of the pollbooks.—*Id.*

Where there were irregularities of election officers resulting in illegal votes, but the conduct of the officers did not evidence a deliberate fraud, the returns will be purged, but the election will not be invalidated.—*Id.*

Where more votes were cast in township for removal than were shown on list of those who had paid poll taxes and were entitled to vote, contestants adducing proof that excessive votes occurred in no legitimate way, contestees, election commissioners, had burden to show the excessive votes were those of qualified voters.—*Id.*

Evidence held sufficient to impeach integrity of returns from a township, where more votes were cast for removal than were shown on list of those who were entitled to vote.—*Id.*

Where there was discrepancy between list of taxpayers and those who had voted in a township, but the evidence was not fully developed, so that contestees might be able to show that returns were correct, the case will be remanded.—*Id.*

(D) Officers and Agents.

⚡74(3) (Tex. Civ. App.) The county treasurer, though he knew, when a candidate and inducted into office, that the commissioners' court did not intend to allow him the statutory compensation is not estopped from claiming it, where the court did not give legal effect to their intention by proper order.—*Smith v. Wise County*, 187 S. W. 705.

As commissioners' court cannot, under *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 3873-3875, fix regular salary for county treasurer, held that under orders of court, treasurer was entitled to receive commissions at rate fixed until they reached sum of \$2,000 per annum, re-

gardless of subsequent orders limiting his total compensation to less sum.—Id.

An order fixing the salary of the county treasurer at a stated sum per annum cannot be maintained under Vernon's Sayles' Ann. Civ. St. 1914, art. 3873, as one fixing a rate of commissions on moneys received and disbursed.—Id.

The commissioners' court held not entitled, under Vernon's Sayles' Ann. Civ. St. 1914, arts. 3873-3875, to fix the salary of the county treasurer at a sum less than \$2,000 provided for by statute.—Id.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§182 (Ark.) Where, having sold bonds at a premium to be accepted and paid for in installments, county defaulted in delivery of the first installment, a contract whereby purchasers received all of bonds at one delivery in consideration of reduction of the premium is valid.—Board of Com'rs of Creek County, Okl., v. Speer & Dow, 187 S. W. 315.

The board of commissioners of an Oklahoma county may enter into a second contract for the sale of bonds, the county having defaulted in the original contract, for it is the county's general agent.—Id.

As the board of commissioners of an Oklahoma county has plenary power with regard to the sale of county board bonds, it may allow the purchaser compensation for his services and expenses in preparing and improving the bonds.—Id.

§196(7) (Tex.Civ.App.) Evidence held sufficient to sustain issuance of injunction at suit of taxpayers to enjoin issuance of county warrants on the ground that tax levy was insufficient to pay interest and provide sinking fund for payment of such warrants on maturity, and on the further ground that there was not such competition in sale of warrants or letting of the contract for which the warrants, were needed as is required by law.—Commissioners' Court of Trinity County v. Miles, 187 S. W. 378.

Where in injunction suit the answer contains special denials to most allegations of the petition in addition to a general denial, the allegation that plaintiffs are property taxpayers of the county, not met by special denial, is sufficiently proved by affidavit attached to the petition.—Id.

COUNTY COURTS.

See Schools and School Districts, §36.

COUNTY SEATS.

See Counties, §35.

COURT COMMISSIONERS.

See Prohibition, §5.

COURTS.

See Appeal and Error, §436; Certiorari, §57; Charities, §43, 47; Clerks of Courts; Constitutional Law, §67, 70, 328; Contempt; Contracts, §127; Dower, §74; Executors and Administrators, §250, 435; Habeas Corpus, §44, 46; Judges; Justices of the Peace; Mandamus, §23-61; Prohibition, §5, 10; Taxation, §403.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§32 (Tex.Civ.App.) In case of a judgment by default, the court's jurisdiction over the defendant must affirmatively appear.—Friend v. Thomas, 187 S. W. 986.

§35 (Ark.) Where special statutory jurisdiction is conferred upon a superior court of record, its judgment can be supported only by a record which affirmatively shows the jurisdic-

tional requisites.—Griffin v. Boswell, 187 S. W. 166.

§35 (Tex.Civ.App.) Every presumption will be indulged in favor of the record of superior courts as to jurisdictional facts, but there can be no presumption against the record.—McCamant v. McCamant, 187 S. W. 1096.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§87 (Mo.) A court of record must speak through its record, and a letter written by one of three judges is not binding on the court, regardless of personal views expressed therein.—Summers v. Cordell, 187 S. W. 5.

§89 (Tex.Cr.App.) Under Const. art. 5, § 3, where a law imposes a penalty by prosecution for its violation and not a remedy by civil recovery, the opinion of the Supreme Court against its validity is not binding on the Court of Criminal Appeals, which may proceed to enforce the statute.—State v. Clark, 187 S. W. 760; Same v. Nabers, Id. 783, 784.

§97(1) (Mo.App.) The law as expounded by the Supreme Court of the United States governs the construction of contracts for shipment in interstate commerce and supersedes the doctrine expounded by state courts.—Donoho v. Missouri Pac. Ry. Co., 187 S. W. 141.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.

§122 (Tex.Civ.App.) That plaintiff was entitled to recover less than the jurisdictional amount would not defeat the jurisdiction once acquired, unless the jurisdictional allegation was fraudulently made.—Commonwealth Bonding & Casualty Ins. Co. v. Meeks, 187 S. W. 681.

§122 (Tex.Civ.App.) When it appears from specific allegations of pleading that the amount recoverable is below the jurisdiction invoked, unsupported general allegations of a greater sum do not confer jurisdiction.—Martin v. Goodman, 187 S. W. 689.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§170 (Tex.Civ.App.) Where the county court acquired jurisdiction under an original petition in which the damages alleged with interest, were less than \$1,000, the maximum jurisdiction of court, held, that it retained jurisdiction over an amended petition on remand asking for an amount including interest in excess of \$1,000.—Gulf Coast Transp. Co. v. Dillard, 187 S. W. 975.

VI. COURTS OF APPELLATE JURISDICTION.

(A) Grounds of Jurisdiction in General

§204 (Tex.Cr.App.) If the district court acts beyond its jurisdiction by issuing an injunction restraining enforcement of a criminal provision, the Court of Criminal Appeals has power to declare the order a nullity.—State v. Clark, 187 S. W. 760; Same v. Nabers, Id. 783, 784.

§207(1) (Tex.Cr.App.) A court of equity could not enjoin a grand jury from returning an indictment, if the grand jury saw proper to do so, and the Supreme Court could not release on habeas corpus if they did do so, because their authority to issue a writ is limited by the Constitution, and to restraint in a civil cause. Rev. St. art. 1529.—State v. Clark, 187 S. W. 760; Same v. Nabers, Id. 783, 784.

§207(1) (Tex.Civ.App.) An appellate court to protect its jurisdiction and enforce its mandates may resort to mandamus, prohibition, or any other appropriate writ.—Birchfield v. Bourland, 187 S. W. 422.

§207(2) (Mo.) On certiorari to review judgment of the Court of Appeals on the ground

that its decision, refusing to determine whether verdict on one count is a bar to actions on other counts covering the same cause of action, is in conflict with designated decisions of the Supreme Court, the writ should be quashed where no such conflict in fact is shown.—*State ex rel. Scullin v. Robertson*, 187 S. W. 34.

⚡209(2) (Tex.) On motion for rehearing in mandamus to require a Court of Civil Appeals to certify a decision under Rev. St. art. 1623, on ground of conflict with decision of another court, Supreme Court will not consider any decision not mentioned in petition.—*Coultrass v. City of San Antonio*, 187 S. W. 194.

(B) Courts of Particular States.

⚡231(2) (Mo.) Courts of Appeals are of last resort, and, when acting within their jurisdiction and not in violation of decisions of the Supreme Court, which questions can be reviewed only by certiorari, or when certified, can, without interference, decide cases as their judgment dictates, whether correct or not.—*Harrison v. Jackson County*, 187 S. W. 1183.

⚡231(6) (Mo.) The jurisdiction of the Supreme Court to review a cause because a constitutional question is involved does not depend upon the validity of the claim of constitutional right set up, if there is substantial dispute.—*Elks Investment Co. v. Jones*, 187 S. W. 71.

⚡231(22) (Mo.App.) In an action by one run down by a motor car, the question whether municipal ordinances relied on were unconstitutional because in violation of the general motor laws held waived, and the case would not be certified to the Supreme Court.—*Carradine v. Ford*, 187 S. W. 285.

⚡231(51) (Mo.) Where plaintiff sued for \$25,000 and secured judgment for \$250, and, being dissatisfied obtained an order for new trial from which defendant appealed, the case stands on the original demand, and transfer from the Court of Appeals to the Supreme Court was justified.—*Craton v. Huntzinger*, 187 S. W. 48.

⚡231(51) (Mo.) Amount sued for fixes jurisdiction of Supreme Court.—*Leslie v. Carter*, 187 S. W. 1196.

⚡247(1) (Tex.) Mere refusal of Court of Civil Appeals to consider an assignment for reasons deemed sufficient does not present question of substantive law necessary to jurisdiction of Supreme Court under Rev. St. 1911, art. 1521, subd. 6, as amended by Acts 33d Leg. c. 55, defining the appellate jurisdiction of Supreme Court.—*Gulf, T. & W. Ry. Co. v. Dickey*, 187 S. W. 184.

Where charge of trial court on material issue was prejudicially erroneous, and Court of Civil Appeals has improperly refused to consider assignment touching it, a question of substantive law is presented to Supreme Court, and, where jurisdiction of Court of Civil Appeals is not final, it is entitled to review on writ of error.—*Id.*

⚡247(5) (Tex.) Under the direct terms of Rev. St. 1911, art. 1522, as amended by Acts 33d Leg. c. 55 (*Vernon's Sayles' Ann. Civ. St. 1914*, art. 1522), a question not included within the first five subdivisions of Rev. St. 1911, art. 1521, as amended by Acts 33d Leg. c. 55 (*Vernon's Sayles' Ann. Civ. St. 1914*, art. 1521), can be presented to the Supreme Court only by writ of error, and cannot be carried to the Supreme Court by certificate from the Court of Civil Appeals.—*Beene v. Waples*, 187 S. W. 191.

⚡247(7) (Tex.) Mandamus to require certification to Supreme Court of decision of Court of Civil Appeals under Rev. St. art. 1623, cannot be based on conflict between decisions of same court.—*Coultrass v. City of San Antonio*, 187 S. W. 194.

In determining whether Supreme Court shall

require certification of decision by Court of Civil Appeals, under Rev. St. art. 1623, on ground of conflict with decision of another court, equitable considerations, showing that petitioner has been denied some rights, cannot be considered.—*Id.*

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

⚡480(1) (Tex.Cr.App.) Civil courts may restrain by injunction acts of prosecutor in enforcing penal statute declared valid by Court of Criminal Appeals only when a vested property right is about to be invaded by such act.—*State v. Clark*, 187 S. W. 760; *Same v. Nabers*, *Id.* 783, 784.

COVENANTS.

See Easements, ⚡26; Estoppel, ⚡23.

I. REQUISITES AND VALIDITY.

(A) Express Covenants.

⚡1 (Mo.) A restrictive covenant held not created by the mere appearance on a plat of broken lines, marked "building lines."—*Zinn v. Sidler*, 187 S. W. 1172.

COVERTURE.

See Husband and Wife.

CREDIBILITY.

See Appeal and Error, ⚡994; Criminal Law, ⚡742, 792; Evidence, ⚡588; Homicide, ⚡219; Trial, ⚡140, 210; Witnesses, ⚡318-410.

CRIMINAL LAW.

See Adulteration; Arson; Burglary; Constitutional Law, ⚡55; Contempt; Embezzlement, ⚡24; Escape; Forgery, ⚡21; Homicide; Indictment and Information; Injunction, ⚡105; Intoxicating Liquors, ⚡219-236; Larceny; Mandamus, ⚡61; Penalties; Physicians and Surgeons, ⚡6; Poisons; Rape; Receiving Stolen Goods; Robbery; Statutes, ⚡241; Sunday; Taxation, ⚡571; Witnesses, ⚡49.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

⚡225 (Tex.Cr.App.) Where defendant, charged by complaint on information and belief with robbery and theft and bringing the stolen property into Texas, waived examination and gave bond, he could not complain of being held under reasonable bond for appearance before the grand jury, having waived the introduction of evidence by the state.—*Ex parte Villareal*, 187 S. W. 214.

⚡260(8) (Ark.) After accused had entered pleas of guilty to sufficient misdemeanor information and judgment had been entered thereon and leave to withdraw pleas had been refused, his appeal to the circuit court was properly dismissed.—*Duncan v. State*, 187 S. W. 906.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

⚡274 (Ark.) It is discretionary with trial court to refuse to permit defendant to withdraw his plea of guilty and substitute a plea of not guilty.—*Duncan v. State*, 187 S. W. 906.

Where one accused of several misdemeanors pleaded guilty in each and the justice of the peace and the prosecuting attorney denied ac-

cused's claim of offers of compromise inducing his pleas of guilty, there was no abuse of discretion in refusing him leave to withdraw pleas.—Id.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

⇒304(6) (Tex.Cr.App.) The Court of Criminal Appeals takes judicial notice that Kerrville is in Kerr county, where the act creating the county provided that the point selected as the county seat should be called Kerrville.—Baker v. State, 187 S. W. 949.

⇒304(16) (Tex.Cr.App.) The trial court may take judicial notice of convictions in its own court.—Baker v. State, 187 S. W. 949.

⇒315 (Tex.Cr.App.) A witness, proven to be incompetent because of a felony conviction, presumably remains incompetent.—Baker v. State, 187 S. W. 949.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

⇒338(1) (Tex.Cr.App.) In a prosecution for robbery of whisky, testimony of a witness that on several occasions one of parties robbed had passed through county with a wagonload of whisky and that he was unlawfully introducing it into Oklahoma, was inadmissible.—Pearson v. State, 187 S. W. 336.

⇒364(6) (Tex.Cr.App.) Accused's denial that he stabbed deceased is admissible as part of the res gestæ, when made a few minutes after the crime.—Baker v. State, 187 S. W. 949.

⇒366(3) (Tex.Cr.App.) Testimony of a witness, who arrived before doctor, as to statements of deceased in response to doctor's questions as to who struck her, although in answer to a question, held admissible as res gestæ.—Thompson v. State, 187 S. W. 204.

⇒366(6) (Tex.Cr.App.) Where doctor who attended deceased within 15 minutes after blows were inflicted believed her about to die and told her so, and believed her to be thoroughly conscious, his testimony as to her replies by nods to his questions as to who hit her held admissible as res gestæ.—Thompson v. State, 187 S. W. 204.

⇒366(6) (Tex. Cr. App.) Deceased's declaration that accused stabbed him is admissible as part of the res gestæ, when made from three to five minutes after the stabbing.—Baker v. State, 187 S. W. 949.

(C) Other Offenses, and Character of Accused.

⇒369(1) (Tex.Cr.App.) In a criminal prosecution, evidence of other offenses or offenses of a like nature is as a rule inadmissible.—Webb v. State, 187 S. W. 485.

⇒369(5) (Tex.Cr.App.) In a prosecution for theft of a lap robe, question, asked a witness if he did not steal whisky from alleged owner of lap robe was error.—Black v. State, 187 S. W. 332.

⇒369(8) (Tex.Cr.App.) In trial for assault to rape, evidence of other offenses against the prosecutrix committed at about the same time is admissible.—Webb v. State, 187 S. W. 485.

⇒371(1) (Tex.Cr.App.) In a criminal prosecution, where intent is an element, and there is testimony tending to show that an act otherwise illegal was committed with innocent intent, evidence of other offenses of like nature is admissible.—Webb v. State, 187 S. W. 485.

⇒371(9) (Tex.Cr.App.) In a prosecution for assault to rape, evidence of other similar offenses against other persons than prosecutrix is admissible on the question of intent, where defendant's testimony tends to show that his otherwise illegal acts were without wrongful intent.—Webb v. State, 187 S. W. 485.

(D) Materiality and Competency in General.

⇒385 (Mo.) That testimony tended to belittle accused's attorney does not warrant its exclusion, if otherwise competent.—State v. Kapp, 187 S. W. 1178.

(E) Best and Secondary and Demonstrative Evidence.

⇒404(4) (Tex.Cr.App.) The bloody clothing of deceased was admissible in connection with testimony as to whether wounds were inflicted by one bullet or more.—McKinney v. State, 187 S. W. 960.

(F) Admissions, Declarations, and Hearsay.

⇒406(1) (Tex.Cr.App.) In a prosecution for arson, testimony of the city marshal, that defendant, after the fire, admitted that he lied when he denied he was in the building immediately preceding the fire, was admissible.—Arensman v. State, 187 S. W. 471.

⇒413 (1) (Tex.Cr.App.) A statute making certain confessions inadmissible does not exclude accused's denial, when arrested, that he stabbed deceased, where he pleaded self-defense.—Baker v. State, 187 S. W. 949.

⇒417(18) (Tex.Cr.App.) The statements and acts of deceased's wife are not inadmissible as those of a bystander, where she took an active part in the quarrel preceding the murder.—Baker v. State, 187 S. W. 949.

⇒419, 420(10) (Tex.Cr.App.) In a prosecution for robbery of whisky, testimony of a witness that she had heard that there was more whisky in a box from which she had seen defendant take alcohol and as to a conversation which she had heard defendant have with a veterinary doctor, was inadmissible as hearsay.—Pearson v. State, 187 S. W. 336.

(G) Acts and Declarations of Conspirators and Codefendants.

⇒422(5) (Tex.Cr.App.) Where jury could find there was a conspiracy between defendant and his wife to burn a building and her merchandise therein for insurance, testimony of witness, that the wife had told him she would burn the place for the insurance before she would go broke, held admissible.—Arensman v. State, 187 S. W. 471.

⇒422(6) (Ark.) In prosecution for assault with intent to kill committed by defendant's sons in his presence, testimony of witness to statement by the son, shortly before assault, that if he caught the assaulted party he would cut his throat, made in absence of defendant, was admissible against defendant to show the intent or disposition of mind of son in making assault.—Woolbright v. State, 187 S. W. 166.

Such threat was admissible against the defendant.—Id.

(I) Opinion Evidence.

⇒456 (Tex.Cr.App.) Where a witness testified that she had seen deceased moaning and raising her body while doctor was examining her wounds, had heard what witnesses said to her, and her answers, her opinion that deceased was conscious was admissible.—Thompson v. State, 187 S. W. 204.

(J) Testimony of Accomplices and Codefendants.

⇒507(1) (Ark.) Under Kirby's Dig. § 2384 touching corroboration of accomplices to secure a conviction for felony, one who confines his participation with accused in transaction exclusively to buying and not selling of intoxicating liquors is not an accomplice.—Wilson v. State, 187 S. W. 440.

(K) Confessions.

⇒520(1) (Tex.Cr.App.) In prosecution for arson, testimony as to confession or admission

made by defendant out on bail, after consulting with attorneys, and some time after he had given the city marshal a written confession under promise of suspended sentence, *held* admissible.—*Arensman v. State*, 187 S. W. 471.

XI. TIME OF TRIAL AND CONTINUANCE.

⚡594(1) (Tex.Cr.App.) There is no error in refusing a continuance for an absent witness, who would have testified to facts which could have been established by other parties not called to the stand.—*Baker v. State*, 187 S. W. 949.

⚡594(3) (Tex.Cr.App.) It is not error to deny continuance for absent witnesses, where one was a fugitive from justice, and the state admitted truth of testimony the others were expected to give.—*Derrick v. State*, 187 S. W. 759.

⚡595(1) (Tex.Cr.App.) Fact that a witness would testify that he knew the deceased was quarrelsome and knew of two men who had made threats, where it was not shown that either were in a position to commit the crime, was not ground for a continuance.—*Thompson v. State*, 187 S. W. 204.

Where witnesses for state testified that they had heard defendant make threats against the deceased, testimony of an absent witness that he had never heard such threats would be immaterial and not ground for continuance.—*Id.*

⚡595(2) (Tex.Cr.App.) In a prosecution for robbery of whisky, where only admissible testimony of an absent witness was that defendant day before robbery had taken two bottles of alcohol out of a box in her presence, refusal of a continuance was not error, since fact was immaterial.—*Pearson v. State*, 187 S. W. 336.

⚡600(3) (Tex.Cr.App.) It is not error to deny continuance for absent witnesses, where one was a fugitive from justice, and the state admitted truth of testimony the others were expected to give.—*Derrick v. State*, 187 S. W. 759.

⚡603(4) (Ark.) It is a requirement of Kirby's Dig. § 6173, that motion for continuance for absence of a witness alleges that affiant believes the evidence to be true.—*Nix v. State*, 187 S. W. 308.

⚡603(11) (Ark.) In prosecution for larceny, *held*, that motion for second continuance made an insufficient showing of diligence, and the trial court did not abuse its discretion in overruling the motion.—*Nix v. State*, 187 S. W. 308.

⚡603(11) (Tex.Cr.App.) Where in her affidavit an absent witness whose testimony is assigned as a ground for continuance does not swear that she was ever subpoenaed and it does not appear that she was not able to appear on day following application for continuance, no diligence was shown.—*Pearson v. State*, 187 S. W. 336.

XII. TRIAL.

(C) Reception of Evidence.

⚡670 (Ark.) In a prosecution for carnally knowing a female under age of 16 years, where an objection was sustained to a question asked a witness if prosecuting witness had not stated to her that she loved some man, statement of defendant's counsel that he thought it was a material question, because the prosecuting witness might have a lover and try to shield him, was not a sufficient statement to the court of what the answer would have been.—*Simmons v. State*, 187 S. W. 646.

⚡673(5) (Tex.Cr.App.) In a prosecution for assault to rape, the jury should be instructed that evidence of other similar offenses against prosecutrix should be considered only to determine defendant's intention to have sexual intercourse with her at the time of the assault for

which he is on trial.—*Webb v. State*, 187 S. W. 485.

In a prosecution for assault to rape, the jury should be charged that evidence of other offenses may be considered in determining whether defendant intended to have sexual intercourse with prosecutrix, not whether he attempted to have such intercourse.—*Id.*

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

⚡695(2) (Mo.) An objection that certain testimony was immaterial *held* insufficient.—*State v. Kapp*, 187 S. W. 1178.

⚡695(6) (Tex.Cr.App.) On objection to testimony, part of which is admissible and part perhaps inadmissible, specific objection must be made to the inadmissible portion.—*Short v. State*, 187 S. W. 955.

⚡695(6) (Tex.Cr.App.) Admission of evidence over objection to the whole of it, when part only of it is inadmissible, presents no error.—*McKinney v. State*, 187 S. W. 960.

⚡698(1) (Mo.) Where defendant allowed testimony to be introduced without objection and fully cross-examined the witness, he could not later object because testimony proved unfavorable.—*State v. Isaacs*, 187 S. W. 21.

(E) Arguments and Conduct of Counsel.

⚡706 (Tex.Cr.App.) In a prosecution for theft of a lap robe, a question asked defendant if he had heard a witness for state testify in which he said he stood beside defendant's car, and if it was not a fact that witness had testified to a lie, was error.—*Black v. State*, 187 S. W. 332.

⚡706 (Tex. Cr. App.) Prosecuting attorneys are officers of the state, whose duty it is to see that justice is done, and they should never attempt to get before the jury evidence they know to be inadmissible.—*Short v. State*, 187 S. W. 955.

⚡718 (Ark.) In prosecution for larceny, argument of prosecuting attorney commenting on the two convictions of another defendant on same evidence as against defendant *held* improper.—*Nix v. State*, 187 S. W. 308.

⚡718 (Mo.) Statements of state counsel that, if defendant had not been violating the law by carrying a revolver, deceased would not have been killed, *held* improper.—*State v. Isaacs*, 187 S. W. 21.

⚡719(1) (Mo.) Record being silent as to the matter, statements of state's counsel as to slanderous statements made by defendant concerning a sister of deceased *held* improper.—*State v. Isaacs*, 187 S. W. 21.

⚡719(1) (Tex.Cr.App.) It is improper for the prosecuting attorney in argument to say that his only witness had, at the first opportunity and consistently, told the same story, there being no evidence to that effect.—*Derrick v. State*, 187 S. W. 759.

⚡720½ (Tex.Cr.App.) In a prosecution for theft of a lap robe, statements of prosecuting attorney to jury that he had taken stand to testify himself because he had seen defendant make out owner of lap robe to be a liar when he knew defendant to be as guilty as a dog was reversible error.—*Black v. State*, 187 S. W. 332.

⚡721½(2) (Tex.Cr.App.) In a prosecution for arson, where there was a conspiracy charged between defendant and his wife to burn the property, the county attorney might argue on defendant's failing to introduce his wife as a witness for him.—*Arensman v. State*, 187 S. W. 471.

⚡722(2) (Tex.Cr.App.) In murder trial, statement by prosecutor that acquittal would bring end of law enforcement and reference to intemperance of accused *held* improper.—*McPeak v. State*, 187 S. W. 754.

⚖723(3) (Tex.Cr.App.) Statements of prosecuting attorney to jury that, if they wished to foster crime, to find defendant not guilty, and, if so, write their grounds in verdict, and never complain to him that crime was prevalent and that the citizens would not convict criminals, held reversible error.—Black v. State, 187 S. W. 332.

⚖723(3) (Tex.Cr.App.) In murder trial, statement by prosecutor that acquittal would bring end of law enforcement and reference to intemperance of accused held improper.—McPeak v. State, 187 S. W. 754.

⚖729 (Ark.) In a prosecution for larceny, withdrawal by prosecuting attorney, immediately upon objection, of his improper argument held to cure the error.—Nix v. State, 187 S. W. 308.

⚖730(16) (Tex.Cr.App.) Where the court instructed jury to disregard improper arguments of county attorney, and in his qualifications shows that argument was provoked by arguments of appellant's attorneys, there was no error.—Pearson v. State, 187 S. W. 336.

(F) Province of Court and Jury in General.

⚖739(2) (Tex.Cr.App.) Question whether accused had proved an alibi held for jury.—Ferguson v. State, 187 S. W. 476.

⚖742(1) (Ark.) The credibility of a witness is for the jury.—Wilson v. State, 187 S. W. 440.

(G) Necessity, Requisites, and Sufficiency of Instructions.

⚖770(3) (Tex.Cr.App.) Where an issue is in a case favorable to accused, he should have that issue submitted in an affirmative way untrammelled by unfavorable conditions.—McPeak v. State, 187 S. W. 754.

⚖772(1) (Tex.Cr.App.) Where accused, in shooting at his wife, killed a girl, held, that charge to acquit if the same shot that killed the girl struck accused's wife sufficiently presented accused's plea of former conviction of assault to murder his wife.—Lillie v. State, 187 S. W. 482.

⚖786(3) (Ark.) In a prosecution for carnally knowing a female under age of 16 years, an instruction on accused's credibility as a witness, that the jury might consider that a conviction would mean incarceration in penitentiary to accused, although argumentative, was not error.—Simmons v. State, 187 S. W. 646.

⚖792(3) (Tex.Cr.App.) An instruction in giving general definition of a principal which quoted the statute, to the effect that any person who advises or agrees to the commission of an offense and is present when it is committed, whether or not he aids in the illegal act, is a principal, was not error.—Ferguson v. State, 187 S. W. 476.

An instruction which quoted substantially article 77 of statute (Pen. Code 1911) on principals, providing that any one employing another who cannot be punished to commit an offense becomes a principal, omitting reference to poison or preparing means whereby a person may injure himself, was not error.—Id.

An instruction quoting from Pen. Code 1911, art. 932, under which prosecution was had, words "all persons engaged in the illegal act are deemed guilty of forgery," was not error, being applicable to the testimony.—Id.

⚖809 (Tex.Cr.App.) In prosecution for arson by burning a building for the insurance, charge that jury could consider defendant's wife's statements in his absence tending to show common design, purpose, or intent to burn "said stock of millinery," when he should have said "said building," was not misleading where the court charged, when the testimony was admitted, that the jury could only thus consider it.—Arenman v. State, 187 S. W. 471.

⚖814(17) (Tex.Cr.App.) Where the case depended on direct and positive evidence consisting of dying declarations of deceased, court properly refused to charge on circumstantial evidence.—Thompson v. State, 187 S. W. 204.

⚖814(17) (Tex.Cr.App.) Where the persons robbed were ordered from a wagon at a point of a pistol, and robbers took charge of the wagon as shown by positive testimony, refusal to charge on circumstantial evidence was not error.—Pearson v. State, 187 S. W. 336.

⚖822(1) (Tex.Cr.App.) The whole of the charge must be considered where objections are made to excerpts or short paragraphs thereof.—Arenman v. State, 187 S. W. 471.

(H) Requests for Instructions.

⚖829(1) (Tex.Cr.App.) The refusal of a requested charge covered by one given is not error.—Hutspeth v. State, 187 S. W. 340.

⚖829(1) (Tex.Cr.App.) Refusal of special charges, covering matters properly submitted, was proper.—Arenman v. State, 187 S. W. 471.

(I) Objections to Instructions or Refusal Thereof, and Exceptions.

⚖841 (Tex.Cr.App.) Objections to the charge should be made before reading to the jury; it being too late to do so after trial.—Arenman v. State, 187 S. W. 471.

(J) Custody, Conduct, and Deliberations of Jury.

⚖857(2) (Tex.Cr.App.) It is improper, after jury retires, for jurors favoring conviction to say to those favoring acquittal that conviction will stop disturbances in a certain community, where there was no evidence on that question.—Derrick v. State, 187 S. W. 759.

(K) Verdict.

⚖875(4) (Tex.Cr.App.) Misspelling of word "years" in a verdict, otherwise perfect, does not vitiate it.—Pearson v. State, 187 S. W. 336.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

⚖917(2) (Tex.Cr.App.) It was error to refuse new trial where the court refused continuance for absence because of sickness of one of accused's witnesses, whose affidavit as to testimony on new trial was strongly corroborative of accused's claim of self-defense.—Moody v. State, 187 S. W. 758.

⚖918(10, 11) (Tex.Cr.App.) Remark of state witness while leaving the stand, when near defendant, not understood by the judge, not shown to have been heard by the jury, and not complained of by defendant at the trial, cannot avail for new trial.—McKinney v. State, 187 S. W. 960.

⚖923(1) (Tex.Cr.App.) The fact that a juror failed to answer a question, which if he had answered would have caused defendant to have peremptorily challenged him, held no ground for new trial.—Powell v. State, 187 S. W. 334.

⚖925(1) (Tex.Cr.App.) The fact that a juror in a criminal case agreed to the verdict as rendered, because he did not want to have a "hung" jury, did not entitle the defendant to a new trial.—Powell v. State, 187 S. W. 334.

⚖932 (Tex.Cr.App.) Remark of juror while discussing the question of suspended sentence, not affecting such question, held no ground for a new trial.—Powell v. State, 187 S. W. 334.

⚖940 (Tex.Cr.App.) In a prosecution for assault with intent to murder, prosecutrix having been shot through a window at night while in bed, refusal of new trial on ground of newly discovered evidence that witnesses had been to scene of crime since trial and could testify that it was impossible for prosecutrix to see a person outside the window at night held not error.—Sparks v. State, 187 S. W. 331.

§941(1) (Ark.) An order denying a new trial for newly discovered evidence which was merely cumulative *held* not an abuse of discretion.—*Groce v. State*, 187 S. W. 936.

§942(1) (Tex.Cr.App.) Affidavits, showing a main witness for the state had a bad reputation for veracity did not support motion for new trial on the ground of newly discovered testimony.—*Johnson v. State*, 187 S. W. 336.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§982 (Tex.Cr.App.) In murder trial, testimony that accused had been residing in a house of prostitution *held* admissible as showing accused's habits on issue of suspended sentence asked by him; it having been proved that keeper of house was accused's wife.—*Neyland v. State*, 187 S. W. 196.

§982 (Tex.Cr.App.) Under Vernon's Ann. Code Cr. Proc. 1916, arts. 865b, 865c, the burden of proving that accused has never been convicted of a felony is upon accused.—*Holland v. State*, 187 S. W. 944.

Under Vernon's Ann. Code Cr. Proc. 1916, arts. 865b, 865c, upon application for suspended sentence, the state can introduce testimony as to bad reputation of accused and also specific crimes, even minor misdemeanors and the general conduct and habits of accused.—*Id.*

Under Vernon's Ann. Code Cr. Proc. 1916, arts. 865b, 865c, upon application for suspended sentence, purely hearsay testimony is inadmissible.—*Id.*

Under Vernon's Ann. Code Cr. Proc. 1916, arts. 865b, 865c, testimony by the state upon application for suspended sentence by accused as to his reputation and habits should be liberally received, and may be introduced at the time of proving the offense itself.—*Id.*

Upon application for accused for suspended sentence, if, when the state offers proof of his habits, reputation, etc., he withdraws his application, the court should permit no such proof.—*Id.*

Under Vernon's Ann. Code Cr. Proc. 1916, arts. 865b, 865c, upon application for suspended sentence, where accused fails to prove that he has never been convicted of a felony, the jury may not pass on the question of recommending a suspended sentence.—*Id.*

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§1028 (Tex.Cr.App.) Where defendant objected to testimony as to contents of a letter and postal from his wife to a witness, but assigned no ground, so that court made no ruling and defendant did not except to the admission of the evidence or any ruling of the court or the failure of the court to make a ruling, there was no error, proper predicate having been laid.—*Arensmann v. State*, 187 S. W. 471.

§1030(1) (Tex.Cr.App.) Where defendant and his attorney agreed to use of affidavit of absent witness and made no objection to its introduction at the trial, its admission is not ground for reversal.—*Debth v. State*, 187 S. W. 341.

§1038(1) (Tex.Cr.App.) Objections to the court's charge, not made at the time of the trial, are too late.—*Powell v. State*, 187 S. W. 334.

§1048 (Tex.Cr.App.) Matters not excepted to but set up for the first time in motion for new trial cannot be noticed.—*Debth v. State*, 187 S. W. 341.

§1053 (Tex.Cr.App.) Evidence cannot be held insufficient merely because the statement of facts fails to show on its face that witnesses were sworn, if no exception was taken at the trial.—*Debth v. State*, 187 S. W. 341.

§1056(1) (Mo.) Instructions given or refused, to which no exceptions were saved, are not reviewable.—*State v. Isaacs*, 187 S. W. 21.

§1056(1) (Tex.Cr.App.) Unless contrary to the law and the facts, a charge, though erroneous, will not be treated as fundamental error unless exception is taken on the trial and before charge is read to the jury, either in felony or misdemeanor cases.—*Debth v. State*, 187 S. W. 341.

(D) Record and Proceedings Not in Record.

§1090(1) (Tex.Cr.App.) Without a statement of the evidence or bill of exceptions, there is no question presented for review.—*Smith v. State*, 187 S. W. 758.

§1090(14) (Tex.Cr.App.) Where requested special charges merely appeared copied in record, nothing in them or in connection with them showing at what time they were presented, acted upon, or why they should have been given, and no bill of exceptions was taken to trial court's refusal to give them, court will not review court's action.—*Ferguson v. State*, 187 S. W. 476.

§1091(4) (Tex.Cr.App.) A bill of exceptions alleging error in admitting a conversation between defendant and the deceased, relative to defendant's signing of a waiver in her divorce case could not be considered, where the bill did not state the conversation nor any facts in connection with it.—*Resendez v. State*, 187 S. W. 483.

A bill of exceptions reciting that a witness was permitted to testify that, about two or three days after defendant had gotten his clothes from his house, he stopped his wife, the deceased, and her sister, and sought to have a conversation with his wife, but which did not state the conversation presented nothing for review.—*Id.*

A bill of exceptions reciting that, while defendant was testifying, the state asked whether he had not made repeated threats to kill his wife; and that objections thereto were overruled, but not setting out the answer presented nothing for review.—*Id.*

Bill of exceptions to admission of evidence not showing its connection with the case, its relevancy, or how it could be harmful, *held* to present nothing for review.—*Id.*

§1091(5) (Tex.Cr.App.) Bill of exceptions, not showing defendant's purpose in offering evidence which was excluded, *held* to present nothing for review.—*Resendez v. State*, 187 S. W. 483.

§1092(11) (Tex.Cr.App.) An objection by defendant to court's qualification of one of his bills of exceptions should have been made before filing bill as qualified.—*Thompson v. State*, 187 S. W. 204.

§1092(16) (Tex.Cr.App.) In prosecution for a misdemeanor, where bills of exceptions and statement of facts were filed in lower court after adjournment of term at which conviction was had, without order authorizing filing, court will not review them on appeal.—*Guild v. State*, 187 S. W. 215.

§1095 (Tex.Cr.App.) In a misdemeanor case, where there was no order in the record authorizing the bills of exceptions and statement of facts after the adjournment of the court for the term, the motion to strike them from the record will be sustained.—*Smith v. State*, 187 S. W. 758.

§1097(1) (Tex.Cr.App.) No question for review is presented by a record on appeal which is accompanied by no statement of facts.—*Haley v. State*, 187 S. W. 754.

§1097(6) (Tex.Cr.App.) The grounds of the motion for a new trial, in the absence of a statement of facts, cannot be considered.—*De Leon v. State*, 187 S. W. 485.

⇨1099(18) (Tex.Cr.App.) In prosecution for a misdemeanor, where bills of exceptions and statement of facts were filed in lower court after adjournment of term at which conviction was had, without order authorizing filing, court will not review them on appeal.—*Guild v. State*, 187 S. W. 215.

⇨1102 (Tex.Cr.App.) In a misdemeanor case, where there was no order in the record authorizing the bills of exceptions and statement of facts after the adjournment of the court for the term, the motion to strike them from the record will be sustained.—*Smith v. State*, 187 S. W. 758.

⇨1111(3) (Tex.Cr.App.) Where appellant accepted allowance of his bills of exceptions as qualified and explained by the trial judge, he is bound thereby.—*Arensman v. State*, 187 S. W. 471.

⇨1119(2) (Mo.) The statement of accused's attorney that he desired to show certain facts presents nothing for review, where no offer of proof was made.—*State v. Kapp*, 187 S. W. 1178.

⇨1120(3) (Ark.) Where error is assigned in the refusal of the trial court to hear the testimony of a witness, the record must disclose the substance of the offered testimony, so that it may be determined whether or not its rejection was prejudicial.—*Simmons v. State*, 187 S. W. 646.

⇨1120(3) (Tex.Cr.App.) In a prosecution for forgery, a bill of exceptions, which did not contain the answer of witnesses to a question objected to, showed no error.—*Ferguson v. State*, 187 S. W. 476.

⇨1122(6) (Tex.Cr.App.) Where it does not appear that requested instructions were presented to judge at the time required by statute, they will not be reviewed.—*Pearson v. State*, 187 S. W. 336.

⇨1124(2) (Tex.Cr.App.) A bill of exceptions to overruling by court of a motion for new trial, where motion is on many grounds and none of them stated in bill, will not be considered.—*Ferguson v. State*, 187 S. W. 476.

(E) Assignment of Errors and Briefs.

⇨1129(3) (Mo.) Instruction in a murder trial is not subject to review where the record does not show that the defect was pointed out to the trial court, and only a general assignment was made on the motion for new trial.—*State v. Kapp*, 187 S. W. 1178.

That the verdict was influenced "by the prosecuting attorney's improper remarks" is not an effective assignment, unless the record affirmatively shows that the verdict was influenced thereby.—*Id.*

(F) Dismissal, Hearing, and Rehearing.

⇨1131(4) (Tex.Cr.App.) Where accused, after conviction, instead of entering into a recognizance, gives an appeal bond and is released from custody, his appeal must be dismissed.—*Bloss v. State*, 187 S. W. 487.

⇨1131(4) (Tex.Cr.App.) An order overruling a motion for a new trial, stating that defendant, having failed to enter into a recognizance, was committed to jail pending appeal, sufficiently evidenced that appellant was confined in jail, so that the motion to dismiss the appeal will be overruled.—*Smith v. State*, 187 S. W. 758.

⇨1133 (Tex.Cr.App.) An objection that no predicate was laid for impeaching testimony cannot be presented for first time on motion for rehearing.—*Thompson v. State*, 187 S. W. 204.

⇨1133 (Tex.Cr.App.) If appellant in term time obtained an order granting time after adjournment for the term in which to file statement of facts and bills of exceptions, he might make such showing on rehearing, after granting of motion to strike his bills of exception and statement of facts.—*Smith v. State*, 187 S. W. 758.

(G) Review.

⇨1134(1) (Tex.Cr.App.) On appeal, the court is not compelled to discuss all questions discussed by appellant's attorneys in their briefs.—*Ferguson v. State*, 187 S. W. 476.

⇨1137(3) (Tex.Cr.App.) Defendant cannot complain of charge given at his request, even though erroneous.—*Debth v. State*, 187 S. W. 341.

⇨1141(2) (Tex.Cr.App.) The presumption is that ruling of trial court was correct.—*Neyland v. State*, 187 S. W. 196.

⇨1144(6) (Tex.Cr.App.) Under Code Cr. Proc. 1911, § 938, providing that the Court of Criminal Appeals shall presume that venue was proven, the point that it was not proven cannot be first raised on appeal.—*Baker v. State*, 187 S. W. 949.

⇨1144(14) (Tex.Cr.App.) Where the court's original charge was delivered to defendant's attorneys for examination, and court made some corrections to conform to objections made, there being nothing in the record to contrary, it will be assumed that the court complied with statute and resubmitted the charge to defendant's attorneys after making corrections.—*Ferguson v. State*, 187 S. W. 476.

⇨1159(2) (Ark.) Where the verdict is warranted by the evidence, the court is not at liberty to disturb it on appeal.—*Simmons v. State*, 187 S. W. 646.

⇨1159(2) (Mo.App.) Where a conviction of selling cocaine in violation of the law was warranted by affirmative testimony, it will not be disturbed.—*State v. Hesse*, 187 S. W. 571.

⇨1159(3) (Tex.Cr.App.) Where defendant attacked verdict for misconduct of jury in discussing his failure to testify, testimony tending to support defendant's contention, opposed to testimony tending to disprove it, raised question of fact for the trial judge.—*Arensman v. State*, 187 S. W. 471.

⇨1166½(12) (Tex.Cr.App.) It was not prejudicial error for the trial court to ask accused if he intended to testify that it was his policy as an attorney to withhold from the authorities information as to stolen property in his possession.—*Cuilla v. State*, 187 S. W. 210.

⇨1168(2) (Tex.Cr.App.) A bill of exceptions, showing that court sustained appellant's objection to a question asked a witness, shows no error.—*Ferguson v. State*, 187 S. W. 476.

⇨1169(1) (Tex.Cr.App.) In a prosecution for robbery, error in admission of testimony as to value of property taken was harmless, the value not affecting the penalty.—*Pearson v. State*, 187 S. W. 336.

⇨1169(1) (Tex.Cr.App.) On application for suspended sentence in burglary trial, where evidence of guilt was clear and accused offered no testimony as to good reputation, or not having been convicted of felony, and the jury assessed the lowest punishment, the admission of hearsay testimony was harmless error.—*Holland v. State*, 187 S. W. 944.

⇨1169(2) (Tex.Cr.App.) Erroneous admission of evidence is not ground for reversal, if the fact testified to be proved by other evidence, not objected to.—*McKinney v. State*, 187 S. W. 960.

⇨1169(9) (Tex.Cr.App.) In murder trial, admission of opinion evidence as to manner of killing was not cause for reversal, where other testimony amply proved such manner.—*Neyland v. State*, 187 S. W. 196.

⇨1170(2) (Tex.Cr.App.) Exclusion of evidence was harmless, when other evidence established without controversy the facts sought to be proved.—*McKinney v. State*, 187 S. W. 960.

⇨1170½(5) (Tex.Cr.App.) Limiting cross-examination of state witness was not reversible error, where it appears certain defendant had in substance got all he could by a longer cross-

examination.—*McKinney v. State*, 187 S. W. 960.

§1170½(6) (Tex.Cr.App.) In murder trial questions, on cross-examination of a witness, if it were not true that accused was supported by prostitutes, it not appearing question was answered, and court instructing jury that it could only be considered by them in passing on whether or not they would suspend sentence should that question arise, and could not be considered in passing on guilt or innocence, did not injure defendant.—*Neyland v. State*, 187 S. W. 196.

§1170½(6) (Tex.Cr.App.) Impeaching testimony held not available error, where the court instructed the jury to consider only relevant testimony, and not reasons and irrelevant statements of the witness.—*Short v. State*, 187 S. W. 955.

Where an alleged improper question was objected to and excluded, and the answer, if given, was not heard by the jury, and the court instructed them to disregard the question, there was no available error.—Id.

§1172(1) (Tex.Cr.App.) In a prosecution for forgery in inducing making of a false note, error in using the word "possibly" in an instruction which told the jury that it need not be proved the forgery was intended to or did injury to any persons, but it is sufficient that "possibly" some one might be injured, was harmless.—*Ferguson v. State*, 187 S. W. 476.

§1172(6) (Tex.Cr.App.) Refusal to instruct that accused had a right to visit the place of the murder is not prejudicial, where the right was not disputed at the trial.—*Baker v. State*, 187 S. W. 949.

§1172(7) (Tex.Cr.App.) An instruction, that where a person making an instrument in writing acts under what he believes, or has reason to believe, is sufficient authority is not guilty, although not called for by the testimony, was harmless error, since it was favorable to defendant.—*Ferguson v. State*, 187 S. W. 476.

§1172(8) (Tex.Cr.App.) In a prosecution for forgery in inducing making of a false note and passing it, where defendant was not convicted of passing instrument, an instruction as to passing a forged instrument was harmless.—*Ferguson v. State*, 187 S. W. 476.

(H) Determination and Disposition of Cause.

§1192 (Tex.Cr.App.) Where there was an agreement on file that no motion for rehearing would be filed, and requesting immediate issuance of mandate, as accused was confined in the county jail, the mandate will be issued immediately on affirmance.—*Young v. State*, 187 S. W. 754.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

§1206(1) (Ark.) Acts 1915, p. 98, §§ 2, 3, touching intoxicating liquors and providing a fixed penalty for its violation, are not unconstitutional as not providing varying degrees of punishment.—*Wilson v. State*, 187 S. W. 440.

CROPS.

See Chattel Mortgages, §48, 117.

CROSS-EXAMINATION.

See Criminal Law, §1170½; Witnesses, §271.

CROSSINGS.

See Railroads, §95, 303-350.

CUMULATIVE EVIDENCE.

See Criminal Law, §941.

CURTESY.

See Dower; Wills, §783.

CUSTODY.

See Divorce, §300-312.

CUSTOMS AND USAGES.

See Brokers, §85; Common Law; Evidence, §67.

§11 (Tex.Civ.App.) If it be pleaded and proved that there is a custom as to the commission for effecting a lease of which a party defendant had knowledge, or that there was a custom so notorious as to charge him with knowledge thereof, the law implies a promise to pay the compensation fixed by such custom.—*Brady v. Richey & Casey*, 187 S. W. 508.

§17 (Tex.Civ.App.) Testimony of custom of carrier to unload live stock at certain point held incompetent to abrogate the express terms of a shipping contract requiring the shipper to unload the stock on its arrival.—*Chicago, R. I. & G. Ry. Co. v. Pavillard*, 187 S. W. 908.

§18 (Mo.App.) Proof is inadmissible as to a custom not pleaded.—*Mendenhall v. Sherman*, 187 S. W. 271.

§18 (Tex.Civ.App.) In broker's action for commission for effecting a lease, not alleging that defendant knew of any custom as to the commission for such services, or that he was legally chargeable with notice thereof, evidence as to the customary commission for such services was inadmissible.—*Brady v. Richey & Casey*, 187 S. W. 508.

DAMAGES.

See Appeal and Error, §1140, 1171; Carriers, §319; Death, §99; Eminent Domain, §102-203; Evidence, §498; Fraud, §47, 57, 59, 62; Landlord and Tenant, §129; Malicious Prosecution, §69; Negligence, §101, 141; New Trial, §75; Sales, §369, 418; Sheriffs and Constables, §139; Telegraphs and Telephones; Waters and Water Courses, §178.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

§23 (Mo.) Damages for breaches of contract are only those which are incidental to, and directly caused by, the breach and may reasonably be supposed to have entered into the contemplation of the parties.—*Weber Implement Co. v. Acme Harvesting Mach. Co.*, 187 S. W. 874.

§30 (Mo.App.) In a servant's action for injury to foot, the loss of time while it was healing, his pain and suffering, past and future, and the humiliation of being crippled, were elements for which he was entitled to recover reasonable compensation.—*Winkleblack v. Great Western Mfg. Co.*, 187 S. W. 95.

§37 (Tex.Civ.App.) Where plaintiff claimed defendant's breach of contract delayed her in opening her millinery business, she cannot recover for loss to her business and also for loss of time which she would have devoted to the business.—*Texas Power & Light Co. v. Roberts*, 187 S. W. 225.

§40(2) (Mo.) Damages for breach of contract do not include speculative profits or accidental or consequential losses or the loss of a fancied good bargain.—*Weber Implement Co. v. Acme Harvesting Mach. Co.*, 187 S. W. 874.

§40(2) (Tex.Civ.App.) Plaintiff held not entitled to recover lost profits for defendant's breach of contract which delayed the opening of her millinery business, but to recover for depreciation in value of stock which she was un-

able to dispose of for that reason.—*Texas Power & Light Co. v. Roberts*, 187 S. W. 225.

(B) **Aggravation, Mitigation, and Reduction of Loss.**

⚖62(2) (Tex.Civ.App.) One injured by another's fault is required to use only ordinary care to prevent aggravation of injuries.—*Southern Traction Co. v. Wilson*, 187 S. W. 536.

⚖62(4) (Mo.App.) Where plaintiffs contracted to plaster a building in a good workmanlike manner and replace any defective work in two years, it was the defendant's duty to repair defects promptly and so lessen his damages, and he can recover only the amount he would have been compelled to spend, had he been diligent.—*Craig v. McNichols Furniture Co.*, 187 S. W. 793.

(C) **Interest, Costs, and Expenses of Litigation.**

⚖69 (Mo.App.) Interest is not allowable on a claim ex delicto prior to rendition of judgment.—*Slack v. St. Louis, I. M. & S. Ry. Co.*, 187 S. W. 275.

VI. MEASURE OF DAMAGES.

(A) **Injuries to the Person.**

⚖95 (Mo.) In a personal injury action, plaintiff, on proving his case, is entitled to full compensation, regardless of what defendant should pay.—*Craton v. Huntzinger*, 187 S. W. 48.

⚖95 (Mo.) In determining damages for personal injuries, the jury must consider the loss of earning capacity and the physical and mental capacity to enjoy the fruits of his labor, from which grows mental suffering, resulting from physical disability and disfigurement.—*McWhirt v. Chicago & A. R. Co.*, 187 S. W. 830.

(B) **Injuries to Property.**

⚖111 (Mo.App.) In a landowner's action for causing his wall to fall, the measure of damages being the cost of constructing a new wall, it cannot be complained that the new wall was better than the old; the only difference being in use of cement mortar instead of lime.—*Knoche v. Pratt*, 187 S. W. 578.

⚖112 (Ark.) Only the actual and not the enhanced value of timber wrongfully cut can be recovered, where cut under belief of right to remove it under a reservation in a deed.—*Hamp-ton Stave Co. v. Elliott*, 187 S. W. 647.

(C) **Breach of Contract.**

⚖124(3) (Tex.Civ.App.) Under written contract for drilling of five oil wells, the contractor, after drilling one well and receiving payment therefor, and after defendant's abandonment of the contract, held not limited to recovery of the profits it might have made on each of the other four wells if driven to a depth of 500 feet.—*Pierce-Fordyce Oil Ass'n v. Warner Drilling Co.*, 187 S. W. 516.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

⚖132(1) (Mo.App.) Verdict of \$2,500 awarded a mine employe, who had two ribs broken, and received other severe injuries which were permanent and impaired his ability to follow his usual occupation, held not so excessive as to show passion or prejudice.—*Shimmin v. C. & S. Mining Co.*, 187 S. W. 76.

⚖132(1) (Mo.App.) In action for personal injuries resulting in serious injury disqualifying from hard work, verdict for \$7,500 held not excessive.—*Burns v. Polar Wave Ice & Fuel Co.*, 187 S. W. 145.

⚖132(3) (Mo.App.) Where plaintiff, a strong, vigorous woman of 68 years of age, has been rendered nervous, has fainting spells, pains in her neck and back, and the evidence is that her condition is permanent, a verdict for \$2,500 held not excessive.—*Modrell v. Dunham*, 187 S. W. 561, 564.

⚖132(7) (Mo.App.) Verdict of \$5,000 for injury to teamster's foot, resulting in a permanent flat foot and limp and some consequent pain and inconvenience, though not materially reducing his earning capacity, was excessive, and would not be sustained, unless he entered a remittitur of \$2,000.—*Winkleblack v. Great Western Mfg. Co.*, 187 S. W. 95.

⚖132(7) (Tex.Civ.App.) Verdict for \$1,125 for personal injury to knee, hip, and back resulting in a tearing of the ligaments, and weakness and pain after working or walking, held not excessive.—*Wichita Falls Traction Co. v. Berry*, 187 S. W. 415.

⚖132(10) (Mo.) Verdict of \$10,000 to a pedestrian whose injuries necessitated amputation of one leg below the knee, and whose other foot was crushed and broken, but not permanently disabled, and who received injuries about the head, was not excessive.—*McWhirt v. Chicago & A. R. Co.*, 187 S. W. 830.

⚖132(12) (Mo.) \$12,000 damages for loss of the left arm above the elbow by a railroad air inspector earning \$2.40 per day, held excessive by \$4,000.—*Young v. Lusk*, 187 S. W. 819.

⚖132(15) (Mo.) Verdict for \$250 for numerous injuries to body, head, and face, causing permanent disfigurement and temporary confinement, held grossly inadequate.—*Craton v. Huntzinger*, 187 S. W. 48.

⚖134(1) (Tex.Civ.App.) Where plaintiff was 40 years of age, earning \$125 a month, as general manager of a telephone company, and had been recently reduced from \$175 a month, because company was not making money, verdict of \$8,500 held not excessive.—*Kansas City, M. & O. Ry. Co. of Texas v. Durrett*, 187 S. W. 427.

⚖134(3) (Ark.) In recovery against railroad by employe for injury to leg, necessitating seven operations, causing great pain and long confinement and loss of earning capacity, verdict for \$9,000 was not excessive.—*St. Louis, I. M. & S. R. Co. v. Ingram*, 187 S. W. 452.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) **Pleading.**

⚖147 (Tex.Civ.App.) Where petition sought to recover special damages for defendant's failure to comply with agreement made when it leased portion of premises to plaintiff, it must aver facts showing that defendant should have known such damages would result from breach.—*Texas Power & Light Co. v. Roberts*, 187 S. W. 225.

⚖159(3) (Mo.App.) Allegation of injury impairing plaintiff's earning capacity and causing a loss of his time, and that such injury and conditions were permanent, was a sufficient allegation of future loss of earnings or loss of time.—*Shimmin v. C. & S. Mining Co.*, 187 S. W. 76.

(B) **Evidence.**

⚖182 (Mo.App.) In a landowner's action for damages for causing his wall to fall, evidence that he was going to change the building to a business house, and that it had not paid as an apartment house, was properly excluded as immaterial.—*Knoche v. Pratt*, 187 S. W. 578.

⚖185(1) (Mo.) Evidence in suit for personal injuries in accident caused by plaintiff's horses becoming frightened by defendant's automobile, held to sustain plaintiff's allegations as to extent of injuries.—*Craton v. Huntzinger*, 187 S. W. 48.

⚖185(2) (Tex.Civ.App.) In action for injuries, that plaintiff became in a toxemic condition from eating and drinking, causing fever after the accident, did not tend to prove plaintiff was not under total disability caused by accident.—*Kansas City, M. & O. Ry. Co. of Texas v. Durrett*, 187 S. W. 427.

(C) Proceedings for Assessment.

⚡208(2) (Mo.App.) In an action for personal injuries caused by a fall across the edge of a two-inch plank in defendant railroad's loading chute, evidence held sufficient to take to jury question whether plaintiff's injuries were caused by the fall or by alleged overlifting.—*Summers v. Chicago, R. I. & P. Ry. Co.*, 187 S. W. 125.

⚡208(3) (Ark.) Submitting the question of plaintiff's permanent injury and deformity to the jury is not error, where there was evidence that a hip fracture had shortened her leg, and that a physician considered the injury permanent.—*St. Louis Southwestern Ry. Co. v. Carmack*, 187 S. W. 635.

⚡208(3) (Mo.App.) Where there was evidence that at trial plaintiff suffered in his abdomen, submission whether plaintiff's injuries were permanent was proper, though surgeon refused to state they were permanent.—*Burns v. Polar Wave Ice & Fuel Co.*, 187 S. W. 145.

⚡216(8) (Mo.App.) Where the evidence as to loss of time after filing the petition was stricken out, an instruction on damages, not restricted to damage before the filing of the petition, held not erroneous.—*Shimmin v. O. & S. Mining Co.*, 187 S. W. 76.

(D) Computation and Amount, Double and Treble Damages, and Remission.

⚡228 (Tex.Civ.App.) Error in awarding an agent an excessive judgment for commissions is cured by requiring him to file a remittitur of the excess.—*Channell Chemical Co. v. Hall*, 187 S. W. 704.

DEATH.

See Contracts, ⚡127; Witnesses, ⚡144-181.

I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

⚡2(1) (Tex.Civ.App.) The law or rule of evidence embodied in Rev. St. 1911, art. 5707, as to the presumption of death after absence of seven years, does not limit the presumption to an absence for seven years, but on proper evidence death before the expiration of such time may be inferred.—*Sovereign Camp of Woodmen of the World v. Robinson*, 187 S. W. 215.

Evidence of character, habits, domestic relations, etc., making the abandonment of home and family improbable and showing the want of motive, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard of may be inferred without regard to the duration of such absence.—*Id.*

⚡2(2) (Tex.Civ.App.) Where one has been absent or unheard of for seven years, the presumption arises that he is dead, but not that he died at any particular time, and, if important to establish death at any particular time, it must be done by evidence.—*Sovereign Camp of Woodmen of the World v. Robinson*, 187 S. W. 215.

⚡4 (Tex.Civ.App.) In a widow's action upon a benefit certificate, evidence held to sustain finding that insured was dead, and that he died at or about the time of his disappearance from home.—*Sovereign Camp of Woodmen of the World v. Robinson*, 187 S. W. 215.

II. ACTIONS FOR CAUSING DEATH.**(D) Pleading and Evidence.**

⚡49(1) (Mo.) An administrator's petition, in death action under Rev. St. 1909, §§ 5425, 5427, must allege the beneficiaries' names other than the estate and facts showing the damage sustained.—*Johnson v. Dixie Mining & Development Co.*, 187 S. W. 1.

⚡58(1) (Mo.) In an action for injuries for death by defendant's negligence, the decedent is presumed to have exercised ordinary care for

her own protection; but this presumption does not continue after all the facts of the injury are shown.—*Carlson v. Atchison, T. & S. F. Ry. Co.*, 187 S. W. 842.

(E) Damages, Forfeiture, or Fine.

⚡99(4) (Mo.App.) That the deceased was 27 years of age, in good health, a farmer, and left a wife, plaintiff, and three children, warranted a recovery of \$5,000.—*Starks v. Lusk*, 187 S. W. 586.

DEBTOR AND CREDITOR.

See Chattel Mortgages, ⚡186, 202; Compositions with Creditors; Descent and Distribution, ⚡119, 146.

DECEDENTS.

See Descent and Distribution; Executors and Administrators.

DECEIT.

See Fraud.

DECLARATIONS.

See Criminal Law, ⚡418, 417, 422; Evidence, ⚡273, 285.

DEEDS.

See Adverse Possession, ⚡71, 79; Cancellation of Instruments; Covenants; Estoppel, ⚡23; Evidence, ⚡317; Fraudulent Conveyances; Logs and Logging, ⚡2; Mortgages; Partition, ⚡4; Reformation of Instruments; Taxation, ⚡789.

I. REQUISITES AND VALIDITY.**(A) Nature and Essentials of Conveyances in General.**

⚡19 (Tex.Civ.App.) Where a party who undertook, in consideration of a conveyance of a half interest in land sold under judicial sale, to act as agent and attorney for an owner in recovering it failed to perform the agreed services, the owner or those in privity with her could rescind the conveyance of the half interest.—*Brady v. Cope*, 187 S. W. 678.

III. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

⚡90 (Tex.Civ.App.) A construction least favorable to the grantor will be adopted when the intention is doubtful.—*Crawford v. Spruill*, 187 S. W. 361.

⚡90 (Tex.Civ.App.) Where meaning or purport of the terms used in a deed is doubtful, the construction most favorable to grantee should be applied.—*Arden v. Boone*, 187 S. W. 995.

(C) Estates and Interests Created.

⚡120 (Tex.Civ.App.) A deed will be construed to give the largest estate under the terms of the grant.—*Arden v. Boone*, 187 S. W. 995.

(D) Exceptions and Reservations.

⚡139 (Tex.Civ.App.) The exception of land required to make the full acreage conveyed under general warranty deed will be rejected as repugnant to the grant.—*Arden v. Boone*, 187 S. W. 995.

IV. PLEADING AND EVIDENCE.

⚡196(2) (Mo.) In suit to cancel deed as procured by deceit and conspiracy, burden of adducing clear, convincing, and complete evidence of such deceit and conspiracy rests on plaintiff.—*Bross v. Rogers*, 187 S. W. 38.

⚡211(3) (Mo.) In suit to cancel deed on ground it was procured by deceit and conspiracy to defraud, evidence of deceit and conspiracy on part of a defendant held insufficient to

satisfy legal requirement of clear, convincing, and complete proof.—*Bross v. Rogers*, 187 S. W. 38.

DEFAMATION.

See Libel and Slander.

DEFAULT.

See Judgment, ¶106-126.

DELEGATION OF POWER.

See Licenses, ¶6.

DELIVERY.

See Bills and Notes, ¶63; Carriers, ¶39, 44, 88, 212; Corporations, ¶123; Insurance, ¶720; Sales, ¶201.

DEMAND.

See Limitation of Actions, ¶66.

DEMONSTRATIVE EVIDENCE.

See Criminal Law, ¶404; Evidence, ¶192.

DEMURRER.

See Appeal and Error, ¶927, 997; Pleading, ¶196-214; Trial, ¶150, 156, 418.

DEPARTURE.

See Pleading, ¶180.

DEPOSITIONS.

¶57 (Mo.) Under Rev. St. 1909, §§ 6390, 6404, order by court for subpoena requiring attendance of witness before special commissioner appointed to take depositions is not necessary and has no greater force than if issued by the commissioner himself.—*State ex rel. McCulloch v. Taylor*, 187 S. W. 1181.

¶58 (Mo.) Rev. St. 1909, §§ 1944-1949, does not authorize requirement that witness produce books and papers on giving deposition.—*State ex rel. McCulloch v. Taylor*, 187 S. W. 1181.

¶90 (Mo.App.) Exclusion of defendant's deposition held proper, where insured was in court and called to the stand and allowed to testify.—*Bush v. Block*, 187 S. W. 153.

¶101 (Ark.) Defendants may introduce the deposition of plaintiff's secretary taken by it in the case, its attorneys consenting thereto.—*Elkins v. Henry Vogt Mach. Co.*, 187 S. W. 663.

DEPOSITS.

See Banks and Banking, ¶119.

DEPUTIES.

See Sheriffs and Constables, ¶18.

DERAILMENT.

See Carriers, ¶316.

DESCENT AND DISTRIBUTION.

See Dower; Executors and Administrators; Wills.

I. NATURE AND COURSE IN GENERAL.

¶11 (Tex.Civ.App.) Where title to land has been established by limitation, upon death of the occupants it descends to their heirs and becomes their separate property.—*Houston Oil Co. of Texas v. Stepney*, 187 S. W. 1078.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

(A) Heirs and Next of Kin.

¶47(1) (Mo.) By Rev. St. 1909, § 544, a testator dies intestate as to children and their descendants not named or provided for in the will.—*Williamson v. Roberts*, 187 S. W. 19.

Under Rev. St. 1909, § 544, providing that as to children unnamed or unprovided for testator shall be deemed to die intestate, where testator left land, which he devised to a daughter, only child he named in will, and personality insufficient to pay debts, will providing that his estate, other than devise to daughter, be disposed of as law directs, there was not provision for other children sufficient to validate devise to daughter.—*Id.*

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTUTES.

(A) Nature and Establishment of Rights in General.

¶91(5) (Tex.Civ.App.) In action on policy, failure of petition to allege any administration of plaintiff's deceased father, the original beneficiary under whom she claimed, held error of law apparent upon the face of the record and fundamental.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

The want of allegations in petition to recover on policy that no administration of plaintiff's father, the original beneficiary, was pending, and that none was necessary, could properly be raised upon a general demurrer.—*Id.*

Petition not showing plaintiff's legal right to sue for interest of her deceased father, one of two original separate beneficiaries, did not give trial court jurisdiction to adjudicate interest of deceased beneficiary, and judgment disposing of such interest was fundamental error.—*Id.*

(B) Advancements.

¶109 (Mo.App.) In partitioning a farm of deceased, who had advanced money to two of his five heirs, the value of the farm and the advancements should be brought into hotchpot, the sum divided into five equal parts, and from two of such parts the amounts advanced should be deducted.—*Pitts v. Metzger*, 187 S. W. 610.

¶115 (Mo.App.) Decedent's payments to his daughter were presumably advancements, chargeable to her upon settling the estate, and she has the burden of proving that they were gifts.—*Pitts v. Metzger*, 187 S. W. 610.

¶117 (Mo.App.) Evidence held to sustain a finding that deceased advanced his daughter \$1,500, to be deducted from her share of his estate.—*Pitts v. Metzger*, 187 S. W. 610.

(C) Debts of Intestate and Incumbrances on Property.

¶119(1) (Tex.Civ.App.) The surviving wife of the deceased maker of a note is not personally liable thereon, but the creditor should proceed against the property of the decedent in her hands.—*Hamlet v. Leicht*, 187 S. W. 1004.

¶146 (Tex.Civ.App.) A petition seeking recovery on a note of decedent as against his surviving wife is insufficient if it fails to show what specific property of the estate was received by her, or that the estate was solvent, or fails to seek foreclosure of a lien on specific property of the estate.—*Hamlet v. Leicht*, 187 S. W. 1004.

DESCRIPTION.

See Boundaries, ¶8-25; Chattel Mortgages, ¶48; Larceny, ¶30.

DESERTION.

See Divorce, ¶37.

DETINUE.

See Replevin.

DILATORY PLEAS.

See Pleading, ¶104.

DILIGENCE.

See New Trial, ¶102.

DIRECTING VERDICT.

See Appeal and Error, ¶886, 1061.

DISCHARGE.

See Bills and Notes, ¶256; Compositions with Creditors; Compromise and Settlement; Mortgages, ¶309; Release.

DISCOVERED PERIL.

See Railroads, ¶338, 390.

DISCRETION.

See Constitutional Law, ¶67.

DISCRETION OF COURT.

See Appeal and Error, ¶959-978; Costs, ¶13; Criminal Law, ¶274; Mandamus, ¶28; Pleading, ¶236; Trial, ¶41, 63; Witnesses, ¶240.

DISCRIMINATION.

See Carriers, ¶13; Constitutional Law, ¶225; Taxation, ¶40.

DISMISSAL AND NONSUIT.

See Appeal and Error, ¶773, 797, 962, 1061, 1191; Criminal Law, ¶1131; Eminent Domain, ¶246; Railroads, ¶161.

I. VOLUNTARY.

¶40 (Ark.) Kirby's Dig. § 6168, providing for the plaintiff's dismissal of an action in the clerk's office during vacation, does not authorize the entry of a consent decree of dismissal containing admissions by the state of Arkansas, plaintiff, that defendants were the owners of certain submerged lands involved in the action.—Parker v. Frierson, 187 S. W. 162.

II. INVOLUNTARY.

¶81(7) (Mo.App.) Where defendants' motion to strike out an amended petition and to dismiss a suit as to them was sustained, the reinstatement of the case as to them put it back where it was before the dismissal.—Southwest Nat. Bank of Kansas City v. McDermand, 187 S. W. 121.

DISSOLUTION.

See Banks and Banking, ¶71; Corporations, ¶616; Partnership, ¶284, 296.

DISTRIBUTION.

See Descent and Distribution.

DISTRICT AND PROSECUTING ATTORNEYS.

See Criminal Law, ¶706; Injunction, ¶105; Malicious Prosecution, ¶22.

DISTRICTS.

See Highways, ¶90; Levees, ¶6.

DIVORCE.

See Bills and Notes, ¶106; Marriage, ¶50; Trial, ¶251, 350.

II. GROUNDS.

¶37(5) (Tex.Civ.App.) While the statute does not use the term "permanent" in prescribing abandonment as a ground for divorce, its permanency is necessarily implied, and an abandonment which is only temporary is not cause for divorce.—McConkey v. McConkey, 187 S. W. 1100.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**(D) Evidence.**

¶111 (Tex.Civ.App.) In husband's action for a divorce on ground of wife's abandonment, evidence as to his other reasons for filing the suit, such as her humiliation or cruelty to him, was immaterial.—McConkey v. McConkey, 187 S. W. 1100.

¶124 (Mo.App.) Evidence held to sustain a divorce decree granted a wife for the husband's habitual drunkenness and the indignities to which he subjected her.—Glover v. Glover, 187 S. W. 278.

(E) Dismissal, Trial or Hearing, and New Trial.

¶149 (Tex.Civ.App.) Error cannot be predicated on the alleged conflict in the verdict which found the mother entitled to a divorce and custody of two girls, but not a fit and proper person to have custody of a boy; no actual conflict necessarily following from such findings.—Hunter v. Hunter, 187 S. W. 1049.

(F) Judgment or Decree.

¶165(3) (Tex.Civ.App.) Decree in action for divorce on ground of wife's abandonment, within jurisdiction of district court under express provisions of Rev. St. 1911, arts. 4630, 4631, the cause being called out of its regular order and tried at an unusual place, without notice to defendant or her counsel, etc., while not a nullity, held so irregular as to authorize its vacation.—McConkey v. McConkey, 187 S. W. 1100.

Wife against whom husband had fraudulently obtained a decree of divorce held entitled to its vacation and to the restoration of her status as a lawful wife and to his support, etc., notwithstanding he had afterwards married another innocent woman; as he was in no position to profit thereby.—Id.

¶167 (Tex.Civ.App.) On allegations and evidence in wife's suit to set aside decree of divorce obtained by husband on ground of her abandonment, held, that the court could not take case from jury.—McConkey v. McConkey, 187 S. W. 1100.

That defendant in a suit to set aside decree of divorce was not made to appear cognizant of agreements of his counsel in violation of which such decree was entered held not a defense.—Id.

The violation of an oral agreement of counsel in a divorce action that the jury fee might be paid at any time before trial, though not enforceable, might be considered as a circumstance of fraud in an action to vacate decree.—Id.

Specific allegations in petition in suit to set aside divorce fraudulently obtained by husband on ground of her abandonment as to her visit to her father, the husband's refusal to furnish a home, etc., held not prejudicial to defendant, though general allegations would have been sufficient.—Id.

In wife's suit to set aside divorce fraudulently obtained by husband on ground of her abandonment, evidence of quarrel between them eleven years before and that she then left him, in view of subsequent reconciliation, was inadmissible on issue of three years' abandonment.—Id.

(G) Appeal.

⚡187 (Mo.App.) The fact that a wife, after securing a divorce decree, remarries pending appeal, does not affect the Court of Appeal's determination of the appeal.—Glover v. Glover, 187 S. W. 278.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

⚡240(5) (Mo.App.) Fifteen hundred dollars permanent alimony awarded to a wife is not excessive, where she brought \$500 into the marriage compact, and defendant was worth \$6,000 or \$7,000.—Glover v. Glover, 187 S. E. 278.

VI. CUSTODY AND SUPPORT OF CHILDREN.

⚡300 (Ark.) If the established facts justify the conclusions that the mother of the child is capable of giving proper care to the child, and that she will comply with the orders of the court, it would not be beyond the power of the court to permit her to take the child to her home in another state.—Weatherston v. Taylor, 187 S. W. 450.

⚡302 (Tex.Civ.App.) It was not fundamental error for the judgment to award divorce to the wife with custody of two girls and deny custody of a boy to her, on the ground that it was not in accordance with the verdict, which, while not in conflict in itself, required such disposition.—Hunter v. Hunter, 187 S. W. 1049.

⚡303(3) (Ark.) An order granting custody of a child to one parent is an adjudication that such parent, and not the other, is a proper person to have custody, and proof to the contrary, is prerequisite to an order awarding custody to the other.—Weatherston v. Taylor, 187 S. W. 450.

Personal knowledge of the chancellor is not sufficient basis for awarding custody of a child to one parent without proof, after it was once awarded to the other parent.—Id.

⚡303(3) (Tex.Civ.App.) Where in divorce the custody of infants is awarded, such judgment is a conclusive adjudication as to those conditions and circumstances, but does not preclude subsequent proceedings involving the custody of such infants when the conditions and circumstances have changed.—Ex parte Garcia, 187 S. W. 410.

A district court granting a divorce cannot secure exclusive power to dispose of minor children of the marriage, and after the decree has been rendered, another court may, circumstances having changed, determine the question of the minors' custody.—Id.

⚡312 (Ark.) An order in divorce awarding custody of a child to one parent is a final order entitling the other parent to appeal, although jurisdiction is retained to modify it.—Weatherston v. Taylor, 187 S. W. 450.

An interlocutory order may be made, relating solely to the right to visit a child, without depriving the parent of the custody, and such an order would not be final and appealable.—Id.

DOCKETS.

See Appeal and Error, ⚡808; Trial, ⚡11.

DOCTORS.

See Physicians and Surgeons.

DOCUMENTS.

See Appeal and Error, ⚡524; Depositions, ⚡58; Evidence, ⚡366.

DONATIONS.

See Gifts.

DOWER.

III. RIGHTS AND REMEDIES OF WIDOW.

⚡68 (Ark.) Under Kirby's Dig. § 2717, providing that it shall be the duty of the heir at law to assign dower, executors of a deceased husband who left no children had no power as such to allot dower in decedent's lands to widow.—Jameson v. Davis, 187 S. W. 314.

⚡69 (Ark.) Under Kirby's Dig. § 2709, probate court has jurisdiction to allot dower to a widow by setting apart to her in fee one-half of all the lands of her husband described in the petition of his executors for the appointment of commissioners to allot dower.—Jameson v. Davis, 187 S. W. 314.

Under Kirby's Dig. §§ 2720, 2721, providing that parties having interest must be made parties to proceedings for allotment of dower, devisees of deceased husband as to lands embraced in executors' petition for allotment of dower to the widow were necessary parties.—Id.

⚡74 (Mo.) Circuit court of county where decedent's land was situated had jurisdiction of subject-matter of suit and person of defendant in suit by decedent's daughter and only child against his widow, praying the admeasurement of dower.—Miller v. Falloon, 187 S. W. 839.

DRAMSHOPS.

See Intoxicating Liquors.

DRUGS.

See Poisons.

DRUNKARDS.

See Railroads, ⚡369.

DUE PROCESS OF LAW.

See Constitutional Law, ⚡251-306.

DUES.

See Insurance, ⚡743.

DUPLICITY.

See Action, ⚡38.

DYING DECLARATIONS.

See Homicide, ⚡202-219.

EARNINGS.

See Parent and Child, ⚡5.

EASEMENTS.

See Highways.

I. CREATION, EXISTENCE, AND TERMINATION.

⚡8(1) (Mo.) Where grantor, who had a contractual right of way over adjoining land, by his deed conveyed "his easement over such land," the grantee was justified in taking possession of the way under his deed, and his possession was adverse to the world.—Phelps v. Crites, 187 S. W. 3.

⚡14(2) (Tex.Civ.App.) Where a certain acreage is conveyed with stipulation that grantees should keep open a permanent roadway, on the tract conveyed, the roadway being necessary to make the full acreage conveyed, stipulation should be construed as reservation of an easement, and not as an exception of an open lane.—Arden v. Boone, 187 S. W. 995.

⚡24 (Mo.) Where grantor had right of way over adjoining land under contract with owner, but in his deed merely conveyed his "easement over the land acquired" from the owner, such words were merely descriptive of the way, but did not limit the grantee's rights to those of

the grantor under the contract.—*Phelps v. Crites*, 187 S. W. 8.

§26(1) (Mo.) Forfeitures are not favored in the law, especially where a right of way under contract, of which grantee did not know, required acts on his part in return for way, and he occupied under deed from former owner, purporting to convey an easement for 22 years.—*Phelps v. Crites*, 187 S. W. 8.

§36(8) (Mo.) Evidence held to show acquisition of absolute title by adverse possession, under deed conveying easement in right of way, under which grantee and his successors occupied, undisputed by the owner, for 22 years.—*Phelps v. Crites*, 187 S. W. 3.

§36(3) (Mo.) Where a private road ran from testator's residence across three adjoining tracts to a county road, evidence held to show intention of testator to reserve it from a residuary devise of the tract nearest the county road.—*Corless v. Eatherton*, 187 S. W. 39.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§53 (Mo.) Where deed purported to convey easement in right of way absolute, and grantee and his successors and owners of servient estate for 22 years treated occupancy as making grantee the owner in possession, prior contract of owners of servient estate and grantor requiring grantor to fence the way would not be enforced.—*Phelps v. Crites*, 187 S. W. 3.

§61(9) (Tex.Civ.App.) In a suit to require grantee to remove gates on a roadway, the deed stipulating that grantee was "to keep open for a permanent roadway 15 feet wide on the extreme east of" the tract conveyed "so that the said" grantor "may have access to the public road," evidence held to support decree for defendant.—*Arden v. Boone*, 187 S. W. 995.

EJECTMENT.

See Injunction, §118; Trespass to Try Title.

I. RIGHT OF ACTION AND DEFENSES.

§9(2) (Mo.) Heirs of testator who created a valid charitable trust as to land, without naming a trustee, cannot recover in ejectment, even if incorporation of an association, the members of which are executing the trust under direction of the court, be void.—*Buckley v. Monck*, 187 S. W. 31.

§9(3) (Ark.) Plaintiff must recover on the strength of his own title, and not on the weakness of defendant's.—*Worley v. McMullen*, 187 S. W. 1061.

II. JURISDICTION, PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.

§45 (Ark.) Under Kirby's Dig. §§ 2734-2737, ejectment may be brought for the recovery of realty against person in possession, or his lessor, or both, and is maintainable where plaintiff is legally entitled to possession.—*Worley v. McMullen*, 187 S. W. 1061.

§50 (Ark.) Under Kirby's Dig. §§ 2734-2737, the person from whom defendant claims may on motion be made a codefendant.—*Worley v. McMullen*, 187 S. W. 1061.

Refusal of court to permit to be made parties the heirs of a decedent under whom defendants held as tenants was proper; the matter being in the discretion of the court.—*Id.*

ELECTION.

See Pleading, §369; Wills, §783.

ELECTION OF REMEDIES.

§11 (Mo.App.) There must be two remedies available before one can be bound as by an elec-

tion of remedies, and there is a difference between an election of remedies and a mistake of remedies.—*Fitzgerald v. Federal Trust Co.*, 187 S. W. 600.

ELECTIONS.

See Counties, §35; Evidence, §5; Highways, §90; Intoxicating Liquors, §34, 37; Statutes, §101.

I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

§25 (Mo.) Laws 1913, p. 323, is not violative of Const. art. 8, § 2, requiring 60 days residence immediately preceding voting.—*Straughan v. Meyers*, 187 S. W. 1159.

§27 (Mo.) Laws 1913, p. 323, relating to voting by absent voters, does not violate Const. art. 8, § 3, providing for numbering of ballots in the order of reception, etc.—*Straughan v. Meyers*, 187 S. W. 1159.

III. ELECTION DISTRICTS OR PRECINCTS AND OFFICERS.

§51 (Ark.) Under Kirby's Dig. §§ 2764, 2765, 2799, 2800, relative to appointment of judges of election by election commissioners and prescribing their qualifications, removal of old election judges by commissioners, prior to election relative to change in location of a county seat and appointment of new judges favorable to change, was authorized.—*Webb v. Bowden*, 187 S. W. 461.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

§120 (Tex.) Acts 33d Leg. (Sp. Sess.) c. 39, § 34 (Vernon's Sayles' Ann. Civ. St. 1914, art. 3174w) and the General Primary Election Law, are to be construed together as one act.—*Beene v. Waples*, 187 S. W. 191.

§122 (Tex.) In absence of constitutional or statutory restrictions, authorities of political party may reasonably regulate nominations, including assessments against candidates.—*Beene v. Waples*, 187 S. W. 191.

§126(3) (Tex.) Under Acts 33d Leg. (Sp. Sess.) c. 39, § 34 (Vernon's Sayles' Ann. Civ. St. 1914, art. 3174w), election officers at primaries for nomination for United States Senator are to be paid out of funds provided by reasonable assessments against candidates for party nominations as provided by general primary election law.—*Beene v. Waples*, 187 S. W. 191.

VIII. CONDUCT OF ELECTION.

§198 (Mo.) Under Laws 1913, p. 323, the requirements that the voter make and subscribe to the affidavit and that the ballot have the names of all the judges on the back thereof are mandatory.—*Straughan v. Meyers*, 187 S. W. 1159.

X. CONTESTS.

§291 (Ark.) Where it appears that a person registered, or that his vote was accepted by the election officer, there is a presumption, in absence of proof to contrary, that such person was a qualified voter.—*Webb v. Bowden*, 187 S. W. 461.

ELECTRICITY.

§4 (Tex.Civ.App.) Under an ordinance granting to an electric company the right to manufacture and vend electricity, held, under Vernon's Sayles' Ann. Civ. St. 1914, art. 5502, not a condition that the company manufacture its own electricity.—*City of Terrell v. Terrell Electric Light Co.*, 187 S. W. 966.

§14(2) (Mo.App.) Electric company must use due care to prevent injury to children apt to come in contact with its wires in streets and alleys.—*Williams v. Springfield Gas & Electric Co.*, 187 S. W. 556.

⚡16(1) (Mo.App.) Where electric company's uninsulated wires were near a tree near a bungalow being built, it was not liable for injuries to boy, attempting to go from top of roof of house to top of tree and falling on such wires below.—Williams v. Springfield Gas & Electric Co., 187 S. W. 556.

⚡19(12) (Tex.Civ.App.) In action by line-man of telephone company against that company and an electric light company for injury from live wire caused by negligence of both companies, evidence as to his warnings by appearance of wire and shouts of others before picking up the wire held to make question of his contributory negligence for the jury.—Brazos Valley Telegraph & Telephone Co. v. Wilson, 187 S. W. 234.

EMBEZZLEMENT.

See Indictment and Information, ⚡83.

⚡24 (Tex.Cr.App.) Under Pen. Code 1911, art. 74, one not a public officer nor employed in such service may be prosecuted as a principal for misapplication of public money, although he could not commit the crime alone.—Quillin v. State, 187 S. W. 199.

EMINENT DOMAIN.

See Municipal Corporations, ⚡407-578.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

⚡2(8) (Ky.) Ky. St. § 829, is not violative of Const. § 13, providing that no man's property shall be taken for public use without consent of his representatives and just compensation, since commission has no power, by making an award or otherwise, to take property or apply it to public use without the consent of carrier or just compensation.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S. W. 296.

II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

⚡102 (Mo.) Damages incident to the division of a tract into two parts by a right of way, such as crossing from one tract to the other, are a proper element of damages in condemnation of the right of way.—Chicago, R. I. & P. Ry. Co. v. Lydik, 187 S. W. 891.

(C) Measure and Amount.

⚡150 (Mo.) In railroad's condemnation proceedings for right of way, where evidence as to damage extended from less than \$500 to more than \$26,000, verdict for \$9,674.34 was not excessive.—Kansas City, C. C. & St. J. Ry. Co. v. Couch, 187 S. W. 64.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

⚡203(1) (Mo.) In railroad's statutory condemnation suit, assessment and report of commissioners were not proper matter for jury's consideration in assessing damages.—Kansas City, C. C. & St. J. Ry. Co. v. Couch, 187 S. W. 64.

⚡219 (Mo.) After notice to property owners in proceedings to open a parkway that damages would be assessed on a certain day, that the proceedings were in fact on the following day, without further notice, held not to invalidate the proceeding, in view of Rev. St. 1909, § 1934.—Boyer v. City of St. Joseph, 187 S. W. 1185.

⚡222(2) (Mo.) In condemnation cases, it is proper for court to direct jury to facts in evidence, which, if proven, may affect market value of land, and to direct them that such evidence is proper for them to consider in that connection.—Kansas City, C. C. & St. J. Ry. Co. v. Couch, 187 S. W. 64.

⚡222(5) (Mo.) In a railroad's statutory condemnation suit, instruction on damages enumerating matters as distinct items held erroneous.—Kansas City, C. C. & St. J. Ry. Co. v. Couch, 187 S. W. 64.

In railroad's condemnation suit, instruction requiring jury to estimate damage occurring, by reason of change in plan on which commissioners made their report and assessment, between December, 1911, and October, 1912, which could only be done by estimating amount of damage as conditions existed at former period, was erroneous.—Id.

In railroad's statutory suit to condemn right of way, instruction requiring jury to separately estimate, as special injury, difference in conditions between December, 1911, and October, 1912, interval in which plan on which commissioners made their report and assessment was changed, was erroneous.—Id.

⚡246(1) (Mo.) Dismissal of a condemnation suit by a levee district held to leave unaffected defendant's right to contest levee taxes.—North Kansas City Levee Dist. v. Hillside Securities Co., 187 S. W. 852.

⚡262(5) (Mo.) An instruction limiting damages to actual damages and stating that "such inconveniences, if any, as are common to other persons and lands in the same neighborhood are not to be taken into such estimate," was not prejudicial error.—Chicago, R. I. & P. Ry. Co. v. Lydik, 187 S. W. 891.

EMPLOYERS AND EMPLOYÉS.

See Master and Servant.

EMPLOYERS' LIABILITY ACTS.

See Master and Servant, ⚡134; Negligence, ⚡141.

ENCROACHMENT.

See Constitutional Law, ⚡52, 55, 70.

ENTIRE OR SEVERABLE CONTRACTS.

See Insurance, ⚡179½.

ENTIRETY, ESTATE BY.

See Husband and Wife, ⚡14; Partition, ⚡2.

ENTRY.

See Dismissal and Nonsuit, ⚡40; Judgment, ⚡815.

ENTRY, WRIT OF.

See Ejectment.

EQUALIZATION.

See Taxation, ⚡466, 493.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, ⚡209-247.

EQUITABLE DEFENSES.

See Pleading, ⚡96.

EQUITY.

See Appeal and Error, ⚡1009; Cancellation of Instruments; Costs, ⚡13; Estoppel: Fraudulent Conveyances; Guardian and Ward, ⚡165; Injunction; Interpleader: Judgment, ⚡423; Partition; Pleading, ⚡96; Quietening Title; Reformation of Instruments; Set-Off and Counterclaim; Specific Performance; Subrogation; Trusts.

II. LACHES AND STALE DEMANDS.

⚡71(3) (Ark.) Cross-action of landowner against adverse occupant of part of the land

in his suit against her to enjoin erection of fence obstructing public access to his cotton gin is not barred by laches, where such other's occupancy was by the landowner's permission.—*Peoples v. Aydelott*, 187 S. W. 671.

ESCAPE

§1 (Mo.) A prisoner placed in the custody of a street commissioner to work on city streets, and who escapes, is guilty of no offense under Rev. St. 1909, § 4381, which applies only to the escape of persons confined in the county jail or held in custody going to such jail.—*State v. Owens*, 187 S. W. 1189.

ESTATES.

See Descent and Distribution; Dower; Executors and Administrators; Husband and Wife, §14; Landlord and Tenant; Wills.

§5 (Mo.App.) The term "fee simple" is not used to distinguish between legal and equitable estates, but to define the quantity or duration of estates.—*Terminal Ice & Power Co. v. American Fire Ins. Co.*, 187 S. W. 564; *Same v. Home Ins. Co.*, Id. 568; *Same v. Lumbermen's Ins. Co.*, Id.; *Same v. Security Ins. Co.*, Id.; *Same v. Commercial Fire Ins. Co.*, Id. 569; *Same v. Stuyvesant Ins. Co.*, Id.

ESTOPPEL

See Appeal and Error, §882; Brokers, §54; Corporations, §80, 344; Criminal Law, §1137; Insurance, §556, 724; Judges, §19; Judgment, §648-743; Landlord and Tenant, §63.

I. BY RECORD.

§3(2) (Mo.App.) Averments of petition in former suit to recover monthly salary due plaintiff for acting as defendant's representative, in view of a showing that he recovered only part of the salary to be paid thereunder, held not to estop him from recovering the remainder thereof.—*Fitzgerrell v. Federal Trust Co.*, 187 S. W. 600.

II. BY DEED.

§23 (Ark.) Defendants in ejectment cannot be heard to say they had no title to the land in derogation of their deed conveying the same in fee, with general covenants of warranty, to plaintiff's grantor.—*Worley v. McMullen*, 187 S. W. 1061.

III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

§56 (Tex.Civ.App.) Assured's acquiescence in an insurance agent's mistaken statement that contemplated foreclosure proceedings voided the policy does not estop him from denying that the policy was canceled by mutual consent, where there is no proof that his silence misled the insurer.—*Glens Falls Ins. Co. v. Walker*, 187 S. W. 1036.

§58 (Mo.App.) Where defendant's compliance with plaintiff's request not to take steps against plaintiff's clerk, who had stolen coal and sold it through defendant, resulted in no loss to defendant, plaintiff is not estopped to hold defendant for conversion.—*Pittsburg & Midway Coal Co. v. Laning Harris Coal Co.*, 187 S. W. 263.

(B) Grounds of Estoppel.

§96 (Tex.Civ.App.) Where negligence is relied upon as ground of estoppel, it must not only influence the action of some one to his injury, but must reasonably have been expected that it would have such effect, though he exercised ordinary care.—*Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, 187 S. W. 681.

(B) Pleading, Evidence, Trial, and Review.

§110 (Mo.) Estoppel is an affirmative defense.—*Williamson v. Roberts*, 187 S. W. 19.

EVIDENCE.

See Constitutional Law, §175; Criminal Law, §304-520; Depositions; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Criminal Law, §670, 673; Trial, §41-89.

I. JUDICIAL NOTICE.

§5(2) (Ark.) It is matter of common knowledge that at general elections, and especially in presidential years, the interest of electorate is stirred so that they are usually brought out in full strength.—*Webb v. Bowden*, 187 S. W. 461.

§30 (Tex.Civ.App.) The court cannot take judicial notice of a special law not made a public act by its own provisions.—*Altgelt v. Gutzeit*, 187 S. W. 220.

II. PRESUMPTIONS.

§60 (Mo.) In civil case, where commission of crime is in issue, presumption of innocence places burden of proof on party alleging crime was committed, and, in absence of evidence of its commission, warrants direction of verdict against the charge.—*State ex rel. Detroit Fire & Marine Ins. Co. v. Ellison*, 187 S. W. 23.

§65 (Mo.) One is presumed to know the legal effect of terms used by him in describing his land.—*Whiteside v. Oasis Club*, 187 S. W. 27.

§67(1) (Tex.Civ.App.) Ordinarily a custom once shown to exist is, in the absence of testimony showing its abrogation, presumed to continue.—*Chicago, R. I. & G. Ry. Co. v. Pavillard*, 187 S. W. 998.

§76 (Tex.Civ.App.) Failure of plaintiff, suing for personal injury to wife, to testify as to material facts directly under his observation, allows a presumption against him.—*Texas & N. O. R. Co. v. Jones*, 187 S. W. 717.

§82 (Mo.) In suit to quiet title, where defendant's title depended on validity of sale under judgment in suit by attachment against party who was plaintiff's and defendant's common source of title, Supreme Court must presume that trial court in the attachment suit acted legally.—*Donovan v. Gibbs*, 187 S. W. 46.

§82 (Mo.) It will, in a proceeding to prohibit enforcement of an order for production of the ballots in a contest for fraud of a local option election, be assumed that the judge will not disregard the law as to secrecy of the ballot.—*State ex rel. City of Monett v. Thurman*, 187 S. W. 1190.

§83(4) (Mo.) On appeal in suit to quiet title, where plaintiffs claimed under a special commissioner to convey for a county lands described in a compromise agreement, it will be presumed that such commissioner properly executed his authority.—*Heagy v. Miller*, 187 S. W. 889.

No presumption of authority attends the execution of a patent for a county by one describing himself therein as commissioner; there being no commissioner until the county court appoints one.—Id.

§83(5) (Mo.App.) The presumption is that the certificate of a notary met the requirements of the statute.—*Toberman, Mackey & Co. v. Gidley*, 187 S. W. 593.

§86 (Mo.) A rebuttable presumption of law generally may be defined as a conclusion, which, in the absence of evidence upon the exact question, the law draws from other proof made or

from facts judicially noticed or both, not being evidence itself.—State ex rel. Detroit Fire & Marine Ins. Co. v. Ellison, 187 S. W. 23.

Despite a rebuttable presumption of law, the party upon whom it casts the burden of proof in a civil case makes out his case when he adduces evidence proving his allegation of fact to be more probably true than the contrary.—Id.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

⇒106(1) (Mo.App.) In action for damages sustained while a passenger on defendant's car from an unlawful assault by defendant's servants, evidence as to plaintiff's good character was inadmissible, where his character had not been attacked.—Deubler v. United Rys. Co. of St. Louis, 187 S. W. 813.

(B) Res Gestæ.

⇒121(12) (Ark.) In servant's action for injuries while carrying shafting, plaintiff was properly allowed to detail profane exclamations, made by himself and his fellow servant helping him carry the shafting, at the time of the injury, to show carelessness on the fellow servant's part.—Pfeiffer Stone Co. v. Shirley, 187 S. W. 930.

⇒128 (Mo.App.) A patient's statements to his physician concerning his present, as distinguished from past, symptoms are admissible.—Amick v. Kansas City, 187 S. W. 582.

(C) Similar Facts and Transactions.

⇒130 (Ark.) In realty dealer's action for commission, testimony that defendant had listed land for sale with other dealers at a price offered in corroboration of defendant's contention that such was the price at which plaintiff was authorized to offer the land was properly refused.—Hight v. Marshall, 187 S. W. 433.

V. BEST AND SECONDARY EVIDENCE.

⇒183(7) (Tex.Civ.App.) In suit to quiet title, proof of the destruction by fire of justice court records of a precinct in a county laid a proper predicate for the introduction of secondary evidence to prove the existence of such a judgment and execution issued thereon under which the land was sold.—Brady v. Cope, 187 S. W. 878.

⇒183(14) (Mo.App.) Evidence held to properly account for the loss of a letter so that there was no error in the admission of the copy thereof.—Citizens' Bank of Senath v. Douglass, 187 S. W. 158.

VI. DEMONSTRATIVE EVIDENCE.

⇒192 (Mo.) In a personal injury suit autoptic preference of the plaintiff may be considered on the extent of the injuries and may be conclusive.—Craton v. Huntzinger, 187 S. W. 48.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

⇒208(1) (Mo.App.) Admission in answer that defendant notified plaintiff he was excavating next her lot, is admissible for what it is worth, to show that he knew of the excavation which actually extended into her lot, and that at least the part of it on his lot was done by his authority.—Knoche v. Pratt, 187 S. W. 578.

⇒211 (Mo.App.) Taking of defendant's deposition by notary public did not constitute defendant plaintiff's witness, so as to make his statements admissions of plaintiff.—Bush v. Block, 187 S. W. 153.

⇒213(2) (Mo.App.) A letter from defendant insurance company to plaintiff, stating that its agent had been authorized to compromise the claim but had not reported any settlement, held not inadmissible because dealing with compromise negotiations.—Maggard v. Pacific Fire

Ins. Co. of City of New York, 187 S. W. 569; Same v. Stuyvesant Ins. Co., Id. 571.

⇒219(1) (Tex.Civ.App.) In action by buyer to recover excess of price paid for cotton, refusal of defendant to take back cotton sold by him at the same price he received for it, notwithstanding an advance of \$2.50 per bale, was competent as an admission, as bearing upon his claim that the grade and classification at which it was sold were the correct ones.—Townsend v. Pilgrim, 187 S. W. 1021.

(D) By Agents or Other Representatives.

⇒243(4) (Ark.) In action for injuries while carrying shafting, plaintiff's testimony, relating to fellow servant's admission, that such servant threw down his end to save himself, made some days after the injury, was incompetent.—Pfeiffer Stone Co. v. Shirley, 187 S. W. 930.

⇒252 (Mo.App.) In an action on a certificate under which the beneficiary before the death of the insured had only an expectant and not a vested interest, evidence for defendant of declarations respecting his age made by insured against his interest were admissible.—Tuite v. Supreme Forest Woodmen Circle, 187 S. W. 137.

Where a contract is one of ordinary life insurance under which the beneficiary acquires a vested interest from the date of the contract, declarations of the insured impairing the validity of the insurance are inadmissible in the beneficiary's action for the insurance.—Id.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

⇒273(2) (Tex.Civ.App.) Prior to an execution sale, the record owner told the purchaser that the judgment debtor owned the land and the debtor confirmed it. Held, the debtor's statement was admissible on the issue of title, where appellant claimed under a prior unrecorded deed of the record owner.—Alexander v. Conley, 187 S. W. 254.

(C) As to Pedigree, Birth, and Relationship.

⇒285 (Mo.App.) An important exception to the general hearsay rule is that hearsay testimony is competent in case of "pedigree," which term embraces not only descent and relationship, but also the facts of birth, marriage, and death and the time when these events happened, but not necessarily the question of age.—Tuite v. Supreme Forest Woodmen Circle, 187 S. W. 137.

In an action on a fraternal beneficiary certificate, evidence of self-serving declarations made by the insured respecting his age when he enlisted did not put his pedigree in issue, and hence was inadmissible under the hearsay rule.—Id.

IX. HEARSAY.

⇒314(1) (Tex.Civ.App.) In action for injuries to passenger while alighting from defendant's car by means of a box under the step which overturned, testimony of witness who learned of the accident from another, and so fixed its date with reference to time when he saw a box there, held not objectionable as hearsay.—Wichita Falls Traction Co. v. Berry, 187 S. W. 415.

⇒314(1) (Tex.Civ.App.) A watchman's record made by punching a box making marks on a tape, and an operator putting down the time they came in, held hearsay as to the time, without testimony of the operator.—Texas Glass & Paint Co. v. Reese, 187 S. W. 721.

⇒317(1) (Tex.Civ.App.) In a broker's action for commission for effecting a lease, evidence of conversation between broker's employee and lessee, not in presence of lessor, that the lessee had made a bad lease and the lessor a good one

was inadmissible.—*Brady v. Richey & Casey*, 187 S. W. 508.

⚡317(2) (Mo.) In suit to cancel a deed as procured by deceit and conspiracy, testimony of plaintiff that he heard it affirmed by a neighbor that a defendant was a "party to a fraud to beat him out of his land" was incompetent as hearsay.—*Bross v. Rogers*, 187 S. W. 38.

X. DOCUMENTARY EVIDENCE.

⚡368(11) (Mo.) In suit to quiet title between parties claiming under a county, patent offered by plaintiffs was ineffectual to prove a conveyance by the county, in the absence of showing, by proof, admission, or reasonable inference, that the county court appointed the grantor to execute the patent.—*Heagy v. Miller*, 187 S. W. 889.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

⚡420(3) (Mo.App.) Where a life policy making payment of the first premium a condition of its going into effect contained no recital of such payment, that the premium was not paid may be established by parol.—*Lyke v. American Nat. Assur. Co.*, 187 S. W. 265.

⚡423(6) (Ark.) One who appears on the face of a note to be a joint maker may show by parol testimony the real fact that he signed only as surety.—*Tancred v. First Nat. Bank of Ft. Smith*, 187 S. W. 160.

(C) Separate or Subsequent Oral Agreement.

⚡441(9) (Ark.) Where articles were sold and the seller took the buyer's note reserving title until the price was paid on the back of which the articles were itemized, such items became a part of the written contract, and it was not competent to show by parol that it was not the seller's intention to reserve title.—*Fears v. Watson*, 187 S. W. 178.

⚡441(9) (Mo.App.) Where contract for sale of player piano provided for payments in money, parol evidence is inadmissible to show that payments should be made in other ways.—*R. L. Burke Music Co. v. Miller*, 187 S. W. 141.

⚡445(4) (Tex.Civ.App.) Notwithstanding *Vernon's Sayles' Ann. Civ. St. 1914, art. 5096*, a verbal extension of a note by the indorser while it was in his hands may be shown by the indorsee in proving his promptness in bringing suit.—*Barger v. Brubaker*, 187 S. W. 1025.

(D) Construction or Application of Language of Written Instrument.

⚡458 (Ark.) In suit to foreclose a chattel mortgage, while its terms cannot be extended by parol, such evidence is admissible to show circumstances under which it was executed, to construe its language.—*Livingston v. Pugailey*, 187 S. W. 925.

⚡461(1) (Tex.Civ.App.) Parol evidence of surrounding circumstances is admissible in determining whether a written guaranty is continuing or affects merely a single credit.—*Self v. Albany Nat. Bank of Albany*, 187 S. W. 982.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

⚡470 (Tex.Civ.App.) A witness should state facts, as it is for the jury to draw conclusions and deductions.—*Missouri, K. & T. Ry. Co. v. Gilcrease*, 187 S. W. 714.

⚡471(6) (Tex.Civ.App.) In broker's action for commission for effecting a lease, the lessee was required to testify to the facts with regard

to what occurred between himself and the broker's employé, instead of his conclusion.—*Brady v. Richey & Casey*, 187 S. W. 508.

⚡472(10) (Tex.Civ.App.) In a broker's action for commission, testimony of witness that he considered 2 or 3 per cent. to be a reasonable commission for effecting a lease for a term, relating to the direct issue in the case, was inadmissible.—*Brady v. Richey & Casey*, 187 S. W. 508.

⚡473 (Tex.Civ.App.) The conclusion of a common observer, testifying as to the result of observation made at the time in regard to the common appearance of facts and conditions of things which cannot be reproduced by description, is admissible.—*Missouri, K. & T. Ry. Co. v. Gilcrease*, 187 S. W. 714.

⚡474(19) (Ark.) In action upon fire insurance policy, admission of testimony by a witness for defendant that a lounge destroyed was without value was not error, where he had observed the lounge a few days before the fire while considering buying plaintiff's furniture.—*Chunn v. London & Lancashire Fire Ins. Co.*, 187 S. W. 307.

⚡477(2) (Ark.) In servant's action for injuries, court should not have permitted a non-medical witness to express opinion that plaintiff did not have appendicitis when he examined him, though witness stated facts on which he based his opinion.—*Pfeiffer Stone Co. v. Shirley*, 187 S. W. 930.

In a servant's action for injuries, it is proper to permit a nonmedical witness, such as a farmer, to describe the physical condition he observed plaintiff to be in when he examined him.—*Id.*

⚡477(2) (Tex.Civ.App.) After testimony of a witness as to his observation of the effect of labor upon plaintiff in personal injury suit, he could give his opinion whether the plaintiff could perform light or heavy labor continuously.—*Missouri, K. & T. Ry. Co. v. Gilcrease*, 187 S. W. 714.

⚡498 (Tex. Civ. App.) Where defendant's breach of contract delayed plaintiff in opening her millinery business, she may give opinion evidence as to amount for which she could have disposed of her stock had it not been for the delay, and its value after change in style.—*Texas Power & Light Co. v. Roberts*, 187 S. W. 225.

⚡501(1) (Mo.App.) Where the age of the insured was in issue, opinions based entirely on his appearance, and not accompanied by evidentiary description of his appearance from which the opinion was formed, were inadmissible.—*Tuite v. Supreme Forest Woodmen Circle*, 187 S. W. 137.

⚡501(3) (Tex.Civ.App.) A witness may give his opinion as to the mental or physical condition of a party after relating the facts upon which such opinion is based.—*Missouri, K. & T. Ry. Co. v. Gilcrease*, 187 S. W. 714.

Opinion as to mental or physical condition may be given before or after testimony of the witness as to the facts upon which his opinion is based.—*Id.*

(B) Subjects of Expert Testimony.

⚡506 (Mo.App.) Testimony of physician that, in his opinion, when plaintiff received the injury of which she told him there was a fracture of the synovial cartilages in the knee, held inadmissible, where the question of any injury was in issue.—*Jackmann v. St. Louis & H. Ry. Co.*, 187 S. W. 786.

⚡525 (Ark.) The value of a lounge destroyed by fire does not require expert evidence.—*Chunn v. London & Lancashire Fire Ins. Co.*, 187 S. W. 307.

(C) Competency of Experts.

⚡535 (Mo.App.) Testimony that an automobile was going "fast" is inadmissible, where it does not appear that the witness was qualified to testify as to speed.—*Priebe v. Crandall*, 187 S. W. 605.

⚡543(2) (Tex.Civ.App.) A skilled witness who is familiar with services connected with some particular profession, trade, or calling may estimate their value, and it is not required that he should be intimately acquainted with the nature of the services which he is appraising but he may know them in a very general way.—*Brady v. Richey & Casey*, 187 S. W. 508.

(D) Examination of Experts.

⚡547 (Tex.Civ.App.) Testimony of doctors as to what was found by their first examination of plaintiff, as well as what they found in last examination to make comparisons, not based on statements or voluntary acts of plaintiff, was admissible.—*Kansas City, M. & O. Ry. Co. v. Texas v. Durrett*, 187 S. W. 427.

⚡553(3) (Tex.Civ.App.) In broker's action for commission for effecting a lease, it was not error to permit him to embrace, in question as to reasonable value of such services, his construction of terms of lease, upon which defendant might inquire thereon upon his construction.—*Brady v. Richey & Casey*, 187 S. W. 508.

(F) Effect of Opinion Evidence.

⚡570 (Mo.App.) Testimony of surgeon as to personal injury is not conclusive, but advisory only.—*Burns v. Polar Wave Ice & Fuel Co.*, 187 S. W. 145.

⚡571(7) (Mo.App.) Where plaintiffs contracted to plaster a building in a good workmanlike manner and replace any defective work in two years, testimony of a plasterer who examined it after four years is without evidentiary value, as to value of work done.—*Craig v. McNichols Furniture Co.*, 187 S. W. 793.

⚡574 (Mo.App.) Evidence based on estimates and on opinions must yield to physical facts.—*Underwood v. West*, 187 S. W. 84.

XIV. WEIGHT AND SUFFICIENCY.

⚡588 (Tex.Civ.App.) A juror is not required to believe a witness, although he makes a plain statement of what is not impossible and is neither impeached nor contradicted by direct evidence, but may discredit him on account of the manner of testifying and attendant circumstances.—*Wichita Falls Traction Co. v. Berry*, 187 S. W. 415.

⚡589 (Tex.Civ.App.) Although the entire testimony as to the instructions given a chauffeur which were depended upon to show the scope of his employment came from defendant and his wife, yet their uncontradicted testimony cannot be disregarded.—*Hill v. Staats*, 187 S. W. 1039.

⚡596(1) (Ark.) In an action on an alleged oral contract to renew a policy of fire insurance, although burden is on plaintiff to establish parol contract to renew, a preponderance of evidence is sufficient, clear and convincing proof not being necessary.—*Etina Ins. Co. v. Short*, 187 S. W. 657.

⚡596(1) (Mo.App.) In actions for loss by fire from locomotive, plaintiff need prove his case only by fair preponderance of evidence.—*Slack v. St. Louis, I. M. & S. Ry. Co.*, 187 S. W. 275.

EXAMINATION.

See Criminal Law, ⚡225; Evidence, ⚡501, 547, 563; Witnesses, ⚡240, 271.

EXCAVATIONS.

See Adjoining Landowners.

EXCEPTIONS.

See Appeal and Error, ⚡253-268, 502; Criminal Law, ⚡1048-1066; Deeds, ⚡139; Easements, ⚡14; Pleading, ⚡228.

EXCEPTIONS, BILL OF.

See Appeal and Error, ⚡544; Certiorari, ⚡70; Criminal Law, ⚡1090-1095, 1111.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

⚡6 (Mo.) There is no law authorizing a bill of exceptions to be filed in the county court containing the oral and documentary evidence introduced before such court so that it may be made a part of the record thereof.—*State ex rel. Combs v. Staten*, 187 S. W. 42.

⚡22 (Ark.) Where offered evidence is excluded as not proving a proper subject of counterclaim, papers, whose form is immaterial, constituting part of such evidence, need not be copied into the bill of exceptions.—*Neely v. Wilmore*, 187 S. W. 637.

II. SETTLEMENT, SIGNING, AND FILING.

⚡32(3) (Mo.App.) Appellee cannot complain because the bill of exceptions was signed both by the trial judge and a special judge who was acting during the trial court's illness at the time of signature.—*Johnson v. Missouri Pac. Ry. Co.*, 187 S. W. 282.

EXCESSIVE DAMAGES.

See Damages, ⚡132, 134.

EXCHANGES.

⚡9 (Mo.App.) In suit for an accounting by member of exchange for damages in settling "future" grain contract in alleged "corner," pleading and proof held not to warrant recovery.—*Albers v. Moffitt*, 187 S. W. 903.

EXCUSABLE HOMICIDE.

See Homicide, ⚡125.

EXECUTION.

See Attachment; Costs, ⚡279; Exemptions: Homestead.

EXECUTORS AND ADMINISTRATORS.

See Constitutional Law, ⚡306; Descent and Distribution; Dower, ⚡68; Husband and Wife, ⚡276; Judgment, ⚡735; Mandamus, ⚡60; Partition, ⚡13; Trusts: Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

⚡17(3) (Mo.App.) Under Rev. St. 1909, § 15, widow, improvident, wasteful, without appreciation of value of money, of immoral character, etc., held entitled to appointment as administratrix of husband's estate, unless disqualified by section 14.—*State ex rel. Scanland v. Thompson*, 187 S. W. 804.

⚡19 (Mo.App.) Party entitled to administer upon a decedent's estate may renounce the right, the statute so providing, and may do so by an antenuptial contract executed in consideration of marriage.—*State ex rel. Scanland v. Thompson*, 187 S. W. 804.

Antenuptial contract between decedent and widow, which merely awarded her \$5,000 at marriage and \$2,000 per year so long as she continued his wife, and thereafter "barred her from his property," was not a renunciation of her right as widow to administer his estate.—*Id.*

⚡22(2) (Tex.Civ.App.) Under Rev. St. art. 8301, held, that a county judge not only may

but must appoint a temporary administrator, to preserve an estate from waste pending the contest of a will.—Huth v. Huth, 187 S. W. 523.

⚡30 (Tex.Civ.App.) Under Rev. St. arts. 3362, 3291, touching appointment of executors and administrators, though an executor named in a will qualified by taking required oath he abandoned his office where he failed to take possession of any of the property, to give bond, or in any way act as such executor and is contesting the will.—Huth v. Huth, 187 S. W. 523.

⚡31 (Mo.App.) Authority of administrator pendente lite appointed by probate court continued until final result of will contest was duly certified to probate court, and did not die upon termination of the will contest, and transcript of record of will contest in circuit court availed defendants nothing in administrator's actions of unlawful entry and detainer.—Diehr v. Dean, 187 S. W. 602.

III. ASSETS, APPRAISAL, AND INVENTORY.

⚡46 (Tex.Civ.App.) Fund due under policy of insurance to one of joint beneficiaries who survived the insured held not exempt from administration under Acts 33d Leg. c. 113, § 21, at the death of a deceased beneficiary.—Modern Woodmen of America v. Yanowsky, 187 S. W. 728.

⚡53 (Tex.Civ.App.) Where the fund due upon certificate of insurance is exempt property, it is not subject to administration.—Modern Woodmen of America v. Yanowsky, 187 S. W. 728.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

⚡122(2) (Tex.Civ.App.) Under Rev. St. art. 3556, held that a temporary administrator appointed pending contest of a will has the power, when so given by the court in his order of appointment, to take possession of all common property of the estate and held same in trust for benefit of those entitled until such contest is determined.—Huth v. Huth, 187 S. W. 523.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

⚡206(2) (Ark.) An implied contract to pay for services in keeping house, nursing, etc., would permit a recovery for what the services were reasonably worth or their reasonable value.—Miller v. Summers, 187 S. W. 664.

⚡221(5) (Ark.) Evidence held sufficient to show that claimant's services in keeping house and caring for deceased were not intended or expected to be gratuitous, and that there was an implied contract for payment.—Miller v. Summers, 187 S. W. 664.

(B) Presentation and Allowance.

⚡225(1) (Ark.) Under Kirby's Dig. §§ 113, 114, evidence held to sustain finding that claim against estate was not barred by statute of nonclaim.—Little v. Arkansas Trust & Banking Co., 187 S. W. 629.

It is not essential to support finding that claim is not barred to show that it was filed with clerk, it being sufficient if presentation was made to administrator within one year of the date of his letters.—Id.

⚡225(1) (Ark.) All the items of account against an estate accruing more than three years before death of deceased were barred by limitations, and could not be recovered on.—Miller v. Summers, 187 S. W. 664.

⚡225(2) (Ark.) Where will authorized trustees to pass on claims, but administratrix was appointed and notice to creditors published, statute of nonclaim was set in motion and would not be tolled by proceedings before trustees.—Little v. Arkansas Trust & Banking Co., 187 S. W. 629.

tees.—Little v. Arkansas Trust & Banking Co., 187 S. W. 629.

⚡227(1) (Ark.) Under Kirby's Dig. § 113, claim against estate for keeping house, nursing, and caring for deceased during his last illness held sufficiently definite to invoke the jurisdiction of the court; as it indicated the kind of evidence that could be used in the establishment thereof.—Miller v. Summers, 187 S. W. 664.

(C) Disputed Claims.

⚡250 (Tex.Civ.App.) The probate court has exclusive, original jurisdiction in a pending administration of claims and liens against the estate, and the remedy upon the administrator's rejection of a lien is in that court, and the district courts have no jurisdiction over the management of the estate, except on appeal.—Ralston v. Stainbrook, 187 S. W. 413.

⚡251 (Mo.App.) In an application in probate court for the allowance of a running account, formal pleadings are unnecessary to raise the objection that plaintiff is attempting to split his demand having already recovered a portion of the same account.—Peper Automobile Co. v. St. Louis Union Trust Co., 187 S. W. 109.

⚡256(4) (Ark.) Where no motion that claim against estate be made definite and certain as required by Kirby's Dig. § 113, was made in probate court upon hearing thereof, there was no abuse of discretion in denying the motion made upon the calling of the case for trial in circuit court.—Miller v. Summers, 187 S. W. 664.

X. ACTIONS.

⚡426 (Mo.App.) Under Rev. St. 1909, §§ 7687, 7688, administrator pendente lite was invested with authority, when acting under order of the probate court requiring him to take possession of decedent's realty and rent it, to bring actions of unlawful entry and detainer against occupants.—Diehr v. Dean, 187 S. W. 602.

⚡431(2) (Tex.Civ.App.) District courts have no jurisdiction of suits against estates in administration unless the claim has been first presented to and rejected by the administrator, and unless the claimant has some legal or equitable right connected with his claim, and the powers of the probate court are inadequate.—Ralston v. Stainbrook, 187 S. W. 413.

⚡435 (Tex.Civ.App.) Under Rev. St. arts. 3443, 3446, 3452, 3450, 3457, and 3488, administrator's refusal to recognize a lien upon a part of land, if a money claim had been allowed, did not authorize claimant to sue in district court to subject the land to payment of claim.—Ralston v. Stainbrook, 187 S. W. 413.

⚡451(4) (Ark.) Findings that claim was never exhibited to administratrix, nor allowed by her, nor filed in probate court, do not prevent recovery where facts found show presentation of claim.—Little v. Arkansas Trust & Banking Co., 187 S. W. 629.

EXEMPTIONS.

See Executors and Administrators, ⚡53; Homestead; Trusts, ⚡151.

I. NATURE AND EXTENT.

(C) Property and Rights Exempt.

⚡44 (Tenn.) An automobile is not exempt from execution, under Shannon's Code, § 3794, exempting horses, mules, and wagons, etc.—Prater v. Reichman, 187 S. W. 305.

EXHUMATION.

See Insurance, ⚡549.

EXPENDITURES.

See Guardian and Ward, ⚡58.

EXPERT TESTIMONY.

See Evidence, ¶506-574.

EXPERT WITNESSES.

See Criminal Law, ¶456.

EXPLOSIVES.

See Master and Servant, ¶111, 259, 279, 285.
 ¶8 (Tex.Civ.App.) A railroad owes the duty to strangers who might be expected to be near a tank car to exercise ordinary care to see that car was in condition to avoid an explosion.—*Magnolia Petroleum Co. v. Ray*, 187 S. W. 1085.

EXTRA WORK.

See Contracts, ¶232.

FAILURE OF CONSIDERATION.

See Deeds, ¶19.

FALSE IMPRISONMENT.

See Malicious Prosecution.

FALSE PERSONATION.

See Robbery, ¶26.

FEDERAL COURTS.

See Courts, ¶97.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Master and Servant, ¶134, 187, 265, 278, 281, 284, 285, 286, 289, 293, 296; Negligence, ¶101, 141; Trial, ¶253.

FEE BILL.

See Costs, ¶70, 279.

FEES.

See Costs, ¶172; Insurance, ¶602; Interpleader, ¶35.

FEE SIMPLE.

See Estates, ¶5; Wills, ¶600, 608.

FELLOW SERVANTS.

See Master and Servant, ¶201, 259, 279.

FENCES.

See Easements, ¶53.

FERRIES.**I. ESTABLISHMENT AND MAINTENANCE.**

¶10 (Ark.) A franchise for the operation of a ferry is a creature of the sovereign power and cannot be exercised without the consent of the state.—*Shults v. Munn*, 187 S. W. 316.

II. REGULATION AND OPERATION.

¶34 (Ark.) Where a ferry crosses a navigable stream at a point of convenient access by private way to a public road, it is a ferry at which a public road crosses within the meaning of Kirby's Dig. § 3570, and subject to the penalties prescribed by section 3582 for operating an unlicensed ferry contrary to sections 3555, 3558.—*Shults v. Munn*, 187 S. W. 316.

In proceedings to recover penalties for operating an unlicensed ferry contrary to Kirby's Dig. §§ 3555, 3558, 3570, evidence that the ferry is reached by a public road in the county across the river from the county in which the action was brought, is competent.—*Id.*

FIDELITY INSURANCE.

See Insurance, ¶145, 146, 250, 256, 265, 285.

FIDUCIARY RELATIONS.

See Wills, ¶163.

FILING.

See Appeal and Error, ¶627; Criminal Law, ¶1092, 1099.

FINAL JUDGMENTS AND DECREES.

See Appeal and Error, ¶66-82.

FINDINGS.

See Appeal and Error, ¶999-1022; Master and Servant, ¶297.

FIRE INSURANCE.

See Insurance.

FIRES.

See Arson; Railroads, ¶453-485.

FLOWAGE.

See Waters and Water Courses, ¶171, 178.

FOOD.

See Adulteration.

FORCE.

See Robbery, ¶6.

FORCIBLE ENTRY AND DETAINER.

See Executors and Administrators, ¶426; Landlord and Tenant, ¶291.

I. CIVIL LIABILITY.

¶6(2) (Mo.App.) In forcible entry and detainer and unlawful detainer cases the question at issue is not one of title or right of possession, but whether plaintiff was in actual possession and whether he was dispossessed by the defendant.—*Bixeman v. Reichel*, 187 S. W. 269.

¶9(1) (Mo.App.) One cannot maintain an action of forcible entry and detainer who at the time of his dispossession was not in the exclusive possession of the land, though there is an exception to the rule when one tenant in common has been dispossessed by his cotenant.—*Bixeman v. Reichel*, 187 S. W. 269.

¶9(2) (Mo.App.) Purchaser in possession under contract for conveyance or by vendor's oral permission, and merely as a licensee, preparatory to taking possession after sale, was not in such exclusive possession at the time of his dispossession by the vendor as to enable him to resort to an action of forcible entry and detainer.—*Bixeman v. Reichel*, 187 S. W. 269.

¶29(4) (Mo.App.) In actions of unlawful entry and detainer, evidence as to time defendants took possession held sufficient to warrant findings of guilt in each case.—*Diehr v. Dean*, 187 S. W. 602.

FORECLOSURE.

See Chattel Mortgages, ¶277; Mortgages, ¶413-589.

FOREIGN CORPORATIONS.

See Corporations, ¶648, 661; Railroads, ¶33.

FOREIGN JUDGMENTS.

See Judgment, ¶816.

FORFEITURES.

See Insurance, ¶310-362; Landlord and Tenant, ¶103-111.

FORGERY.

See Indictment and Information. **§94.**

§6 (Tex.Cr.App.) Where a person making an instrument in writing acts under an authority which he has good reason to believe, and does believe, to be sufficient, he is not guilty of forgery.—Ferguson v. State, 187 S. W. 476.

§21 (Tex.Cr.App.) As the statute on principals applies to all offenses, so far as forgery is concerned, it is exactly the same as if specifically embraced in and a part of the forgery statute.—Ferguson v. State, 187 S. W. 476.

Where a person commits forgery by an agent, he is guilty as a principal whether or not agent is also guilty.—Id.

§37 (Tex.Cr.App.) Testimony, that person whose name was forged delivered cotton as a credit on a note previously made by him, was admissible.—Ferguson v. State, 187 S. W. 476.

In a prosecution for forgery in inducing the making of a false note payable to bank of which defendant was vice president, testimony of a witness on examination of the books of bank, that they did not show a credit on another note of the person whose name was forged payable to bank was admissible.—Id.

Testimony as to notes made by person whose name was forged and payments thereon was admissible and material.—Id.

§44(2) (Tex.Cr.App.) In a prosecution for forgery in inducing making of a false note, in which defendant attempted to prove an alibi, it appearing that note was signed by a clerk at direction of defendant who was vice president of bank made payee in the forged note, evidence held sufficient to support a verdict of guilty.—Ferguson v. State, 187 S. W. 476.

§48 (Tex.Cr.App.) In a prosecution for forgery in inducing making of a false note and passing it, an instruction as to passing a forged instrument was not error.—Ferguson v. State, 187 S. W. 476.

FRANCHISES.

See Electricity, **§4**; Ferries, **§10**.

FRAUD.

See Brokers, **§38**; Corporations, **§80, 317**; Deeds, **§198, 211**; Frauds, Statute of; Fraudulent Conveyances; Insurance, **§256**; Principal and Agent, **§84**; Trial, **§193, 252, 296**.

**I. DECEPTION CONSTITUTING
FRAUD AND LIABILITY
THEREFOR.**

§25 (Tex.Civ.App.) No action for fraud arises unless damage results.—Hope v. Shirley, 187 S. W. 973.

II. ACTIONS.**(B) Parties and Pleading.**

§41 (Mo.) Petition in an action for damages for fraud, whereby plaintiff was induced to sell shares of corporate stock worth \$136 per share for \$80 per share, held to state a cause of action.—Wagner v. Binder, 187 S. W. 1128.

§47 (Tex.Civ.App.) Petition in action for damages for fraud in purchasing plaintiff's land at less than its listed price, so that plaintiff was compelled to pay a broker's commission, not showing that plaintiff had sustained any damage, held to state no cause of action.—Hope v. Shirley, 187 S. W. 973.

§49 (Mo.) In an action for fraud for inducing plaintiff to sell shares of corporate stock for less than their value, held no variance between the pleadings and proof.—Wagner v. Binder, 187 S. W. 1128.

(C) Evidence.

§52 (Mo.) In an action for fraud for inducing plaintiff to sell corporate shares of stock for

less than their value, evidence designed to throw light upon the value of the corporate property, the value of the shares of stock, and the charges of fraud held properly admitted.—Wagner v. Binder, 187 S. W. 1128.

In action for fraud in inducing plaintiff to sell shares of stock for less than their value, evidence as to the price for which defendant as plaintiff's agent sold such stock is admissible on the issue of fraud.—Id.

§57 (Mo.) In an action for fraud in inducing plaintiff to sell shares of corporate stock for less than their value, evidence as to the price for which a defendant sold plaintiff's stock as her agent held admissible on the measure of damages, where it tended to show a fraudulent scheme to secure the agency, and that he had defrauded her of the difference between the price paid her and the price for which he sold the stock.—Wagner v. Binder, 187 S. W. 1128.

§58(1) (Mo.) Evidence held sufficient to sustain a judgment for plaintiff for damages against defendants for fraudulently inducing plaintiff to sell corporate shares of stock for less than their true value.—Wagner v. Binder, 187 S. W. 1128.

§58(2) (Mo.) In an action for fraud for inducing plaintiff to sell shares of corporate stock for less than their value, evidence held sufficient to warrant a finding that statements made by defendants with reference to the value of plaintiff's stock were statements as to material facts and known to be untrue, and not mere expressions of opinion not constituting actionable fraud.—Wagner v. Binder, 187 S. W. 1128.

(D) Damages.

§59(3) (Tex.Civ.App.) Where vendee is induced by false representations as to the value or quality of lands to enter into a contract to purchase to his loss, the measure of his damages in action therefor is the difference between the sum paid and the value of the land.—Martin v. Goodman, 187 S. W. 689.

§62 (Mo.) In an action for fraud for inducing plaintiff to sell shares of corporate stock for less than their value, a verdict for plaintiff for \$9,352 held not excessive, where the evidence showed that she owned 167 shares of stock worth at least \$136 per share, for which she received \$80 per share.—Wagner v. Binder, 187 S. W. 1128.

(E) Trial, Judgment, and Review.

§64(1) (Mo.) In an action for fraud whereby plaintiff was induced to sell shares of corporate stock for less than their value, held, that the question whether statements made by defendants as to the value of such stock were merely expressions of opinion not constituting actionable fraud, or whether such statements were of material facts known to be untrue, was properly a jury question.—Wagner v. Binder, 187 S. W. 1128.

§65(1) (Mo.) In an action for fraud whereby plaintiff was induced to sell corporate shares of stock for less than their value, an instruction that plaintiff's measure of damages is such sum as would fairly compensate her for the damages directly suffered as a result of the fraud and misrepresentation, and that the jury should consider the difference between the reasonable value of plaintiff's stock and the price which she received, held proper.—Wagner v. Binder, 187 S. W. 1128.

An instruction that the measure of damages for fraudulently inducing the plaintiff to sell shares of stock for less than their value is the difference between the price paid and the value on one date instead of another held not erroneous, where there was no evidence of a change in value between such dates and no contention in the trial court that there was any such change of value.—Id.

In an action for fraud, a requested instruction

that option executed by defendant and relied on by plaintiff did not constitute false or fraudulent representation upon which a recovery could be had *held* properly refused as not warranted by the evidence.—Id.

FRAUDS, STATUTE OF.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT, OR MISCAR-RIAGE OF ANOTHER.

§14 (Tex.Civ.App.) A parol promise by a wife to pay a debt due a physician by her husband for services rendered necessary to her child would not render her separate estate liable.—Davenport v. Rutledge, 187 S. W. 988.

§23(3) (Ark.) Contractor's promise to pay a debt of the subcontractor, supported by a sufficient consideration, *held* an original, and not a collateral, promise.—Brown v. Morrow, 187 S. W. 449.

§24 (Ark.) In determining whether an oral promise is original or collateral, the intention of the parties at the time it was made must be regarded; and the words of the promise, the situation of the parties, and all the conditions attending the transaction should be considered.—Brown v. Morrow, 187 S. W. 449.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§72(1) (Mo.App.) Suit to enforce agreement for common use of railroad switch on land of complainant and respondent is not on a contract for the sale of lands within Rev. St. 1909, § 2783.—P. M. Bruner Granitoid Co. v. Glencoe Lime & Cement Co., 187 S. W. 807.

FRAUDULENT CONVEYANCES.

I. TRANSFERS AND TRANSACTIONS INVALID.

(D) Indebtedness, Insolvency, and Intent of Grantor.

§57(3) (Ark.) Conveyance of property by corporation, under agreements providing that if it sold for more than debt mentioned, surplus should be returned to company's president, without requiring it paid on company's other debts, stipulating it should not be considered a mortgage, *held* calculated to deceive, and fraudulent toward company's creditors.—Morgan Co. v. Buena Vista Veneer Co., 187 S. W. 640.

§57(3) (Mo.) Where a father, within two months after the maturity of his debt to plaintiff, conveyed to his son all of his real estate and personalty, receiving only \$500, which was borrowed on the land conveyed, and, when judgment was entered upon plaintiff's note, execution was issued and returned unsatisfied, the father was rendered insolvent by the conveyance.—Barrett v. Foote, 187 S. W. 67.

§64(2) (Mo.) Where a father's conveyance to his son rendered the father insolvent and was made without provision for payment of the father's existing creditor, the son agreeing to support the father for life, borrow \$500 on the land, and turn it over, such conveyance was invalid as to such creditor, regardless of motives.—Barrett v. Foote, 187 S. W. 67.

(E) Consideration.

§74(3) (Tex.Civ.App.) Under Rev. St. art. 3967, relating to fraudulent conveyances, to sustain a gift of land as against prior creditors it must appear that the grantor was, at the time, possessed of property within the state subject to execution, sufficient to pay his existing debts.—First State Bank & Trust Co. of Abilene v. Walker, 187 S. W. 724.

§95(1) (Ark.) Where a conveyance by a husband to his wife left the former without any property subject to execution and the wife paid only a part of the agreed consideration, the

conveyance was fraudulent as to creditors.—Blakemore v. Edmondson, 187 S. W. 912.

§96(2) (Mo.) Conveyance by father to son, which rendered father insolvent, of land in which the son owned a half interest, son agreeing to support father, result being that he held \$575 of father's property for future support, was invalid as to an existing creditor of the father.—Barrett v. Foote, 187 S. W. 67.

(F) Confidential Relations of Parties.

§107 (Mo.) In dealings between father and son, as between husband and wife, where the rights of creditors are involved, their acts should be closely scrutinized.—Barrett v. Foote, 187 S. W. 67.

(J) Knowledge and Intent of Grantee.

§159(2) (Ark.) Grantee of corporation which transferred to him all of its property was bound to know the transfer rendered the company insolvent.—Morgan Co. v. Buena Vista Veneer Co., 187 S. W. 640.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(A) Persons Entitled to Assert Invalidity.

§206(2) (Tex.Civ.App.) Where a creditor takes a renewal note for his debt, after the debtor makes a voluntary conveyance, the original debt still continues and has precedence over the fraudulent conveyance, if the debtor was insolvent at the time of the gift.—First State Bank & Trust Co. of Abilene v. Walker, 187 S. W. 724.

(G) Evidence.

§271(1) (Tex.Civ.App.) In suit to remove cloud on title, by one claiming under parol gift from a debtor, against lenders of money to him claiming the rights of mortgagees by subrogation, burden was on defendants to show they were prior creditors of the donor.—First State Bank & Trust Co. of Abilene v. Walker, 187 S. W. 724.

§272 (Tex.Civ.App.) In suit to remove cloud on title, by one claiming under parol gift from a debtor, against lenders of money to him claiming the rights of mortgagees by subrogation, burden was on plaintiff to show her donor's solvency at time of gift only if defendants were prior creditors of donor.—First State Bank & Trust Co. of Abilene v. Walker, 187 S. W. 724.

§277(3) (Ark.) Where evidence showed that insolvent husband conveyed land to his wife for \$1,000, only part of which was paid by her, the transaction was presumptively in fraud of creditors, and the burden was on the defendants to show good faith.—Blakemore v. Edmondson, 187 S. W. 912.

Evidence *held* insufficient to rebut the presumption that a transfer whereby an insolvent husband conveyed property to his wife, who paid only part of the agreed consideration, was in fraud of creditors.—Id.

§299(12) (Mo.) Evidence *held* insufficient to warrant a cancellation of deeds from a husband to his wife on the ground that such deeds were fraudulent as to creditors.—Kraemer v. Bennett, 187 S. W. 846.

§299(13) (Mo.) In suit to set aside a conveyance as fraudulent, evidence *held* sufficient to show defendant executed and delivered a deed to the land to his son for the purpose and with the intent of hindering and delaying plaintiff from collecting his debt and of placing all his property beyond reach of plaintiff.—Barrett v. Foote, 187 S. W. 67.

§301(3) (Mo.) In suit to set aside conveyance as fraudulent, evidence *held* sufficient to show that a defendant, who received a conveyance from his father, knew that his father owed plaintiff and was desirous to place his property beyond reach of seizure.—Barrett v. Foote, 187 S. W. 67.

In suit to set aside conveyance as fraudulent.

evidence *held* sufficient to show that the debtor's son as grantee, attempted to aid his father in placing the land beyond plaintiff's creditor's reach, and accepted a deed for that purpose.—*Id.*

FREIGHT.

See Shipping, ¶145.

FRIVOLOUS APPEAL.

See Costs, ¶280.

FUNDS.

See Corporations, ¶312.

FUTURE ADVANCES.

See Chattel Mortgages, ¶110.

GAME.

See States, ¶131.

GARBAGE.

See Nuisance, ¶87, 75.

GARNISHMENT.

See Attachment.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

¶52 (Ark.) Where insurance company sent draft in payment of defendant's loss to its agent for delivery to defendant, such draft remained the property of the insurance company subject to recall until delivery to the insured, and could not be reached by garnishee proceedings in which such agent was made garnishee.—*Ard v. Bowie*, 187 S. W. 1066.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

¶162 (Ark.) In garnishment proceedings to reach a draft payable to defendant for insurance loss, the fact that the insurance policy was in the name of the defendant's wife is *prima facie* evidence that she and not the defendant is entitled to the proceeds of such draft.—*Ard v. Bowie*, 187 S. W. 1066.

GEOGRAPHICAL FACTS.

See Criminal Law, ¶304.

GIFTS.

See Charities.

I. INTER VIVOS.

¶49(6) (Ark.) Evidence *held* to justify a finding that mother gave a bond to plaintiff.—*Haglin v. Haglin*, 187 S. W. 321.

GOOD FAITH.

See Specific Performance, ¶87, 94.

GOVERNOR.

See States, ¶60, 119, 120.

GRAND JURY.

See Indictment and Information; Injunction, ¶105; Mandamus, ¶61.

GRANTS.

See Public Lands.

GUARANTY.

See Carriers, ¶13; Evidence, ¶461; Indemnity.

I. REQUISITES AND VALIDITY.

¶7(1) (Ark.) Where guarantors indorsed a guaranty of the buyer's performance of a contract of sale on the back of such contract, the transaction was not merely an offer of guaranty requiring notice of acceptance, but all that was necessary to make it binding on the guarantor was that the seller should act upon it.—*J. W. York & Sons v. Powell*, 187 S. W. 628.

II. CONSTRUCTION AND OPERATION.

¶30 (Tex.Civ.App.) Where defendant wrote to the president of a corporation guaranteeing a third party's debt he knew was due the corporation, the guaranty was available to the corporation.—*Martin v. Blair & Hughes Co.*, 187 S. W. 505.

¶36(2) (Tex.Civ.App.) Where defendant guaranteed a third party's debt due plaintiff, he was liable only for the then existing debt with legal interest and not for the interest and attorney's fees stipulated in notes subsequently made by the debtor to plaintiff for the debt in question.—*Martin v. Blair & Hughes Co.*, 187 S. W. 505.

¶36(3) (Tex.Civ.App.) Where one S. checked on defendant banker in favor of W., who indorsed the check to plaintiff, *held* that defendant was liable for the amount under a letter to plaintiff, promising to take care of W.'s drafts on S. up to \$1,800.—*Self v. Albany Nat. Bank of Albany*, 187 S. W. 982.

¶38(1) (Tex.Civ.App.) A banker's letter that he would take care of W.'s drafts on S. up to \$1,800, *held* to be a continuing guaranty, where he had financed S.'s business for several years.—*Self v. Albany Nat. Bank of Albany*, 187 S. W. 982.

IV. REMEDIES OF CREDITORS.

¶91 (Ark.) Evidence *held* sufficient to show a breach of contract of sale by the buyer, performance of which had been guaranteed by the defendants.—*J. W. York & Sons v. Powell*, 187 S. W. 628.

GUARDIAN AND WARD.

See Limitation of Actions, ¶102; Trusts, ¶102.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

¶54 (Tex.Civ.App.) Under the statute, where the guardian of a minor's estate by the exercise of due diligence could have loaned funds and failed to do so, he is chargeable with interest thereon at the highest legal rate.—*Yates v. Watson*, 187 S. W. 548.

¶58 (Tex.Civ.App.) Under Rev. St. 1911, art. 4131, requiring authorization for payments out of the principal of a ward's estate, a guardian cannot recover expenses paid by him prior to his appointment and never filed and approved by the court, although allowed and approved on his final account.—*Yates v. Watson*, 187 S. W. 548.

The estate of a minor ward is not chargeable with burial expenses of the father of such ward.—*Id.*

Where the guardian upon appointment paid a reasonable attorney's fee due for collection of personal injury compensation constituting the estate, which amount was never inventoried as part of the estate, he was not liable therefor, although such payment was never approved by the court.—*Id.*

Traveling expenses of the guardian not verified, filed, and approved by the county court, are not chargeable against the minor's estate.—*Id.*

Court fees and costs in other courts retained

out of money belonging to ward's estate are properly chargeable by the guardian against the estate of the ward, though not filed nor approved.—Id.

VI. ACCOUNTING AND SETTLEMENT.

—165 (Tex.Civ.App.) Under Rev. St. 1911, art. 4300, a bill of review is proper to correct errors in orders of county court approving guardian's final report and account on his application for discharge and may be entertained at any time after final order of discharge until barred by statute.—Yates v. Watson, 187 S. W. 348.

HABEAS CORPUS.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

—44 (Tex.Cr.App.) Under Const. art. 5, § 5, stating the powers of the Court of Criminal Appeals, that court may issue writs of prohibition to enforce its jurisdiction and prevent restraint of prosecutions by the civil courts.—State v. Clark, 187 S. W. 760; Same v. Nabers, Id. 783, 784.

—46 (Tex.Civ.App.) The district court has jurisdiction to issue habeas corpus upon application of a complaining parent and to determine the right to custody of child.—Ex parte Garcia, 187 S. W. 410.

—83 (Tex.Civ.App.) In habeas corpus for the custody of a child, *held*, that a plea setting up want of jurisdiction because of pending divorce suit was no plea in abatement, and the only question was whether the court had jurisdiction over the subject-matter, and the pendency of other suit involving the same question could not be considered.—Ex parte Garcia, 187 S. W. 410.

—85(1) (Tex.Cr.App.) The burden of proof, in habeas corpus, for a reduction of bail and a discharge from custody, is upon the state, which must show probable cause for holding the arrested party.—Ex parte Villareal, 187 S. W. 214.

—109 (Tex.Cr.App.) Where there is probable cause for believing an offense has been committed, the district court on habeas corpus may hold the party for an investigation by the grand jury.—Ex parte Villareal, 187 S. W. 214.

HARMLESS ERROR.

See Appeal and Error, —1033-1073; Criminal Law, —1166½-1172; Homicide, —340.

HEALTH.

See Adulteration.

HEARSAY EVIDENCE.

See Criminal Law, —419, 420; Evidence, —314, 317.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

See Municipal Corporations, —680-822; Railroads, —95; Statutes, —97.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(B) Establishment by Statute or Statutory Proceedings.

—58(3) (Mo.) The order of the county court establishing a new road and assessing damages is appealable to the circuit court under Rev. St. 1909, § 10440.—Summers v. Cordell, 187 S. W. 5.

—60 (Mo.) Relator, who failed to disclose, on face of petition for certiorari to review action

of county court in establishing a public road, that he had any interest in subject-matter, was not entitled to writ, so that circuit court's action in dismissing it was proper.—State ex rel. Combs v. Staten, 187 S. W. 42.

If proceedings for certiorari show want of jurisdiction on the part of the county court in establishing a public road, all proceedings before such court are nullified.—Id.

—63 (Mo.) Judgment of county court establishing a new county road *held* to be good against collateral attack where the record affirmatively showed compliance with R. S. 1909, §§ 10435, 10436, 10438, regulating the establishment of such roads.—Summers v. Cordell, 187 S. W. 5.

—64 (Mo.) Where the county court acquires jurisdiction over the proceedings for the establishment of a road and over the proper parties by duly posted notices, the action of the court in ordering a survey, appointing commissioners, etc., cannot be collaterally attacked in a suit to enjoin the opening of such road.—Summers v. Cordell, 187 S. W. 5.

The order of the county court establishing a new road and assessing damages is appealable to the circuit court under R. S. 1909, § 10440, and, where no objections or exceptions were made, nor any appeal taken, errors not jurisdictional cannot be raised on collateral attack in proceedings to enjoin the opening of the road.—Id.

The competency of commissioners appointed by the county court under R. S. 1909, § 10438, to assess damages in establishing a new road and the insufficiency of the damages are questions that cannot be reviewed in collateral attack on an order establishing the road.—Id.

The plaintiff in proceedings to enjoin opening of road cannot complain that he was misled by letter of presiding judge of county court, where commissioners were appointed to assess damages more than a year thereafter without any remonstrance or objection by him.—Id.

II. HIGHWAY DISTRICTS AND OFFICERS.

—90 (Ark.) The formation of a road district under Acts 1915, p. 1400, is a special statutory proceeding.—Griffin v. Boswell, 187 S. W. 165.

When forming a road district under Acts 1915, p. 1400, a compliance with subdivision "b" of section 1 thereof, requiring the filing of a preliminary survey, etc., with the county court, is a jurisdictional requisite.—Id.

A county court's establishment of a road district under Acts 1915, p. 1400, is void for lack of jurisdiction where its record does not show a compliance with subdivision "b" of section 1 thereof, requiring filing of a preliminary survey, etc., with the county court.—Id.

—90 (Tex.Civ.App.) The determination of the area of a proposed road district, the sufficiency of the petition, and other prerequisites to its establishment are within the discretion of the commissioners' court, and the motives of the petitioners cannot be considered in determining the validity of establishment.—League v. Brazoria County Road Dist. No. 13, 187 S. W. 1012.

In an action to enjoin the issue of bonds of a road district, a petition, attacking the qualifications of the signers of the petition for the district, merely alleging that some petitioners had paid no poll tax and that others had not returned their property for taxation, *held* not sufficient.—Id.

Injunction will not lie to restrain the holding of an election for the issuance of bonds of a road district, on the ground that the law authorizing such election is unconstitutional, as in that case the bonds will be void.—Id.

The holding of an election to authorize the issue of road bonds is a political proceeding, and not subject to interference by way of injunction by the courts.—Id.

V. REGULATION AND USE FOR TRAVEL.

(A) Obstructions and Encroachments.

⚡155 (Ark.) Owner of ginhouse in possession of land occupied by it through permission of owners, a railroad and an individual, could enjoin the individual from building a fence across a road which was the only access the public had to the gin.—*Peebles v. Aydelott*, 187 S. W. 671.

⚡155 (Tex.Civ.App.) Plaintiff, without showing any injury to him different from that of the public, may have defendant enjoined from obstructing a road, where in a prior suit by him against it he was adjudged an easement in it.—*Santa Fé Town-Site Co. v. Norvell*, 187 S. W. 978.

⚡156 (Tex.Civ.App.) That plaintiff in a suit against T. had judgment requiring T. to lay out a road, and giving plaintiff an easement therein, gives plaintiff no right to have S. enjoined from obstructing the road where it passes through his property; it not being shown that title thereto was acquired against him.—*Santa Fé Town-Site Co. v. Norvell*, 187 S. W. 978.

(B) Use of Highway and Law of the Road.

⚡172(1) (Mo.) Laws 1911, p. 330, § 12, subd. 9, requires automobile drivers to exercise the highest degree of care while operating upon public highways.—*Meenach v. Crawford*, 187 S. W. 879.

⚡183 (Mo.App.) Defendant's failure to sound his automobile horn did not proximately cause the collision, where plaintiff knew of his approach when 600 feet distant and turned out of the road in ample time.—*Priebe v. Crandall*, 187 S. W. 605.

⚡184(3) (Mo.App.) Evidence held sufficient to take to the jury the question of defendant's negligence in not decreasing the speed of his automobile while passing plaintiff's pony, in view of Laws 1911, p. 830, § 9, imposing a high degree of care upon motorcar drivers.—*Priebe v. Crandall*, 187 S. W. 605.

⚡184(4) (Mo.App.) An instruction regarding defendant's duty to slow up when he saw plaintiff's pony in the way of his automobile held error, where plaintiff claimed the pony was at the side of the road and backed into the automobile while it was passing.—*Priebe v. Crandall*, 187 S. W. 605.

HOLIDAYS.

See Sunday.

HOMESTEAD.

See Exemptions.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

⚡163 (Tex.Civ.App.) Removal coupled with intent never to return constitutes abandonment of homestead.—*Derry v. Harty*, 187 S. W. 343.

⚡164 (Tex.Civ.App.) A homestead may be abandoned notwithstanding another has not been acquired.—*Derry v. Harty*, 187 S. W. 343.

⚡181(3) (Tex.Civ.App.) In action by widow to recover title and possession of a lot as a homestead, evidence of removal and declarations held to support finding of abandonment.—*Derry v. Harty*, 187 S. W. 343.

⚡181½ (Tex.Civ.App.) In action raising issue of homestead abandonment, the intent to abandon is a question of fact for the jury or court trying the case.—*Derry v. Harty*, 187 S. W. 343.

V. PROTECTION AND ENFORCEMENT OF RIGHTS.

⚡213 (Tex.Civ.App.) Allegations of answer in action to restrain sale under deed of trust, to foreclose deed of trust and vendor's liens, held

insufficient, as against a general demurrer, to set up acquisition of homestead in 200 acres of part remaining after sale of 199 acres from 413-acre tract.—*Crawford v. Spruill*, 187 S. W. 861.

HOMICIDE.

See Criminal Law, ⚡364, 366, 404, 417, 422, 982.

III. MANSLAUGHTER.

⚡74 (Tex.Cr.App.) For one to be guilty of negligent homicide, there must be apparent danger of killing, but no apparent intent to kill.—*McPeak v. State*, 187 S. W. 754.

IV. ASSAULT WITH INTENT TO KILL.

⚡100 (Ark.) In a prosecution for assault with intent to kill, where defendant was present while his sons committed the assault, approved and encouraged it, and had a short time previous stated that he was going to beat h— out of the party assaulted, and before the assault had suggested that he had a pistol, defendant is guilty as principal.—*Woolbright v. State*, 187 S. W. 166.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

⚡125 (Tex. Cr. App.) If homicide occurs through mistake as to pistol being on safety guard so that it cannot be fired, or through mistake as to its being loaded, it is accidental, not negligent, homicide.—*McPeak v. State*, 187 S. W. 754.

VII. EVIDENCE.

(B) Admissibility in General.

⚡165 (Tex.Cr.App.) In prosecution for wife murder, defendant's statement, made on her request to sign a waiver so that she might secure a divorce, that he would not sign any divorce and that she should be careful because she would know what she was going to get, was admissible as bearing upon the relation of the parties.—*Resendez v. State*, 187 S. W. 483.

In a prosecution for the murder of his wife, evidence that defendant, about two weeks before, had gone to his own house with a policeman and had taken his clothes away with him was admissible, as bearing upon the relation of the parties.—*Id.*

⚡166(2) (Tex.Cr.App.) Testimony of a previous quarrel between deceased and defendant was admissible as tending to show motive for the crime.—*Thompson v. State*, 187 S. W. 204.

⚡166(3) (Tex.Cr.App.) In prosecution for wife murder, defendant's statement, made on her request to sign a waiver so that she might secure a divorce, that he would not sign any divorce and that she should be careful because she would know what she was going to get, was admissible as bearing upon the defendant's motive.—*Resendez v. State*, 187 S. W. 483.

⚡167(1) (Tex.Cr.App.) In prosecution for assault with intent to murder, prosecutrix having been shot through a window while in bed, where witness testified that accused was talking with her about assaulted person, his statement, "I spends my money on the —, and if she don't treat me right I will kill her," was sufficiently identified as referring to the assaulted party and was admissible.—*Sparks v. State*, 187 S. W. 331.

⚡169(1) (Tex.Cr.App.) In trial for murder of a drug store clerk, evidence, that accused before the shooting on same day had gotten a bottle of bitters for a friend from deceased, was irrelevant.—*McPeak v. State*, 187 S. W. 754.

⚡171(1) (Tex.Cr.App.) In murder trial, where killing occurred in dispute between deceased and accused's wife, her acts and conduct in transaction were admissible.—*Neyland v. State*, 187 S. W. 196.

⚡174(6) (Mo.) Where soon after the crime body of deceased and surrounding premises

were searched and no weapons found, but later a pair of "knucks" were found near body, evidence that defendant, instead of deceased, had access to the "knucks," was admissible.—*State v. Isaacs*, 187 S. W. 21.

⇒178(1) (Mo.) In a trial for committing murder after holding up a hotel, testimony that another hotel had been held up previously by some one who was presumably also responsible for the holdup and murder in issue is incompetent as attempting to fasten the crime on one not on trial.—*State v. Kapp*, 187 S. W. 1178.

⇒181 (Tex.Cr.App.) Where accused's evidence merely tended to show that he shot deceased in the heat of passion, induced by deceased's gossip regarding accused's cousin, it was permissible to show accused's own alleged illicit relations with his cousin as tending to disprove his claim of passion, by either circumstantial or positive evidence.—*Short v. State*, 187 S. W. 955.

⇒187 (Tex.Cr.App.) Under a self-defense plea, evidence that when deceased, stabbed by his wife's father, staggered from his store, his wife put up a sign "Closed To-day," is admissible to determine whether a revolver found hidden there was one used by deceased, or whether it had been there always and the store was closed to prepare self-defense evidence.—*Baker v. State*, 187 S. W. 949.

⇒188(2) (Tex.Cr.App.) In murder trial, it is not error to exclude evidence by accused of details of specific acts of violence previously committed by deceased on others than accused, where there is no evidence that defendant knew of these matters prior to homicide.—*Neyland v. State*, 187 S. W. 196.

(C) Dying Declarations.

⇒202 (Tex.Cr.App.) Where doctor who attended deceased within 15 minutes after blows were inflicted believed her about to die and told her so, and believed her to be thoroughly conscious, his testimony as to her replies by nods to his questions as to who hit her held admissible as dying declarations.—*Thompson v. State*, 187 S. W. 204.

⇒203(3) (Tex.Cr.App.) Deceased's declaration that accused stabbed him, that he was turning blind, and would fall, is admissible as a dying declaration, where he did fall and die within a few minutes.—*Baker v. State*, 187 S. W. 949.

⇒204 (Tex.Cr.App.) If dying declarations are made under a consciousness of impending death, without hope of recovery, length of time thereafter before death is immaterial.—*McKinney v. State*, 187 S. W. 960.

⇒207 (Tex.Cr.App.) Testimony of a witness who arrived before doctor, as to statements of deceased in response to doctor's questions as to who struck her, although in answer to a question, held admissible as dying declarations.—*Thompson v. State*, 187 S. W. 204.

⇒216 (Tex.Cr.App.) Statements made to undertaker some time after the crime was committed, while he was preparing to shave head of deceased, tending to show that deceased was conscious, held admissible as dying declarations.—*Thompson v. State*, 187 S. W. 204.

⇒216 (Tex.Cr.App.) Requisites prescribed by Code Cr. Proc. 1911, art. 808, for admission of dying declaration, need not be established by direct and positive statement of deceased at the time.—*McKinney v. State*, 187 S. W. 960.

⇒219 (Tex.Cr.App.) Conflict in testimony as to whether deceased was conscious when making alleged dying declarations would not render the statements inadmissible, but would go to the weight of the evidence.—*Thompson v. State*, 187 S. W. 204.

(E) Weight and Sufficiency.

⇒230 (Tex.Cr.App.) In a prosecution for assault with intent to murder, prosecutrix having been shot through a window while in bed, it was not necessary to a conviction that defend-

ant could see the prosecutrix on the bed.—*Sparks v. State*, 187 S. W. 331.

⇒234(6) (Tex.Cr.App.) Where a number of witnesses testified as to statements made by deceased immediately after the crime accusing defendant, evidence held sufficient to sustain a verdict of guilty.—*Thompson v. State*, 187 S. W. 204.

⇒234(8) (Tex.Cr.App.) In a prosecution for assault with intent to murder, prosecutrix having been shot through a window while in bed at night, and having testified that accused had been sleeping with her, knew location of the bed, and that she recognized his voice, it was not necessary to a conviction that prosecutrix could and did see and recognize appellant.—*Sparks v. State*, 187 S. W. 331.

⇒250 (Mo.) Evidence held to sustain a conviction of murder.—*State v. Kapp*, 187 S. W. 1178.

⇒250 (Tex.Cr.App.) Evidence held to sustain a conviction for murder.—*Wilson v. State*, 187 S. W. 207.

⇒250 (Tex.Cr.App.) Evidence in a prosecution for wife murder held sufficient to sustain a conviction.—*Resendez v. State*, 187 S. W. 483.

⇒255(2) (Ark.) Evidence held sufficient to sustain a conviction of voluntary manslaughter.—*Groce v. State*, 187 S. W. 936.

⇒257(1) (Ark.) In a prosecution for assault with intent to kill, committed by defendant's sons in his presence and with his approval and encouragement, evidence held sufficient to show concert of action between the parties.—*Woolbright v. State*, 187 S. W. 166.

In a prosecution for assault with intent to kill, committed by defendant's sons in his presence, evidence held sufficient to sustain a verdict of guilty.—*Id.*

VIII. TRIAL.

(C) Instructions.

⇒300(2) (Tex.Cr.App.) An instruction that accused was justified in killing deceased if he asked for a knife and said he would kill accused, or made either statement, is not error, since the coupling of the statements is cured by the alternative clause.—*Wilson v. State*, 187 S. W. 207.

⇒300(7) (Tex.Cr.App.) In murder trial, it is not error to submit affirmatively the state's theory of claim of self-defense, where defendant's theory of self-defense is also fully charged.—*Neyland v. State*, 187 S. W. 196.

⇒300(7) (Tex.Cr.App.) Where accused's evidence merely tended to show that he shot deceased in the heat of passion, induced by deceased's gossip regarding accused's cousin, requested charge on self-defense was properly refused.—*Short v. State*, 187 S. W. 955.

If the evidence raises the issue of self-defense, such issue should be fairly and affirmatively presented to the jury; but, if there is no evidence thereon, it is properly withheld.—*Id.*

⇒304 (Tex.Cr.App.) It is error to instruct that accused, if homicide was accidental, and if it was not negligent or careless, is not guilty.—*McPeak v. State*, 187 S. W. 754.

Where there was no direct evidence that accused intentionally shot his pistol, an instruction, allowing accused to be found guilty of negligent homicide if he so negligently and carelessly handled his pistol that it might be discharged and thereby killed deceased, was error.—*Id.*

⇒310(1) (Ark.) In a prosecution for assault with intent to kill, committed by defendant's sons in his presence, court's refusal to give defendant's requested instruction, directing jury that they must find beyond a reasonable doubt that defendant had in mind a specific intent to kill the assaulted party before they could find him guilty, was not error.—*Woolbright v. State*, 187 S. W. 166.

In a prosecution for assault with intent to kill, committed by defendant's sons in his pres-

ence, court's refusal to give defendant's requested instruction that the fact that the son fled after crime should not be considered as proof against defendant *held* not error.—*Id.*

X. APPEAL AND ERROR.

⚡340(4) (Tex.Cr.App.) On appeal from conviction of manslaughter where accused received lowest penalty, error in charging on murder was harmless.—*Neyland v. State*, 187 S. W. 196.

On appeal from conviction of manslaughter, where accused received lowest penalty, and no error in charging on manslaughter is pointed out which could have tended to bring about conviction, other errors in charge will not be considered.—*Id.*

HORSES.

See Railroads, ⚡447.

HOTCHPOT.

See Descent and Distribution, ⚡109.

HUMANE OFFICERS.

See Sheriffs and Constables, ⚡18.

HUMANITARIAN DOCTRINE.

See Negligence, ⚡83; Railroads, ⚡338, 890.

HUSBAND AND WIFE.

See Descent and Distribution, ⚡119, 146; Divorce; Dower; Frauds, Statute of, ⚡14; Fraudulent Conveyances, ⚡95, 107; Marriage; Witnesses, ⚡52, 53, 370.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

⚡14(7) (Ark.) Kirby's Dig. § 739, providing that every interest in realty, granted or devised to two or more persons, shall be in tenancy in common unless expressly declared to be a joint tenancy, has no application to a grant or devise to husband and wife, who hold by the entirety.—*Davies v. Johnson*, 187 S. W. 323.

⚡19(15) (Tex.Civ.App.) A wife is not personally liable for a debt due a physician for necessary services rendered to her child, unless the debt was contracted by her personally.—*Davenport v. Rutledge*, 187 S. W. 988.

⚡23¾ (Tex.Civ.App.) If a wife calls in a physician to treat her child, it is presumed she does so as agent of her husband.—*Davenport v. Rutledge*, 187 S. W. 988.

In a physician's action against wife for services rendered her infant child, parol testimony of a promise to pay, if admissible, was only so to show a contract for such services in first instance.—*Id.*

IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

(B) Property and Conveyances.

⚡69½ (Ark.) Where period of coverture of married woman owning land extended back beyond beginning of another's adverse occupancy, her suit against such other was not barred by limitations.—*Peeples v. Aydelott*, 187 S. W. 671.

VI. ACTIONS.

⚡205(2) (Mo.App.) The Married Woman's Act has not changed the rule that neither husband nor wife are liable to each other in a civil action for a personal tort.—*Butterfield v. Butterfield*, 187 S. W. 295.

⚡235(2) (Tex.Civ.App.) Evidence *held* sufficient to go to the jury on the question of a husband being his wife's agent to rent her separate property.—*Jackson v. Walls*, 187 S. W. 678.

VII. COMMUNITY PROPERTY.

⚡248 (Tex.Civ.App.) Where, when a man married, he had, as at all times thereafter, a living and undivorced wife, property purchased by him and the second putative wife with joint earnings, deeds naming both as grantees, was not community property, but joint or partnership property of the two.—*Little v. Nicholson*, 187 S. W. 506.

⚡276(1) (Tex.Civ.App.) Appointment of a temporary administrator to take charge of all of community property belonging to plaintiff and estate of his deceased wife made under Rev. St. art. 3559, providing that an executor or administrator shall acquire possession of all common property of a community estate, *held* not unconstitutional.—*Huth v. Huth*, 187 S. W. 523.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

⚡278(1) (Ark.) Agreements made between husband and wife, looking to the adjustment of their property rights, standing alone, are not invalid.—*Flood v. Roleson*, 187 S. W. 1059.

IX. ABANDONMENT.

⚡302 (Tex.Cr.App.) Where defendant left his wife and children with some supplies because he did not like his wife's people, he was guilty of willfully deserting them in destitute circumstances, though his mother would have supplied the wife with necessities.—*Pippins v. State*, 187 S. W. 213.

X. ENTICING AND ALIENATING.

⚡324 (Mo.App.) To recover for the alienation of his wife's affections, it is not necessary for plaintiff to show that defendant's acts were the sole cause.—*Linden v. McClintock*, 187 S. W. 82.

The husband has a right of action for partial alienation of his wife's affections.—*Id.*

A stranger has no right to interfere to prevent a reconciliation between spouses or prevent the husband from regaining his wife's affections.—*Id.*

It is not necessary, to recover for alienation of a wife's affections, that her debauchment be shown.—*Id.*

⚡333(1) (Mo.App.) Where a stranger is the cause of estrangement between spouses, he has the burden, in an action for alienation of affections, to prove that his motives were proper, and that what he did was without intent to cause a separation.—*Linden v. McClintock*, 187 S. W. 82.

⚡333(9) (Mo.App.) Alienation of a wife's affections may be shown by circumstantial evidence.—*Linden v. McClintock*, 187 S. W. 82.

⚡335 (Mo.App.) In a suit for the alienation of a wife's affections, evidence *held* sufficient to go to the jury.—*Linden v. McClintock*, 187 S. W. 82.

Where a stranger, by his wrongful acts, estranges husband and wife, proof of such fact is sufficient to carry the case to the jury.—*Id.*

HYPOTHETICAL QUESTIONS.

See Evidence, ⚡553.

IMPAIRING OBLIGATION OF CONTRACT.

See Constitutional Law, ⚡165, 175.

IMPEACHMENT.

See Homicide, ⚡219; New Trial, ⚡143; Witnesses, ⚡318-410.

IMPLIED CONTRACTS.

See Executors and Administrators, ⚡206.

IMPRISONMENT.

See Escape; Habeas Corpus.

IMPROVEMENTS.

See Constitutional Law, ¶233, 290; Mechanics' Liens; Mortgages, ¶182, 203; Municipal Corporations, ¶407-578.

IMPUTED NEGLIGENCE.

See Negligence, ¶93.

INADEQUATE DAMAGES.

See Damages, ¶132.

INDEMNITY.

See Guaranty; Sheriffs and Constables, ¶90.
 ¶8 (Mo.) Under a contract with a street railway for constructing a coal chute upon its property, providing that the contractor shall assume all risk of accident to workmen or persons engaged in or about the building, the contractor was liable to the railway company for amount paid by it for injuries to workman of employé of subcontractor, although caused by railway company's negligence.—*St. Louis & S. Ry. Co. v. Stewart*, 187 S. W. 836.

INDEMNITY INSURANCE.

See Insurance, ¶435.

INDEPENDENT CONTRACTORS.

See Master and Servant, ¶5.

INDICTMENT AND INFORMATION.

See Burglary, ¶22; Intoxicating Liquors, ¶219; Larceny, ¶30, 40; Physicians and Surgeons; Poisons, ¶9; Receiving Stolen Goods, ¶7.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

¶83 (Tex.Cr.App.) An indictment of one not a public officer nor employed in such service, for misapplication of public moneys as a principal under Pen. Code 1911, art. 74, and articles 96, 97, need not allege the facts relied on to show accused to be a principal.—*Quillin v. State*, 187 S. W. 199.

¶94 (Tex.Cr.App.) An indictment in words of Pen. Code 1911, arts. 924, 932, defining forgery, without alleging that the defendant caused to be written the false note, was sufficient to support conviction for forgery in inducing making of a false note.—*Ferguson v. State*, 187 S. W. 476.

¶110(2) (Tex.Cr.App.) Under Acts 29th Leg. c. 108, as amended by Acts 30th Leg. c. 131, relating to pure feedstuff, and providing a penalty for its violation, an information naming cotton seed cake described therein as "concentrated feeding stuff," omitting the word "commercial," held sufficient.—*Guild v. State*, 187 S. W. 215.

¶110(3) (Ark.) Upon a charge of a statutory misdemeanor, an information in the general language of the statute, which apprises accused of the nature of the accusation made against him, is sufficient.—*Duncan v. State*, 187 S. W. 906.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

¶124(4) (Mo.App.) Under Rev. St. 1909, §§ 8313, 8315, joint indictment of two for practicing medicine without a license, and joint conviction thereof, held not warranted.—*State v. Hendricks*, 187 S. W. 272.

IX. ISSUES, PROOF, AND VARIANCE.

¶174 (Tex.Cr.App.) A principal offender may be charged directly in the indictment with the commission of the offense, though it may not have actually been committed by him, and it is never necessary to the validity of an indictment, or the introduction of evidence establishing that the accused is a principal, that the indictment shall allege the acts which make him a principal.—*Arensman v. State*, 187 S. W. 471.

INDORSEMENT.

See Bills and Notes, ¶242-362.

INFANTS.

See Divorce, ¶300-312; Electricity, ¶14; Guardian and Ward; Master and Servant, ¶95; Negligence, ¶85; Parent and Child; Taxation, ¶805.

VII. ACTIONS.

¶112 (Ark.) An infant cannot collaterally attack a judgment, under Acts 1895, p. 88, amending Acts 1893, p. 24, condemning land for levee taxes on the ground that she was not served as required by Kirby's Dig. § 6049; the prescribed warning order having been published.—*Nelms v. Orne*, 187 S. W. 322.

INFORMATION.

See Indictment and Information; Railroads, ¶254.

INHERITANCE.

See Descent and Distribution.

INJUNCTION.

See Appeal and Error, ¶458, 837, 874; Counties, ¶196; Courts, ¶480; Highways, ¶64, 90, 155; Intoxicating Liquors, ¶260, 279; Mortgages, ¶413; Municipal Corporations, ¶183, 979; Nuisance, ¶19, 75; Prohibition, ¶5; States, ¶168½.

I. NATURE AND GROUNDS IN GENERAL.**(A) Nature and Form of Remedy.**

¶1 (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 4643, authorizing a writ of injunction where it appears that applicant is entitled to relief which requires the restraint of some prejudicial act, the right to injunction is not confined to rules of equity jurisprudence.—*Birchfield v. Bourland*, 187 S. W. 422.

¶8 (Tex.Civ.App.) Where an injunction has been dissolved, complainant by amendment or by supplemental bill may procure a second injunction, but not upon grounds set up in the first bill or which should have been set up therein.—*Birchfield v. Bourland*, 187 S. W. 422.

(B) Grounds of Relief.

¶14 (Tex.Civ.App.) An "irreparable injury" is one which cannot be fully compensated in damages or cannot be measured by any certain pecuniary standard.—*Birchfield v. Bourland*, 187 S. W. 422.

II. SUBJECTS OF PROTECTION AND RELIEF.**(A) Actions and Other Legal Proceedings.**

¶28 (Tex.Civ.App.) Under Rev. St. art. 3631, a person aggrieved by the decision of a county court relating to administration of community property in which he has a joint interest with decedent must appeal to district court of county in which administration is pending and cannot restrain enforcement of such decision of county court.—*Huth v. Huth*, 187 S. W. 523.
 ¶33 (Tenn.) Courts of forum may restrain citizen of the state of forum from prosecuting suit against citizen of same state in a foreign

state.—*American Express Co. v. Fox*, 187 S. W. 1117.

Defendant, a resident of Tennessee, will not be enjoined from suing complainant in Mississippi on cause of action arising in Tennessee, because it would be to complainant's convenience to be sued in Tennessee, or because rules of law in Mississippi are slightly different.—*Id.*

Courts of forum will not, at suit of nonresident corporation which might remove suit brought by resident of state to federal courts, enjoin a resident from suing in foreign state.—*Id.*

(H) Criminal Acts, Conspiracies, and Prosecutions.

§105(1) (Tex.Cr.App.) A court of equity could not enjoin a grand jury from returning an indictment, if the grand jury saw proper to do so.—*State v. Clark*, 187 S. W. 760; *Same v. Nabers*, *Id.* 783, 784.

If prosecution by the county attorney is enjoined, the court may appoint another person to prosecute, and no power exists to prevent prosecution.—*Id.*

§105(2) (Tex.Cr.App.) Injunction will not lie to prevent enforcement of the pool hall law, which merely imposes a penalty upon violators, and does not affect property rights.—*State v. Clark*, 187 S. W. 760; *Same v. Nabers*, *Id.* 783, 784.

The general rule is that injunction will not be granted to stay criminal proceedings or quasi criminal proceedings, whether the prosecution be for the violation of the common law or the infraction of statutes or municipal ordinances.—*Id.*

III. ACTIONS FOR INJUNCTIONS.

§114(1) (Tex.Civ.App.) To proceedings to declare invalid common school districts, as established by county school trustees through change of boundary, the trustees of the districts, by *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2822, constituted bodies corporate, are necessary parties.—*Oliver v. Smith*, 187 S. W. 528.

§118(1) (Tex.Civ.App.) In a petition for injunction, the averments of material and essential elements must be sufficiently certain to negative every reasonable inference of the existence of facts under which petitioner would not be entitled to relief.—*Birchfield v. Bourland*, 187 S. W. 422.

In petition for injunction, allegations that plaintiff was lawfully in possession of land, and that defendants unlawfully entered and forcibly ejected him therefrom, are mere conclusions of law and insufficient to authorize injunction.—*Id.*

§118(2) (Tex.Civ.App.) A petition for injunction, alleging that plaintiff's lessor was formerly the owner in fee simple for the year 1916, must be construed as implying that he was not the owner of the land and had no legal right to lease to plaintiff, and is therefore insufficient to sustain a writ of injunction restraining the ejection of plaintiff.—*Birchfield v. Bourland*, 187 S. W. 422.

§118(3) (Tex.Civ.App.) Allegations of threatened ouster from a farm and destruction of growing crops held sufficient allegations of irreparable injury to authorize a temporary injunction.—*Birchfield v. Bourland*, 187 S. W. 422.

§128 (Ark.) In suit to enjoin foreclosure, evidence held to sustain contention of plaintiff rather than that of defendant as to amount expended by mortgagee in possession for repairs.—*Morgan v. Mahony*, 187 S. W. 633.

In suit to enjoin foreclosure, preponderance of evidence held to lie against the claim of defendant mortgagee for board of mortgagor's sons while mortgagee was in possession.—*Id.*

§128 (Mo.App.) In suit for injunction, evidence held to show unwarranted interference by

respondent with complainant's use of a common switch.—*P. M. Bruner Granitoid Co. v. Glencoe Lime & Cement Co.*, 187 S. W. 807.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

§139 (Tex.Civ.App.) A special district judge of one court has no authority to grant a temporary injunction returnable to any other court, and an injunction so granted is void.—*League v. Brazoria County Road Dist. No. 13*, 187 S. W. 1012.

§143(2) (Tex.Civ.App.) To authorize an ex parte injunction, the petition must expressly negative any possible hypothesis on which defendant might lawfully do the act complained of.—*Santa Fe Town-Site Co. v. Norvell*, 187 S. W. 978.

Granting an ex parte mandatory injunction changing the status quo is authorized only where great and irreparable injury might follow delay for notice and hearing, and therefore not by inconvenience in having to travel by a less direct route.—*Id.*

INQUISITION.

See Insane Persons.

INSANE PERSONS.

II. INQUISITIONS.

§18 (Mo.App.) Under Rev. St. 1909, § 519, as to hearings regarding sanity of a person confined as of unsound mind, the hearing by a jury must be within a reasonable time, and it is an abuse of discretion to postpone it for four months.—*State ex rel. Wagener v. Cook*, 187 S. W. 1122.

INSOLVENCY.

See Corporations, §544, 558; Fraudulent Conveyances, §57, 272.

INSPECTION.

See Corporations, §181; Insurance, §549.

INSTRUCTIONS.

To jury, see Criminal Law, §770-841; Trial, §191-296.

INSURANCE.

See Accord and Satisfaction, §17; Constitutional Law, §163, 247, 303, 326; Contracts, §127; Death, §4; Evidence, §213, 252, 420, 474, 596; Executors and Administrators, §46, 53; Garnishment, §52, 162; Parties, §52, 59; Pleading, §433; Trial, §28, 237, 260, 296, 350.

I. CONTROL AND REGULATION IN GENERAL.

§4 (Mo.) Rev. St. 1909, § 7068, providing that insurance companies vexatiously refusing to pay losses may be assessed punitive damages and attorney's fees, held not unconstitutional.—*Barber v. Hartford Life Ins. Co.*, 187 S. W. 867.

III. INSURANCE AGENTS AND BROKERS.

(A) Agency for Insurer.

§84(1) (Tex.Civ.App.) In insurance agent's contract for bonus on business procured during the year, the words "sixty days allowed for settlements" held not to give interest in business done in the additional 60 days.—*Reliance Life Ins. Co. v. Beaton*, 187 S. W. 743.

In action by insurance agent for contracted bonus upon insurance procured during year, evidence held to support finding that business procured during year exceeded \$1,250,000.—*Id.*

V. THE CONTRACT IN GENERAL.**(A) Nature, Requisites, and Validity.**

⇒131(1) (Ark.) In the absence of any statutory prohibition, parol contract of insurance is valid.—*Ætna Ins. Co. v. Short*, 187 S. W. 657.

⇒131(2) (Ark.) Where agent of fire insurance company authorized to issue policies and to make renewals was not required to receive premium in advance as condition precedent to making parol contracts to renew policy, he was authorized to make a preliminary contract binding upon the company to be consummated by filling out and delivering policy pursuant thereto.—*Ætna Ins. Co. v. Short*, 187 S. W. 657.

⇒136(5) (Mo.App.) An insured cannot, after receiving a life policy, delay acceptance for nearly six months, and then, by writing "Accepted" on the face of the policy, place it in effect, thus delaying time for payment of subsequent premiums.—*Lyke v. American Nat. Assur. Co.*, 187 S. W. 265.

⇒137(3) (Mo.App.) Where a life policy provided it should not go into effect until payment of the first premium, payment of premium by agent did not render it effective.—*Lyke v. American Nat. Assur. Co.*, 187 S. W. 265.

⇒145(1) (Ark.) The terms of a fire policy are neither enlarged, restricted nor changed by a renewal, but rights of both parties, are bound by provisions of policy as originally issued.—*Ætna Ins. Co. v. Short*, 187 S. W. 657.

⇒145(1) (Mo.App.) A renewal of a policy or bond constitutes a separate and distinct contract for the period covered thereby, and, where the renewal receipt recites a renewal in accordance with the terms of the bond, it is a contract with the same terms as evidenced by the bond renewed.—*Commercial Bank v. American Bonding Co.*, 187 S. W. 99.

The original warranties run through any renewal of a fidelity bond, and the insurer, in case demand is made on it under the terms of the contract, may show that any statements in the original application made for the bond were untrue.—*Id.*

(B) Construction and Operation.

⇒146(1) (Mo.App.) A policy of insurance is to be given effect, if permissible, as if it was intended to cover and include the subject of the insurance for which the premium was paid, rather than to aid an escape from liability thereon.—*De Mun Estate Corp. v. Frankfort General Ins. Co.*, 187 S. W. 1124.

⇒146(3) (Mo.App.) The contract of a surety company executing its fidelity bond for a consideration must be construed most strictly in favor of the obligee.—*Commercial Bank v. Maryland Casualty Co.*, 187 S. W. 103.

⇒147(1) (Mo.App.) An accident policy issued to one residing in the city of St. Louis, and who died there, was to be interpreted in connection with the suicide statute of the state.—*Brunswick v. Standard Acc. Ins. Co. of Detroit, Mich.*, 187 S. W. 802.

⇒179½ (Tex.Civ.App.) In a paid-up policy loan note, an agreement that on nonpayment the amount of paid-up insurance guaranteed should be reduced in the same proportion as the debt bore to the cash surrender value is valid and in harmony with the policy indicated by Rev. St. 1911, art. 4741.—*Hartford Life Ins. Co. v. Benson*, 187 S. W. 351.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

⇒186(2) (Mo.) Where the policy provides that annual dues should be paid on a certain date, the insurance company cannot, without the consent of the policy holder, change the date of payment.—*Barber v. Hartford Life Ins. Co.*, 187 S. W. 867, 874.

⇒191 (Mo.) Where an insurance company's charter intrusted all its affairs to a board of directors and the making of by-laws to the

stockholders, *held*, that its executive officers lacked power to levy assessments unauthorized by the directors or the by-laws.—*Barber v. Hartford Life Ins. Co.*, 187 S. W. 867, 874.

VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.

⇒222 (Mo.App.) Assignee of life policy taken as security for insured's note had the right, upon insured's refusal to pay premiums, to convert the policy into a paid-up policy upon notice to the insured.—*Bush v. Block*, 187 S. W. 153.

Assignment of life policy as security for a note did not relieve insured of obligation to pay premiums.—*Id.*

Under Rev. St. 1909, § 1732, in suit to foreclose insured's interest in a life policy assigned as security for his note, which policy, upon insured's failure to pay premiums, the holder of note converted into a paid up policy, the insurance company, not claiming interest, was not a necessary party.—*Id.*

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

⇒235 (Tex.Civ.App.) Evidence *held* to sustain a verdict that a fire insurance policy was not canceled by mutual consent.—*Glens Falls Ins. Co. v. Walker*, 187 S. W. 1086.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.**(A) Grounds in General.**

⇒250(1) (Mo.App.) Rev. St. 1909, §§ 7024, 7026, relating to the construction of warranties of fact, and section 6937, relating to misrepresentations, *held* not to apply to fidelity bonds.—*Commercial Bank v. American Bonding Co.*, 187 S. W. 99.

⇒253 (Mo.App.) Representations are not a part of the contract in the sense that warranties are, but are inducements to a contract, though not facts which are contracted to be true, and they do not have to be literally true as do warranties.—*Commercial Bank v. American Bonding Co.*, 187 S. W. 99.

⇒255 (Mo.App.) A representation in the renewal receipt of a fidelity bond that the employé was not in default was a representation material to the risk, and which, if falsely or fraudulently made, would avoid the contract.—*Commercial Bank v. American Bonding Co.*, 187 S. W. 99.

⇒256(1) (Mo.App.) A representation in the renewal receipt of a fidelity bond that the employé was not in default was a representation material to the risk, and which, if falsely or fraudulently made, would avoid the contract.—*Commercial Bank v. American Bonding Co.*, 187 S. W. 99.

⇒256(2) (Mo.App.) In the case of a representation although material to the risk, if made in good faith, its falsity will not, because it is untrue, render the contract induced thereby void or voidable.—*Commercial Bank v. American Bonding Co.*, 187 S. W. 99.

Misrepresentations contained in renewal certificate that the employé was not then in default, made without knowledge that he was in default and in the honest belief that the representations were true, would not defeat a recovery on the renewal bond.—*Id.*

⇒265 (Mo.App.) Statement in renewal receipt upon fidelity bond that the employé was not then in default, not made a warranty by any terms of contract, *held* only a representation, and not a warranty.—*Commercial Bank v. American Bonding Co.*, 187 S. W. 99.

⇒267 (Mo.App.) A warranty is a parcel of the contract, and must be absolutely true,

whether material to the risk or not.—*Commercial Bank v. American Bonding Co.*, 187 S. W. 99.

(B) Matters Relating to Property or Interest Insured.

⚡282(6) (Mo.App.) A policy, not mentioning incumbrances, but providing for fee-simple ownership, is not breached by existence of mortgage liens.—*Terminal Ice & Power Co. v. American Fire Ins. Co.*, 187 S. W. 564; *Same v. Home Ins. Co.*, Id. 568; *Same v. Lumbermen's Ins. Co.*, Id.; *Same v. Security Ins. Co.*, Id.; *Same v. Commercial Fire Ins. Co.*, Id. 569; *Same v. Stuyvesant Ins. Co.*, Id.

Where there is no mention of incumbrances, a policy provision of "unconditional and sole ownership" of a building is not breached by existence of incumbrances.—Id.

A policy is not avoided by lack of title of insured where a sheriff's deed of the property to another is not effective and is a mere cloud on insured's title.—Id.

⚡285 (Mo.App.) Answers by president of plaintiff bank in application to casualty company for a bond for its employé and officer in respect to his other business interests, his indebtedness to officers, and his balances held not misrepresentations.—*Commercial Bank v. Maryland Casualty Co.*, 187 S. W. 103.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(A) Grounds in General.

⚡310(2) (Ark.) Insurer held bound to notify insured that it elected to treat, after default, premium note as indebtedness against the policy which would reduce the term insurance purchased with the surrender value.—*Missouri State Life Ins. Co. v. Orabtree*, 187 S. W. 173.

(B) Matters Relating to Property or Interest Insured.

⚡328(2) (Mo.App.) The giving of a mere option, not exercised, on insured property does not breach a policy provision against "change in interest or title."—*Terminal Ice & Power Co. v. American Fire Ins. Co.*, 187 S. W. 564; *Same v. Home Ins. Co.*, Id. 568; *Same v. Lumbermen's Ins. Co.*, Id.; *Same v. Security Ins. Co.*, Id.; *Same v. Commercial Fire Ins. Co.*, Id. 569; *Same v. Stuyvesant Ins. Co.*, Id.

⚡328(14) (Mo.App.) Foreclosure by insured himself of mortgage he has bought in on insured property in order to perfect title does not avoid a policy under provision against "foreclosure proceedings."—*Terminal Ice & Power Co. v. American Fire Ins. Co.*, 187 S. W. 564; *Same v. Home Ins. Co.*, Id. 568; *Same v. Lumbermen's Ins. Co.*, Id.; *Same v. Security Ins. Co.*, Id.; *Same v. Commercial Fire Ins. Co.*, Id. 569; *Same v. Stuyvesant Ins. Co.*, Id.

⚡329 (Mo.App.) A tenant's going into possession of premises insured by his landlord does not breach a policy provision against "change of possession."—*Terminal Ice & Power Co. v. American Fire Ins. Co.*, 187 S. W. 564; *Same v. Home Ins. Co.*, Id. 568; *Same v. Lumbermen's Ins. Co.*, Id.; *Same v. Security Ins. Co.*, Id.; *Same v. Commercial Fire Ins. Co.*, Id. 569; *Same v. Stuyvesant Ins. Co.*, Id.

(E) Nonpayment of Premiums or Assessments.

⚡362 (Mo.) Forfeiture of an insurance policy cannot be predicated upon nonpayment of an assessment which was excessive, both under the contract itself and as modified by a foreign judgment.—*Barber v. Hartford Life Ins. Co.*, 187 S. W. 867, 874.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

⚡376(3) (Tex.Civ.App.) A local agent of a fire company, authorized to solicit insurance, deliver policies, and collect premiums, may waive conditions and forfeitures in the policy regardless of authority conferred by insurer, unless insured knows of such limitations.—*New Jersey Fire Ins. Co. v. Baird*, 187 S. W. 356.

⚡383 (Tex.Civ.App.) A local insurance agent, authorized to waive conditions and forfeitures contained in a fire policy, may waive them by parol.—*New Jersey Fire Ins. Co. v. Baird*, 187 S. W. 356.

XII. RISKS AND CAUSES OF LOSS.

(B) Insurance of Property and Titles.

⚡425 (Tex. Civ. App.) Proof of loss held sufficient within a policy against theft, declaring "mere disappearance" insufficient evidence of theft.—*Great Eastern Casualty Co. v. Boll*, 187 S. W. 686.

(C) Guaranty and Indemnity Insurance.

⚡435 (Mo.App.) Where every part of habitable portion of building was let to and occupied by tenants when cornice fell and injured pedestrians, policy, stipulating indemnity for owner, providing it was issued with understanding that assured was the owner, but not in occupation or control of the property, covered the case.—*De Mun Estate Corp. v. Frankfort General Ins. Co.*, 187 S. W. 1124.

There can be no recovery, on a landlord's contingent policy for amounts paid persons injured by falling of a cornice, unless the cornice was defective when leases of the building were executed by the owner and the property passed into the hands of tenants.—Id.

Where a building was leased by heirs and thereafter they incorporated, the company was liable to pedestrians injured by fall of cornice from building into street, though property was under lease when the company acquired it, so that insurer of heirs against such liability, was liable to the company.—Id.

(E) Accident and Health Insurance.

⚡465 (Mo.App.) Under an accident policy, excepting liability for injury self-inflicted while insane, construed with Rev. St. 1909, § 5945, held that the suicide of insured was to be regarded as an accident, permitting a recovery on the policy.—*Brunswick v. Standard Acc. Ins. Co. of Detroit, Mich.*, 187 S. W. 802.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(B) Insurance of Property and Titles.

⚡495(1) (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4893, provision in policy covering piano that insurer should not be liable for more than three-fourths of its cash value at time of loss, so making insured a co-insurer, held void.—*Fireman's Ins. Co. v. Jesse French Piano & Organ Co.*, 187 S. W. 691.

⚡500 (Mo.App.) The valued policy law (Rev. St. 1909, § 7030) merely fixes the value of the insured property at the time of insurance, and not its value at the time of destruction.—*Strawbridge v. Standard Fire Ins. Co. of Hartford, Conn.*, 187 S. W. 79.

Under Rev. St. 1909, § 7080, forbidding insurance at ratio greater than three-fourths the value of the property, the value of an automobile insured for \$1,500 is, as between the parties, conclusively fixed at \$2,000 at the time the insurance was written.—Id.

(E) Accident and Health Insurance.

⚡527 (Mo.) In an action to recover double indemnity provided by accident insurance policy for death of insured while a passenger on a

public conveyance, insured approaching a standing car with its doors open with intent to board it as a passenger was a "passenger."—*Fay v. Aetna Life Ins. Co.*, 187 S. W. 861.

XIV. NOTICE AND PROOF OF LOSS.

§549 (Tex.Civ.App.) Where the policy gave the insurer the right to an autopsy, but it was not demanded at the time of death, the insurer could not six weeks after interment insist on such right, especially where the only dispute was whether his neck was broken or dislocated by the accident.—*American Nat. Ins. Co. v. Nuckols*, 187 S. W. 497.

To give the insurer the right of exhumation of the insured's body, such right must be clearly expressed in no uncertain words in the policy.—*Id.*

Insurer's right to exhume insured's body, if covered by right to autopsy, can be exercised only at once and upon showing that it will show fraud or mistake.—*Id.*

Where insurer pleaded that doctors' conflicting statements that insured died from broken neck, and from dislocated neck, meant the same thing, it could not base its right to an autopsy on such conflicting statements.—*Id.*

§556(2) (Tex.Civ.App.) Where the company agent was notified of death and viewed the body and said he was satisfied and that loss would be paid, and the adjuster recognized his authority until suit was brought, and then denied it, the company was estopped to deny the agency.—*American Nat. Ins. Co. v. Nuckols*, 187 S. W. 497.

§558(4) (Mo.) Where defendant's insurance adjuster admitted liability, and after a dispute as to the amount, an arbitration followed, no blank proofs of loss being furnished the plaintiff as required by statute, *held*, there was a waiver of proof of loss.—*Young v. Pennsylvania Fire Ins. Co.*, 187 S. W. 856.

XV. ADJUSTMENT OF LOSS.

§574(5) (Mo.) An appraisal under a fire insurance policy does not discharge the cause of action on such policy, although binding as to the amount fixed by such appraisal if not fraudulently procured.—*Young v. Pennsylvania Fire Ins. Co.*, 187 S. W. 856.

§579 (Tex.Civ.App.) All that is required to validate a compromise on a life policy is that the beneficiary understand the settlement and that the insurer act in good faith in disputing the claim.—*McDonald v. Aetna Life Ins. Co. of Hartford, Conn.*, 187 S. W. 1005.

XVI. RIGHT TO PROCEEDS.

§582 (Tex.Civ.App.) Where the trustee, to whom insurance was payable as his interest might appear in action on the policy by the owner, answered, disclaiming interest, the owner's right to recover the full amount due under the policy was established.—*Camden Fire Ins. Ass'n v. Baird*, 187 S. W. 699.

§586 (Ark.) An insurer cannot by contract with the insured change the vested rights of the beneficiary.—*Missouri State Life Ins. Co. v. Crabtree*, 187 S. W. 173.

§586 (Mo.App.) Where a contract is one of ordinary life insurance, the beneficiary acquires a vested interest therein from the date of the contract.—*Tuite v. Supreme Forest Woodmen Circle*, 187 S. W. 137.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

§602 (Ark.) Under Acts 1905, p. 307, in an action on an alleged oral contract to renew a policy of fire insurance, which had not been consummated by delivering a policy, allowance of an attorney's fees and the penalty provided by the statute was error.—*Aetna Ins. Co. v. Short*, 187 S. W. 657.

§602 (Mo.) Evidence held sufficient to sustain an award of attorney fees under the statute for vexatiously refusing to pay fire insurance.—*Young v. Pennsylvania Fire Ins. Co.*, 187 S. W. 856.

§602 (Mo.App.) The refusal of a fire insurance company to pay a policy held not vexatious within Rev. St. 1909, § 7068, and so an attorney's fee could not be properly allowed the insured.—*Strawbridge v. Standard Fire Ins. Co. of Hartford, Conn.*, 187 S. W. 79.

XVIII. ACTIONS ON POLICIES.

§610 (Mo.) The provisions of Rev. St. 1909, § 868 (Laws 1909, p. 347), providing that contracts containing agreements to arbitrate shall not preclude suit without submitting to arbitration held not retroactive, so that an insurance policy executed in 1907 would not be thereby affected.—*Young v. Pennsylvania Fire Ins. Co.*, 187 S. W. 856.

§612(3) (Mo.) Under Rev. St. 1909, § 868, provisions in insurance policies which enforce arbitration or settlement are unenforceable, and compliance therewith is not a condition precedent to a suit on such a contract.—*Young v. Pennsylvania Fire Ins. Co.*, 187 S. W. 856.

§621 (Mo.) The waiver of proofs of loss has the same effect as the filing of proofs of loss, and a suit commenced more than 60 days after such waiver is not premature, although proofs of loss were made as a matter of precaution less than 60 days before suit.—*Young v. Pennsylvania Fire Ins. Co.*, 187 S. W. 856.

§623(1) (Mo.) The defense of premature suit is not available where proofs of loss were waived by submitting to arbitration, and such arbitration was pleaded as a defense.—*Young v. Pennsylvania Fire Ins. Co.*, 187 S. W. 856.

§638 (Mo.) Under Rev. St. 1909, § 7068, plaintiff in action on policy to recover damages for vexatious refusal to pay the loss must by appropriate allegation in his petition show that he claims and is entitled to such damages.—*Fay v. Aetna Life Ins. Co.*, 187 S. W. 861.

§639 (Tex.Civ.App.) A complaint on a fire policy need not allege that the fire did not result from causes for which insurer was not liable.—*St. Paul Fire & Marine Ins. Co. v. Laster*, 187 S. W. 969.

§640(1) (Mo.) In an action on a fire insurance policy, the defense of premature suit is in the nature of a plea in abatement, and must be specifically pleaded; a general denial not being sufficient.—*Young v. Pennsylvania Fire Ins. Co.*, 187 S. W. 856.

§640(4) (Mo.) Where defendant fire insurance company pleaded an arbitration, it thereby admitted a waiver of proof of loss.—*Young v. Pennsylvania Fire Ins. Co.*, 187 S. W. 856.

§641(1) (Mo.) Under Rev. St. 1909, § 1812, the insured in an action on a fire insurance policy may plead by way of reply fraud of the insurer in procuring a fraudulent appraisal; the word "settlement," as used in the statute, having a broader meaning than payment and satisfaction.—*Young v. Pennsylvania Fire Ins. Co.*, 187 S. W. 856.

§645(4) (Mo.) Under Rev. St. 1909, § 7068, allegations of vexatious delay in payment of policy loss entitling plaintiff to damages may be shown by any competent evidence, whether it tends to establish the main issue, the right to recover the policy amount or not.—*Fay v. Aetna Life Ins. Co.*, 187 S. W. 861.

§646(3) (Mo.) An insurance company, seeking to avoid payment of a policy because forfeited by nonpayment of an assessment, must prove that the assessment was levied in accordance with the contract.—*Barber v. Hartford Life Ins. Co.*, 187 S. W. 867, 874.

§646(8) (Mo.App.) In an action on a fire policy for the destruction of an automobile, an article changing in value, plaintiff has the

burden of proving its value at the time of its injury.—*Strawbridge v. Standard Fire Ins. Co., of Hartford, Conn., 187 S. W. 79.*

⚖648(1) (Mo.) In action for double indemnity provided by accident insurance policy if insured was killed while a passenger in or on any public conveyance, with allegations claiming damages for vexatious delay in payment as authorized by R. S. 1909, § 7068, pleadings of defendant, releases taken by it, and investigations made by it held admissible on issue of vexatious delay.—*Fay v. Aetna Life Ins. Co., 187 S. W. 861.*

⚖651(4) (Tex.Civ.App.) Where defendant fire insurance company claimed that a policy had been canceled by mutual consent in a conversation between its agent and assured, the assured's explanation that he understood the policy was void only during certain foreclosure proceedings is admissible where the conversation was somewhat ambiguous.—*Glens Falls Ins. Co. v. Walker, 187 S. W. 1036.*

⚖658 (Ark.) In action upon fire insurance policy, defense being incendiarism, exclusion of answer to question to manager of electric light plant, if the wiring of a house did not frequently ignite it, was not error, where there was no showing that the wiring could have caused the fire.—*Chunn v. London & Lancashire Fire Ins. Co., 187 S. W. 307.*

⚖660 (Mo.App.) In an action on a fire policy, evidence of depreciation of the article insured cannot be shown by proof that because it had been used by the insured it would sell for less sum than if not secondhand.—*Strawbridge v. Standard Fire Ins. Co., of Hartford, Conn., 187 S. W. 79.*

⚖665(1) (Mo.) Under Rev. St. 1909, § 7068, a jury may assess punitive damages and an attorney's fee against an insurance company upon concluding, from a general survey, that its refusal to pay the claim was vexatious and no explicit proof to that effect is necessary.—*Barber v. Hartford Life Ins. Co., 187 S. W. 867, 874.*

⚖665(2) (Tex.Civ.App.) Evidence held to sustain a verdict that a fire insurance policy was delivered to assured.—*Glens Falls Ins. Co. v. Walker, 187 S. W. 1036.*

⚖665(4) (Mo.App.) In an action on a fire policy upon an automobile, evidence held to warrant finding that the automobile, at the time of its destruction, was worth the sum fixed in the policy.—*Strawbridge v. Standard Fire Ins. Co., of Hartford, Conn., 187 S. W. 79.*

⚖665(4) (Mo.App.) In action by owner of building against insurance company for indemnity for amounts paid to persons injured when a cornice of the building fell into the street, evidence held to support finding that the injuries were caused by the negligence of the insured.—*De Mun Estate Corp. v. Frankfort General Ins. Co., 187 S. W. 1124.*

⚖665(4) (Tex. Civ. App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4874, where the insured premises are a total loss, no showing or proof of the amount, etc., of the loss is necessary.—*St. Paul Fire & Marine Ins. Co. v. Lester, 187 S. W. 969.*

⚖665(7) (Mo.) Evidence held to warrant a finding that appraisal of loss under a fire insurance policy was fraudulent.—*Young v. Pennsylvania Fire Ins. Co., 187 S. W. 856.*

⚖668(3) (Tex.Civ.App.) The construction of a written provision as to the extent of the insurer's liability was a question for the court and not for the jury.—*Fireman's Ins. Co. v. Jesse French Piano & Organ Co., 187 S. W. 691.*

⚖668(10) (Mo.) Where the issue as to the damages given by Rev. St. § 7068, for an insurer's vexatious refusal to pay a loss is not made out by proof, it should be taken from the jury, but, if there is any evidence from which the

jury may infer a vexatious refusal to pay, the issue is for the jury.—*Fay v. Aetna Life Ins. Co., 187 S. W. 861.*

⚖669(10) (Ark.) In an action upon fire insurance policy, defense being incendiarism, refusal of plaintiff's instruction that she had the right to remove goods from her house without notice to the company, so long as the hazard was not increased thereby, is not error, since the jury could regard removal on the origin of the fire.—*Chunn v. London & Lancashire Fire Ins. Co., 187 S. W. 307.*

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

⚖693 (Tex.Civ.App.) By-law of fraternal beneficiary society declaring that member's disappearance should not be any evidence of his death, contravened Rev. St. 1911, art. 5707, relating to the presumption of death, and was invalid.—*Sovereign Camp of Woodmen of the World v. Robinson, 187 S. W. 215.*

A by-law of a fraternal beneficiary association, to be valid, must be reasonable.—*Id.*

(B) The Contract in General.

⚖712 (Mo.App.) Under Rev. St. 1909, § 7109, defining the beneficiaries in benefit certificates, and in view of Rev. St. 1909, §§ 1671-1678, held, that foreign fraternal beneficiary society was entitled to the benefit of the laws of this state, as there was no substantial difference between classes of beneficiaries recognized by its charter and classes mentioned by statute.—*Tuite v. Supreme Forest Woodmen Circle, 187 S. W. 137.*

⚖720 (Ark.) Fraternal society held not liable for death benefit of member whose certificate was not delivered to him, he being ill with appendicitis when it was received by clerk of society from home office.—*Clinton v. Modern Woodmen of America, 187 S. W. 939.*

⚖724(1) (Mo.App.) Fraternal beneficiary association could not waive or estop itself from setting up the defense that a certificate was ultra vires and void, as such waiver or estoppel could not bind the association to a contract which its charter would not authorize.—*Tuite v. Supreme Forest Woodmen Circle, 187 S. W. 137.*

In an action on a fraternal beneficiary certificate, where the insurer, if sustaining the defense of ultra vires, would be liable for the premiums received of the insured as for money had and received, it was not bound to make a sufficient tender or any tender on pain of waiving its rights to defend on the ground of ultra vires.—*Id.*

(C) Dues and Assessments.

⚖743 (Mo.App.) If the insured was older than the maximum age at the time he applied for his certificate and membership, the only remedy which his beneficiary might enforce against the insurer would be to recover back the money the insured had paid for insurance.—*Tuite v. Supreme Forest Woodmen Circle, 187 S. W. 137.*

(E) Beneficiaries and Benefits.

⚖783 (Mo.App.) The interest of a beneficiary in a certificate before the death of the insured is only an expectancy and not a vested interest.—*Tuite v. Supreme Forest Woodmen Circle, 187 S. W. 137.*

⚖787 (Ark.) Under Kirby's Dig. § 1557, voluntary intoxication of a member of a fraternal order held no excuse for his violation of law by which he met his death.—*Eminent Household of Columbian Woodmen v. Howle, 187 S. W. 176.*

⚖787 (Ark.) Terms of fraternal insurance society's policy, providing for benefit upon total

disability, do not apply solely to the particular occupation named in the application, unless the language constitutes the statement regarding his occupation as a warranty that he will continue so engaged.—*Southern Woodmen v. Davis*, 187 S. W. 638.

☞788(1) (Mo.) A beneficiary association certificate payable to "legal representatives," *held* not benefit certificate to which suicide was a defense under Rev. St. 1909, § 7109, but an insurance policy to which suicide was no defense under Rev. St. 1909, § 6945.—*Ordelheide v. Modern Brotherhood of America*, 187 S. W. 1193.

☞789(1) (Ark.) Where member of fraternal insurance society furnished proof of disability upon forms prescribed by the society, tending to show he was permanently disabled, his right to recover was not defeated because his physician erroneously diagnosed his affliction.—*Southern Woodmen v. Davis*, 187 S. W. 638.

☞795 (Mo.) The proceeds of a fraternal beneficiary association certificate payable to "legal representatives" go to the estate of deceased member.—*Ordelheide v. Modern Brotherhood of America*, 187 S. W. 1193.

(F) Actions for Benefits.

☞813 (Tex.Civ.App.) In a suit on a certificate, failure to make plaintiff's father, originally named as a beneficiary, and through whom she claimed by assignment by his heirs, a party, *held* not error where it appeared that he was dead.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

☞817(3) (Mo.App.) In an action on a life insurance policy, the burden is on the insurer, who claims that the insured committed suicide by drinking carbolic acid to show that he not only drank the carbolic acid, but that he took it with suicidal intent.—*Hoette v. North American Union*, 187 S. W. 790.

☞819(4) (Mo.App.) In an action on a life insurance policy, evidence *held* insufficient to warrant a peremptory instruction for defendant on the ground that decedent committed suicide by drinking carbolic acid.—*Hoette v. North American Union*, 187 S. W. 790.

INTENT.

See Contracts, ☞147; Adverse Possession, ☞11; Criminal Law, ☞371; Evidence, ☞461; Frauds, Statute of, ☞24; Fraudulent Conveyances, ☞64; Larceny, ☞3, 71; Partnership, ☞17; Robbery, ☞3; Statutes, ☞184; Wills, ☞439.

INTEREST.

See Damages, ☞69; Guardian and Ward, ☞54.

INTERPLEADER.

II. PROCEEDINGS AND RELIEF.

☞35 (Tex.Civ.App.) In a suit by certain employees and materialmen against a railroad subcontractor, the railway company and the contractor are not entitled to attorney's fees as stakeholders, where they did not pay into court, but contested, the amount found due from them to the subcontractor.—*Texas Bldg. Co. v. Collins*, 187 S. W. 404.

INTERSTATE COMMERCE.

See Commerce.

INTERVENING CAUSE.

See Negligence, ☞62.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

See Criminal Law, ☞419, 420, 1206; Municipal Corporations, ☞870; Statutes, ☞77, 85.

III. LOCAL OPTION.

☞25 (Tex.Civ.App.) Local option law (Rev. St. 1911, art. 5715 et seq.) is penal, and, unless its provisions are strictly followed, an election thereunder is void.—*Cain v. Garvey*, 187 S. W. 1111.

☞34(5) (Tex.Civ.App.) Rev. St. 1911, art. 5719, prescribing form of local option election ballots, is mandatory.—*Cain v. Garvey*, 187 S. W. 1111.

Rev. St. 1911, art. 5719, requiring local option ballots to bear words "Official Ballot," "For Prohibition," and "Against Prohibition," requires three-line, not five-line, ballot, especially where it also requires voters to draw "a line" through one of last two phrases.—*Id.*

Under Rev. St. 1911, art. 5719, requiring clerk of county court to furnish local option ballots, *held*, that the duty cannot be delegated to another.—*Id.*

Under Rev. St. 1911, art. 5719, requiring clerk of county court to furnish local option ballots, and prohibiting use or counting of any except official ballots, term "official ballots" refers to those furnished by the clerk.—*Id.*

☞37 (Mo.) Contests of local option elections and legislation regulating them is not precluded by Const. art. 8, § 9, providing for trial of contested elections of officers by such courts or judges and under such procedure as shall be fixed by general law.—*State ex rel. City of Monett v. Thurman*, 187 S. W. 1190.

Local option does not have to be adopted to have the provision of Rev. St. 1909, § 7242, for contest of a local option election in effect, any more than it does to have the provision for holding the election in effect.—*Id.*

VIII. CRIMINAL PROSECUTIONS.

☞219 (Ark.) Indictment, charging unlawful sale of intoxicants in language of statute, so as to enable person of common understanding to know what was intended, etc., *held* sufficient, though not alleging the name of the person to whom the liquor was sold.—*McNeil v. State*, 187 S. W. 1060.

☞224 (Ark.) The state has the burden of proving beyond a reasonable doubt the guilt of one charged with illegal sale of intoxicating liquors.—*Scoggin v. City of Morrilton*, 187 S. W. 445.

☞236(2) (Ark.) In prosecution for unlawful sale of intoxicants, testimony *held* sufficient to support finding that defendant made sale of whisky charged after 1st day of January, 1916.—*McNeil v. State*, 187 S. W. 1060.

☞236(11) (Ark.) In prosecutions for illegal sale of intoxicating liquors, where two witnesses testified in each case to a sale, evidence *held* sufficient to support a conviction.—*Wilson v. State*, 187 S. W. 440.

☞236(11) (Ark.) Evidence *held* insufficient to show illegal sale of liquors.—*Scoggin v. City of Morrilton*, 187 S. W. 445.

While a sale may be proved by circumstances as well as by affirmative evidence, circumstances must warrant the inference that there was a seller and a purchaser and compensation for the thing sold.—*Id.*

☞236(11) (Mo.App.) Evidence in a prosecution for sale of whisky in violation of the local option law *held* sufficient to sustain a conviction.—*State v. Barr*, 187 S. W. 575.

X. ABATEMENT AND INJUNCTION.

☞260 (Mo.App.) The illegal sale of intoxicating liquors cannot be enjoined when unaccompanied by circumstances making it a nuisance.—*State ex rel. Lashly v. Kirkwood Leisure Hours' Social and Pastime Club*, 187 S. W. 819.

⚡279 (Mo.App.) Where an injunction was issued upon a petition alleging that a certain place was a nuisance because of its boisterous gatherings, illegal liquor sales, etc., held that the court had no jurisdiction to punish disobedience of its injunction where only illegal sales of liquor were proven.—State ex rel. Lashly v. Kirkwood Leisure Hours' Social and Pastime Club, 187 S. W. 819.

INTOXICATION.

See Carriers, ⚡284; Insurance, ⚡787.

INVENTION.

See Patents.

INVITED ERROR.

See Appeal and Error, ⚡882.

IRREPARABLE INJURY.

See Injunction, ⚡14.

JIM CROW LAWS.

See Railroads, ⚡253.

JOINDER.

See Indictment and Information, ⚡124; Parties, ⚡35, 84.

JOINT CONTRACTS.

See Contracts, ⚡182.

JUDGES.

See Exceptions, Bill of, ⚡32; Injunction, ⚡139; Justices of the Peace; Trial, ⚡29.

II. SPECIAL OR SUBSTITUTE JUDGES.

⚡15(1) (Tex.Civ.App.) Selection of a special judge by agreement of the parties, in a case where the regular judge was not disqualified merely by his absence, was a nullity, and the acts of the special judge were void.—Pickett v. Michael, 187 S. W. 426.

⚡19 (Tex.Civ.App.) Where the parties elect a special judge, where the regular judge is not disqualified but is absent from any cause, they are not estopped from denying his jurisdiction.—Pickett v. Michael, 187 S. W. 426.

JUDGMENT.

See Courts, ⚡32.

For judgments in particular actions or proceedings, see also the various specific topics. For review of judgments, see Appeal and Error.

I. NATURE AND ESSENTIALS IN GENERAL.

⚡17(10) (Tex.Civ.App.) Under Rev. St. 1911, art. 1864, a writ showing execution of citation upon an impossible date will not support a default judgment.—Friend v. Thomas, 187 S. W. 986.

⚡18(1) (Tex.Civ.App.) A plea having been eliminated, by the sustaining of exceptions thereto, will not sustain a finding, and judgment thereon, for defendant.—First Nat. Bank of Roswell, N. M., v. Browne Grain Co., 187 S. W. 489.

⚡18(2) (Tex.Civ.App.) Where a petition is defective in substance to the extent of failing to show a cause of action, a judgment for the plaintiff is null and void.—McCamant v. McCamant, 187 S. W. 1096.

IV. BY DEFAULT.

(A) Requisites and Validity.

⚡106(1) (Mo.App.) The fact that the term at which the defendants' motion to make the petition more definite and certain was sustained so as to require the filing of an amended petition expired before the amendment was made did not ipso facto work a judgment in favor of the defendants.—Southwest Nat. Bank of Kansas City v. McDermand, 187 S. W. 121.

⚡119 (Tex.Civ.App.) Under Rev. St. 1911, art. 2330, providing that, where service is made by publication, first day of second term after publication shall be appearance day, a judgment by default at first term after publication, whether void or voidable, will ordinarily be set aside on appeal.—Davenport v. Rutledge, 187 S. W. 988.

⚡126(1) (Mo.App.) Where a petition states a cause of action against a defendant who duly appears but does not answer, judgment against such defendant without evidence to support the petition is proper.—Austin v. Ennis, 187 S. W. 599.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

⚡199(1) (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1990, the court could not enter judgment for defendant, notwithstanding the jury's verdict for the plaintiff.—Fireman's Ins. Co. v. Jesse French Piano & Organ Co., 187 S. W. 691.

⚡199(3) (Tex.Civ.App.) Where a judgment was the only one which could have been rendered upon the verdict, the appellant was not entitled to a judgment non obstante veredicto on the ground that the finding upon an issue was without evidence to support it.—Kuehn v. Meredith, 187 S. W. 386.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

⚡248 (Tex.Civ.App.) Facts proven, but not alleged, cannot form the basis of a judgment.—Modern Woodmen of America v. Yanowsky, 187 S. W. 728.

⚡248 (Tex.Civ.App.) Until their action is called in exercise by pleadings, courts have no more power to render judgment in favor of a person than to render judgment against a person until he has been brought within their jurisdiction.—McCamant v. McCamant, 187 S. W. 1096.

⚡256(2) (Tex.Civ.App.) Judgment must conform to the jury's findings on special issues, though the court can afterwards set it aside, as contrary to the evidence.—Jackson v. Walls, 187 S. W. 676.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

⚡315 (Mo.) An order striking out part of an original judgment after affirmance on appeal was erroneous, where there was nothing in the record, or the judge's docket, or the clerk's minutes or papers on file, to show a mistake in the entry.—Williams v. Sands, 187 S. W. 1188.

⚡335(1) (Tex.Civ.App.) Under Rev. St. 1911, art. 2026, giving defendant two years in which to file a bill of review and obtain a new trial after service by publication, remedy given is cumulative or additional to an appeal.—Davenport v. Rutledge, 187 S. W. 988.

⚡335(2) (Tex.Civ.App.) Under Rev. St. 1911, art. 2026, touching judgment on service of process by publication, defendant was entitled to a bill of review and to be heard upon merits of an action in a justice court against her on service by publication requiring her to appear at the second term, in which judgment was rendered by default at first term, although she had ac-

tual notice of pendency of suit.—*Davenport v. Rutledge*, 187 S. W. 988.

Under Rev. St. 1911, art. 2026, judgment being rendered against defendant by default at first term after service by publication, there not being proper service, defendant was entitled to vacate judgment which was void, although facts might warrant another judgment.—*Id.*

IX. OPENING OR VACATING.

☞358 (Tex.Civ.App.) A judgment will not be set aside for defects or insufficiency in the pleadings, especially where the alleged defect was amendable or had been waived by joining issue and by going to trial.—*McCamant v. McCamant*, 187 S. W. 1096.

☞386(2) (Tex.Civ.App.) Neither lapse of time nor laches affect the right to sue to vacate a judgment void on its face.—*McCamant v. McCamant*, 187 S. W. 1096.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

☞423 (Tex.Civ.App.) Although judgment in suit under Rev. St. § 1909, to recover a cow, erroneously required delivery of the cow, instead of payment of her value, which was under \$50, so that the case was not appealable from the county court, it was not void and subject to direct attack in a proceeding to enjoin its enforcement.—*Kalmans v. Baumbush*, 187 S. W. 697.

If judgment is rendered by a court of competent jurisdiction, error therein does not render it void, or subject to be set aside, except for fraud, accident, or mistake, though the amount in controversy is so small as to prevent appeal.—*Id.*

XI. COLLATERAL ATTACK.

(A) Judgments Impeachable Collaterally.

☞475 (Mo.App.) Order of probate court directing administrator pendente lite to take charge of decedent's realty cannot be collaterally assailed, in unlawful entry and detainer instituted by such administrator, by defendants' argument that he failed to make proper application to the probate court for the order.—*Diehr v. Dean*, 187 S. W. 602.

☞485 (Tex.Civ.App.) A judgment, the invalidity of which is apparent upon the record, may be successfully attacked at any time and under any circumstances.—*McCamant v. McCamant*, 187 S. W. 1096.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) Judgments Operative as Bar.

☞552 (Mo.) The Supreme Court cannot, on appeal in an action for compensation of attorney by county, relieve him from a prior adverse judgment of the Court of Appeals in a mandamus proceeding to enforce such payment, but, the merits then having been investigated, his remedy was by certiorari.—*Harrison v. Jackson County*, 187 S. W. 1183.

☞581 (Mo.) While a recovery upon one count is final and in bar of recovery upon other counts, a reversal of the judgment on appeal removes the bar, and on another trial recovery may be allowed on a count other than the one on which the former judgment was had.—*State ex rel. Scullin v. Robertson*, 187 S. W. 34.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

☞587 (Ark.) Judgment, in action to recover mortgaged chattels, based entirely on right to foreclose without furnishing itemized account in accordance with statute, on which issue verdict was for plaintiff, was not res judicata as to defendant's right to foreclose.—*Livingston v. Pugsley*, 187 S. W. 925.

☞589(1) (Mo.App.) Judgment of Supreme Court on application for writ of certiorari held

res judicata on relator's subsequent original proceeding in prohibition attacking the jurisdiction of the probate judge, who had adjudicated him insane, upon the same grounds.—*State ex rel. Wagener v. Cook*, 187 S. W. 621.

☞590(1) (Mo.) Where plaintiff, in suit to set aside deed for fraud, etc., neglected to claim expenses of litigation, including attorney's fees, rule of res adjudicata bars an independent action to recover them, the claim, if recoverable, belonging to and arising out of the original cause of action.—*Leslie v. Carter*, 187 S. W. 1196.

☞592 (Mo.) Entire claim, arising upon contract or in tort, cannot be divided up and made the subject of several suits.—*Leslie v. Carter*, 187 S. W. 1196.

It is not ground for a second action on the same claim upon a contract or arising in tort that plaintiff in the first action was not able to prove all items of his demand, or that all damages were not then suffered.—*Id.*

☞592 (Mo.App.) A judgment in an action for a portion of a single demand bars a right of action to the residue thereof.—*Peper Automobile Co. v. St. Louis Union Trust Co.*, 187 S. W. 109.

☞594 (Mo.App.) While plaintiff, suing to recover his monthly salary as representative of defendant trust company, was bound to include all installments of salary then due, his prior action for salary then alleged to be due and payable did not prevent the bringing of a later action for salary subsequently accruing.—*Fitzgerrell v. Federal Trust Co.*, 187 S. W. 600.

☞614(2) (Mo.App.) Obtaining of general judgment for a debt does not bar the remedy for the enforcement of a lien upon the security.—*Bush v. Block*, 187 S. W. 153.

☞622(1) (Tex.Civ.App.) Where a set-off is pleaded by defendant and attempted to be supported by evidence, it will, whether allowed or disallowed, become res adjudicata.—*Trinity County Lumber Co. v. Conner*, 187 S. W. 1022.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

☞648 (Tex.Cr.App.) A judgment of the Court of Criminal Appeals that a prohibitory pool hall law is valid is of such public interest as to be conclusive upon all persons.—*State v. Clark*, 187 S. W. 760; *Same v. Nabers*, *Id.* 783, 784.

(B) Persons Concluded.

☞670 (Mo.) That a former action was against members of the county court in their official capacity, whereas the instant action is directly against the county does not remove the bar of adjudication.—*Harrison v. Jackson County*, 187 S. W. 1183.

☞683 (Mo.App.) Judgment in suit on note was conclusive as to all facts involved therein in suit by the assignee of the judgment to foreclose interest of maker in the policy assigned to secure the note.—*Bush v. Block*, 187 S. W. 153.

☞683 (Mo.App.) Where the lessor secures judgments for rent in justice courts, and they are allowed to become final, such matters are res judicata as to defendant, which assumed all debts and obligations of lessee.—*Julian v. Kansas City Granite & Monument Co.*, 187 S. W. 584.

☞701 (Ark.) A judgment against a corporation for a third party for money advanced for salary of the corporation's president is not, as between the president and the corporation, res judicata of the right of the president to retain the salary.—*G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 187 S. W. 1063.

☞707 (Tex.Civ.App.) A judgment is not binding upon persons not parties nor privies thereto.—*Houston Oil Co. of Texas v. Stepney*, 187 S. W. 1078.

(C) Matters Concluded.

⚡713(2) (Mo.App.) Where the lessor secures judgments for rent in justice courts, and they became final, all matters involved in such litigation, and all matters that might have been raised therein, are res judicata as to the lessee.—Julian v. Kansas City Granite & Monument Co., 187 S. W. 584.

⚡735 (Mo.App.) Judgment for plaintiff, in proceedings by administrator in probate court under statute for discovery of assets in which he charged that defendant had in her possession and was concealing property belonging to the estate, held not res judicata in defendant's proceedings in the probate court against decedent's estate for services rendered.—Boyken v. Sharp, 187 S. W. 90.

⚡739 (Mo.App.) The principle of res judicata does not bar defendant in prosecution of claim which he could not have litigated in the first proceeding.—Boyken v. Sharp, 187 S. W. 90.

⚡739 (Mo.App.) Where lease required lessee to pay one-third of the light bills, and lessor took judgment before expiration of term, amount of light cost due was not res judicata, but was for the jury in subsequent suit against lessee's assignee of business.—Julian v. Kansas City Granite & Monument Co., 187 S. W. 584.

⚡743(2) (Tex.Civ.App.) One is not estopped by a judgment that he has no title to land, from setting up an after-acquired title, or a title based on the ten-year statute of limitations.—Houston Oil Co. of Texas v. Stepney, 187 S. W. 1078.

XVII. FOREIGN JUDGMENTS.

⚡816 (Mo.) The record of a Connecticut suit between a policy holder suing on behalf of himself and other policy holders against defendant insurance company, wherein the policy contract was modified, is admissible under the full faith and credit clause of the federal Constitution (article 4, § 1), in an action on a similar policy.—Barber v. Hartford Life Ins. Co., 187 S. W. 867, 874.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

⚡949(1) (Mo.) Where the effect of a foreign judgment upon the pending litigation is generally stated, the answer is sufficient against an objection first raised at the trial.—Barber v. Hartford Life Ins. Co., 187 S. W. 867, 874.

JUDICIAL NOTICE.

See Criminal Law, ⚡304; Evidence, ⚡5, 30.

JUDICIAL POWER.

See Constitutional Law, ⚡67, 70.

JUDICIAL SALES.

See Banks and Banking, ⚡71; Mortgages, ⚡502-529; Trusts, ⚡100.

JURISDICTION.

See Appeal and Error, ⚡436; Appearance; Courts; Habeas Corpus, ⚡44, 46; Pleading, ⚡104; Prohibition, ⚡5, 10.

JURY.

See Appeal and Error, ⚡1069; Criminal Law, ⚡857, 923-932; Divorce, ⚡312; Eminent Domain, ⚡219, 222; New Trial, ⚡44-56, 143; Trial, ⚡314.

II. RIGHT TO TRIAL BY JURY.

⚡10 (Ark.) The statutory right of trial by jury is confined to cases which at common law were so triable before the adoption of the Con-

stitution.—Drew County Timber Co. v. Board of Equalization of Cleveland County, 187 S. W. 942.

⚡10 (Mo.) The right to jury trial protected by Const. 1820, art. 12, § 8, remains now as it was established and guaranteed in 1820.—Elks Investment Co. v. Jones, 187 S. W. 71.

No legislative change in procedure can impair the right to jury trial guaranteed by Const. 1820, art. 12, § 8.—Id.

⚡19(17) (Ark.) In an action for reduction of valuation of timber lands by county board of equalization, a taxpayer has no right to trial by jury.—Drew County Timber Co. v. Board of Equalization of Cleveland County, 187 S. W. 942.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

⚡97(1) (Ark.) Holding competent to serve as juror one who has previously recovered in litigation against defendant railroad company, who states that he has no prejudice, the defendant exhausting its last peremptory challenge on him, is not error.—St. Louis, I. M. & S. R. Co. v. Ingram, 187 S. W. 462.

⚡131(15) (Tex.Cr.App.) Refusal to permit a juror to be asked if, after hearing the evidence, he has a reasonable doubt of defendant's intent to kill, he would give defendant the benefit of the doubt, held not error, in view of question asked and allowed.—McKinney v. State, 187 S. W. 960.

JUSTICES OF THE PEACE.

See Courts, ⚡231.

III. CIVIL JURISDICTION AND AUTHORITY.

⚡54(1) (Tex.Civ.App.) If suit primarily is for an amount within the jurisdiction of a justice's court, the court retains jurisdiction, although pending suit damages accrue beyond that amount.—Sulzberger & Sons Co. of America v. Hille, 187 S. W. 992.

V. REVIEW OF PROCEEDINGS.

⚡202(2) (Tex. Civ. App.) Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 742, 745, a petition for certiorari to a justice purporting to be that of the applicant's next friend, signed by third party, together with verification by third party stating he "believed the facts set forth above to be true and correct," was insufficient.—Hughes v. Underwood Typewriter Co., 187 S. W. 399.

LACHES.

See Contracts, ⚡270; Corporations, ⚡80; Equity, ⚡71.

LANDLORD AND TENANT.

See Adverse Possession, ⚡25; Injunction, ⚡118; Insurance, ⚡329, 435; Vendor and Purchaser, ⚡232.

I. CREATION AND EXISTENCE OF THE RELATION.

⚡9 (Mo.App.) Possession of land by a purchaser under a contract for a conveyance, taken either under the contract or by oral permission of the vendor, could not invest the purchaser with the relationship of a tenant to his vendor, nor make his holding anything more than that of a licensee.—Bixeman v. Reichel, 187 S. W. 299.

III. LANDLORD'S TITLE AND REVERSION.

(B) Estoppel of Tenant.

⚡63(5) (Mo.) The acceptance of a lease does not estop a tenant to deny the lessor's title

to land expressly excepted from the lease.—*Whiteside v. Oasis Club*, 187 S. W. 27.

IV. TERMS FOR YEARS.

(B) Assignment, Subletting, and Mortgage.

§75(3) (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5489, a tenant has no right to sublet premises without the consent of his landlord.—*Birchfield v. Bourland*, 187 S. W. 422.

§76(4) (Tex.Civ.App.) In lessee's action for damages from lessor's refusal to consent to a subletting, evidence held to sustain a finding that lessor did wrongfully, arbitrarily, and without cause refuse to consent to the occupancy of the premises by the subtenant, either as assignee of the lease or as subtenant.—*A. Harris & Co. v. Campbell*, 187 S. W. 365.

§79(2) (Tex.Civ.App.) Where lessee copartnership, with right to sublet on the lessor's written consent, afterwards incorporated in the same name without notice of the assignment of the lease to the corporation, there was no such privity to the lease as entitled the corporation to sue for damages for the lessor's refusal to permit a subletting.—*A. Harris & Co. v. Campbell*, 187 S. W. 365.

(D) Termination.

§103(1) (Ark.) To enforce a forfeiture clause in a lease, the landlord must bring himself within its strict provisions.—*Sells v. Brewer*, 187 S. W. 907.

§108(1) (Ark.) A forfeiture clause for nonpayment of rent is valid in a lease.—*Sells v. Brewer*, 187 S. W. 907.

§111 (Tex.Civ.App.) A tenant who disavows his landlord's title and asserts title in himself forfeits his rights as a tenant and becomes a mere trespasser.—*Rice v. Schertz*, 187 S. W. 245.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(B) Possession, Enjoyment, and Use.

§129(3) (Ark.) Where the landlord refuses to deliver possession, the tenant cannot recover any damages in the absence of evidence of the agreed rent.—*Person v. Williams*, 187 S. W. 1063.

§129(4) (Ark.) Where a landlord refuses to deliver possession, the measure of the tenant's damages is the difference between the reasonable rental value and the stipulated rent for the premises and does not include reasonable profits from cultivation.—*Person v. Williams*, 187 S. W. 1063.

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

§199½ (Mo.App.) Where defendant rented office space under a year's lease and installed its agent, and, on discharging him, he refused to vacate the office, it was not the landlord's duty to eject him, but defendant was liable for the rent for the term in the absence of eviction by the landlord.—*Julian v. Kansas City Granite & Monument Co.*, 187 S. W. 584.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§291(16) (Ark.) In unlawful detainer suit, it was error not to submit to jury question of waiver of clause forfeiting lease upon nonpayment of rent when due; there being conflicting evidence on that question.—*Sells v. Brewer*, 187 S. W. 907.

LANDS.

See Public Lands,

LARCENY.

See Criminal Law, §225, 369, 595; Embezzlement; Receiving Stolen Goods; Robbery.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§3(2) (Tex.Cr.App.) A fraudulent intent at the time of finding lost property is necessary to constitute the crime of larceny; but the fact that the property contained no means of identification is no defense.—*Hutspeth v. State*, 187 S. W. 340.

§5 (Ark.) Despite Kirby's Dig. § 1898, a domesticated cow which runs at large on the range only for short periods and returns to the owner's home every day or so is the subject of larceny, though over 12 months old, unmarked, and unbranded.—*Nix v. State*, 187 S. W. 308.

§13 (Tex.Cr.App.) If defendant obtained lawful possession of a lap robe from owner or party having the right to give consent, but subsequently appropriated it, he was not guilty of theft under general statute, which requires intention to appropriate at time of taking.—*Black v. State*, 187 S. W. 332.

§22 (Tex.Cr.App.) One who commits robbery or steals in Mexico, and brings the proceeds into Texas, is amenable to the laws of Texas under the statute for bringing the stolen property or property acquired by robbery into the state.—*Ex parte Villareal*, 187 S. W. 214.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

§30(5) (Ark.) Indictment describing the property stolen as "one cow the property of" a certain person is sufficient.—*Watson v. State*, 187 S. W. 434.

§40(9) (Tex.Cr.App.) In a prosecution for theft of a lap robe alleged to have been in possession of a husband, and shown to be separate property of wife, there was not a variance between proof and allegation, since separate property of wife is under control of husband.—*Black v. State*, 187 S. W. 332.

(B) Evidence.

§50 (Tex.Cr.App.) In prosecution for larceny, the state may show accused's financial condition immediately before and immediately after the alleged theft.—*Hutspeth v. State*, 187 S. W. 340.

§55 (Ark.) In a prosecution for larceny of an unmarked and unbranded heifer, evidence held sufficient to support verdict of guilty.—*Nix v. State*, 187 S. W. 308.

§55 (Ark.) All the elements of the offense of larceny may be established by circumstantial evidence. Unexplained possession of recently stolen property is sufficient to sustain conviction for larceny.—*Watson v. State*, 187 S. W. 434.

§64(7) (Ark.) In trial for larceny, evidence of finding of cows at or near accused's house with marks freshly changed to accused's own mark held to sustain conviction.—*Watson v. State*, 187 S. W. 434.

(C) Trial and Review.

§71(2) (Tex.Cr.App.) In a prosecution for theft, when facts raise the issues, jury should be instructed as to the difference between general statute requiring intention to appropriate at time of taking to constitute theft and statute making a fraudulent conversion of property legally obtained a violation of law.—*Black v. State*, 187 S. W. 332.

LAST CLEAR CHANCE.

See Negligence, §83; Railroads, §338, 390.

LAW MERCHANT.

See Common Law, ¶6.

LAW OF THE CASE.

See Appeal and Error, ¶1195.

LAWYERS.

See Attorney and Client.

LEADING QUESTIONS.

See Witnesses, ¶240.

LEASE.

See Landlord and Tenant; Railroads, ¶259.

LEAVE OF COURT.

See Pleading, ¶236, 237.

LEGISLATIVE POWER.

See Constitutional Law, ¶50-55.

LETTERS.

See Evidence, ¶188.

LETTERS PATENT.

See Patents.

LEVEES.

See Infants, ¶112.

¶6 (Mo.) Under Rev. St. 1899, §§ 8252, 8253, 8362, an owner of land included in a levee district who, not being named in the articles of association, has not entered his appearance nor has been served with summons or any notice, and who is not mentioned, nor his land described, in the decree of incorporation, is not affected by such proceedings.—*North Kansas City Levee Dist. v. Hillside Securities Co.*, 187 S. W. 852.

Where the owner of lands included in levee district was not served with process in the proceedings to establish the district, nor in condemnation proceedings by the district, its agreement to appear in a contemplated condemnation suit did not amount to an agreement to become a party in the original condemnation proceedings.—*Id.*

¶13½ (Mo.App.) After officers of a levee company refused to serve and the company became defunct, when plaintiff and adjacent owners furnished land and constructed new levees integral with the old, they could not, when a new levee district was organized, have compensation as owners of the old levee, under Rev. St. 1909, § 5707.—*Voss v. Des Moines & Mississippi Levee Dist. No. 1*, 187 S. W. 820.

Nor could they have compensation as persons interested under Rev. St. 1909, § 5707.—*Id.*

In such case, Rev. St. 1909, § 5707, created no liability against the defunct company on the ground of acceptance and use of benefits.—*Id.*

¶27 (Mo.) The defense, in an action to collect taxes for a levee, that the land of defendant is not taxable as included in levee district, is not a collateral attack upon the organization of the district.—*North Kansas City Levee Dist. v. Hillside Securities Co.*, 187 S. W. 852.

In action to collect taxes for a levee, a defendant, notwithstanding a prima facie case for plaintiff made by the offer in evidence of a certified tax bill, etc., has the right to show that he never had his day in court and an opportunity to be heard as to his land.—*Id.*

In action to collect taxes for a levee, where it is proved or conceded that defendant was not served with process and failed to have his day in court before the decree of incorporation of the levee district was entered, the prima facie

case of plaintiff made by evidence of certified tax bills, etc., is overturned.—*Id.*

LEX LOCI.

See Arbitration and Award, ¶18.

LIBEL AND SLANDER.**II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.**

¶47 (Mo.App.) Where plaintiff had attacked the character of defendant's father, the defense of qualified privilege was not available to defendant, who published a libelous affidavit defending his father's character.—*Ritschy v. Garrels*, 187 S. W. 1120.

IV. ACTIONS.**(C) Evidence.**

¶105(3) (Mo.App.) Where a libel action is based upon a part of an affidavit, the defendant may introduce its remaining portions to explain the paragraphs directly involved and to mitigate the damages.—*Ritschy v. Garrels*, 187 S. W. 1120.

(E) Trial, Judgment, and Review.

¶123(3) (Tenn.) In slander action held error to direct for defendant, where he roughly said to plaintiff, a customer, in the presence of others, that a hat was stolen from the store, and that the hat on her head looked very much like it and was the hat.—*Bowker v. Bry-Block Mercantile Co.*, 187 S. W. 304.

LICENSES.

See Commerce, ¶69; Corporations, ¶648; Negligence, ¶32; Physicians and Surgeons, ¶6.

I. FOR OCCUPATIONS AND PRIVILEGES.

¶1 (Tex.Cr.App.) A license to operate a pool hall is not a property right, nor a contract, nor does it create a vested right, but it is a mere permit.—*State v. Clark*, 187 S. W. 700; *Same v. Nabers*, *Id.* 783, 784.

¶5½ (Ark.) Under Kirby's Dig. § 5438, an incorporated town has power to pass an ordinance requiring a license fee of \$5 per annum for the privilege of operating each billiard and pool table, although not used for gaming or as gambling devices.—*Thomas v. Town of Des Arc*, 187 S. W. 908.

¶6(1) (Ark.) The Legislature has authority under the Constitution to delegate to cities the power to tax occupations.—*Laprairie v. City of Hot Springs*, 187 S. W. 442.

¶8(1) (Ark.) Acts 1907, p. 782, held to apply only to Independence county.—*Laprairie v. City of Hot Springs*, 187 S. W. 442.

II. IN RESPECT OF REAL PROPERTY.

¶48 (Mo.App.) Consent of agent to make excavation on principal's land, obtained and induced by the false statement that the principal had already consented, is of no effect even if the agent had power to give such privilege.—*Knoche v. Pratt*, 187 S. W. 578.

¶84 (Mo.App.) Evidence held insufficient to show that the consent of the landowner or his agents was obtained by adjoining owner to make an excavation in the land.—*Knoche v. Pratt*, 187 S. W. 578.

LIENS.

See Chattel Mortgages, ¶138-157; Mechanics' Liens; Mines and Minerals, ¶112; Vendor and Purchaser, ¶278, 281.

LIFE ESTATES.

See Dower; Wills, ¶600.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

See Adverse Possession; Executors and Administrators, ¶225; Insurance, ¶621, 623; Vendor and Purchaser, ¶278.

I. STATUTES OF LIMITATION.**(B) Limitations Applicable to Particular Actions.**

¶24(2) (Tex.Civ.App.) Rev. St. 1911, art. 5688, subd. 1, providing that actions for debt on contracts in writing shall be commenced within four years, applies to an action to recover on bill of lading.—Texas & P. Ry. Co. v. R. W. Williamson & Co., 187 S. W. 354.

¶39(1) (Ark.) An action by mother for debauchery of her daughter is not barred by the one-year limitation of Kirby's Dig. § 5065, but is governed by the 5-year provision of section 5074.—Breining v. Lippincott, 187 S. W. 915.

II. COMPUTATION OF PERIOD OF LIMITATION.**(A) Accrual of Right of Action or Defense.**

¶45 (Ark.) Where cross-complaint attempted to set off half interest in a bond given by mother of parties to plaintiff as a loan, plaintiff's action in collecting interest and principal of the bond more than three years before filing of the cross-complaint amounting to a conversion, defendant's claim is barred by limitations.—Haglin v. Haglin, 187 S. W. 321.

¶46(11) (Tex.Civ.App.) Where cotton was shipped on through bill of lading from Texas via New Orleans to Liverpool and portion of it destroyed by fire while in defendant's possession, held, that statute of limitations did not begin to run until plaintiffs, not being negligent, actually learned of nondelivery.—Texas & P. Ry. Co. v. R. W. Williamson & Co., 187 S. W. 354.

(B) Performance of Condition, Demand, and Notice.

¶66(3) (Tex.Civ.App.) Despite Rev. St. 1911, art. 1366, county treasurer cannot recover commissions accruing for a period more than two years before institution of the suit, for he might sue within a reasonable time after presentation of claim.—Smith v. Wise County, 187 S. W. 705.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

¶102(11) (Mo.App.) Whether or not a trust exists after final settlement by a guardian who used wards' funds in paying for his lands, it being a resulting trust, and the amount being finally and fully ascertained, limitations run from the settlement.—Koyl v. Lay, 187 S. W. 279.

(H) Commencement of Action or Other Proceeding.

¶124 (Tex.Civ.App.) Where two are jointly interested in a contract, but action for breach thereof was begun by only one, an amended petition joining the other as coplaintiff in the same cause of action is not the commencement of a new suit within the statute of limitations.—Jeffress v. Western Union Telegraph Co., 187 S. W. 514.

¶127(1) (Mo.App.) Where an original suit to enforce a materialman's lien was brought in due time and its dismissal as to the defendant owners was set aside and the case reinstated at the same term, the suit upon the refiling of amended petition was still in court, not as a new suit, but merely as the continuation of the original

suit.—Southwest Nat. Bank of Kansas City v. McDermand, 187 S. W. 121.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

¶163(1) (Mo.App.) Partial payment on a claim barred by limitations renews its life as to the balance.—Koyl v. Lay, 187 S. W. 279.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

¶168 (Mo.App.) Lien or mortgage on a life policy assigned to secure insured's note is regarded as an incident thereto, and, so long as the debt for which the security is given is kept alive, the lien remains alive, and suit to foreclose is not barred.—Bush v. Block, 187 S. W. 153.

LIMITATION OF LIABILITY.

See Carriers, ¶158-160, 218, 307; Insurance, ¶495.

LIQUIDATED DEMAND OR DEBT.

See Accord and Satisfaction, ¶10.

LIQUOR SELLING.

See Intoxicating Liquors.

LOCAL OPTION.

See Intoxicating Liquors, ¶25-37.

LOGS AND LOGGING.

See Contracts, ¶57.

¶2 (Ark.) Reservation in deed of land of standing timber, with right to remove, gives only a reasonable time therefor, none being stated.—Hampton Stave Co. v. Elliott, 187 S. W. 647.

When one who had deeded land, reserving standing timber, cut it over for the third time, seven years after the deed, held the reasonable time for removal had expired.—Id.

¶8(5) (Ark.) Where plaintiff had a contract to haul timber various distances at various prices, he could not, on alleged breach, and on evidence that hauling a certain number of feet of timber for a certain distance he would have made a certain profit, recover such sum.—Grayling Lumber Co. v. Hemingway, 187 S. W. 327.

One alleging breach of contract to haul logs has the burden of proving his damages by way of lost profits.—Id.

The mere fact that defendant who had hired plaintiff to haul logs complained that the work was unsatisfactory did not amount to waiver of the breach of contract, and would not support instruction permitting verdict for plaintiff if his breach was condoned.—Id.

LONG ACCOUNTS.

See Reference, ¶8.

LOOKOUTS.

See Railroads, ¶369, 370.

LOT.

See New Trial, ¶52.

LUNATICS.

See Insane Persons.

MALICE.

See Robbery, ¶3.

MALICIOUS PROSECUTION.**II. WANT OF PROBABLE CAUSE.**

⚡22 (Ark.) One cannot make a false statement as to another's alleged offense, to the prosecuting attorney, and defeat the action for malicious prosecution on the ground that the officer brought the prosecution, or that he acted on advice of counsel.—*Randleman v. Johnson*, 187 S. W. 626.

V. ACTIONS.

⚡69 (Ark.) Verdict of \$2,000 compensatory and punitive damages to minor in action for malicious prosecution in charging him with burglary held not excessive in view of defendant's wealth.—*Randleman v. Johnson*, 187 S. W. 626.

MANDAMUS.

See Courts, ⚡209.

I. NATURE AND GROUNDS IN GENERAL.

⚡1 (Tex.Civ.App.) The purpose of mandamus is to require some inferior court or officer, etc., to do some particular thing specified in the writ which appertains to their office or duty, in aid of jurisdiction of court issuing the writ.—*Ætna Club v. Jackson*, 187 S. W. 971.

II. SUBJECTS AND PURPOSES OF RELIEF.**(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.**

⚡28 (Mo.App.) If it appears that there has been an abuse of discretion by a court, mandamus is the proper remedy.—*State ex rel. Wagener v. Cook*, 187 S. W. 1122.

⚡35 (Tex.Civ.App.) Under Rev. St. 1911, arts. 2078, 2084, 2097, 2101, it is the duty of the trial court to fix the amount of supersedeas bond on appeal from a prohibitory injunction, and it may be enforced by mandamus.—*Ætna Club v. Jackson*, 187 S. W. 971.

⚡60 (Mo.App.) Probate court acts judicially in determining whether right to administer an estate has been renounced by one of those entitled to priority, and, in the absence of an abuse, its discretion may not be reviewed by mandamus.—*State ex rel. Scanland v. Thompson*, 187 S. W. 804.

When return in mandamus shows that probate court found that a widow's right to administer was waived or renounced, and sets forth all the facts, so that it affirmatively appears that the question turns on a conclusion of law, immunity from review by mandamus does not necessarily obtain.—*Id.*

⚡61 (Mo.) Mandamus will not lie to require judge of circuit court to strike from records of that court a "complete special report" of an investigation by grand jury of the official acts of relator as prosecuting attorney, alleged to be false and malicious.—*State ex rel. Lashly v. Wurdeman*, 187 S. W. 257.

III. JURISDICTION, PROCEEDINGS, AND RELIEF

⚡154(7) (Tex.Civ.App.) Where application for mandamus to require a clerk of court to approve and file a supersedeas bond does not show the clerk refused to perform his duty, the writ will not issue.—*Wigwam Bowling & Athletic Club v. Escajeda*, 187 S. W. 972.

MANDATE.

See Appeal and Error, ⚡1191.

MANSLAUGHTER.

See Homicide.

MARRIAGE.

See Breach of Marriage Promise; Divorce; Husband and Wife.

⚡50(1) (Mo.App.) A default divorce judgment is, in later action between the parties, evidence of marriage prior to the divorce.—*Butterfield v. Butterfield*, 187 S. W. 295.

MARRIAGE PROMISE.

See Breach of Marriage Promise.

MARRIED WOMEN.

See Husband and Wife.

MARSHALS.

See Municipal Corporations, ⚡180, 183.

MASTER AND SERVANT.

See Appeal and Error, ⚡1056; Carriers, ⚡241; Chattel Mortgages, ⚡138; Compromise and Settlement, ⚡6; Damages, ⚡30; Evidence, ⚡121, 243, 477; Insurance, ⚡285; Judgment, ⚡594; Negligence, ⚡101, 141; Pleading, ⚡433; Trial, ⚡251, 253.

I. THE RELATION.**(A) Creation and Existence.**

⚡5 (Mo.App.) Teamster employed and paid by transfer company, subject to discharge by it, assigned to teaming for a manufacturing company and put under its control, held the servant of the manufacturing company.—*Winkleblack v. Great Western Mfg. Co.*, 187 S. W. 95.

As a general rule, the relation of master and servant does not exist between an employer and the servant of an independent contractor.—*Id.*

⚡6 (Tex.Civ.App.) Evidence held to show contract for services.—*Osvald v. Williams*, 187 S. W. 1001.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.**(A) Nature and Extent in General.**

⚡95 (Tex.Civ.App.) Railroad company held not guilty of negligence in employing callboy 14 years old, where it did not appear that his immaturity prevented him from realizing danger.—*Galveston, H. & H. R. Co. v. Anderson*, 187 S. W. 491.

(B) Tools, Machinery, Appliances, and Places for Work.

⚡103(1) (Mo.App.) A master's duty to furnish a reasonably safe working place cannot be delegated.—*Amick v. Kansas City*, 187 S. W. 582.

⚡107(3) (Tex.Civ.App.) Rule requiring master to exercise ordinary care to furnish servant with a reasonably safe place to work held not to apply to car inspector whose work required him to go on cars in unsafe and dangerous condition to discover and remedy such defects.—*Magnolia Petroleum Co. v. Ray*, 187 S. W. 1085.

There may be unusual circumstances rendering situation of car inspector extraordinarily hazardous, and, when he is excusably ignorant thereof, the master may be liable for an injury resulting therefrom.—*Id.*

⚡111(1) (Tex.Civ.App.) A railroad owes the duty to its employes, other than its car inspector, who might be expected to be near a tank car, to exercise ordinary care to see that car was in condition to avoid an explosion.—*Magnolia Petroleum Co. v. Ray*, 187 S. W. 1085.

(C) Methods of Work, Rules, and Orders.

⚡134 (Mo.) Under federal Employers' Liability Act, negligently failing to warn an employe of danger is a ground of liability.—*Young v. Lusk*, 187 S. W. 840.

☞137(5) (Mo.) Under federal Employers' Liability Act, negligently switching cars against an employé is a ground of liability.—*Young v. Lusk*, 187 S. W. 849.

☞139 (Mo.) Even if failure of engineer to give signals were negligence, it would not avail a section man on a hand car who, by seeing the train, had timely notice of its approach.—*Woods v. St. Louis & S. F. R. Co.*, 187 S. W. 11.

(D) Warning and Instructing Servant.

☞154(1) (Tex.Civ.App.) Where railroad call-boy 14 years old knew and appreciated danger of trains in yards where he was required to work, railroad company's failure to warn him does not constitute negligence.—*Galveston, H. & H. R. Co. v. Anderson*, 187 S. W. 491.

☞154(1) (Tex.Civ.App.) If a minor knows and appreciates the dangers of his employment, the law does not require the master to warn him in relation thereto.—*Dallas Fair Park Amusement Ass'n v. Barrentine*, 187 S. W. 710.

A minor must not only know the danger, but also the extent, and have the capacity to appreciate it, in order to assume the risk.—*Id.*

A minor who for two years had been employed about a merry-go-round, when ordered to close the doors after the lights were out, held not entitled to be warned not to stumble upon stobs driven into ground between doors.—*Id.*

☞155(3) (Mo.) It is not the duty of a railroad company to notify section men that any certain trains are expected to pass over the road, but it is their duty to be on the lookout and keep out of the way.—*Woods v. St. Louis & S. F. R. Co.*, 187 S. W. 11.

☞158 (Tex.Civ.App.) If a minor servant understands the risk and appreciates the danger, the master's failure to warn is not the proximate cause of his injury.—*Dallas Fair Park Amusement Ass'n v. Barrentine*, 187 S. W. 710.

(E) Fellow Servants.

☞201(3) (Mo.App.) Where a servant's injury by the explosion of an asphalt boiler was proximately due to his master's failure to provide a safety valve, recovery is not barred because a fellow servant, by negligently overheating the boiler, contributed to the injury.—*Amick v. Kansas City*, 187 S. W. 582.

(F) Risks Assumed by Servant.

☞203(1) (Tex.Civ.App.) The defense of assumption of risk implies negligence on the part of the master, and, if there has been no negligence on his part, the defense of assumed risk has no place in the case.—*Magnolia Petroleum Co. v. Ray*, 187 S. W. 1085.

☞204(1) (Tex. Civ. App.) Under Employers' Liability Act, § 1, par. 3, assumed risk as a defense is eliminated in cases to which the act applies.—*Dallas Fair Park Amusement Ass'n v. Barrentine*, 187 S. W. 710.

☞208(1) (Mo.App.) A servant does not assume the risk of injury caused by the master's negligence in failing to exercise reasonable care to furnish him a reasonably safe place to work.—*Winkleblack v. Great Western Mfg. Co.*, 187 S. W. 95.

☞217(1) (Tex.Civ.App.) An employé does not assume the negligence of the master unless he knows or should have known thereof.—*Texas Glass & Paint Co. v. Reese*, 187 S. W. 721.

☞226(1) (Mo.) A servant does not assume the risk of his master's negligence.—*Young v. Lusk*, 187 S. W. 849.

(G) Contributory Negligence of Servant.

☞238(6) (Mo.App.) Where the master ordered the servant to drive from the top of a load of shingles, and the servant voluntarily stood on the load, when he was free to sit or stand, his injury, resulting from his standing position, is referable to his own act.—*Gilbert v. Hilliard*, 187 S. W. 594.

☞240(1) (Mo.) A railroad section man held negligent in not leaving a hand car seasonably on approach of a train, and in going in the direction the train would throw the hand car.—*Woods v. St. Louis & S. F. R. Co.*, 187 S. W. 11.

(H) Actions.

☞258(13) (Tex.Civ.App.) Petition in car inspector's action for injury from explosion of tank car held not to show any unusual facts or circumstances exempting him from rule as to servant employed to repair defective machinery or equipment.—*Magnolia Petroleum Co. v. Ray*, 187 S. W. 1085.

☞258(17) (Mo.App.) Defendant's actual or constructive knowledge of the defect should be alleged and shown to have existed for a sufficient length of time to permit a removal in the use of reasonable care.—*Shimmin v. C. & S. Mining Co.*, 187 S. W. 76.

☞259(2) (Mo.App.) In a servant's action for injuries caused by the explosion of dynamite given to plaintiff by a fellow servant, allegation in petition that the fellow servant was negligent in handing the dynamite to plaintiff after lighting the fuse or placing it in contact with a fuse that could have lighted it without telling plaintiff, held a sufficient allegation of negligence.—*Puckett v. Haynes*, 187 S. W. 91.

☞264(4) (Mo.App.) In an action for injury from defects in floor of dock or warehouse, into which the wheel of a truck fell, held, that plaintiff under the specification of its location, might show that it was just over the line in the dock platform.—*Winkleblack v. Great Western Mfg. Co.*, 187 S. W. 95.

☞265(3) (Mo.App.) A servant cannot recover where the evidence merely shows that his injury was caused by any one of two or more causes, for only one of which his master is liable.—*Amick v. Kansas City*, 187 S. W. 582.

☞265(9) (Ark.) Under federal Employers' Liability Act, a railway company is not chargeable with negligence by mere proof of defect in appliances, but actual or constructive notice must be shown.—*St. Louis, I. M. & S. R. Co. v. Ingram*, 187 S. W. 452.

☞276(4) (Mo.App.) Evidence held to sustain a verdict that plaintiff's injury by the explosion of an asphalt boiler was proximately due to his master's failure to provide a safety valve.—*Amick v. Kansas City*, 187 S. W. 582.

☞278(4) (Ark.) In railroad fireman's action for injury, where it was claimed that the hole in the floor of the tender for the coupling pin was too large, evidence that it was about customary size of that on other railroads was evidence of what a reasonably prudent employer would ordinarily do, but not conclusive evidence thereof.—*St. Louis & S. F. R. Co. v. Keathley*, 187 S. W. 819.

☞278(18) (Mo.) Evidence held to sustain a verdict that defendant railroad company was negligent in failing to warn an air inspector before shunting cars against the standing car on which he was working.—*Young v. Lusk*, 187 S. W. 849.

☞278(19) (Ark.) Under federal Employers' Liability Act evidence that a railroad rule requiring trains not to exceed ten miles per hour through yards had been violated by employées held not sufficient to show abrogation or modification of rules, since such rules could be abrogated or modified only by acquiescence in the habitual violation of such rules, of which there was no evidence.—*St. Louis, I. M. & S. R. Co. v. Stewart*, 187 S. W. 920.

☞278(19) (Mo.) Evidence held to sustain a verdict that defendant railroad company waived a rule requiring air inspectors to set out a blue flag before going between standing cars by a superior's direction not to use the flag and general nonobservance of the rule.—*Young v. Lusk*, 187 S. W. 849.

—279(6) (Mo.App.) In a servant's action for injuries caused by the explosion of dynamite given to plaintiff by a fellow servant after attempting to light fuse with a lantern which was blown out by wind, evidence held sufficient to sustain a finding that fellow servant was negligent.—Puckett v. Haynes, 187 S. W. 91.

—280 (Tex.Civ.App.) Relative to a night watchman assuming the negligence of the master, held, his going through a doorway several times before hitting his head on a projecting plank was not conclusive that he knew of it.—Texas Glass & Paint Co. v. Reese, 187 S. W. 721.

—281(9) (Ark.) In action for personal injuries under federal Employers' Liability Act, evidence of the acquiescence of yardmaster in the habitual violation of a rule, requiring trains to run through yards under control, held to warrant a finding that such rule had been modified, so that engineer's violation thereof would not be contributory negligence.—St. Louis, I. M. & S. R. Co. v. Stewart, 186 S. W. 920.

—284(1) (Mo.) Evidence held sufficient to go to the jury on the issue whether defendant railroad company and an injured employé were engaged in interstate commerce, within federal Employers' Liability Act, when the accident occurred.—Young v. Lusk, 187 S. W. 849.

—285(5) (Mo.App.) In a servant's action for injuries caused by explosion of dynamite given to plaintiff by a fellow servant after attempting to light the fuse with a lantern which was blown out by wind, whether the fuse was lighted when handed to plaintiff or exploded without apparent cause held for the jury.—Puckett v. Haynes, 187 S. W. 91.

—285(7) (Mo.) In an action under the federal Employers' Liability Act, the issue of fact as to whether a crack in the flange of a car wheel was an old chilled crack or not held a jury question under conflicting evidence.—Blankenbaker v. St. Louis & S. F. R. Co., 187 S. W. 840.

—286(13) (Tex.Civ.App.) Question, whether injury to car inspector from explosion of tank car ought to have been anticipated by defendant road as the probable result of allowing defective car to remain in its yard, held for the jury.—Magnolia Petroleum Co. v. Ray, 187 S. W. 1085.

—286(19) (Mo.App.) In action for injury from ice falling from top of mine shaft, held that whether it was negligent for defendant to defer removing the apparently dangerous ice was for the jury.—Shimmin v. C. & S. Mining Co., 187 S. W. 76.

—286(24) (Ark.) In action under federal Employers' Liability Act, evidence that plaintiff was injured by breaking of an unloading skid, an old bridge timber long exposed, the question whether defendant was negligent in directing its use without inspection was for jury.—St. Louis, I. M. & S. R. Co. v. Ingram, 187 S. W. 452.

—289(1) (Tex.Civ.App.) If a servant assumes the risk, the question of contributory negligence does not arise.—Dallas Fair Park Amusement Ass'n v. Barrentine, 187 S. W. 710.

—289(15) (Mo.App.) In a teamster's action for personal injury when the wheel of a truck fell into a hole in the floor, evidence held to make his contributory negligence a question for the jury.—Winkleblack v. Great Western Mfg. Co., 187 S. W. 96.

—289(19) (Tex.Civ.App.) In action by line-man of telephone company against that company and an electric light company for injury from live wire caused by negligence of both companies, evidence as to his warnings by appearance of wire and shouts of others before picking up the wire held to make question of his contributory negligence for the jury.—Brazos

Valley Telegraph & Telephone Co. v. Wilson, 187 S. W. 234.

—289(29) (Ark.) In an action for personal injuries under federal Employers' Liability Act, evidence held to warrant submission of question whether plaintiff, an engineer, was negligent in not having his engine under control, and whether he exceeded the special limit fixed by railroad rules.—St. Louis, I. M. & S. R. Co. v. Stewart, 187 S. W. 920.

—293(20) (Ark.) In an action for personal injuries under the federal Employers' Liability Act, an instruction, properly stating the law as to abrogation of railroad rules by custom, held improper as misleading the jury by not informing them as to what extent violations would constitute abrogation of such rules.—St. Louis, I. M. & S. R. Co. v. Stewart, 187 S. W. 920.

—296(13) (Ark.) An instruction that plaintiff, an engineer could not recover under the federal Employers' Liability Act if he violated the rule requiring his train not to exceed ten miles per hour through yard limits held improperly refused.—St. Louis, I. M. & S. R. Co. v. Stewart, 187 S. W. 920.

In an action for personal injuries under the federal Employers' Liability Act, an instruction, properly charging jury that plaintiff's violation of railroad rules was negligence, and requiring the jury to determine whether the rules were in force or had been abrogated or modified by custom, held improperly refused.—Id.

—297(1) (Tex.Civ.App.) Findings on special issues held a sufficient finding of negligence, as to safe place to work, in leaving a plank projecting into a doorway, through which a night watchman had to go.—Texas Glass & Paint Co. v. Reese, 187 S. W. 721.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

—302(2) (Tex.Civ.App.) Where defendant's chauffeur, after leaving defendant's wife and children at a circus, drove away in disobedience of specific instructions, and ran down plaintiff, held, that defendant was not liable, since the chauffeur was acting outside the scope of his employment.—Hill v. Staats, 187 S. W. 1039.

(C) Actions.

—329 (Mo.App.) One who seeks to avoid liability for a tort on the ground that it was the act of an independent contractor has the burden of proving the relationship, as well as of pleading it.—Knoche v. Pratt, 187 S. W. 578.

—330(1) (Mo.App.) Where contractor excavated on defendant's lot and into plaintiff's lot and caused her building to collapse, facts held to raise the presumption that the work was done by defendant's servants, and to charge him for damages resulting.—Knoche v. Pratt, 187 S. W. 578.

MATERIALITY.

See Criminal Law, —940; Insurance, —255.

MAYOR.

See Municipal Corporations, —168.

MEASURE OF DAMAGES.

See Damages, —95-124.

MECHANICS' LIENS.

See Limitation of Actions, —127; Railroads, —159, 161.

III. PROCEEDINGS TO PERFECT.

—157(5) (Mo.App.) Inclusion of nonlienable item in account of 261 lienable items does not

necessarily invalidate the whole account.—*Craig v. McNichols Furniture Co.*, 187 S. W. 793.

VII. ENFORCEMENT.

⌘291(7) (Mo.App.) Under Rev. St. 1909, § 8221, a mortgagee of lots, not made a party to a subsequent mechanic's lien proceeding, was not bound by the judgment establishing the lien and by an execution sale to the lienor.—*Farmington Equitable Building & Loan Ass'n v. Miners' Lumber Co.*, 187 S. W. 555.

MEMBERS.

See Exchanges, ⌘9.

MERGER.

See Mortgages, ⌘295.

MINES AND MINERALS.

See Chattel Mortgages, ⌘138, 157; Master and Servant, ⌘286.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

(B) Mining Partnerships and Companies.

⌘97 (Tex.Civ.App.) Persons contributing labor, material, and cash to driving an oil well under agreement to incorporate and issue stock in proportion to their contributions, if the well comes in, otherwise each to lose what he puts in, are partners.—*Roberts v. McKinney*, 187 S. W. 976.

(C) Rights and Liabilities Incident to Working.

⌘112(3) (Tex. Civ. App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5644, and Rev. St. 1911, art. 5502, subds. 1, 6, and Const. art. 1, § 3, held that laborers drilling an oil well with the machinery of an oil company had no lien upon such machinery.—*Barton v. Wichita River Oil Co.*, 187 S. W. 1043.

MINORITY STOCKHOLDERS.

See Corporations, ⌘55, 174.

MINORS.

See Infants.

MISJOINDER.

See Pleading, ⌘369; Process, ⌘153.

MISLEADING INSTRUCTIONS.

See Criminal Law, ⌘809.

MISREPRESENTATION.

See Fraud.

MISTAKE.

See Election of Remedies, ⌘11; Judgment, ⌘315.

MIXED TRAINS.

See Carriers, ⌘280, 298.

MODIFICATION.

See Divorce, ⌘303.

MONEY PAID.

See Sales, ⌘396.

MORTGAGES.

See Chattel Mortgages; Evidence, ⌘445; Injunction, ⌘123; Insurance, ⌘282, 323; Limitation of Actions, ⌘168; Trespass to Try Title, ⌘6.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

⌘24 (Mo.) Heirs of owner of land who borrowed from bank and gave note, secured by deed of trust to its president, with knowledge of his official character, held unable to recover the land from such trustee's grantee on foreclosure.—*House v. Clarke*, 187 S. W. 57.

⌘32(3) (Tex.Civ.App.) A judgment creditor's attorney purchased land on an execution sale which he conveyed to a grantee, who paid the judgment debts with the understanding that such grantee would convey to the judgment debtor when reimbursed for his outlay. Held, the attorney's deed was in effect a mortgage.—*Alexander v. Conley*, 187 S. W. 254.

⌘39 (Tex.Civ.App.) Whether deed was given as a mortgage held on the evidence to be a jury question.—*Alexander v. Conley*, 187 S. W. 254.

III. CONSTRUCTION AND OPERATION.

⌘114 (Ark.) Where mortgage covers only indebtedness to bank, foreclosure cannot be had for commissions due the cashier of such bank as confidential agent of mortgagor.—*Evans v. Williams*, 187 S. W. 446.

(C) Property Mortgaged, and Estates of Parties Therein.

⌘132 (Mo.App.) A conveyance of lots by deed of trust and a sale thereunder carried the improvements made subsequent to the conveyance, where nothing excepting them appeared.—*Farmington Equitable Building & Loan Ass'n v. Miners' Lumber Co.*, 187 S. W. 555.

⌘137 (Mo.App.) A mortgage, being a mere lien on the land, does not affect the quality of the fee-simple estate of the mortgagor, and until the mortgagee enters, the mortgagor is the owner in fee simple.—*Terminal Ice & Power Co. v. American Fire Ins. Co.*, 187 S. W. 564; *Same v. Home Ins. Co.*, Id. 568; *Same v. Lumbermen's Ins. Co.*, Id.; *Same v. Security Ins. Co.*, Id.; *Same v. Commercial Fire Ins. Co.*, Id. 569; *Same v. Stuyvesant Ins. Co.*, Id.

(D) Lien and Priority.

⌘171(1) (Ark.) By Kirby's Dig. § 5306, all mortgages, whether on realty or personalty, are a lien on the property as against third parties from the time filed for record.—*Murray Co. v. Satterfield*, 187 S. W. 927.

IV. RIGHTS AND LIABILITIES OF PARTIES.

⌘199(3) (Ark.) Mortgagee in possession was chargeable with rents and profits in excess of mortgage debt.—*Morgan v. Mahony*, 187 S. W. 633.

⌘202 (Ark.) Mortgagee in possession was entitled to costs of ordinary repairs.—*Morgan v. Mahony*, 187 S. W. 633.

⌘203 (Ark.) Mortgagee in possession could not recover for permanent improvements.—*Morgan v. Mahony*, 187 S. W. 633.

⌘211 (Ark.) A mortgagee in possession is not entitled to a lien on the land for amount due him by the mortgagor for the board of the mortgagor's sons during such possession.—*Morgan v. Mahony*, 187 S. W. 633.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

⌘278 (Ark.) Where a bank purchased the equities in a portion of mortgaged lands in consideration of release of its judgment against grantors, mortgage was not extinguished, and upon purchase of mortgage bank had legal right to treat mortgage lien as superior to its own equities and enforce it against all of mortgaged lands.—*Huffman v. Fudge*, 187 S. W. 644.

⚡280(3) (Mo.App.) A covenant to assume an incumbrance which was fraudulently inserted and without consideration is not binding on the grantee, though he retained the deed after discovery and sold it; the holder of the incumbrance not being misled.—*Johnson v. Maier*, 187 S. W. 143.

A grantee who took a deed containing a covenant to assume payment of an incumbrance held not liable to the holder of the incumbrance on the ground that he should have rescinded.—*Id.*

⚡283(1) (Mo.App.) A purchaser of mortgaged land, who assumes the mortgage becomes the principal debtor, and the vendor a surety only, and the mortgagee must so treat them after notice of the arrangement.—*Hildrith v. Walker*, 187 S. W. 608.

⚡292(3) (Mo.App.) The vendor of mortgaged land cannot sue his purchaser for failure to pay a mortgage assumed as part of the purchase price until the vendor himself has paid it.—*Hildrith v. Walker*, 187 S. W. 608.

⚡295(4) (Tex.Civ.App.) Where a mortgagee took a deed of the mortgaged land in satisfaction of the debt and in ignorance of a vendor's lien upon the land, made after the mortgage, the mortgage lien did not merge with the equity of redemption, but remained, superior to the vendor's lien.—*Tankersley v. Jackson*, 187 S. W. 985.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

⚡298(2). (Ark.) A junior mortgagee is not protected by mere payment to the trustee of deed of trust securing a prior mortgage and cancellation of such trust deed by the trustee, as against a holder of one of the prior mortgage notes.—*Coffin v. Planters' Cotton Co.*, 187 S. W. 309.

⚡309(2) (Ark.) Where a mortgagee, with full means of knowing the facts and legal effect of an unauthorized discharge by trustee of the trust deed securing her debt, accepted as security a subordinate lien, she was held to have ratified the discharge and estopped to assert priority of her note.—*Coffin v. Planters' Cotton Co.*, 187 S. W. 309.

X. FORECLOSURE BY ACTION.

(B) Right to Foreclose and Defenses.

⚡413 (Ark.) Where one partner sued to foreclose a deed of trust to satisfy his pro rata part of the indebtedness to the partnership, but did not show that he had acquired the entire interest of the firm in the deed, etc., the suit will be enjoined.—*Cannon v. Harmon*, 187 S. W. 164.

⚡415(1) (Mo.) Fact that grantor in deed of trust given to secure his note to a bank was in poor health, left the state soon after the execution of the deed, and died in California thereafter, imposed no duty on the bank or its officers to extend the time or wait longer to foreclose.—*House v. Clarke*, 187 S. W. 57.

(D) Judgment or Decree and Execution.

⚡497(1) (Ark.) A judgment in a suit to foreclose a mortgage against the widow and heirs of deceased mortgagor, in which no plea of limitations was interposed, being regular on its face and showing jurisdiction, is not subject to collateral attack by minor heirs.—*Evans v. Williams*, 187 S. W. 446.

(J) Sale.

⚡502 (Ark.) An application to renew the order of sale made in mortgage foreclosure proceedings does not require notice to the minor heirs under Kirby's Dig. § 6248, and section 4431, subd. 8, since it is not an action to divest them of any interest in real property or require a conveyance from them.—*Evans v. Williams*, 187 S. W. 446.

⚡513 (Tex.Civ.App.) In suit to restrain foreclosure under trust deed and for judgment on mortgage note and foreclosure of mortgage and vendor's lien notes, held that plaintiff was entitled to have 199 acres out of 413-acre tract sold first, and proceeds applied to payment of vendor's lien notes prior to first mortgage note.—*Crawford v. Spruill*, 187 S. W. 361.

⚡516 (Mo.) Cashier of bank which loaned landowner money, latter giving his deed of trust, naming bank president as trustee, as security, had right as an individual on foreclosure to bid on property at trustee's sale and to buy it in if he were highest and best bidder.—*House v. Clarke*, 187 S. W. 57.

⚡529(6) (Mo.) Mere inadequacy of consideration, unless consideration is so insignificant as to shock the moral sense, is not sufficient to warrant setting aside a foreclosure sale, so that sale on foreclosure of a deed of trust of land worth \$5,000 for \$1,800 will not be set aside.—*House v. Clarke*, 187 S. W. 57.

⚡529(8) (Mo.) Under Rev. St. 1909, §§ 2829, 2830, where neither grantor in deed of trust nor his heirs gave notice or security, and failed to tender into court the debt, interest, etc., to mortgagee bank cashier of which purchased on foreclosure for it, they were not entitled to recover the land from the cashier.—*House v. Clarke*, 187 S. W. 57.

(O) Operation and Effect.

⚡589 (Mo.App.) When a mortgage is foreclosed whatever rights may have been acquired in respect of it under a judgment establishing a mechanic's lien is gone.—*Farmington Equitable Building & Loan Ass'n v. Miners' Lumber Co.*, 187 S. W. 555.

MOTIONS.

See Continuance; Criminal Law, ⚡603; New Trial, ⚡143; Pleading, ⚡369.

MOTIVE.

See Homicide, ⚡166.

MUNICIPAL CORPORATIONS.

See Counties; Criminal Law, ⚡304; Licenses, ⚡5½; Nuisance, ⚡87, 75; Schools and School Districts; Statutes, ⚡90; Street Railroads; Trial, ⚡191.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

⚡57 (Ark.) Municipalities can exercise only such powers as are delegated to them by the Legislature, expressly or by necessary implication.—*Laprairie v. City of Hot Springs*, 187 S. W. 442.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

⚡111(1) (Mo.App.) An ordinance, purporting to establish a new street grade, not showing whether the elevations given were above or below the directrix, was without meaning and void.—*McGuire v. Wilson*, 187 S. W. 612.

V. OFFICERS, AGENTS, AND EMPLOYEES.

(A) Municipal Officers in General.

⚡126 (Tex.Civ.App.) Under San Antonio City Charter, § 16, par. 3, providing for creation by commission of "offices and employments," reference is not had to elective and appointive offices already enumerated and limited in the charter, but the words "offices or employment" are necessarily synonymous.—*Brown v. Uhr*, 187 S. W. 381.

⚡131 (Tex.Civ.App.) In San Antonio City Charter, § 16, pars. 1 and 2, touching appoint-

tive officers, the words "unless otherwise provided" refer to other provisions made in the charter and not to ordinances that may be passed.—Brown v. Uhr, 187 S. W. 381.

⇒168 (Tex.Civ.App.) Under City Charter of San Antonio, the provision giving mayor "all powers and duties not distributed or assigned to another department," being a general provision, will not affect a special provision, section 16, enumerating and defining the nominating powers of mayor.—Brown v. Uhr, 187 S. W. 381.

(B) Municipal Departments and Officers Thereof.

⇒180(3) (Tex.Civ.App.) An ordinance providing that the police force of San Antonio shall consist of a chief marshal, assistant marshals, and patrolmen, although not establishing a police force, created the office of marshal, because specially named.—Uhr v. Lancaster, 187 S. W. 379.

⇒183(1) (Tex.Civ.App.) Under City Charter of San Antonio, as amended in 1915, enumerating elective and appointive officers of city and providing that officers and employes shall hold office for two years, the city marshal not being enumerated, although an officer contemplated by Const. art. 16, § 17, providing that officers of state shall continue to perform duties until successors are duly qualified, is an employe, and not officer appointed by mayor.—Uhr v. Lancaster, 187 S. W. 379.

⇒183(1) (Tex.Civ.App.) Under City Charter of San Antonio, as amended in 1915, enumerating appointive and elective officers of the city and providing that officers and employes shall hold office for two years, the city marshal, not being enumerated as an officer, is an "employe" as the word is used in the charter, and not an appointive officer appointed by the mayor.—Brown v. Uhr, 187 S. W. 381.

⇒183(2) (Tex.Civ.App.) Under San Antonio City Charter, amendment 1915, § 16, par. 2, where plaintiff admits that defendant had been appointed in 1913 in accordance with an ordinance creating position of marshal, and does not allege that a successor has been appointed and qualified, an injunction restraining defendant from exercising the duties of the position will not be allowed.—Uhr v. Lancaster, 187 S. W. 379.

IX. PUBLIC IMPROVEMENTS.

(E) Assessments for Benefits, and Special Taxes.

⇒407(1) (Ark.) Acts 1915, p. 831, confirming officers of an incorporated town which the Legislature had attempted to make a city under an unconstitutional special act, as to acts of council in establishing a water supply district and in levying assessments, did not violate Const. art. 19, § 27, relating to special assessments.—Cotten v. Hughes, 187 S. W. 905.

⇒439 (Mo.) A cemetery being drained by a sewer, preventing noxious substances therefrom being disseminated to other property, is benefited, as regards assessment for sewer construction.—Mullins v. Mt. St. Mary's Cemetery Ass'n, 187 S. W. 1169.

(F) Enforcement of Assessments and Special Taxes.

⇒568(1) (Mo.) There is a presumption of reasonableness of an ordinance including a cemetery with other property in a sewer district.—Mullins v. Mt. St. Mary's Cemetery Ass'n, 187 S. W. 1169.

⇒575 (Ark.) Under Kirby's Dig. §§ 5691-5696, touching actions against delinquent property by improvement districts, where plaintiffs' property was advertised for sale "owner unknown," and at the public sale was bid in by an attorney for improvement district commission, the sale was invalid.—Cabell v. Board of Improvement of Improvement Dist. No. 10 of Arkansas, 187 S. W. 666.

⇒578 (Ark.) Where plaintiffs' land was advertised for sale as "owner unknown" and sold without their knowledge in a proceeding to collect delinquent assessments, the sale may not be set aside for fraud, in that the owner actually was known at time of sale.—Cabell v. Board of Improvement of Improvement Dist. No. 10 of Texarkana, 187 S. W. 666.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

⇒680, 681(1) (Tex. Civ. App.) Municipalities may not, under grant of exclusive control of streets under Vernon's Sayles' Ann. Civ. St. 1914, art. 854, legislate on every phase of manner and means of business permitted use of the streets.—City of Terrell v. Terrell Electric Light Co., 187 S. W. 906.

⇒682(4) (Tex.Civ.App.) If municipality, although without power to do so, annexes a condition to a grant to enter upon its streets, grantee, voluntarily accepting the grant, is bound by the condition.—City of Terrell v. Terrell Electric Light Co., 187 S. W. 906.

⇒703(1) (Mo.) A pedestrian has a right to cross a street in the middle of a block.—Meenach v. Crawford, 187 S. W. 879.

⇒705(1) (Mo.) Under Laws 1911, p. 327, § 8, subd. 2, and at common law, the driver of a motor car must slow down or stop upon approaching a street car discharging passengers and must slow down and signal upon approaching a pedestrian.—Meenach v. Crawford, 187 S. W. 879.

Laws 1911, p. 327, § 8, subd. 2, requiring motor car drivers to slow down or stop upon approaching a street car discharging passengers, is for the protection, not only of such passengers, but of all those who may be near the street car.—Id.

⇒705(1) (Mo.App.) The "ordinary care" which the driver of a wagon must use to turn a corner as near the right-hand curb as possible, as required by city ordinance, is such care as a reasonably prudent man would have used under the circumstances, while "negligence" is failure to use such care.—Burns v. Polar Wave Ice & Fuel Co., 187 S. W. 145.

⇒705(2) (Mo.App.) A pedestrian has the same right on a street as a driver of a vehicle, and is no more bound to watch for the approach of motor cars than motorists are bound to watch for him.—Carradine v. Ford, 187 S. W. 285.

⇒705(4) (Mo.App.) Where plaintiffs' wagon, having right to be standing on far side of street, was struck by defendant's consequently upon defendant's servant's violation of section of an ordinance requiring wagons, in turning corners, to keep as near as possible to the right-hand curb, defendant was liable, whether or not its driver knew plaintiffs' wagon was standing in the street.—Burns v. Polar Wave Ice & Fuel Co., 187 S. W. 145.

⇒705(4) (Mo.App.) Where municipal ordinance fixed the speed at which motor vehicles might be operated, the operation of a motor vehicle at a speed in excess of that authorized by the ordinance is negligence per se.—Carradine v. Ford, 187 S. W. 285.

⇒705(10) (Mo.App.) Slight negligence by one run down by an electric coupé will not, where not efficient cause of injury, bar recovery; the driver of the coupé being guilty of negligent failure to follow Laws 1911, p. 330, § 9, requiring the highest degree of care.—Carradine v. Ford, 187 S. W. 285.

A pedestrian about to cross a street is not, where he sees a motor car approaching, bound to continue his observation until he reaches a place of safety.—Id.

Where a pedestrian about to cross a street sees a motor car approaching, but the car is at such a distance that under ordinary circum-

stances he could safely cross ahead of it, he is not guilty of negligence in starting across the street in front of the car.—*Id.*

⇒706(1) (Mo.App.) Where petition of plaintiff, who was run down by motor car, alleged defendants' violations not only of municipal ordinances regulating motor vehicles, but of statutes applicable, petition is sufficient to state a cause of action though ordinances were invalid.—*Carradine v. Ford*, 187 S. W. 285.

⇒706(4) (Mo.) In determining whether defendant was exercising due care when he ran down plaintiff's intestate on the street with his automobile, the fact that automobiles are dangerous instrumentalities must be considered.—*Meenach v. Crawford*, 187 S. W. 879.

⇒706(4) (Mo.App.) In an action for injuries in collision between wagons, sections 2 and 5 of Ordinance 25104, which are parts of sections 1327, 1330, Rev. Code St. Louis 1912, requiring driver to keep to right, *held* admissible in evidence.—*Burns v. Polar Wave Ice & Fuel Co.*, 187 S. W. 145.

⇒706(6) (Mo.) Where plaintiff's intestate passed in front of a standing street car, but was killed by defendant's automobile before reaching the curb, *held*, that defendant's negligence was a jury question in view of Laws 1911, p. 327, § 8, subd. 2, and page 330, § 12, subd. 9, requiring automobile drivers to slow down, signal, and exercise the highest degree of care in such situations.—*Meenach v. Crawford*, 187 S. W. 879.

Where plaintiff's intestate passed in front of a standing street car and could be seen from defendant's automobile for about 60 feet before it struck him near the curb, *held*, that defendant's negligence was a jury question.—*Id.*

⇒706(7) (Mo.App.) In an action for injuries received in a collision with defendant's electric coupé, the question of plaintiff's contributory negligence *held* under the evidence for the jury.—*Carradine v. Ford*, 187 S. W. 285.

⇒706(8) (Mo.App.) In action for injuries in collision between wagons, instruction on liability for injury through plaintiff's wagon's having been dragged after the collision, *held* justified by evidence.—*Burns v. Polar Wave Ice & Fuel Co.*, 187 S. W. 145.

XII. TORTS.

(C) Defects or Obstructions in Streets and Other Public Ways.

⇒759(1) (Mo.App.) One injured on a portion of a street which a city has not invited him to use cannot recover from the city.—*Jackson v. City of Sedalia*, 187 S. W. 127.

⇒759(2) (Mo.App.) A city in accepting a street acts in its governmental or legislative capacity and is not liable for neglect of duty until it has acted in its ministerial capacity by giving the street to public for use, and it also is a governmental matter for the city to say to what extent it will offer a street to the public for use.—*Jackson v. City of Sedalia*, 187 S. W. 127.

⇒759(3) (Mo.App.) Where a space was left in each side of a well-defined graded roadway, it being suitable for travel by pedestrians and so used, *held*, that there was a sufficient invitation for its use as a sidewalk to render city liable for defects negligently allowed to exist.—*Jackson v. City of Sedalia*, 187 S. W. 127.

⇒759(5) (Mo.) Where property owner had carelessly piled I-beams on a portion of street between property line and sidewalk, the city is not relieved of liability for injuries to plaintiff from a falling I-beam, because such portion of the street was unimproved.—*Miller v. Missouri Wrecking Co.*, 187 S. W. 45.

⇒762(2) (Mo.) The rule relieving the city of liability for injuries sustained from a temporary use of the street in loading and unloading ma-

terial does not apply to injuries received through an I-beam falling from a pile which had remained for several weeks on a street between the sidewalk and the property line.—*Miller v. Missouri Wrecking Co.*, 187 S. W. 45.

⇒791(2) (Mo.) Where pile of I-beams remained on unimproved portion of paved street between sidewalk and property line for seven weeks, actual notice to city was unnecessary.—*Miller v. Missouri Wrecking Co.*, 187 S. W. 45.

⇒818(1) (Mo.App.) Although fact that a city has improved, or has sought to repair, the portion of a street where an injury occurs, is evidence that such portion has been given and opened to the public for use, an invitation to use it can be shown in other ways.—*Jackson v. City of Sedalia*, 187 S. W. 127.

⇒819(1) (Mo.) Evidence *held* sufficient to sustain a finding of negligence in permitting a loose, irregular, inclined pile of I-beams of irregular dimensions to remain on an unimproved portion of the street between the property line and the sidewalk.—*Miller v. Missouri Wrecking Co.*, 187 S. W. 45.

⇒821(2) (Mo.App.) In an action for personal injuries received from a fall over stakes set in a sidewalk, where evidence on both sides agrees upon facts which show that public had been invited to use strip as a sidewalk, question of invitation to public is no longer a contested issue.—*Jackson v. City of Sedalia*, 187 S. W. 127.

⇒821(16) (Mo.) Where a pile of I-beams remained on unimproved portion of paved street between the sidewalk and the property line for seven weeks, the question of constructive notice to the city was for the jury.—*Miller v. Missouri Wrecking Co.*, 187 S. W. 45.

⇒821(24) (Mo.App.) In an action for personal injuries received by falling over stakes which plaintiff knew were set in a sidewalk, but because of darkness she veered a few feet to one side of center of walk, plaintiff's care *held* for the jury.—*Jackson v. City of Sedalia*, 187 S. W. 127.

⇒822(1) (Mo.App.) In an action for personal injuries from falling over stakes in a sidewalk, court's refusal of instructions making the question of city's invitation to use strip as a sidewalk depend entirely on whether it had manifested that invitation by placing or maintaining a prepared or constructed walk was proper.—*Jackson v. City of Sedalia*, 187 S. W. 127.

(D) Defects or Obstructions in Sewers, Drains, and Water Courses.

⇒835 (Mo.App.) The maintenance of a sewer pipe under a street, which did not change the flow of surface water as much as an ordinary culvert, was not a violation of rights of owner of land flowed thereby.—*Cornet v. Meckel Realty & Investment Co.*, 187 S. W. 622.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

⇒870 (Mo.) Rev. St. 1909, § 7242, making the city holding a local option election defendant in a contest thereof, is not void as requiring it to expend public money for a private purpose; the only expenditure, if any, devolved on it being payment of costs.—*State ex rel. City of Monett v. Thurman*, 187 S. W. 1190.

(D) Taxes and Other Revenue, and Application Thereof.

⇒979 (Ark.) The collection of an illegal tax imposed by ordinance may be enjoined.—*Laprairie v. City of Hot Springs*, 187 S. W. 442.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, ¶693-819.

MUTUALITY.

See Contracts, ¶10, 57.

NAMES.

See Corporations, ¶47, 453; Partnership, ¶197; Process, ¶153.

NAVIGABLE WATERS.

See Ferries; Waters and Water Courses.

NECESSITY.

See Sunday.

NEGLIGENCE.

See Banks and Banking, ¶175; Carriers, ¶108-136, 177, 217, 227-230, 280-417; Death, ¶49-99; Electricity, ¶14-19; Estoppel, ¶96; Explosives; Highways, ¶172-184; Homicide, ¶74, 125; Master and Servant; Municipal Corporations, ¶705-822; Pleading, ¶8; Railroads, ¶259-485; Street Railroads; Telegraphs and Telephones; Trover and Conversion, ¶22.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.**(A) Personal Conduct in General.**

¶4 (Tex.Civ.App.) To incur liability for negligence, it is sufficient if it reasonably appears that an ordinarily prudent person could have foreseen that a similar injury might arise as a probable result of such negligence.—Missouri, K. & T. Ry. Co. of Texas v. Cardwell, 187 S. W. 1073.

(C) Condition and Use of Land, Buildings, and Other Structures.

¶32(1) (Tex.Civ.App.) The owner of premises who invites others thereon or knowingly permits them to use or remain thereon must exercise reasonable care to so use and maintain such premises as to prevent injuries to such licensee or invitee.—Missouri, K. & T. Ry. Co. of Texas v. Cardwell, 187 S. W. 1073.

II. PROXIMATE CAUSE OF INJURY.

¶61(1) (Tex.Civ.App.) The proximate cause of an injury in a legal sense is not necessarily the immediate or sole cause.—Missouri, K. & T. Ry. Co. of Texas v. Cardwell, 187 S. W. 1073.

¶62(1) (Tex.Civ.App.) If defendant's negligence be a concurring cause operating at the same time in producing the injury as an intervening cause, it may be the proximate cause if the injury or some like injury could have reasonably been foreseen as a consequence of such negligence.—Missouri, K. & T. Ry. Co. of Texas v. Cardwell, 187 S. W. 1073.

An injury will not be said to be proximately caused by an intervening agency other than defendant's negligence, unless such agency entirely supersedes the act of negligence and was in itself responsible for the injury and was of such character that it could not reasonably have been foreseen or anticipated.—Id.

¶62(1) (Tex.Civ.App.) Intervening agencies between an act or omission constituting negligence and an injury do not preclude a finding that negligence was proximate cause of the injury, if it can reasonably be said that injury was natural and proximate result of such negligence.—Magnolia Petroleum Co. v. Ray, 187 S. W. 1085.

III. CONTRIBUTORY NEGLIGENCE.**(A) Persons Injured in General.**

¶83 (Tex.Civ.App.) The "last clear chance" rule applies only where the operation of the injured person's negligence in getting into a position of peril has come to an end, and not when his contributory negligence continues to the time of the injury.—Southern Traction Co. v. Wilson, 187 S. W. 536.

(B) Children and Others Under Disability.

¶85(3) (Tex.Civ.App.) A child of very tender years may be presumed as matter of law not to have sufficient discretion to appreciate dangers obvious to one of maturer age; there is no such presumption as to a boy 14 years old.—Galveston, H. & H. R. Co. v. Anderson, 187 S. W. 491.

(C) Imputed Negligence.

¶93(1) (Tex.Civ.App.) Where plaintiff was injured at railroad crossing, while riding in automobile, negligence of his companion, who was engaged in joint enterprise with him, could not be imputed to plaintiff.—Kansas City, M. & O. Ry. Co. of Texas v. Durrett, 187 S. W. 427.

(D) Comparative Negligence.

¶101 (Ark.) The violation of rules limiting the speed of trains is negligence per se, which bars a recovery under federal Employers' Liability Act by an engineer injured as a consequence thereof, except as to such compensation as is allowed by the federal statute for the proportion attributable to the negligence of the railroad company.—St. Louis, I. M. & S. R. Co. v. Stewart, 187 S. W. 920.

IV. ACTIONS.**(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.**

¶103½ (Ark.) Where plaintiff was injured in Texas, her right of action is governed by the law of that state.—St. Louis Southwestern Ry. Co. v. Carmack, 187 S. W. 635.

¶119(7) (Mo.App.) Where plaintiff specifies in his petition, he must be held to his specification and cannot recover on proof of a different statement of facts, and, where the petition avers negligence generally and is followed by the averment of specific facts of the alleged negligence, plaintiff will be confined to a recovery upon the specific facts.—Winkleblack v. Great Western Mfg. Co., 187 S. W. 95.

¶119(7) (Tenn.) Plaintiff suing for injuries caused by negligence is under burden that his proof in substance shall correspond with averments of his pleadings.—Memphis St. Ry. Co. v. Cavell, 187 S. W. 179.

(B) Evidence.

¶121(1) (Mo.App.) The rule that one is liable when his negligence combines with act of God or vis major is applicable only when negligence is shown.—Sherwood v. St. Louis S. W. Ry. Co., 187 S. W. 260.

¶121(1) (Tenn.) Plaintiff suing for injuries caused by negligence has burden of showing by preponderance of evidence that the negligence was the cause of his injury, and that defendant was responsible for the negligence.—Memphis St. Ry. Co. v. Cavell, 187 S. W. 179.

¶121(2) (Tenn.) In general, mere proof that accident injurious to plaintiff has occurred does not justify verdict or judgment imposing liability therefor upon defendant.—Memphis St. Ry. Co. v. Cavell, 187 S. W. 179.

¶121(3) (Mo.App.) Ordinarily the presumption of negligence attending the falling of a building's cornice into the street on a practically windless evening would alone show negligence on the part of the owner of the building, under the rule of res ipsa loquitur, casting the burden on him to rebut the prima facie

showing.—*De Mun Estate Corp. v. Frankfort General Ins. Co.*, 187 S. W. 1124.

(C) **Trial, Judgment, and Review.**

§136(9) (Tex.Civ.App.) Negligence, whether of plaintiff or defendant, is generally a question of fact, and becomes a question of law only when the act done is in violation of law or when the facts are undisputed and admit of but one inference.—*Missouri, K. & T. Ry. Co. of Texas v. Cardwell*, 187 S. W. 1073.

To authorize a directed verdict on the issue of negligence, the evidence must be of such character that there is no room for ordinary minds to differ as to the conclusion to be drawn.—*Id.*

§136(25) (Tex.Civ.App.) The proximate cause of an injury is ordinarily a jury question.—*Missouri, K. & T. Ry. Co. of Texas v. Cardwell*, 187 S. W. 1073.

§141(12) (Mo.) In an action under the federal Employers' Liability Act, where the cause of negligence is attributable partly to the negligence of the carrier and partly to that of the injured employé, an instruction that plaintiff can recover only a diminished sum bearing the same relation to the full damages that the negligence of the carrier bears to the negligence attributable to both is proper.—*Blankenbaker v. St. Louis & S. F. R. Co.*, 187 S. W. 840.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEGROES.

See Railroads, §253.

NEWLY DISCOVERED EVIDENCE.

See Criminal Law, §940-942; New Trial, §102, 108.

NEWS AGENTS.

See Carriers, §234, 241, 307.

NEW TRIAL.

See Appeal and Error, §5, 110, 281-302, 502, 544, 854, 856, 978, 1178; Criminal Law, §917-942, 1097, 1124.

II. GROUNDS.

(A) Errors and Irregularities in General.

§26 (Tex.Civ.App.) Where appellant's counsel was present and made no objection to erroneous remarks of the court in retiring the jury after its request to be discharged, his objection to the error came too late in motion for new trial made a week later.—*Hunter v. Hunter*, 187 S. W. 1049.

(C) Rulings and Instructions at Trial.

§34 (Tex.Civ.App.) In action by insurance agent for bonus on business written, where defendant company had duplicate set of books of agency in its home office, refusal of postponement to enable company to further investigate agency's books was not ground for new trial.—*Reliance Life Ins. Co. v. Beaton*, 187 S. W. 743.

(D) Disqualification or Misconduct of or Affecting Jury.

§44(3) (Tex.Civ.App.) In action for breach of marriage promise, held that a juror's statement that he thought defendant was the man who had ruined another woman was not so prejudicial as to make the refusal of new trial an abuse of trial court's discretion.—*Kaker v. Parrish*, 187 S. W. 517.

Fact that jury discussed how much plaintiff would have to pay as lawyer's fees, etc., held not such misconduct as made the trial court's

refusal of a new trial an abuse of its discretion.—*Id.*

§52 (Tex.Civ.App.) A verdict by lot for an amount substantially the same as that awarded held not such misconduct as to make the refusal of a new trial on that ground an abuse of the trial court's discretion.—*Kaker v. Parrish*, 187 S. W. 517.

§56 (Tex.Civ.App.) That juror misstated he had never been represented by attorney for plaintiff was not ground for setting aside verdict for plaintiff or for granting new trial, in absence of some showing that defendant was injured by accepting the juror.—*Galveston Electric Co. v. Hanson*, 187 S. W. 533.

(F) Verdict or Findings Contrary to Law or Evidence.

§68 (Tex.Civ.App.) A verdict unsupported by evidence should be set aside on motion for new trial.—*Bender v. Bender*, 187 S. W. 735.

§75(4) (Mo.) Where damages awarded by verdict are grossly inadequate, it is the duty of the court to interfere, and new trial may be granted.—*Craton v. Huntzinger*, 187 S. W. 48.

(H) Newly Discovered Evidence.

§102(1) (Tex.Civ.App.) New trial will not be granted for newly discovered evidence except upon showing of good reason why the evidence was not discovered prior to trial and produced thereon.—*Brady v. Cope*, 187 S. W. 678.

§108(1) (Tex.Civ.App.) New trial will not be granted for newly discovered evidence, unless it is likely that the evidence would produce a different result upon a new trial.—*Brady v. Cope*, 187 S. W. 678.

§108(3) (Tex.Civ.App.) The trial court correctly denied a motion for new trial based upon an affidavit that the lever to a stump puller, for whose purchase price the note sued upon was given, was about 20 feet long, instead of 18 feet, as stated at the trial.—*Jenkins v. Morgan*, 187 S. W. 1091.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§143(2) (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2021, a litigant impeaching a verdict by the testimony of the jurors has the burden of showing, not only that the matters of which he complains amount to misconduct on the part of the jury, but also that they operated to his prejudice.—*Kaker v. Parrish*, 187 S. W. 517.

NOMINATION.

See Elections, §120-126.

NON OBSTANTE VEREDICTO.

See Judgment, §199.

NON-RESIDENTS.

See Attachment, §265.

NONSUIT.

See Dismissal and Nonsuit.

NOTARIES.

See Evidence, §83, 458.

NOTES.

See Bills and Notes.

NOTICE.

See Adjoining Landowners; Adverse Possession, §31; Appeal and Error, §420, 430;

Attorney and Client, *§*180; Bills and Notes, *§*342; Carriers, *§*159, 218; Chattel Mortgages, *§*150-155; Constitutional Law, *§*290; Fraudulent Conveyances, *§*159, 301; Guaranty, *§*7; Injunction, *§*143; Insurance, *§*310, 376, 549-558; Mortgages, *§*171; Municipal Corporations, *§*791, 821; Principal and Agent, *§*148, 166, 177; Statutes, *§*8½; Vendor and Purchaser, *§*232.

NOVATION.

*§*1 (Ark.) Novation is the substitution by mutual consent of one debtor for another, or a new debt for an old one, whereby the old debt is extinguished.—*Elkins v. Henry Vogt Mach. Co.*, 187 S. W. 663.

*§*11 (Ark.) Answer held to sufficiently plead defense of novation.—*Elkins v. Henry Vogt Mach. Co.*, 187 S. W. 663.

Defendants under their defense of novation may introduce any correspondence, transactions, conduct, or admissions of plaintiff or its authorized agent tending to support it.—*Id.*

*§*12 (Ark.) Defendant has the burden of proof on the defense of novation.—*Elkins v. Henry Vogt Mach. Co.*, 187 S. W. 663.

Novation need not be shown by express words to that effect, but may be implied from the facts and circumstances and the subsequent conduct of the parties.—*Id.*

*§*13 (Ark.) Evidence held sufficient to go to the jury on the question of novation.—*Elkins v. Henry Vogt Mach. Co.*, 187 S. W. 663.

NUISANCE.

See Intoxicating Liquors, *§*260, 279.

I. PRIVATE NUISANCES.

(C) Abatement and Injunction.

*§*19 (Mo.App.) Injunction against the use of premises in a noisy way by immoral parties, etc., is not precluded because the illegal sale of liquor is also present.—*State ex rel. Lashly v. Kirkwood Leisure Hours' Social and Pastime Club*, 187 S. W. 819.

II. PUBLIC NUISANCES.

(A) Nature of Injury, and Liability Therefor.

*§*62 (Mo.App.) Where the air is corrupted by noisome smells so as to substantially interfere with the ordinary comforts of human existence, or to materially diminish the value of another's property, such smells constitute a nuisance.—*Swanson v. Bradshaw*, 187 S. W. 268.

*§*67 (Mo.App.) The fact that defendant was using an approved method and was disposing of garbage in a careful manner would not justify his interference with the reasonable and comfortable enjoyment of property in the vicinity, or the causing of material injury thereto.—*Swanson v. Bradshaw*, 187 S. W. 268.

(B) Rights and Remedies of Private Persons.

*§*75 (Mo.App.) A decree perpetually enjoining maintenance of a nuisance must be understood, interpreted, and limited with reference to the subject-matter of the litigation and the object to be attained.—*Swanson v. Bradshaw*, 187 S. W. 268.

Evidence in a suit to enjoin the maintenance of a nuisance, consisting in the use of land for disposing of the garbage and dead animals collected from a city, held to sustain a perpetual injunction.—*Id.*

OBJECTIONS.

See Appeal and Error, *§*193-236, 499; Criminal Law, *§*695, 698, 841, 1028-1038; New Trial, *§*26; Parties, *§*84-96; Trial, *§*76-85.

OBLIGATION OF CONTRACTS.

See Constitutional Law, *§*165, 175.

OBSTRUCTIONS.

See Highways, *§*155, 156; Municipal Corporations, *§*759-835.

ODORS.

See Nuisance, *§*62.

OFFER OF PROOF.

See Criminal Law, *§*670.

OFFICERS.

See Clerks of Courts; Corporations, *§*294-344, 429, 432; Counties, *§*74; Elections, *§*51, 126; Embezzlement; Evidence, *§*83; Judges; Justices of the Peace; Municipal Corporations, *§*126-183; Schools and School Districts, *§*36; Sheriffs and Constables; States, *§*60; Statutes, *§*125; Taxation, *§*466.

OIL

See Explosives, *§*8.

OPINION EVIDENCE.

See Criminal Law, *§*456; Evidence, *§*470-574.

OPTIONS.

See Insurance, *§*328.

ORDERS.

See Dismissal and Nonsuit, *§*40.

ORDINANCES.

See Municipal Corporations, *§*111.

ORDINARY CARE.

See Negligence, *§*4.

PARDON.

See Witnesses, *§*49, 78.

PARENT AND CHILD.

See Fraudulent Conveyances, *§*96, 107; Guardian and Ward; Infants.

*§*5(1) (Tex.Civ.App.) A widowed mother, or a mother whose husband is imprisoned or has deserted her, is entitled to the services and earnings of a minor child to the same extent as the father would be if living.—*Trinity County Lumber Co. v. Conner*, 187 S. W. 1022.

*§*6 (Tex.Civ.App.) An action for wages earned by an infant cannot be maintained where his mother is living, and there is no pleading or proof that plaintiff was emancipated when he performed such labor.—*Trinity County Lumber Co. v. Conner*, 187 S. W. 1022.

PAROLE.

See Witnesses, *§*49.

PAROL EVIDENCE.

See Evidence, *§*420-461.

PARTIES.

For parties on appeal and review of rulings as to parties, see Appeal and Error.
For parties to particular proceedings or instruments, see also the various specific topics.

II. DEFENDANTS.**(B) Joinder.**

⚡35 (Ark.) Under Kirby's Dig. § 6007, as to parties, one partner suing for breach of a contract with the firm can make the other partner, who had attempted to cancel the contract, a defendant.—*W. D. Reeves Lumber Co. v. Davis*, 187 S. W. 171.

III. NEW PARTIES AND CHANGE OF PARTIES.

⚡52 (Mo.App.) Under Rev. St. 1909, §§ 1848, 1849, 1854, 1857, permitting amendments before judgment by bringing in new parties, in suit to foreclose insured's interest in life policy assigned to secure note, amendment after submission of the case to bring in as a party insured's attorney, to whom assured assigned after submission, was allowable.—*Bush v. Block*, 187 S. W. 153.

⚡59(2) (Mo.App.) By Rev. St. 1909, § 1924, touching substitution of parties upon transfer of an interest in suit to foreclose insured's interest in a life policy assigned as security for a note, insured's attorney, upon assignment by insured to him after submission of the case, could be substituted as defendant.—*Bush v. Block*, 187 S. W. 153.

⚡63 (Mo.App.) As a general rule, the substituted party takes up the litigation where the original party left it.—*Bush v. Block*, 187 S. W. 153.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

⚡84(4) (Tex.Civ.App.) Omission of necessary parties is a defect rendering a petition subject to general demurrer.—*Oliver v. Smith*, 187 S. W. 528.

⚡95(1) (Ky.) Error in misjoinder of parties must be corrected by motion to require election as to which party will prosecute.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

⚡96(1) (Ark.) Where the complaint states a cause of action within the jurisdiction of the court and there is no answer or demurrer for improper joinder or incapacity of parties, such issues are, under Kirby's Dig. §§ 6093-6096, deemed waived.—*Equitable Surety Co. v. Wilson*, 187 S. W. 940.

⚡96(1) (Mo.) Under Rev. St. 1909, §§ 1800, 1804, a defect in parties plaintiff is waived by going to trial upon a general denial.—*Stone v. McConnell*, 187 S. W. 884.

PARTITION.

See Witnesses, ⚡150, 155.

I. BY ACT OF PARTIES.

⚡2 (Ark.) Estate held by husband and wife by entireties does not become subject to partition after conveyance by wife of her interest to third party, and divorce of the original tenant.—*Davies v. Johnson*, 187 S. W. 323.

II. ACTIONS FOR PARTITION.**(A) Right of Action and Defenses.**

⚡13 (Tex.Civ.App.) Under Rev. St. arts. 3557, 3560, upon application for partition by owner of a joint interest with estate of a decedent in any property in which administration is pending, it is the duty of court to make partition between applicant and estate of deceased.—*Huth v. Huth*, 187 S. W. 523.

(B) Proceedings and Relief.

⚡63(3) (Tex.Civ.App.) In suit for partition between heirs, evidence exclusive of that erroneously admitted held sufficient to support a verdict for plaintiff with an award of a one-half interest in certain tracts to a defendant

as partnership land of himself and the deceased.—*Peil v. Warren*, 187 S. W. 1052.

PARTNERSHIP.

See Compositions with Creditors, ⚡13; Mines and Minerals, ⚡97; Mortgages, ⚡413; Parties, ⚡85.

I. THE RELATION.**(A) Creation and Requisites.**

⚡17 (Ark.) Two persons by jointly contracting with another to cut and haul the timber on its land at a stipulated price per 1,000 feet, a matter of speculation, manifest their intention to form a partnership.—*W. D. Reeves Lumber Co. v. Davis*, 187 S. W. 171.

II. THE FIRM, ITS NAME, POWERS, AND PROPERTY.

⚡67 (Mo.) Where a father, partner with his son, realized \$1,600 for his Oklahoma homestead, which he brought to V. county, Mo., and deposited in bank in his own name, the money continued to be his individual property.—*Bartlett v. Foote*, 187 S. W. 67.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.**(A) Representation of Firm by Partner.**

⚡139 (Ark.) Where cancellation of a firm's contract would practically terminate the business for which it was formed, one of the partners cannot cancel it.—*W. D. Reeves Lumber Co. v. Davis*, 187 S. W. 171.

(D) Actions by or Against Firms or Partners.

⚡197 (Tex.Civ.App.) Partnerships are not recognized either by the common or statutory law as constituting separate and distinct legal entities, and there is no right to sue or be sued in partnership name; but litigation by or against partnerships must be in name of individual members, and not in partnership name.—*Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, 187 S. W. 681.

⚡216(3) (Tex.Civ.App.) In action to cancel stock subscription, allegations of petition held to give court jurisdiction as against one of the individual promoters, over objection that while he was sued as an individual the proof showed a cause of action against his firm.—*Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, 187 S. W. 681.

V. RETIREMENT AND ADMISSION OF PARTNERS.

⚡239(1) (Tex.Civ.App.) A dissolution agreement, obligating the remaining partner to pay all the firm debts, held to obligate him to pay a note, although signed by the partner who had retired.—*Keels v. Ashworth*, 187 S. W. 1008.

⚡239(4) (Tex.Civ.App.) A partner, who sold out to his two partners, who assumed a partnership indebtedness, but whom the creditor did not release, was bound on the note, and the creditor was entitled to a judgment against him.—*Abernathy Rigby Co. v. McDougle, Cameron & Webster Co.*, 187 S. W. 503.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.**(B) Rights, Powers, and Liabilities after Dissolution.**

⚡284 (Ark.) The contract of a partnership to cut and haul the timber on certain lands is not for personal services, and so one of the partners can carry it out on retirement of the other.—*W. D. Reeves Lumber Co. v. Davis*, 187 S. W. 171.

⚡296(3) (Tex.Civ.App.) On the issue of liability of a remaining partner on a note execut-

ed by a withdrawing partner, whether \$5.50 of the proceeds thereof was used to pay firm debts was immaterial; it appearing that the note was known by the partners at time of dissolution to be part of the firm indebtedness.—*Keels v. Ashworth*, 187 S. W. 1008.

PART PAYMENT.

See Accord and Satisfaction, ¶10, 11; Limitation of Actions, ¶63; Trusts, ¶79.

PASSENGERS.

See Carriers, ¶241-333.

PASSION.

See Homicide, ¶181.

PATENTS.

See Specific Performance, ¶87.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(B) Assignments and Other Transfers.

¶195 (Tex.Civ.App.) In a suit against plaintiff's partner to recover an interest in a patent issued to the defendant, evidence held to sustain a finding that the attorney's fees for obtaining the patent were not paid by the partnership under an agreement that the patent right should become the property of the firm.—*Kuehn v. Meredith*, 187 S. W. 386.

PAYMENT.

See Accord and Satisfaction; Bills and Notes, ¶484, 527; Compromise and Settlement; Insurance, ¶137, 186, 362, 602, 638; Landlord and Tenant, ¶108; Limitation of Actions, ¶163; Mortgages, ¶298; Pledges; Principal and Agent, ¶106; Sales, ¶202; Subrogation; Taxation, ¶530, 534; Trusts, ¶77-89.

II. APPLICATION.

¶38(1) (Tex.Civ.App.) Where a creditor has several claims against a debtor, a voluntary payment must be applied to the debt designated by the debtor.—*Jenkins v. Morgan*, 187 S. W. 1091.

PEDESTRIANS.

See Municipal Corporations, ¶703.

PENALTIES.

See Constitutional Law, ¶165, 247, 303; Ferries, ¶34; Insurance, ¶602; Railroads, ¶254; Statutes, ¶241.

II. ACTIONS AND OTHER PROCEEDINGS.

¶16 (Ark.) Under Kirby's Dig. §§ 1546, 2082, statutory penalties may be recovered by civil or criminal actions if the only penalty is a fine, but the offense is no less a public offense.—*St. Louis, I. M. & S. Ry. Co. v. State*, 187 S. W. 1064.

¶32 (Mo.App.) Though an action be one to recover a penalty imposed by statute, a party desiring to avail himself of the provisions of the act is required to state only such facts as will bring his case clearly within it.—*State ex rel. and to Use of Missouri Poultry & Game Co. v. Nolte*, 187 S. W. 896.

PERMIT.

See Corporations, ¶648.

PERSONAL INJURIES.

See Carriers, ¶280-333; Damages, ¶95, 132, 134, 185, 216; Electricity, ¶14-19; Explosives; Highways, ¶183, 184; Master

and Servant; Municipal Corporations, ¶705-822; Negligence; Railroads, ¶259-400; Street Railroads.

PETITION.

See Mandamus, ¶154; Pleading, ¶46.

PHYSICIANS AND SURGEONS.

See Evidence, ¶128; Husband and Wife, ¶19, 23½; Indictment and Information, ¶124; Poisons, ¶4; Witnesses, ¶219.

¶6(9) (Tex.Cr.App.) Requisites of indictment for practicing without license stated.—*Rutherford v. State*, 187 S. W. 481.

¶6(11) (Tex.Cr.App.) In a prosecution for unlawfully practicing medicine under Pen. Code 1911, art. 758, a jury finding accused guilty must assess both fine and imprisonment.—*Rutherford v. State*, 187 S. W. 481.

PLACE.

See Elections, ¶25.

PLEA.

See Criminal Law, ¶274.

PLEADING.

See Appearance, ¶4; Estoppel, ¶3; Evidence, ¶208; Indictment and Information; Judgment, ¶18, 106, 248; Parties, ¶84. For pleadings in particular actions or proceedings, see also the various specific topics. For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

¶6(5) (Ky.) Under Ky. St. § 829, in proceeding to enforce award by Railroad Commission as copy of award filed amounts to an allegation that carrier has received amount of award which shipper has paid, a denial in answer that carrier did not owe amount was only a conclusion and insufficient.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

¶8(17) (Mo.App.) Petition held to plead merely a conclusion that agent of defendant was negligent.—*King v. Missouri Dairy Co.*, 187 S. W. 284.

¶34(6) (Mo.App.) An answer after verdict must receive a liberal interpretation in favor of the judgment, and such matters as may be reasonably inferred therefrom are regarded as sufficiently pleaded.—*Keller v. Yzabal*, 187 S. W. 578.

¶36(3) (Mo.App.) Specific admissions and confessions in an answer control a general denial.—*P. M. Bruner Granitoid Co. v. Glencoe Lime & Cement Co.*, 187 S. W. 807.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

¶46 (Tex.Civ.App.) Under Rev. St. 1911, arts. 1827, 1850, 1852, petition in suit in county court failing to allege the residence of either of the defendants held not to authorize the clerk to command the sheriff to execute the citation therein.—*Friend v. Thomas*, 187 S. W. 986.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

¶85(1) (Tex.Civ.App.) Objection that the suit is based on an illegal contract, when the petition discloses it, may be made at any stage, as it goes to the substance of the petition.—*St. Louis, I. M. & S. Ry. Co. v. Landa & Storey*, 187 S. W. 358.

¶96 (Mo.App.) An equitable defense in the answer must satisfy all the requirements of a good bill in equity.—*Davidson v. Gould*, 187 S. W. 591.

(B) Dilatory Pleas and Matter in Abatement.

¶104(2) (Tex.Civ.App.) Defendant's plea of privilege, complying with Rev. St. 1911, art. 1903, was sufficient, though it did not allege that the allegation of plaintiff's petition that suit was based on a written contract to be performed in the county of suit was fraudulently made to confer jurisdiction.—*Gensberg v. Neely*, 187 S. W. 247.

(C) Traverses or Denials and Admissions.

¶121(3) (Ky.) Under Ky. St. § 829, in proceeding to enforce an award by Railroad Commission, the averment of the answer that it did not have knowledge or information sufficient from which to found a belief as to whether the amounts had been paid to or received by it was not sufficient.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

¶180(3) (Mo.App.) In action against carrier for damages to an interstate shipment of hogs, where plaintiff declared on contract of shipment, without saying whether it was written or created by delivery and acceptance, and defendant set up written contract, plaintiff's reply denying validity of written contract alleged did not make any change in his cause of action.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

V. DEMURRER OR EXCEPTION.

¶196 (Mo.) A reply in an action at law which sets up facts entitling plaintiff to equitable relief is not demurrable, although it may require a transfer of the cause to the equity side of the court.—*Young v. Pennsylvania Fire Ins. Co.*, 187 S. W. 856.

¶207 (Mo.App.) Rev. St. 1909, § 1830, providing that no further pleading of facts after reply is necessary to put case at issue, does not obviate necessity of special demurrer attacking plaintiff's cause of action if changed by reply.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

¶214(1) (Tex.Civ.App.) On general demurrer, the allegations of the petition must be regarded as true.—*W. B. Clarkson & Co. v. Gans S. S. Line*, 187 S. W. 1106.

¶228 (Tex.Civ.App.) Where no punitive damages were sought and the petition averred that defendant maliciously breached its contract, special exception thereto should have been sustained; motive being immaterial.—*Texas Power & Light Co. v. Roberts*, 187 S. W. 225.

¶228 (Tex.Civ.App.) An exception to the petition as seeking to enforce a contract illegal as violative of the United States laws relating to rates on interstate commerce, need not name the particular laws.—*St. Louis, I. M. & S. Ry. Co. v. Landa & Storey*, 187 S. W. 358.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

¶236(1) (Ark.) Large discretion is vested in trial courts in the matter of permitting amendments to pleadings.—*Butler County R. Co. v. Exum*, 187 S. W. 329.

¶236(6) (Ark.) In a passenger's action for damages, the allowance of a trial amendment to supply the necessary allegation to support the plaintiff's prayer for damages for mental anguish held not an abuse of the discretion.—*Butler County R. Co. v. Exum*, 187 S. W. 329.

¶237(8) (Mo.) Where a petition to recover real estate commissions alleged defendants' promise to directly pay one M. his share thereof and the fixing of this share, an amendment alleging defendants' promise to pay a sum fixed does not change the cause of action and may be allowed under Rev. St. 1909, §§ 1846-1848, when conforming to the proof.—*Stone v. McConnell*, 187 S. W. 884.

¶237(8) (Mo.App.) Under Rev. St. 1909, § 1848, petition to enjoin change of grade alleging both false line and illegality of work was amendable after proof by more specific averments of invalidity of authorizing ordinance.—*McGuire v. Wilson*, 187 S. W. 612.

¶245(3) (Tex.Civ.App.) A trial amendment which would probably cause delay in a trial comes too late if offered after the parties have entered upon the trial.—*Bender v. Bender*, 187 S. W. 735.

¶246(2) (Mo.App.) In an action against a detective agency for breach of an agreement to protect plaintiff from charges made against him as the result of his detective work, an amendment to the petition held properly allowed.—*Pickard v. William J. Burns Detective Agency*, 187 S. W. 614.

¶248(1) (Tex.Civ.App.) It was not intended by the rule allowing trial amendments that an amendment so filed might be made matter of right to include new causes of action or new defenses.—*Bender v. Bender*, 187 S. W. 735.

¶248(4) (Tex.Civ.App.) A complaint, in action for services in locating timber in a certain county, is not changed to a new cause of action by amendment alleging that the timber was to be in plaintiff's neighborhood.—*Osvald v. Williams*, 187 S. W. 1001.

¶248(10) (Mo.App.) In action against carrier for damages to interstate shipment of hogs, that the original petition was on a written contract and the amendment to petition was on an implied contract was immaterial, being matter of procedure governed by state practice.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

XI. MOTIONS.

¶369(1) (Ky.) Error in misjoinder of causes of action must be corrected by motion to require election.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

¶403(2) (Mo.App.) In an action on a sheriff's official bond of indemnity for refusal to sell stock levied upon, failure to fully allege the judgment debtor's interest was aided by an averment in the answer that the judgment debtor did have some interest in the stock.—*State ex rel. and to Use of Missouri Poultry & Game Co. v. Nolte*, 187 S. W. 896.

¶420(3) (Mo.App.) In action against carrier for damages to interstate shipment of hogs, variance between original petition and amended petition was waived by answering over.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

¶433(5) (Mo.App.) On appeal the petition can only be assailed for vital defects going to its utter insufficiency to state a cause of action; all minor imperfections being cured by the verdict.—*State ex rel. and to Use of Missouri Poultry & Game Co. v. Nolte*, 187 S. W. 896.

¶433(7) (Mo.App.) A petition's failure to allege that certain tools, when burned, were in the same shed as when defendant issued its policy insuring them is cured by a verdict for the plaintiff.—*Maggard v. Pacific Fire Ins. Co. of City of New York*, 187 S. W. 569; *Same v. Stuyvesant Ins. Co. Id.* 571.

⌚433(8) (Mo.App.) Under Rev. St. 1909, § 2119, petition in servant's action for injury, not alleging defendant's knowledge of dangerous condition in a sufficient time to have enabled it to remove it with ordinary care, in absence of demurrer and in view of evidence and instructions *held* good after verdict.—*Shlamin v. C. & S. Mining Co.*, 187 S. W. 76.

⌚433(10) (Mo.) An objection to the petition for duplicity comes too late after the verdict.—*McWhirt v. Chicago & A. R. Co.*, 187 S. W. 830.

⌚434 (Mo.App.) After trial, the case will be treated as though an answer were on file, irrespective of the true situation.—*Roaring Fork Potato Growers v. C. C. Clemons Produce Co.*, 187 S. W. 617.

PLEDGES.

See Corporations, ⌚123.

⌚44 (Mo.App.) Where bank renewed original debt, for which two notes were deposited as collateral, extending time of payment by taking other notes, the collateral notes continued as security for the renewal notes.—*McLean County Bank v. Brown*, 187 S. W. 785.

POISONS.

⌚4 (Mo.App.) Rev. St. 1909, § 5786, prior to its amendment in 1915, forbidding the sale of cocaine except upon prescription, etc., was not intended to apply to a licensed physician selling and delivering cocaine in the course of his practice and his treatment of a patient.—*State v. Hesse*, 187 S. W. 571.

⌚9 (Mo.App.) Information under Rev. St. 1909, § 5786, before its amendment in 1915, for an unlawful sale of cocaine, *held* sufficient.—*State v. Hesse*, 187 S. W. 571.

Conviction, in prosecution under Rev. St. 1909, § 5786, as it stood prior to its amendment in 1915, for selling cocaine, *held* not to show local bias in a county in which local option law was in force.—*Id.*

POLICE.

See Municipal Corporations, ⌚180, 183.

POOL ROOMS.

See Constitutional Law, ⌚101; Injunction, ⌚105; Licenses, ⌚1, 5½.

POSSESSION.

See Adverse Possession: Chattel Mortgages, ⌚173, 186; Forcible Entry and Detainer, ⌚6, 9; Insurance, ⌚329; Landlord and Tenant, ⌚129; Larceny, ⌚64; Replevin, ⌚10; Vendor and Purchaser, ⌚232.

POWERS.

See Wills, ⌚600.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PRECEDENTS.

See Courts, ⌚89, 97.

PREFERENCES.

See Carriers, ⌚13; Compositions with Creditors, ⌚13, 27; Corporations, ⌚544.

PREJUDICE.

See Jury, ⌚97.

PRELIMINARY EXAMINATION.

See Criminal Law, ⌚225.

PREMIUMS.

See Insurance, ⌚187, 186, 191.

PRESCRIPTION.

See Adverse Possession: Limitation of Actions.

PRESENTATION.

See Executors and Administrators, ⌚225, 227.

PRESENTMENT.

See Bills and Notes, ⌚404.

PRESUMPTIONS.

See Appeal and Error, ⌚901-934; Criminal Law, ⌚315, 1141, 1144; Death, ⌚2; Evidence, ⌚60-86.

PRETERMITTED CHILD.

See Descent and Distribution, ⌚47.

PRIMARY ELECTIONS.

See Elections, ⌚120, 126.

PRINCIPAL AND ACCESSORY.

See Indictment and Information, ⌚83, 174.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Corporations, ⌚294-344; Forgery, ⌚21; Husband and Wife, ⌚23½; Indictment and Information, ⌚94; Insurance, ⌚84, 131, 376, 556; Witnesses, ⌚141.

I. THE RELATION.

(A) Creation and Existence.

⌚23(1) (Ark.) The fact that the parties labeled the relationship existing between them as one of agency is not controlling.—*J. R. Watkins Medical Co. v. Williams*, 187 S. W. 653.

⌚23(2) (Tex.Civ.App.) The fact or extent of agency may be established by circumstantial evidence.—*Jackson v. Walls*, 187 S. W. 676.

⌚23(3) (Tex.Civ.App.) Agency may be proved by acquiescence of the principal in other similar acts of the agent, so connected with that in question as to constitute a course of dealing.—*Jackson v. Walls*, 187 S. W. 676.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

⌚56 (Tex.Civ.App.) Where divorced wife appointed agent and attorney to recover land which had been community property, such agent and attorney carried out his contract by employing an attorney to prosecute suit against adverse claimants, who did file suit.—*Brady v. Cope*, 187 S. W. 678.

⌚70 (Mo.App.) One cannot act as agent for two parties whose interests are antagonistic, as in case of buyer and seller.—*Crossley v. Summit Lumber Co.*, 187 S. W. 113.

⌚84 (Ark.) Where an agent is guilty of fraud, dishonesty, and unfaithfulness in the transaction of his agency, such conduct is a bar to his recovery of compensation.—*Neely v. Wilmore*, 187 S. W. 637.

⌚89(5) (Tex.Civ.App.) A petition setting out the contract for commission agency, the amount of goods sold, the commissions due, and defendant's promise to pay, and that payment has been demanded and refused, to which an exhibit of sales, amounts, purchases, etc., is attached, is sufficient as against demurrer.—*Channell Chemical Co. v. Hall*, 187 S. W. 704.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

⚡105(9) (Mo.App.) Without special authority an agent for collection can receive payment only in legal currency.—In re Ziegenhein, 187 S. W. 893.

⚡106 (Tex.Civ.App.) In action to recover from an individual promoter a share which he and his partnership received, it was not necessary to show that such individual promoter actually received the money, as payment to his agent acting within apparent scope of his authority was payment to him.—Commonwealth Bonding & Casualty Ins. Co. v. Meeks, 187 S. W. 681.

⚡124(2) (Mo.App.) In an action on notes given subject to an advertising contract providing for a contest, etc., held, that whether plaintiff's agent had authority to accept and submit different propositions than those contained within the printed blanks furnished him by the plaintiff was for jury.—Brenard Mfg. Co. v. Freeman & Wescott, 187 S. W. 104.

(C) Unauthorized and Wrongful Acts.

⚡148(1) (Mo.App.) Where defendant saw landowner's brother and asked permission to excavate into owner's land, and the brother replied that he would have to see the owner, but later said he had not seen the owner, but guessed it would be all right, defendant had notice that the brother had no power as agent to give the permission.—Knoche v. Pratt, 187 S. W. 578.

(D) Ratification.

⚡166(1) (Ark.) Before a principal can be held to have ratified any unauthorized act of an alleged agent, he must have knowledge of all the material facts.—Coffin v. Planters' Cotton Co., 187 S. W. 309.

⚡170(2) (Mo.App.) Where plaintiff's agent was authorized to submit and accept propositions different from those contained in printed forms, defendant's delivery of order and contract notes, etc., to agent, was delivery to plaintiff for acceptance, and plaintiff's approval thereof was an acceptance of contract made with agent.—Brenard Mfg. Co. v. Freeman & Wescott, 187 S. W. 104.

In action on notes given to plaintiff for its co-operation in advertising contest scheme, held, that defendant might assume that the contract, etc., between it and plaintiff's agent, were forwarded to plaintiff, and, on receipt of an acknowledgment in general terms, might assume an acceptance by plaintiff.—Id.

⚡170(3) (Ark.) When a principal, with full knowledge of the facts of an unauthorized contract by an alleged agent, remains silent when he should speak, he cannot thereafter be heard to deny the agency.—Coffin v. Planters' Cotton Co., 187 S. W. 309.

⚡171(1) (Ark.) When a principal, with full knowledge of the facts of an unauthorized contract by an alleged agent, accepts some benefit which he obtains by virtue of his reputed agent's acts, he cannot thereafter be heard to deny the agency.—Coffin v. Planters' Cotton Co., 187 S. W. 309.

⚡171(9) (Mo.App.) Plaintiff, by suing three times on contract with carrier alleged to have been signed by his agent without authority, ratified it and cannot now assert that agent had no authority to sign.—Bowles v. Quincy, O. & K. C. R. Co., 187 S. W. 131.

PRINCIPAL AND SURETY.

See Appeal and Error, ⚡151; Guaranty; Indemnity; Mortgages, ⚡283.

V. RIGHTS AND REMEDIES OF SURETY.

(B) As to Principal.

⚡177 (Mo.App.) A surety cannot sue the principal debtor for an unpaid portion of the debt until the surety has paid it.—Hildrith v. Walker, 187 S. W. 608.

⚡184 (Tex.Civ.App.) The general rule that a surety cannot recover against his principal until the former has paid the debt does not apply where the surety has satisfied the debt of the principal by the execution of his negotiable note.—Ball v. Miller, 187 S. W. 688.

Where defendant's note to plaintiff was given in consideration of plaintiff executing his note to a bank in order to reduce the defendant's debt thereto and the bank accepted the note, plaintiff could sue defendant on his note.—Id.

PRINTING.

See Appeal and Error, ⚡808.

PRIORITIES.

See Banks and Banking, ⚡166; Boundaries, ⚡25; Chattel Mortgages, ⚡138-157; Mortgages, ⚡171.

PRIVATE NUISANCE.

See Nuisance, ⚡19.

PRIVATE ROADS.

See Easements.

PRIVILEGE.

See Pleading, ⚡104.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, ⚡47.

PROBABLE CAUSE.

See Malicious Prosecution, ⚡22.

PROBATE.

See Wills, ⚡324.

PROBATE COURTS.

See Executors and Administrators, ⚡250; Judgment, ⚡475.

PROCESS.

See Appearance; Attachment; Garnishment; Judgment, ⚡17; Mandamus; Prohibition.

II. SERVICE.

(C) Publication or Other Notice.

⚡84 (Tex.Civ.App.) Under Rev. St. art. 2026, actual knowledge of existence of a suit will not supply want of service.—Davenport v. Rutledge, 187 S. W. 988.

⚡103 (Tex.Civ.App.) The statutes relating to citation by publication are strictly construed, requiring strict compliance with essential requirement of statute.—Davenport v. Rutledge, 187 S. W. 988.

III. DEFECTS, OBJECTIONS, AND AMENDMENT.

⚡153 (Tex.Civ.App.) Erroneous statement of defendant's name in process served by publication will reverse the case.—Davenport v. Rutledge, 187 S. W. 988.

⚡158 (Ky.) A misjoinder of actions and of parties plaintiff is not a ground for quashing service of a summons.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S. W. 296.

PROFITS.

See Damages, ¶40, 147; Mortgages, ¶199.

PROHIBITION.

See Courts, ¶207; Habeas Corpus, ¶44; Intoxicating Liquors.

I. NATURE AND GROUNDS.

¶5(2) (Mo.) Where subpoena requires one to appear as witness before commissioner as well as to produce certain letters, he is not entitled to prohibition to prevent enforcement of subpoena.—State ex rel. McCulloch v. Taylor, 187 S. W. 1181.

¶5(3) (Tex.Civ.App.) A writ of prohibition will issue to a lower court to prevent a second writ of injunction on a petition alleging only such facts as were averred or should have been averred on the first application.—Birchfield v. Bourland, 187 S. W. 422.

¶10(1) (Tex.Cr.App.) If the petition alleges no ground of injunction within Rev. St. arts. 4643-4693, the district court is without jurisdiction to issue the writ; and, the remedy by appeal from the order granting injunction being inadequate, defendant may apply for writ of prohibition to the Court of Criminal Appeals if the law involved is penal.—State v. Clark, 187 S. W. 760; Same v. Nabers, Id. 783, 784.

A judgment of the Court of Criminal Appeals that a prohibitory pool hall law is valid is of such public interest as to be conclusive upon all persons, and when district courts seek to enjoin prosecutions thereunder, it is the duty of the appellate court to issue a writ of prohibition.—Id.

¶10(2) (Ark.) The court having jurisdiction to expunge a consent decree from the record and order the case to proceed, prohibition will not lie to prevent it from exercising such power.—Parker v. Frierson, 187 S. W. 162.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

¶20 (Mo.) In proceedings to prohibit a judge from compelling relator to attend as witness before special commissioner and produce certain letters, statement in petition that subpoena was served, not challenged by respondent, will be taken as true.—State ex rel. McCulloch v. Taylor, 187 S. W. 1181.

¶34 (Mo.) Where record in prohibition proceedings does not contain copy of subpoena issued to relator, it will be presumed that it conforms to court's order authorizing its issuance.—State ex rel. McCulloch v. Taylor, 187 S. W. 1181.

PROMISSORY NOTES.

See Bills and Notes.

PROOF OF LOSS.

See Insurance, ¶549-558, 640, 789.

PROPERTY.

See Estates; Licenses, ¶48, 64.

¶6 (Mo.) The laws of a foreign state have no effect to regulate or control the conveyances, incumbrances, or diversion of real property from the use to which it has been devoted by the laws of the state in which such real property is located.—Union Pac. R. Co. v. Public Service Commission, 187 S. W. 827.

PROTEST.

See Accord and Satisfaction, ¶11; Bills and Notes, ¶408, 422.

PROXIMATE CAUSE.

See Negligence, ¶61, 62.

PUBLICATION.

See Process, ¶103.

PUBLIC DEBT.

See Municipal Corporations, ¶870, 979; States, ¶119-168½.

PUBLIC IMPROVEMENTS.

See Constitutional Law, ¶233, 290; Municipal Corporations, ¶407-578.

PUBLIC LANDS.

See Carriers, ¶2, 12, 18; Constitutional Law, ¶52; Railroads, ¶150.

III. DISPOSAL OF LANDS OF THE STATES.

¶175(5) (Tex.Civ.App.) Rev. St. 1895, art. 4269 (Acts 18th Leg. c. 40), does not mean that in ascertaining the boundaries of county school lands such construction will be given to field notes as to give the county the benefit of those calls most favorable to the county; and the word "survey," in the expression "the land included in the lines of the survey" does not mean the diagram or map required by Rev. St. 1911, art. 5336, but is used synonymously with "field notes."—Cross v. Wilkinson, 187 S. W. 345.

¶175(6) (Tex.Civ.App.) Rev. St. 1895, art. 4269 (Acts 18th Leg. c. 40), by its express terms is applicable only to surveys which had been patented at the time it was passed.—Cross v. Wilkinson, 187 S. W. 345.

¶178(1) (Tex.Civ.App.) Where a county selling land to which it has good title by patent from the state conveys by the same description as in the patent, it is not liable to purchaser on account of differences or difficulties in ascertaining the boundaries of the tract conveyed.—Cross v. Wilkinson, 187 S. W. 345.

PUBLIC NUISANCE.

See Nuisance, ¶62-75.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE COMMISSIONS.

See Carriers, ¶18; Statutes, ¶98.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Eminent Domain.

PULLMAN CARS.

See Carriers, ¶413, 417.

PUNISHMENT.

See Criminal Law, ¶1206; Physicians and Surgeons, ¶6.

QUALIFIED PRIVILEGE.

See Libel and Slander, ¶47.

QUASHING.

See Process, ¶158.

QUIETING TITLE.

See Appeal and Error. **714**: Evidence, **183, 366**.

I. RIGHT OF ACTION AND DEFENSES.

10(2) (Tex.Civ.App.) In suit to quiet title, party to whom one-half interest in land was conveyed in consideration of his acting as agent and attorney for an owner to recover it, though he failed to perform the services, could recover against the grantees of the purchaser at judicial sale of the property under a judgment of which satisfactory proof was not made.—*Brady v. Cope*, 187 S. W. 678.

15 (Mo.) In suit to quiet title, where plaintiffs claimed under a county through the patent of a special commissioner, and the county abided the effect of his conveyance for 40 years, defendants could not raise the question that the patent was void, because the compromise agreement under which it was made did not empower the commissioner to convey to his grantee, except upon proof that the commissioner deviated from his power.—*Heagy v. Miller*, 187 S. W. 889.

II. PROCEEDINGS AND RELIEF.

30(2) (Mo.) Under Rev. St. 1909, § 2535, where appellants were the only remaining active parties defendant in suit to quiet title when they went to trial, their claim being to the same land and under the same title and as tenants in common, there was no misjoinder of parties defendant, though there were numerous other defendants.—*Heagy v. Miller*, 187 S. W. 889.

44(3) (Mo.) Evidence held to sustain the judgment of the trial court in quieting title to land in controversy in defendants, who claimed under alleged conveyance from plaintiff's original grantor.—*Ledbetter v. Phillips*, 187 S. W. 9.

44(4) (Mo.) In suit to quiet title between parties claiming under a county, it was incumbent on plaintiffs to make a prima facie showing of title in themselves before they could become entitled to a decree declaring defendant's claim invalid.—*Heagy v. Miller*, 187 S. W. 889.

RAILROADS.

See Action, **38**; Appeal and Error, **882, 1050, 1062**; Carriers; Contracts, **234, 287**; Eminent Domain; Evidence, **596**; Explosives; Master and Servant; Negligence, **23**; Street Railroads.

II. RAILROAD COMPANIES.

33(1) (Mo.) A foreign railroad company which has acquired property by authority of Rev. St. 1879, § 790, is subject to all the duties, liabilities, and provisions of the laws of this state concerning railroad corporations as fully as if incorporated in the state.—*Union Pac. R. Co. v. Public Service Commission*, 187 S. W. 827.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

95(5) (Ark.) The streets of a city or town extend to and include that part thereof occupied and used for sidewalks.—*Chicago, R. I. & P. Ry. Co. v. Redding*, 187 S. W. 651.

At crossing of railroad by street 50 feet wide railroad company held required to leave more than the 16 or 20 feet used for teams, and to construct footway across its road from end of sidewalk to sidewalk on opposite side.—*Id.*

VIII. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES.

(A) Nature and Extent of Liabilities.

150 (Mo.) Under Public Service Commission Act, § 21, a fee fixed by the Public Serv-

ice Commission amounting to \$10,962.25 for issuing a certificate authorizing an issue of bonds of indebtedness by a railroad company amounting to \$31,848,900 to reimburse it for expenditures, only \$124,930.38 of which had been expended upon the property in the state, held valid and reasonable.—*Union Pac. R. Co. v. Public Service Commission*, 187 S. W. 827.

A railroad company which avails itself of the privileges and immunities under Public Service Commission Act, § 21, to secure the approval by the commission of an issue of bonds, cannot thereafter deny the existence of the power which it invoked, for the sole purpose of avoiding the payment of the fee fixed by the Legislature for the services of the commission in approving said bonds.—*Id.*

The fee chargeable by the Public Service Commission under Public Service Commission Act, § 21, for approving an issue of railroad bonds, held to be a reasonable and proper exercise of legislative discretion.—*Id.*

159(4) (Tex.Civ.App.) *Vernon's Sayles' Ann. Civ. St. 1914, art. 5640*, giving a lien to mechanics, laborers, and operatives on railway construction work, applies to copartners who worked themselves and employed about 30 teams on grading work, especially where no profit was made on the job.—*Texas Bldg. Co. v. Collins*, 187 S. W. 404.

Vernon's Sayles' Ann. Civ. St. 1914, art. 5640, giving a lien to mechanics, laborers, and operatives on railway construction work, applies to a subcontractor's foreman or superintendent earning \$200 per month and doing an appreciable amount of manual labor.—*Id.*

161 (Ark.) Where employé sued a railroad for injuries within a year after injury, and, after judgment for him was reversed on appeal he took a nonsuit and brought a new suit therefor more than a year after injury, he was not entitled to lien for damages given by Kirby's Dig. § 6661, being barred by section 6662.—*St. Louis, I. M. & S. R. Co. v. Ingram*, 187 S. W. 452.

X. OPERATION.

(B) Statutory, Municipal, and Official Regulations.

253 (Tex.Civ.App.) A passenger cannot recover even nominal damages against a carrier for an infraction of the separate coach law without showing that he was injured.—*Weller v. Missouri, K. & T. Ry. Co.*, 187 S. W. 374; *Connally v. Same*, *Id.* 376.

254(4) (Ark.) Under Acts 1911, p. 257, requiring railroads to block frogs, the penalty accrues on failure to block all frogs, and but one penalty can be collected in one county to the date of beginning the prosecution, regardless of the number of frogs left unblocked.—*St. Louis, I. M. & S. Ry. Co. v. State*, 187 S. W. 1064.

Under Acts 1911, p. 257, requiring all railroads to block frogs, the penalty imposed is a continuing one, for violation of which prosecution may be instituted in one county on each day that the offense continues.—*Id.*

254(6) (Ark.) Acts 1911, p. 257, providing for recovery of a penalty of a fine on conviction of failing to block frogs, is a penal statute; and the penalty is properly recoverable in criminal proceedings by prosecutions under informations filed by the prosecuting attorney before a justice of the peace.—*St. Louis, I. M. & S. Ry. Co. v. State*, 187 S. W. 1064.

(C) Companies and Persons Liable for Injuries.

259(1) (Mo.) A railroad company which leases its tracks to another company is liable for injuries to pedestrians by negligence of the lessee company, equally with such company, under specific provision of Rev. St. 1909, § 3073 (Act March 24, 1870 [Laws 1870, p. 90]).—*McWhirt v. Chicago & A. R. Co.*, 187 S. W. 830.

(D) Injuries to Licensees or Trespassers in General.

↪276(4) (Tex.) Railroad's engine hostler, who permitted boy to get upon engine while he was in charge, was under obligation to use care of ordinarily prudent person, under like circumstances, in turning on injector, to see if valve was closed, to prevent injury to boy.—*Gulf, T. & W. Ry. Co. v. Dickey*, 187 S. W. 184.

↪282(10) (Tex.) In action for injuries to plaintiff, a small child, when he was scalded by defendant railroad's employé, turning on injector of his engine without examining the valve of the squirt hose, issue of negligence held for jury.—*Gulf, T. & W. Ry. Co. v. Dickey*, 187 S. W. 189.

(F) Accidents at Crossings.

↪303(6) (Tex.Civ.App.) Where an underground passageway under defendant's track connecting portion of plaintiff's inclosure, which passageway was used by plaintiff and his landlord for six years, whether plaintiff's right to use such passageway was by implied contract or whether he was a mere invitee was immaterial in determining the defendant's negligence in maintaining a defective passageway.—*Missouri, K. & T. Ry. Co. of Texas v. Cardwell*, 187 S. W. 1073.

↪312(3) (Mo.) It is gross negligence for the engineer in switching operations to approach a traveled street crossing from a point 600 feet distant, without giving any of the signals required by statute.—*McWhirt v. Chicago & A. R. Co.*, 187 S. W. 830.

↪312(3) (Mo.App.) Where the locomotive bell was not rung for 100 feet preceding a crossing, the fireman having stopped ringing to consult his time card, the railroad's negligence per se was established as to one injured at the crossing.—*Underwood v. West*, 187 S. W. 84.

↪312(11) (Mo.) It is negligence for a switching train to back over a crossing without a light on the front car.—*McWhirt v. Chicago & A. R. Co.*, 187 S. W. 830.

↪320 (Mo.) If deceased so suddenly transformed his position of safety at crossing to one of danger that defendant could not have prevented accident by the degree of care called for by the circumstances, there can be no recovery.—*Maginnis v. Missouri Pac. Ry. Co.*, 187 S. W. 1105.

Where pedestrian proceeded parallel with track toward station, and engineer gave signals, and pedestrian was struck and killed as he suddenly turned to cross track, there can be no recovery.—*Id.*

↪327(1) (Mo.App.) The duty of one approaching a railroad track, to look and listen, is absolute, and failure to perform it, when it would have been effective, is negligence as a matter of law.—*Underwood v. West*, 187 S. W. 84.

↪327(5) (Mo.App.) The duty of a traveler about to cross a railroad is to look both ways, and the fact that he looked one way, though he thought that was the most likely source of danger, does not absolve him.—*Underwood v. West*, 187 S. W. 84.

↪328(4) (Mo.) Where plaintiff's intestate, a woman of mature age and unimpaired sight and hearing, was killed on defendant's railroad crossing, at a point where there was an unobstructed view of 2,228 feet in the direction from which train came, held, her contributory negligence precluded recovery.—*Carlson v. Atchison, T. & S. F. Ry. Co.*, 187 S. W. 842.

↪333(2) (Mo.App.) Where plaintiff, driving his team about 5 miles per hour, could have observed a train approaching at right angles at 12 miles per hour and about 90 feet away, 30 feet before he reached the track, and looked in the opposite direction, he was guilty of contributory negligence as a matter of law.—*Underwood v. West*, 187 S. W. 84.

↪333(3) (Mo.) A pedestrian, who on approaching a crossing watched a moving lantern

at one side and was struck by switching train without a light on front car, held not guilty of contributory negligence.—*McWhirt v. Chicago & A. R. Co.*, 187 S. W. 830.

↪335(1) (Mo.App.) Although defendant railroad was negligent in operating its train, plaintiff cannot recover if he was guilty of contributory negligence, though it was comparatively slight.—*Underwood v. West*, 187 S. W. 84.

↪338 (Mo.) If deceased, though careless, was in perilous position and oblivious thereto, and this was known or should have been known to railroad's employés, and they failed to use means at hand to avert injury, railroad is liable.—*Maginnis v. Missouri Pac. Ry. Co.*, 187 S. W. 1165.

↪345(3) (Mo.) Although there was no complaint as to position of cars near the point of plaintiff's injury, evidence on that question cannot be excluded from consideration by the jury, since it is from such surrounding facts and conditions that liability is to be determined.—*McWhirt v. Chicago & A. R. Co.*, 187 S. W. 830.

↪346(5) (Tex.Civ.App.) In action for injuries at railroad crossing, there being nothing in plaintiff's pleadings to indicate that he was negligent, and nothing in his evidence to suggest it, the burden is on defendant to prove contributory negligence.—*Kansas City, M. & O. Ry. Co. of Texas v. Durrett*, 187 S. W. 427.

↪348(1) (Mo.) In action for causing death of pedestrian at railroad crossing, evidence held to authorize verdict for plaintiff on theory that engineer observed danger in time to have prevented accident.—*Maginnis v. Missouri Pac. Ry. Co.*, 187 S. W. 1165.

↪348(1) (Tex.Civ.App.) The fact that a railroad bridge is constructed in the same manner as all other bridges of its kind is not conclusive that its maintenance for use as the roof of an underground passageway between portions of an inclosure was not negligence.—*Missouri, K. & T. Ry. Co. of Texas v. Cardwell*, 187 S. W. 1073.

↪348(4) (Ark.) Evidence held to sustain a verdict that defendant railway was negligent in not giving proper signals and keeping a lookout for plaintiff, who was standing near the track in a street.—*St. Louis Southwestern Ry. Co. v. Carmack*, 187 S. W. 635.

↪348(6) (Ark.) Evidence held to sustain a verdict that plaintiff was not guilty of contributory negligence when run down by a railway train while standing on a street crossing and absorbed in watching a frightened horse.—*St. Louis Southwestern Ry. Co. v. Carmack*, 187 S. W. 635.

↪350(13) (Mo.) That plaintiff had had two drinks of whisky, and that a bottle of whisky was found in his pocket, does not show contributory negligence, in the absence of evidence that such facts caused him to relax vigilance, nor does it absolve the railroad from its negligence, but it does no more than make it a jury question.—*McWhirt v. Chicago & A. R. Co.*, 187 S. W. 830.

↪350(15) (Tex.Civ.App.) Plaintiff, who was injured by his head striking the end of a projecting bolt while riding a mule through a passage underneath defendant's railway, when his mule ran away, was not negligent as a matter of law, although he knew the bridge to be so low that a man on horseback must lean over to guard against injury.—*Missouri, K. & T. Ry. Co. of Texas v. Cardwell*, 187 S. W. 1073.

Where plaintiff, knowing the dangerous character of an underground passageway under a railroad crossing his inclosure, was injured while using it when his mule ran away, held, the fact there was a grade crossing 1,800 feet east of such passageway did not make plaintiff negligent as a matter of law in not using such grade crossing.—*Id.*

↪350(16) (Ark.) Failure to look and listen when near a railroad track is negligence per

se according to the Arkansas rule, but in Texas requires submission to jury.—*St. Louis Southwestern Ry. Co. v. Carmack*, 187 S. W. 635.

⚡350(32) (Tex.Civ.App.) That plaintiff's mule on which he was riding was frightened and ran away, resulting in plaintiff's injury by striking his head on projecting bolts of a bridge negligently maintained over an underground passageway by defendant, did not relieve defendant of liability for its negligence; the proximate cause of the injury being for the determination of the jury.—*Missouri, K. & T. Ry. Co. of Texas v. Cardwell*, 187 S. W. 1073.

(G) Injuries to Persons on or near Tracks.

⚡369(1) (Mo.App.) Where it was defendant's duty to look for persons upon its tracks, it is immaterial whether, before being struck by defendant's train, deceased was drunk or sober, standing up or lying down.—*Starks v. Lusk*, 187 S. W. 586.

⚡370 (Mo.App.) Use of railroad trestle by pedestrians *held* to require defendant's trainmen to anticipate and look out for persons on the track at this point.—*Starks v. Lusk*, 187 S. W. 586.

⚡376(1) (Ark.) Where there was nothing indicating that decedent walking along the railroad track would not get off, which he did in fact, employes on locomotive were not negligent in failing to sound the alarm or slow down or stop the train to prevent injury to decedent.—*Chicago, R. I. & P. Ry. Co. v. Jones*, 187 S. W. 436.

Where decedent was walking on or near a railroad track toward an approaching train apparently aware of its approach, there was no duty on the part of the operatives of the train to sound any alarm, or attempt to stop or slow down until it was apparent that decedent did not know the train was coming, or, knowing that, had determined upon putting himself in its way, or was incapable of appreciating the danger and avoiding it.—*Id.*

⚡376(2) (Ark.) That decedent was seen by the engineer and fireman of a locomotive walking along the track half a mile away, where he continued until he was struck by the engine, did not render the road liable.—*Chicago, R. I. & P. Ry. Co. v. Jones*, 187 S. W. 436.

⚡390 (Ark.) Railroad whose engineer discovered decedent on the track walking toward train in time to have avoided accident by exercise of ordinary care *held* liable, though decedent was wrongfully on the track and guilty of negligence.—*Chicago, R. I. & P. Ry. Co. v. Jones*, 187 S. W. 436.

⚡390 (Mo.App.) Where deceased passed the caboose of defendant's train and went upon the trestle before the train backed up and no trainman was then at the rear end of the train to look for clear track or to avoid danger, deceased being "seeable" by the trainmen while in peril and in time to have averted his injury, the humanitarian doctrine applied.—*Starks v. Lusk*, 187 S. W. 586.

⚡398(1) (Ark.) In suit against a railroad for death on its track, evidence *held* to warrant finding that decedent did not leave the track from the time the whistle first blew until he was struck by the train and that he was walking with his head "dropped."—*Chicago, R. I. & P. Ry. Co. v. Jones*, 187 S. W. 436.

In an action for death on railroad track, evidence *held* to warrant jury in concluding that decedent was oblivious of the rapidly approaching train, and that the road's servants discovered, or might have discovered, his condition by ordinary care in time to have prevented the injury.—*Id.*

⚡398(2) (Mo.App.) In an action for death alleged to have been caused by defendant's train

backing upon a trestle, evidence *held* to show that deceased had passed the caboose and gone upon the trestle before the train backed up, and that no trainman was then at the rear of the train who could or did look for a clear track or take steps to avert danger.—*Starks v. Lusk*, 187 S. W. 586.

⚡400(1) (Ark.) In an action against a railroad for death on a track, whether plaintiff's witness could have seen that decedent was walking with his head down was for the jury.—*Chicago, R. I. & P. Ry. Co. v. Jones*, 187 S. W. 436.

(H) Injuries to Animals on or near Tracks.

⚡447(3) (Ark.) In action for injuries to horse trying to climb out of a cut ahead of a train, an instruction *held* proper that the burden was on the company to prove that the damage was not caused by its negligence.—*Arkansas, L. & G. R. Co. v. Morse*, 187 S. W. 169.

(I) Fires.

⚡453 (Mo.App.) A railroad company is liable for fires set by sparks escaping from its locomotives, irrespective of defects in locomotives or negligence in operation.—*Slack v. St. Louis, I. M. & S. Ry. Co.*, 187 S. W. 275.

⚡480(1) (Mo.App.) Plaintiff has the burden of showing that his property was set on fire by sparks from defendant's locomotive.—*Slack v. St. Louis, I. M. & S. Ry. Co.*, 187 S. W. 275.

⚡482(1) (Mo.App.) That a railroad company fired premises adjacent to its tracks may be established by circumstantial evidence.—*Taylor v. Lusk*, 187 S. W. 87.

⚡482(1) (Mo.App.) In action for loss by fire from locomotive sparks, evidence *held* to sustain verdict for plaintiff.—*Slack v. St. Louis, I. M. & S. Ry. Co.*, 187 S. W. 275.

⚡482(2) (Mo.App.) Plaintiff may prove the origin of the fire by circumstantial evidence.—*Slack v. St. Louis, I. M. & S. Ry. Co.*, 187 S. W. 275.

That a locomotive passed near the property of plaintiff shortly before the fire, or that it was emitting sparks at the time, does not authorize a verdict for plaintiff.—*Id.*

⚡484(1) (Mo.App.) In an action against a railroad company for firing a sawmill, evidence *held* sufficient to carry the case to the jury.—*Taylor v. Lusk*, 187 S. W. 87.

⚡485(4) (Mo.App.) An instruction in an action for the firing of plaintiffs' premises authorizing verdict for plaintiff if it was more likely that the premises were fired by an engine operated on defendants' tracks than from any other cause *held* erroneous.—*Taylor v. Lusk*, 187 S. W. 87.

RAPE.

See Criminal Law, ⚡369, 371, 673.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

⚡16(5) (Tex.Cr.App.) In a prosecution for assault to rape a female under the age of consent, proof of defendant's intention to use whatever force may be necessary to obtain intercourse is unnecessary; the offense being complete if defendant's handling of the female indicated a present intent to have intercourse with or without her consent.—*Webb v. State*, 187 S. W. 485.

II. PROSECUTION AND PUNISHMENT.

⚡44 (Tex.Cr.App.) In a prosecution for assault to rape, evidence of no change in social relationships between family of defendant and family of prosecutrix after the family of the latter had notice of the alleged assaults is admissible.—*Webb v. State*, 187 S. W. 485.

§52(1) (Ark.) In a prosecution for carnally knowing a female under age of 16 years, evidence held to warrant conviction.—*Simmons v. State*, 187 S. W. 646.

§59 (23) (Tex.Cr.App.) In a prosecution for assault on rape, an instruction on aggravated assault is proper, where there is evidence tending to show that defendant's acts towards prosecutrix were without intent to rape.—*Webb v. State*, 187 S. W. 485.

RATE.

See Carriers, §12, 18.

RATIFICATION.

See Contracts, §134; Corporations, §426; Principal and Agent, §166-171.

REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer; Quieting Title; Trespass to Try Title.

REBATES.

See Carriers, §13.

REBUTTAL.

See Trial, §63.

RECEIVERS.

See Banks and Banking, §166; Corporations, §553; Venue, §27.

RECEIVING STOLEN GOODS.

See Criminal Law, §225; Trover and Conversion, §11.

§1 (Tex.Cr.App.) Pen. Code 1911, art. 1349, forbids either the receiving or concealing of stolen personal property.—*Cuilla v. State*, 187 S. W. 210.

§7(6) (Tex.Cr.App.) An indictment alleging that accused received and concealed certain personal property will warrant a conviction for either receiving or concealing.—*Cuilla v. State*, 187 S. W. 210.

§8(3) (Tex.Cr.App.) Evidence held to sustain an attorney's conviction for receiving and concealing a revolver stolen by his client.—*Cuilla v. State*, 187 S. W. 210.

RECEPTION OF EVIDENCE.

See Criminal Law, §670, 673.

RECORDS.

See Appeal and Error, §499-714; Chattel Mortgages, §144-155; Courts, §32; Criminal Law, §304, 1090-1124, 1144; Mortgages, §171.

REFERENCE.

See Appeal and Error, §1018-1022; Arbitration and Award.

I. NATURE, GROUNDS, AND ORDER OF REFERENCE.

§8(1) (Mo.) In a case involving complex accounts, the court may direct a suitable person to call in the parties and go over the items to simplify them before their submission to the jury.—*Elks Investment Co. v. Jones*, 187 S. W. 71.

§8(3) (Mo.) The pleadings in an action upon building contractor's bond, held not to show a "long account" within Rev. St. 1909, § 1996.—*Elks Investment Co. v. Jones*, 187 S. W. 71.

§8(3) (Mo.App.) When an account sued on contains 271 items of debit and credit on various dates, it is a "long account," subject to compulsory reference under Rev. St. 1909, §

1996.—*Craig v. McNichols Furniture Co.*, 187 S. W. 793.

§8(6) (Mo.App.) Whether a matter is one for compulsory reference is to be determined from the pleadings when the order of reference is made, and the petition determines unless the account is conceded, especially where there is a general denial.—*Craig v. McNichols Furniture Co.*, 187 S. W. 793.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

I. RIGHT OF ACTION AND DEFENSES.

§16 (Tex.Civ.App.) Before equity will change the terms of a written instrument as not expressing the real agreement, it must appear that they were inserted through accident, fraud, or mutual mistake, or, if the mistake be unilateral, it must be material going to the substance of the contract.—*Arden v. Boone*, 187 S. W. 995.

§25 (Tex.Civ.App.) Equity will relieve from the terms of a contract for unilateral mistake only if it arises through no want of ordinary care or diligence on complainant's part.—*Arden v. Boone*, 187 S. W. 995.

Where party executed preliminary contract and accepted deed providing for his keeping open a permanent roadway, in the absence of showing of fraud or excuse for failure to read the two instruments, reformation thereof could not be had on the ground of accident, fraud, or mistake.—*Id.*

§28 (Tex.Civ.App.) Equity will reform a chattel mortgage in case of mutual mistake between the parties so as to make it express the true intent, and third parties cannot complain of the reformation unless they plead and prove that they are subsequent lienholders or purchasers in good faith.—*Blount, Price & Co. v. Payne*, 187 S. W. 990.

II. PROCEEDINGS AND RELIEF.

§36(1) (Tex.Civ.App.) In an action to reform and foreclose a chattel mortgage, it is not necessary for the petition to allege that it was registered; for as between the parties it was a valid and binding obligation without registration.—*Blount, Price & Co. v. Payne*, 187 S. W. 990.

REHEARING.

See Criminal Law, §1183; New Trial.

REINSTATEMENT.

See Dismissal and Nonsuit, §81.

RELEASE.

See Accord and Satisfaction; Bills and Notes, §258; Chattel Mortgages, §244; Compositions with Creditors; Compromise and Settlement; Mortgages, §309; Trial, §145, 194; Trusts, §296.

I. REQUISITES AND VALIDITY.

§15 (Mo.) Injured railroad employé who signed a release of liability could not set it aside because he did not read it, where it contained only terms of parol agreement of settlement with the representative of the road.—*Reid v. St. Louis & S. F. R. Co.*, 187 S. W. 15.

§24(2) (Mo.) It was incumbent on injured railroad employé, before attacking release of liability for fraud, company's representative having used neither guile nor force to prevent servant from reading it, to tender road the money received.—*Reid v. St. Louis & S. F. R. Co.*, 187 S. W. 15.

Correspondence of railroad with injured servant's attorney held not a waiver of tender back of consideration paid by the road for the injured servant's release of liability.—*Id.*

II. CONSTRUCTION AND OPERATION.

§28(1) (Ark.) A release of one of three joint makers of a note, the contract of release containing an express reservation as to the liability of another one of the makers, but making no mention to reserve the liability of the third maker, he not being a party, and not consenting to the release, completely releases him.—*Tancred v. First Nat. Bank of Ft. Smith*, 187 S. W. 160.

RELEVANCY.

See Criminal Law, §338-366: Evidence, §106-130.

RELIGIOUS SOCIETIES.

§25 (Mo.) Church corporation suing to quiet title to land used as cemetery by an existing voluntary association of the same name, held to have failed to show any interest in itself in the land.—*German Evangelical Protestant Congregation of Church of the Holy Ghost v. Schreiber*, 187 S. W. 845.

REMISSION.

See Appeal and Error, §1140: Damages, §223.

REMOVAL.

See Corporations, §294; Divorce, §300.

RENEWAL.

See Insurance, §145.

RENT.

See Landlord and Tenant, §108, 199½; Mortgages, §199.

RENUNCIATION.

See Executors and Administrators, §19.

REPAIRS.

See Mortgages, §202.

REPLEVIN.**I. RIGHT OF ACTION AND DEFENSES.**

§10 (Mo.App.) Where defendant, anticipating trouble, had delivered a diamond to his clerk to be sold, held defendant, through his agent or servant, had such possession as would support replevin.—*DeWolff v. Morino*, 187 S. W. 620.

IV. PLEADING AND EVIDENCE.

§69(5) (Mo.App.) Where petition in replevin alleged the weight of a diamond to be two and eleven-sixteenths carats, while the proof showed that it weighed two and ten-sixteenths, a sixteenth, a thirty-second, and maybe a sixty-fourth, held not a fatal variance.—*DeWolff v. Morino*, 187 S. W. 620.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§93 (Mo.App.) In replevin, the omission of the findings of fact to find that defendant was in possession of the property when the action was instituted is ordinarily fatal.—*DeWolff v. Morino*, 187 S. W. 620.

REPLY.

See Pleading, §180.

REPORT.

See Corporations, §340.

REPRESENTATIONS.

See Insurance, §253-265.

REPUBLICAN FORM OF GOVERNMENT.

See Constitutional Law, §82.

REPUGNANCY.

See Witnesses, §379-392.

RESALE.

See Sales, §339.

RESCISSION.

See Contracts, §270; Cancellation of Instruments; Insurance, §235; Sales, §124.

RESERVATIONS.

See Easements, §14; Logs and Logging, §2.

RES GESTÆ.

See Criminal Law, §364, 366: Evidence, §121, 128.

RESIDENCE.

See Venue.

RES INTER ALIOS ACTA.

See Evidence, §180.

RES JUDICATA.

See Judgment, §648-743.

RESTAURANTS.

See Adulteration.

RESULTING TRUSTS.

See Trusts, §77-89.

RETIREMENT.

See Partnership, §239.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error, §837-1099; Certiorari; Criminal Law, §1028-1192; Eminent Domain, §262; Executors and Administrators, §256; Guardian and Ward, §165; Justices of the Peace, §202; Schools and School Districts, §39.

REVISION.

See Statutes, §146.

RIGHT OF WAY.

See Easements.

RISKS.

See Master and Servant, §203-226, 280.

ROADS.

See Highways.

ROBBERY.

See Criminal Law, §388.

§3 (Ark.) Under the statute regarding assault with intent to rob, making malice aforethought an element of the crime, the words

"malice aforethought" mean the voluntary and intentional doing of an unlawful act with the purpose, means, and ability to accomplish the reasonable and probable consequence of it, done in a manner showing a heart regardless of social duty and fatally bent on mischief.—Gordon v. State, 187 S. W. 913.

⚡6 (Ark.) To constitute the offense of robbery, the law does not require that one be beaten up before he submits.—Gordon v. State, 187 S. W. 913.

⚡24(3) (Ark.) In trial for assault with intent to rob, evidence held sufficient to support verdict based on identification of accused.—Gordon v. State, 187 S. W. 913.

⚡24(6) (Ark.) In trial for assault with intent to rob, evidence held to show the exercise of sufficient force to support not only the charge of assault to rob, but a charge of robbery.—Gordon v. State, 187 S. W. 913.

⚡26 (Tex.Cr.App.) In a prosecution for robbery in taking whisky by force under pretense that accused was a deputy sheriff, refusal of requested peremptory instructions, that testimony was insufficient to establish the offense alleged, but, if any, swindling, and to acquit—was not error.—Pearson v. State, 187 S. W. 336.

RULE IN SHELLEY'S CASE.

See Wills, ⚡608.

SAFE PLACE TO WORK.

See Master and Servant, ⚡103, 107, 208.

SALARY.

See Clerks of Courts, ⚡33.

SALES.

See Account, Action on, ⚡12, 14; Banks and Banking, ⚡71; Commerce, ⚡40; Contracts, ⚡10; Evidence, ⚡219, 441; Mortgages, ⚡502-529; Municipal Corporations, ⚡575, 578; Trial, ⚡253; Trusts, ⚡100; Vendor and Purchaser; Venue, ⚡7.

I. REQUISITES AND VALIDITY OF CONTRACT.

⚡1(1) (Ark.) A sale is a contract for the transfer of property from one person to another for valuable consideration.—Scoggin v. City of Morrilton, 187 S. W. 445.

⚡22(3) (Tex.Civ.App.) An oil company could not be bound by broker's contract or memorandum of sale of oil to plaintiff, unless it accepted the terms of the contract.—Farmers' & Ginners' Cotton Oil Co. v. Cleburne Oil Mill Co., 187 S. W. 350.

⚡52(5) (Ark.) Evidence held to sustain a verdict that the parties were principal and agent, rather than seller and buyer, especially since unsold goods could be returned without liability for the purchase price.—J. R. Watkins Medical Co. v. Williams, 187 S. W. 653.

⚡53(2) (Tex.Civ.App.) In an action for breach of contract for the sale of oil to the plaintiff, evidence held to make defendant's acceptance of the contract a question for the jury.—Farmers' & Ginners' Cotton Oil Co. v. Cleburne Oil Mill Co., 187 S. W. 350.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(C) Rescission by Buyer.

⚡124 (Mo.App.) Ordinarily a buyer must seasonably inspect goods and reject and return, or offer to return, them if he wishes to rescind a contract of sale because the goods do not comply with the contract.—Allaire, Woodward & Co. v. Cole, 187 S. W. 816.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

⚡181(18) (Mo.App.) In action by drug company for the price of drug furnished other than that ordered, verdict for defendant held authorized.—Allaire, Woodward & Co. v. Cole, 187 S. W. 816.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

⚡201(4) (Mo.App.) Where plaintiff consigned cars to its order at Kansas City, with directions to notify defendant and allow inspection, and sent the bill of lading with draft attached to a Kansas City bank, held there was no delivery at Carbondale, Colo., where some of the cars were loaded.—Roaring Fork Potato Growers v. C. C. Clemons Produce Co., 187 S. W. 617.

⚡202(2, 3) (Ark.) Where purchasers of machinery complied with conditions of contract of sale in executing notes for the price and mortgages to secure them, and paying part of the price, they acquired title to the machinery.—Murray Co. v. Satterfield, 187 S. W. 927.

⚡202(5) (Mo.App.) Where freight was consigned to the consignor's order, notify another and allow inspection, and the bill of lading sent to a bank for delivery to the party to be notified, upon his paying an attached draft, held, that title did not pass until the purchase price was paid or tendered.—Roaring Fork Potato Growers v. C. C. Clemons Produce Co., 187 S. W. 617.

⚡202(6) (Mo.App.) Where a bill of lading is used to secure the purchase price, the title does not pass until payment has been made or tendered.—Roaring Fork Potato Growers v. C. C. Clemons Produce Co., 187 S. W. 617.

VII. REMEDIES OF SELLER.

(D) Resale.

⚡339 (Tex.Civ.App.) Where a contract for sale of onions to be grown was repudiated by buyer before time for performance, seller could sell them and recover the difference.—Texas Seed & Floral Co. v. Chicago Set & Seed Co., 187 S. W. 747.

(E) Actions for Price or Value.

⚡343, 344 (Mo.App.) Where goods are of any value and the buyer retains them, he must pay the reasonable value thereof.—Allaire, Woodward & Co. v. Cole, 187 S. W. 816.

⚡347(6) (Mo.App.) If goods are wholly worthless, the buyer may successfully defend a suit for their price on the ground of total failure of consideration, even though he does not tender them back.—Allaire, Woodward & Co. v. Cole, 187 S. W. 816.

⚡355(1) (Mo.App.) Where plaintiff did not prove a delivery at the locality alleged, he cannot assert that plaintiff waived the place of delivery by absolutely refusing the goods, when such waiver has not been pleaded.—Roaring Fork Potato Growers v. C. C. Clemons Produce Co., 187 S. W. 617.

⚡355(3) (Mo.App.) Where a petition alleges that plaintiff, pursuant to a contract, delivered goods to defendant at a particular place, the proof must show delivery at that place.—Roaring Fork Potato Growers v. C. C. Clemons Produce Co., 187 S. W. 617.

⚡359(1) (Mo. App.) In account for ice sold and delivered to a saloon, evidence held sufficient to sustain finding that defendant was either owner or partner in the business, or that the person in charge was his agent.—Wells v. Vallo, 187 S. W. 621.

⚡364(1) (Mo.App.) In an action for the balance due on a car of feed, instruction for defendant as to his failure to receive any invoice and as to his payment therefor held not reversible error.—Toberman, Mackey & Co. v. Gidley, 187 S. W. 593.

(F) Actions for Damages.

⚡369 (Tex.Civ.App.) Where a contract for sale of onions to be grown was repudiated by buyer before time for performance, seller could accept repudiation and sue for damages, or elect to consider contract as still in force, treat onions as property of buyer, and sell them at time set for performance.—*Texas Seed & Floral Co. v. Chicago Set & Seed Co.*, 187 S. W. 747.

VIII. REMEDIES OF BUYER.**(A) Recovery of Price.**

⚡396 (Tex.Civ.App.) In action for excess paid on price of cotton by buyer, where the contract pleaded was that the cotton should be paid for on the basis of its grade, plaintiff need not allege that the contract provided for grading in town to which it was to be shipped by seller, to admit testimony of its real grade ascertained at such place.—*Townsend v. Pilgrim*, 187 S. W. 1021.

(C) Actions for Breach of Contract.

⚡418(3) (Mo.App.) In lumber buyer's action for nondelivery, plaintiff held entitled to recover for lumber secured elsewhere by him, whether borrowed or bought, on basis of market value.—*Crossley v. Summit Lumber Co.*, 187 S. W. 113.

⚡418(7) (Mo.) Where seller breaks his contract to deliver, under contract for postponed payments, goods not purchasable in open market, the buyer is not bound to minimize his damages from loss of resale profits by buying such goods for cash from seller.—*Weber Implement Co. v. Acme Harvesting Mach. Co.*, 187 S. W. 874.

⚡418(15) (Mo.) In action for breach of contract to deliver goods, damages for loss of profits of probable resale of such goods are not recoverable.—*Weber Implement Co. v. Acme Harvesting Mach. Co.*, 187 S. W. 874.

A contract for mowers, providing for shipment direct to subvendees and for fixed time of delivery and postponed payments to allow buyer to collect on resales before paying, so appraised seller of contemplated resales that on breach of contract to deliver he was liable in damages for profits on goods resold.—*Id.*

⚡418(19) (Mo.App.) Where drug company shipped the manufacturer of hog remedy, instead of what he ordered, a poisonous drug, which ignorant of the change he mixed with his remedy, the drug company was liable for money paid by him to customers whose hogs died from the compound, for loss by destruction of compound in which the drug had been used, and for resulting loss of business.—*Allaire, Woodward & Co. v. Cole*, 187 S. W. 816.

(D) Actions and Counterclaims for Breach of Warranty.

⚡426 (Ark.) Contract of sale of a stallion, giving privilege of returning him in a certain time and receiving another if not as guaranteed, held to furnish the only remedy for his failure to come up to guaranty.—*Holland Banking Co. v. Haynes*, 187 S. W. 682.

IX. CONDITIONAL SALES.

⚡474(1) (Ark.) Where the seller of personal property in the buyer's note reserved the title until the price was paid, the buyer could vest no absolute title in another until payment of price, and could not by affixing the articles to leased land vest title in his landlord.—*Fears v. Watson*, 187 S. W. 178.

SATISFACTION.

See Accord and Satisfaction; Compromise and Settlement; Release.

SCHOOL LANDS.

See Public Lands, ⚡175.

SCHOOLS AND SCHOOL DISTRICTS.

See Injunction, ⚡114; Public Lands, ⚡175; Statutes, ⚡96, 235; Venue, ⚡27.

II. PUBLIC SCHOOLS.**(B) Creation, Alteration, Existence, and Dissolution of Districts.**

⚡22 (Ark.) Acts 1909, p. 947, relating to organization of special school districts, is repealed only as to Greene county by Acts 1915, p. 108.—*Special School Dist. No. 33, Greene County, v. Howard*, 187 S. W. 444.

Power of the Legislature in enacting laws for formation or dissolution of school districts is plenary, provided contractual obligations are not impaired.—*Id.*

⚡22 (Mo.) Sess. Acts 1913, p. 721, providing for organization of consolidated schools and rural high schools, and providing state aid therefor, is not violative of Const. art. 10, § 11, prescribing limits of taxation for local purposes.—*State ex inf. Wright v. Morgan*, 187 S. W. 54.

⚡30 (Tex.Civ.App.) A common school district as established by the county school trustees by adding territory so that the farthest line thereof is more than four miles from its center, contrary to Vernon's Sayles' Ann. Civ. St. 1914, art. 2815, can have no legal existence.—*Oliver v. Smith*, 187 S. W. 528.

⚡36 (Ark.) Acts 1915, p. 108, gives power to county court to dismember districts organized under Acts 1909, p. 947.—*Special School Dist. No. 33, Greene County, v. Howard*, 187 S. W. 444.

⚡36 (Tex.Civ.App.) That a maintenance tax has been voted in a common school district does not affect the power of the county school trustees to reduce the district's area.—*Oliver v. Smith*, 187 S. W. 528.

Any power of the court to correct abuse of discretion of county school trustees, in changing territory of one school district to another, can be exercised only in quo warranto instituted by a proper party.—*Id.*

⚡39 (Tex.Civ.App.) Under Acts 34th Leg. c. 36, appeals to the district court may be made direct from action of the county board of school trustees in consolidating districts.—*Clark v. Hallam*, 187 S. W. 964.

SECONDARY EVIDENCE.

See Evidence, ⚡183.

SECURITY.

See Bills and Notes, ⚡357.

SEDUCTION.

See Limitation of Actions, ⚡39.

SELF-DEFENSE.

See Homicide, ⚡187, 188, 300.

SELF-SERVING DECLARATIONS.

See Criminal Law, ⚡413.

SENTENCE.

See Criminal Law, ⚡982.

SEPARATE COACH LAW.

See Railroads, ⚡253.

SEPARATE MAINTENANCE.

See Husband and Wife, ⚡278.

SEPARATION.

See Trial, ⚡41.

SERVANTS.

See Master and Servant.

SERVICE.

See Process.

SERVICES.

See Executors and Administrators, ¶206, 221; Parent and Child, ¶5.

SET-OFF AND COUNTERCLAIM.

See Judgment, ¶622.

II. SUBJECT-MATTER.

¶29(1) (Ark.) In action by agent for compensation, loss alleged to have been sustained by principal from agent's unfaithful discharge of the contract on which he sues is proper counterclaim under Kirby's Dig. § 6099.—Neely v. Wilmore, 187 S. W. 837.

SETTING ASIDE.

See Chattel Mortgages, ¶202; Divorce, ¶165, 167; Judgment, ¶358, 386; Mortgages, ¶529; Municipal Corporations, ¶578.

SETTLEMENT.

See Compromise and Settlement; Criminal Law, ¶1092; Exceptions, Bill of, ¶82; Guardian and Ward, ¶165; Release.

SEVERAL CONTRACTS.

See Insurance, ¶179½.

SHERIFFS AND CONSTABLES.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(C) Deputies and Assistants, Substitutes, and Special Officers.

¶18 (Ark.) Acts 1915, p. 354, § 26, providing in part that in a township within which is situated any larger city subject to the act the constable may have five deputies, one of which shall be the Arkansas humane officer, merely authorizes constable to appoint five or a smaller number of deputies, but does not require such appointment.—Rankin v. Allnutt, 187 S. W. 934.

Under Acts 1915, p. 354, § 26, approval of county court is condition precedent to validity of appointment made by constable.—Id.

Under Acts 1915, p. 354, § 26, where the constable appoints five deputies, one of them should be charged specially with enforcing the duties of the humane officer.—Id.

II. COMPENSATION.

¶28 (Tex.Civ.App.) In Acts 25th Leg. Sp. Sess. c. 15 (10 Gammel's Laws, pp. 1482-1484), amending 10 Gammel's Laws, pp. 1445-1453, § 10, limiting compensation of constables in cities of certain population determinable by "next preceding city election," the words do not mean the election next preceding the passage of the law, but the election next preceding the occasion which gives rise to its application.—Harris County v. Smith, 187 S. W. 701.

In Acts 25th Leg. Sp. Sess. c. 15 (10 Gammel's Laws, pp. 1482-1484), amending 10 Gammel's Laws, pp. 1445-1453, the words "next preceding city election" refer to regular or general elections for the election of city officers held at fixed intervals, and not to special elections.—Id.

Power of Legislature to fix fees or compensation of constables, or methods of ascertaining fees, is not limited by the Constitution.—Id.

III. POWERS, DUTIES, AND LIABILITIES.

¶78 (Mo.App.) Under Rev. St. 1879, pp. 1516, 1517, providing that special laws applicable to the sheriff of the county of St. Louis shall apply to the city of St. Louis, which had been separated from the county of St. Louis by the adoption of the Scheme and Charter of 1876, the "Sheriffs and Marshals Act" (Rev. St. 1899, pp. 2550-2553) remained applicable to the city of St. Louis.—State ex rel. and to Use of Missouri Poultry & Game Co. v. Nolte, 187 S. W. 896.

Under Rev. St. 1879, §§ 3158, 3160, the revision, amendment, and re-enactment of the general act regarding third party claims (Rev. St. 1909, § 2204) did not operate to repeal the "Sheriffs and Marshals Act" (Rev. St. 1899, pp. 2550-2553), a special act applicable only to the city of St. Louis.—Id.

¶90 (Mo.App.) Although a sheriff is entitled to demand an indemnifying bond upon the filing of a third party claim to property taken on execution, a claim which fails to conform to the statutory requirements is in law no claim, and does not justify the officer in refusing to perform the duties imposed upon him by law.—State ex rel. and to Use of Missouri Poultry & Game Co. v. Nolte, 187 S. W. 896.

¶120½ (Mo.App.) Under Rev. St. 1909, § 2240, on a sheriff refusing to sell stock taken on execution, because of the filing of a third party claim which did not comply with the statute, though he acted in good faith under legal advice, thinking that the claim was not properly filed, acted at his peril.—State ex rel. and to Use of Missouri Poultry & Game Co. v. Nolte, 187 S. W. 896.

¶139(4) (Mo.App.) Under Rev. St. 1909, § 2240, sheriff refusing to sell under an execution held liable for the execution debt, regardless of actual damage.—State ex rel. and to Use of Missouri Poultry & Game Co. v. Nolte, 187 S. W. 896.

IV. LIABILITIES ON OFFICIAL BONDS.

¶168(1) (Mo.App.) In an action on a sheriff's official bond for refusal to sell stock levied upon, it was not essential that plaintiff allege anything more as to the judgment debtor's interest than that the sheriff had levied and seized upon all of his right, title and interest therein.—State ex rel. and to Use of Missouri Poultry & Game Co. v. Nolte, 187 S. W. 896.

In a suit on a sheriff's official bond for refusal to sell stock levied upon, being for the penalty of the statute and not for the recovery of damages actually sustained, it was not necessary to allege the value of judgment debtor's interest.—Id.

Under Rev. St. 1909, § 2240, imposing liability upon an officer to whom an execution shall be delivered if he shall refuse and neglect to proceed with it according to law, in an action on a sheriff's official bond, the petition need not allege that the sheriff "wrongfully" refused to make the sale.—Id.

SHIPPING.

See Ferries.

VII. CARRIAGE OF GOODS.

¶108 (Tex.Civ.App.) A shipping contract, binding the shipper to pay for space unused in a vessel by reason of the shipper's failure to furnish a cargo according to contract, held not unilateral.—W. B. Clarkson & Co. v. Gans S. S. Line, 187 S. W. 1106.

¶145 (Tex.Civ.App.) Evidence held sufficient to support a judgment for plaintiff, a carrier, for the rent of unused space in a vessel against a shipper failing to furnish merchandise for shipment pursuant to contract requirements.—

W. B. Clarkson & Co. v. Gans S. S. Line, 187 S. W. 1108.

SIDEWALKS.

See Railroads, ¶95.

SIGNALS.

See Highways, ¶183; Railroads, ¶312, 376.

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See Exceptions, Bill of, ¶32; Trial, ¶323.

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SLEEPING CARS.

See Carriers, ¶413, 417.

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SPECIFICATION OF ERRORS.

See Appeal and Error, ¶728-731, 758.

SPECIFIC LEGACIES.

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SPECIFIC PERFORMANCE.

III. GOOD FAITH AND DILIGENCE.

¶87 (Tex.Civ.App.) In a suit for specific performance of contract whereby patent issued to defendant was to be property of firm consisting of plaintiff and defendant, plaintiff could not recover where he had not fully complied with his contract and did not offer to perform or show any equitable excuse for his default.—Kuehn v. Meredith, 187 S. W. 386.

¶94 (Ark.) Where defendants contracted to sell equity in mortgaged lands in consideration of release of bank's judgment against them, a deed reciting the mortgage and that bank assumed payment of mortgage not being in compliance with contract, by refusing to execute the deed in any other form they broke contract and were not in a position to seek specific performance of the contract.—Huffman v. Fudge, 187 S. W. 644.

IV. PROCEEDINGS AND RELIEF.

¶117 (Tex.Civ.App.) In suit under Vernon's Sayles' Ann. Civ. St. 1914, for specific performance of a contract for sale of land by defendant's testatrix, where the petition alleged a misdescription in the contract and stated a correct description, and such allegations were shown by evidence, there was no variance.—Bender v. Bender, 187 S. W. 735.

SPEED.

See Evidence, ¶535; Highways, ¶184.

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See Action, ¶53; Judgment, ¶592.

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II. GOVERNMENT AND OFFICERS.

¶60 (Tex.Civ.App.) Under Const. art. 4, § 5, and article 16, § 6, an act passed February 11, 1915 (Acts 34th Leg. c. 9), making an appropriation covering deficiencies for fuel, water, lights, etc., for the Governor's mansion but including items for food, automobile repair, punch, water, hire and coal, was invalid.—Terrell v. Middleton, 187 S. W. 367.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

¶119 (Tex.) Acts 83d Leg. (Sp. Sess.) c. 39, § 34 (Vernon's Sayles' Ann. Civ. St. 1914, art. 3174w), is not unconstitutional as violating Const. art. 3, § 52, relating to use of public funds and credit.—Beene v. Waples, 187 S. W. 191.

¶119 (Tex.Civ.App.) A bill appropriating money for water, fuel, lights, etc., for the Governor's mansion, containing items for food, liquors, groceries, and automobile repairs for the Governor's private use, is violative of Const. art. 3, § 50, providing that the Legislative shall have no power to authorize the giving or lending of the credit of the state.—Terrell v. Middleton, 187 S. W. 367.

¶120 (Tex.Civ.App.) Under Const. art. 3, § 49, and Rev. St. 1911, art. 4342, a bill making an appropriation for water, fuel, lights, etc., for the Governor's mansion and covering items for food, liquors, engraved cards, and invitations for the Governor's private use, was unconstitutional.—Terrell v. Middleton, 187 S. W. 367.

¶130 (Ark.) Under the provisions of Const. art. 5, § 23, article 16, § 12, and Kirby's Dig. §§ 3409, 3415, 3441, a specific appropriation is an absolute prerequisite to the drawing from or payment out of the state treasury of any money therein required to be appropriated.—Dickinson v. Clibourn, 187 S. W. 909.

¶131 (Ark.) The Game and Fish Act, §§ 11, 12, 20, does not specifically appropriate moneys to the payment of game wardens' salaries so that they may be paid from the state treasury.—Dickinson v. Clibourn, 187 S. W. 909.

¶168½ (Tex.Civ.App.) In view of Rev. St. 1911, art. 1526, as revised by Acts 33d Leg. c. 55, relating to Supreme Court, the district court retains jurisdiction to issue an injunction against a state comptroller to restrain him from issuing warrants on the state treasurer covering expenditures made by the government.—Terrell v. Middleton, 187 S. W. 367.

Rev. St. 1911, art. 5732, does not deprive the district court of the power and authority to restrain the performance of an illegal or unconstitutional act by a state officer.—Id.

A citizen and taxpayer may maintain an action to restrain state officers from performing illegal and unauthorized and unconstitutional acts.—Id.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

¶8½(1). (Mo.) Laws 1913, p. 323, is of general application and not special or local, and therefore not offensive to Const. art. 4, § 54.

without notice of intention to apply for special law.—*Straughan v. Meyers*, 187 S. W. 1159.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§67 (Tex.Civ.App.) If the authority to legislate by special act upon a certain subject is given by constitutional provision other than article 3, § 56, forbidding special acts regulating certain matters, such authority carries with it the right to enact all provisions which would be legitimately embraced in the bill if section 56 was not a part of the Constitution.—*Altgelt v. Gutzeit*, 187 S. W. 220.

§77(2) (Mo.) Treating local option elections as a class being justified, Rev. St. 1909, § 7242, authorizing contest of such an election, is not a special law.—*State ex rel. City of Monett v. Thurman*, 187 S. W. 1190.

§85(4) (Mo.) Rev. St. 1909, § 7242, making the city holding a local option election defendant to the contest thereof, held not special legislation regulating practice in court in violation of Const. art. 4, § 53, par. 33.—*State ex rel. City of Monett v. Thurman*, 187 S. W. 1190.

§90(1) (Ark.) Acts 1915, p. 831, confirming officers of an incorporated town, as to acts of council in establishing a water supply district and in levying assessments, did not violate Const. art. 12, §§ 2, 3, prohibiting special acts conferring corporate power.—*Cotten v. Hughes*, 187 S. W. 905.

§96(1) (Mo.) Sess. Acts 1913, p. 721, providing for organization of consolidated schools and rural high schools, and providing state aid therefor, is not violative of Const. art. 4, § 53, prohibiting local or special laws concerning schools.—*State ex inf. Wright v. Morgan*, 187 S. W. 54.

§97(1) (Tex.Civ.App.) Const. art. 3, § 56, forbidding the Legislature to pass any local or special law in reference to certain matters, was annulled, in so far as it related to the maintenance of public highways and roads, by the amendment to article 8, § 9.—*Altgelt v. Gutzeit*, 187 S. W. 220.

Under authority of the Legislature under the amendment to Const. art. 8, § 9, to pass local laws relating to highways such a law is not objectionable, notwithstanding it incidentally regulates county affairs.—*Id.*

§98(1) (Ky.) Ky. St. § 829, touching procedure before Railroad Commission in rate cases, is not violative of Const. § 59, subsec. 1, prohibiting all special acts to regulate courts of justice.—*Louisville & N. R. Co. v. Greenbrier Distillery Co.*, 187 S. W. 296.

§101(1) (Mo.) Laws 1913, p. 323, as to non-resident voting, is not obnoxious to Const. art. 4, § 53, subd. 12, prohibiting special laws changing place of voting.—*Straughan v. Meyers*, 187 S. W. 1159.

III. SUBJECTS AND TITLES OF ACTS.

§108 (Tex.Civ.App.) Const. art. 3, § 35, providing that no bill shall contain more than two subjects, must be construed liberally, and no provision of a statute will be held invalid when they relate to the same subject and are not foreign to the subject expressed in the title.—*Altgelt v. Gutzeit*, 187 S. W. 220.

§125(6) (Tex.Civ.App.) Under Const. art. 3, § 35, and article 3, § 56, and in view of Ver-

non's Sayles' Ann. Civ. St. 1914, arts. 2274, 2275, 3870, 6901, and Sp. Acts 33d Leg. c. 77, §§ 3, 6, 7, 14, and 27, held, that section 5 thereof, fixing an annual salary for a county commissioner, was not unconstitutional as embracing two subjects.—*Altgelt v. Gutzeit*, 187 S. W. 220.

IV. AMENDMENT, REVISION, AND CODIFICATION.

§146 (Mo.App.) The acts of the revisors in continuing to include a statute which had been repealed in subsequent revisions of the statutes would not operate to keep it in force.—*State ex rel. and to Use of Missouri Poultry & Game Co. v. Nolte*, 187 S. W. 896.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§181(2) (Mo.) In construing statutes, the results and consequences of a proposed interpretation must be given effect.—*Straughan v. Meyers*, 187 S. W. 1159.

§184 (Mo.) In construing statutory provisions, the object and purpose which induced their enactment and the mischief they are intended to prevent must be given effect.—*Straughan v. Meyers*, 187 S. W. 1159.

§188 (Mo.) Doubtful words of a statute may be enlarged or restricted in their meaning to conform to the true intent of the lawmakers when manifested by the aid of sound principles of interpretation.—*Straughan v. Meyers*, 187 S. W. 1159.

§188 (Tex.Civ.App.) Intention of Legislature as to law is to be determined primarily from plain and ordinary import of language used.—*Harris County v. Smith*, 187 S. W. 701.

§211 (Ark.) Although the title of an act may be looked to, to ascertain its meaning, it is no part of the act, and is not controlling.—*Special School Dist. No. 33, Greene County, v. Howard*, 187 S. W. 444.

§211 (Mo.) Where certain terms of a statute are ambiguous, courts are at liberty to go to the title as a clue or a guide to the legislative intent.—*Straughan v. Meyers*, 187 S. W. 1159.

§218 (Tex.Civ.App.) Where statute is ambiguous, great weight will be given to its contemporaneous construction by other departments of the government.—*Cain v. Garvey*, 187 S. W. 1111.

(B) Particular Classes of Statutes.

§235 (Mo.) It is the policy of the Supreme Court, in construing statutes relating to schools and school districts, to give them a liberal construction, and to uphold the same whenever it can be done without violating the plain provisions of the law.—*State ex inf. Wright v. Morgan*, 187 S. W. 54.

§241(1) (Ark.) A penal statute is construed strictly, since courts are opposed to enforcement of penalties except to the extent necessary to secure the manifest object of their infliction.—*St. Louis, I. M. & S. Ry. Co. v. State*, 187 S. W. 1064.

§241(1) (Mo.) Criminal statutes must be strictly construed.—*State v. Owens*, 187 S. W. 1189.

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See Carriers, ¶280, 300.

II. REGULATION AND OPERATION.

¶93(2) (Tex.Civ.App.) The violation by mo-
torman of a railway company's rule to run
slowly at a certain point does not of itself
give an injured person a right of action.—
Southern Traction Co. v. Wilson, 187 S. W.
536.

¶110(2) (Tex.Civ.App.) In action against a
street railway company, an answer alleging
that plaintiff was in plain view of the car, and
that he negligently drove his wagon upon the
track without making any effort to avoid colli-
sion, was a good plea of contributory negli-
gence continued after discovered peril by plain-
tiff, at least where no exception was taken.—
Southern Traction Co. v. Wilson, 187 S. W.
536.

¶112(3) (Tex.Civ.App.) In an action for in-
juries caused by defendant's street car strik-
ing plaintiff's automobile, where only act of
negligence charged was discovered peril, bur-
den of proof was on plaintiff to establish that
employee actually had knowledge of plaintiff's
peril and that they did not exercise reasonable

care.—Jacobe v. Houston Electric Co., 187 S.
W. 247.

¶113(7) (Tex.Civ.App.) In action against
street railway for injuries to wagon driver,
evidence that motorman was violating the com-
pany's rules in not running slowly was admis-
sible as tending to show absence of negligence
by plaintiff.—Southern Traction Co. v. Wil-
son, 187 S. W. 536.

¶114(19) (Mo.App.) In action for death of
motorcyclist struck by street car, evidence that
motorcycle approached tracks at speed of over
50 feet per second in street so narrow that
deceased could not be seen by motorman more
than a second before collision held not to sus-
tain a verdict for plaintiff.—Schoenhard v. Dun-
ham, 187 S. W. 273.

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SUBROGATION.

¶23(1) (Tex.Civ.App.) Where money was lent
a mortgagor to discharge mortgages, and the
lender retained the instruments, their payment
gave it the right of subrogation, if it was not a

mere volunteer.—*First State Bank & Trust Co. of Abilene v. Walker*, 187 S. W. 724.

⚡23(3) (Tex.Civ.App.) A party, who, without interest to protect, voluntarily loans to a mortgagor to satisfy and cancel the mortgage, taking a new mortgage for his own security, cannot have the former mortgage revived and himself subrogated to the rights of the mortgagee, unless a subrogation takes place by agreement of the parties.—*First State Bank & Trust Co. of Abilene v. Walker*, 187 S. W. 724.

⚡41(6) (Tex.Civ.App.) Mere delivery, to party loaning money to mortgagor to satisfy and cancel the mortgage, of the instrument and the note was not sufficient to show agreement that lender should be subrogated to the rights of the mortgagee under the old instrument.—*First State Bank & Trust Co. of Abilene v. Walker*, 187 S. W. 724.

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SUICIDE.

See Insurance, ⚡788.

SUMMONS.

See Process.

SUNDAY.

⚡7 (Ark.) Only in cases of extreme emergency is one justified in disregarding the Sabbath, in order to make preparations for work or to continue work done on other days of the week.—*Wilson v. State*, 187 S. W. 937.

That the work of defendants, members of a logging crew, on Sunday was necessary to provide a sufficient number of logs to prevent a shutdown of the sawmill on week days held not a justification of the violation of the Sabbath law.—*Id.*

Where a sawmill furnished light and water to the town, using sawdust and refuse for engine fuel, that labor of defendants on Sunday was necessary to furnish sufficient logs in order that enough refuse be available for fuel to furnish such light and water was not sufficient justification of the violation of the Sabbath law.—*Id.*

⚡29(3) (Ark.) In a prosecution for unlawfully laboring on the Sabbath day, the burden is on the defendant to show the existence of the necessity which justified nonobservance of the Sabbath.—*Wilson v. State*, 187 S. W. 937.

SUPERSEDEAS.

See Appeal and Error, ⚡458.

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TAXATION.

See Adverse Possession, ⚡79; Jury, ⚡19; Levees, ⚡27; Licenses, ⚡1-8; Municipal Corporations, ⚡979.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

⚡37 (Tex.) Acts 33d Leg. (Sp. Sess.) c. 39, § 34 (Vernon's Sayles' Ann. Civ. St. 1914, art. 3174w), is not unconstitutional as violating Const. art. 8, § 3, requiring taxes to be levied by general laws.—*Beene v. Waples*, 187 S. W. 191.

⚡38 (Tex.) Acts 33d Leg. (Sp. Sess.) c. 39, § 34 (Vernon's Sayles' Ann. Civ. St. 1914, art. 3174w), is not unconstitutional as violating Const. art. 8, § 3, requiring taxes to be levied for public purposes only.—*Beene v. Waples*, 187 S. W. 191.

⚡40(8) (Ark.) Under Const. art. 16, § 5, and Kirby's Dig. § 7008, touching equality in taxation, a valuation of plaintiff's timber lands under an arbitrary classification and higher than agricultural lands of greater value, although below market value, held an unlawful discrimination.—*Drew County Timber Co. v. Board of Equalization of Cleveland County*, 187 S. W. 942.

V. LEVY AND ASSESSMENT.

(G) Review, Correction or Setting Aside of Assessment.

⚡466 (Ark.) A county board of equalization, being created by statute, can perform no act not specially authorized by the statute.—*Drew County Timber Co. v. Board of Equalization of Cleveland County*, 187 S. W. 942.

⚡493(1) (Ark.) A taxpayer, aggrieved at the action of the board of equalization, may apply to the county court for relief, and in turn appeal to the circuit court.—*Drew County Timber Co. v. Board of Equalization of Cleveland County*, 187 S. W. 942.

VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

⚡530 (Ark.) Where agent of landowner paid taxes at collector's office and took receipt from person in charge, held payment was made to collector and mistake of description in issuing the receipt resulting in the sale of lands for taxes rendered the tax sale void.—*Robertson v. Johnson*, 187 S. W. 439.

A tax sale of lands, caused through mistake of collector in crediting payment of taxes to the wrong description, will be set aside, notwithstanding the failure of the collector to collect the penalty prescribed by Acts 1909, p. 783, § 1, for failure to pay taxes within 30 days after the first Monday in October.—*Id.*

⚡534 (Ark.) An attempt to pay taxes, made in good faith by landowner or his agent and frustrated by mistake, negligence, or other fault of the collector, renders the subsequent sale of land for nonpayment of taxes void.—*Robertson v. Johnson*, 187 S. W. 439.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(A) Collectors and Proceedings for Collection in General.

⚡571 (Tex.Cr.App.) The offenses by tax collectors having state money in their custody denounced in Pen. Code 1911, arts. 96, 97, by article 144, and by article 107, are separate and distinct, and neither is in conflict with or repeats the other.—*Quillin v. State*, 187 S. W. 199.

XI. TAX TITLES.**(B) Tax Deeds.**

⚡789(3) (Tex.Civ.App.) A tax deed is not evidence of title unless authority of maker of deed is shown by proof of compliance with requirements of law conferring authority to make sale. —O'Hanlon v. Morrison, 187 S. W. 692.

(C) Actions to Confirm or Try Title.

⚡805(1) (Ark.) Kirby's Dig. § 5075, excepting infants from section 5061, providing that the possession of a tax grantee must be attacked within two years after plaintiff was seised or in possession, does not avail an infant plaintiff claiming under the possession of her father, who died three years before section 5075 was enacted. —Brandon v. Parker, 187 S. W. 312.

Kirby's Dig. § 5061, providing that the possession of a tax sale grantee must be attacked within two years, protects a defendant who has been in possession over two years under a donation tax deed, although plaintiff's predecessors had previously been in possession over two years under a similar deed. —Id.

TELEGRAPHS AND TELEPHONES.**II. REGULATION AND OPERATION.**

⚡67(2) (Tex.Civ.App.) Where a telegraph message was worded, "Your father died this afternoon at four o'clock," being insufficient to charge telegraph company with notice that addressee of message would request a postponement of funeral until he could arrive, damages suffered by addressee held too remote. —Western Union Telegraph Co. v. Griffiths, 187 S. W. 348.

⚡71 (Tex.Civ.App.) A verdict of \$975 is not excessive, where telegram announcing death of addressee's favorite brother was not delivered, causing her to miss his funeral, which she had made prior arrangements to attend. —Western Union Telegraph Co. v. Alexander, 187 S. W. 1016.

TENANCY IN COMMON.

See Husband and Wife, ⚡14.

TENDER.

See Cancellation of Instruments, ⚡24.

TERM.

See Appeal and Error, ⚡864.

THEFT.

See Insurance, ⚡425; Larceny.

THREATS.

See Homicide, ⚡167.

TIMBER.

See Damages, ⚡112; Logs and Logging.

TIME.

See Appeal and Error, ⚡230, 627, 773, 797; Appearance, ⚡4; Bills and Notes, ⚡404; Carriers, ⚡100; Costs, ⚡70; Criminal Law, ⚡841; Executors and Administrators, ⚡225; Homicide, ⚡207; Insurance, ⚡186; Judgment, ⚡119, 386; Parties, ⚡52; Pleading, ⚡85, 245; Trial, ⚡76; Trusts, ⚡77; Wills, ⚡481.

TITLE.

See Banks and Banking, ⚡159; Brokers, ⚡63; Descent and Distribution, ⚡11; Ejectment, ⚡9; Forceful Entry and Detainer, ⚡6; Insurance, ⚡282, 328; Judgment, ⚡

743; Limitation of Actions, ⚡45; Quieting Title; Sales, ⚡201, 202; Statutes, ⚡211; Taxation, ⚡789, 805; Trespass to Try Title.

TORTS.

See Carriers, ⚡108-136, 177, 217, 227-230, 280-417; Damages, ⚡69, 95-112, 132, 134; Death, ⚡49-96; Electricity, ⚡14-19; Explosives; Forceful Entry and Detainer; Fraud; Libel and Slander; Malicious Prosecution; Master and Servant; Municipal Corporations, ⚡705-822; Negligence; Nuisance; Trespass; Trover and Conversation.

TOWNS.

See Counties; Municipal Corporations.

TRANSCRIPTS.

See Appeal and Error, ⚡597.

TRANSFER OF CAUSES.

See Trial, ⚡11.

TREASURERS.

See Counties, ⚡74.

TREES.

See Logs and Logging.

TRESPASS.**II. ACTIONS.**

⚡67 (Mo.App.) It is a question for the jury as to what caused a wall to fall where defendant excavated on plaintiff's property to within two feet of the wall. —Knoche v. Pratt, 187 S. W. 578.

TRESPASS TO TRY TITLE.

See Trial, ⚡255.

I. RIGHT OF ACTION AND DEFENSES.

⚡64(1) (Tex.Civ.App.) A mortgagee who has never been in possession cannot maintain a suit in trespass to try title. —Alexander v. Conley, 187 S. W. 254.

II. PROCEEDINGS.

⚡41(1) (Tex.Civ.App.) In trespass to try title, evidence held sufficient to sustain a verdict for plaintiff, where defendant had repudiated the contract of tenancy under which he claimed lawful possession and thereafter had asserted adverse title. —Rice v. Schertz, 187 S. W. 245.

TRESTLES.

See Railroads, ⚡370.

TRIAL.

See Continuance; Costs; Criminal Law, ⚡670-875; Jury; New Trial; Reference; Venue.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

II. DOCKETS, LISTS, AND CALENDARS.

⚡11(2) (Ark.) There is no error in refusing to transfer to equity an action by one partner for breach of a contract, which the other partner, joined as a defendant, canceled, so far as he could. —W. D. Reeves Lumber Co. v. Davis, 187 S. W. 171.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§25(4) (Mo.App.) In an action on a note, *held*, on the admissions and issues, that the opening and closing of the argument was properly allowed to the defendants.—*Citizens' Bank of Senath v. Douglass*, 187 S. W. 158.

§28(3) (Mo.) Refusal to permit the jury to visit another city to view property destroyed by fire for which plaintiff seeks to recover insurance *held* not an abuse of judicial discretion, where testimony was received clearly disclosing the facts, and the view would delay trial two or three days.—*Young v. Pennsylvania Fire Ins. Co.*, 187 S. W. 858.

§29(1) (Mo.App.) In action against railroad for injuries, where, upon defendant's endeavoring to show that attorneys were called by plaintiff before she called in physicians, court stated he thought the attorneys at his bar were reputable and their records clean, the language was improper as a reflection on the conduct of defendant's attorneys.—*Jackmann v. St. Louis & H. Ry. Co.*, 187 S. W. 786.

§29(1) (Tex.Civ.App.) Court may interrogate jury when it reports as to its answer to special issue in open court and in presence of counsel for both parties.—*Myers v. Grantham*, 187 S. W. 532.

§29(2) (Tex.Civ.App.) Remarks of trial judge explanatory of his action in excluding immaterial deeds were not improper.—*Black v. Wilson*, 187 S. W. 498.

The court, in rejecting testimony of statements made by a third person, which could not bind plaintiff, was justified in asking defendant, "How in the world could any statement made to Black by other people bind this plaintiff in this case?"—*Id.*

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

§41(5) (Tex.Civ.App.) That witness talks to another during trial, after rule has been invoked, does not disqualify him; but court may in its discretion refuse to permit him to testify.—*Kansas City, M. & O. Ry. Co. of Texas v. Durrett*, 187 S. W. 427.

§48 (Tex.Civ.App.) Where certain parts of excluded testimony were hearsay, it could not be held that the court erred in excluding it as a whole.—*Nevill v. Gulf, C. & S. F. Ry. Co.*, 187 S. W. 388.

(B) Order of Proof, Rebuttal, and Re-opening Case.

§63(2) (Ark.) A large discretion rests with the trial judge in permitting the introduction of evidence not strictly rebuttal.—*Chunn v. London & Lancashire Fire Ins. Co.*, 187 S. W. 307.

(C) Objections, Motions to Strike Out, and Exceptions.

§76 (Tex.Civ.App.) Objections to testimony should be made to questions or by motion to exclude answers, giving reasons, so that trial court may rule on objections made.—*Kansas City, M. & O. Ry. Co. of Texas v. Durrett*, 187 S. W. 427.

§83(2) (Mo.App.) The point that a letter deals with compromise negotiations between the parties is not raised by the objection that it is immaterial.—*Maggard v. Pacific Fire Ins. Co. of City of New York*, 187 S. W. 569; *Same v. Stuyvesant Ins. Co.*, *Id.* 571.

§84(1) (Mo.App.) An objection, in an action by one run down by a motor car, to introduction of ordinance regulating speed of such vehicles, does not raise question that ordinance is invalid as being in conflict with general statute relating to motor vehicles.—*Carradine v. Ford*, 187 S. W. 285.

§84(1) (Mo.App.) Objection as to whether defendant's adverse character witness had said anything about plaintiff being a disturber, on the ground that defendant's question was leading, *held* not a sufficient objection to the admission of testimony to impeach defendant's character witness.—*Deubler v. United Rys. Co. of St. Louis*, 187 S. W. 813.

§84(4) (Mo.App.) A general objection to the admission of an account does not sufficiently present the specific objection that plaintiff cannot recover because of splitting his demand.—*Peper Automobile Co. v. St. Louis Union Trust Co.*, 187 S. W. 109.

§85 (Tex.Civ.App.) Where a part of the testimony objected to as a whole was not hearsay, the objection was ineffectual to reach any part of the evidence to which it might be pertinent.—*Wichita Falls Traction Co. v. Berry*, 187 S. W. 415.

§89 (Mo.App.) A motion to strike the account sued upon is appropriate to raise the question that plaintiff cannot recover because of having split a single demand.—*Peper Automobile Co. v. St. Louis Union Trust Co.*, 187 S. W. 109.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§129 (Mo.App.) An alleged objectionable remark by defendant's counsel in his closing argument made in answer to an improper argument on behalf of the plaintiff, could not be made the basis of an error by the plaintiff, the party first guilty.—*Citizens' Bank of Senath v. Douglass*, 187 S. W. 158.

§132 (Tex.Civ.App.) Error cannot be predicated upon remarks of counsel which were withdrawn.—*Black v. Wilson*, 187 S. W. 493.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

§136(3) (Tex.Civ.App.) If a contract for broker's commission is not ambiguous, it is proper to ask court to construe it, and if it is ambiguous, but the evidence makes its intention clear, it would be proper for the court to construe it and require the jury to accept such construction in estimating the value of services.—*Brady v. Richey & Casey*, 187 S. W. 508.

§139(1) (Mo.App.) Because a question of fact is close is no reason for taking it out of jury's hands.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

§139(1) (Tex.Civ.App.) In an action for injuries caused by defendant's street car striking plaintiff's automobile, where there was no evidence tending to prove the issue to be submitted, court did not err in instructing a verdict for defendant.—*Jacobe v. Houston Electric Co.*, 187 S. W. 247.

§140(1) (Mo.App.) In a street car passenger's action for injuries caused by a fall, it is only where the fall is so contrary to physical facts and laws and so at variance with common experience that it is shocking to reason that the court can reject evidence as to the place from which she fell and the manner thereof as of no evidentiary value; credibility being for jury.—*Modrell v. Dunham*, 187 S. W. 561, 564.

§140(2) (Ark.) The inference from an uncontradicted statement of one of the parties directly interested in the result of the suit is for the jury.—*Yazoo & M. V. R. Co. v. Altman*, 187 S. W. 656.

§141 (Tex.Civ.App.) It is proper to refuse to submit to the jury issues as to which on the evidence only one conclusion is possible.—*St. Paul Fire & Marine Ins. Co. v. Laster*, 187 S. W. 969.

§143 (Mo.App.) The rule that where plaintiff makes out a prima facie case, the oral un-

controverted testimony in behalf of defendant, no matter how strong and convincing, does not authorize a directed verdict, has no application where unimpeached documentary evidence precluding a recovery is adduced.—Peper Automobile Co. v. St. Louis Union Trust Co., 187 S. W. 109.

⇒145 (Mo.) In action for injuries against railroad by injured employé who executed a release, *held*, that it was defendant's right to have issue of fraud in procuring the release specifically withdrawn from jury.—Reid v. St. Louis & S. F. R. Co., 187 S. W. 15.

(B) Demurrer to Evidence.

⇒150 (Mo.App.) Where it is shown by evidence received without objection that plaintiff's demand is a running account on which recovery had been had of a part, an objection, though not pleaded, to recovery on the ground that a single demand cannot be split, is properly raised by demurrer to the evidence.—Peper Automobile Co. v. St. Louis Union Trust Co., 187 S. W. 109.

⇒156(1) (Mo.App.) Remarks of court on overruling final demurrer to the evidence as to what it should have done as to an earlier demurrer are of no effect, only what was actually done being material.—Knoche v. Pratt, 187 S. W. 578.

⇒156(3) (Mo.) Demurrer to evidence admits facts evidence tends to prove, and court must make every inference of fact in favor of party offering evidence which jury might with any degree of propriety have inferred in his favor.—Maginnis v. Missouri Pac. Ry. Co., 187 S. W. 1165.

⇒156(3) (Mo.App.) Although plaintiff's evidence might have been insufficient on the first demurrer, which was overruled, where defendant then introduced his evidence, plaintiff, on a second demurrer, was entitled to every reasonable inference of fact from the whole record.—Knoche v. Pratt, 187 S. W. 578.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

⇒191(4) (Mo.) An instruction as to benefit to land from the owner's statutory right to switch connections after building of railroad was not error because not warranted by evidence, and because it assumed that the facilities would be a benefit, whereas the owner would have to pay their cost.—Chicago, R. I. & P. Ry. Co. v. Lydik, 187 S. W. 891.

⇒191(6) (Mo.App.) An instruction authorizing recovery, if defendant failed to slacken the speed of his automobile and sound a warning, is improper, since it does not require a finding of negligence, but assumes that certain omissions constitute negligence.—Priebe v. Crandall, 187 S. W. 605.

⇒191(7) (Mo.App.) In an action for personal injuries on a sidewalk, an instruction, which submitted question whether strip on which the accident occurred had been left as a sidewalk for use of public and had been used as such for a long time prior to the accident, was not improper, as assuming that city had thrown portion of the street in controversy open to public use.—Jackson v. City of Sedalia, 187 S. W. 127.

⇒191(8) (Tex.Civ.App.) An instruction that plaintiff was guilty of contributory negligence in the use of an underground passageway if he knew such use to be dangerous *held* properly refused as invading the province of the jury.—Missouri, K. & T. Ry. Co. of Texas v. Cardwell, 187 S. W. 1073.

⇒191(9) (Tex.Civ.App.) In action for injuries to woman alighting from street car, instructions *held* not erroneous as assuming the conductor's failure to exercise due care.—Galveston Electric Co. v. Hanson, 187 S. W. 533.

⇒192 (Mo.App.) In action for injuries in collision between wagons, where objections to sec-

tions of an ordinance of the city, when offered, in no manner challenged existence of the particular sections, instruction, not setting out such sections or requiring jury to find they were in force, merely stating their effect, was proper.—Burns v. Polar Wave Ice & Fuel Co., 187 S. W. 145.

⇒192 (Tex.Civ.App.) An instruction assuming a fact is not erroneous, where uncontradicted testimony establishes the fact.—Townsend v. Pilgrim, 187 S. W. 1021.

⇒193(2) (Mo.) In an action for fraud, a requested instruction that option executed by defendant and relied on by plaintiff did not constitute false or fraudulent representation upon which a recovery could be had *held* properly refused as invading the province of the jury.—Wagner v. Binder, 187 S. W. 1128.

In an action for fraud for inducing plaintiff to sell shares of stock for less than their value, instruction that defendants' statements as to the value of such stock were merely expressions of opinion not authorizing a recovery *held* properly refused as invading the province of the jury.—Id.

⇒194(9) (Mo.) In action for injuries against railroad by employé who executed a release, an instruction *held* not erroneous as telling jury claim was fairly settled.—Reid v. St. Louis & S. F. R. Co., 187 S. W. 15.

⇒194(15) (Tex.Civ.App.) In action against sleeping car company for loss of wearing apparel and consequent mental embarrassment, instruction upon defendant's negligence *held* to be upon the weight of the evidence and reversible error.—Pullman Co. v. Moise, 187 S. W. 249.

(B) Necessity and Subject-Matter.

⇒203(1) (Tex.Civ.App.) In an action against a sleeping car company for loss of wearing apparel stolen from a car and for consequent embarrassment, defendant *held* entitled to an instruction applying the law to its theory of the facts as to its exercise of reasonable care to guard the property against theft.—Pullman Co. v. Moise, 187 S. W. 249.

⇒203(3) (Tex.Civ.App.) In action for injury to car inspector from explosion of tank car, defendant *held* entitled to instruction affirmatively presenting the group of facts upon which it relied to refute negligence on which suit was predicated.—Magnolia Petroleum Co. v. Ray, 187 S. W. 1085.

⇒210(3) (Mo.App.) Where there was a conflict in testimony of defendant's character witness, it was proper to instruct on the credibility of witnesses.—Deubler v. United Rys. Co. of St. Louis, 187 S. W. 813.

(C) Form, Requisites, and Sufficiency.

⇒228(2) (Mo.App.) In action for injuries in collision between wagons, instruction which specifically referred to others for facts necessary to a recovery was not erroneous as directing a verdict and not covering all facts.—Burns v. Polar Wave Ice & Fuel Co., 187 S. W. 145.

⇒234(7) (Mo.) In action on fire policy, where defense was arson, instruction that in civil suits, as in trial for crime, the law presumes the person charged with the willful burning of the property is innocent, was erroneous as directing jury to look for more conclusive proof than in ordinary civil cases.—State ex rel. Detroit Fire & Marine Ins. Co. v. Ellison, 187 S. W. 23.

⇒237(3) (Mo.) In action on fire policy, where defense was arson, instruction requiring proof by preponderance of evidence of circumstances relied on to show insured was guilty, then requiring the circumstances "be inconsistent with any other reasonable hypothesis than that of his guilt," was improper.—State ex rel. Detroit Fire & Marine Ins. Co. v. Ellison, 187 S. W. 23.

(D) Applicability to Pleadings and Evidence.

⇒251(1) (Tex.Civ.App.) Pleadings without proof do not justify submission of an issue.—*Black v. Wilson*, 187 S. W. 493.

⇒251(3) (Mo.App.) In action against succeeding carrier for damages to interstate shipment of hogs, instruction which told jury that, before verdict for plaintiff could be returned, they must find that defendant failed to transport hogs in reasonable time, and that by reason of said failure hogs were injured so that some of them died, was not improper and did not submit different case from that alleged.—*Bowles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 181.

⇒251(8) (Mo.App.) In a servant's action for injuries caused by an explosion of dynamite given to plaintiff by a fellow servant, where the petition sufficiently alleged negligence, an instruction requiring jury to find on the ultimate fact of negligence held not erroneous.—*Puckett v. Haynes*, 187 S. W. 91.

⇒251(8) (Mo.App.) In an action against a dairy company and an express company for personal injury from being struck by an empty milk can, instruction stating hypothesis necessary to plaintiff's case, but not found in his petition, in absence of offer to amend, held erroneous.—*King v. Missouri Dairy Co.*, 187 S. W. 284.

⇒251(8) (Mo.App.) An instruction authorizing recovery for any negligence of defendant or his chauffeur is reversible error, where the petition alleges specific acts of negligence.—*Priebe v. Grandall*, 187 S. W. 605.

⇒251(8) (Mo.App.) In action against railroad for injuries in derailment, instruction on what railroad must prove held improper, where the road did not claim accident was the result of inevitable accident.—*Jackmann v. St. Louis & H. Ry. Co.*, 187 S. W. 786.

⇒252(1) (Mo.) An instruction unsupported by record evidence is erroneous.—*Kansas City, C. & St. J. Ry. Co. v. Couch*, 187 S. W. 64.

⇒252(1) (Mo.App.) The refusal of an instruction not based on evidentiary facts is not error.—*Jackson v. City of Sedalia*, 187 S. W. 127.

The refusal of requested instructions in conflict with conceded facts is proper.—*Id.*

⇒252(1) (Mo.App.) Instructions must be predicated on the evidence.—*Burns v. Polar Wave Ice & Fuel Co.*, 187 S. W. 145.

⇒252(3) (Mo.App.) Where evidence went into the case without objection, it was competent for the court to submit it to the jury by instructions.—*Keller v. Yzabal*, 187 S. W. 576.

⇒252(5) (Mo.) An instruction that a mere possibility that electric railroads might be built to or near the property in the future, and that said property might become available as subdivision property, could not be considered in estimating the value of land taken or damages to the remainder, was proper.—*Chicago, R. I. & P. Ry. Co. v. Lydik*, 187 S. W. 891.

⇒252(16) (Tex.Civ.App.) Where there was no evidence that a broker was limited to three months in which to sell, defendant's request seeking to inject such issue into the case was properly refused.—*Black v. Wilson*, 187 S. W. 493.

⇒252(17) (Mo.) In an action for fraud in inducing plaintiff to sell shares of corporate stock for less than their true value, an instruction that there was no evidence that one of the defendants had any greater knowledge of the value of plaintiff's stock than had plaintiff or her agent, and that therefore plaintiff had no right to rely upon such defendant's expressions of opinion as to the value of the stock, held properly refused as unsupported by the evidence.—*Wagner v. Binder*, 187 S. W. 1128.

⇒252(20) (Mo.) In an action for fraud in inducing plaintiff to sell shares of corporate stock for less than their value, an instruction that

the evidence as to the value of the property and assets of the company together with all other evidence as to the value of such shares of stock should be considered in arriving at the value of such stock when she disposed of it held properly supported by the evidence.—*Wagner v. Binder*, 187 S. W. 1128.

⇒253(1) (Mo.App.) Instructions failing to present all facts of case for consideration of jury were properly refused.—*Crossley v. Summit Lumber Co.*, 187 S. W. 113.

⇒253(1) (Mo.App.) The rule that matters of pure defense need not be negated in plaintiff's instruction is applicable only when the situation presents harmless error, and not where the instruction ignores the most potent factor in the case.—*Sherwood v. St. Louis S. W. Ry. Co.*, 187 S. W. 260.

⇒253(3) (Mo.App.) In an action for injuries to land, by alleged insufficient opening for water course in railway embankment, instruction permitting recovery is erroneous if it disregards the issues whether a flood was so great that no negligence arose in failing to anticipate that opening would be insufficient, and whether injury would have occurred regardless of size of opening.—*Sherwood v. St. Louis S. W. Ry. Co.*, 187 S. W. 260.

⇒253(4) (Mo.App.) Where the servant's petition counts upon specific acts of negligence of the master, an instruction purporting to cover the entire case should require the jury to find the specific acts charged prerequisite to recovery.—*Gilbert v. Hilliard*, 187 S. W. 594.

Where the servant alleged the master's negligence in ordering him to stand upon a load of shingles, a general instruction, permitting recovery if the master ordered the servant to drive from the load, is erroneous, since he might have sat; the injury possibly resulting from the act of standing.—*Id.*

⇒253(4) (Tex.Civ.App.) In action for injuries to woman alighting from street car, instructions held not erroneous as authorizing a finding for plaintiff in spite of contributory negligence.—*Galveston Electric Co. v. Hanson*, 187 S. W. 533.

⇒253(4) (Tex.Civ.App.) An instruction which ignored the issues of plaintiff's contributory negligence and the proximate cause of the injury held improper.—*Missouri, K. & T. Ry. Co. of Texas v. Cardwell*, 187 S. W. 1073.

⇒253(6) (Mo.App.) Instruction, purporting to cover plaintiff's whole case, which omits an essential element necessary to recovery, is erroneous.—*Rissmiller v. St. Louis & H. Ry. Co.*, 187 S. W. 573.

⇒253(9) (Ark.) Instruction, in an action by railroad engineer under the federal Employers' Liability Act, allowing a recovery if the jury found that defendant's yardmaster signaled the engineer to go ahead, held erroneous as ignoring the material question whether the engineer was negligent in violating rules as to the speed of his train in the yard where he was injured.—*St. Louis, I. M. & S. R. Co. v. Stewart*, 187 S. W. 920.

⇒253(10) (Mo.App.) In lumber buyer's action for nondelivery, instruction held correctly refused as entirely omitting any reference to defendant lumber company's acts on which ratification of its manager's unauthorized act in selling his own mill's product in the name of the company might rest.—*Crossley v. Summit Lumber Co.*, 187 S. W. 113.

(E) Requests or Prayers.

⇒255(1) (Tex.Civ.App.) Notwithstanding Acts 33d Leg. c. 59, requiring all objections to the court's charge to be presented in writing to the opposing counsel and the court before the jury is instructed, it is still necessary to request a special instruction to supply an alleged omis-

sion in a charge.—*Modern Woodmen of America v. Yanowsky*, 187 S. W. 728.

⚡255(4) (Tex.Civ.App.) In an action to try title, receiving evidence admissible on the question of appellees' care in not discovering an unrecorded deed to appellant, but inadmissible on the question whether such deed was a mortgage, is not reversible error when no request was made to limit its effect.—*Alexander v. Conley*, 187 S. W. 254.

⚡255(5) (Mo.App.) Defendant, if not satisfied with the restriction placed on the evidence, should ask the court to repeat the same in a form of a written instruction.—*Shimmin v. C. & S. Mining Co.*, 187 S. W. 76.

⚡255(13) (Tex.Civ.App.) In a broker's action for commission, if defendant desired definition of "efficient and procuring cause" he should have requested it.—*Black v. Wilson*, 187 S. W. 493.

⚡256(3) (Tex.Civ.App.) Where the court fails to give an instruction applying the law to a party's theory of the facts as disclosed by the evidence, the party has a right to prepare and have given a special charge supplying the omission in the general charge.—*Pullman Co. v. Moise*, 187 S. W. 249.

⚡256(13) (Mo.App.) In an action for death on a railroad track, where specific instruction was desired as to what should be taken into consideration in determining the amount of the verdict, it should have been requested.—*Starks v. Lusk*, 187 S. W. 586.

⚡260(1) (Ark.) There is no error in striking from defendant's requested instruction a part in effect stated in an instruction given.—*W. D. Reeves Lumber Co. v. Davis*, 187 S. W. 171.

⚡260(1) (Ark.) Prayers for instructions fully covered by charges given were properly refused.—*Chicago, R. I. & P. Ry. Co. v. Jones*, 187 S. W. 436.

⚡260(1) (Ark.) The refusal of requested instructions was proper when covered by the instructions given.—*Miller v. Summers*, 187 S. W. 664.

⚡260(1) (Mo.App.) The refusal of requested instructions, proper elements of which are contained in given instructions, is proper.—*Jackson v. City of Sedalia*, 187 S. W. 127.

⚡260(1) (Mo.App.) Refusal of requested instructions which are fully covered by given instructions is not error.—*Boyles v. Quincy, O. & K. C. R. Co.*, 187 S. W. 131.

⚡260(2) (Tex.Civ.App.) Where given charges contain all the issues required, refusal of court to give special charges is not error.—*Kansas City, M. & O. Ry. Co. of Texas v. Durrett*, 187 S. W. 427.

⚡260(8) (Tex.Civ.App.) The refusal of a charge requested by defendant on contributory negligence is not error, where no exception or complaint is made to the court's general charge on that issue.—*Missouri, K. & T. Ry. Co. of Texas v. Cardwell*, 187 S. W. 1073.

⚡260(9) (Ark.) In an action on a fraternal insurance certificate, an instruction on the responsibility of insured for his illegal acts held covered by plaintiff's instruction given.—*Eminent Household of Columbian Woodmen v. Howle*, 187 S. W. 176.

(G) Construction and Operation.

⚡296(1) (Mo.App.) Where plaintiff's instruction purported to cover the whole case, and authorizes verdict for plaintiff, but omitted an element of the case, a correct and conflicting one for defendant touching the same matter will not supply the deficiency in plaintiff's instruction.—*Rissmiller v. St. Louis & H. Ry. Co.*, 187 S. W. 573.

⚡296(2) (Mo.) In an action for fraud, a requested instruction that an option executed by defendant and relied on by plaintiff did not constitute false or fraudulent representations upon which a recovery could be had held properly re-

fused, where in another instruction the jury were charged that, if such option was executed in good faith, plaintiff could not recover.—*Wagner v. Binder*, 187 S. W. 1128.

⚡296(3) (Tex.) Instruction containing contradictory statements of railroad's duty relative to child's safety, one of which was erroneous, was not cured by the correct statement therein.—*Gulf, T. & W. Ry. Co. v. Dickey*, 187 S. W. 184.

⚡296(3) (Tex.Civ.App.) An instruction charging the defendant for liability in negligently maintaining the instrumentality which resulted in plaintiff's injury held prejudicial, where the issues of contributory negligence and proximate cause were ignored, although such issues were covered by other proper instructions.—*Missouri, K. & T. Ry. Co. of Texas v. Cardwell*, 187 S. W. 1073.

⚡296(7) (Mo.) In an action on fire policy, where defense was arson, added clause that "the presumption continues until he is proven guilty by the preponderance of the credible evidence" held not to cure error in charge that in civil suits, as in trial for crime, law presumes person charged with willful burning is innocent.—*State ex rel. Detroit Fire & Marine Ins. Co. v. Ellison*, 187 S. W. 23.

VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

⚡314(1) (Tex.Civ.App.) Where the jury in a civil case announced that it was divided nine to three and could not agree, it was improper for the court to emphasize the difference between civil and criminal cases, as to deprivation of liberty and money judgments, thus minimizing the importance of the case on trial.—*Texas Cent. R. Co. v. Driver*, 187 S. W. 981.

⚡314(1) (Tex.Civ.App.) When the jury had been out two days and asked to be discharged, it was highly improper for the judge to reply that the trial had been costly and that he would give them eight more days to reach a verdict, where, in view of terrific storm conditions and lack of communication with their homes, the jury might have been and apparently was coerced into rendering a compromise verdict.—*Hunter v. Hunter*, 187 S. W. 1049.

IX. VERDICT.

(A) General Verdict.

⚡323 (Mo.App.) Rev. St. 1909, § 7280, requiring all agreeing jurors to sign the verdict unless unanimously rendered, when the foreman alone signs it, refers to a three-fourths verdict authorized by the amended Constitution and is inapplicable to one returned by 11 jurors under a stipulation that the case might proceed with them the same as with 12 jurors.—*Ritschy v. Garrels*, 187 S. W. 1120.

⚡343 (Ark.) Where there is evidence to sustain plaintiff's cause of action, a material issue must be treated as settled by the verdict.—*Southern Woodmen v. Davis*, 187 S. W. 638.

(B) Special Interrogatories and Findings.

⚡350(1) (Tex.Civ.App.) It is error to submit an issue not raised by the evidence.—*Bender v. Bender*, 187 S. W. 735.

⚡350(3) (Tex.Civ.App.) In wife's suit to set aside decree of divorce fraudulently obtained by husband, requested special issue as to whether the decree would have been rendered if the clerk had received the jury fee held speculative and immaterial.—*McConkey v. McConkey*, 187 S. W. 1100.

⚡350(4) (Tex.Civ.App.) In action on accident policy, the issue being whether nail in insured foot caused death, held proper to refuse an issue whether deceased's sticking a nail in his foot was the sole cause of death, and to submit issue whether death was "caused solely through external, violent and accidental means."—*Com-*

monweath Bonding & Casualty Ins. Co. v. Hendricks, 187 S. W. 698.

—350(6) (Tex.Civ.App.) In action for injuries at railroad crossing, defendant's special issue as to the distance from the crossing to caboose on passing track, was properly refused as being an evidentiary fact.—Kansas City, M. & O. Ry. Co. of Texas v. Durrett, 187 S. W. 427.

—350(6) (Tex.Civ.App.) Evidence held to require submission of special issue whether a very prudent person under the circumstances would have foreseen the plaintiff's act in leaving a train halted at a distance from station and her injury; the carrier's liability depending on whether by the highest degree of care it could have been anticipated.—Texas Cent. R. Co. v. Driver, 187 S. W. 981.

—351(1) (Tex.Civ.App.) Trial court's allowance of an hour or an hour and a half for counsel to prepare and file objections to the special issues submitted and special issues which it desired to have submitted held not an abuse of its discretion.—McConkey v. McConkey, 187 S. W. 1100.

—351(5) (Tex. Civ. App.) Requested issues were properly refused, where, so far as proper, they were sufficiently comprehended in the special issues submitted.—McConkey v. McConkey, 187 S. W. 1100.

In wife's action to vacate decree of divorce fraudulently obtained by husband, failure to submit the issue of fraud or to require a finding thereof held immaterial where it was a necessary inference from the facts actually submitted and found.—Id.

—356(5) (Tex.Civ.App.) Where finding upon special issue is not essential to proper judgment, inability of jury to answer such issue does not invalidate judgment rendered upon answer to pertinent issue.—Reliance Life Ins. Co. v. Beaton, 187 S. W. 743.

X. TRIAL BY COURT.

(B) Findings of Fact and Conclusions of Law.

—396(1) (Tex.Civ.App.) A plea having been eliminated, by the sustaining of exceptions thereto, will not sustain a finding, and judgment thereon, for defendant.—First Nat. Bank of Roswell, N. M., v. Browne Grain Co., 187 S. W. 489.

—396(2) (Tex.Civ.App.) A finding for a drawee of a draft, sued by the payee, who had cashed it for the drawer, that the drawer had a deposit with the payee sufficient to repay it, is unauthorized, in the absence of plea of such fact.—First Nat. Bank of Roswell, N. M., v. Browne Grain Co., 187 S. W. 489.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

—418 (Mo.) Refusal of instructions in the nature of demurrers to the evidence need not be reviewed, where the party requesting them afterwards introduced evidence, abandoning his position indicated by them.—McWhirt v. Chicago & A. R. Co., 187 S. W. 830.

TROVER AND CONVERSION.

See Estoppel, —58.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

—11 (Mo.App.) A coal dealer, who received coal stolen from a mine by a servant of the mine owner, is guilty of a conversion.—Pittsburg & Midway Coal Co. v. Laning Harris Coal Co., 187 S. W. 263.

II. ACTIONS.

(A) Right of Action and Defenses.

—22 (Mo.App.) Where plaintiff's shipping clerk was not clothed with any indicia of ownership or allowed to sell on his own behalf, held that, where he stole coal and disposed of it through defendant, defendant could not escape liability on the ground that plaintiff should have earlier discovered the theft.—Pittsburg & Midway Coal Co. v. Laning Harris Coal Co., 187 S. W. 263.

TRUST DEEDS.

See Mortgages.

TRUSTEE PROCESS.

See Garnishment.

TRUSTEES.

See Corporations, —312.

TRUSTS.

See Charities: Limitation of Actions, —102; Wills, —682.

I. CREATION, EXISTENCE, AND VALIDITY.

(B) Resulting Trusts.

—77 (Mo.) In case of a claimed resulting trust arising from the payment of the purchase price of realty and title being taken in the name of another, relation of trustee and cestui must result from facts as they existed at the time of or anterior to the purchase.—Barrett v. Foote, 187 S. W. 67.

—79 (Mo.) Where purchase money for realty is paid by two persons and title taken in the name of one, the land is held by the latter in resulting trust in favor of both purchasers in proportion to the amount paid by each.—Barrett v. Foote, 187 S. W. 67.

—89(2) (Ark.) Evidence held to sustain a finding that no resulting trust arose from defendant's purchase, in her own name, of certain lots with money furnished by plaintiff, but that the money was advanced as a loan.—Schneider v. Bunn, 187 S. W. 625.

(C) Constructive Trusts.

—100 (Ark.) A parol trust, arising out of plaintiff's agreement to buy in defendant's land on foreclosure and to allow defendant to redeem on payment of purchase price, will, where to refuse to enforce it would give plaintiff an unconscionable advantage, be enforced.—Strasner v. Carroll, 187 S. W. 1057.

—102(2) (Mo.App.) No trust arises, but merely a contractual relation, where on final settlement by a guardian the wards acknowledge receipt of balance, without receiving anything, and the guardian promises to pay them in the future.—Koyl v. Lay, 187 S. W. 279.

—110 (Ark.) In ejectment to recover land, evidence held to show that plaintiff bought in the land at foreclosure of a mortgage under an agreement that he should convey to defendant, the owner, on receipt of amount advanced.—Strasner v. Carroll, 187 S. W. 1057.

II. CONSTRUCTION AND OPERATION.

(B) Estate or Interest of Trustee and of Cestui Que Trust.

—151(1) (Ark.) Where a surviving husband was devised a certain amount per month payable by the trustee for his support, which amount was necessary therefor, his interest was not subject to levy and attachment at the suit of his creditors.—Fortner v. Phillips, 187 S. W. 318.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

⇒257 (Mo.App.) Where title to shares in trust funds has been adjudicated, one to whom for convenience the fund has been intrusted cannot complain that, in suit to have certain shares of the fund transferred to guardian for certain cestuis, another cestui is not joined.—Austin v. Ennis, 187 S. W. 599.

VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.

⇒296 (Mo.App.) Trustee paying and distributing a trust fund under decree of court is indemnified by the order itself, and needs no release.—Austin v. Ennis, 187 S. W. 599.

UNDUE INFLUENCE.

See Wills, ⇒162, 166.

UNIFORMITY.

See Taxation, ⇒40.

UNITED STATES.

See Patents.

UNLAWFUL DETAINER.

See Forcible Entry and Detainer; Landlord and Tenant, ⇒291.

USAGES.

See Customs and Usages.

VACATION.

See Chattel Mortgages, ⇒202; Divorce, ⇒165, 167; Judgment, ⇒358, 386; Mortgages, ⇒529; Municipal Corporations, ⇒578.

VAGRANCY.

See Witnesses, ⇒345.

VALUE.

See Courts, ⇒122, 170, 231; Evidence, ⇒472, 474, 525, 543, 571; Insurance, ⇒660.

VALUED POLICIES.

See Insurance, ⇒500.

VARIANCE.

See Indictment and Information, ⇒174.

VENDOR AND PURCHASER.

See Contracts, ⇒10; Frauds, Statute of, ⇒72; Landlord and Tenant, ⇒9; Logs and Logging, ⇒2; Mortgages, ⇒295, 502-529; Municipal Corporations, ⇒575, 578; Sales; Specific Performance; Trusts, ⇒100; Waters and Water Courses, ⇒89.

I. REQUISITES AND VALIDITY OF CONTRACT.

⇒13 (Tex.Civ.App.) A contract for sale of land which was an ordinary land sale contract providing for earnest money, examination of title, and making title good or return of earnest money held not lacking consideration.—Bender v. Bender, 187 S. W. 735.

⇒44 (Tex.Civ.App.) Evidence held not sufficient to raise the issue of undue influence procuring contract of sale.—Bender v. Bender, 187 S. W. 735.

V. RIGHTS AND LIABILITIES OF PARTIES.

(C) Bona Fide Purchasers.

⇒232(9) (Tex.Civ.App.) Possession of a tenant, though under a lease for the year, is notice

to a purchaser, putting him on inquiry as to his having an oral lease for the next year.—Jackson v. Walls, 187 S. W. 676.

VI. REMEDIES OF VENDOR.

(A) Lien and Recovery of Land.

⇒278 (Tex.Civ.App.) Vernon's Sayles' Ann. Civ. St. art. 5695, relating to vendor's liens providing the lien shall be in force until four years after the maturity provided in an extension, and the date of maturity set forth in the deed of conveyance or the recorded extension of the same shall be conclusive as to the date of maturity, is a statute of limitations for the protection of those who may deal with lands, against undisclosed liens against them.—Barger v. Brubaker, 187 S. W. 1025.

⇒281(3) (Mo.App.) In partition, wherein the appealing defendant sought to have a vendor's lien enforced against the proceeds of the sale, and where another defendant had a prior lien by virtue of a trust deed, evidence held to sustain a judgment awarding a vendor's lien against proceeds subject to deed of trust.—Hodges v. Bryant, 187 S. W. 623.

VENUE.

I. NATURE OR SUBJECT OF ACTION.

⇒7 (Tex.Civ.App.) In action by buyer of apples for breach of seller's oral agreement to make good damage if buyer would accept shipment, seller's plea of privilege held properly sustained.—Gensberg v. Neely, 187 S. W. 247.

II. DOMICILE OR RESIDENCE OF PARTIES.

⇒22(1) (Tex.Civ.App.) In a suit for a specific fund to which other litigants make claim, the venue of the action may be laid in any county in which any one or more of the proper or necessary defendants reside.—Roaring Springs Independent School Dist. v. McAbee, 187 S. W. 431.

⇒27 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1830, providing that transfer or assignment of a chose in action shall not change the venue, in an action on contract against a school district in which the receiver of plaintiff's assignor is a party defendant, the school district may claim a transfer under article 1832 to the county of its situs notwithstanding nonresidence of such receiver.—Roaring Springs Independent School Dist. v. McAbee, 187 S. W. 431.

⇒32(2) (Ark.) Under Kirby's Dig. § 6074, defendant's objection to trial in a county other than that of his residence, where service was had in the county of his residence, held not waived by filing a counterclaim, by taking appeal from justice court, or by taking appeal to Supreme Court.—Seelbinder v. Witherspoon, 187 S. W. 325.

⇒32(2) (Tex.Civ.App.) Where defendant, through no fault of the clerk or plaintiff or his attorneys, fails to call the court's attention to a plea of privilege at the term at which filed, and there was time for the court to have passed on it, and the case is not continued without prejudice to such plea, he waives his right to have the plea passed on at a subsequent term, under Vernon's Sayles' Ann. Civ. St. 1914, art. 1910, and district and county court rule 24 (142 S. W. xix).—Smith v. First Nat. Bank of Waco, 187 S. W. 233.

Where defendant fails to have a plea of privilege heard at the term at which filed, he cannot file an amended plea of privilege after the case has been continued for that term, under Vernon's Sayles' Ann. Civ. St. 1914, art. 1910, and district and county court rule 24 (142 S. W. xix).—Id.

VERDICT.

See Appeal and Error, *§*990-1022; Criminal Law, *§*875, 1159; Divorce, *§*149; Judgment, *§*256; New Trial, *§*68, 75, 143; Replevin, *§*93; Trial, *§*323-356.

VERIFICATION.

See Justices of the Peace, *§*202.

VESTED RIGHTS.

See Constitutional Law, *§*101; Insurance, *§*783.

VIEW.

See Trial, *§*28.

VOTERS.

See Elections.

WAGES.

See Parent and Child, *§*6.

WAIVER.

See Appeal and Error, *§*1078; Appearance, *§*4, 24; Bills and Notes, *§*422; Carriers, *§*159, 218; Constitutional Law, *§*43; Criminal Law, *§*225; Estoppel; Insurance, *§*376, 383, 558, 623, 724; Parties, *§*96; Trial, *§*418; Venue, *§*32; Witnesses, *§*181, 219.

WARDS.

See Guardian and Ward.

WARNING.

See Master and Servant, *§*154, 165.

WARRANT.

See Counties, *§*196.

WARRANTY.

See Bills and Notes, *§*296; Insurance, *§*265, 267.

WATERS AND WATER COURSES.

See Boundaries, *§*14; Levees; Statutes, *§*90.

II. NATURAL WATER COURSES.

(E) Bed and Banks of Stream.

*§*89 (Mo.) Whenever land is sold and conveyed as being bounded by a water course, the water course usque ad filum aquae is included.—*Whiteside v. Oasis Club*, 187 S. W. 27.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

*§*171(1) (Mo.App.) A railroad was not negligent in constructing an embankment with a 90-foot opening for a water course, unless it had reasonable cause to believe that a larger opening would be required to dispose of water likely to accumulate.—*Sherwood v. St. Louis S. W. Ry. Co.*, 187 S. W. 260.

Damages for overflow during an extraordinary flood, alleged to have been caused by railway's negligence in leaving insufficient opening in embankment, cannot be allowed, unless the injury would not have occurred unless the opening was too small.—*Id.*

*§*178(1) (Mo.App.) Damages for overflow on land, alleged to have been caused by railway's negligence in leaving insufficient opening in embankment, are not the entire damage but only that caused by the insufficient opening.—*Sherwood v. St. Louis S. W. Ry. Co.*, 187 S. W. 260.

WAYS.

See Highways.

WIDOWS.

See Dower.

WILLS.

See Charities; Descent and Distribution; Executors and Administrators; Trusts.

IV. REQUISITES AND VALIDITY.

(F) Mistake, Undue Influence, and Fraud.

*§*163(2) (Mo.) Where a person occupying a fiduciary relation toward testator is made a legatee or devisee on a scheme for his enrichment is provided by the will, a presumption of undue influence arises, and the burden of proof is on him to negative such presumption.—*Ryan v. Rutledge*, 187 S. W. 877.

*§*166(2) (Mo.) Evidence held insufficient to show undue influence exercised by a trustee over the testator, where such trustee derived no benefit from the provisions of the will except his legal fees as trustee.—*Ryan v. Rutledge*, 187 S. W. 877.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(D) Hearing or Trial.

*§*324(3) (Mo.) Evidence held sufficient to warrant a directed verdict for defendant in an action by plaintiffs to set aside the provisions of a will for undue influence.—*Ryan v. Rutledge*, 187 S. W. 877.

VI. CONSTRUCTION.

(A) General Rules.

*§*439 (Ark.) The purpose of all rules for construction of wills is to ascertain and effectuate intention of testator, but they are ordinarily only resorted to where there are ambiguous, inconsistent, or repugnant clauses.—*State v. Gaughan*, 187 S. W. 918.

*§*476 (Ark.) A codicil must be construed in connection with the will and its language harmonized therewith where there is no repugnancy.—*State v. Gaughan*, 187 S. W. 918.

*§*481 (Ark.) A will is effective from testator's death, so that one cannot dispose of property by will during his natural life.—*State v. Gaughan*, 187 S. W. 918.

*§*481 (Mo.) A will takes effect at testator's death.—*Williamson v. Roberts*, 187 S. W. 19.

*§*486 (Mo.) In making his will, a person is presumed to hold in judgment what property, and the method of its distribution, which he shall own at the time of his death.—*Williamson v. Roberts*, 187 S. W. 19.

(E) Nature of Estates and Interests Created.

*§*600(1) (Ark.) Where testator's will gave his wife a life estate with power of disposition which she must exercise in her lifetime, if at all, the wife's estate in the land was not enlarged into a fee.—*State v. Gaughan*, 187 S. W. 918.

*§*608(1) (Ark.) By terms of testator's will and codicil, devise held to create estate in fee simple in widow in undivided half of realty remaining undisposed of at her death, under rule in *Shelley's Case*.—*State v. Gaughan*, 187 S. W. 918.

(H) Estates in Trust and Powers.

*§*682(2) (Ark.) Under direction of will of his deceased wife that the executor pay him \$50 per month for life, defendant held to take no property right, but to be simply the beneficiary of a trust for his support.—*Fortner v. Phillips*, 187 S. W. 318.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(D) Election.

☞783 (Mo.) A surviving husband entitled to the fee of one half of the land of which his wife had died seized in fee could not take such interest contrary to the terms of her will, and also take a life estate in the other half under the will, but was put to his election whether to claim under the statute or the will.—Schuster v. Morton, 187 S. W. 2.

(E) Abatement.

☞812 (Mo.App.) A will, containing specific and general bequests and disposing of decedent's residuary estate, is strong evidence that testator believed the estate would be ample to discharge all the legacies, and that it was not intended that specific legacies should be subject to deduction or abatement in favor of general legacies.—In re Drew's Estate, 187 S. W. 788.

Where testator by specific legacy devised her interest in a leasehold to respondent, such legacy was not subject to abatement or deduction, in order to pay a general legacy to a religious institution, although the will contained a clause that, should testator's personal estate prove insufficient for the payment of such general bequest, resort should be had to any realty of which testator died seized and possessed.—Id.

WITHDRAWAL

See Criminal Law, ☞274, 729; Trial, ☞145.

WITNESSES.

See Appeal and Error, ☞994; Criminal Law, ☞315, 594, 721½, 742, 942, 1170½; Depositions; Evidence; Prohibition, ☞5; Trial, ☞41, 140, 210.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

☞37(1) (Tex.Civ.App.) Under the general rules of evidence, all persons are competent witnesses to testify to any fact relative and material to the matter under investigation, and which is within their knowledge, and are disqualified to so testify only because excepted by some special statute.—Peil v. Warren, 187 S. W. 1052.

☞49 (Tex.Cr.App.) One convicted of a felony, whose sentence was suspended in good behavior, is, until the suspension is revoked and sentence pronounced, a competent witness.—Coleman v. State, 187 S. W. 481.

☞52(7) (Tex.Cr.App.) In prosecution for arson, where jury could find a conspiracy between defendant and his wife to burn a building for insurance, testimony that the wife told him she would burn the place for the insurance before she would go broke, held admissible, despite statute prohibiting the state from making a wife testify against her husband.—Arensman v. State, 187 S. W. 471.

☞53(2) (Mo.App.) In action by husband against street car company for injuries to wife causing loss of her services, the wife's testimony is incompetent, notwithstanding Rev. St. 1909, § 6359.—Lynch v. United Rys. Co. of St. Louis, 187 S. W. 800.

☞78 (Tex.Cr.App.) A copy of the pardon is the best evidence to show that a witness previously incompetent was rendered competent.—Baker v. State, 187 S. W. 949.

(B) Parties and Persons Interested in Event.

☞92 (Mo.) At common law persons having a legal, certain, and immediate interest in a contract or cause of action were incompetent to testify in their own behalf or in behalf of any person claiming under them.—Wagner v. Binder, 187 S. W. 1128.

The true test of interest of a witness is, will

he either gain or lose by the direct legal operation and effect of the judgment, or will the record be legal evidence for or against him in some other action.—Id.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

☞128 (Mo.) The rule, as to the exclusion of the testimony of a witness interested in the result as to conversations with a party since deceased, applies with equal force to actions in tort and in contract.—Wagner v. Binder, 187 S. W. 1128.

☞140(1) (Mo.) In an action for fraud for inducing plaintiff to sell shares of corporate stock for less than their value, where her agreement of sale was made on condition that another stockholder should sell his shares at the same time and on the same terms, held, that such shareholder was not disqualified by interest as a witness to conversations with a defendant since deceased.—Wagner v. Binder, 187 S. W. 1128.

☞141 (Mo.) In an action for fraud, an agent of plaintiff who is not a party to the suit is not disqualified, under Rev. St. 1909, § 6354, nor under the common law, from testifying as to representations made by a deceased defendant regarding the value of plaintiff's stock.—Wagner v. Binder, 187 S. W. 1128.

☞144(1) (Mo.App.) Under Rev. St. 1909, § 6354, in action against corporation for injuries caused by the driver of its wagon, deceased before suit, plaintiff, could not testify to the acts of the driver which it was claimed caused the accident, but was competent as to the damages.—Burns v. Polar Wave Ice & Fuel Co., 187 S. W. 145.

☞144(2) (Mo.) In an action for fraud in inducing plaintiff to sell shares of corporate stock, plaintiff is disqualified under Rev. St. 1909, § 6354, as a witness to conversations with a defendant since deceased.—Wagner v. Binder, 187 S. W. 1128.

☞148 (Mo.) In an action for fraud for inducing plaintiff to sell shares of corporate stock for less than their value, where one of the defendants was dead, plaintiff was a competent witness against a living defendant, although not as against the deceased defendant.—Wagner v. Binder, 187 S. W. 1128.

☞150(3) (Tex.Civ.App.) Suit for partition against plaintiff's brother and sister, as heirs of their deceased father, held a suit by or against heirs of a deceased as such, within Vernon's Sayles' Ann. Civ. St. 1914, art. 3690, so that defendants' testimony as to statements made by and transactions had with decedent, tending to establish their interest, was inadmissible.—Peil v. Warren, 187 S. W. 1052.

☞154 (Mo.) A corporation can speak only through its officers and agents, and, upon their death, an adverse party cannot testify as to conversations with them in regard to the cause at suit.—Wagner v. Binder, 187 S. W. 1128.

☞155 (Tex.Civ.App.) In suit for partition against plaintiff's brother and sister as surviving heirs of their deceased father, defendants held opposite parties, within Vernon's Sayles' Ann. Civ. St. 1914, art. 3690, incompetent to testify to transactions with and statements by the deceased unless called thereto by plaintiff.—Peil v. Warren, 187 S. W. 1052.

☞159(7) (Tex.Civ.App.) In suit against corporations to remove cloud on title by one claiming under parol gift from a decedent, testimony of plaintiff as to transactions with and statements by such decedent, showing the gift, held admissible.—First State Bank & Trust Co. of Abilene v. Walker, 187 S. W. 724.

☞178(1) (Mo.App.) Taking deposition of a witness held to waive his incompetency to testify concerning transactions had with one since deceased.—Bush v. Block, 187 S. W. 153.

⚡180 (Mo.App.) In action against a corporation for injuries caused by the driver of its wagon, deceased before suit, general objection to plaintiff's competency as a witness was properly overruled, though on proper objection he was incompetent to testify to the acts of the driver which caused the accident.—Burns v. Polar Wave Ice & Fuel Co., 187 S. W. 145.

⚡181 (Mo.App.) Objection to competency of plaintiff's testimony relative to agreement between him and defendant's predecessor, since deceased, is waived by defendant's examining plaintiff on deposition during pendency of suit and after the death, although deposition was never transcribed and filed.—P. M. Bruner Granitoid Co. v. Glencoe Lime & Cement Co., 187 S. W. 807.

(D) Confidential Relations and Privileged Communications.

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⚡360 (Tex.Cr.App.) Where the state developed that accused had been indicted for a felony within the past seven years, he could show his acquittal of the charge.—Baker v. State, 187 S. W. 949.

⚡361(1) (Tex.Civ.App.) In lessee's action for damages from lessor's wrongful refusal to consent to a subletting, where lessee attempted to impeach lessor's credibility and integrity, testimony of witness who had known lessor for 35 years, that he had a good reputation for truth and fair dealing, was admissible.—A. Harris & Co. v. Campbell, 187 S. W. 365.

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⚡379(11) (Tex.Cr.App.) Where defendant's witness testified that she believed the deceased was unconscious when she made statement that defendant inflicted injuries on her, statements by the witness to the physician who attended deceased, prior to so testifying, were admissible to impeach her.—Thompson v. State, 187 S. W. 204.

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⚡380(5) (Mo.App.) Where defendant's adverse character witness testified contrary to his previous statement to defendant's claim agent, defendant, on the ground of surprise, was entitled to impeach such witness.—Deubler v. United Rys. Co. of St. Louis, 187 S. W. 813.

⚡392(1) (Tex.Cr.App.) In prosecution for murder, where a witness for defense testified at variance with statement made on the day of the murder, it was proper for the district attorney, who elicited such statement, to testify that he wrote it as nearly in the witness' language as he could, using narrative form, and that he explained the nature of the inquest before taking the statement, which witness signed after he read it to her.—Short v. State, 187 S. W. 955.

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